

**Starcon, Inc. and International Brotherhood of
Boilermakers, Iron Ship Builders, Blacksmiths,
Forgers and Helpers, AFL-CIO. Case 13-CA-
32719**

June 13, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND
HIGGINS

On December 27, 1996, Administrative Law Judge Robert T. Wallace issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, the Union filed a brief in opposition to the exceptions, and the Respondent filed a brief in reply to the opposition brief.

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

ORDER

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

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

We also find without merit the Respondent's allegations of factual errors, mischaracterizations of testimony, and bias on the part of the judge. On our full consideration of the record, we find that the judge has not mischaracterized testimonial evidence and that any factual errors are trivial and do not affect our decision. We further find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias in his credibility resolutions, analysis, or discussion of the evidence.

²In affirming the judge's recommended remedy, we note that his deferral of certain remedial issues to the compliance phase is further supported by the Board's recent decisions in *Ultrasystems Western Constructors*, 316 NLRB 1243 (1995), and *B E & K Construction Co.*, 321 NLRB 561, 562 (1996).

Paul Hitterman and *Richard Kelliher-Paz, Esqs.*, for the General Counsel.

J. Roy Weathersby and *Mark L. Keenan, Esqs. (Ogletree, Deakins, Nash, Smoak & Stewart)*,¹ of Atlanta, Georgia, for the Respondent.

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

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge. This case was tried in Chicago, Illinois, on July 17 through 20 and August 28 through 30, 1995. The charge was filed on August 15, 1994,² and the complaint issued on October 24.

Basically this is a "salting" case, i.e., where dedicated union members seek to work at nonunion companies in order to organize other employees.³ At issue is whether Respondent Starcon violated Section 8(a)(3) of the National Labor Relations Act by refusing to hire or consider for employment union members, by changing job application procedures, by subcontracting work to other employers, by issuing disciplinary warnings to employees Wayne Darby and Millard Howell, and by suspending Darby; and whether it engaged in independent violations of Section 8(a)(1) by creating an impression of surveillance, threatening to discipline union sympathizers, and threatening to subcontract work.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties,⁴ I make the following

FINDINGS OF FACT/ANALYSIS

I. JURISDICTION

Starcon, a corporation with office in Manhattan, Illinois, annually provides pipeline maintenance services valued well in excess of \$50,000 for major oil refiners directly engaged in interstate commerce. It admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

Starcon is a nonunion contractor with customers located primarily in the greater Chicago area. Included among these are Mobil, Armco, Shell and Uno-Ven. Its work force is comprised of welders and mechanics (each in three skill classifications) and laborers. Jobs involve year round maintenance performed by permanent employees and periodic "turnaround" projects during which a contracting company temporarily shuts down a portion (sometimes all) of its refinery for a complete overhaul. Turnarounds must be completed on time, and to that end involve round-the-clock operations and sharp increases in workers during periods that typically last from 4 to 6 weeks.

Anticipating that 1994 would be a banner year, Starcon's owner and president (Mike Uremovich) explored with several other companies during late 1993 the possibility of exchanging skilled workers or subleasing manpower requirements during their respective peak periods. He pursued the matter again on March 14 when he visited the office of B E & K in Birmingham, Alabama. The latter is a major nonunion contractor operating on a national and international level.

¹ Counsel Weathersby advises that, as of April 9, 1996, his new firm affiliation is Littler, Mendelson, Fastiff, Tichy & Mathiason of Atlanta.

² All dates are in 1994 unless otherwise indicated.

³ See *NLRB v. Town & Country Electric*, 116 S.Ct. 450 (1995).

⁴ An all-party motion to substitute an amended stipulation for that found at Tr. 892-893 is granted, and the amendment is received as CP Exh. 28.

In April and May, Starcon began directly and aggressively to solicit applicants for employment. In mid-April Uremovich and Starcon's field resources coordinator (Bentley Hatteberg) drove 140 miles to Decatur, Illinois, where unemployment was high and there hand distributed at various parking lots numerous copies of a flier which reads as follows:

A GROWING MIDWESTERN CONTRACTOR

is looking for experienced field personnel. We are looking for team players who are willing to make a career in the petro-chemical industry.

We offer competitive wages and good benefits. Progressive training and advancement are two of our trademarks.

We are interested in anyone who can meet the following standards for our craftsmen:

Welders:

Welders will need to be able to pass a 2 inch pipe welding test. Prior pipeline or petro-chemical experience is helpful. Wages for our B-welders start at \$19.05.

Mechanics

Must have a working knowledge of piping, heat exchangers, above-ground tanks, and refinery turnarounds. Wages for our A-mechanics start at \$15.44.

Laborers

Any hard-working individual ready and willing to learn how to work in the petro-chemical industry can apply. Wages for our laborers start at \$8.31.

We have built a reputation on the Midwest based on our records for safety, quality, training, and commitment to excellence.

Anyone interested in learning more about a potential future with an industry leader, please send a resume or letter to:

Bentley P. Hatteberg
P.O. Box 93
Manhattan, IL 60442-0093

And from April 28 through May 4, Starcon placed advertisements in various newspapers across the midwest and as far away as Houston, Texas, reading as follows:

Growing midwestern mechanical contractor is looking for experienced welders and mechanics. We are looking for team players who want to grow with our company. Welders will need to pass a 2 inch SCH 80XX pipe test. Prior pipeline or petrochemical experience is helpful. Starting pay for qualified pipe welders is \$19.05 per hour.

Mechanics must have knowledge of piping, heat exchangers, tanks, and turnarounds. Starting pay for mechanics is up to \$15.44 per hour.

Call 815-741-5769 [Hatteberg's number].

On May 1, one of the advertisements came to the attention of Eugene Forkin, a "Fight Back" organizer for the Charg-

ing Union. The quoted term refers to a well-publicized nationwide effort by the Union to organize employees of non-union contractors. Under that program (at least insofar as appears on this record) members are given permission by local unions to work for such contractors with a view to organizing their employees. Those who participate do so voluntarily and receive no pay or benefits other than what they receive as employees of the nonunion contractors.

III. ALLEGED UNFAIR LABOR PRACTICES

Forkin immediately called the listed number and learned that Starcon had placed the advertisement. He then urged a number of persons who had worked for nonunion companies to apply without identifying themselves as union members. Within the next 2 weeks at least four⁵ called the Company and received assurances from Hatteberg that jobs would be available; and he urged them to file applications. Several requested and later received in the mail additional application forms for distribution to friends.

Huber and others made application forms available to Forkin who promptly reproduced and distributed them at union halls in Chicago and Minneapolis and told those interested to return completed applications to him after writing "voluntary union organizer" (VUO) on the top margin of the first page.

On May 12, Starcon obtained a contract to perform turn-around work for Uno-Ven at its refinery in Lemont, Illinois, during the period May 15 through September 1. On June 11, it signed an indefinite term contract with B E & K under which the latter agreed to perform boiler repair and retrofit services, when and if it received work orders from Starcon, at "reasonable" costs, including specified hourly rates to journeymen and other personnel used in performing requested services. The "Evergreen type" contract had been mailed to Starcon by a B E & K executive (Jackie Lee Tadlock).

On June 22, Forkin sent 80 applications (including his own)—each bearing some form of the requested "VUO" designation—to Starcon by certified mail in a single package. In an accompanying cover letter, Forkin introduces the applicants as "qualified Union Boilermakers"⁶ "willing to accept immediate employment under your terms and conditions . . . [with an assurance] that any organizing activity will in no way interfere with their job duties."

Hatteberg received the package on June 27. After reading Forkin's letter, Hatteberg went to Vice President Bob Dunklau who took the package and told him "to hold tight."⁷ After a time period Hatteberg describes as between a week and a month, Dunklau handed the applications back to Hatteberg, stating that he would get back to him as to "what we were going to do." Hatteberg then put the package in the bottom drawer of a file cabinet.

⁵ Dale Huber, Millard Howell, Phil Smith, and Michael Lancaster.

⁶ Most of the applicants list high skill levels as welders and/or mechanics, and many claim experience in the petrochemical industry.

⁷ Hatteberg admits that prior to this time he regularly received and considered mailed-in applications, some of which came in batches. He did not review any of the 80 VUO applications before turning them over to Dunklau assertedly because of quantity and lack of time. On average, it takes him about 5 or 10 minutes to review an application.

On July 7, and pursuant to instructions from Dunklau, the applications were sent back to Forkin with a letter drafted by Dunklau and signed by Hatteberg which reads as follows:

I am returning the applications you sent to Starcon because as a matter of company policy, we do not accept applications through the mail. From time to time we find it necessary to accept applications for employment and when we do so, we require the applications to be filled out in person by the applicant in our Manhattan, IL office.

We are presently accepting applications. If you or any of the members of the Boilermakers' organization wish to stop by and fill out an application in person, we would be happy to accept it.

On July 11, Dunklau issued a memorandum to staff in which he "clarified" Starcon's hiring policies with changes being effective as of July 7. Although Dunklau testified that Starcon had followed a strategy of building up a reserve of applications for long-term hiring needs, his memorandum states that applications would be accepted only if an opening actually exists or is anticipated within 60 days. It goes on to announce that applications must be completed in person at the Manhattan office on Mondays or Wednesdays between 10 a.m. and 2 p.m., with each application to be numbered in the office and valid only for 60 days. The memo also recites that "we give hiring preference to current employees who are laid off, those who have worked for us in the past and have a favorable work record, then those applicants who are recommended by Starcon's supervisors . . . [and only thereafter] will we entertain outside applications." At about this time, a new application form⁸ was introduced and all prior ones on file became obsolete.⁹

The effect on applicants, new and old, was immediate and significant.

On July 22, union member Howell called Hatteberg and inquired as to his application filed on June 28 in which B E & K was shown as his employer from May 1989 to November 1993.¹⁰ Hatteberg told him he would have to file a new application because "they had run into some legalities and . . . had to change their hiring procedure." When Howell protested that he was in New York and did not want to travel to Illinois just to file again, Hatteberg assured him he was at the top of the list and promised to interview him im-

⁸ The new application form states at the top of the first page that it is valid for 60 days. This represents an increase of 15 days over the 45-day provision in the old form. But that provision is one of a number of certifications on p. 4 and there is no indication that it was enforced or that applications were not accepted unless openings existed or were expected within the 45-day period.

⁹ Starcon's first work order ("No. 001") under its subcontract with B E & K is dated July 19 and calls for six skilled boilermakers (including one supervisor) to work at the Uno-Ven site at Lemont beginning on July 19 and extending through July 29. It appears, however, that the first B E & K employees arrived and began to work as early as July 12.

¹⁰ Howell had extensive experience as a welder, pipefitter, and rigger both in an out of the petrochemical industry. He had called Hatteberg almost weekly since May 1 seeking a job as a welder and he had faxed his application on June 28 at Hatteberg's urging. He had not previously identified himself as a union member nor did he do so in the application.

mediately when he refiled at the office. In reply to Howell's comment that it sounded like a bunch of red tape, Hatteberg said: "Yeah."

Meanwhile, after learning that Starcon would no longer accept mail applications, Forkin began to send members to apply in person. On Tuesday morning, July 19, members Bob Behrends and Kenneth Lusk (both experienced welders and mechanics) went to the union hall in Chicago to sign an out-of-work list. Forkin urged them to visit Starcon's office and write VUO on their applications. They arrived there at about 11 a.m. Going in, they handed the receptionist applications they had received from Forkin. She refused to accept their applications (each of which bore a prominent VUO legend) telling them they had to use the new form and fill it out only on Mondays and Wednesdays. Behrends inquired as to whether they would be interviewed if they returned tomorrow, as they were from out of town. She told him he had to speak to Hatteberg, adding that they would have to wait to ask because Hatteberg was then interviewing.

Both Behrends and Lusk returned on the next day and, after filling out new applications, asked for an interview. Handing them a card bearing Hatteberg's telephone number, the receptionist told them they had to preschedule one. Behrends urged her to arrange an interview that day pointing out that each visit entailed a 100-mile drive. She begged off stating: "I don't want to get in trouble." They left after filing new applications in which they described themselves as VUOs.

Behrends called Hatteberg several times over the next few days leaving voice mail messages each time. He got through to Hatteberg on July 27 and asked for an interview. Hatteberg declined, telling him all positions had been filled. Behrends asked to be considered for any openings and Hatteberg agreed to do so but never called back.

On Monday, July 25, Forkin led a group of about 30 union members to Starcon's office. They entered in groups of five and there filled out and submitted applications. While they were doing so Hatteberg, in response to a question from Forkin, said he was not giving any interviews that day.¹¹ The applications each bear a VUO designation and in most instances applicants' list substantial welding and/or mechanical skills as well as experience at oil refineries. Many note their willingness to start immediately "under your terms and conditions" and to refrain from organizational activities during working hours.

On submitting his completed application form to an office secretary (Pam Novotny), Forkin inquired whether Starcon was accepting applications anywhere else. Novotny identified Midwest Temporary Group in New Lenox, Illinois, as an alternate filing site. At Forkin's urging two union members (mechanic Brian Geiger and welder Matthew Grammer) went that afternoon to Midwest's office. There an employee told them the Company was accepting applications for Starcon and handed them forms and a math test. After completing and turning in those items, the employee, on noting their history of working for union contractors, informed them that Starcon was nonunion and asked whether they would work

¹¹ Asked whether anyone in the group had requested an interview, Hatteberg replied: "Not to my knowledge, no." At a prior point, he testified that his normal practice on walk-in applicants was to interview them promptly after they filled out applications.

nonunion. When both said yes, she told them she would forward their applications to Starcon. Neither ever heard from Starcon.

On July 27, the same day Hatteberg told Behrends Starcon was not hiring, Howell arrived at the Starcon headquarters. Hatteberg went out to greet him and invited him to fill out a new application in his office. As he did so, Hatteberg asked if he knew a Mr. Shadinger or a Mr. Tadlock when he worked for B E & K. When Howell replied that neither name rang a bell, Hatteberg asked if he knew Larry Kerridge (then a senior Starcon supervisor). Howell said he did not recall any named Kerridge, adding that he might "possibly know him just as Larry." Nonetheless, Hatteberg instructed him to write on the upper corner of his application: "Referred by Larry Kerridge"¹² and to take various preemployment tests during the next 2 days. Again, Howell did not reveal his involvement with the Union.

Beginning at 8:40 a.m. on July 27, Hatteberg sought to fill a laborer's position by calling 4 of the 30 applicants who had filed VUO applications 2 days earlier. One of these (Robert Lieske) declined stating he had obtained another job. Another (Ernest Grossman) did not respond to a voice mail message. A third (Donald Lieske) did not answer the phone although Hatteberg rang three times. When the fourth (Wayne Darby) returned his call on July 28, Hatteberg offered him the job and told him to report to a training facility in Sherwood, Illinois, at 7 a.m. on the following day. Darby did so and there received 3 hours of general training for refinery work, after which he reported to the Mobile large Mobil refinery at Joliet, Illinois, for another 1-1/2 hours of specialize training for work at that facility. At 2:30 p.m., he went to the Starcon office at Manhattan where Hatteberg had him fill out various employment forms, gave him a copy of Starcon rules and regulations, and told him to report to the Mobil at Joliet on the following Monday.

Howell also attended the training session at Sherwood on July 29. There he met another trainee (David Shadinger) who had been a general foreman for B E & K on a job Howell had worked in Georgia. He knew him only by the nickname "Shad." Later they had lunch together.

When Howell returned to the Starcon later that afternoon, he was greeted by Hatteberg who took him into a conference room to complete paperwork. There Howell chided Hatteberg for not telling him that Starcon was having union problems and he recounted what B E & K employee Shadinger told him at lunch about Starcon subcontracting labor out to B E & K because of "union trouble." Hatteberg said, "That's right"¹³ and proceeded to tell him about "Fight Back" and

¹²As filed with Starcon, Howell's application bears the "referred by" note. Hatteberg does not deny having instructed Howell to make the insertion. For his part, Kerridge states that he might "possibly" have been involved in Howell's hiring, asserting that Hatteberg "sometime last summer" mentioned having phone calls with an applicant named Howell who "thought he knew me." He claims to have replied: "the name sounds familiar . . . I will look his application over and talk to him." Kerridge does not state that he recommended Howell. Indeed, there is no evidence that he ever saw Howell or his application prior to the time Howell reported to him as a new hire.

¹³Starcon issued its first subcontract ("work order") to B E & K on July 19. Therein it ordered one salaried field supervisor and five hourly field boilermakers to perform work at the Lemont refinery under Starcon's turnaround contract with Uno-Ven.

the Union's attempt to organize Starcon employees. He went on to say "they" had decided to hire one of the organizers and had sent him to the Mobil plant where there were fewer Starcon employees and where he'd be under the eye of Owner Uremovich who was filling in there as project manager—this in preference to giving him a job at the Uno-Ven refinery where "all the workers was."¹⁴ Hatteberg's statement violates Section 8(a)(1) since, as alleged, it creates an impression that Darby would be kept under surveillance because of his anticipated union organizing activities.¹⁵

Howell reported for work at Uno-Ven on July 30. A man whom he had never met before greeted him at the gate, introduced himself as Kerridge, and drove Howell in a pickup truck 2 miles to the jobsite. En route, Howell inquired about the union trouble, mentioned having worked with Shadinger at a B E & K job, and related how he had been told by Hatteberg to write, "Referred by Kerridge" on his application. Kerridge replied: "that is the only way I could get on his [Kerridge's] job at Starcon," winked, and told Howell that if he had friends with tank experience "he would refer them just like he referred me."¹⁶ The reply is a thinly veiled threat not to hire union members in violation of Section 8(a)(1).¹⁷

On August 2, Darby reported for his first day at the Starcon field office at the Mobil refinery where he met Owner Uremovich and General Foreman Henry Pieper. Contrary to instruction he received during training about being clean shaven, he had a 2-day growth of facial hair. Noting the stubble, Uremovich told him he would have to write him up, adding: "I'm not picking on you . . . its [Starcon] policy."¹⁸ Darby was given a razor and cream, and while he shaved Uremovich prepared and signed a written warning. When Darby finished shaving, Uremovich gave him the warning and gave him a work assignment. At quitting time, Uremovich told Darby he knew he was a union organizer

¹⁴Hatteberg testified that his conversation with Howell was limited to an explanation of what he would be expected to do on the job, and that the only reference to B E & K was when Howell mentioned in passing having met two B E & K employees during his morning training session. Further, he disclaims making any reference to hiring Darby or having referred to "Fight Back." Indeed he claims no knowledge of the Union's Fight Back Program until a week before he testified on August 29. I have credited Howell's account. His testimony was given with apparent candor and is replete with truth enhancing detail. On the other hand, Hatteberg's denials appeared to be uttered without conviction and my view of his credibility is not enhanced by his having told Howell to say he had been recommended by Kerridge when Hatteberg does not appear to have had any reason to believe that was the case. As to Hatteberg's candor with Howell, I conclude that Hatteberg felt certain that Howell was not a union activist.

¹⁵*Lucky 7 Limousine*, 312 NLRB 770, 771 (1993); *Ichikoh Mfg.*, 312 NLRB 1022, 1023 (1993); *Flexsteel Industries*, 311 NLRB 257, 257-258 (1993).

¹⁶Kerridge did not deny that the conversation was as stated by Howell. He simply could not "recall" driving Howell in the pickup truck or ever making the statements attributed to him. He allows that he may at one time have told Howell that he would refer his friends "just like I referred you," but denies ever winking at him. Here too I have found probable and credit Howell's account.

¹⁷*Wellsstream Corp.*, 313 NLRB 698, 706 (1994); *Teksid Aluminum Foundry*, 311 NLRB 706 (1994).

¹⁸On occasion workers had to wear respirator-type face masks which may not seal properly in the presence of facial hair.

and assured him there would be no trouble as long as he continued to work as well as he had that day.

I find issuance of the written warning to be in violation of Section 8(a)(1) and (3), as alleged. Foreman Pieper testified that the "clean-shaven" rule was not enforced "a lot of times . . . on a turnaround or something"; and while the offense sometimes prompted verbal warnings, it does not appear that a more serious written warning ever was given for a first offense.¹⁹ I conclude that Darby was singled out for more rigorous enforcement, because he was a union organizer.

By August 20 Howell had been transferred to the Mobil site at Joliet where preshutdown work was in progress on a turnaround contract obtained by Starcon.

When his shift ended that day at 5:30 p.m., Uremovich came by and told Howell and others that he needed people to work overtime. Howell volunteered. At about 1 a.m., Uremovich had occasion to drive Howell on an errand. En route, Uremovich praised Howell for doing a good job at Uno-Ven, assured him that there would be plenty of work following the Mobil turnaround, and opined "there might be a possible spot for you after November . . . probably 40 hours a week." Howell inquired about jobs for his friends. Uremovich replied that "he couldn't hire direct because he had all that union organizing trouble . . . [adding that] the organizer applications were good for about 60 days and [that] he was just going to use B E & K until it all blew over." These undenied comments (and similar statements made by Hatteberg to Howell on July 29) are alleged to constitute threats not to hire VUOs and to subcontract work in violation of Section 8(a)(1). I so find.

On August 25, Howell was absent from work without permission. The next day when General Foreman Pieper's asked why he hadn't called in. Howell simply shrugged and said, "I just didn't." Pieper replied that unless Uremovich said something, "I ain't going to worry about it . . . [but] from now on if you miss any time, you need to call and let us know."

However, when Darby, on the following day (Saturday, August 27), was absent without having called in, Pieper located Howell in the "smoke shack" and told him to come to the office. There, he handed Howell a written warning for the absence on August 25, explaining it was issued because "the little union guy" (Darby) had to be written up "two or three times . . . [to] get rid of his ass." He added: "Well, as far as I'm concerned, you can just wipe your ass on it and throw it in the garbage." Darby was given his warning when he returned on the following Monday. Both warnings were prepared on August 27.²⁰

¹⁹ Pieper states that the written warning was given because Darby was the only employee ever to appear unshaven on his first day thereby implying that the same discipline would be imposed all first-day offenders. I decline to so assume. Moreover, it was not Pieper who wrote and issued the warning. It was Uremovich, and he did not testify on this matter.

²⁰ Pieper does not dispute Howell's account of the conversation on August 25. However, he denies making any reference to the "union guy" on August 27 but allows he told Howell that since it was a first warning, "I don't care what you do with it." Asked why he waited a day before writing up Howell, he replied: "I probably was busy on Friday." I find more likely, and have credited, Howell's account of both conversations.

I conclude that Darby, like Howell on August 25, would merely have been orally admonished for a first time unexcused absence had he not been engaged in protected activity; and that the warning to Howell was issued defensively to rebut any claim of discrimination against Darby. Accordingly, I find both warnings violative of Section 8(a)(1) and (3), as alleged.²¹

When Darby arrived at the main gate of the Mobil refinery on Friday, September 9, representatives of either the International Brotherhood of Teamsters or Laborers International Union of North America were picketing in protest against a company other than Starcon. He chose to return home rather than cross the line. He then called Hatteberg and apprised him of the situation. Hatteberg insisted that Darby report to work but persisted in refusing to cross a picket line.

On the following Monday, Darby went to the Starcon office and handed Uremovich a note stating that he had opted to go on strike to protest Starcon unfair labor practices. Uremovich had him wait for an hour and then called him into the office. With Hatteberg present, Uremovich gave Darby a written warning for the absence on September 9 together with a notice advising that he was suspended 3 days for cumulative warnings and would be terminated for any subsequent dereliction.

Here too I find the warning and suspension to be in violation of Section 8(1) and (3). Absent special circumstances not shown here, failure to cross a picket line is a protected activity for which an employee may not be disciplined.²²

Darby opted not to return to Starcon, and there is no claim of constructive discharge. Howell voluntarily quit on September 14.

Starcon hired 18 permanent employees between July 4 and September 8 (7 laborers, 6 mechanics, and 5 welders). Of these, 10 are listed as being referred by supervisors (5 by Kerridge, including Howell), 4 were former employees, 3 were sent by an employment agency, and 1 (Darby) is listed as a "walk-in." Of the former employees: Jerome Clifford had been terminated by Starcon for laziness and low production, Gary Wilson had had a similar problem, and Eric Frahm had been "very arrogant" and had welds that failed X-ray tests.²³

Between July 17 and October 16 and pursuant to work orders issued by Starcon, B E & K sent skilled boilermakers (mechanics and welders—no laborers) to the Uno-Ven and Mobil sites. During peak periods the number of such workers varied from 14 to 42 per week. According to credited testimony of Howell, B E & K and Starcon boilermakers were about equal in number, worked side by side on the same projects, and were usually supervised by Starcon field foremen.²⁴

²¹ *Electro-Tec, Inc.*, 310 NLRB 131 (1993); *L. C. Cassidy & Son*, 272 NLRB 123, 131 (1984); *O'Dovero Construction, Inc.*, 264 NLRB 751 fn. 2 (1982); *Armcor Industries*, 217 NLRB 358 (1975).

²² *Fluor Daniel, Inc.*, 311 NLRB 498, 501 (1993); *Western Stress, Inc.*, 290 NLRB 678 (1988).

²³ Clifford and Wilson were both hired as mechanics on July 25; Frahm was hired as a welder on July 21.

²⁴ Howell testified that a representative of B E & K (Robbie Tadlock) was present at the Mobil site coordinating with Starcon General Foreman Pieper "working relationship in the field" For his part, Owner Uremovich states that B E & K always super-

Continued

Starcon regularly uses subcontractors who perform specialized tasks such as painting, scaffolding, and hydroblasting as well as those requiring use of cranes and other heavy machinery. Uremovich, however, is not aware of any situation where Starcon used any subcontractor other than B E & K to provide welders and mechanics on request.

An employer who refuses to hire, or to consider for hire, applicants because of their union affiliation violates Section 8(a)(3) of the Act.²⁵ This is true even when the applicants are union members ("salts") intent on organizing other employees.²⁶ Likewise, an employer who establishes application and hiring procedures designed to impede or screen out union applicants violates Section 8(a)(3).²⁷

In the instant case, the employer (Starcon) acknowledges receiving on June 27 a package containing 80 applications for employment from individuals who identified themselves as "Voluntary Union Organizers"; and at least facially most of the applicants possessed high levels of skill as boilermakers in the petrochemical industry. In addition, between July 19 and 27, at least 32 avowed "VUOs" with similar apparent qualifications went to Starcon's office and there filled out and filed new application forms. None of these applicants were interviewed and only one (Darby) was hired. I find Starcon unlawfully discriminated against them (1) by changing its application and hiring policies, (2) by refusing to hire or even consider them for employment, and (3) by subcontracting work to B E & K. These matters are considered seriatim below.

1. Changes in application and hiring policies

Prior to receipt of the 80 applications on June 27, Starcon had informal application procedures designed to produce a backlog of applications as a hedge against unforeseen needs. Prospective employees were allowed to submit applications by mail and blank forms were even mailed to them to facilitate filing. Applicants were encouraged to have friends apply and to mail in applications in batches. However, on July 7 and on consultation with counsel, new forms and procedures were adopted and used as a basis for returning the applications of VUOs.

The new policies described above (p. 5) patently were designed to impede or prevent refilings by VUOs.²⁸ Among other things, applications had to be completed at the Starcon office but only at specified times on Mondays or Wednesdays; and VUOs found it virtually impossible to obtain same day interviews.

vised its own employees even when Starcon and B E & K employees worked together on the same crew.

²⁵J. L. Phillips Enterprises, 310 NLRB 11, 13 (1993), *Electro-Tec*, supra (fn. 20); *Ultrasystems Western Constructors*, 310 NLRB 545, 554 (1993); *Sunland Construction Co.*, 309 NLRB 1224, 1225 (1992).

²⁶NLRB v. *Town & Country Electric*, supra (fn. 3), aff'd. 309 NLRB 1250, 1265 (1992).

²⁷*Ultrasystems*, supra at 555; *Handy Andy, Inc.*, 296 NLRB 1001, 1003 (1989); *American Press*, 280 NLRB 937, 942 (1986).

²⁸Starcon claims throughout that its actions had nothing to do with discouraging union members, and in that regard it points out that a number of union members were already on its payroll, including Senior Supervisor Kerridge. That circumstance, however, does not negate animus against union activists.

The only explanation for the changes was supplied by Starcon Vice President Dunklau who states: "[T]he whole policy was reformed in an effort to enhance the control that we had over our hiring policies to ensure that . . . [they] were consistent with employment and labor laws." This reason appears wholly pretextual. There is no requirement under the Act for any of the changes; and Dunklau does not elucidate on why they are needed under other labor laws.

Further evidence of the sham nature of the new application and hiring policies is demonstrated by Manager Hatteberg's treatment of undercover union activist Howell. Hatteberg, in effect, hired Howell during a telephone call because of his nonunion background, conceding to him that the requirement of a new application submitted in person was only red tape; and having been told to hire one union activist, Hatteberg also hired Darby by telephone and even dispensed with giving him a personal interview.

2. Refusing to hire or consider VUOs for employment

According to undisputed evidence the 80 applications received by Starcon on June 27 were not reviewed by any company official beyond simply noting that each prominently displayed the designation, "Voluntary Union Organizer." Instead they were relegated to a bottom file drawer.²⁹ On July 7, Hatteberg mailed them back to the Union with an accompanying letter announcing (in part) the new application policies and procedures. Although signed by Hatteberg, the letter had been composed by Dunklau after consultation with company lawyers.

Similar treatment was accorded the applications of 39 avowed VUOs who, between July 19 and 25, complied with the new rules and appeared at Starcon's office during the prescribed times. None of those applicants were interviewed or scheduled for interviews, despite repeated requests and, while Hatteberg telephoned several of them, all further effort in that regard ended abruptly when one (Darby) accepted on the phone single position (laborer) being offered. Any doubt about the "token" nature of Darby's hire is dispelled by Hatteberg's confiding in Howell that "they" had decided to hire and keep close watch over one of the organizers.

This studied neglect occurred shortly after Starcon had advertised for applicants in midwestern papers and after Hatteberg and owner Uremovich made a 300-mile round trip drive to Decatur where they hand distributed fliers announcing job availability. Further, and despite the impressive facial qualifications of the union applicants, Starcon hired other applicants for permanent positions,³⁰ including three who had displayed serious deficiencies while working for it in the past; and it began to fill its pressing "turn-around" need for substantial numbers of temporary employees by turning to B E & K.

²⁹Hatteberg claims he put the applications in the drawer, because there were so many and because he had no time even to scan them.

³⁰Also indicative that the new procedures were a sham designed to weed out union activists is Hatteberg's treatment of Howell. In effect, he assured Howell of a job on the telephone, telling him he would be given an immediate interview whenever he came in and that refiling his application was just red tape necessitated by "legalities." In the same vein, he told Howell to write on top of the new form the mantra "Referred by Larry Kerridge," although that was not the case.

3. Subcontracting to B E & K

As found, Starcon's first written work order to B E & K for skilled boilermakers at its Uno-Ven turnaround job issued on July 19³¹—well beyond June 27 when it received the 80 VUO applications; and B E & K personnel did not begin to arrive at its Mobile turnaround site until early in September—well beyond the period in July when 37 VUOs filed the new application forms. In these circumstances, and having in mind the pattern of unlawful discrimination toward VUO applicants displayed by Starcon on this record, an inference is warranted that it entered into the subcontract with B E & K to avoid hiring union organizers and in furtherance of that unlawful conduct.³² Indeed, statements made to Howell by both Hatteberg and Uremovich confirm that intent.

Starcon has not met its burden of rebutting the inference.³³

I find incredible its contention that it never intended to use its own employees to perform turnaround work. In the first place, Starcon has performed turnarounds both before and after 1994 without subcontracting for outside labor; and the problems it assertedly experienced in obtaining a reliable work force for turnarounds in 1987 hardly explain why it had needed to have recourse to an outside source only in 1994. Second, if it did not intend to hire the large work force necessary to perform turnarounds in 1994, there would have been no need aggressively to seek applicants for employment as it did in April and May 1994. Given those efforts, it is plain that the subcontract it signed with B E & K on June 11, which did not require Starcon to use any specific number of B E & K employees (or indeed any), was intended only as a backup measure.

Similarly, Starcon's regular use of subcontractors (including some unionized ones) does not establish that subcontracting to B E & K was a normal business decision. Those other subcontracts involved performance of peripheral tasks, such as painting, scaffolding, and hydroblasting. Only B E & K was called on to supply skilled boilermakers for Starcon undertakings. Rather than being of a piece with the other subcontracts, the B E & K subcontract was a unique response to the union organizing campaign.

I conclude that but for its refusal to hire applicants who were union activists, Starcon would have had no need to use B E & K employees under the subcontract in 1994.

CONCLUSION OF LAW

Respondent Starcon is shown to have violated Section 8(a)(1) and (3) of the Act in the particulars and for the reasons stated above, and its violations have affected, and unless permanently enjoined will continue to affect, commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease

³¹ Although Starcon had various contacts with B E & K prior to June 27, including one around June 23, no commitment was made under the subcontract until July 19.

³² *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Universidad Interamericana*, 268 NLRB 1171 (1984).

³³ See *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 445 U.S. 989 (1982).

and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Among other things, Respondent will be ordered to consider for employment and to hire all job applicants named in appendix A to the complaint and to make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination practiced against them. Those amounts will be computed on a quarterly basis from the date they would have been hired but for Respondent's unlawful conduct to the date of a proper offer of employment, less any net interim earnings and plus interest as prescribed in prior cases.³⁴ Questions concerning the number of jobs (regular and temporary) that would have been available during the period of discriminatory conduct and use of remedial preferential hire lists are reserved for determination in the compliance phase of this proceeding.³⁵

Disposition

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁶

ORDER

The Respondent, Starcon, Inc., Manhattan, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees by telling them that union organizers who apply for jobs will not be hired, and that it would subcontract work to avoid hiring applicants who were union members.

(b) Creating an impression among its employees that their union activities were under surveillance.

(c) Threatening employees with discipline and discharge because of their union sympathies.

(d) Discouraging employees from engaging in activities on behalf of a labor organization by refusing to hire, reprimanding, or otherwise discriminating against them.

(e) Subcontracting work to B E & K, or any other contractor, to avoid hiring union members or organizers.

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

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

(a) Offer immediate employment to the employees listed in appendix A to the complaint in positions for which they applied or, if nonexistent, to substantially equivalent positions, and make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination practiced against them in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplinary

³⁴ *F. W. Woolworth Co.*, 90 NLRB 289 (1950); *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

³⁵ See *Ultrasystems*, *supra* at 546; *Fleur-Daniel*, *supra* at 506; *Town & Country Electric*, 309 NLRB 1250, 1280-1281 (1992).

³⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

warnings issued to Wayne Darby and Millard Howell and notify them in writing that this has been done and that the discipline will not be used against them in any way.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension issued to Wayne Darby and notify him, in writing, that this has been done, and make him whole for any loss of earnings or benefits he may have suffered by reason of the discrimination practiced against him.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at all of its jobsites and in its office in Manhattan, Illinois, copies of the attached notice marked "Appendix."³⁷ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and the individuals named in appendix A to the complaint in this proceeding.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

³⁷If 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 threaten to refuse to hire union supporters or to subcontract work to avoid hiring applicants who are union supporters.

WE WILL NOT create an impression that activities of union supported are under surveillance.

WE WILL NOT threaten employees with discipline and discharge because of their union sympathies.

WE WILL NOT discourage employees from engaging in activities on behalf of a labor organization by refusing to hire, reprimanding, or otherwise discriminating against them.

WE WILL NOT subcontract work to B E & K, or any other contractor, to avoid hiring union members or organizers.

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

WE WILL offer the employees listed in Appendix A to the complaint in this proceeding employment in positions for which they applied or, if nonexistent, to substantially equivalent positions, and make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination practiced against them.

WE WILL remove from our files any reference to the unlawful disciplinary warnings issued to Wayne Darby and Millard Howell and notify them in writing that this has been done and that the discipline will not be used against them in any way.

WE WILL remove from our files any reference to the unlawful suspension issued to Wayne Darby and notify him, in writing, that this has been done, and make him whole for any loss of earnings or benefits he may have suffered by reason of the discrimination practiced against him.

STARCON, INC.