

**Goodless Electric Co., Inc. and Local Union No. 7,
International Brotherhood of Electrical Workers,
AFL-CIO.** Cases 1-CA-31249, 1-CA-31429, and 1-CA-31657

April 30, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

The issues presented in this case¹ are (1) whether the Union attained the status of an exclusive bargaining representative within the meaning of Section 9(a) of the Act; (2) whether the Respondent violated Section 8(a)(5) by withdrawing recognition from the Union, implementing unilateral changes, and directly bargaining with unit employees; and (3) whether the Respondent violated Section 8(a)(3) of the Act by constructively discharging four apprentice electricians.

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, and conclusions² only to the extent consistent with this Decision and Order.

I. FACTS

The Respondent is a construction industry employer engaged in electrical contracting. As permitted under Section 8(f) of the Act, the Respondent executed a memorandum of agreement in June 1988 that bound it to an existing bargaining agreement between the Union and the multiemployer National Electrical Contractors Association (NECA). The memorandum of agreement provided that the Respondent would sign a letter of assent that, among other things, authorized NECA to act as the Respondent's bargaining agent, unless such authority was withdrawn on 150 days' notice of cancellation. The Respondent did not actually sign a letter of assent until 1992, as discussed below.

In July 1990, the Respondent became signatory to a new 3-year collective-bargaining agreement between NECA and the Union. On June 18, 1992, the Respondent provided the requisite written notice that NECA no longer was authorized to negotiate on the Respondent's behalf. The notice further stated that the Respondent would not be bound to any future extensions or modifications of the current contract but would honor its terms through its June 30, 1993 expiration date.

¹ On March 2, 1995, Administrative Law Judge William F. Jacobs issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed an answering brief.

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

² In the absence of exceptions, we adopt the judge's dismissal of the complaint in Case 1-CA-31657.

In July 1992, the Union presented the Respondent's president, Leon Goodless, with a letter of assent. Goodless was told that the Union had to have signed letters of assent from all electrical contractors covered by the NECA contract. The Union could not otherwise process "target money" payments to the Respondent.³ Goodless examined the letter of assent. In accordance with the Respondent's prior termination notice, he deleted all provisions in the letter that referred to binding obligations beyond the term of the 1990-1993 contract. He did not delete or revise the following language:

The Employer agrees that if a majority of its employees authorize the Local Union to represent them in collective bargaining, the Employer will recognize the Local Union as the NLRA Section 9(a) collective bargaining agent for all employees performing electrical construction work within the jurisdiction of the Local Union on all present and future jobsites.

Goodless signed the letter of assent on July 15, 1992. The Respondent thereafter adhered to its contractual obligations while rejecting any invitations to participate in negotiations between NECA and the Union. In the spring of 1993,⁴ the Respondent negotiated separately with the Union about service work issues. At a meeting on June 22, Goodless reiterated his intention to terminate the Respondent's relationship with the Union when the contract expired on June 30. The Union urged him to consider the contractual changes regarding service work that NECA had accepted earlier in the month. Goodless objected to the over-time provision of the proposed changes. The meeting ended with an agreement to meet again on June 25.

On June 24, the Union's business agent, Douglas Bodman, convened a meeting of all the Respondent's employees. Bodman informed them about the progress of negotiations, including the concessions the Union was offering to persuade the Respondent to remain a union contractor. After relating to the employees claims by Goodless about their lack of support for the Union, Bodman asked them to sign authorization cards as evidence of their desire for continued representation. The Respondent's entire 22-man work force signed the authorization cards, which stated

I authorize Local Union No. 7 of the International Brotherhood of Electrical Workers to represent me in collective bargaining with my present and future employers on all present and future jobsites within the jurisdiction of the Union. This authorization is non-expiring, binding and valid until such time as I submit a written revocation.

³ Target money was financial assistance provided by the Union as part of a program to aid union employers in competition with non-union electrical contractors.

⁴ All dates are in 1993, unless otherwise indicated.

At the June 25 meeting, Goodless again rejected the Union's contract proposals and stated that his relationship with the Union would cease at the end of the month. In response, Bodman presented Goodless with the 22 signed authorization cards. Bodman stated that all of the employees had advised him that they wanted the Union to continue to represent them in contract negotiations. The parties subsequently agreed on a 6-month extension of 1990–1993 contract, as supplemented by an addendum pertaining to service work.

On December 13, Goodless reminded the Union that the contract extension was due to expire at the end of the month. He stated that he did not intend to renew it. On December 17, Goodless sent each of his employees a letter declaring his intent to discontinue the Respondent's relationship with the Union. He invited anyone interested in continued employment to discuss the matter with him personally by December 23.

The Union's counsel sent Goodless two letters on December 21. Collectively, the letters reminded Goodless of the language in the letter of assent that bound the Respondent to recognize the Union as the 9(a) bargaining representative on a showing of majority employee support. Counsel stated that the Union made the requisite showing when Bodman presented the authorization cards to Goodless at the June 25 meeting. Alternatively, counsel claimed (incorrectly) that the Respondent was bound by a 1993–1996 contract extension that NECA and the Union had negotiated.

Union Business Manager Bodman composed a form letter response to Goodless' December 17 letter to employees. All but one of the Respondent's employees signed and submitted this form letter, which stated in relevant part that:

I intend to continue my employment with Goodless Electric and maintain my membership with [the Union]. I expect you to continue to comply with my union contract and maintain the current wages and terms and conditions of employment.

If you need to discuss any matters concerning wages or terms and conditions of employment, contact my Union Representative Douglas Bodman.

On December 30, Goodless announced new terms of employment to take effect January 1, 1994. The Respondent ceased to recognize the Union as a bargaining representative and implemented the new terms on January 1, 1994. With the exception of apprentice electricians, all incumbent employees continued to work for the Respondent under its newly implemented terms of employment. The Respondent's termination of its relationship with the Union effectively terminated its participation in the Union's apprenticeship program. The four apprentices who had been working for the

Respondent in that program continued to work until they received a letter from the Joint Apprentice Training Committee (JATC) on January 6, 1994. The letter informed the apprentices that, due to the Respondent's nonunion status, they would be subject to termination from the apprenticeship program if they continued to work for the Respondent. All four apprentices then quit their jobs with the Respondent.

II. ANALYSIS

A. *The 8(a)(5) Issues*

As indicated above, the Union initiated its relationship with the Respondent without any claim or proof of majority support, as permitted by Section 8(f) of the Act. Bargaining obligations in such a relationship are enforceable through Section 8(a)(5) of the Act only for the duration of a collective-bargaining agreement. *John Deklewa & Sons*, 282 NLRB 1375, 1377–1378 (1987). The critical issue in determining the legality of the Respondent's postcontractual withdrawal of recognition, direct dealing with employees, and unilateral changes is whether the Union had achieved the status of a collective-bargaining representative under Section 9(a) of the Act prior to those challenged actions. Resolution of this issue turns on the legal effect of the Respondent's execution of the 1992 letter of assent and the Union's subsequent submission of authorization cards from a majority of unit employees.

Notwithstanding the letter's express language binding a signatory employer to recognize the Union as a 9(a) collective-bargaining agent if a majority of employees authorized the Union to represent them, the judge found that the Respondent did not agree to recognize the Union at any time in the future as the 9(a) representative of employees and that Goodless clearly intended to limit all obligations to the Union to the term of the 1990–1993 8(f) contract. Moreover, the judge found that the authorization cards signed by a majority of unit employees on June 24 were not a reliable indicator of their desire for union representation, and that the Union did not make a cognizable demand for recognition when it submitted these cards to Goodless on June 25. The judge therefore recommended dismissal of all complaint allegations of 8(a)(5) violations.

The General Counsel and the Union have excepted to the judge's failure to give effect to the alleged unequivocal intent of the letter of assent, the authorization cards, and the Union's claims of continuing representative status. We find merit in these exceptions.

In *Golden West Electric*, 307 NLRB 1494 (1992), the Board summarized the standards by which a construction industry union can prove that a construction industry employer has voluntarily recognized the union as a 9(a) majority representative of the employees in question:

[A] union can establish voluntary recognition by showing its express demand for, and an employer's voluntary grant of, recognition to the union as bargaining representative based on a contemporaneous showing of union support among a majority of employees in an appropriate unit. *Brannan Sand & Gravel Co.*, 289 NLRB 977, 979-980 (1988); *American Thoro-Clean*, 283 NLRB 1107, 1108-1109 (1987). Further in *J & R Tile*, 291 NLRB 1034, 1036 (1988), the Board held that, to establish voluntary recognition there must be positive evidence that a union unequivocally demanded recognition as the employees' 9(a) representative and that the employer unequivocally accepted it as such. [307 NLRB at 1495.]

We find that the language of the 1992 letter of assent proves the Union's unequivocal demand for recognition as a 9(a) bargaining representative and the Respondent's voluntary acceptance of the demand on that basis. The 1992 letter of assent states that, if a majority of its employees authorize the Union to represent them, the Employer agrees that it "will recognize the Union as the NLRA Section 9(a) collective bargaining agent." The Respondent's execution of the letter of assent containing this language bound it to recognize the Union as a 9(a) representative, subject only to the condition that the Union prove its majority support at some point prior to the letter of assent's expiration. In other words, the letter of assent constituted, for the remainder of its term, both a continuing request by the Union for 9(a) recognition and a continuing, enforceable promise by the Respondent to grant voluntary recognition on that basis if the Union demonstrated majority support.⁵

It is hard to conceive of language with a clearer meaning. Yet the judge refused to give effect to this language because the parties did not discuss it, Goodless signed the letter of assent in order to get the target money for his company, and he made changes in other provisions of the letter that allegedly demonstrated an intent to terminate the 8(f) relationship with the Union as of June 30, 1993.

⁵The Respondent argues that the July 1992 letter of assent was void ab initio as a result of the 150-day termination notice that it had previously provided NECA and the Union. We disagree. In its June 1992 letters to NECA and the Union, the Respondent simply asserted its lawful right to terminate NECA's bargaining authority to bind it by any future negotiations with the Union. These letters did not purport to, and legally could not, repudiate the Respondent's obligations under the 1990-1993 contract and letter of assent. On the contrary, the Respondent assured both parties that it would "continue to honor the terms of the [1990-1993] collective bargaining agreement through its expiration date of June 30, 1993." In signing the letter of assent, the Respondent not only reaffirmed this commitment to be "bound by all of the terms and conditions contained in said current [agreement]" through its June 30, 1993 expiration, but it also agreed until that date to extend conditional 9(a) recognition to the Union.

None of these factors justify the judge's nullification of the express recognition language in the letter of assent. Parties are bound to the clear and specific terms of their contract, regardless of whether they have discussed each and every one of them.⁶ Furthermore, whatever Goodless' motivation may have been for signing the letter of assent, the Respondent cannot validly claim to be bound only by those contract terms that benefit it.⁷ Finally, the revisions made by Goodless to the letter of assent merely reinforced his prior lawful notice of intent not to be bound by any further agreement negotiated between NECA and the Union. It did not relieve him of the obligation to comply with all provisions of the letter of assent and the current 1990-1993 agreement, including the obligation to recognize and deal with the Union as a 9(a) representative if it made the requisite showing of majority support.

The Union made this showing at the negotiation session of June 25, 1993, when Business Manager Bodman presented Goodless the authorization cards signed by all of the Respondent's employees. In presenting the cards on this date, all of which were examined and independently verified by Goodless, Bodman stated that "all 22 of your employees have asked us to represent them."

On its face, the execution and presentation of these cards was sufficient to trigger the Respondent's obligation to recognize the Union as a 9(a) majority representative. The authorization language of the cards was clear and unmistakable, and the execution of the 1992 letter of assent met all other requirements for the establishment of a 9(a) relationship. Yet the judge again refused to give the apparent clear meaning to these events. He instead found that the cards were unreliable evidence of employee sentiment because they had been signed in coercive circumstances and, moreover, that Bodman solicited the cards and presented them to Goodless solely for the negotiating purpose of proving that all electricians would strike if the Union ordered them off the job.

The judge's assessment of the cards' reliability directly contradicts well-established precedent. Authorization cards that state clearly on their face that their purpose is to designate the union as collective-bargaining representative will not be denied their face value unless there is affirmative proof of misrepresentation or coercion.⁸ No such irregularities are present here. When the employees signed their cards at the June 24

⁶E.g., *Northern Pacific Sealcoating*, 309 NLRB 759, 760 (1992).

⁷The record does not support the judge's suggestion that the Union fraudulently represented to Goodless that the only purpose to signing the letter of assent was to assure the Respondent's eligibility for target money.

⁸*NLRB v. Gissel Packing Co.*, 395 U.S. 575, 584-606 (1975); *DTR Industries*, 311 NLRB 833, 839 (1993), enf. denied on other grounds 39 F.3d 106 (6th Cir 1994).

union meeting, they told Bodman that they wanted the Union to continue to represent them. Any statements by Bodman that the cards were needed to show Goodless that the employees supported the Union's bargaining position did not controvert this purpose. Statements of this kind "are not inconsistent with the stated representative purpose of the card, and do not negate the written language of the card or amount to a direction to the signer to disregard the written language."⁹

We also reject the judge's claim that the cards were signed under coercive conditions. In this regard, he opined that the employees were "probabl[y]" involuntary union members by virtue of a union-security clause in the existing 8(f) contract, and they had signed their cards at the union hall where there "had to be some peer pressure to sign . . . because any one of [them] who failed to sign a card could immediately be identified." Not only is there no record evidence to support this speculation, but the Supreme Court in *Gissel* specifically abjured analysis of the subjective motivations of card signers because it "involv[es] an endless and unreliable inquiry." 395 U.S. at 608.¹⁰ Certainly, the fact that employees signed authorization cards at a union meeting is not itself sufficient objective evidence of coercive circumstances.

For similar reasons, we reject the judge's suggestion that Bodman's statements to Goodless negated the cards' submission as proof of 9(a) representative status. As previously stated, the express language of the 1992 letter of assent constituted a continuing claim by the Union for such status and a continuing agreement by the Respondent to recognize the Union on that basis upon presentation of a showing of majority support. The letter of assent did not impose the additional requirement that the Union specifically renew its demand for 9(a) status or refer to the parties' prior agreement when making this showing.

In any event, there was no point to the Union's demonstration of majority employee support if it only intended to preserve the existing 8(f) relationship. *Casale Industries*, 311 NLRB 951, 952 (1993). Moreover, Bodman did expressly assert that all of the Respondent's employees had asked the Union to continue to represent them. Any additional statements by Bodman that the cards proved employees would support a union-sponsored walkout were fully consistent with a claim of majority support for continued representation by the Union even after the expiration of the parties' 8(f) contract. The only legally enforceable

relationship under such circumstances would be one that met the requirements of Section 9(a).¹¹

In sum, we find that the Union has proved that it met all of the Board's requirements for establishment of a 9(a) relationship with the Respondent as of June 25, 1993. Accordingly, the Union enjoyed a continuing rebuttable presumption of majority representative status even after the expiration of the parties' collective-bargaining agreement on December 31, 1993. The Respondent has not presented evidence sufficient to rebut this presumption. Its withdrawal of recognition from the Union on January 1, 1994, therefore violated Section 8(a)(5) of the Act. Its unilateral implementation of new terms and conditions of employment and its direct dealing with unit employees about those matters also violated Section 8(a)(5).

We find no merit in the Respondent's argument that the Union's erroneous claim that the Respondent was bound through 1996 by the extended NECA-union contract either waived the Union's right to bargain about postcontractual changes or excused the Respondent from bargaining about them. Such defenses are not cognizable when raised in the context of the Respondent's declared intent to terminate its relationship with the Union after December 31, 1993. In any event, the Respondent never gave the Union notice of or an opportunity to bargain about postcontractual changes. It only communicated with employees about these changes. Furthermore, the record does not support the claim that the Union insisted on compliance with the extended NECA contract and would have refused to bargain with the Respondent about any different terms or conditions of employment. On the contrary, the Union did negotiate different terms during separate negotiations with the Respondent in June 1993.

B. *The 8(a)(3) Constructive Discharge Issue*

The judge recommended dismissing the allegation that the Respondent constructively discharged its four apprentice employees in violation of Section 8(a)(3) and (1) by causing them to quit their employment rather than work under the Respondent's unlawfully imposed employment terms. The judge found that the apprentices voluntarily quit because of the threat from the JATC to remove them from the apprenticeship program.

Employees who quit work as a consequence of an employer's unlawful withdrawal of recognition from their collective-bargaining representative and unilateral implementation of changes in their terms and condi-

⁹ *Montgomery Ward & Co.*, 288 NLRB 126, 128 (1988).

¹⁰ In any event, with respect to the union membership status of the employees, Bodman's uncontradicted testimony was that the employees were union members not by virtue of a contractual union-security clause but because they signed union membership cards that are distinct from authorization cards.

¹¹ Even assuming, arguendo, some legal insufficiency in the claim of 9(a) status attendant to the submission of cards on June 25, the Union's December 21 letters to the Respondent unequivocally demanded recognition of the Union's 9(a) status on the basis of the majority card showing and the letter of assent, which remained in effect at that time by virtue of the parties' extension agreement.

tions of employment have been constructively discharged in violation of Section 8(a)(3) and (1). *White-Evans Co.*, 285 NLRB 80, 81 (1987); *Superior Sprinkler, Inc.*, 227 NLRB 204 (1976). The theory of this violation is that employees have the statutory right to union representation as well as the contractual benefits negotiated by their representative. They may not be forced to make the Hobson's choice of leaving their jobs or forfeiting their statutory rights in order to remain employed under the working conditions unlawfully set by their employer. *Noel Corp.*, 315 NLRB 905, 909 (1994); *RCR Sportswear*, 312 NLRB 513 (1993).¹²

The apprentices here clearly confronted such a choice. The Respondent's unlawful withdrawal of recognition necessarily terminated its participation in the JATC apprenticeship program. If the apprentices had chosen to stay with the Respondent, they would have not only have lost the opportunity to continue in the program, they would also have lost credit for time already served in it. Although the JATC communicated this fact to the apprentices, it was the Respondent's unlawful actions that forced the choice. We therefore find that the Respondent constructively discharged the four apprentices in violation of Section 8(a)(3) and (1).¹³

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. Since June 25, 1993, the Union has been the exclusive representative of the Respondent's journeymen electricians and apprentices for purposes of collective bargaining under Section 9(a) of the Act.

¹² Member Cohen agrees that where, as here, employees are confronted with an unlawful withdrawal of recognition and an unlawful termination of a substantial and important benefit, the voluntary "quit" by those employees can be considered an unlawful constructive discharge. However, he does not agree with the broader proposition that a "constructive discharge" conclusion necessarily follows from any unlawful working condition set by the employer. For example, if an employer, within the context of an ongoing collective-bargaining relationship, unilaterally reduces breaktime from 15 minutes to 10, the new condition is unlawful. However, the employees are not "forced to make the Hobson's choice of leaving their jobs or forfeiting their statutory rights." There is a third alternative: they can continue to work while they seek relief through available means of redress (e.g., grievance-arbitration procedure, charge with NLRB). The phrase "work now, grieve later" is more than just a slogan. In many cases, it is a better solution than quitting, both from the standpoint of labor relations and from the standpoint of the affected employees and their union.

¹³ We find no need to discuss the scope of the broader constructive discharge proposition as characterized and criticized by Member Cohen. We note, however, that a grievance-arbitration procedure is not likely to be a viable means of redress for changes implemented after an unlawful withdrawal of recognition.

3. By withdrawing recognition from and by refusing to bargain with the Union since January 1, 1994, by unilaterally discontinuing and changing employees' existing terms and conditions of employment, and by dealing directly with employees concerning terms and conditions of employment, the Respondent has violated Section 8(a)(5) and (1) of the Act.

4. By constructively discharging employees because of their refusal to accept unilaterally imposed terms and conditions of employment, the Respondent has violated Section 8(a)(3) and (1) of the Act.

5. The violations found are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(5), (3), and (1) of the Act, we shall order it to cease and desist and to take certain affirmative action to effectuate the policies of the Act. Specifically, we shall order the Respondent to recognize and, on request, bargain with the Union as the exclusive bargaining agent of its journeymen electricians and apprentices. We shall also order the Respondent, on request by the Union, to rescind changes in employment terms made on and after December 31, 1993, restoring those employment terms to levels that existed prior to that date. As to those employment terms for which rescission is requested and restoration occurs, the Respondent shall be ordered (1) to make whole all employees who worked for it on and after December 31, 1993, for any loss of wages and other benefits suffered, as calculated in accordance with *Ogle Protection Service*, 183 NLRB 682, 683 (1970), with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), (2) to make whole any fringe benefit funds in the manner prescribed in *Merryweather Optical Co.*, 240 NLRB 1213 (1979), and (3) to reimburse employees for any losses or expenses they may have incurred because of its failure to make payments to those funds, in the manner prescribed in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. mem. 661 F.2d 940 (9th Cir. 1991), with interest computed in the manner prescribed in *New Horizons for the Retarded*, supra.

The Respondent shall also be ordered to offer each of the apprentice employees whom it constructively discharged immediate and full reinstatement to the position that the apprentice occupied prior to their discharge, dismissing, if necessary, anyone who may have been hired or assigned to that position. If one or more of the positions of those apprentices no longer exists, the Respondent shall reinstate the affected apprentices to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. It shall

also make each of the discriminatees whole for any loss of earnings and other benefits suffered as a result of their unlawful constructive discharges, with backpay computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest computed in the manner prescribed in *New Horizons for the Retarded*, supra.

ORDER

The Respondent, Goodless Electric Co. Inc., Springfield, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withholding recognition from, and failing and refusing to bargain with, Local Union No. 7, International Brotherhood of Electrical Workers, AFL-CIO as the exclusive representative of employees in an appropriate bargaining unit consisting of:

All journeymen and apprentice electricians employed at and out of its Springfield, Massachusetts, facility excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

(b) Bypassing the Union and dealing directly with unit employees regarding wages, hours, and working conditions.

(c) Changing the terms and conditions of employment for unit employees without first giving notice to the Union and affording it an opportunity to bargain about the proposed change.

(d) Constructively discharging employees because of their union activity and support.

(e) 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) Recognize and, on request, bargain in good faith with the Union as the bargaining agent for unit employees and embody any agreement reached in a written contract.

(b) On request of the Union, rescind any or all changes made on and after January 1, 1994, in the terms and conditions of employment for unit employees, and make whole all unit employees and benefit funds for losses suffered as a result of these changes in the manner prescribed in the remedy section of this decision.

(c) Offer those apprentice employees whom it has constructively discharged immediate and full reinstatement to their former jobs, dismissing, if necessary, anyone whom it may subsequently have hired or assigned to those jobs or, if those jobs no longer exist, offer immediate and full reinstatement to substantially equivalent positions, without prejudice to the apprentice employees' seniority or any other rights and privi-

leges, and make them whole for any loss of pay and benefits they may have suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(d) 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.

(e) Post at its Springfield, Massachusetts facility copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 1 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 those notices are not altered, defaced, or covered by any other material.

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

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT withhold recognition from and fail and refuse to bargain with Local Union No. 7, International Brotherhood of Electrical Workers, AFL-CIO as the exclusive representative of our employees in the following appropriate bargaining unit:

All journeymen and apprentice electricians employed at and out of our Springfield, Massachu-

setts facility excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT bypass your collective-bargaining agent and try to deal directly with you concerning your wages, hours, and working conditions.

WE WILL NOT change any term and condition of employment for unit employees without first giving the Union notice and affording it an opportunity to bargain about that change.

WE WILL NOT constructively discharge employees because of their activity or support for the Union.

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 recognize and, on request, bargain in good faith with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit described above.

WE WILL, on request by the Union, rescind any or all changes which we unilaterally made in the terms and conditions of employment for unit employees on and after January 1, 1994, and WE WILL make those employees and their benefit funds whole for any losses resulting from those unilateral changes.

WE WILL offer those apprentice employees whom we constructively discharged in January 1994 immediate and full reinstatement to their former jobs, dismissing, if necessary, anyone whom we have subsequently hired or assigned to those jobs or, if those jobs no longer exist, WE WILL offer immediate and full reinstatement to substantially equivalent positions, without prejudice to the employees' seniority or any other rights or privileges previously enjoyed, and WE WILL make those employees whole for any loss of earnings and other benefits resulting from their constructive discharges, less any net interim earnings, plus interest.

GOODLESS ELECTRIC CO., INC.

Don Firenze, Esq., for the General Counsel.

Jay M. Presser and Jeffrey Hummel, Esqs. (Skoler, Abbott & Presser, PC), of Springfield, Massachusetts, for the Respondent.

Aaron D. Krakow, Esq. (Feinberg, Charnas & Birmingham, PC), of Boston, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. These consolidated cases were tried before me on July 27 through 29 in Springfield, Massachusetts. Local Union No. 7, International Brotherhood of Electrical Workers, AFL-CIO, CLC (the Union or Local 7) filed the charge against Goodless Electric Co., Inc. (the Respondent, the Company, or the Em-

ployer) in Case 1-CA-31249 on January 3, 1994,¹ and amended that charge on February 24. The complaint issued in that case on March 25 alleging that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing and refusing to bargain in good faith with Local 7 by withdrawing recognition from the Union, bypassing the Union and dealing directly with its employees, and unilaterally changing the terms and conditions of employees.

Local 7 also filed the charge against Respondent in Case 1-CA-31429 on February 25 and amended that charge on March 24. The complaint issued in that case on May 31 alleging that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with Local 7 by withdrawing recognition from the Union, and unilaterally changing the terms and conditions of the unit by limiting its membership in and contributions to the Springfield Area Electrical Joint Apprenticeship and Training Fund and violated Section 8(a)(3) and (1) by making the unilateral changes thus causing the termination of certain named apprentice electricians. The Region ordered Cases 1-CA-31249 and 1-CA-31429 consolidated on the day the complaint issued in the latter case.

Finally, Local 7 filed the charge against Respondent in Case 1-CA-31657 on May 3 and amended it on June 14. The complaint issued in that case on June 17 alleging that Respondent violated Section 8(a)(3) and (1) by refusing to consider certain applicants for hire because of their union activity and violated Section 8(a)(1) by interrogating employees as to their union membership, activities, and sympathies and by telling employees that Respondent was going nonunion. The Region ordered all three cases consolidated for hearing on July 18.

Respondent filed timely answers to the complaints denying the commission of any unfair labor practices.

All parties were represented at the hearing and were afforded full opportunity to be heard and to present evidence and argument. On the entire record, my observation of the demeanor of the witnesses, and after giving due consideration to the briefs, I make the following

FINDINGS OF FACT²

Respondent, a corporation with an office and place of business in Springfield, Massachusetts, is engaged in the business of electrical construction. In 1980, the NLRB conducted an election among its employees to determine whether or not a majority of them desired to be represented by Local 7. The Union lost the election. Thereafter, no further attempts were made by the Union to organize Respondent's employees. In 1982, however, the Respondent and the Union signed an agreement that was terminated after a few months under circumstances not revealed by the record here.

On July 29, 1988, Respondent entered into an 8(f) agreement with three IBEW locals, shortly thereafter merged into Local 7, whereby Respondent agreed to be bound by the National Electrical Contractors Association collective-bargaining

¹ Hereinafter all dates are in 1994 unless noted otherwise.

² Jurisdiction and the status of the Union as a labor organization are admitted.

agreements in effect at the time in western Massachusetts.³ It was understood by the parties that if the arrangement proved unsatisfactory, either the Union or the Respondent was free to withdraw from the agreement upon giving 150 days' notice.

Following the signing of the memorandum of agreement, Respondent complied with the terms of the NECA collective-bargaining agreements. The relationship between the parties was amicable and remained so into 1990.

On July 1, 1990, NECA and Local 7 signed a new collective-bargaining agreement that took effect immediately and that was scheduled to expire on June 30, 1993. Respondent, then engaged in commercial, industrial, and residential wiring, maintained a large service department as well. It, once again, became subject to the NECA contract.

Until this time the economy of the area was healthy. In 1990, however, the electrical construction industry began to have problems. The various contractors brought these problems to the attention of the Union. Respondent, in particular, was hurt because of the amount of service work in which it was engaged, far more than most of the NECA employers, and it had greater problems because of the number of non-union competitors in the electrical service portion of the industry. Many of the NECA contractors asked for relief from the Union, but none more than Respondent who, through its president, Leon Goodless, made frequent calls to the Union, complaining about his financial difficulties and the necessity for relief under the contract. In late 1990, Leon⁴ wrote letters to the Union threatening to "drop out of the Union" if it did not lower the rates. The Union, in return, reminded him that he was bound by the contract. Respondent continued to comply with the terms of the most recent NECA agreement.

Difficult times continued into 1991, the NECA contractors continued to complain as did Respondent. Meetings were held and efforts made to solve the problems. In August 1991, Leon wrote to District 2, IBEW seeking to enlist additional aid in obtaining relief to make him more competitive with nonunion shops. He received no direct response but Local 7 was advised of his complaint.

In the winter of 1992 and on into the spring, Local 7 held a series of meetings attended by NECA and non-NECA signatories to the collective-bargaining agreement then in effect and not scheduled to expire until June 30, 1993. The purpose of these meetings was to negotiate concessions to the various employers to afford them relief from some of the economic problems about which they had been complaining. Both Leon and Jeffery attended at least some of these meetings and, like other contractors, registered their complaints about problems with competition.

On April 30, 1992, Local 7 and NECA entered into a new residential agreement retroactively effective from February 28, 1991, through August 31, 1993. It provided for a lower wage scale for employees of NECA contractors doing resi-

dential work, thus enabling NECA contractors to better compete with nonunion contractors doing similar work.

About June 1992,⁵ Leon learned that NECA was considering entering prematurely into contractual negotiations with Local 7. On June 18, he sent letters to both NECA and Local 7 advising them that Respondent would not be bound by any extensions or modifications of the then current collective-bargaining agreement, that NECA had no authority to negotiate any changes on behalf of Respondent, that Respondent would honor the then current collective-bargaining agreement through its expiration date of June 30, 1993, but that "this letter can also be considered the 150-day notice of termination." Leon closed his letter with the statement: "This does not preclude the possible future mutual agreement to continue the relationship beyond the date of that contract." By this letter Respondent properly withdrew from the multi-employer bargaining agreement as of June 30, 1993. The Union did not reply to Respondent's June 18 letter.

After June 18, representatives of the Respondent and the Union continued to meet, Respondent insisting on concessions, which if not met, would result in Respondent's "going nonunion" as of June 30, 1993.

Meanwhile, NECA and Local 7 met and negotiated wage and benefit concessions that were to take effect as of July 1 and continue on through the last year of the then current contract to June 30, 1994, the new expiration date. The negotiated concessions were incorporated into the 1990-1993 agreement that was thus converted into the new 1992-1994 agreement.

The new 1992-1994 collective-bargaining agreement went into effect July 1. Respondent either obtained a copy of the new agreement or learned of its content by some other means. On July 6, Leon, in a letter to Local 7, reiterated its position that it would not be bound by any extension of the earlier collective-bargaining agreement but would honor the terms of the earlier agreement scheduled to expire on June 30, 1993. He agreed, however, on a temporary basis pending negotiations between Respondent and Local 7, to give the 40-cent-per-hour raise to its electricians, provided for in the new agreement. He refused to comply with any other changes contained in the new agreement and continued his attempts at obtaining additional concessions through his individual contracts with the Local and the International.

Back in June 1991, the letter of assent A form was revised and new wording added that included a reference to NLRA Section 9(a) for the first time. Specifically, the newly worded paragraph read:

The Employer agrees that if a majority of its employees authorize the Local Union to represent them in collective bargaining, the Employer will recognize the Local Union as the NLRA Section 9(a) collective bargaining agent for all employees performing electrical construction work within the jurisdiction of the Local Union on all present and future jobsites.

In the spring of 1992, a recovery program was instituted to help union electrical contractors in competition with non-union contractors. Included within this program were payments to be made, under particular circumstances, to certain union contractors, such payments designated as target money.

³The memorandum of agreement required that Respondent sign letters of assent binding it to the various agreements between the three Locals and the Western Massachusetts Chapter of NECA extant at the time. Neither Respondent nor the Locals ever signed the letters of assent.

⁴Leon and Jeffrey Goodless, president and vice president of the Company, respectively, will henceforth be identified by their first names.

⁵Hereinafter, all dates are in 1992 unless noted otherwise.

As part of the recordkeeping connected with the recovery program, the International directed the Locals to update their letters of assent A by replacing the old forms with the relatively new 6/91 revised form. In keeping with the directive, John Collins, as business manager of Local 7, prepared new revised letters of assent A forms for the signature of the various contractors with whom Local 7 had collective-bargaining agreements. On May 27, he signed and dated one that he had prepared for Respondent but did nothing with it immediately.

During the first week in July, Collins took the letter of assent A that he had prepared for Respondent to Leon. He explained that the Union did not have a letter of assent A from his Company, and without one the Union could not pay him his target money. Leon told Collins to leave the form with him and he would go through it later.

Collins' last day as business manager was July 6. He left office that day and did not hold union office thereafter but immediately went away on vacation. Because Collins did not participate in union affairs thereafter, he never came back to pick up the letter of assent that he had given to Leon.⁶

Douglas Bodman replaced Collins as business manager for Local 7 on July 6. He immediately took up where Collins left off by attempting to update the letters of assent by providing all of the union contractors with revised forms. When he gave another copy of the letter of assent, with Collins' signature and the May 27 date on it, to Leon, Leon took it and promised to review it.

When Leon called Bodman to have him come over and pick up the document on or about July 15, Bodman found the letter of assent had been signed and dated July 15 but also revised by Leon with the revisions initialed. At sometime or other, Bodman also initialed the same revisions thus indicating agreement with Leon's revisions.

Leon's revisions consisted of changing the following text from:

In signing this letter of assent the undersigned firm does hereby authorize Western Mass Chapter of N.E.C.A. as its collective bargaining representative for all matters contained in or pertaining to the current and any subsequent approved Inside Agreement labor agreement between the Western Mass Chapter of N.E.C.A. and Local Union 7, IBEW. In doing so, the undersigned firm agrees to comply with, and be bound by, all of the terms and conditions contained in said *current and subsequent approved labor agreements*. This authorization, in compliance with the current approved labor agreement, shall become effective on the 1st of July 1990. It shall remain in effect until terminated by the undersigned employer giving written notice to the Western Mass Chapter of N.E.C.A. and to the Local Union at least one hundred fifty (150) days prior to the then current anniversary date of the *applicable approved* labor agreement.⁷

⁶Leon's testimony to the contrary is not credited. Collins testified, when shown the document signed by Leon, that he could remember signing the document but did not recognize all of the "scribbling" on it, clearly referring to the modifications written on the document by Leon.

⁷Italics indicate deletions.

to:

In signing this letter of assent, the undersigned firm does hereby authorize Western Mass Chapter of N.E.C.A. as its collective bargaining representative for all matters contained in or pertaining to the current Inside Agreement labor agreement between the Western Mass Chapter of N.E.C.A. and Local Union 7, IBEW. In doing so, the undersigned firm agrees to comply with, and be bound by, all of the terms and conditions contained in said current [labor agreement]. This authorization, in compliance with the current approved labor agreement, shall become effective on the 1st day of July, 1990. It shall remain in effect until terminated by the undersigned employer giving written notice to the Western Mass Chapter of N.E.C.A. and to the Local Union at least one hundred fifty (150) days prior to the then current anniversary date of the *July 1, 1990* labor agreement.⁸

Thus, it is clear that the deletions and additions made by Leon in the letter of assent were intended to limit his liability to the terms and conditions of the then current labor agreement and to make certain Respondent would not be bound by subsequent revisions, modifications, or additional agreements entered into by NECA. Leon thus reiterated the position he had made clear in his earlier letters. Bodman, by initialing Leon's changes, clearly indicated his understanding of Leon's position.

As to the reference to NLRA Section 9(a) in the letter of assent, there is no testimonial or other evidence that Leon even noticed its existence. It is clear, however, that he fully intended to recognize Local 7 as the collective-bargaining representative of his electricians only to the expiration date of the original July 1, 1990-June 30, 1993 contract.

After July 15 and throughout the rest of 1992, the Goodlisses continued to complain in person, by telephone, and by letter to both Local 7 and to International Representative Dick Penegrassi⁹ that the Union was not doing enough to grant him relief sufficient to enable Respondent to be competitive with nonunion shops. Leon testified at length about the failure of both Local 7 and Penegrassi to return his attempts to communicate with them but also complained about their uninvited visits. The bottom line appears to be that Respondent was not getting what it wanted, lower wage rates and a decrease in costly benefits for its employees.

In the meantime, the July 1, 1992-June 30, 1994 agreement between NECA and Local 7 was signed on September 9, 1992. Respondent, of course, took no part in the execution of this agreement.

On October 26, Jeffrey wrote to Penegrassi recounting how Respondent was losing service accounts and was unable to get new construction contracts, not because of the economy but because of Local 7. He noted that open shops were taking pay cuts and benefit cuts and staying busy while the Union was getting pay raises through negotiations and thereby losing jobs. Jeffrey closed by pointing out that in a recent discussion between himself and Penegrassi, they had talked about the elimination of pension benefits and the reduction of rates by 90 cents and that Penegrassi had promised to get

⁸Italics indicate additions.

⁹Spelling varies throughout the record.

back to him but had failed to do so. He complained that he was losing money daily, and that the problem needed immediate attention if he were to continue as a union contractor. Jeffrey's letter went unanswered.

On November 6, Leon wrote a letter to Penegrassi reminding him of his failure to get back to the Respondent as promised and of the Union's failure to make the changes necessary to ensure Respondent's survival. He further reminded Penegrassi of the 150-day notice provision and of the fact that notice had been given the previous June. He pointed out that the 150-day notice was due to run out in December and that Respondent intended to end its relationship with the IBEW at that time. He requested that Penegrassi assure him, in keeping with past promises, that Respondent was free to discontinue the relationship effective January 1, 1993, without the necessity of engaging in litigation over the matter. Respondent received no reply to this letter.

Without having received any reply to either Jeffrey's letter of October 26 or Leon's letter of November 6 and in the absence of any assurances concerning the initiation of litigation, Respondent decided to continue to operate under the terms and conditions of the 1990-1993 collective-bargaining agreement through its June 30, 1993 expiration date.

In mid-February 1993,¹⁰ J. David Keaney, chapter manager of NECA, telephoned Respondent and invited Leon to a negotiating session with Local 7 scheduled for March 2, at which service work was to be discussed. Leon declined the invitation explaining that NECA could no longer represent him. Despite Leon's refusal to attend the meeting, he received a written invitation dated February 24.

On March 12, Respondent, through its attorney, reminded NECA that it had previously decided and notified all parties that it was rescinding NECA's right to negotiate on its behalf and accordingly would not be attending any negotiating sessions between NECA and IBEW, Local 7. The letter reiterated Respondent's position that it would continue to honor the terms of the collective-bargaining agreement that it had executed until its expiration date of June 1993.

Although Respondent had refused to attend the March 2 NECA/Local 7 bargaining session, it agreed to meet separately with Local 7 to discuss the problems it was having with service work issues. The first meeting was held on April 13 specifically for the purpose of discussing a service contract. Jeff, Leon, and their attorney met with Bodman and Business Representative Joe Fitzpatrick, representing the Union at Local 7's conference room. The meeting did not last very long, however, and apparently accomplished little.

A second meeting was scheduled for April 27, once again to discuss a service contract for Respondent. The same individuals attended this meeting that attended the April 13 meeting except for Respondent's attorney. Subjects discussed included a lower hourly rate that Respondent could live with, a reduced number of holidays, and overtime rates. It was decided that additional negotiations should take place for the purpose of arriving at a service agreement.

Throughout the spring months of 1993, Local 7 negotiated separately with NECA representatives and with Respondent's representatives concerning a service agreement. The Union would arrive at an agreement with NECA on certain issues only to find that it was not up to the expectations of the

Goodlesses. The agreement would then be amended to satisfy Respondent's representatives, then had to be taken back to the NECA contractors for their approval.

On May 6, Respondent's representatives met with Local 7 for the third time to negotiate a service contract. The same individuals attended and discussed the same issues. Overtime rates, double time for Sunday, in particular, were problems that Respondent could not live with. A service rate of \$13.25 per hour was suggested, apparently by Respondent. When this suggested rate was taken back to the next NECA meeting, it was considered unrealistic, that capable electricians would not work at that rate since up to that time service work had been done under the residential rate of \$15.65 per hour.

Throughout June, there were telephonic communications between Penegrassi and Leon, with the former trying to convince the latter, without much success, that he was trying to obtain concessions that would enable Respondent to be more competitive with his service department.

In June, Local 7 reached an agreement with NECA (dated June 1, 1993) consisting of a letter or memorandum, regarding service work and proposed changes to residential work performed under the inside agreement. This agreement was brought back and ratified by the membership on June 21. Leon was contacted and a meeting scheduled. The memorandum covering the service work contained a provision for overtime at time and a half after 8 hours.

On the morning of June 22, Bodman, Penegrassi, and Fitzpatrick arrived at Respondent's office where they met with the Goodlesses.¹¹ Penegrassi announced that the Union had something for Respondent, that it now could give Respondent better rates. Leon, clearly skeptical, said that he was "tired of promises, of living in a world of dreams." He stated that he was getting out, meaning that his relationship with the Union would be over as of July 1. Penegrassi, at this point, interrupted Leon and told him, "Wait a minute. Let's talk like businessmen. Let us show you what we have to offer." Penegrassi then brought out the document containing the memorandum on service work and the proposed changes to the residual agreement to which NECA had already agreed and that the membership had ratified and showed it to Leon.

Leon studied the document while it was explained to him that he could use the \$13 rate for his service department rather than the \$15 plus rate he was paying at the time and could also take advantage of the lowered benefits described in the document.

The Goodlesses, after looking over the document, were somewhat mollified but voiced objections to the provision for overtime after 8 hours and suggested overtime after 40 hours. The union delegation agreed to take Respondent's suggestions back to NECA and see if NECA would agree to the change. Another meeting with the Goodlesses was scheduled for June 25. It was Bodman's expectation that if he were able to get NECA to agree to Respondent's recommended change in the overtime provision, he would have

¹¹ Leon testified that he could not recall a meeting on June 22. I find, however, that Bodman's precise description of the two separate and distinct meetings with the Goodlesses to be convincing and credible. I further find that Leon's testimony concerning matters, clearly of first impression, occurred more likely on June 22 rather than on June 25 as he erroneously testified.

¹⁰ Hereinafter all dates are in 1993 unless noted otherwise.

an agreement with Respondent to which the membership would also agree.

Between June 22 and 25 Bodman obtained the agreement of NECA and the Union's executive board to Respondent's recommended change in the overtime provision. He also had the necessary physical changes made in the document itself.

While negotiations were proceeding toward a new collective-bargaining agreement, including the memorandum on service work and proposed changes to residential agreement, Respondent was taking steps to guard against any action the Union might take against it come the June 30 expiration date. In late May or early June, Jeff ran two or three advertisements for electricians in the local newspaper. He feared that the Union would pull its members off Respondent's jobs if a new agreement was not reached by June 30. Although Bodman did not specifically tell Respondent's employees that he would pull them off Respondent's jobs on July 1, 1993, if no agreement with Respondent was reached, he testified that he was prepared to pull the men if he had to, and that was common knowledge because "that's how it works." Rumors that the men would be pulled on July 1 spread among the employees and Bodman did nothing to assuage Jeff's and Leon's fears when he told them repeatedly that the men would go if he told them to. Nevertheless, during these conversations, Jeff and Leon would reply to Bodman that they did not think that all of the men would go, that half of them would continue on the job. The debate continued between the Goodlesses and Bodman throughout June as to how many of Respondent's employees would go and how many would remain, if the Union tried to pull them off the job. These discussions, of course, took place in the context of conversations concerning the success or failure of the parties' attempts at reaching agreement. Leon never wavered from his oft-repeated statement of position that unless the Union could give Respondent better rates and keep him competitive so it could keep its service department, as per his letters, "Goodbye, I'm out."

In response to Respondent's newspaper ads, a number of applications for jobs were received, some from visitors coming into the shop off the street, others through the mail. At the time, Leon was involved in going through the applications, sometimes making notes in the margins as he reviewed them. He testified that he may have invited in for interview applicants whom he found to be most promising, but was not certain as to when he did this, whether it was in June 1993 or later.

Jeff testified to placing ads in the newspaper in June 1993 and receiving between 25 and 60 applications that he looked over but did not segregate in any way. He did not call in any of the applicants to interview during this period.

On June 24, the Union called a meeting at the union hall with Respondent's electricians. This meeting was scheduled to update them on the progress of negotiations and the position of the parties. Bodman testified that at this meeting, he explained to Respondent's electricians that the Goodlesses had told him that they wanted to get out of their contract with the Union and that to keep him a union contractor, Local 7 had offered Respondent a number of concessions. He described the concessions to those present and told them that he felt that the parties could come to an agreement based on these concessions. He promised that the Union would continue to negotiate with Respondent on their behalf. After

some discussion concerning the content of the concessions, the membership advised Bodman that they wanted Local 7 to continue to represent them in negotiations with Respondent.

Bodman then told Respondent's employees that during discussions with the Goodlesses, they had claimed that if Respondent went nonunion, over half of them would stay with the Respondent rather than leave if the Union tried to pull them off the job. He then asked them to sign authorization cards in preparation for his following day meeting with the Goodlesses, evidently to indicate their support for and loyalty to the Union and prove majority support for the Union's position. All 22 of Respondent's employees did so. Bodman and Joe Fitzpatrick then collected the signed cards and the meeting closed.

There is no testimony or evidence of any kind to indicate that Respondent's employees, at this meeting, signed the authorization cards for the purpose of Bodman demanding recognition.

On June 25, Bodman, Fitzpatrick, and Penegrassi met once again with Leon and Jeff at Respondent's office. The union delegation once again offered the document containing the memorandum on service work to the Goodlesses, this time with the requested change in overtime included therein. The document was, of course, not a contract nor a collective-bargaining agreement and not intended to be. There were no spaces for signature and dates. It was, as labeled, merely a memorandum containing certain concessions and a proposal to change the existing residential agreement, in short a proposal to keep Respondent from going nonunion on July 1.

Penegrassi tried to assure the Goodlesses that the document being offered did not contain all of the concessions that Local 7 was prepared to make. There would be things in addition, including the Union's looking into possibly switching over to Respondent's insurance company that he said he had discovered would cost only half what the Union was then paying for the same benefits. To this end, Penegrassi was furnished with information concerning how to get in touch with Respondent's insurance agent.

Despite the concessions contained in the documents and Penegrassi's additional oral promises, however, Leon was not receptive. He stated that as of the following week, June 30, his relationship with the Union was at an end.

When Leon made the statement that he would be going nonunion the following week, Bodman took out the 22 authorization cards that he had Respondent's employees sign the day before and placed them on the desk in front of Leon.¹² He commented that all of Respondent's employees had signed with the Union and had asked Local 7 to continue to represent them. Leon went through all of the cards, looked at them individually, and made comments about some of his employees whom he had thought would not have signed because they had worked for him long before he had gone Union. Bodman indicated that by signing the authorization cards, Respondent's employees were saying that if Leon

¹²Leon's testimony that he was only shown two of the cards is rejected as incredible. As Bodman was intent upon convincing Leon that all of his employees supported the Union and would walk as of July 1, there is no reason why he would not show all of the cards to him. Moreover, Jeff's failure to testify on the subject warrants an adverse inference. *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

went nonunion, they would stay with the Union and would not continue to work for Respondent after June 30.

Leon took Bodman's presentation of the authorization cards as a threat to have Respondent's employees walk if he went nonunion. He turned around and, pointing to his credenza, stated, "Back here, I have 10 applicants for every one of your men. Take those cards and shove them up your ass." Bodman replied that if they did not work out a deal, all of the card signers were going to walk the following week.

At this point, Penegrassi broke in and said that Bodman and Leon should not be arguing. He emphasized the content of the service work memorandum, the proposed changes in the residential agreement and made further promises. He cautioned, however, that he would need 6 months to fulfill all of his promises. After voicing some doubt as to the reliability of the Union's promises, Leon finally agreed to call up his attorney and have him prepare an extension for 6 months, during which he wanted to see additional action in the way of concessions or relief. The understanding was reached that the attorneys for the parties would be in contact and would draw up the necessary papers to reflect the agreement reached that day.

At no point during the meeting did Bodman or anyone else demand recognition nor did the Goodlesses offer recognition. The subject of a 9(a) recognition was never discussed.

In the days immediately following June 25, documents were faxed back and forth among the offices of the parties and their attorneys until language was agreed upon by all parties. On July 1, Bodman took the document which he had already signed over to Leon's office where Leon added his signature and gave it back to Bodman. The agreement signed by the parties July 1 reads as follows:

Memorandum of Agreement

WHEREAS, IBEW, LOCAL NO. 7 (the "Union") and GOODLESS ELECTRIC CO., INC. (the "Company") disagree as to whether the Company has an obligation to comply with the terms and conditions of the current collective-bargaining agreement between the Union and NECA after July 1, 1993;

WHEREAS, the Union and the Company strive to resolve their differences without a costly and contentious legal battle in the courts and/or at the National Labor Relations Board;

WHEREFORE, the Union and the Company enter into the following Memorandum of Agreement:

1. The Union and the Company hereby agree that between July 1, 1993 and December 31, 1993, they will comply with the terms and conditions of the current collective-bargaining agreement between the Union and NECA, including the June, 1993 Letter of Memorandum regarding Service Work and the Residential Agreement.

2. In agreeing to comply with the NECA Agreement between July 1, 1993 and December 31, 1993, the Company does not authorize NECA to negotiate on its behalf.

3. By entering into this Agreement, neither party waives any of its rights regarding the obligations of the Company, if any, effective January 1, 1994.

The Respondent lived up to this agreement through its termination date of December 31, 1993.

Although the parties had entered into the July 1 memorandum of agreement ostensibly to enable work to be performed under the current collective-bargaining agreement while the parties negotiated additional concessions as promised by Penegrassi at the June 25 meeting, no negotiations took place thereafter. The probable reason for the lack of negotiations was that in July, Respondent began to encounter difficulties with the application of the service rate. Assignments would be made by management to employees to perform electrical service work under the service work memorandum of the agreement and the employee would note the \$13-per-hour rate and refuse to perform the job. When asked why he would not go to the job, he would say that under the Local 7 rules, he had a right to refuse the job. When asked what Respondent was supposed to do under the circumstances, call the customer and tell him that Respondent could not do the job, the employee would reply, "That's your problem." Faced with this problem, Leon or Jeff would call Bodman to complain. Bodman had not told Leon or Jeff earlier, when the service work memorandum containing the \$13 rate was first executed, that Respondent's employees were free to refuse jobs providing for that rate. Neither did he tell them that employees assigned jobs providing for that rate had to accept such assignments. Leon credibly testified that if he had been told that his employees could refuse to work for the \$13 rate, he would not have signed the document.

When Leon or Jeff first complained to Bodman about the employees refusing to work at the \$13 rate, Bodman acknowledged, as though it had been an oversight, "Oh, that's right. We had an agreement, the [men don't] have to [work for the \$13 rate]. We'll send you a new man." When Leon or Jeff inquired, "What am I supposed to tell my customers till you send me a new man?" Bodman replied that he could not force the men to work for \$13 or \$30 per hour if they did not want to, that he was only a business manager. He reiterated his offer to get them people who were willing to work at the \$13 rate. Leon or Jeff, not satisfied, told Bodman that they had an agreement for a \$13 rate and the men would have to work for that.

Despite the existence of the \$13 rate in the agreement and Respondent's determination to have its employees work at that wage, they continued to refuse. Each time there was a refusal, either Leon or Jeff would call Bodman, only to be given the same answer, namely, that he could not force the particular employee involved to work at the \$13 rate but would send him a replacement. Finally, either Leon or Jeff threatened to go to the street to hire electricians at the \$13 rate. Bodman's response was that under the agreement then in effect Respondent was free to hire off the street only if the Union were unable to supply the requested personnel within 48 hours.

The particular difficulty that Respondent was having with the refusal of its employees to perform service work was due, in part, to the nature of its operation. Thus, employees would be sent out at the beginning of the workday to work at various sites in a series under different contractual rates—residential, service, inside, or outside. A particular employee, on occasion, would refuse one of the jobs in the middle of the day and Respondent would have to call Bodman to find

another employee willing to pick up that job at the \$13 service rate.

On one such occasion, Jeff called Bodman and told him that he could not run a business that way, that he had to get the work done, and that if there was a service job in the middle of the day, the employee would have to be willing to do that job at the agreed-on rate of \$13 per hour. He said he could not run his service department with people picking and choosing which assignments they would take. Once again Bodman said that he could not make the reluctant employees do the job at the \$13 rate or any rate if he did not want to do it. Jeff told Bodman to get somebody to do the job or he would get his own people because he had applications. He added that getting replacements the next day or 48 hours later was not going to solve the problem. Bodman simply said that it was the best he could do.

Bodman testified that he never told Respondent's employees that they had a right not to accept an assignment but admitted that he had told them that he could not make them do it and that if they chose not to take the assignment, they had a right to be laid off as opposed to being fired or discharged. Bodman testified that his statement concerning Respondent's employees' rights to refuse assignments was based on an old 1989 policy no longer existing in written form.

Armed with the information supplied to them by Bodman, two of Respondent's employees, who had refused to perform service work at the \$13 rate, suggested to Leon or Jeff that they be laid off. Their suggestion was rejected with the explanation that there was work available for them. Subsequently, they filed for unemployment compensation.

At the unemployment compensation hearing, Bodman testified on behalf of the employees. He testified that under the agreement the men do not have to go and do the job. He produced an agreement, which had been signed at a meeting by Bodman and by all of Respondent's residential electricians, that provided that Respondent's employees had the right to refuse work assigned them by their Employer. The upshot was that Respondent got no relief or satisfaction from the Union in getting member employees of Respondent to work at the \$13 rate. Bodman explained that he could not force people to work at the residential rate. All he could do was to send a replacement and, if he could not do so, Respondent was free to hire someone off the street after 48 hours.

Respondent's dissatisfaction with its relationship with the Union after July 1 was primarily the result of its employees' refusal to work for the \$13 rate provided for by the agreement of that date. Leon, however, was also displeased because neither Penegrassi nor anyone else from the Union ever contacted him concerning the promised concessions, changes, or modifications. Nor, on the other hand, did he contact the Union concerning these matters. Leon called his insurance agent to find out if Penegrassi had been in touch with her concerning a change in carriers as he had promised during the June 25 meeting. She advised Leon that Penegrassi had not contacted her. Finally, Leon was dissatisfied that after he had signed the letter of assent A on July 15, 1992, for the sole purpose of receiving target money from the Union, payments presumably due were never received. As a result of the problems here described, the Respondent and the Union never met again after July 1 to con-

tinue negotiations toward a new collective-bargaining agreement. No proposals were exchanged.

NECA and the Union had, in June and July, been negotiating changes in the then current 1992-1994 collective-bargaining agreement. On July 30, these changes were incorporated in a new extended agreement, effective July 1, 1993, through June 30, 1996, signed by representatives of NECA and the Union on that date. Bodman told Respondent's employees when the agreement was negotiated that their Employer was bound by the new extended collective-bargaining agreement through 1996 well after he had been informed by Respondent that NECA could not bargain on its behalf. Bodman's explanation as to why he made this statement to Respondent's employees was that the new 1993-1996 agreement had been reached between the Union on the one hand and NECA and the contractors who had been present in negotiations leading up to the new agreement on the other. Bodman testified that the Goodlesses attended these negotiations and he therefore assumed that they were agreeing to be bound by the result. The Union, following the execution of the 1993-1996 NECA/Local 7 agreement, took the position that Respondent was bound by that agreement. Respondent, on the other hand, took the position that it had no contractual obligations after December 31, 1993.

On December 13, Leon wrote a letter to Bodman reminding him that the memorandum of agreement between Respondent and the Union was due to expire December 31, 1993. In it he stated once again that he did not intend to renew it but would honor it through its expiration date. The letter advised Bodman that Respondent's employees had been or would be advised of this change in relationship but contained no statement concerning possible changes in wages, benefits, or terms and conditions of employment.

Leon also addressed the matter of moneys owed by both parties to the other including target money owed by the Union to Respondent. He suggested that they cooperate to "clean up the books" rather than become involved in expensive litigation.

On December 16, the Union, through its attorney, Aaron Krakow, replied to Leon's December 13 letter. In it he took the position that although the memorandum of agreement was, in fact, due to expire on December 31, Respondent was nevertheless bound by the terms and conditions of the NECA agreement through June 30, 1996. Krakow stated that the Union would take legal action if Respondent failed to comply with its provisions. Krakow gave no basis for his position in this letter.

On December 17, Respondent sent the following letter to all of its employees:

At this time we have decided that it would be in our best business interest to discontinue our relationship with the union. As you are all aware, our contract expires on December 31, 1993. If any employee would like the opportunity to stay in our employ and evaluate what we have to offer, please see me personally no later than December 23, 1993 as I have numerous decisions to make by the first of January. To all those who do not wish to remain with us, we respect your decision and wish you all the best of luck.

In addition to this letter, at least one employee testified to having been asked by management whether he intended to stay with the Union or leave it.

On December 21, Krakow wrote a followup to his December 16 letter to Respondent in which he stated that since writing the earlier letter, he had been told by his client that on January 25, 1991, the Union had presented Respondent with authorization cards from a majority of its electrical worker employees¹³ and that in the letter of assent, Leon had agreed that if a majority of Respondent's employees authorized Local 7 to represent them in collective bargaining, Local 7 would be recognized as the exclusive bargaining agent.¹⁴ Krakow concluded that by virtue of Section 9(a) of the National Labor Relations Act, as of January 25, 1991, Local 7 became the exclusive bargaining representative of Respondent's electrical worker employees. He concluded further that Respondent was therefore bound by the current NECA/Local 7 agreement and if not, as Respondent contended, then it was, at least, prohibited by law from unilaterally changing the terms and conditions of employment for its electrical employees and from bargaining directly with its employees. Krakow closed with the threat that charges would be filed if Respondent engaged in such conduct.

Later, on December 21, Krakow wrote a second letter advising Jeff to consider its content in conjunction with the first letter. He then reminded Jeff that on June 24, Bodman and Pennegrassi had presented him with authorization cards signed by all of his electrical worker employees. Based on this submission and the letter of assent, Krakow concluded that there could be no dispute that Local 7 was the collective-bargaining representative of Respondent's electrical worker employees. The letter of December 21 was the first indication that Respondent considered the submission of cards on June 25 as a showing of interest to support a demand for recognition.

When Bodman learned of Respondent's December 17 letter to employees, he composed a form letter that all but one of them signed at a meeting on or about December 21:

I intend to continue my employment with Goodless Electric and maintain my membership with IBEW Local 7. I expect you to continue to comply with my union contract and maintain the current wages and terms and conditions of employment.

If you need to discuss any matters concerning wages or terms and conditions of employment, contact my Union representative Douglas Bodman.

Respondent did not contact the Union after receiving the above letter from its employees inviting it to do so. Rather, it responded to each of its employees who had signed the

¹³ The record does not support this claim.

¹⁴ As noted supra, the letter of assent was signed by Leon on July 15, 1992, for the sole purpose of complying with the requirements necessary to receive target money. The boilerplate language referring to Sec. 9(a) of the NLRA was not discussed, referred to by either party nor noticed by Leon. Recognition was not demanded by the Union either through Collins or through Bodman and Leon, through his modifications, clearly indicated his intent not to be bound beyond June 30, 1993. Because recognition was neither demanded, granted, nor discussed, the Union has no basis for relying on the letter of assent as evidence of recognition.

Bodman-designed letter, by a letter of its own, dated December 23:

Dear _____:

I have received your memo and am delighted you wish to stay with us. You are, of course, free to maintain your membership in the Union. However, we do not believe that we are bound by, and we will not continue to, honor the Union contract. The terms and conditions of employment will be as I describe unless subsequently we again enter into a new prehire agreement with the Union or, following a certification by the NLRB, negotiate new terms and conditions.

If someone has informed you otherwise, there is a difference of opinion regarding our obligations that, if necessary, will be litigated. You should not expect to be paid pursuant to the contract and, in our opinion, should not expect to prevail in litigation. If this alters your plans, please let me know.

Sincerely,

/s/ Jeffery S. Goodless
Vice President

On December 30, Respondent sent letters to all of its electrician employees announcing the terms and conditions of employment to be put in place as of January 1, 1994. Two slightly different sets of letters were sent, one to the service department electricians, the other to class A electricians. The letter to the service department electricians contained the following language:

Dear _____:

As you are aware, starting January 1, 1994 Goodless Electric will no longer be a signatory to any agreement with the I.B.E.W. Your new rate of pay will be \$15.75 per hour unless placed on a prevailing wage job at which time we will pay the posted wage directly to you. If you elect to take our insurance, we have a sixty day waiting period. You may be entitled to cobra benefits through the Union's insurance. I would recommend that you talk to the union about this option. Our insurance company is Principal Mutual Life and the coverage includes a PCS card and a life policy. Goodless will be paying the employee coverage with an employee contribution of \$5.00 per week. If you elect to place your dependents on the insurance, you will be responsible for the additional cost. At this time Goodless Electric has implemented a Section 125 to help defray these costs. You will have six paid holidays and one week paid vacation.

If you should have any further questions or need me to be more explicit on any issues, please feel free to contact me at your convenience.

This letter was signed by Jeff as was the other which was sent to the class A electricians:

Dear _____:

As you are aware, starting January 1, 1994 Goodless Electric will no longer be a signatory to any agreement with the I.B.E.W. You will now be receiving the posted wage in your paycheck. Our new insurance company is Principal Mutual, and we offer a PCS card for prescrip-

tions and a life insurance policy. If you elect to take our insurance, we have a sixty day waiting period. You may be entitled to Cobra benefits through the union, but I would recommend that you talk to the union about this option. If you elect to take our insurance while on a prevailing wage job, the insurance premium obviously comes out of the pay check. In the event a prevailing wage job is not available, please see me so we can discuss payscales, holidays, vacations, insurance, and retirement packages in more detail.

If you should have any further questions, please feel free to contact me.

Copies of these letters were not sent to the Union. Nor was the Union notified by the Respondent by any other means of the changes in terms and conditions of employment announced in these letters. On the other hand, the Union never contacted Respondent to demand to negotiate over the changes.

Respondent withdrew recognition of the Union as of January 1, 1994.¹⁵ Thereafter it ceased calling the union hall for referrals, stopped contributing to the various fringe benefit funds enumerated in the NECA agreement, and implemented the changes broadly described in its December 30 letters. These changes were unilateral in nature.

In anticipation that the Union might pull Respondent's electricians, all union members, off the job as of January 1, Respondent placed additional ads in the newspapers. In response, a large number of applications were received.

Although Respondent fully expected that its union electricians would be pulled by the Union on January 1 upon withdrawal of recognition, this did not occur¹⁶ and all or almost all of them were still employed at the time of the hearing. Bodman testified that the Union has rules that bar members from working for a nonsignatory contractor and that a member who works for a nonsignatory contractor or for a contractor who claims to be nonsignatory jeopardizes his union status if he does so without the knowledge of the business agent. Bodman testified further, however, that members who sign a salting agreement with the Local may apply for work with or may continue to work for an employer such as Respondent. The salting agreement permits the member to continue to work for the nonsignatory contractor as long as he agrees to help organize the nonunion employer. Bodman testified that all of Respondent's electricians had been union members covered by a union collective-bargaining agreement through December 31, 1993, and when Respondent withdrew recognition from the Union effective January 1, they were all permitted to continue to work for Respondent because they signed a salting agreement with Bodman and the Union.

The salting agreement concerning which Bodman testified was never offered into evidence. None of Respondent's electricians, all of whom were union members and all of whom supposedly signed the salting agreement, testified concerning having done so. If all of Respondent's electricians were

union members at the time of the withdrawal of recognition and all signed the salting agreement, who was left to organize? I find that there was no salting agreement in effect as of January 1.¹⁷ I further find that Bodman's testimony concerning the existence of a salting agreement is not to be credited, nor is the meager testimony of other witnesses testifying in its support. Bodman's testimony concerning the non-existent salting agreement was clearly offered to disguise the true reason for the Union's agreeing to permit its members to continue to work for Respondent in the absence of a contract.¹⁸

Under the NECA/Local 7 collective-bargaining agreement to which Respondent was party up until December 31, 1993, there existed an apprenticeship program that was run by the Joint Apprentice Training Committee (JATC) consisting of three members of the Union and three members of the contractors' association. According to the Local Apprenticeship and Training Standards for the Electrical Contracting Industry, an employer, to be eligible to train apprentices had to "be signatory to and meet the qualifying requirements as set forth in the basic labor agreement and provide the necessary work experience for training."

Until December 31, 1993, Respondent employed four apprentices working within the apprenticeship program for whom it contributed 10 to 20 cents per hour into the apprenticeship fund. When Respondent went nonunion on January 1, it was no longer eligible to participate in the program. Nevertheless, the four apprentices continued to work for Respondent along with all of its other union electricians. The JATC did not communicate with Respondent concerning the continued employment of the apprentices who, as required under the program, also continued to attend classes, thus advancing toward their journeyman status.

Under the newly instituted working conditions, the apprentices continued to perform the same job duties but at least one received a slight cut in wages. Nevertheless, they were satisfied with their jobs with Respondent and had no intention of quitting their employment with Respondent. Respondent encouraged at least some of the apprentices to stay.

On January 6, the JATC sent letters to each of the four apprentices:

Dear Brother _____:

As you are well aware, Goodless Electric has declared itself to be a Non-Union Contractor and has ceased complying with the terms and conditions of the Collective-Bargaining Agreement. Therefore, they are not supporting the training program through contributions to the J.A.T.C.

Although Local #7 is contesting this action by Goodless Electric through the National Labor Relations Board, the Joint Apprentice Training Committee cannot

¹⁵ Hereinafter all dates are in 1994 unless noted otherwise.

¹⁶ Michael P. Shea was 1 of the 20 or so union member employees who decided to continue his employment with Respondent after January 1. When he told Jeff that he would stay on the job, he also told him that he had decided to stay a member of the Union. Jeff replied that that was fine. Shea assured Jeff that if he did leave, he would give sufficient notice.

¹⁷ Members working under a salting agreement maintain their place on the referral list until the time their names come to the top of the list at which time they would be advised of the availability of the union job with its higher wages and benefits and would be expected to leave the nonunion job to accept the new one. This is according to union witnesses. Michael Shea, however, still a union member and employee of the Respondent, at the time of the hearing, testified that Bodman offered him a job at a union shop after January but he decided to stay with Respondent and was not disciplined.

¹⁸ See discussion, *infra*.

condone your continued employment under the present conditions.

If you continue your employment with Goodless Electric on or after January 10, 1994, you will be subject to termination from the apprenticeship program.

Fraternally,
/s/ Robert Illig
Apprenticeship Coordinator
I.B.E.W. Local #7 JATC

Neither before nor after January 6 did the parties contact each other concerning the possibility of continuing the apprenticeship program under some exception to the general rules.

When the four apprentices received their letters from the JATC, each of them quit his employment with Respondent rather than risk losing his apprenticeship status and the time he had already invested in the program. All quit before January 10 and testified that, but for the letter from JATC, they would not have done so. One of the apprentices inquired of the JATC if there was some way he could continue working for Respondent and getting paid while the Union and Respondent sorted out their differences through the NLRB. He was told that there was no way that he could continue working for Respondent because it was going to stop its contributions to the apprenticeship fund.¹⁹

Upon notification from the JATC, each of the apprentices went into Jeff's office, shook his hand, and explained that he had to leave. They told him that they had enjoyed working there, were sorry things could not be worked out, and good bye. These four apprentices constituted Respondent's entire complement of apprentices.

Respondent hired Jeffrey Burton on January 4, 1994. Burton, a licensed electrician in Massachusetts since 1966, had worked previously for Respondent from 1983 through 1988. He may have worked for Respondent on union jobs before being laid off in 1988 but, in any event, worked on union jobs thereafter and was a union member when he contacted Jeff Goodless toward the end of December seeking employment.

During his December interview with Leon and Jeff, Burton mentioned that he was still in the Union but was going to get out when his dues ran out in June. Burton testified that he volunteered this information and was not asked about his union status by Jeff. I find it likely, however, that his disclosure was probably prompted by Jeff's telling Burton that he was going nonunion in January and by the fact that Burton had heard earlier through the grapevine that Respondent would be going nonunion.

The upshot of the interview was that Leon and Jeff agreed to hire Burton nonunion and put him to work January 4. Burton knew that if Respondent were a union contractor hiring

him as a union employee, he would have to go through the hiring hall and get referred to the job off the referral list. Since he was not on the list, he could not be hired until after January 1 and then only as a nonunion applicant.

The General Counsel argues, in brief, that Respondent violated the Act by informing Burton that it was going nonunion in January and by interrogating Burton as to his union status during this interview. I find, however, that the discussion was legitimately in pursuit of finding a way to hire Burton and not in violation of the Act.

Burton's first day on the job for Respondent was January 4. He finished the first week but early in his second week on the job, about January 11, he was visited at the jobsite by Bodman, Fitzpatrick, and a third individual. They were aware that he had not gotten the job through the union hall's referral procedure and asked him what he was doing there. They advised him that if he stayed on the job, it could result in charges being brought against him or in other "repercussions" for not going through the proper procedures. They also said that there was a conflict going on and that it would not be good for Burton to be working there. Bodman added that he did not think that Burton should be helping out someone with whom the Union was having a little problem. Burton explained that he needed a job, that he was running out of money, and that his wallet was getting a little thin. Bodman replied that Burton still should not be there, that it could be a problem between him and the Union if he stayed. He was then told it was in his best interest to get out of there and was asked to do so. He agreed, saying that he was going to take a vacation anyway.

After Bodman, Fitzpatrick, and the third individual left the jobsite, Burton called Jeff. He explained what had happened and said that he had to get out of there. Jeff encouraged him to stay but Burton replied that he was leaving town and asked if Jeff could get someone out to the jobsite quick to take his place. Jeff tried to calm Burton down, then told him that there was no problem, and that he could probably get someone out there in the morning. Burton remained on the job a few hours, then left.

Burton quit the following morning, although the job had just begun and had a long way to go. He did so, he testified, because the Union told him to. He took a 6-month vacation after which he resigned from the Union on June 30, then contacted the Respondent and was rehired.

I find the Union's forcible removal of Burton from Respondent's jobsite of particular interest in light of surrounding circumstances. Granted the Union would not normally have appreciated Burton's obtaining employment with Respondent on his own and circumventing proper referral procedures, but at the time he was removed, Bodman was ostensibly attempting to salt Respondent's complement of employees with union members who were being permitted to work for a nonunion shop only on condition they agree to help organize it. It would appear that Burton, having been hired by Leon and Jeff, would be a perfect candidate to serve in this capacity. Yet, he was not chosen for this role. I find this fact to be further evidence that no salting operation was in progress and that the Union's decision to permit its member employees of Respondent to continue in its employ was based on other considerations.

If the Union was not salting Respondent's operation, why would Bodman testify to the contrary? I find that the salting

¹⁹ Contributions were based on the number of hours worked. There is no dispute that Respondent met all of its obligations through December 31, 1993. Since contributions for hours worked in January would not be due until the apprentices' hours were tallied up at the end of the month, it is clear that the apprentices were not pulled from the job because Respondent had failed to pay into the fund but rather because Respondent was no longer signatory to the NECA agreement, was no longer permitted to contribute under the rules, and was not expected to do so in the future.

story was proffered as a coverup to explain why the Union permitted its members to continue to work for Respondent after it went nonunion instead of pulling its members as was the usual practice. The next question concerns why the Union did not pull its members. The answer to that question is probably that most or all of its members would not have left the employ of Respondent but would have continued on the job, resigning their membership if necessary, rather than lose their jobs. Faced with the possible loss of 20 members, Bodman created the salting story in order to avoid a confrontation that he knew would be lost and permit Respondent's union members to continue to work for a nonunion employer. If the Union did not have the loyalty of Respondent's union employees as of January 1, 1994, it is doubtful that it had their loyalty back in June 1993 when Bodman convinced them to sign the authorization cards to be used as a weapon to bluff Respondent into agreeing to an extension of the existing collective-bargaining agreement. It is clear that these very questionable authorization cards should not be the basis for establishing a 9(a) relationship. An NLRB election should be the procedure to follow in this case.

On February 24, another of Respondent's advertisements for licensed electricians appeared in the local newspaper. Jeff testified that by that time he already had so many applications that he had not even opened some of the envelopes but he ran the advertisements anyway because he wanted to determine how many experienced licensed electricians, then working for certain competitors, could be hired away from their current employers and also to find out the wage scales and benefits paid by competitors. Although most of the people who answered Jeff's advertisements were not working, some were employed at the time.

In addition to one advertisement with Respondent's name appearing there, Jeff also placed a blind ad in the same newspaper. He testified that he could not recall why he placed the blind ad considering the fact that he already had more applications than he could use and he had been assured by his union employees that the Union was not going to pull them off the job.

Applications in the form of resumes arrived at Respondent's offices, mailed directly there by the applicants, others were forwarded there or to Jeff's home by the newspapers. Other applicants walked in off the street and were given application forms to fill out. When an application indicated that the applicant was currently employed by one of Respondent's major competitors, Jeff would call him or put his application aside for a later call to determine what wages and benefits the competitor was paying compared to what Respondent was paying at the time.

Respondent's February 24 ad came to the attention of Bodman and Fitzpatrick that day. Bodman asked Fitzpatrick to file an application with Respondent, he testified, to see if the Union could reorganize Respondent. In other words, to continue the salting process ostensibly begun by the Union in January at a time when 100 percent of Respondent's electricians were union members. He asked Fitzpatrick to apply for a full-time job at Respondent's shop at a time when Fitzpatrick was employed by Local 7 as a full-time union official. According to Bodman, if Fitzpatrick succeeded in obtaining full-time employment at Respondent's shop, he would not be asked to resign his position with Local 7 but would hold down both full-time jobs, as an electrician for Respondent

during the day and as an organizer for Local 7 after hours, getting paid by both. To this end, Bodman testified, he and Fitzpatrick signed a salting agreement.

Bodman testified that he did not have discussions with other members about applying for work with Respondent but that Fitzpatrick did. He said that he was not present during Fitzpatrick's discussions with other members because he was "in and out of the office" but witnessed Fitzpatrick carrying on conversations with them, one or two at a time, as they came in, explaining to them how they were going to try to go back to work for Respondent and organize the Company. According to Bodman, Fitzpatrick spoke in this way to each of the members who showed up later that day to apply for work with Respondent. These members eventually were alleged in the complaint as discriminatees.

Fitzpatrick testified, in support of Bodman's testimony, that it was decided that he and some other members should answer Respondent's advertisement by applying for jobs as electricians, the purpose being both to work as electricians and to talk to the young unrepresented employees of Respondent and explain the benefits of union membership. He determined himself who these applicants should be. Admittedly, he did not choose as applicants the members at the top of the hiring hall list as was the usual practice, a practice which coincided with the rights of members who were entitled to referral. Rather, Fitzpatrick testified he called some members who were on the out-of-work list, who might be available and in close proximity to the hall, to find out if they were interested in going to work and applying for electricians' jobs at Respondent's shop.

Fitzpatrick did not, however, support Bodman's testimony that he had personally met with each of the applicants at the union hall and had personally fully explained to each of them the purpose of their applying for work with Respondent. On the contrary, Fitzpatrick was not examined on this subject.

One of the members Fitzpatrick chose to apply for employment at Respondent's shop was John Collins. Collins testified that he had not seen Respondent's advertisement but received a phone call from Fitzpatrick who asked him if he would go down to Respondent's shop and fill out an application. He testified further that he could not recall whether Fitzpatrick indicated why he wanted him to apply for work with Respondent. Because Collins could remember receiving only a phone call from Fitzpatrick but did not testify and was not examined concerning the personal meeting with Fitzpatrick, which Bodman described as having taken place at the union hall, I find the meeting between Fitzpatrick and Collins never took place. Bodman's description of the purported meeting, uncorroborated by either Fitzpatrick or Collins, is not credited.

Leon Pilon was another member whom Fitzpatrick contacted on February 24 to apply for work with Respondent. Pilon testified that he received a phone call from Fitzpatrick who told him about Respondent's advertisement and asked him if he would be willing to go and make application. Pilon agreed. Pilon testified further that during this conversation he was told that he would be working primarily as a journeyman electrician but would also have to organize for the Union while employed by Respondent and that was the purpose of his applying there. Fitzpatrick did not say that Pilon would have to sign a salting agreement.

Neither Pilon nor Fitzpatrick testified concerning any face-to-face meeting at the union hall on February 24. Bodman's description of the purported meeting is not credited.

Paul Mykytiuk Jr. testified that he was contacted by Fitzpatrick on February 24 and told that he and certain other members were going to Respondent's shop and apply for a job and, once hired, he would be expected to organize for the Union to try to get Goodless back. Fitzpatrick did not mention his having to sign any kind of salting agreement.

After arrangements were made, Fitzpatrick, Collins, Pilon, Mykytiuk, and Local 7 member Roy Eady²⁰ all went down together that morning to Respondent's shop. Fitzpatrick asked one of the clerical staff for applications for employment and each applicant was furnished with one. As the five were filling out their applications, Leon and Jeff came into the area and asked what they were doing. When told, Leon asked them if they were there to work as electricians or were going to quit like Burton had done.²¹ Fitzpatrick replied that he and the others were there to work as electricians. Some small talk took place then between Jeff and Collins wherein Jeff told Collins that he had heard that Collins was again running for business manager and, if he won, then maybe he would have someone he could talk to. He added that it was unfortunate that circumstances had come to the point that they had and, if Collins were still business manager, they would not be in the situation they were.

Jeff testified that when he saw the five union men filling out the applications he could not figure out what they were up to, whether they really wanted to go to work or were there just to harass him.

After completing the applications, the five union members returned them to the clerical. After obtaining permission to sign the guest book in order to evidence their presence, they did so, then left. The applications were passed on to Jeff by the clerical. Jeff was heard to comment to Leon that they should hire John Collins "for the fun of it." He also stated that he was going to call his lawyer to see what he should do with the applications. He then returned to his office.

Jeff testified that he did not hire any of the five applicants on February 24 because he was not hiring anybody at the time. Company records support his testimony to the extent that they reflect that no applicant was hired on February 24 from any source, though about 23 applied that day, and none was hired thereafter until March 1. Jeff testified that the applications filed on February 24 were not sorted out, analyzed, or even looked at in some cases because there were no actual vacancies for electricians that day and there were already a number of applications on file already, some of which had already been segregated and placed in Jeff's top desk draw as promising candidates for employment and for consideration at a later time when vacancies occurred.

Jeff testified that of the five applicants who applied together on February 24, he did take Fitzpatrick's application seriously. That is to say that if Respondent offered Fitzpatrick a job and he accepted the offer, he would actually have worked for Respondent. Jeff felt, however, that once he heard the terms and conditions being offered by Respondent,

²⁰ Eady did not testify.

²¹ Initially, Collins testified that he could not recall the question being asked. When shown his affidavit, however, and his recorded reply: "I said I was going to quit just as the rest of the union people did," Collins admitted that the question had been asked.

Fitzpatrick would not have accepted a job offer. The matter never became an issue, according to Jeff, because there were no openings.

The record supplies the following information about Fitzpatrick as of February 24, much of it known to Jeff and Leon who had dealt with him over the previous several years on a personal basis. First of all, he was currently employed full time by the Union and had been since July 1991. During this period of time, he had not been employed as an electrician although he had been employed by various electrical contractors as a licensed journeyman electrician before his becoming a union official.

Fitzpatrick testified that he was legitimately seeking employment on February 24 when he applied at Respondent's shop and had, in fact, been applying for work with other contractors. He did not, however, name any of the other contractors to whom he ostensibly applied and specifically admitted that he had not answered any of Respondent's earlier newspaper advertisements. Moreover, if Fitzpatrick were seeking employment, he would have placed his name on the out-of-work list and he specifically testified that his name was not on the list. Further, if he were genuinely interested in obtaining employment for members of the local, he would have taken the top five on the out-of-work list. Although he admitted looking at the names of the top five men on the list, he did not adequately explain why he did not take them to Respondent's shop to apply instead of indiscriminately gathering up four bodies to apply. What if they were hired? How would he explain to the top men on the list their being bypassed?²² Finally, if Fitzpatrick were truly interested in obtaining employment with Respondent, why would he bring four other applicants along? Suppose there were just one opening. Why would he deliberately diminish his chances of obtaining employment? The following testimony reflects the true reason for Fitzpatrick and company's visit to Respondent's shop on February 24:

Q. You went down there to see if you would be hired by Goodless Electric Company. Correct?

A. That's right.

Q. All right. Not to actually start working as an electrician.

A. Right.

I take Fitzpatrick's testimony as an admission that he and his fellow "applicants" were not really applying for work at all and would not have accepted work if offered.

The application form that Fitzpatrick filled out at Respondent's shop reflects the fact that he was not seriously interested in obtaining employment. Thus, the space provided for him to list his employment experience was left blank except to note his position as organizer for Local 7 and his job as part-time electrical inspector for a nearby township, a job he held for only a few months. Although he had worked 15

²² Fitzpatrick testified that the top five members on the out-of-work list would not have been considered bypassed because the five members chosen to apply were to be used to salt Respondent's complement of employees. This explanation is rejected since the top five on the out-of-work list could just as well serve as salt as those actually chosen to apply. Additionally, as of February 24, Respondent employed 22 union members who were held over ostensibly as salt to help organize the 8 employees hired since January 1.

years or more for electrical contractors prior to becoming a union official in July 1991, he supplied none of their names, addresses, or other information from which Respondent could determine the extent of his experience and his probable value as an employee. He was clearly not interested in employment.

Jeff testified that, unlike Fitzpatrick, he did not think that Collins was a serious applicant the day that he applied. He came to this conclusion, he said, because he had looked at his application and it stated that he would not be able to start work for 6 weeks because of medical problems.

The record supplies the following information about Collins as of February 24, much of it known to Jeff and Leon who had dealt with him over the previous several years on a personal basis. First of all, Collins had been a full-time employee of the Union from 1988 to July 1992, first as business representative, later as business manager. During the years he held union office he did not work as a paid electrician although occasionally he would do a job gratis.

As of February 24, Collins had been a licensed electrician for 22 years, licensed in Massachusetts and Connecticut. After he stopped working for the Union in July 1992, however, Collins never again worked regularly for pay as an electrician except for 2 weeks in December 1993. Though he had 26 years' experience as an electrician, he testified that as of February 24, his "tools were rusty." Nevertheless, he claimed that he was ready to go to work that day as soon as he was hired by somebody and was actually looking for a job when Fitzpatrick called him and asked him to apply for a job at Respondent's shop.

Although Collins testified that he was ready to go to work and was looking for a job as of February 24, he also testified that he was unable to work at the time because of medical restrictions. When Fitzpatrick called him and asked him to file an application with Respondent, he did not bother to mention that his doctor had ordered him not to work. Clearly, if he had no intention of working even if offered a job, the medical restrictions would not matter.

When Collins filled out the application on February 24, he noted that he would not be able to begin work for Respondent until March 30, 1994, some 5 weeks later. Despite some testimony to the contrary, I find that Collins would not be able to begin working for Respondent for at least 5 weeks. I find further that since, like Fitzpatrick, he failed to fill out the employment experience page of the application, except for his Local 7 connection, he had no intention of seeking employment with Respondent. His application was, in effect, no application at all. After filling out the application, Collins signed the guest book and left. He never contacted Respondent after February 24 to follow up on his original application. Collins did not start working as an electrician again until June 6, 1 week before the charge in Case 1-CA-31657 was filed.

Leon Pilon, a journeyman electrician for 31 years, licensed in Massachusetts was the third member of Fitzpatrick's party to file an application on February 24. As of February 24, Pilon had been out of work for a year and a half. Although Pilon had, over the years, worked for electrical contractors on different occasions he, like Collins and Fitzpatrick, failed to name any of them on the employment experience page of the application, thus making it impossible for Respondent to contact any previous employers to verify his experience and

determine whether he was or was not a good employee in case an opening should occur. The sole entry Pilon entered on this page was Local 7, the same as Fitzpatrick and Collins. Pilon's failure to list previous employers for reference purposes would indicate that his application was not intended as serious. His explanation for listing Local 7 as his sole employer was that he had obtained his jobs through Local 7 for 25 years, all his records were there and there were too many contractors to list. These explanations do not solve the inherent problem faced by Respondent who was seeking information concerning Pilon's employment experience.

Although Jeff had become acquainted with Pilon back when Pilon was an inspector for the city of Springfield from 1985 to 1988, Pilon never worked for Respondent. Nor had Pilon ever worked under any of Respondent's supervisory personnel. Respondent therefore had no knowledge of Pilon's capabilities or work habits. A single exception was the decorating of Court Square in Springfield, Massachusetts, on two occasions at Christmas time when Pilon volunteered his services and Jeff supervised the whole job. On that project, Respondent donated the materials and the IBEW membership volunteered the labor. The whole job consisted of putting lights on Christmas trees.

Royster L. Eady, a journeyman electrician and member of the Union for between 22 and 25 years, licensed in Massachusetts, was the fourth member of Fitzpatrick's party to file an application on February 24. Eady did not sign his application and did not testify during the hearing. Like the other applicants, Eady did not bother to list the various contractors for whom he worked over the previous 20 or more years in the employment experience section of the application. Rather, like Pilon, Fitzpatrick, and Collins, he merely entered Local 7 in that space. I therefore find that Eady, like the others, was not a serious applicant when he applied at Respondent's shop on February 24.

Paul C. Mykytiuk Jr., a journeyman electrician since 1972, and member of the Union for 30 years, licensed in Massachusetts, was the fifth member of Fitzpatrick's party to file an application on February 24. Unlike the others, Mykytiuk listed three previous employers for whom he worked during the period December 3, 1993, through February 4, 1994, doing electrical work. As of the date of his application, he was the only one of the applicants whose name was among the top five on the Union's hiring list. Though Mykytiuk had had many years of experience working for other contractors in the electrical industry, he had never before been employed by Respondent, nor had he worked for Leon, Jeff, or any other member of Respondent's management.

Bodman testified that of the five members sent to apply for work at Respondent's shop on February 24, only Mykytiuk was among the top five on the referral list. He admitted that Fitzpatrick was not on the referral list at all, and that the others were chosen despite the fact that they were further down the list than fellow members. Bodman explained that these particular five members were chosen out of order because they agreed to help organize Respondent. Bodman did not explain why the top five members on the referral list were not chosen both to work and to organize. The top five on the list were entitled to the next five jobs available and if the Union seriously intended to permit its members to take jobs with Respondent, those at the top of the list should have been given priority in accordance with

the established rule. There is nothing in the record to indicate that members at the top of the referral list were offered the chance to apply for work with the understanding that they were also expected to help organize, and I find they were not.

Of the five union members who filled out applications for employment with Respondent on February 24, the record indicates no evidence that Respondent offered any of them employment or even called any of them in for an interview. On the other hand, the record indicates no evidence that any of the five followed up on his application by making inquiries as to the status of his application, a practice frequently followed by serious job seekers.

I. RESPONDENT'S COMPLEMENT OF EMPLOYEES—
JANUARY 1 THROUGH FEBRUARY 24

As noted earlier, both Leon and Jeff were convinced that that Union intended to pull the electricians off Respondent's jobs as of January 1. When it did not do so, Respondent continued to employ all 20 of them right up until the date of the hearing except for those who quit of their own volition.

Jeff, who was in charge of hiring since about mid-December 1993 did, however, hire several additional electricians as needed, beginning January 3.²³ He testified that hiring was done without regard to the union or nonunion status of the various applicants. He denied questioning any of them concerning their union membership despite some testimony to the contrary, because he did not care whether or not they were union members. He testified credibly, with the support of documentation, that basically he hired people who had worked for him previously or for other members of his management staff.

Despite Jeff's testimony that he neither asked nor cared about the union status of applicants, he was nevertheless directed by one examining attorney to testify to his impression as to the union status of each applicant at the time he was hired. Thus, on January 3, Jeff hired Robert Lipp as an apprentice and Michael Loveling as a journeyman. With regard to Lipp, Jeff testified that he initially thought that Lipp came from a union background. He was not asked to explain why he had reached this initial conclusion and therefore gave no reasons. He did add, however, that after he found out that Lipp's previous employers were nonunion and then met Lipp and talked to him, he reached the opposite conclusion. Lipp was not called to testify.

Loveling filed an application with Respondent on December 7, 1993. Jeff interviewed him the same day. When he noted that he had previously worked for an open shop contractor, he concluded that Loveling was not a union member. Both Jeff and Loveling, however, testified that the subject of Loveling's union status never came up.

Jeff Burton's short history of reemployment with Respondent from January 4 through 12 has been covered. He was a union member and Jeff Goodless knew it when he hired him. After the Union forced Burton to quit on January 12, he left the area. Subsequently he returned, resigned from the Union

on June 30, contacted Jeff, again sought reemployment the second week in July, and was hired a week or two later.

On January 12, Jeff hired James Martin as a journeyman electrician. Martin had worked for Respondent as a helper, for about a year and 5 months, 10 years before in 1983 and 1984, both as a nonunion and union employee. When he left Respondent in 1984, he remained a member of the Union and worked in union shops. Then, after being laid off and out of work for a year and a half, Martin resigned from the Union in 1989.

In early December 1993, Martin heard a rumor that Respondent was going to go nonunion. Because he was unemployed at the time, he decided to check out this rumor and on December 13 visited Respondent's shop to talk to Leon or Jeff whom he, of course, knew from his previous employment with them. While there he filled out an application. As he had not telephoned before visiting the shop, he was not expected and no interview took place, both Leon and Jeff being busy. Jeff did, however, acknowledge his presence, asked how he was doing, and told him to call back in a couple of days.

In a couple of days, Martin called Jeff as instructed and a meeting was scheduled. At the appointed time, Martin visited the shop where both men chatted socially about the past, mostly personal matters. Martin had supplied both a resume and his completed application form to Jeff and Jeff believed him to be a union member because on his application it indicated that he had been a union member when he worked for Respondent in 1984 and had worked for other union contractors in the meantime with membership between 1985 and 1989.²⁴ Martin discussed the various types of work he had done as a licensed electrician working for union contractors, work which was presumably of a more advanced type than that which he had performed as a helper for Respondent.

Following this interview with Jeff, Martin continued to pursue the possibility of employment with Respondent by making frequent phone calls to inquire about work. As a result, Jeff invited Martin to the shop for further discussion about employment. This was later in December. At this meeting further information was exchanged. Jeff confirmed that Respondent would possibly be going nonunion in January. Martin revealed that he was no longer a member of the Union after being asked if he had a card. The thinking behind Jeff's question probably was that if Martin was still a union member, Respondent could not hire him directly but only through the hiring hall since the contract was still in effect. Moreover, if Respondent reached agreement with the Union to extend the existing relationship, Martin would still have to go through the hiring hall procedure to obtain employment with the Respondent. On the other hand, if Martin were not a member of the Union, Respondent would be free to hire him at the expiration of the contract on January 1. In the context of all the surrounding circumstances, Jeff's questioning of Martin appears to be based on legitimate busi-

²³ There were 56 applications on hand in January, but Jeff denied going through them to determine the union status of the applicants. Applications received in response to newspaper advertisements both in January and thereafter sometimes remained unopened because Respondent was not generally in need of new employees.

²⁴ Martin's employment history documentation also included the names of employers with whom Jeff was not familiar as well as the names of nonunion shops. Initially he concluded that Martin had obtained permission from the Union to work for these nonunion employers.

ness considerations and not on antiunion motivations.²⁵ The conversation concluded with Jeff advising Martin that whether or not Martin was hired depended on whether Respondent succeeded in going nonunion. He instructed Martin to call back after January 1. As was the case during Burton's prehire interview, I find no 8(a)(1) violation in Martin's interview. Jeff's questioning of Martin as to his union status and Jeff's explaining Respondent's decision to go nonunion was merely a mutual exchange of information pursuant to the eventual hiring of Martin by Respondent.

After January 1, Martin called Jeff twice. The second call resulted in Martin being instructed to report for work on January 12. He did so and began work that day.

On January 17, Respondent hired Steve Kurtycz. Jeff testified that when he hired Kurtycz, he was under the impression that he was a union member, that he had, in fact, been responsible for bringing him into the Union back in 1988 when Respondent went Union itself. Jeff added, however, that he was not certain of this and his initial impression might have been wrong. In any case, according to Jeff, he definitely remembered that Kurtycz worked for Respondent at some point during the period 1988 through 1990.

When Kurtycz applied for employment most recently, he did so at the shop, in person. Jeff saw him and recognized him immediately. Because he already knew Kurtycz's abilities as an electrician, he did not have to wait to look at his application before deciding to hire him. He just told Kurtycz that when he started work to make sure he filled out an application. Subsequently, Jeff did look at the application but could not determine whether or not Kurtycz's most recent employer was a union shop. When Kurtycz worked for Respondent initially, he was a helper. When rehired on January 17, it was as an apprentice.

Bodman testified that Kurtycz was not and never was a member of the Union. If Kurtycz had been a member of the Union, Respondent would have kept records of deductions made on his behalf similar to those of other union employees, received into the record for other purposes. No such records were offered. I therefore find that Kurtycz was never a union member. It is possible, however, as admitted by Jeff, that he could have mistakenly believed that Kurtycz had been a union member at the time of his rehire. Kurtycz did not testify.

Respondent hired Robert Coulombe on January 31 as a helper. Jeff testified that at the time he hired Coulombe, he was aware that he was not a union member.

Respondent hired Tony Mastroiani on February 7. Jeff testified that he did not think that he was a union member when he first applied for work because he had been employed most recently by a nonunion shop. The record is unclear as to when he filed his application and as to whether he filed it in person or through the mail. He began working on February 7 as a helper, then later left the employ of Respondent to become an apprentice with IBEW, Local 7.

Respondent hired Al De Verry on February 22. Leon and De Verry had been personal friends for many years. De Verry had been employed by Respondent as far back as 1967

and on many occasions since then. Each time De Verry sought employment, he was either hired or told that he would be hired if any work became available. Much of the work De Verry had performed for Respondent had been as foreman.

In early December 1993, De Verry sent in an application for employment with Respondent. In mid-December he was called in for an interview. Leon handled the interview and told De Verry that they should keep in touch with each other until something opened up.

In accordance with their agreement, De Verry called Leon periodically until just before the end of the year. At that time Leon told De Verry that he would like De Verry to hire on as a foreman. De Verry, who had been employed as a maintenance electrician for a number of years rather than as an electrical foreman, was not that confident about his ability to perform. He told Leon that he would like to see the prints before accepting Leon's offer.

De Verry visited the shop where Leon showed him a set of prints for a large, complex job. He asked Leon if he could take the prints home and study them and Leon agreed. About 3 days later, De Verry returned with the blueprints and advised Leon that he did not want the job because, he did not feel comfortable. He said that he did not want to embarrass himself or the Company and would rather walk before he ran. He stated that if Leon had something a little less complex coming up, he would be glad to wait.

At this meeting, Leon informed De Verry that he had advised the Union that he was going to be a nonunion contractor as of January 1. He said he was concerned that there would be a lot of men leaving but also a number who would be staying but he did not yet know the mix. He explained that he did not know how many positions would have to be filled but he was looking for some key people to hedge his bets. He indicated that De Verry, as foreman, could be one of them.

Sometime in February, De Verry again contracted Leon concerning possible openings. Leon told him to call back the following day. When he did so, Leon told him to come to the shop to discuss another job as foreman which had become available. When De Verry visited the shop, he was shown a set of blueprints for a somewhat less complex job than he had been offered before. De Verry accepted the job and began work on February 22. The job was completed May 15 at which time De Verry was laid off. He was recalled in July and was still working as of the date of the hearing.

II. RESPONDENT'S COMPLEMENT OF EMPLOYEES—AFTER FEBRUARY 24

After the 5 alleged discriminatees filed their applications on February 24, Respondent hired 12 new employees, primarily to replace those employees who for one reason or another left Respondent's employ. Thus, on March 1, Respondent hired Joseph Guest and Dennis Sherman. As to Joseph Guest, Jeff testified that he did not think he was a union member when he hired him but did not really know. He explained that he hired Guest as a helper after his apprentices were pulled off the job by the Union and did not have time to research his application to check his background or employment experience until 3 weeks after he was hired. Guest

²⁵ Jeff denied asking any applicant if he was a member of a union or if he had a union card or "anything of that sort." He also denied discussing with any applicant the subject of Respondent's remaining a union contractor or going nonunion. Where the text indicates evidence to the contrary, I do not credit Jeff's denials.

had been given a commitment a week or two before he was actually hired.

With regard to Dennis Sherman, Jeff testified that when Sherman was hired, he did not believe that he was a union member. He also testified, without question or contradiction, that all of the employees hired after January 1 had previously worked directly for Respondent or for another employer but under the direct supervision of one of Respondent's key members of management except one.²⁶ Because this statement went unchallenged at the hearing and could easily have been disproved, if untrue, through access to company employment records, which access the General Counsel had, I credit Jeff's testimony.

Concerning the circumstances surrounding the hiring of Sherman, Sherman testified that he was unemployed at the time when he drove by Respondent's shop on January 19 and saw a sign inviting electricians to apply for employment. Inside, Sherman filled out an application and was interviewed for employment by Leon. During the interview Leon told Sherman that Respondent was nonunion and asked him if he was a union member. Sherman replied that he was not.²⁷

During the interview, Sherman mentioned that he had been working for Kubera Electric. Leon then asked Sherman if he knew Don Steinbach. Sherman replied that he knew Steinbach quite well and had worked with him at Kubera for about 3 years. Steinbach had been the business manager at Kubera at the time and had been one of Sherman's bosses. At this point in the interview, Leon had Sherman go speak with Steinbach who, at the time, was Respondent's purchasing agent and project manager. After Sherman and Steinbach chatted awhile and some additional conversation between Leon and Sherman, Leon told Sherman that he would have to come back and see Jeff who was in charge of making the hiring decisions but, at the time, was away on vacation.

When Jeff returned from vacation in early February he and Steinbach discussed Sherman whom Jeff had not yet met. Steinbach described Sherman as a great snaker, meaning he was particularly adept at guiding electrical wiring into and through conduits behind existing walls to outlets. Since this ability would make Sherman a valuable asset as a residential electrician in Respondent's service department and there were jobs coming up of that nature in the near future, Steinbach agreed to call Sherman in to meet with Jeff.

Jeff and Sherman met for an interview sometime in mid-February. During the interview Jeff asked Sherman if he was a union member.²⁸ Sherman replied that he was not, and that he was not interested in becoming one. Leon apparently never told Jeff of Sherman's nonunion status. Jeff then told

Sherman that Steinbach had given him a good reference. Steinbach, who was present for at least part of the interview, acknowledged that Sherman was a good worker. Jeff then stated that he would be hiring Sherman as soon as something came up. Jeff called him a few days later and said that there would be a job for him in a couple of days. Sherman's first day of work for Respondent was March 1.

Respondent hired Mark Geanacopoulos on March 7 as a helper. Jeff testified that he did not think that he was a union member when he first applied for work.

Respondent hired Michael Charron on March 14. Jeff testified that he was not really sure whether or not Charron was a union member when he hired him. Charron, a master electrician for slightly less than 12 years, was a cousin and close friend of Gerald Marshan, one of Respondent's project managers and estimators. Charron had licenses in Massachusetts, Connecticut, Vermont, and New Hampshire and was a good prospect for employment because of his portability.

Jeff and Charron first met each other several years before Respondent hired him when they were both attending trade school taking an electrical code class together. Whenever they would meet thereafter, employment with Respondent would always be a topic of conversation, but Charron never accepted Jeff's offer because he already had a job.

In January, one of the responses to Respondent's December blind ad was from Charron. Jeff immediately spoke with Marshan about Charron who had worked for him several years before. Marshan informed Jeff that Charron was a really great worker but might not want to work for Respondent for personal reasons. Jeff pointed out that he had gone to school with Charron and had gotten along very well with him. Marshan then said that he did not want to discuss it but did not think Charron would be good for Respondent. Jeff testified that Marshan's reluctance about hiring Charron gave him the impression that it might have something to do with Charron possibly being a member of the Union.

In reviewing Charron's resume Jeff noted that of the nine employers listed, only two of them he knew to be nonunion, two he felt might be union, while five he had never heard of before. From this review, according to Jeff, he could not tell whether Charron was a union member or not. As it turned out, Charron was not, and never had been a member of the Union.

Despite Marshan's stated opinion about Charron, Jeff called his home and in his absence left a message with his wife. This was still in January. Charron, however, did not return his call. Finally, in February Charron called Jeff and asked to come down and see him. When he arrived he advised Jeff that he was dissatisfied with certain conditions of employment at his present place of employment and would like to work for Respondent. Jeff told Charron that he was interested in hiring him but did not make any commitment at the time. He told Charron to call back in a week. Charron did so only to be told to call again the following week. After several such exchanges, Jeff told Charron to come to the shop for a second interview and to fill out one of Respondent's application forms. He did so on February 28²⁹ but

²⁹ Jeff placed the date of this interview, as prior to February 24. Charron testified that it occurred on February 28. Dates are significant because the General Counsel theorizes that Respondent placed want ads in the newspapers with the intention of hiring applicants

²⁶ Paul Shepardson, discussed infra.

²⁷ The General Counsel alleged, in brief, that both the statement and the question were violative of Sec. 8(a)(1) of the Act. Since Respondent had just switched from being a union employee to a non-union employee and Burton and the four apprentices had been pulled off jobs within the past 2 weeks, however, it was clearly in the interest of both parties to be aware of the situation so that they could make educated decisions. Inasmuch as the discussion was free of threats, explicit or implied, the hiring process progressed smoothly and Sherman was offered and accepted employment, I find, under the circumstances, that effectuation of the purposes of the Act does not require the finding and remedying of a technical violation of Sec. 8(a)(1) of the Act.

²⁸ I find the question, for reasons stated supra, not violative of the Act.

when told he was hired, requested permission to give Marx, his employer at the time, 2 weeks' notice. Permission was granted and Charron started working for Respondent on March 14.

Charron testified in agreement with the general testimony of Jeff, that Jeff did not ask him during the interview on February 28 whether or not he was a union member. He testified further that Jeff did not discuss with him on this occasion the fact that Respondent had gone nonunion.

Respondent hired Carl Hansen on March 23. Jeff testified that he was hired by Steinbach who knew him from having worked with him elsewhere.

According to Hansen, he was out of work when he received a call from Steinbach. His previous employers had been nonunion shops and he had never been a member of the Union. He and Steinbach had worked together for Kubera some time before where Steinbach was Hansen's foreman and had, at the time, expressed satisfaction with his work. Steinbach had heard from a mutual friend that Hansen was out of work and called to ask him if he would care to work for Respondent. He suggested that Hansen file an application. On March 14, Hansen went to Respondent's shop and filed an application. A week later he again visited Respondent's shop where he was interviewed by Jeff for about an hour. During the interview Jeff did not ask him if he was a union member or had prounion sympathies but may have mentioned that Respondent was nonunion. This, however, Hansen had already known because Steinbach had told him and because it was common knowledge that Respondent was going to go nonunion even before it did so. Moreover, Hansen had a pretty good idea which contractors in the area were Union and which ones were not.

During the interview Jeff also discussed with Hansen his qualifications for the job, his background as an electrician, and job-related questions about his performance.

Respondent hired Lou Cennamo and Tony Marek on April 4. Jeff testified that he did not think either Cennamo or Marek were union members. With regard to Cennamo, Jeff testified that in December 1993, he received a call from a mill in Southampton that was checking on Cennamo who had named Jeff as a reference while seeking employment at the mill. After waiting 2 or 3 weeks, Jeff phoned Cennamo who had worked with Jeff for Respondent in the 1970s for 2 or 3 years. He offered Cennamo employment as a licensed journeyman electrician.

Cennamo had never been a member of the IBEW. Respondent had considered Cennamo a very good worker back in the 70s and indicated as much to him. He also got along very well with both Leon and Jeff on a personal basis.

In December, when Jeff called Cennamo to offer him a job, Cennamo was working for Johnson, a nonunion company. He had been employed by Johnson for about 6 months but was not satisfied working there. Prior to that he had been engaged as an electrician and a contractor in business for himself. Cennamo had left his employment with Respondent to enter into this venture.

who responded but changed the procedure to hiring ex-employees when the five alleged discriminates applied for employment on February 24. Since Charron's application was being considered back in January, however, the difference in the testimony of Jeff and Charron as to the date of his interview is of limited significance.

During their December conversation, Jeff advised Cennamo that Respondent would be undergoing some changes in January and would like him to come in and talk to him after the first of the year. Cennamo said he would call Jeff in January.

In January Cennamo called Jeff and then came in to see him in January or early February. Jeff did not ask Cennamo if he was a union member but did explain the terms, conditions, and benefits of the job to Cennamo including that fact that Respondent was now nonunion. Cennamo appeared receptive. He promised to get back in touch with Jeff. Later, however, in early to mid-February, Cennamo called back and told Jeff that he had to finish the job he was then working on for Johnson, that he could not leave just yet. Jeff said that was all right, to call him back in a couple of weeks.

Cennamo called back later in February. He told Jeff that he was still trying to finish up a job for Johnson whom he did not wish to hurt. He also mentioned that in the meantime his father had become ill and had passed away. Jeff assured Cennamo that he respected him for his loyalty to his present employer and asked him to let him know when he was ready to come on board.

In mid-March, there was one further contact between the two. Cennamo told Jeff that he would be available for work shortly. Jeff told him he was hired and would start working for Respondent's service department as of April 4.

Tony Marek, a licensed electrician was hired as a helper. Jeff hired him 2 weeks beforehand to begin work April 4.

Respondent hired David Miller on May 6. Jeff testified that at the time he rehired Miller, he thought he was still in the Union. The record indicates that Miller, an electrician licensed in both Massachusetts and Connecticut was hired for the first time on April 10, 1988, when he was referred by the Union to the Respondent on or about that date. Miller remained an employee of Respondent for approximately 4 years, all the while, he testified, as a union member. He was considered a very good employee by Jeff during this entire period of employment.

In December 1991, Miller ceased paying his union dues. As of July 1, 1992, he was dropped from union membership because of his being delinquent but, according to Miller, was never notified of the fact. The Union offered no documentation nor other evidence to directly contradict Miller's testimony.

On November 5, 1992, Bodman wrote a letter to Leon drawing his attention to earlier conversations between them and complaining that Miller was still employed by Respondent although he had chosen to terminate his membership in the Union. Since membership in the Union was a condition of employment under the contract, Bodman was recommending Miller's discharge. Bodman concluded with a statement to the effect that if Miller wished to reinstate his membership, the Union would be obliged to discuss it with him.

On November 10, Jeff replied by letter to Bodman stating that he could not terminate Miller unless it was for failure to pay union dues and Bodman's letter had not discussed this subject.

On November 23, Bodman wrote a second letter clarifying the fact that Miller had, indeed, been dropped from membership because of his failure to pay his dues. Shortly thereafter Miller left the employ of Respondent. According to Miller, when he left Respondent in the fall of 1992, he was still a

member of the Union as far as he knew because he had never been notified otherwise and had continued to receive information from the Union through the mail up until within a few months of the hearing. Miller testified that the reason he left Respondent's employ was that he had financial difficulties at the time and was unable to maintain his electrical license in the State of Massachusetts. He did admit, however, that when he left Respondent's employ in 1992, although he had not resigned nor been dismissed from the Union, he was behind in his dues and had had no contact with it. Jeff also testified that Miller was having personal problems in November 1992 and quit because of them. He denied firing Miller and stated that his layoff was mutually agreed upon, that he could have stayed in Respondent's employ if he had wanted to do so. Although Jeff initially testified that he kept Miller employed, despite the Union's letters, for many months after they were received, he later admitted that Miller did not work for Respondent after November 23, 1992. In a discussion with Miller, Jeff testified, he told him that if he worked his problem out with the Union, he could stay and Miller replied that he might do that.

After Miller left Respondent's employ in November 1992, he maintained contact with Jeff. He telephoned him periodically with hopes of getting rehired right up until his actual reemployment. According to Miller, he did not work for any union or nonunion electrical contractors between the time he left Respondent and the time he returned.

According to Jeff, he told Miller when he left that he would help him any way he could but that Miller got out of electrical work almost entirely and went to work in construction about a month after leaving Respondent. The two remained friends thereafter and spoke to each other frequently by telephone. Although Miller was primarily in general construction and had lost his Massachusetts license, Jeff gave him a few electrical side jobs to do on his own. Miller also stopped by at Respondent's shop on a few occasions and gave Respondent a few jobs and steered work its way.

About December 1993 or after January 1, Miller made one of his periodic calls to Jeff. Jeff told him that he had a job that was going to be starting up on or about February 1 in Connecticut and he needed someone with a Connecticut license. The job did not come open, however, though Miller called every week for months. Jeff kept telling Miller, "Maybe next week." The job was an Italian Restaurant but the owner was having problems getting financing, so although Jeff's commitment was made in January, there was one delay after another that lasted in toto for about 4 months.

Jeff testified that when he offered to hire Miller for the Connecticut job, he thought he was still in the Union. He pointed out that when Respondent first went Union in the late 1980s, Miller was referred to it from the hiring hall. He stated further that although the Union had specifically said in its letters of November 1992 that Miller had been dropped as a member, he did not believe it because he still had union members working for him in January 1994 and he would have heard about it from them if he had been thrown out of the Union. Still further, Jeff testified that the Union's letter of November 5 invited Miller to discuss reinstatement of his membership with them if he wished and since he told Jeff that he might work it out with them, he might have chosen to do so.

I find Jeff's testimony that he thought Miller was a union member when he offered him the job in Connecticut in December 1993 or the following January totally incredible. He admitted that the Union advised him by letters in November 1992 that he was no longer a union member because he had fallen delinquent in dues payment, that the Union had requested that Respondent terminate him for this reason, and that Respondent did not employ him thereafter. He testified further that although he had remained close friends with Miller after he ceased working for Respondent and had frequent contacts with him right up until the time he was rehired in 1994, Miller never mentioned discussing reinstatement of his membership in the Union with the Union or with Jeff. Finally, everyone of Respondent's electricians as of January 1 was a member of the Union. They must have known that Miller was no longer a member and had not worked for Respondent for over a year. Had that situation changed they would have known that and Jeff would have learned about it through them, because of the nature of the industry and its society, as Jeff also admitted. He learned nothing new from them. I find that Jeff knew full well, when he rehired Miller, that he was not a union member at the time and had not been for over a year. His testimony to the contrary was a transparent attempt to pad the evidence to support his position that Respondent's hiring procedure did not give any consideration to the Union or nonunion status of applicants.

About the last day in April, Jeff told Miller to report for work May 6. Initially he did service work in Massachusetts until the job in Connecticut was ready to proceed. At no time, according to Miller, was his nonunion status discussed with him by Jeff during the hiring process.

Respondent hired John Edwards on June 22. Jeff testified that he thought Edwards was a "salt attacker" but that he was hired anyway. What made Jeff suspicious of Edwards was the fact that although he appeared to have a lot of experience, none of it was from around the area. Edwards claimed to be a journeyman who had his own company in Texas and to have an apartment at Chestnut Towers in Springfield. Almost all of his job experience was in Texas and Virginia. Edwards sold himself to Jeff who hired him as a helper because he had no Massachusetts license. After Edwards was hired, Jeff did some research and found that Edwards did not live at Chestnut Towers after all. The same day that Jeff found this out, during the hearing in the instant case, Edwards left the employ of Respondent without explanation. His sudden departure convinced Jeff that his suspicions had probably been correct, that he had been a union member from another territory.

Bodman took the stand to testify that Edwards was not and never had been a member of Local 7. He testified that he was unaware as to whether or not Edwards was a member of another IBEW local but pointed out that if he was, he should have checked in and signed the referral list at Local 7 and had not done so. He denied that Edwards had been sent by Local 7 to apply for work with Respondent.

Respondent hired Paul Shepardson, a licensed electrician, on June 28. Jeff testified that he did not believe that Shepardson was a union member at the time he hired him but added that the circumstances surrounding his hiring was somewhat different than the other hires because his experience was different.

Jeff testified that up until 1988, Respondent had been engaged in the business of installing and electrically servicing gas pumps but that it lost that business when it went Union. He explained that there are many different manufacturers of gas pumps, that each type of gas pump is different, and that a licensed electrician, before working on a particular type of gas pump, must be certified to work on that type of pump. In 1988, Respondent had contracts with gas stations and with the Dairy Mart chain to do this type of service work.

In June 1993, when Respondent was placing ads in the newspapers in contemplation of breaking off its relationship with Local 7, it received among its numerous applications for employment, one from Paul Shepardson, whom Jeff knew to be a licensed electrician employed by the Bierman Petroleum Corporation, certified in the field of installing and servicing gas pumps. He felt that if he broke off with the Union at that time, he might decide to go back into servicing and installing gas pumps once again. For this reason he placed Shepardson's application in his desk draw along with those of other potential employees. When he decided, at the time, to extend his relationship with the Union, he did nothing with Shepardson's application.

In December 1993, when Respondent placed additional want ads in the newspapers, Shepardson again applied. Jeff, in handling the applications received either the previous June or in January, once again took special notice of Shepardson's petroleum experience but again did nothing about it because he was not yet sure whether or not he wanted to get back into the gasoline pump end of the business.

Sometime between June 14 and 25, Jeff caught sight of Shepardson as he drove his Bierman Petroleum truck into a Dairy Mart area and began work. Jeff watched him work for awhile, then engaged him in conversation. He told him who he was and discussed the possibility of Shepardson coming to work for Respondent. He invited him to come down to his shop and discuss it that evening. Shepardson agreed to do so.

That evening, Jeff told Shepardson that he was interested in getting back into the petroleum business and wanted to hire Shepardson to that end since he was certified and was aware of the various changes that had recently taken place in the industry. Arrangements were made that evening for Shepardson to begin working for Respondent beginning June 28.

Although Jeff had planned to get back into the gasoline pump installation and servicing business and to renew his account with the Dairy Mart chain, this plan did not pan out as of the date of the hearing at which time Shepardson was working in Respondent's service department. Nevertheless, the very special circumstances surrounding the hiring of Shepardson, his certification, and his unique experience precluded the hiring of any other individual in his stead for the same purpose, including the union members who applied on February 24.

Respondent hired Stanley Green, a helper on July 6. Jeff testified that he did not believe him to be a union member. The record contains no further information about him.

Respondent hired Dave De Levo on July 13. Jeff testified that he did not think that De Levo was a union member but gave it no thought one way or the other at the time he was hired or when the commitment to hire him was made, a month before. According to Jeff, when he made the commit-

ment to hire De Levo, he did not bother to go back to consider the various resumes and applications that had been received previously because Steinbach was going to be the project manager on the job for which De Levo was being hired to work on in July and De Levo had worked for Steinbach for 3 years. Carl Hansen had previously been De Levo's foreman and he too was going to be on the new job beginning in July. Since all three had worked together as a team previously on a large project, Jeff gave his approval to Steinbach and Hansen to hire De Levo to fill the opening on the new job so they could once again work together. Before giving his approval, however, Jeff had Hansen bring De Levo to his office to personally meet him. Between the commitment to hire given in June and the start of the job in July, De Levo spent some weeks on vacation.

III. APPLICATIONS FROM UNHIRED APPLICANTS

When Respondent received a resume or application, Jeff could usually tell by checking the list of contractors for whom the applicant had worked which of the contractors were Union and which were nonunion and thereby deduce which of the applicants were probably union members. It is clear from Jeff's testimony that this procedure was followed, and Jeff's testimony notwithstanding, it was important whether or not the applicant was a union member. This concern, however, did not necessarily reflect an antiunion motivation, for a majority of Respondent's employees were Union. Rather, because the Union had announced its intention to pull Respondent's employees and, in fact, did so when it could, Respondent had to stay on the alert for purely business reasons.

Applications from un hired applicants were subpoenaed by the General Counsel and several with notations made in their margins were placed in the record to prove that Respondent had a propensity not to hire applicants who were union members. Thus, in the margin of an undated letter from an applicant named Chad Fink, there is the notation admittedly written by Jeff, "You can hire union under terms and conditions of your new policy." Jeff testified that the language in the margin was from a phone conversation he had with his attorney after John Collins walked out, presumably on February 24. According to Jeff, his attorney told him that if the union member was willing to work under Respondent's terms and conditions, he should feel free to hire him. When his attorney told Jeff how to handle union members' applications that day, Chad Fink's application happened to be on top of the stack on the table, and so that is where he wrote the note. The Fink file consists of an undated letter signed by Fink with a two-page resume attached, also undated. Also attached were three letters of reference praising Fink, two undated and one dated September 10, 1987. None of these documents indicate whether Fink was or was not a union member and there is no evidence, testimonial or otherwise, as to whether Fink's union status had anything to do with Respondent's failure to hire him. I fail to see the probative significance which the General Counsel apparently attaches to the document.

A second applicant's file placed in the record by the General Counsel belongs to Leo P. Wiedersheim. It consists of an undated cover letter with an undated three-page resume covering Wiedersheim's professional experience as an electrician. The documents in Weidersheim's file cover the pe-

riod 1964 up to his self-employment, "1993–Present." There is no indication of his union or nonunion status. On the cover letter Leon had written, "Good, but must be Union!" He testified that he had written that notation because he believed that although Wiedersheim was probably an excellent candidate, he feared that if he hired him, the Union would not let him keep him but would withdraw him along with the other union men. Leon's stated belief may have been well founded in light of what eventually happened to Jeffery Burton. I find the notation insufficient, in itself, to reflect antiunion animus.

The third applicant's file placed in the record by the General Counsel belongs to Michael Morris. It consists of Morris' resume, social security card, and various licenses. The period covered by the section of the resume dealing with employment experience is May 1984 through May 1989. Union jobs were noted as such by Morris right in the resume.

On the resume there appears two handwritten notes: one, admittedly written by Leon states, "Could be service elec. Was union in '89." With regard to the resume, Leon testified credibly that in June 1993, he probably picked up the envelope at the post office, opened it, read the resume, wrote the note, and placed it on Jeff's desk. Leon explained that he wrote the note because he was in fear that the Union was about to pull the men and he wanted replacements available to take their places. He believed that if the Union pulled his regular employees and they were all union electricians, no union electricians would agree to work as their replacements. The notation therefore was to alert Jeff that this particular applicant probably could not be counted on to accept a job offer in case of a work stoppage. Leon added that his note had to have been put on the resume in June rather than later because thereafter he stopped handling applications and Jeff took over the hiring duties himself.

The second note on Morris' resume, admittedly written by Jeff, states, "Do not know him. Should set up interview." Jeff testified that upon reading Morris' resume, he concluded that he had some good experience and should be interviewed. When agreement with the Union was reached in mid-1993, however, the danger of the Union pulling its members off Respondent's jobs safely passed and so did the need to hire new employees. Some of the applications were never taken out of their envelopes and Jeff never set up an interview with Morris.

Jeff testified that Leon's note was probably already on the resume when he wrote his note recommending an interview, but was not certain. The General Counsel attaches some significance to this. But whether Leon's note was placed there before or after Jeff's note is of little significance as Morris himself noted in the resume which of the jobs were union jobs obtained through Local 7. Jeff apparently was interested, at the time, in interviewing Morris, based on his experience, whether or not he was a union member.

Between January 1 and the date of the hearing, Respondent's complement of electricians remained relatively constant. From January 1, when Respondent employed 20 to 22 electricians, until the hearing when it employed 24, it did not significantly expand its work force but merely replaced those who left.

IV. ANALYSIS AND CONCLUSIONS

A. Case 1–CA–31249: The 8(a)(5) and (1) Allegations

The record reflects, and I find, that Respondent gave proper, adequate, timely, and effective notice that it would not be bound by any modifications to or renewal of the July 1, 1990–June 30, 1993 collective-bargaining agreement. I find further that Respondent's signing of the letter of assent A on July 15, 1992, did not indicate a willingness to have the existing 8(f) relationship converted to a 9(a) relationship because the section of the letter of assent dealing with Section 9(a) was not discussed; the deletions and additions made in the document by Respondent indicate clearly that Respondent intended fully to break off all relationships with the Union including the 8(f) relationship; and Respondent was assured by the Union that the signing of the letter of assent was a mere formality necessary to enable Respondent to be eligible to receive target money.

I find that at the meeting at the union hall on June 24, Respondent's employees all signed authorization cards for the sole purpose of showing support for the Union's position in negotiations, particularly to convince Respondent, during the meeting scheduled for the following day, that they would leave their jobs if the Union called for a work stoppage at the expiration of the contract. Respondent's employees could clearly benefit if, by signing the cards, they could succeed in getting Respondent to agree to the terms of the NECA agreement. As Bodman did not testify to having obtained authorization from Respondent's electricians to demand recognition based on the cards and none of the 22 card signers were called to testify concerning such authorization, however, I find that no authorization was given to demand recognition.

Granted that each authorization card itself unequivocally states that the signer authorizes the Union to represent the signer, I do not find the language conclusive of the signer's desire. Indeed, the signing took place in the union hall in the presence of the union officials who called the meeting and the entire complement of Respondent's employees, all members of the Union by virtue of the 8(f) contract then in effect. There had to be some peer pressure to sign these authorization cards because any one of the unit employees who failed to sign a card could immediately be identified. Because the 22 member employees of Respondent were members by virtue of the 8(f) contract, it is probable that some or all of them were involuntary members who became members for the sole purpose of obtaining and sustaining employment with Respondent. To rely on these cards as a showing of interest or to force a 9(a) relationship between the Respondent and the Union in lieu of an NLRB election would undermine the concept of freedom of choice in selecting a collective-bargaining representative.³⁰

There being little evidence in the record to indicate the state of mind or true desires of the card signers, one must assume the probability of mixed loyalties among them. There had to be a certain amount of loyalty felt toward the Union that was bargaining on their behalf and also some feelings

³⁰ Moreover, a bargaining agreement entered into as an 8(f) agreement continues as such regardless of whether a majority of employees become union members in the interim. *Comtel Systems Technology*, 305 NLRB 287 (1991).

of solidarity toward brother members. There had to be some loyalty toward Respondent, their Employer, who had employed some of them for years. And finally there had to be concern for their families and themselves and what to do to preserve their income.

The best of all possible worlds for Respondent's employees, at the time, would have been for the Union to have succeeded in getting Respondent to sign a new agreement with the Union, and to this end I have found that the employees signed the authorization cards. I, however, also find that they did not intend the cards to be used to seek recognition for purposes of establishing a 9(a) relationship because Bodman studiously avoided doing so the following day at the meeting where he showed Leon the cards. Moreover, it cannot be assumed that the Union really wanted a 9(a) relationship with Respondent because it is not all that clear from the record. Respondent continuously demanded more from the Union than did association members.

Finally, I believe that the card signers gave Bodman the distinct impression that if Respondent, after seeing the signed cards, still refused to continue its relationship with the Union, and the Union tried to pull its members off the job, they would not walk but would opt to stay with the Respondent and continue receiving paychecks.

I find that during the Union's meeting with Respondent on June 25, Bodman showed Respondent the signed authorization cards for the sole purpose of indicating that he had the support of all of Respondent's electricians and that they would all walk if the Union ordered them off the job. Bodman did not demand recognition based on the showing of the authorization cards because he had not been authorized to do so. Leon did not understand the presentation of the cards to be in support of a demand for recognition and rejected them as a show of strength and threat to pull his employees if he went nonunion.

In short, the General Counsel did not establish the existence of a 9(a) relationship as of June 25 because to establish voluntary recognition pursuant to Section 9(a) of the Act in the construction industry, where there already exists an 8(f) relationship, there must be evidence that the union unequivocally demanded recognition as a 9(a) representative and that the employer unequivocally accepted it as such.³¹

I find that the bargaining between Respondent and the Union before, on, and immediately after June 25, 1993, which resulted in the extension of their contractual relationship through December 31, 1993, reflected good faith on the part of Respondent and an honest attempt to reach accord with the Union. I find further that the likelihood of a good relationship in the future between Respondent and the Union was seriously undermined by Bodman's advising Respondent's employees that they did not have to work for the hourly wage contained in the agreement executed about that time by the parties.

With regard to the allegations in the complaint that Respondent violated Section 8(a)(1) and (5) by bypassing the Union and dealing directly with its employees in the unit by soliciting them, in letters dated December 17 and 30, 1993, to discuss their wages, hours, and other terms and conditions of employment directly with Respondent, I find that the alle-

gation is without merit. The letters in question did, indeed, invite the employees to deal directly with Respondent but concerned future wages, hours, and conditions of employment after January 1, 1994, when the Union no longer would be their exclusive collective-bargaining representative. There is no violation here.³²

Finally, with regard to the allegation that Respondent violated Section 8(a)(5) by unilaterally changing the terms and conditions of employment of its unit employees effective January 1, 1994, I find that inasmuch as the changes were instituted at a time when the Union was no longer the collective-bargaining representative of the employees in the unit, Respondent was free to make the changes unilaterally.³³

B. Case 1-CA-31429

The allegations in Case 1-CA-31429 reiterated to some extent, those alleged in Case 1-CA-31249 but added the allegation that by limiting its membership in and contributions to the Springfield Area Electrical Joint Apprenticeship and Training Fund, it also violated Section 8(a)(3) and (1) of the Act by causing the termination of certain apprentice electricians.

With regard to this allegation, I find that under the circumstances of this case, Respondent did not constructively discharge the apprentices. Rather, the apprentices were invited by Respondent to remain in its employ but quit because of the threat from the JATC to remove them from the apprenticeship program. In short, it was the JATC that deprived the apprentices of their employment, not Respondent. Finally, the unilateral discontinuance of contributions to the apprenticeship program was permissible under the circumstances.³⁴

C. Case 1-CA-31657

With regard to the allegation contained in the complaint in the case cited immediately above, I find that Respondent did not violate Section 8(a)(3) and (1) of the Act by refusing to consider for hire the five alleged discriminatees named there because of their union activity.

Rather, I find that Bodman's testimony that the five applicants were sent to Respondent's shop to seek and obtain employment in order to again salt the operation is incredible. Although Respondent had hired several new employees since January 1, the majority of Respondent's electricians were still members of the Union and if the Union truly wanted to represent Respondent's employees, all the Union had to do was to have the members then employed by Respondent sign authorization cards, then file a petition for an election, using the cards as a showing of interest. The only reasons for not proceeding to an election would be that either Bodman did not trust the 8(f) members to vote for the Union or he did not want to represent Respondent's employees at all because Respondent would not accept the NECA agreement then in effect.

Further, Bodman's description of how Fitzpatrick organized the trip to Respondent's shop bore no resemblance to the description of it as testified to by the participants. Again, I find Bodman's testimony on this point incredible.

³¹ *American Thoro-Clean*, 283 NLRB 1107, 1108-1109 (1987); *J & R Tile*, 291 NLRB 1034 (1988).

³² *Yellowstone Plumbing*, 286 NLRB 993 (1987).

³³ *Id.*, citing *John Deklewa & Sons*, 282 NLRB 1375 (1987); *Pre-cision Striping*, 284 NLRB 1110 (1987).

³⁴ *Yellowstone*, supra.

Finally, only one of the five alleged applicants was among the top five on the referral list and if the Union were truly interested in obtaining employment at Respondent for its members, it would have sent the five members at the top of the referral list, those eligible for the next available jobs.

The testimony of the Union's witnesses, notwithstanding, I find that there was no salting agreement on February 24, any more than there was in January. Like in January, the nonexistent salting agreement was used as an excuse to hide the true purpose of the Union in sending the five members to Respondent's shop. In this case, it was to legitimize their applications in the face of the Union's rule that its members were forbidden to work for a nonunion employer. The true purpose initially was probably only to harass Leon and Jeff but may also have included the establishment of a factual basis for the filing of a new³⁵ 8(a)(3) and (1) charge.

When the five arrived at Respondent's shop and filed their applications, Leon asked the very legitimate question which reflected his well-founded concerns, whether they were there to work as electricians or were going to quit like Burton had done. The question was legitimate because Respondent had kept employed every member of the Union who had chosen to stay and the five who quit, did so because of actions taken by the Union directly or through the JATC. Because Fitzpatrick was personally known to both Leon and Jeff as an officer of Local 7 and Collins as an individual who had held office and who would be running for office again, it was clear to them that the group of five had been sent at the behest of the Union and were acting on its behalf rather than singly as individuals. Because the Union had demonstrated that it would remove any union members over whom it held any leverage or control, Leon and Jeff were clearly correct in concluding that these five people were not legitimate applicants who truly desired employment with Respondent and who, if hired, could be counted upon to remain employees in the face of the Union's past practice.³⁶ With no vacancies available at the time and 56 or so applications on file, and more to be filed within the next few days for the first job to open up, and no cloud besmirching the applications of the

³⁵ Outstanding charges had been on file since January 3. These charges had been amended and the amended charge signed just the day before, on February 23, by the Union's attorney.

³⁶ This situation is not the same as the one in *Ultrasystems Western Constructors*, 310 NLRB 545 (1993), where the Board found that it was a violation of Sec. 8(a)(3) and (1) of the Act to refuse to consider an applicant because of his union organizing propensities. Rather, in this case, organizing was not in issue. Respondent was already organized and the only question was whether the applicant, if hired, would work. The instant situation involves a confrontational one, analogous to a strike, though one was not actually in progress at the time. In a strike situation it has been held that an employer does not violate Sec. 8(a)(3) and (1) by refusing to hire a professional union organizer whose role is inherently and unmistakably inconsistent with employment behind a picket line. *Sunland Construction Co.*, 309 NLRB 1224 (1992). The same holds true here insofar as the Union was attempting to keep Respondent from operating with union labor by removing union people from the job whenever it was able to do so. Respondent had the right here to protect itself from economic injury by choosing to hire applicants who were more likely to perform tasks assigned than hire applicants sent by the Union during a period when the Union was trying to undermine production by removing union members from the job. *Sunland*, supra.

other 56 applicants, how much consideration for employment was Respondent required by the Act to give to this 5-man group. I find that they were given about as much consideration as they deserved under the circumstances and the fact that they were not given more was not based on any per se antiunion animus but on legitimate business considerations. Indeed the small talk between Jeff and Collins on this occasion reflected a desire on Respondent's part to once again go Union if Collins were to gain office and represent the Union in future good-faith profitable negotiations.

I find that the employment history of the five alleged discriminatees and the content of their applications, as fully described supra, also militate against a finding that they were legitimate applicants. Thus, Fitzpatrick had not worked as an electrician, and I find had not looked for work or applied for work as an electrician for 2-1/2 years until prompted to do so by Bodman upon discovering Respondent's want ad. Further, Fitzpatrick's failure to list any references was designed to invite rejection as was his listing of Local 7 in that section of the application. The mention of Local 7 there probably had two purposes: First, it advised Respondent that the applicant would not accept employment except through the Union under NECA contract conditions. Second, it established a basis for company knowledge of the applicant's union activities and affiliations so that if the applicant was not hired it could serve as evidence in support of an 8(a)(3) charge. Collins, like Fitzpatrick, had not worked as an electrician, for any extended time, for years, not since 1988. Even when he applied for work with Respondent at Fitzpatrick's request, he was in no position to accept employment because of medical restrictions. I find that despite his testimony, Collins' employment history indicates that he was not looking for work when he filed his application on February 24 and that he did so because Bodman had enlisted Fitzpatrick to get him to apply for the purposes indicated above. As Collins' application contains the same information as Fitzpatrick's, it too supports the finding that Collins' was not a legitimate applicant.

Pilon had been out of work for 1-1/2 years as of February 24 when he applied along with the others. Because he, like Fitzpatrick, listed no references except Local 7, it is clear, for the same reasons, that neither his employment history nor his application supports a finding that he was a legitimate applicant. Clearly, he would have to have been regarded by Leon and Jeff as one of Fitzpatrick's clique. The same for Eady.

Mykytiuk's employment experience and application place him in a separate category from the others. He was clearly looking for work as of February 24 because his name was among the top five on the Union's referral list. It is unlikely, however, that either Leon or Jeff was aware of this fact. Further, Mykytiuk took the time to list three of his previous employers, unlike the other applicants. He might well have been given some consideration as an applicant if there had been an opening at the time, if Respondent had not been deluged with other applications from other job seekers, and if he had not been part of Fitzpatrick's entourage. As it was, he was probably considered just part of Fitzpatrick's attempt at giving Respondent a hard time and given the same consideration as the others were given.

In summation, I find that Respondent did not violate Section 8(a)(3) and (1) of the Act by failing to hire or consider

for hiring the five alleged discriminatees on February 24 or thereafter.

The General Counsel theorizes that Respondent placed the want ads in the newspaper on February 24 because it fully intended to hire new employees from those who replied to the ads but changed the intended procedure to hiring only journeymen applicants who had previously worked for Respondent or with members of its management staff because the alleged discriminatees filed their applications on February 24 in reply to the want ads and Respondent did not want to be put in a position where it had to consider union applicants. The theory was that if it changed its hiring procedure, it would no longer have this difficulty. To test the General Counsel's theory, the backgrounds of applicants hired by Respondent both before and after February 24 were investigated, analyzed, and discussed in the previous sections of this decision. From the evidence, it would appear, and I find, that Respondent, both before and after February 24, preferred to hire journeymen whose work records were known to Respondent and its managerial staff over strangers whether Union or nonunion. I find that the filing of the applications by the alleged discriminatees on February 24 had no bearing on Respondent's hiring procedure.

With regard to the allegations of independent violations of Section 8(a)(1), I find that neither the questioning of applicants concerning their union membership or status nor the

statements concerning Respondent's union or nonunion status or future status were coercive. In the context of the discussions between Respondent's management and the applicants it was both reasonable and beneficial for all parties to be aware of the possibilities and probabilities in the event that Respondent remained Union or went nonunion. Though not conclusive as to Respondent's intent in discussing these matters with the applicants involved, it is of some consideration that all were hired and remained employed through the time of the hearing. It is also of some moment that but for the Union's removal of some of Respondent's employees from their jobs, some of the discussions alleged to have been coercive probably never would have been necessary.

In conclusion, it appears that whatever problems still exist involving Respondent, its employees, and the Union and its members can best be resolved through an NLRB election.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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

3. The Respondent did not engage in any of the unfair labor practices alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]