

**Custom Topsoil, Inc. and International Union of Operating Engineers, Local Union No. 17.** Case 3–CA–21008

May 20, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On November 17, 1998, Administrative Law Judge Martin J. Linsky issued the attached decision. The Charging Party Union filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting 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 record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions, as modified below, and to adopt the recommended Order.

The judge found that the Respondent did not violate Section 8(a)(3) and (1) of the Act by limiting to two the number of applicants who could apply at one time and by requiring applicants to complete a "Custom Topsoil" application at its office. We agree with the judge that the Respondent did not act unlawfully with respect to the challenged application procedures, but only for the following reasons.<sup>2</sup>

Under *Wright Line*, the General Counsel must first make a threshold evidentiary showing sufficient to support the inference that employer animus against union activity was "a motivating factor" in the employer's decision to take adverse action against employees who participated in the union activity. Upon such showing, the burden shifts to the employer to demonstrate that it would have taken the same action notwithstanding the union activity. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

Here, we find that on this record, the Respondent established that it would have imposed or enforced these rules even in the absence of union activity. With regard to the two-at-a-time rule, the Respondent established that

<sup>1</sup> There were no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by refusing to hire 10 of 16 union members who applied for available jobs in June 1997.

The judge here has referred to a judge's decision in a prior proceeding involving the Respondent. On November 16, 1998, the Board adopted that judge's findings that the Respondent committed 8(a)(3) violations similar to those in the instant case. See *Custom Topsoil*, 327 NLRB 121 (1998). The Board reversed the judge, however, and dismissed an 8(a)(1) threat allegation based on a statement made by the Respondent's bookkeeper, Michelle Podpura, to union member job applicants. We therefore disavow the judge's reliance in this case on the Podpura statement as evidence of the Respondent's animus. This does not affect the results here, particularly in the absence of exceptions to the judge's findings that the Respondent unlawfully refused to hire 10 union member job applicants.

<sup>2</sup> The judge failed to apply the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980).

it acted on the basis of a legitimate concern that its office was simply not large enough to accommodate large numbers of applicants attempting to file applications en masse. It was certainly not large enough to handle the group of 16 union members who arrived together on June 9, 1997, to file their applications. *The General Counsel does not dispute this fact.* His main argument instead is that the Respondent engaged in disparate treatment of union members by notifying only the Union and union members about the new rule. However, only the Union had attempted en masse applications. Nor is there anything sinister about the fact that the rule is aimed only at applicants. There is no evidence that any other visitors to the Respondent's office, such as vendors or customers, had ever attempted to enter or would reasonably be expected to enter the office in such numbers as to require regulation of their traffic. There also is no evidence that the Respondent had limited or would limit its rule only to union member job applicants. Finally, there is no evidence that allowing only two applicants into the office at one time had the effect, or would tend to have the effect, of preventing anyone from filing an application. Absent such evidence, we find that the rule was not unlawfully designed to restrict, and in fact did not restrict, the ability of union applicants to apply for work.

As for the in-office application procedures, the General Counsel does not dispute the general legitimacy of the Respondent's rule that applicants fill out and sign Custom Topsoil applications at its office. Rather, the General Counsel challenges the application of such a rule in this case as a "sham designed to cloak a discriminatory motive" for rejecting generic union job applications filed by a group of union members on December 11, 1997. He relies primarily on two points: (1) the Respondent accepted the generic union forms completed off-site by the June 9 union applicant group; and (2) the Respondent interviewed certain nonunion applicants without having them fill out Custom Topsoil applications at its office until their first day of work.

We find no merit in the exceptions. As to the first point, the Respondent's "acceptance" of the Union's generic group applications on June 9 appears to have been a singular departure from its usual practice.<sup>3</sup> Thus, as reflected in the prior unfair labor practice proceeding, the union applicants whom the Respondent refused to hire in June and December 1996 were required to fill out company applications in the office. These events corroborate the testimony of the Respondent's office manager, Diane Burger, that it has always been the Respondent's general practice to require in-office completion of a Custom Topsoil application.

<sup>3</sup> See *J. O. Mory, Inc.*, 326 NLRB 604 (1998) (a "single departure from normal, legitimate hiring policy" did not prove disparate treatment or pretext in the application of that policy to an applicant group of union organizers).

The General Counsel's second point fails as well to prove unlawful disparate treatment. The circumstances of applicants interviewed before they had to complete the Respondent's application form differed from those of the group of union member applicants who were advised on December 15 of the need to return to the Respondent's office to fill out the Custom Topsoil form. In sum, the evidence shows that the Respondent differentiated between "stranger" applicants and familiar applicants, not between union and nonunion applicants. Those applicants interviewed before completing an application form were already known by the Respondent to some degree through past employment or employment with a subcontractor of the Respondent. Respondent Official Michael Fronchowiak used the interview to reacquaint himself with the abilities of such applicants. Ultimately, however, all applicants had to fill out the same Custom Topsoil application at the Respondent's office before beginning work.

Based on the foregoing, we conclude that the Respondent has proved that it would have imposed or enforced its application rules even in the absence of the Union's activity. We therefore affirm the judge's conclusion that the Respondent's actions with respect to these rules did not violate Section 8(a)(3).

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Custom Topsoil, Inc., Cheektowaga and Buffalo, New York, its officers, agents, successors and assigns, shall take the action set forth in the Order.

*Doren Goldstone, Esq.*, for the General Counsel.

*Jeremy Cohen, Esq. (Bond, Schoeneck & King)*, of Buffalo, New York, for the Respondent.

*Michael E. Reilly, Esq. (Morris, Cantor, Barnes, Goodman & Furlong)*, of Cheektowaga, New York, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. The charge and amended charge in Case 3-CA-21008 were filed by the International Union of Operating Engineers, Local Union No. 17 (the Union) on December 8, 1997, and February 23, 1998, respectively, against Custom Topsoil, Inc. (Respondent).

On February 26, 1998, the National Labor Relations Board (the Board), by the Regional Director for Region 3, issued a complaint alleging that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), since June 9, 1997, when it refused to hire 16 union applicants for employment and when on June 16 and December 11, 1997, it change its hiring practices and policies to restrict the receipt of job applications.

Respondent filed an answer in which it denied that it violated the Act in any way.

A hearing was held before me in Buffalo, New York, on August 10 and 11, 1998.<sup>1</sup>

On the entire record in this case to include posthearing briefs submitted by the General Counsel, Respondent, and the Charging Party and on my observation of the demeanor of the witnesses I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

At all material times, Respondent, a corporation, with an office and place of business in Buffalo, New York, has been engaged in the construction industry as a site contractor.

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

##### II. THE LABOR ORGANIZATION INVOLVED

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 ALLEGED UNFAIR LABOR PRACTICES

###### *A. Background and Overview*

This is a so-called "salting" case. "Salting" is a practice where union members, under the direction or at the suggestion of a union organizer, seek employment with nonunion employers in order to get hired and to organize the nonunion employer's employees.

The Respondent in this case was targeted to be salted. This was not the first time. In June 1996, Respondent was the target of a "salting" campaign that led to unfair labor practice charges being filed and the issuance of a complaint. That complaint was tried before Judge Eleanor MacDonald on December 8 and 9, 1997. Judge MacDonald issued a decision on June 22, 1998, finding, inter alia, that Respondent violated Section 8(a)(1) and (3) of the Act when it refused to hire seven job applicants because they were members of the Union. Exceptions were filed and her decision (JD (NY)-14-98) is pending before the Board.

The case before me involves a "salting" effort in June 1997.

###### *B. Facts and Analysis of "Salting" Case*

Chris Hollfelder is a union organizer for Operating Engineers Local No. 17, the Charging Party, in this case. His objective with respect to Respondent was to help get union members hired by Respondent and then to organize Respondent's employees.

On June 9, 1997, Hollfelder gathered at the union hall with 16 union members. The 16 union members filled out applications for employment on forms provided by the Union.

At approximately 2 p.m. on the afternoon of June 9, 1997, Hollfelder and the 16 union applicants went to Respondent's office in Cheektowaga, New York, a community right next to Buffalo, New York. They did not have an appointment and Respondent did not require appointments.

As the 16 union applicants for employment, a number of whom were wearing union hats and jackets, approached Respondent's office, the person in charge at Respondent's office was Diane Burger, the daughter of Respondent's president, Henry Fronchowiak, and the sister of Michael Fronchowiak

<sup>1</sup> Respondent's motion to correct transcript, as modified by the Charging Party's motion to correct transcript, is granted.

who ran Respondent's day-to-day operations, called out to her subordinates to close and lock all the windows and doors.

The applicants for employment were refused entry to Respondent's offices.

Hollfelder knocked on the door eventually getting Diane Burger's attention and told her they were there to apply for jobs. Burger spoke on the phone with someone and told Hollfelder that the job applications they wanted to submit could be slipped through the mail slot. Hollfelder slipped the 16 applications for employment through the mail slot and he and the job applicants left the area. Not only were the applicants for employment denied entry into the office but Burger did not even open the door. Hollfelder was not an applicant for employment. It is under these highly unusual circumstances that Respondent received the 16 job applications on June 9, 1997. It was stipulated before me that the union applicants were not unruly on June 9, 1997. The police were not called. Although Diane Burger conceded at trial before me that she had overreacted when she saw the job applicants approach the offices of Respondent, I do not credit her testimony that she did not know they were union affiliated applicants. She knew they were because some wore union hats and jackets and her reaction manifests extraordinary union animus.

The applications of the 16 union members, 3 of whom, Lisa Smoczynski, James Smolinski, and William Frye, testified before me reflect that they were highly qualified in the skills needed by Respondent to conduct its business which is the operation of two concrete crushing plants as well as demolition and site development work.

The 16 applicants and their years of experience as reflected in their job applications are as follows:

1. Richard Benz (3 years' experience)
2. Steve Curtin (7-1/2 years' experience)
3. John J. Danahy (years of experience not listed on application)
4. James Erhardt (6 years' experience)
5. Steven A. Everett (14 years' experience)
6. William R. Frye (16 years' experience)
7. Mah Hogey (10 years' experience)
8. Paul Hopkins (8 years' experience)
9. Eric Maybee (7 years' experience)
10. James McGann (31 years' experience)
11. Ellen Preischel (years of experience not listed on application)
12. Michael Radetich (27 years' experience)
13. Nathaniel A. Raffner (4 years' experience)
14. Lisa Smoczynski (4 years' experience)
15. James A. Smolinski (35 years' experience)
16. Anthonio Ventresca (years of experience not listed on application)

All 16 applicants, to include the 3 who did not list on their applications the number of years of experience they had, listed the skills they possessed.

All 16 applications reflected that the applicant was a voluntary union organizer and would work for the wages that would customarily be paid a worker of their experience.

All 16 applicants noted on their applications that they would take any job offered.

It is clear that Respondent when it received the applications of the 16 applicants on June 9, 1997, knew from the applications that the applicants appeared imminently well qualified for

employment by Respondent and that they were union affiliated and, if hired, would attempt to organize Respondent's employees because each of the 16 applications contained the following language:

I am a voluntary union organizer. If hired, I will perform all duties to the best of my ability. I will also attempt, during nonwork time and in nonwork areas, to organize Operating Engineers into Local Union #17.

None of the 16 union applicants for employment were even called by Respondent for an interview or offered a job by Respondent. None, obviously, went to work for Respondent.

On June 16, 1997, Respondent sent to the Union a letter which provided as follows:

June 16, 1997

International Union of Operating Engineers  
Local 17  
150 North America Dr  
West Seneca, NY 14224

To Whom it may concern:

We are in receipt of the 'applications' that were dropped off at our office last week.

Please be advised that they will be reviewed and considered.

Should you wish to send people in the future, we ask that you limit the number of people to a maximum of two (2) at a time. We are unable to accommodate any more than that, and the large crowd that showed up last week created a perceived safety issue. We hope you will understand we must protect our office staff's safety.

Thank you.

The evidence at trial reflects that since June 9, 1997, Respondent has hired 17 persons to do work which the 16 union applicants appear qualified to do based on their applications. The 17 people hired by Respondent began work over a 13-month period between June 23, 1997, and July 13, 1998, in the following order:

- |                         |                    |
|-------------------------|--------------------|
| 1. John Cuttitta        | June 23, 1997      |
| 2. John Nelson          | August 5, 1997     |
| 3. Steve Swinarski      | August 18, 1997    |
| 4. Kevin Haag           | August 25, 1997    |
| 5. Glenn Ranno          | August 26, 1997    |
| 6. Michael Webster      | September 29, 1997 |
| 7. Norman Faulkner III  | October 13, 1997   |
| 8. Doris Patterson      | March 3, 1998      |
| 9. Walter Swinarski     | April 28, 1998     |
| 10. David Zielinsky     | April 28, 1998     |
| 11. Caroline Basker     | May 5, 1998        |
| 12. Robert Crawford     | May 13, 1998       |
| 13. Ray Schafer, Sr     | May 19, 1998       |
| 14. Douglas Hyman       | May 26, 1998       |
| 15. Richard Fronckowiak | May 26, 1998       |
| 16. Jay Pauley          | July 6, 1998       |
| 17. Lyle Emerson        | July 13, 1998      |

For some time, Respondent had a sign posted in its office which said that applications were not being accepted. The sign was inside Respondent's office but could not be seen by the union applicants who applied for jobs on June 9, 1997. However, Respondent's witness, Diane Burger, testified that 1 week

after the 16 union applicants applied for work on June 9, 1997, the sign was taken down. In other words the sign was removed on the same day that Respondent started accepting applications and on the same day it wrote to the union that the applications of the 16 union applicants would be “reviewed and considered.”

Respondent claims that prior to being salted in June 1996 its policy was to discard and throw away job applications if Respondent had no openings. Since being salted in June 1996, Respondent’s policy is to send applications it doesn’t need to its lawyer, Jeremy Cohen, Esq. Respondent keeps no file on hand of applications it receives and would then consider if it had a job opening.

However, I find credible the testimony of James A. Smolinski. Smolinski was 1 of the 16 union applicants for employment on June 9, 1997. After not hearing from Respondent for 1 month, Smolinski called Respondent’s office. Smolinski did not identify himself as a union member, but simply “called, identified myself; who I was and the person asked me my reason for calling and I said that I think I have an application there on file and the person said ‘we’re not hiring, we will call you back’ and I never heard from—again from Custom Topsoil and I have an answering machine.” (Tr. 50.)

Respondent is a family business and day-to-day operations and hiring are done by Michael Fronchowiak, the son of Respondent’s president and owner, Henry Fronchowiak.

Michael Fronchowiak testified that when he needs to hire someone he will ask his other employees to recommend people to him and that he also consults business associates and job superintendents for recommendations.

If an application is received at the office it is put in his inbox and he reviews it when he gets a chance. He spends most of his time in the field and not in the office. With particular reference to the 16 union applicants of June 9, 1997, he testified as follows:

Q. Were you aware that union applicants had applied for work on or around June 9, 1997?

A. Yes, I was.

Q. And, had you seen the applications which they gave to Diane Burger on that date?

A. Yes.

Q. And, were those applications that you—did you read those applications?

A. No.

Q. Did you read any of the applications?

A. I said I might have thumbed through the names or something, that’s about all.

Q. How long of a period did you spend reviewing applications submitted by the 16 applicants?

A. I don’t recall.

Q. Was a it something like you spent 30 minutes or you spent five minutes?

A. No more than five minutes.

Q. And, that’s for all 16 applications?

A. Yes.” [Tr. 242.]

Fronchowiak then sent the applications to his attorney. When asked later in his testimony if anyone’s application in the pile of union applications looked like they might be useful during the 1997 construction season he replied, “I didn’t really look at them.” (Tr. 243.)

However, the June 16, 1997 letter to the Union advised that the applications “will be reviewed and considered.” It is obvious by Burger’s actions on June 9, 1997, and Fronchowiak simply going through the motions that because of union animus Respondent had no intention of considering for hire or hiring any the union applicants. I should also note that the claimed safety threat of June 9, 1997, is utter and complete nonsense.

Respondent seems to think that if it sends applications to its attorney it is forbidden by law to consider those applications in filling openings. As Judge MacDonald noted in her decision:

[Michael] Fronchowiak would have me accept the statement that because his lawyer had the original applications he himself had no applications pending for the Union members when he was hiring new employees after June 13, 1996. This position is pure sophistry. Of course, Respondent is deemed to have applications in its possession when it has turned them over to its attorney. Had Fronchowiak been in good faith, he could have obtained the originals or copies of the applications by making one telephone call. [JD– (NY)–41–98 at p. 8.]

It would seem appropriate at this juncture to discuss the 17 people who were hired by Respondent after June 9, 1997.

Ray Schaffer Sr. worked only 1 day. He is an elderly gentleman (late 70s at the time) and was an old friend of Henry Fronchowiak, Respondent’s president, and was hired for old times’ sake.

Lyle Emerson was a former employee of Respondent and was hired as a foreman.

Doris Patterson was known to Respondent because she worked for one of Respondent’s subcontractors and Respondent was familiar with her skills and this was true for Kevin Haag as well.

John Cuttitta was hired on the recommendation of his father Anthony Cuttitta who worked for Respondent.

Robert Crawford was also a former employee of Respondent and Respondent was familiar with his skills.

Lastly, Richard Fronckowiak was a brother to Henry Fronckowiak and an uncle to Michael Fronckowiak and uncle to Diane Burger.

I find that the hiring of Ray Schaffer Sr., Lyle Emerson, Doris Patterson, Kevin Haag, John Cuttitta, Robert Crawford, and Richard Fronckowiak is not evidence of unlawful discriminatory hiring by Respondent because these hiring selections were made on a basis other than union or no union affiliation.

However that leaves 10 jobs that were filled by new hires where the union applicants were refused hire, in my opinion, because of their union affiliation.

The 16 union applicants were well qualified and experienced as reflected in their applications, which are in evidence whereas many of those actually hired by Respondent are decidedly less qualified, e.g., Steve Swinarski had what Michael Fronchowiak referred to as “minimal” experience (Tr. 258) and I believe Fronckowiak is correct because Swinarski listed his work experience as one of detailing cars. Norman Faulkner III had no experience in construction, and David Zielinski’s experience was in cleaning floors.

Respondent, in its defense, claims that it did offer employment to Joel Nuwer in March 1998 and that Nuwer was a union member but Nuwer turned down the job. There is no evidence to support Michael Fronchowiak’s statement that he offered Nuwer a job, e.g., no application for Nuwer and Nuwer did not testify. But even if Nuwer was offered a job, it does not neces-

sarily follow that Respondent did not discriminate against the 16 union applicants who filed applications on June 9, 1997, because Nuwer, unlike the 16 union applicants, never identified himself as a voluntary union organizer.

The Board has held the elements of a discriminatory refusal-to-hire case include the employment application by each alleged discriminatee, the refusal to hire each, or showing that each was or might be expected to be a union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus.

Considering all the evidence above recited and taking into consideration the Board's landmark decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and Board decisions in other so called "salting" cases, e.g., *M. J. Mechanical Services*, 324 NLRB 812 (1997); *Walz Masonry*, 323 NLRB 1258 (1997); and *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), I find that Respondent violated Section 8(a)(1) and (3) of the Act when it failed and refused to hire the union applicants who filed applications with Respondent on June 9, 1997.

Needless to say if Judge MacDonald's decision is affirmed by the Board and her findings of union animus left undisturbed, this is further evidence to support my finding of an 8(a)(1) and (3) violation. In particular, Judge MacDonald found that Respondent's agent, bookkeeper Michelle Podpora, on June 13, 1996, told union applicants that Respondent was "nonunion" and that applicants' union membership would affect their chances of being hired. Podpora's statements were captured on tape and Judge MacDonald discredited Podpora's denial that she said union membership would affect the chance of being hired. Podpora testified before Judge MacDonald in December 1997 some 6 months after the June 1997 salting effort which is the subject matter of this case.

#### C. Change in Hiring Practices in June and December 1997

In its June 16, 1997 letter to the Union, Respondent wrote, "[S]hould you wish to send people in the future, we ask that you limit the number of people to a maximum of two (2) at a time." Judge MacDonald found in her case that the reception area at Respondent's office had a table that could accommodate three people. Even one of the General Counsel's witnesses in the case before me, Lisa Smoczynski, testified that the office was small.

I do not find that the imposition of this rule of "two applicants at a time" was unlawful even if promulgated with anti-union motivation because it is a reasonable rule considering how small the reception area is and the rule does not limit the number of applicants who can apply at one time but only that no more than two at a time can be in the office. This is how the rule was understood by the Union and understood and enforced by Respondent. In December 1997 union applicants for employment entered Respondent's office two at a time to apply and more than two a day could and did apply.

In December 1997 on one of the days that Judge MacDonald was hearing her case involving Respondent, union affiliated applicants for employment went to Respondent's office to apply for a job. Thereafter, Respondent in a letter dated December 15, 1997, to the union applicants advised that applicants for employment must "personally complete a Custom Topsoil, Inc. application at our office" and that Respondent's "office is

available for that purpose from 9:00 am to 12:00 noon and from 1:00 p.m. to 3:30 p.m., Monday through Friday."

It is alleged that requiring applicants to complete one of Respondent's application at Respondent's office was a new rule unlawfully designed to make it more difficult for union affiliated applicants for employment to apply for work with Respondent.

Respondent claims that this was not a new rule but was always their rule which may or may not have always been enforced. Further, Respondent has the rule so that it will know if the applicant can read and write and that the signature on the application form is actually that of the applicant. In addition, Respondent claims its application form asks for pertinent information that may not be on a resume or generic application, e.g., that the applicant is 18 years of age or older, the applicant's social security number, educational background, and references.

Even if the enforcement of this old rule or implementation of a new rule was motivated by union animus, I do not find it unlawful because Respondent's office is conveniently located near Buffalo and not in a remote area and my own experience with Board cases discloses that many employers have requirements that applications be filled out in person on the employer's application form. These rules make sense and in the context of this case are not unreasonable and, therefore, not unlawful.

#### REMEDY

Between June 9, 1997, and the hearing before me in August 1998, Respondent hired 17 people into positions for which the 16 union applicants appear imminently well qualified. Seven of the 17 people hired were hired for reasons that had nothing to do with the union pro or con. Ten positions, therefore, were available to be filled by the 16 union applicants. I will leave to the compliance stage of this proceeding the determination as to which of the 16 union applicants is offered 1 of the 10 jobs.

Backpay, of course, should be paid and Respondent ordered to post a notice and cease and desist from its unlawful behavior.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) and (3) of the Act when it failed to hire 10 of 16 union applicants for employment.
4. This unfair labor practice is an unfair labor practice having an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

#### ORDER

The Respondent, Custom Topsoil, Inc., Buffalo and Cheektowaga, New York, its officers, agents, successors, and assigns, shall

<sup>2</sup> 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.

1. Cease and desist from

(a) Failing and refusing to hire applicants for employment because they are members of a union.

(b) 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) Within 14 days from the date of this Order, offer 10 of the 16 discriminatees the jobs which they were denied or, if those jobs no longer exist, to substantially equivalent positions at new jobsites, if necessary, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay to be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) 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, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facilities in Buffalo and Cheektowaga, New York, and all other places where notices customarily are posted, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 3, 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 the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own ex-

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

pense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 9, 1997.

(d) 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.

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 fail and refuse to hire applicants for employment because they are members of a union.

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

WE WILL within 14 days from the date of this Order, offer immediate employment to 10 of the 16 following applicants for employment, i.e., Richard Benz, Steve Curtin, John T. Danahy, James Erhardt, Steven A. Everett, William R. Frye, Mah Hoge, Paul Hopkins, Eric Maybee, James McGann, Elle Preischel, Michael Radetich, Nathaniel Raffner, Lisa Smoczynski, James A. Smolinski, and Antonio Ventresca WE WILL make them whole for any loss of earnings and other benefits resulting from our discrimination, less any net interim earnings, plus interest.

CUSTOM TOPSOIL, INC.