

Global Industrial Services, Inc. and Service Employees International Union, Local 200B, AFL-CIO.
Case 3-CA-19273

April 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN
AND BRAME

On November 28, 1995, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

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

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

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and the complaint is dismissed.

Robert A. Ellison, Esq., for the General Counsel.

Alan B. Pearl, Esq. (Portnoy, Messinger, Pearly & Associates, Inc.), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on September 12 and 13, 1995,¹ in Binghamton, New York. The complaint herein, which issued on May 10 and was based on an unfair labor practice charge that was filed on March 30 by Service Employees International Union, Local 200B, AFL-CIO (the Union), alleges that Global Industrial Services, Inc. (Respondent) was a successor employer and that it violated Section 8(a)(1), (3), and (5) of the Act by telling the predecessor's employees that it would not consider them for employment because of their union or protected concerted activities, subsequently refused to hire them for these reasons, refused to recognize the Union as the collective-bargaining representative of the employees in this unit, and failed to maintain the terms and conditions of employment set forth in the contract between the Union and the predecessor employer.

¹ The General Counsel 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 the evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

¹ Unless indicated otherwise, all dates referred to herein relate to the year 1995.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

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

III. THE FACTS

The facts herein relate to a plant in Owego, New York (the facility). In more prosperous times, this was one of three plants operated by I.B.M. in the area. Since about 1986, the janitorial and maintenance work at the facility was performed by International Service Systems, Inc. (ISS), whose employees at the facility were represented by the Union. The most recent collective-bargaining agreement between ISS and the Union is effective for the period November 1, 1991, through October 31. In about 1993, I.B.M. discontinued its operation at the facility and, at about that time, Loral Federal Systems Company, Inc. (Loral), principally a defense contractor, commenced operations at the facility. ISS continued to perform the janitorial and maintenance work at the facility until January 20 when Respondent was awarded the contract to perform this work. Loral employed temporary employees to perform this work for the following week while Respondent, which previously had no operation or production employees in the area, hired a staff, got its operation in order at the facility, and commenced the janitorial and maintenance work at the facility on Monday, January 30. From that time until the date of hearing, Respondent had not hired any of the janitorial employees previously employed by ISS at the facility. The General Counsel alleges that Respondent failed to hire the former ISS employees in order to discourage union membership and to avoid the successorship obligation and therefor violated Section 8(a)(1), (3), and (5) of the Act. Respondent defends that its failure to hire these employees resulted from a simple and nondiscriminatory fact: the former employees never applied, either individually or as a group through the Union, to work at the facility. Whereas ISS paid the employees at the facility about \$9 an hour pursuant to the terms of its contract with the Union, Respondent was only paying its employees \$5.50 an hour and, presumably, that accounted for their lack of interest.

A. The Bidding Process

In about late 1994, Loral requested bids on the janitorial and maintenance work performed at the facility. It was competitive bidding to be awarded on the basis of "best value, lowest bidder." Scott Schwartz, Respondent's president, testified that labor costs represented approximately 70 percent of his total submission, and, in preparing his bid for this work, after researching the issue, he determined that the wage rate that his bid would be based upon for the janitorial employees would be \$5.50 an hour. Respondent, as well as other employers, including ISS, were the bidders for this work. The Union sent the following letter, dated December 5, 1994, to the companies that were bidding for the work:

We were recently notified that your firm was solicited by representatives of Loral Corporation to submit a bid to provide janitorial services for their facility in Owego, New

York. We are privileged to have represented the employees servicing that facility for thirty years and we are looking forward to continuing that relationship.

Should your firm be awarded the contract we are requesting that you recognize this organization as the sole bargaining agent for the purpose of collective bargaining in respect to rates of pay, wages, hours and other conditions of employment. Also, that you will agree to take over the employees currently employed at the job location and these employees shall not have their rate of pay, hours of work or other benefits reduced.

I am requesting you respond to this correspondence as soon as possible as we would like to know your position on this issue.

In attempting to send this letter to Respondent, the Union addressed and allegedly mailed it to: "Mr. Jerry Gilbert, Global, 71 South Central Avenue, Valley Stream, New York 11580." While the address was correct for Respondent, and while Triangle Maintenance Corporation (Triangle) and Gilbert, an officer of Triangle, also maintained an office at that address, Gilbert was never an employee, owner, or principal of Respondent. Dennis Eames, secretary-treasurer of the Union, testified that at that time the Union assumed that Gilbert was an officer of Respondent and did only learn otherwise when it received a Dun & Bradstreet report which showed that Gilbert held no office with Respondent and that Schwartz was the principal of Respondent. Schwartz testified that he never received this December 5, 1994 letter from the Union.

B. The Award

By letter (and fax) to Respondent at the same address as above, Loral notified Respondent that its proposal had been accepted to perform the janitorial work at the facility. The relevant terms of this letter are that ISS will be notified of the award on January 21, Respondent will have access to permanent offices and telephone lines on January 21, Loral will "self perform" the janitorial work for the period January 23 through 27, Respondent will begin the work on Monday, January 30, and interviewing would be conducted by Respondent away from the facility. Peter Leddy, procurement manager for Loral, testified that he met with Respondent's representatives earlier in January to discuss some aspects of their proposal and at that time he told them that until the contract was officially awarded, they were not to discuss it with anybody. There were two reasons for this prohibition: Loral wanted to notify ISS of the award and there were security reasons as well. Loral faxed the award to Respondent on January 20 shortly before 5 p.m. On the following morning, Loral notified ISS of the termination of its contract, and, at about the same time, ISS notified its employees who worked at the facility that they would no longer be employed there by ISS. Leddy testified that the reason for the secrecy about the award and the last minute notification was security; when an employee is terminated, Loral wants them immediately removed from the facility. Therefore, the security badges of the former ISS employees were deactivated after their last day of employment on January 20. Neil Brewer, an employee in the industry and the Union's divisional president, testified that on the morning of Saturday, January 21, he received a telephone call from an ISS representative who told him that the ISS employees at the facility had lost their positions there, and he was going to call each of them to notify them that they were no longer employed at the facility, effec-

tive immediately. The former ISS employees who testified stated that they were notified on the morning of January 21 that they were no longer employed at the facility.

C. Respondent Interviews and Hires Employees

Schwartz testified that even though the contract was not awarded until January 20, by January 9 and 13, he felt that negotiations with Loral were progressing well and he was optimistic about receiving the award. Because of this, and the fact that he had made commitments to Loral that he could perform the contract on a "fast track," he placed an ad in the local paper for employees. John Fuller, Respondent's site manager at the facility, testified that on January 13, he received a telephone call from someone at Respondent's main office who read him an ad that he was to place in the local newspaper to obtain employees for the facility. He called the newspaper and the following ad ran in the paper from January 15 through 19:

Janitors F/T, P/T

5 needed immediately.

\$5.50/hr. Call for Interview.

788-9189 code 4533

Those calling the telephone number in this ad heard a recording that asked them to leave their name and telephone number. On about January 20, somebody from Respondent's main office called the newspaper and obtained the names and telephone numbers of those who called, and at about 11 a.m., on January 21, Fuller received a listing of 233 names and telephone numbers of those who responded to the ad. At the same time, he was instructed (presumably by Schwartz) to begin calling the names on the list and interviewing them for possible hire at the facility. At that time, he and Dan Williams, Respondent's operations manager (Fuller's assistant at the facility), began calling the individuals and arranging for them to be interviewed at a Howard Johnson motel in the area, and interviews were conducted by Fuller and Williams at that location on Saturday, January 21, and Monday and Tuesday, January 23 and 24. On those days, Fuller and Williams had the applicants fill out employment applications for Respondent and interviewed them. About 150 applicants were interviewed jointly by Fuller and Williams on those 3 days; only about 20 percent had experience performing maintenance or janitorial work. Fuller testified that they told the applicants of the type of work and "the general area" where it was located, but not the precise location. Between January 24 and 26, Fuller and Williams discussed the ratings that they gave to each of those that were interviewed and chose 35 to 40 employees for immediate employment, and on January 26 and 27 these individuals were called, were told that they were hired, that they would be performing janitorial work at the facility, and were told to report to the facility on Saturday, January 28, for an orientation session.

Fuller testified that the applicants for employment were not told where they would be working until those hired were so notified on January 26 and 27 because of the secrecy restrictions placed on Respondent by Loral. The newspaper ad's reference to five employees was another product of Loral's restriction on Respondent revealing that it had obtained, or would obtain, the contract. Fuller testified: "We didn't want to draw attention to the site and the way the employment is in the area, if you put in for five people you get a hundred anyway, so it really didn't make much difference." Schwartz testified that Loral prohibited them from speaking to anybody about the

award until January 21; the award states that Loral will notify ISS of the award on January 21. Since Loral is a government contractor, for security reasons, once an employee's employment is over at the facility, that employee is escorted off the facility. Loral, therefore, did not want the ISS employees at the facility to know that they were no longer employed there until after they had all left the facility on January 20. He testified that this "gag order" was imposed by Loral and he was told that a violation of this secrecy pledge could result in a cancellation of the award.

Schwartz also testified that he determined that the starting wage rate at the facility would be \$5.50 an hour. He made that determination based upon surveys that he had access to of the area as well as discussions with Fuller who had experience in the area for about 30 years. Fuller told him of the unemployment situation in the area, what similar facilities were paying, and what rate would attract applicants; Fuller also told him that ISS was paying its employees at the facility between \$7 and \$10 an hour. Schwartz used that \$5.50 figure in his submission to Loral, and told Fuller to use that figure in the newspaper ad.

As stated above, the final day of work for the ISS employees at the facility was Friday, January 20, and they each received a telephone call from ISS supervisors on the following morning notifying them that they were no longer employed at the facility, effective immediately. Loral maintained the facility with its own employees as well as employees of temporary agencies during the week of January 23. During that week, Respondent, together with Fuller and Williams, was busy with the required paperwork and ordering of supplies (in addition to the interviewing and hiring of employees as described above) so that it would be ready to begin operations on Monday, January 30. On Saturday, January 28, Respondent conducted a 3-hour training session at the facility with the approximately 40 employees that it hired that week, and Respondent commenced performing the janitorial work at the facility on Monday, January 30. From that time until the time of the hearing herein, Respondent had not hired any of the former ISS janitorial employees who were employed at the facility. The critical issue is whether this resulted from a conscious determination by Respondent not to hire the former ISS employees in order to avoid being a successor to ISS and being obligated to recognize and bargain with the Union as the representative of its employees at the facility, as alleged by counsel for the General Counsel, or whether it resulted from the fact that none of the employees applied to work for Respondent at the facility because they would not work for \$5.50 an hour when they had previously earned substantially more from ISS, as is alleged by counsel for Respondent.

The General Counsel produced a number of witnesses who testified about conversations that they had with alleged agents of Respondent regarding working at the facility. Richard Arnold, who had been employed at the facility since 1979, testified that on about February 2 he called the telephone number that had previously been used by ISS at the facility. The person answering the phone did not give his name, but identified himself as a second-shift supervisor. Arnold asked whom he should speak to about obtaining an application for employment, and he answered, "[T]alk to me." Arnold asked where he could get applications and he said that they do not have applications available, but that they could mail one to him. Later, on cross-examination, he testified that he was told that he *couldn't* mail

them. Arnold then said: "I'm one of the people from outside,² being I used to work for ISS, is there any problem with hiring me?" He testified that the person he spoke to said: "Well, our work force is full right now and then he didn't say anything else."

Ute Pralat, who was never employed by Respondent and is presently married to Leo Pralat, who was an ISS employee at the facility and was a union steward and committee chairman, testified that during February and March she called the prior ISS telephone number at the facility every 2 to 3 days, in total, on more than 10 occasions. On these occasions, she spoke to "Lynn," "Bill," and "Dan." On the occasion or occasions that she asked to speak to "Dan," she was asked, "Dan Williams?" and she said yes. On those occasions, she called and asked if she could apply for a job and was told there was no place to get an application. She left her name, at that time Showerman, and telephone number and was told that they would get back to her, but never did. In one such call, apparently with Williams, she asked if they would mail her an application and he said that they don't do that. During another call, where she "tried to be fairly insistent about getting an application," she was told: "Yeah, I know who you are." She never got an application from Respondent. Williams testified that Showerman called the facility on two occasions after January 30. She asked him if they were taking applications and he said that they had a full staff, but that he would take her name and telephone number, which he did. When she called on the second occasion, he told her the same thing and verified the telephone number that he had listed.

Leo Pralat testified that he was shown Respondent's newspaper ad and he called the listed telephone number on January 22. He got the recording and left a message saying that he was Leo Pralat, the Union's committee chairman, and "asked if they were going to hire any of those people to work in the Owego plant." His message gave the Union's telephone number for him to be called at. He never received a response to that call. Pralat did not mention this telephone call in the affidavit that he gave to the Board. Leo Pralat testified further that on January 27 he called the principal Loral telephone number and asked to be connected to the extension that had previously been the ISS office at the facility, but was then employed by Respondent. The telephone was answered by Williams and Pralat told him who he was, that he was picketing at the facility, "and I'd like an application for a job because I'd like to work there and he told me he couldn't do that, that he'd have to get with John Fuller and let me know." Pralat gave Williams his home telephone number, but neither Williams nor Fuller ever called him back. Pralat testified that he had been earning \$9.81 an hour while employed at ISS at the facility, but was not certain what salary Respondent was offering. He was out on a disability from October 1994 through April 1, [1995]. Williams testified that he knows Leo Pralat from past negotiations and that he never received a telephone call from Pralat in late January.

Sandra Shearer, who had been employed by ISS at the facility, and whose name appeared on the ISS payroll as Sandra Shearer/LoParco, testified that in about mid-February, she called the former ISS telephone number at the facility and a man answered the phone, but she could not recollect his name. She asked him if they were hiring, and he said that they were

² The former employees picketed the facility from about January 23 to April 9.

not hiring at that time. She asked if she could get a job application, and he said that they had no applications at any place where she could get one, but to call back on the following day and he would then have more information for her. He asked for her name and telephone number, and “not wanting to jeopardize anything too much,” she gave her daughter’s name and telephone number. He told her that if she didn’t hear anything from him in the next couple of days to call back, and she did so. At that time, she again asked for an application and was told that they had no applications available, but that she might possibly be able to get one through the employment service. Williams testified that he does not remember receiving a telephone call during that period from Shearer/LoParco; however, during the 4- to 6-week period beginning on January 30, he received about 36 telephone calls from individuals looking for work, about 90 percent of whom gave their names, and he told them that they had a full staff at that time, but that he would be happy to take their names and telephone numbers and that he would call them back when there was an opening and would arrange for a personal interview. None of the individuals who called seeking work during this period said that they had been employed at the facility by ISS.

Roberta Ingraham, who had been employed by ISS at the facility, testified that she called Respondent’s office at the facility sometime during the first week of picketing, between January 23 and 27. She called the prior ISS number at the facility and Williams answered the telephone and identified himself. She asked him if he was doing any hiring, that she was looking for an application and had 16 years’ experience. When Williams asked where, she told him at the plant, “and he told me that they weren’t hiring anybody that previously worked there.” Williams testified that he does not recall any such telephone call from Ingraham, that in none of the telephone calls that he received did the caller identify himself or herself as a former ISS employee at the facility, and that he never told any caller that he would never consider hiring anybody who had previously been employed by ISS at the facility.

Alexa Wales, who was employed by ISS at the facility, testified that in about the last week of January she called the prior ISS telephone number at the facility. She cannot remember whether the person who answered the phone identified himself, other than saying: “I think he just said Global,” and she does not know his name. She did not identify herself, but said that she wanted to find out where she could obtain an application for employment. The person to whom she was speaking didn’t appear to know what to do, and asked her to call back the following day, and she did so. At that time, a different man answered the phone by saying Respondent’s name. She again asked about a job application, and he said that he thought she could get one from the Binghamton or Owego Employment office. Williams testified that he doesn’t remember receiving any telephone call from Wales.

Brian Short, who was employed by ISS at the facility, testified that on about February 1, he called the prior ISS telephone number at the facility. Somebody who identified himself as either Dan or Dave answered the phone and Short identified himself, said that he had worked for ISS at the facility, and asked where he could obtain a job application form: “He told me they were full and not hiring at that time.” Williams testified that he does not remember receiving a telephone call from Short, but as he did for everyone who called at about that time, “I just told them we had a full staff at that time, that I would be

happy to take their names and phone numbers and call them back when . . . there was a spot open and that we would make some arrangements to get them an application and interview them face to face.”

Williams testified that on January 30, he received a telephone call from Brewer, who did not immediately identify himself, but Williams recognized his voice. Brewer asked if there were any positions available, and Williams said not at that time, that they already had a full staff. He asked if he could fill out an application, and Williams said that Respondent did not have any other office at that time, but that he would be happy to take his name and telephone number and contact him when an opening developed. Brewer then asked, “[I]f we were going to be hiring any people outside the facility” and Williams said that “if he gave me a list of names and numbers I would do the same for them.” Brewer then identified himself and asked Williams to have Fuller call him.

In addition to William’s denials as specified above, Respondent further defends that many of these alleged conversations could not have occurred as Fuller and Williams spent almost no time at the facility between January 23 and 27. In that regard, Fuller testified that he and Williams conducted interviews at the Howard Johnson Motel in the area on January 23 and 24, and were not present at the facility on those days. On Wednesday, he and Williams went to the facility and were given a tour of the facility by a Loral representative; they were shown, but did not go into, the ISS office that they would be occupying. About 15 minutes after the tour began, the Loral representative was paged and he told them that they would have to leave immediately, which they did. They were present at the facility for about 20 minutes on that day. Neither he nor Williams were present at the facility on Thursday or Friday, January 26 and 27. They were present on Saturday, January 28, for 10 to 12 hours, 3 of which were spent at the orientation program for the new employees. The balance of the time was spent preparing for the operation which was to begin on Monday. This involved ordering, assembling, and unpacking equipment and supplies. That was the first day that Respondent had an office from which to operate; earlier in the week, Loral provided them with a storeroom for their equipment, but the room had no telephone. The office had the same telephone number that had previously been used by ISS and, apparently, Respondent was capable of receiving incoming calls beginning on January 28. Williams also testified that he and Fuller were interviewing at the motel on January 23 and 24 and were not at the facility on those days; they were at the facility on January 25 for about 20 minutes when they were asked to leave. Prior to leaving, he went into the office and saw ISS employees working there. On Thursday and Friday, January 26 and 27, they were reviewing applications and did not go to the facility. The first day that they were able to use the office was Saturday, January 28, when they began moving equipment and supplies into the office. He testified that he received no inquiries about employment while he was present in the office on January 25 and 28. When he answers the office telephone, he begins with a salutation and then says, “Global,” but does not state his name at that time.

Neil Robinson, Loral’s manager of facilities maintenance, testified that to his knowledge, ISS continued to use its office at the facility for about a week after they were notified that they had lost the contract, and Respondent moved into that office on about January 28. During the week of January 23, Loral gave Respondent a temporary office to use in a different part of the

building. Leddy, who testified with some uncertainty about the office arrangements during the week of January 23, testified that he believes that Loral had ISS move its office so that Respondent could use the office during that week. The contract award to Respondent states that effective January 21 they will have access to "terminal offices, storage facilities and three designated telephone lines."

Respondent's defense herein is a rather simple one: it did not hire the former ISS employees at the facility because they never applied to work for Respondent, either individually by the employees or through the Union as a group, apparently because they were unwilling to accept Respondent's starting wage rate of \$5.50 an hour, about \$3 or \$4 less than they had been earning at ISS. As stated above, Schwartz testified that he never received a letter dated December 5, 1994, from the Union addressed to Gilbert at Global. On about January 26, Schwartz told Fuller that any former ISS employee at the facility "should be given first consideration." When Fuller told him that none of these individuals applied, he told Fuller to hire the best applicants that he had. Schwartz testified that Respondent did receive a letter from the Union dated January 24, also addressed to Gilbert as the president of Respondent, stating:

This correspondence is sent to inform you that Loral Federal Systems Company has informed us that you will be taking over the janitorial contract from I.S.S. at their plant in Owego on January 28, 1995.

We would request that you inform us of where our members, who were employed by I.S.S. at this site, can make application for employment in order to return to this worksite.

If you should have any questions please do not hesitate to contact me at (315) 424-1750.

Schwartz testified that Gilbert, who has an office in Manhattan as well as the floor in the office building in Valley Stream in which Respondent is located, gave him this letter on either Friday, January 27, or Monday, January 30. He immediately called his labor consultants and then directed Fuller to send the following letter dated January 30 to Eames:

Your correspondence to our corporate offices dated January 24, 1995 was forwarded to my attention.

Please be advised that Mr. Jerry Gilbert is not the President of Global nor does he hold any position with the company.

As per your request any of your members wishing to make application for employment can do so by calling (607) 751-4952.

Schwartz was asked what instructions, if any, he had given Fuller regarding possible applications for employment by the former ISS employees at the facility. He testified:

As of January 30th, John Fuller was given very specific instructions that if anybody that was a former employee on that site would apply for a job, that they would be brought to the top of the hiring list and over and above whatever 50, a hundred, a hundred and fifty applications that they had on hand, that they were going to call and hire from. Those people would be accelerated right to the top of that list and they would be called immediately.

By "called immediately," he meant being called for an interview rather than being hired immediately, and that he initially

gave these instructions to Fuller on January 20 or 21, although this employment preference was never communicated to the Union, and Fuller testified, as well, that Schwartz told him of this policy on about January 20 or 21. Schwartz testified further that from that time through the end of March he never received a letter or telephone call from the Union requesting employment for the former ISS employees at the facility, and during this period Fuller told him that he also had not received any applications from former ISS employees at the facility. The only time that he ever received a list of the former ISS employees at the facility was the list that was attached to the complaint herein as an appendix.

Schwartz and Fuller each testified that Respondent used its standard employment application for employment at the facility. Respondent's policy has generally been that it does not mail out employment applications or allow individuals to pick up applications for others; if an individual wants a job, he meets with a representative of Respondent, fills out an application at that time and is interviewed. Fuller testified that he was instructed that if he received a call from individuals looking for work after the initial responses from the ad, he was to take their name and telephone number, tell them what the job involved and the starting salary, and, if the individual was interested, arrange for an interview at a local bowling alley or McDonalds at which time the individual would complete the application and be interviewed. The first time that a former ISS employee at the facility applied for a job with Respondent was a few days prior to the hearing herein, and that individual was to begin work a few days after the hearing.

Schwartz testified that Respondent deviated from this applications policy in the instant situation (with his approval) by Fuller arranging that the former ISS employees at the facility could pick up and fill out employment applications at a New York State Employment Office (the Employment office) in Owego. Fuller testified that Brewer called him at the facility on either January 30 or 31; he asked Fuller what he was going to do "with his people." Fuller told him that Respondent had already hired a full staff for the facility and also had a list of alternates to contact in case of openings. Brewer asked: "Well, what can you do with our people?" Fuller said that Respondent did not have an office in the area where applicants could come, fill out an application for employment and be interviewed, and their agreement with Loral did not allow them to have employees come to the facility for interviews. "But to accommodate the people," he told Brewer that he would arrange to send applications to the Employment office, where the women in charge would give them only to the former ISS employees at the facility, interview them, and report back to him. He would then hire employees from those applications. He then told Brewer that Respondent's starting salary at the facility was \$5.50 to \$6 an hour and Brewer asked: "How do you expect people to live on that?" Fuller asked Brewer to call him back about this arrangement with the Employment office, and if Brewer agreed with this arrangement, Fuller would make the arrangements with them.

Fuller testified that after this conversation with Brewer, he called the manager of the Employment office in Binghamton, who referred him to the Owego office which would be more convenient for the former ISS employees, and the manager of that office agreed to take the applications and hold them for the former ISS employees. During the month of February he did not receive any calls or letters from Brewer regarding this pro-

posed arrangement, nor did he hear from any former ISS employees asking for employment. As to the latter, he felt that could be explained by the fact that the general practice in the industry is for the maintenance contractor to be paid for a 30-day period from the date of cancellation of an agreement, and he assumed that Loral paid ISS for an extra month on the cancellation of its agreement, and that ISS was likewise paying its employees for the additional month and during that period they were content receiving pay and not working.³ As he had not heard from Brewer since their conversation at the end of January, Fuller wrote to him by letter dated March 1:

This is in follow up to our conversation on January 30, 1995 regarding the hiring of the former ISS employees who had worked at the Loral site in Owego, New York.

As I had stated during our conversation, we already had a complete work staff plus alternates hired. I also said that we had no place to receive or hand out applications at this time. However, I would try to make arrangements with the local employment office to accommodate your people.

I have since then (as of February 2, 1995) contacted the manager of the employment office in Binghamton, NY and made him aware of what I wanted to do. He then referred me to the Owego, NY area, which would be more convenient for the applicants. The Owego employment office agreed and was willing to accommodate us. As I have not heard from you as of this date (March 1, 1995) I have not yet taken the applications to the Owego office. Should you still require us to do so, please contact me.

Shortly thereafter, Brewer called Fuller and said that he was aware that Fuller contacted the Employment office. Fuller testified: "I explained exactly what I needed and I said, 'well, what are you going to do?' He said, 'well, I can't make that decision. I'll have to get with Syracuse [where the Union's main office is located] and I'll let you know.' Well, I never heard another word again." He testified that Brewer never wrote to him or called him regarding this offer.

By letter dated May 15, Fuller wrote to Brewer with an attachment of the alleged discriminatees that was an appendix to the complaint herein: "Please supply me with the addresses and telephone numbers of the persons whose names are attached to this letter, so we can be in a position to offer work at the LFS Owego facility." Having received no response from the Union, Fuller wrote Brewer again on May 31:

As of this date I have not yet received any response from the letter dated May 15, 1995.

In that letter, Global Industrial Services requested the addresses and telephone numbers of the persons whose names appeared on the enclosed list. We would request that information so we can be in a position to offer work at the LFS Owego facility. Thank you for your help in this matter.

The Union never responded to this letter, as well. Fuller testified that Respondent had some turnover in employees at the facility, and he wrote these letters to Brewer so that he could

... be a little freer to, to start hiring people, rather than I felt that I was kind of boxed in because I had made a commitment

³ Other testimony establishes that Fuller's assumption that ISS was paying its employees for an extra month was incorrect.

to hire the former ISS people, I made the commitment to Neil and, and we were running light, but it got to a point where he either had to make a decision that he was going to send me the people or not send me the people, which that decision he never made.

He testified that the "commitment" that he referred to above was the commitment that he made to Brewer on January 30 that he would set up an area where the former ISS employees could obtain and complete applications to work for Respondent. He testified further that he never took the applications to the Employment office

[b]ecause Mr. Brewer never made a commitment to tell me that he was going to send his people down. These applications I wasn't taking to the Owego employment office for the general public. We had plenty of people, either on the list or people that were referrals for applications. This was to accommodate the people who previously worked at the Loral site.

He testified that he was frustrated and embarrassed by the lack of a response from the Union because he had spoken to, and made arrangements with, the Binghamton office and the Employment office, and nothing was happening on the union side. As to whether it was unusual for Respondent to hire inexperienced employees for the facility, Fuller testified:

I don't want to be disrespectful to the industry, but it doesn't take a rocket scientist to be a janitor. If a person is willing and, and they're able and they want, want to do it, they can learn pretty fast.

Brewer testified that at the end of January he obtained Fuller's pager number and paged him. When Fuller called him, he asked Fuller: "What are we going to do with these 45 to 50 janitors we have out here, that would like to seek employment and go to work?" Fuller said that he already had a full staff and alternates, but he needed a place where he could bring employment applications that the former ISS employees could obtain and he would call the Employment offices in Binghamton and Owego "and we're going to put applications down there." Brewer said that sounded good and was a move in the right direction and, at the conclusion of that conversation, Brewer's understanding was that Fuller was going to leave employment applications at the Employment office. Therefor, within a day or two, he and Leo Pralat went to the Employment office and the woman in charge told them that she was under the impression that Fuller was going to leave applications for the former ISS employees, but she never received them. He received Fuller's March 1 letter on March 7; the only thing that he disagrees with in the letter is Fuller's statement that Brewer was to get back to him before he would leave the applications at the office. He testified: "I don't recollect saying that, that I would get back to him." When Brewer received Fuller's May 15 letter, he called Fuller and told him that he would call the Union's main office to see what they want to do about the matter. He learned that the Union was preparing to meet with counsel for Respondent in an attempt to settle the outstanding matters [and they did meet] and therefor he did nothing further regarding Fuller's letters. Because of these pending settlement discussions, he did not respond to Fuller's May 31 letter.

Fuller testified that on January 24 and 25, while Tom Terrell, the ISS representative at the facility, was moving their equipment and supplies out of the facility, he told Fuller that he had a few supervisors "that aren't too bad that I won't need in Endi-

cott” and asked if Fuller would like to hire them. Fuller said that if he were interested, he would call them, but he never did because he didn’t hear very good things about these individuals. However, he did hire former ISS supervisors at the facility who were no longer employed there on January 20. They called him, he knew them and hired them.

Fuller was asked why he didn’t offer employment to the former ISS employees at the facility on January 21, after everybody was notified that ISS lost the contract at the facility. He testified that he thought that ISS was paying them for an additional month since ISS was being paid for an extra month according to industry practice, and he did not know whether ISS was going to transfer them to another of its locations. In addition, he testified: “Global’s position is that they don’t, I’ll use the term pirate, people from other companies. ISS could eat Global in a heartbeat.” Schwartz also testified about this subject: “We have a strict policy, we don’t raid the employees of competitors, especially ones that could eat us alive.” Respondent’s gross business was about \$3 million whereas ISS is a multibillion dollar company: “They could put us out of business if they really wanted to.”

Fuller and Williams each testified that after the original complement of employees were hired, most of the employees who they subsequently hired to work at the facility came from their original list of employees who were interviewed in January. In addition, some prospects were recommended by employees and some called the facility indicating an interest in working at the facility. On those occasions, Williams met the individuals at a convenient location away from the facility, interviewed them, and had them complete an employment application.

IV. ANALYSIS

The underlying allegation herein is that Respondent is a successor to ISS in the cleaning and maintenance of the Loral facility in Owego; if that were so, Respondent would have to recognize and bargain with the Union for the janitorial and maintenance employees at the facility. In determining whether a successorship obligation exists, the Board traditionally has looked at a number of factors in determining whether there is a substantial continuity in the employing enterprise. *Blitz Maintenance*, 297 NLRB 1005 (1990). Some of these factors are a comparison of business operations, plant, work force, jobs, working conditions, supervisors, machinery, equipment, and production methods. The primary factor, however, is a comparison of the work force of the predecessor and the alleged successor. If a majority of the latter’s employees had previously been employed by the former there is usually a successorship obligation absent any major disparity in their operations. As a comparison of employees is the principal test in these determinations, an employer cannot defeat a successorship obligation by purposely refusing to hire the predecessor’s employees in order to avoid an obligation to bargain with the Union. In *Systems Management, Inc. v. NLRB*, 901 F.2d 297, 302 (3d Cir. 1990), the court stated:

[I]t is now established that the discriminatory refusal to hire predecessor employees eliminates the obligation for a majority of the employees to be present in order for a new enterprise to be deemed a “successor” The new employer cannot argue that a majority of the employees of his predecessor have not been employed in the new work force when the

failure to employ them is a result of discriminatory, and hence illegal, hiring practices.

In making the determination of whether an employer refused to hire the predecessor’s employees in order to avoid a successorship obligation, the traditional test of *Wright Line*, 251 NLRB 1083 (1980), is employed. *Fremont Ford Sales*, 289 NLRB 1290 (1988); *Weco Cleaning Specialists*, 308 NLRB 310 (1992).

Based on the facts herein, I find that The General Counsel has not satisfied his initial burden under *Wright Line* of establishing that the union membership of ISS’ employees at the facility was a motivating factor in Respondent’s failure to employ them. The General Counsel’s case herein is supported by inference and assumptions, but very little evidence. I am fairly certain that Respondent is very happy that it is not obligated to bargain with the Union as the representative of its employees at the facility, but there is no positive evidence that they did anything to discriminate against the former ISS employees at the facility. From January 21, when the employees were notified that ISS had lost the contract, and that they were no longer employed at the facility, until at least the time of the hearing herein, the Union had made no demand upon the Respondent to hire the former ISS employees at the facility. There may be a very simple reason for this: these employees did not want to perform the same work for Respondent that they had performed for ISS for about 60 percent of the wage rate that they had been earning. While one could certainly understand and sympathize with the situation that was presented to these employees, Respondent was under no affirmative obligation to seek out these employees and ask them if they wanted to work for Respondent. In fact, when the Respondent “reached out” to the Union through Fuller’s letters dated March 1, May 15, and 31, the Union never responded in any meaningful way.

The principal evidence of unlawful motive herein is the secretive method employed by Respondent in advertising for, and interviewing, job applicants. Respondent did not give its name in the ad, nor did it name the location at which these employees would be employed, and it stated that it needed 5 employees, not the 40 that it actually needed. This was somewhat similar to the hiring method employed by the respondent in *Love’s Barbeque Restaurant No. 62*, 245 NLRB 78 (1979). However, I find the testimony of Respondent’s witnesses, principally Fuller, who I found to be a credible and believable witness, to be reasonable and explanatory on this subject. Respondent was bidding to receive this contract from Loral, which was a defense contractor with obvious security concerns. Loral’s fears were not unreasonable that if Respondent’s ad mentioned the facility, the existing employees at the facility would learn of the situation causing possible security problems. In addition, Fuller’s testimony that, considering the economic situation in the area, it made no difference that Respondent’s ad referred to only 5 employees being needed, was borne out by the fact that Respondent obtained over 200 applicants from the ad. I therefore find that Respondent’s method of advertising for job applicants herein did not exhibit any discriminatory motive to avoid hiring the existing employees.

A number of employees testified that they called Respondent’s office at the facility and were unlawfully refused employment, and the complaint so alleges. Arnold testified that when he spoke to somebody who identified himself as a second-shift supervisor on about February 2, he was told that Respondent’s work force at the facility was full at that time,

which, according to the credited testimony of Fuller and Williams was true, and does not establish any discriminatory practice. Apparently, the principal portion of Pralat/Showerman's testimony was that when she was being insistent upon getting an application, Williams allegedly told her: "Yeah. I know who you are." Even if I were to credit Showerman over Williams, which I do not, that statement is subject to numerous interpretations. It is just as reasonable to conclude that it meant: "Oh, it's you again," as it is to conclude: "You must be one of the pickets," and I find no evidence of a discriminatory intent from this conversation.

Pralat testified that he was shown Respondent's newspaper ad on January 22 and called the telephone number, left his name and the Union's telephone number, and "asked if they were going to hire any of those people to work in the Owego plant." He testified further that he called Respondent's office at the facility on January 27, identified himself and said that he would like an application for a job. Williams said that he couldn't do that, that he would have to ask Fuller to call him back, but he never did. Williams and Fuller testified that they were not at the facility on January 27, and Williams testified that he knows Leo Pralat and did not receive any calls from him. I credit the testimony of Williams and Fuller. Pralat testified that he called the newspaper and left his message on January 22; yet 2 days earlier all the messages were received by Respondent's main office and transferred to Fuller on January 21. That could account for the lack of response to his message. In addition, I credit the testimony of Fuller and Williams that they were not present at the office at the facility on January 27, and therefore could not have received Pralat's alleged call on that day. Finally, Pralat testified that he was earning \$9.81 while employed by ISS at the facility, but was not certain what salary Respondent was offering. This testimony makes me question his overall credibility. Pralat was a union steward and committee chairman and saw Respondent's newspaper ad. The \$5.50 hourly wage was so much less than the ISS employees had been receiving that I find it difficult to believe that Pralat did not remember this figure. Rather, I find it more likely that Pralat testified in this manner in order to avoid being asked if he would have accepted employment with Respondent at this rate. Regardless, I find no violation, or discriminatory intent, from his testimony.

Shearer/LoParco and Wales, while credible witnesses, could not identify whom they spoke to and, even if they had, it would not have established any discriminatory intent on the part of Respondent. Short testified that he spoke to "Dan or Dave" on about February 1, said that he had worked for ISS at the facility, and asked for an application. He was told that they were full and not hiring, which was true. Williams testified that he does not remember receiving a call from Short, but when people called during that period, he told them that they had a full staff, but would be happy to take their name and telephone number and call them back when an opening occurred. As stated above, I found Williams to be a credible and believable witness and although Short was also a credible witness, as it is necessary to make a credibility finding, I credit Williams. The strongest testimony for the General Counsel was Ingraham's testimony that when she called Respondent's office at the facility between January 23 and 27, Williams answered the phone and identified himself. When she told him that she had 16 years' experience working at the facility, he said that they weren't hiring anyone who had previously worked there. Wil-

iams testified that he does not remember receiving any call from Ingraham during this period, nor did he receive any calls from individuals identifying themselves as former ISS employees at the facility. In addition, he never told any caller that Respondent would not consider hiring anyone who had previously been employed at the facility. Although Ingraham was an apparently credible witness, as I must make a credibility determination herein, I credit Williams. I have already credited his and Fuller's testimony that they were not present in the office at the facility during the week of January 23, when Ingraham testified that she made the telephone call. In addition, I find it highly unlikely that Williams, who has been employed in the industry for 8 years and was aware that the former employees were picketing the facility, would make the obvious statement attributed to him by Ingraham. I therefore credit him and find no violation or evidence of animus herein.

Finally, there is the matter of the employment applications that were supposed to have been left with the employment service, but never were. Although this issue is not crucial to the ultimate determination herein, it presents a credibility determination that I believe illustrates an important aspect of this case. Fuller testified that on January 30 or 31 he received a call from Brewer asking: "What can you do with our people?" Fuller told him that Respondent did not have an office in the area where they could get employment applications and that its agreement with Loral did not allow them to interview applicants at the facility, but "to accommodate" the Union, Fuller would leave employment applications, solely for the former ISS employees at the facility, at the Employment office. When he told Brewer that the starting salary was \$5.50 an hour, Brewer responded: "How do you expect people to live on that?" Fuller did not respond, but testified that he told Brewer to call him if he wanted him to proceed with the arrangements with the Employment office. Brewer's testimony about this conversation is basically identical, except that he testified that Fuller said that he would bring the employment applications to the Employment office; there was no mention of Brewer getting back to him to approve of the arrangement. Fuller wrote to Brewer on March 1, restating their conversation a month earlier, and saying that the manager of the Employment office was willing to accommodate them, but that he had not yet brought the applications to the office because he had not heard from Brewer. The letter concluded: "Should you still require us to do so, please contact me." After receiving this letter, Brewer called Fuller and said that he knew that Fuller contacted the Employment office. When Fuller asked him what he was going to do, Brewer said that he could not make that decision; he would have to contact the Union's main office. By letter dated May 15, Fuller wrote to the Union with the names on the complaint's appendix, and asked the Union for the address and telephone numbers of the people on the list so that Respondent could offer them work at the facility; he received no response. Fuller repeated this request by letter dated May 31, but, again, there was no response. Brewer testified that he did not respond to these letters because he became aware of settlement discussions between the Union and counsel for Respondent.

As stated above, I found Fuller to be a credible and believable witness and would credit his testimony regarding this incident as well. However, even absent that finding, this evidence leads to an inescapable fact herein, that the Union and the employees were not interested in working for Respondent at the terms and conditions offered. Fuller and Brewer spoke about

the arrangement with the Employment office on about January 30. Within a day or two, Brewer and Pralat went to the Employment office and learned that Fuller had not brought the applications there, as he had allegedly promised, yet Brewer and the Union did nothing. Fuller wrote Brewer on March 1, repeating the offer and asking Brewer to act. Brewer did call him and said that he would have to contact the Union's main office. Again, the Union did nothing. When Fuller wrote to Brewer on May 15 and 31 asking for the telephone numbers and addresses of the alleged discriminatees herein, the Union never responded. If the Union were really interested in getting its people back to work at the facility, they would not have been so lax in responding to Respondent's offers.

As stated above, it appears to me that the principal factor separating the Respondent from the former ISS employees at the facility was the wage rate that Respondent was offering, \$5.50 an hour, substantially less than they had previously earned at the facility. However, an employer is free to establish the wage rates that it offers prospective employees upon commencing operations of a business, *W.Q.T., Inc.*, 254 NLRB 816 (1981); *Spruce Up Corp.*, 209 NLRB 194 (1974). Additionally, an employer need not offer employment to its predecessor's employees as long as it is not motivated by discriminatory reasons. In *Vantage Petroleum Corp.*, 247 NLRB 1492 (1980), cited by counsel for Respondent, the employer was awarded a license by the State to operate highway gasoline stations formerly operated by Exxon, whose employees were represented by a union, and Mobil, whose employees were unrepresented. The employer decided that it would pay the attendants according to its wage structure starting at minimum wage, and would hire its own employees, rather than those previously employed at the stations. In the absence of any unlawful motive, the Board dismissed the complaint stating: "In summary, we find that Respondent's actions did not result from union animus, but were the outcome of its personnel policy of individual hiring and of hiring service attendants at the minimum wage." The situation herein is similar except, in the instant case, Respondent's wage scale prevented the former employees from applying to work for Respondent.

Counsel for the General Counsel, in his brief, cites *Sierra Realty Corp.*, 317 NLRB 832 (1995), for the proposition that a refusal to hire because of a union wage scale bears "its own indicia of intent" and other antiunion animus need not be shown. However, there are a number of differences between *Sierra* and the instant matter, principally that, in *Sierra*, the union made four unconditional requests upon the employer to hire its members who had previously been employed at the

building and the employees also asked the employer about returning to work. In the instant matter, the Union never made such request, even when requested to do so by Respondent.

Counsel for the General Counsel, in his brief, also alleges that the picketing by the former ISS employees placed Respondent on notice that they had been terminated and were available for employment, and the fact that Loral told Respondent that it had no objection to hiring the former ISS employees, establishes that by not hiring them, Respondent has exhibited its union animus herein. However, prior to this time, Respondent had obtained responses from 233 job applicants, and had interviewed, and obtained job applications from, about 150 individuals. As the job only required about 40 employees, by the time Respondent became aware of the ISS employees' availability, they already had a surplus of applicants and reserves.

On the basis of all of the above, I find that there is insufficient evidence to support the allegation that Respondent was a successor to ISS at the facility or that Respondent refused to hire the former ISS employees at the facility in order to avoid a successorship obligation. I would also recommend dismissal of the allegation that Respondent told the former ISS employees that it would not consider them for hire because of their union or protected activities. I would therefore recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. The Respondent, Global Industrial Services, Inc., has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent did not violate Section 8(a)(1), (3), and (5) of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

Having found and concluded that Respondent has not engaged in the unfair labor practices alleged in the complaint herein, the complaint is dismissed in its entirety.

⁴ 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.