

Pan American Electric, Inc. and International Brotherhood of Electrical Workers, Local Union No. 446, AFL-CIO and Local Union No. 480, AFL-CIO. Case 26-CA-16607 (formerly Cases 15-CA-13057 and 15-CA-13060).

April 16, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX
AND HURTGEN

On April 4, 1996, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed answering briefs.¹

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ as further explained below and to adopt the recommended Order as modified.⁴

1. The judge found that the Respondent engaged in multiple violations of Section 8(a)(1) of the Act. We agree with the judge as amplified below.

The judge found unlawful interrogation. He credited the testimony of Wayne Divine and James Hill that Project Superintendent Danny Hendrix asked them whether they were union men. The question was asked when they went to the Levi-Strauss project on September 26, 1994,⁵ in search of work. He also credited the testimony of Ronald Beaudoin that Job Superintendent Ted Stanton asked him whether he was a union member. This question was asked during an October 4 employment interview at the North Monroe Hospital project. Questions concerning union preference, in the context of job applications, are inherently coercive. *Gilberton Coal Co.*, 291 NLRB 344, 348 (1988), and cases there cited. Accord-

ingly, the Respondent's questioning of Divine, Hill, and Beaudoin violated Section 8(a)(1) of the Act.

The judge also found that the Respondent engaged in multiple violations of Section 8(a)(1) at the Levi-Strauss project. He credited the testimony of employee Johnnie Smith both generally as "a truthful witness who testified in a forthright manner," and also specifically with respect to statements made by Project Superintendent Hendrix. Smith testified that on September 22, Hendrix told him that he had "some guys"⁶ wearing union caps and T-shirts "come out on the job and try to apply. And . . . he didn't give them an application. And he had sent them away . . . [because] . . . [t]hey should have knew [sic] he wasn't going to hire them." Smith further testified that Hendrix said at this time that "he had learned to keep to strict hiring practices to keep from hiring union applicants."

Smith also testified about events on September 26 when Hill and Divine came to the Levi-Strauss project seeking jobs. Smith stated that Hendrix told Hill and Divine "he had had union people coming out trying to make applications" and "would they [Hill and Divine] mind backdating their applications." The judge credited the testimony of Hill and Divine over that of Hendrix with respect to this incident. Hill and Divine both testified that Hendrix told them they would have to backdate their applications because he "told [union guys] that I am not taking any more applications."

Finally, Smith testified about events on January 10, 1995, when Union members came to the jobsite to apply for work with another contractor on the job site. Smith stated that Trent King and Robert Taylor told Hendrix "that they [sic] were union guys on the job" and that Hendrix "rummaged through his desk and got a copy of a [Not Hiring] sign" and took it to the job trailer "and posted them in the window and on the door."⁷

When Hendrix told Smith that (1) he would not take applications from union applicants, and (2) he was trained in how to screen out union applicants; and when he asked Divine and Hill to backdate their applications because he had turned union applicants away, Hendrix clearly indicated that the Respondent would not hire any person who engaged in union activities. Moreover, Hendrix conveyed the same message when he posted "Not Hiring" notices in response to union adherents seeking employment with another contractor at the jobsite. Thus,

⁶ Hendrix was referring to Sammy Yelverton and Carl Roberts.

⁷ We find that the judge implicitly credited Smith's testimony based on his finding Hendrix' January 10, 1995, posting unlawful and his general crediting of Smith. In addition, Divine and Sammy Yelverton corroborated some of Smith's testimony. They stated that seven or eight union members came to the jobsite wearing union buttons and applied for work with Computer-Aided Systems, Incorporated; that this took about 30 or 40 minutes; that the group then walked over to the Respondent's job trailer; and that there the group observed two signs stating "Not accepting applications at this time" in the window and on the door.

¹ The General Counsel discussed the Respondent's violations at the North Monroe Hospital project in Monroe, Louisiana, in one brief, and at the Levi-Strauss project in Gluckstadt, Mississippi, in the other brief.

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

³ The judge denied the Respondent's motion for production of all exculpatory matters citing the Respondent's lack of entitlement under the Act. The Respondent excepts, citing *Brady v. Maryland*, 373 U.S. 83 (1963). We find no merit in the Respondent's exception. The Board has long held that the *Brady* rule, which applies to criminal proceedings, does not apply to Board proceedings. See, e.g., *Multimatic Products, Inc.*, 288 NLRB 1279, 1342-1343 (1988), and cases cited there.

⁴ We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

⁵ All dates are in 1994 unless otherwise indicated.

site. Thus, Hendrix both stated that efforts to secure union representation would be futile and altered the Respondent's hiring practices with a manifest antiunion purpose. Accordingly, Hendrix' statements and conduct violated Section 8(a)(1) of the Act.

The judge also found that the Respondent violated Section 8(a)(1) of the Act by posting a "Not Hiring" sign on the job trailer on October 6⁸ at the North Monroe Hospital project. We agree with the judge. The judge specifically credited the testimony of Lonnie Shows and John Hopkins over that of Job Superintendent Ted Stanton about their visit to the job site on October 5. Shows and Hopkins asked Stanton to sign the Union's collective-bargaining agreement and inquired about employment. Stanton declined to sign an agreement and told Shows and Hopkins to return between 7 and 8 the following morning. However, when they complied with Stanton's instructions on October 6, Shows and Hopkins found "Not Hiring" signs on the job trailer. The Respondent's posting of these "Not Hiring" notices in response to Union activity violated the Act.⁹

2. The alleged discriminatees in this case sought work with the Respondent, a nonunion contractor, in order to organize other employees on the job. They did so pursuant to a "salting" program devised by their Union, the International Brotherhood of Electrical Workers and its Locals 480 and 446. The judge found these applicants to be statutory employees irrespective of their status as paid union officials, pursuant to *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995). We agree.¹⁰ The judge

⁸ The judge inadvertently designated October 5 rather than October 6 as the posting date in the "North Monroe Hospital Project Analysis" portion of his decision. However, the judge designated the correct date elsewhere in his decision.

⁹ The judge inadvertently omitted this specific violation of Sec. 8(a)(1) from his "Conclusions of Law" and Order. We shall include it in the Order.

¹⁰ We similarly agree with the judge's rejection of the Respondent's claim that the alleged discriminatees were engaged in an unlawful conspiracy in restraint of trade. The Respondent's reliance on the Union's various organizational and "salting" manuals is misplaced. These show only the Union's desire to organize nonunion employers and to target what it perceives as unfair labor practices and wage scales and employment practices that undermine its standards. The Respondent's reliance on the testimony of Wayne Devine, the Union's assistant business manager, that he targeted the Respondent for organization after he heard of the Respondent's successful Levi-Strauss project bid is similarly misplaced. Even if Devine heard this from an employer with whom the Union maintained a collective-bargaining agreement, no unlawful conspiracy in restraint of trade is made out. The Respondent has neither adduced nor proffered evidence showing a conspiracy between the Union and the Respondent's competitors, outside the context of a collective-bargaining agreement, to restrain competition in the relevant business market "in ways that would not follow from elimination of competition over wages and working conditions." *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616, 635 (1975). Neither has it adduced or proffered evidence of an agreement with nonlabor groups of the kind at issued in *United Mine Workers v. Pennington*, 381 U.S. 657, 665-666 (1975). With respect to the Respondent's contention that the Union sought to monopolize the manpower pool, see generally *Electrical Workers IBEW Local 46 (Puget Sound NECA)*, 303 NLRB

also found that the Respondent engaged in multiple violations of Section 8(a)(3) and (1) of the Act. We agree with the judge as amplified below.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act at the Levi-Strauss project when it refused to take applications from, and to hire, Sammy Yelverton, Carl Roberts, Wayne Divine, Scott Phillips, James Hill, and Jim Bounds.¹¹ The Respondent refused to take applications from Yelverton and Roberts on September 22, from Divine and Hill on September 26, and from Bounds and Phillips on September 28.¹²

The General Counsel established a prima facie case that hostility to union activity or affiliation was a motivating factor in an employer's failure to hire. In this regard, he proved animus, union activity or affiliation, employer knowledge, timing and the availability of jobs for the applicants.¹³

On September 22, when Yelverton and Roberts came to the site openly wearing union insignia, Superintendent Hendrix turned them away and told employee Johnnie Smith that he would not take applications from union applicants and was trained in how to screen out union applicants. On September 26, Hendrix asked Divine and Hill about their union activities when they inquired about work and told them that they would have to backdate their applications because he had turned away union men who had wanted to file applications. Hendrix once again told Smith about his exploits in thwarting applications by union adherents. Hendrix' statements to Smith, Hill, and Divine and interrogations of Hill, and Divine violated the Act, as discussed above, and establish antiunion animus.

Furthermore, the Respondent knew of the union affiliation of the six alleged discriminatees. Yelverton, Roberts, Phillips, and Bounds openly wore union insignia when they applied for jobs with the Respondent. Divine and Hill were without similar apparel in the same situation. Nevertheless, the judge found that electrician Robert Taylor told Superintendent Hendrix that Divine and Hill were "union men" shortly before Hendrix told Divine and Hill that he was not now taking applications but would be hiring in December.

48 (1991) (union could lawfully protect labor supply for its hiring hall by preventing employers with which it contracted from supporting rival referral services).

¹¹ The complaint alleges that the Respondent refused to hire the named discriminatees. It does not also allege that the Respondent refused to take applications from them. However, the latter allegation is subsumed by the former and was fully litigated at the hearing.

¹² The judge found that the discriminatees had more than 3 years of industrial experience as electricians and would have accepted work as electricians had it been offered. They all so testified except Jim Bounds, who did not appear as a witness. Wayne Divine and Sammy Yelverton held union office; the other four discriminatees were unemployed union members at the critical time.

¹³ *GM Electrics*, 323 NLRB 125, 128 (1997), citing *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Finally, the Respondent refused to hire Yelverton, Roberts, Phillips, Bounds, Divine, and Hill when the Respondent had jobs for applicants. The Respondent claims that it ceased taking applications on September 20 and told the alleged discriminatees to return in December when the Respondent would be hiring. However, the evidence does not support this claim. The judge credited employee Johnnie Smith's testimony. Smith testified that the Respondent hired him on September 12, and at that time the Respondent had three electricians—Robert Taylor, Trent King, and Smith—and two electrician's helpers—Kenneth Breisch and Samson McGee.¹⁴ Smith also testified that Hendrix told him “around September 20” that Hendrix “would need help in a week or so . . . [and was] going to build up to . . . ten or twelve electricians and six helpers.”¹⁵ Superintendent Danny Hendrix testified that he hired 25 employees at the Levi-Strauss project. The Respondent's payroll records and employee applications show that in addition to the employees on the site in September, the Respondent hired one electrician—Gary Hamilton—in October and two electricians in November—Wayne Smith and Gary Cauthen.¹⁶ We therefore find that the Respondent planned to hire approximately seven to nine electricians and four electrician's helpers at the time Hendrix refused to take applications from, and refused to hire, the six alleged discriminatees. Moreover, the Respondent actually hired at least three electricians during the period that the Respondent claimed that it was not hiring.

Accordingly, we find, as did the judge, that the General Counsel established a prima facie case. Moreover, the judge also correctly found that the Respondent failed to show that it would not have hired the alleged discriminatees even in the absence of union animus.¹⁷ The judge specifically discredited Superintendent Hendrix' explanation for his asserted cessation of hiring on September 20 and the alleged hiring hiatus until December. Moreover, as discussed above, Hendrix hired at least three electricians during this period. Accordingly, we find that the Respondent violated

¹⁴ The payroll records and employee applications at the Levi-Strauss project corroborate Smith's testimony. They also show that the Respondent hired Herschell Lawless and Willie Cross as an electrician and electrician's helper respectively on September 8.

¹⁵ Smith testified that Hendrix also anticipated needing more employees than those hired directly—“if he needed any additional people on a temporary basis, he would get them from . . . Labor Finders, Incorporated.”

¹⁶ The documents show that the Respondent also hired Donald Edwards as an electrician either on November 28 (“Wage Authorization and Status Sheet”) or December 5 (Payroll Records). Edwards' application is dated October 28. The documents also show that Gary Hamilton applied for employment on October 26, and was hired on October 31, Wayne Smith applied on November 1 and was hired on November 7, and Gary Cauthen applied on November 9, and was hired on November 28.

¹⁷ *Wright Line*, supra.

Section 8(a)(3) and (1) of the Act when it refused to take applications from and to hire Sammy Yelverton, Carl Roberts, Wayne Divine, Scott Phillips, James Hill, and Jim Bounds at the Respondent's Levi-Strauss project.¹⁸

The judge also found that the Respondent violated Section 8(a)(3) and (1) of the Act at the Levi-Strauss project when it refused to offer overtime to Johnnie Smith on November 18, 1994. The Respondent raised Section 10(b)¹⁹ of the Act as a defense when the General Counsel amended the complaint at trial to include this allegation. The judge rejected this defense. He found that the overtime allegation was closely related to other timely filed charge allegations and had occurred within 6 months of the filing of such charges.²⁰ The judge recounted Smith's testimony that on November 17 he revealed his union membership to Hendrix and on November 18 Hendrix denied Smith the customary overtime which was performed by all the other employees.

The Respondent, in conclusionary exceptions, contends that the overtime incident occurred outside the Section 10(b) period and that Smith is not a statutory employee.

We find no merit to the Respondent's exceptions. First, the Union filed the original charge concerning the Levi-Strauss project on January 25, 1995. It alleged that the Respondent discriminatorily refused to hire the six discriminatees on September 22, 26, and 28, 1994. Smith's November 18, 1994, loss of overtime occurred within 6 months of the filing of the charge on January 25, 1995. Moreover, the gravamen of the allegations is identical—that the Respondent discriminated, both in hiring and in assigning overtime. These violations are “of the same class . . . and . . . continuations in pursuance of the same objectives.”²¹ Both allege that Hendrix thwarted union activities on the jobsite in violation of Section 8(a)(3) by discrimination in terms and conditions of employment.

As to the merits, the judge implicitly credited Smith's testimony that he told Hendrix about his Union membership on November 17, and that Hendrix withheld overtime from him on November 18. As found above, the Respondent demonstrated its antiunion animus both before and after Hendrix discriminated against Smith on

¹⁸ The remedy is discussed below in sec. 3.

¹⁹ This section provides in pertinent part “That no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board.”

²⁰ The judge cited *Redd-I, Inc.*, 290 NLRB 1115 (1988) and *BRC Injected Rubber Products*, 311 NLRB 66, 71 fn. 16, 72 fn. 17 (1993).

²¹ *Redd-I, Inc.*, supra at 1116, citing *National Licorice Co. v. NLRB*, 309 U.S. 350, 369 (1940).

November 18. Accordingly, the General Counsel established a clear prima facie case that the Respondent violated Section 8(a)(3). The Respondent failed to show that it would have denied Smith his customary overtime in the absence of union animus.

As to employee status, the Respondent merely asserts that Smith is not a statutory employee because he is a “salt.” As we have discussed above, the Respondent’s assertion is erroneous in light of the Supreme Court’s decision in *Town & Country Electric*, supra. Therefore, the General Counsel’s case stands un rebutted.²²

Finally, the judge found that the Respondent violated Section 8(a)(3) and (1) of the Act at the North Monroe Hospital project when it refused to permit Lonnie Shows, John Hopkins, and Curtis Bullock to complete employment applications and refused to hire Shows, Hopkins, Bullock, and Ronald Williams.²³

We shall again apply *Wright Line*, supra. Shows, Hopkins, and Williams visited the North Monroe Hospital project on October 5. Shows asked Job Superintendent Ted Stanton for an application form which he planned to complete later. Hopkins did not specifically ask for a form. Williams completed the Respondent’s application form.²⁴ Stanton told Shows and Hopkins to return the following morning between 7 and 8 and at that time Stanton would take applications. When Shows and Hopkins returned at the designated time, Stanton had posted “Not Hiring” signs. Williams telephoned Stanton a few days later to inquire about his application, and Stanton told him that he had not made a decision and “was still taking more applications.”²⁵ Bullock visited the jobsite on October 7. Bullock saw the “Not Hiring” signs but asked an office representative for an application form and whether the Respondent was hiring. The office representative told Bullock that the Respondent was not hiring and declined to give him an application form.²⁶

²² *Wright Line*, supra.

²³ The complaint alleges that the Respondent “refused to give applications for employment to” named individuals and that the Respondent refused to hire named individuals. Both issues were fully litigated at the hearing.

²⁴ Williams’ form has October 5 on it in two places. In addition, Williams completed the “Wage Authorization and Status Sheet” and dated that October 5.

²⁵ The record indicates that Williams’ telephone conversation with Stanton occurred on October 10. We note the judge inadvertently failed to specifically credit Williams concerning this follow-up phone call with Stanton. The judge cited this testimony in his decision and impliedly credited it in making his findings concerning the Respondent’s discriminatory refusal to hire Williams. The judge also consistently credited other witnesses, e.g., Beaudoin, Shows, and Hopkins, over Stanton. In these circumstances, we find Stanton was still taking applications several days after October 4.

²⁶ The Respondent does not except to the judge’s finding that the four alleged discriminatees were qualified electricians. However, the Respondent excepts to Lonnie Shows’ status as a bona fide applicant because he was a full-time business manager of Local 446 and testified about his many responsibilities and limited time. Nevertheless, Shows also testified that he was prepared to go to work for the Respondent if offered a position. He testified that he would have juggled his union

The record establishes the Respondent’s antiunion animus. As discussed above, the Respondent violated Section 8(a)(1) of the Act on two occasions at the North Monroe Hospital project. On October 4, Job Superintendent Ted Stanton asked Ronald Beaudoin whether he was a union member during his employment interview. On October 6, Stanton posted “Not Hiring” signs on the job trailer.

Furthermore, the Respondent knew of the union affiliation of three of the alleged discriminatees. Shows, Hopkins, and Williams visited the jobsite together. Shows and Hopkins specifically asked Stanton to sign their union contract, thereby announcing their union affiliation. Moreover, the judge found, and we agree, that Stanton perceived Williams as a union supporter by reason of his acquaintance with Shows and Hopkins and by reason of Williams’ admission to Stanton that he was a former union member.²⁷ Bullock sought employment with the Respondent after the Respondent violated the Act by posting a no-hiring sign specifically to exclude applicants with union affiliation. We recognize that the Respondent was unaware of Bullock’s union affiliation. However, inasmuch as Respondent’s “no hiring” sign was unlawfully motivated, and Bullock was refused hire as a result thereof, we conclude that Bullock was a victim of an unlawful policy and was therefore himself a discriminatee. Thus, in the circumstances of this case, the Respondent has no defense to the allegation of discrimination against Bullock.²⁸

Finally, the Respondent refused to hire Shows, Hopkins, Williams, and Bullock when the Respondent had jobs for applicants. The record shows that the Respondent accepted 18 applications and hired 3 electricians and 4 electrician’s helpers at the critical time. As to electricians—Tommy Brown applied on October 3 and was hired on October 10; Ronald Beaudoin applied on October 4 and was hired on October 12; Jason Freeland applied on October 4 and was hired on October 26. As to electrician’s helpers—Jimmy Burns applied on October 4 and was hired on October 12; Timothy Rogers applied on October 3 and was hired on November 22; Luther Layton applied on October 4 and was hired on October 10; and Jill Stanton applied on October 10 and was hired October 10.²⁹ As noted, the record also shows that the Respon-

responsibilities working on those largely at night and with the assistance of another union member. Under these circumstances, we find that Shows was a bona fide applicant for employment.

²⁷ We have previously found employers to be aware of discriminatees’ union sympathies in circumstances where the discriminatees were brothers of a known union activist or merely consorted with known union activists. See *T.M.I.*, 306 NLRB 499 (1992), and *Yellow Freight Systems*, 313 NLRB 309 (1993), respectively.

²⁸ *Economy Foods*, 294 NLRB 660, 662–663 (1989), enfd. sub nom. *NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 510 (4th Cir. 1991); *CBF, Inc.*, 314 NLRB 1064, 1075–1076 (1996).

²⁹ Jill Stanton’s “Applicant’s Statement” is dated “10/10/94.” The “Date of Application” on the first page of her “Application For Employment” is illegible as to the specific day. The “Wage Authorization

dent accepted eleven applications from individuals who were never hired:—one is dated September 30; one October 2; four October 3, and five October 5. Thus there were job openings, plans to hire, and hiring during the period in question.

Accordingly, we find, like the judge, that the General Counsel established the elements of a prima facie case. Moreover, the judge also correctly found that the Respondent failed to show that it would not have hired the alleged discriminatees in the absence of union animus.³⁰ The Respondent contends that it hired in order of application with an October 4 cutoff date for applications. Yet Job Superintendent Ted Stanton testified that he complied with the Respondent's "Employment Application Guidelines"³¹ that were in place at the North Monroe Hospital project with emphasis on checking the experience of applicants and their work history. Neither the extensive and detailed "Guidelines" nor Stanton's testimony indicate any primacy for application sequence.

and Status Sheet" is twice dated "10/10/94." The Respondent failed to provide Jill Stanton's payroll records. The Respondent provided payroll information for three employees only: Gerald R. Smith, John Scott Stephens, and Jimmy D. Burns.

³⁰ *Wright Line*, supra.

³¹ The "Employment Application Guidelines" provide:

1. One person should be responsible for handing out applications to applicants and reviewing applications.
2. Accept applications only when there are job openings on the project and only for those positions for which there are openings. Prospective applicants should be told:
 - (a) We are accepting applications for all positions at this time; or
 - (b) We are only accepting applications for the position(s) of _____ at this time; or
 - (c) We are not accepting applications at this time.
3. Prospective applicants must apply in person and fill out their own application form.
4. Application forms submitted by someone other than the applicant will not be accepted.
5. Application forms submitted by mail or facsimile will not be accepted. Application forms received in this manner should be returned by Certified Mail—Return Receipt Requested with a statement that application must be made in person.
6. Establish a set time when prospective applicants may apply for employment, e.g., 6:00—7:00 a.m. Monday mornings. Do not permit anyone to apply at any other time.
7. Applicants should be told that after 45 days their application will be considered stale and if they are still interested in a job after 45 days, they should reapply. (This hiring guideline is properly included on the application form).
8. Employees who have previously worked for Pan American Electric, Inc. and have a good employment record should be given first preference in hiring.
9. [sic]
10. Give preference to applicants who have previously worked for a wage comparable to the wage which Pan American Electric, Inc. will pay.
11. Applications should be rejected as a matter of Company policy if they are not completely filled out.
12. Explain Company rules to the applicant. If he expresses any dissatisfaction with these rules, he should not be considered further for employment.
13. You are not required to tell an applicant the reason he was not hired.

Moreover, the Respondent both failed to hire employees who applied before some of those who were hired, and hired at least one employee (Jill Stanton) who applied after the four discriminatees sought employment. Significantly, several days after October 4, Stanton told Williams that he was still accepting applications for the North Monroe Hospital project. These facts do not reflect hiring in sequence until October 4.

Therefore we find that the Respondent violated Section 8(a)(3) and (1) of the Act at the North Monroe Hospital project when it refused to permit Shows, Hopkins, and Bullock to complete employment applications and refused to hire Shows, Hopkins, Bullock, and Williams.³²

3. The Respondent argues that the judge erred in concluding that the Respondent discriminatorily failed to hire the 10 discriminatees and that at most it merely failed to consider the discriminatees for hire. It asserts that there is little or no evidence that it would have hired these individuals if it had considered them. We disagree. As discussed above, the complaints alleged specific violations by discriminatory failure to hire at both the Levi-Strauss project and the North Monroe Hospital project and the violations were fully litigated at the hearing. As also discussed above, that full litigation resulted in a record that amply establishes the violations.

Nevertheless, the current record does not fully support the judge's remedy. At the Levi-Strauss project, the record shows that the Respondent hired three electricians in the period during which it discriminatorily refused to hire Sammy Yelverton, Carl Roberts, Wayne Divine, Scott Phillips, James Hill, and Jim Bounds. At the North Monroe Hospital project, the record shows that the Respondent hired three electricians and four electrician's helpers in the period during which it discriminatorily refused to hire Lonnie Shows, John Hopkins, Curtis Bullock, and Ronald Williams.

In *BE&K Construction Co.*, 321 NLRB 561 (1996),³³ the Board discussed the appropriate remedy in cases where the actual number of job openings is fewer than the number of discriminatees. The Board was guided by the Fourth Circuit's decision in *Ultrasystem's Western Constructors v. NLRB*, 18 F.3d 251, 258–259 (1994), and

³² The remedy is discussed below in sec. 3.

³³ The United States Court of Appeals for the Eleventh Circuit denied enforcement on October 27, 1997. *BE&K Construction Co. v. NLRB*, 133 F.3d 1372 (1997). The court found no prima facie case concerning the employer's alleged discriminatory hiring practices. The court noted that the Board's evidence for the crucial element of animus consisted of the employer's stated preference for a merit shop rather than a union shop. The court found the employer's statements to be lawful expressions of opinion protected by Sec. 8(c) of the Act and the Constitution. We note that this case, unlike *BE&K Construction*, is replete with evidence of animus consisting of the Respondent's independent violations of Sec. 8(a)(1) of the Act.

In regard to *BE&K Construction*, Member Hurtgen notes that he agrees with the court. That is, in Member Hurtgen's view, the Board in that case improperly relied upon an employer's lawful 8(c) statements of preference to operate nonunion.

the Board's decision on remand, 316 NLRB 1243 (1995). The Board left for compliance the issue of which of the discriminatees the Respondent would have hired for the existing vacancies but for its discrimination. The discriminatees so identified were to be offered immediate employment in those positions and paid backpay. If the positions no longer existed at the time the Board's order issued, it was to be determined whether the discriminatees would have been assigned to jobs at other sites after those jobs ended.³⁴ If so, then backpay for the subsequent jobs and offers of employment in current equivalent positions would be appropriate. Additionally, if it were shown at compliance that the Respondent would have hired any of the other discriminatees, they, too, were to be made whole.

Consistent with these principles, we find that, with respect to the electrician positions at the Levi-Strauss project, the Respondent must offer three of the discriminatees³⁵ employment and make them whole.³⁶ With regard to the other three discriminatees, if the General Counsel shows in compliance that nondiscriminatory consideration would have resulted in their being hired into positions equivalent to those for which they applied, which positions became available subsequent to their applications (whether at the Levi-Strauss project or other projects of the Respondent), then they are to be offered backpay attributable to those jobs. If that showing is made, then, as in the case of the other three discussed above, they are to be offered employment in current equivalent jobs, unless the Respondent shows that its personnel policies and procedures do not provide for retaining employees and reassigning them to jobs at other sites after the termination of a particular project.

It is also apparent that at the North Monroe Hospital project, the Respondent must offer three of the discriminatees³⁷ employment and backpay as to the electrician positions, which the discriminatees would have received but for the Respondent's discrimination.³⁸ With regard to the fourth discriminatee, the General Counsel may show in compliance that this discriminatee would have received any other position that became available subsequently, in the manner discussed with reference to the Levi-Strauss project.

In sum, all 10 of the discriminatees at both locations will be placed in the position that each would have occupied had the Respondent not discriminated against them because of their union affiliations.

³⁴ The presumption is that they would have been assigned.

³⁵ The General Counsel may specify the discriminatees at the compliance stage of this proceeding.

³⁶ The General Counsel may show at the compliance stage of this proceeding that the Respondent filled more than three positions that would have gone to the discriminatees but for the Respondent's discrimination. We simply use the figure provided by the current record.

³⁷ The same considerations apply here as noted in fn. 35 supra.

³⁸ The same considerations apply here as noted in fn. 36 supra.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist and take certain affirmative action deemed necessary to effectuate the policies of the Act.

We have found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire or to consider for hire Sammy Yelverton, Carl Roberts, Wayne Divine, Scott Phillips, James Hill, and Jim Bounds. We have also found that the Respondent unlawfully denied them at least three electrician positions at its Levi-Strauss project. Therefore, we shall order that compliance shall identify which three discriminatees would have been hired for the three electrician vacancies. Those three must then be offered immediate employment in those positions and backpay. If it is shown at the compliance stage of this proceeding that the Respondent, but for its discrimination, would have hired any of the remaining three discriminatees to jobs at other sites, the Respondent shall make those individuals whole for the discrimination (including employment) and, if those positions no longer exist, shall place them in positions substantially equivalent to those for which they applied at the Levi-Strauss project. Backpay shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by denying Johnnie Smith overtime on November 18, we shall order that the Respondent make Smith whole for any pay and any benefits he lost as a result of the Respondent's unlawful discrimination against him, with interest. Backpay shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, supra, and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded*, supra.

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire or to consider for hire Lonnie Shows, John Hopkins, Curtis Bullock, and Ronald Williams, and denying at least three electrician positions at its North Monroe Hospital project to them, we shall order that, when the discriminatees are identified in the compliance proceeding as those who would have been hired, they shall be offered immediate employment in those positions and made whole. If it is shown at the compliance stage of this proceeding that the Respondent, but for its discrimination, would have hired any of the other discriminatees to jobs at other sites, the Respondent shall make those individuals whole for the discrimination found (including employment) and, if those positions no longer exist, shall place them in positions substantially equivalent to those for which they applied at the North Monroe Hospital project. In all instances, backpay shall be computed on a quarterly basis

as prescribed in *F. W. Woolworth Co.*, supra, and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded*, supra.

We shall also order that the Respondent shall (1) notify in writing all of the discriminatees that any future job applications will be considered in a nondiscriminatory manner; (2) remove from its records any reference to the unlawful refusal to accept applications and to hire and to the unlawful denial of customary overtime to Smith, and inform these individuals in writing that the unlawful conduct will not be used against them in any manner in the future; (3) preserve and make available to the Board or its agents on request, payroll and other records to facilitate the computation of backpay and reimbursement due; and (4) in addition to the customary posting, mail copies of the notice to all known applicants and current and former employees employed by the Respondent on the Levi-Strauss project and the North Monroe Hospital project in 1994 and 1995.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Pan American Electric, Inc., Nashville, Tennessee, its officers, agents, successors and assigns shall take the action set forth in the Order as modified.

1. Cease and desist from

(a) Interrogating applicants for employment regarding their union membership, activities, affiliation, or sympathies.

(b) Informing employees that its agents or supervisors have received training to maintain strict hiring practices aimed at screening out union applicants.

(c) Informing employees and applicants that it has turned away or refused to hire or accept applications from union members or supporters.

(d) Informing employees that it asked applicants to back date their applications in order to avoid taking applications from union supporters.

(e) Altering hiring practices by asking applicants for employment to backdate employment applications for discriminatory purposes.

(f) Refusing to permit employees to work overtime because of their union membership, activities, affiliation, or sympathies.

(g) Placing "not hiring" signs at its jobsite because union applicants are on the construction site seeking employment with another employer.

(h) Placing "not hiring" signs at its jobsite to discourage union applicants.

(i) Refusing to permit union members and supporters to file applications for employment and refusing to hire them because of their union activities, membership, and

affiliation or because of their perceived union membership, activities, or affiliations.

(j) 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 actions necessary to effectuate the policies of the Act.

(a) Within 14 days from the compliance Order, offer immediate employment to the three discriminatees from among Sammy Yelverton, Carl Roberts, Wayne Divine, Scott Phillips, James Hill, and Jim Bounds, who are determined in the compliance stage of this proceeding, as the three individuals who should have been hired for the three available positions at the Levi-Strauss project for which they applied and were qualified or, if those positions no longer exist, to substantially equivalent position.

(b) Make whole the three discriminatees identified in the paragraph 2(a) above as the three individuals who should have been hired at the Levi-Strauss project for losses sustained by reason of the discrimination against them as set forth in the amended remedy section of this decision. As for the remaining three discriminatees, if it is shown at the compliance stage of the proceeding, that the Respondent, but for its discrimination, would have hired any of these discriminatees to jobs that became available subsequent to their applications either at the Levi-Strauss project or other sites, the Respondent shall make them whole for the discrimination found in the manner set forth in the amended remedy section of this decision.

(c) Within 14 days from the compliance Order, offer immediate employment to the discriminatees among Lonnie Shows, John Hopkins, Curtis Bullock, and Ronald Williams, who are determined in the compliance stage of this proceeding, as the individuals who should have been hired for the available positions at the North Monroe Hospital project for which they applied and were qualified or, if those positions no longer exist, to substantially equivalent positions.

(d) Make whole the discriminatees identified in paragraph 2(c) above as the individuals who should have been hired at the North Monroe Hospital project for losses sustained by reason of the discrimination against them as set forth in the amended remedy section of this decision. As for any remaining discriminatees, if it is shown at the compliance stage of the proceeding, that the Respondent, but for its discrimination, would have hired any of these discriminatees to jobs that became available subsequent to their applications either at the North Monroe Hospital project or other sites, the Respondent shall make them whole for the discrimination found in the manner set forth in the amended remedy section of this decision.

(e) Within 14 days from the date of this Order notify, in writing, the 10 discriminatees who applied for employment at the Respondent's Levi-Strauss project and

North Monroe Hospital project in 1994, and who were unlawfully denied employment, that any future job applications will be considered in a nondiscriminatory manner.

(f) Make whole Johnnie Smith for the loss of earnings and benefits he suffered by reason of the Respondent's unlawful refusal to permit him to work an overtime day, with interest as set forth in the amended remedy section of this decision.

(g) Within 14 days from the date of this Order remove from its records all reference to the unlawful actions taken against the discriminatees, and Smith, and within 3 days thereafter advise them in writing that this has been done, and that these actions shall not be used against them in any manner in the future.

(h) 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 back-pay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facilities in Nashville, Tennessee; Monroe, Louisiana; and Gluckstadt, Mississippi; copies of the attached notice marked "Appendix."³⁹ Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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. The Respondent shall also duplicate and mail, at its own expense, a copy of the notice to all known applicants and all current employees and former employees employed by the Respondent on the Levi-Strauss project and the North Monroe Hospital project in 1994 and 1995.

(j) 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 interrogate applicants for employment concerning their union membership, activities, affiliation or sympathies.

WE WILL NOT inform employees that we have received training to maintain strict hiring practices aimed at screening out union applicants.

WE WILL NOT inform employees and applicants that we have turned away union applicants or refused to accept applications from them.

WE WILL NOT inform employees that we ask applicants to backdate their applications in order to avoid taking applications from union supporters.

WE WILL NOT alter hiring practices by asking applicants for employment to backdate employment applications for discriminatory purposes.

WE WILL NOT refuse to permit employees to work overtime because of their union membership, activities, affiliation, or sympathies.

WE WILL NOT place "Not Hiring" signs at our jobsites to deter union applicants who come directly to us or who are on the construction site seeking employment with another employer.

WE WILL NOT refuse to hire applicants for employment or refuse to permit them to apply for employment because of their union membership, activities, or sympathies or their perceived union membership or sympathies.

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 offer to three employees from List A below, as determined in the compliance stage of this proceeding, the three available positions at the Levi-Strauss project for which they applied and are qualified, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed.

A

Sammy Yelverton
Carl Roberts
Wayne Divine
Scott Phillips
James Hill
Jim Bounds

³⁹ 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."

WE WILL make those from List A who would have been hired whole for any loss of earnings and other benefits resulting from our refusal to hire them, less any net interim earnings, plus interest.

WE WILL make whole any of the remaining three discriminatees from the above List A, in the manner set forth in the Board's decision and amended remedy, if it is shown at the compliance stage of this proceeding, that, based on neutral considerations, we would have hired any of them to jobs at the Levi-Strauss project or at other sites.

WE WILL, offer to the employees from List B below, as determined in the compliance stage of this proceeding, the available positions at North Monroe Hospital project for which they applied and are qualified, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed.

B

Lonnie Shows
John Hopkins
Curtis Bullock
Ronald Williams

WE WILL make those from List B who would have been hired whole for any loss of earnings and other benefits resulting from our refusal to hire, less any net interim earnings, plus interest.

WE WILL make whole any remaining discriminatees from the above List B, in the manner set forth in the Board's decision and amended remedy, if it is shown at the compliance stage of this proceeding, that, based on neutral considerations, we would have hired any of them to jobs at the North Monroe Hospital project at other sites.

WE WILL, within 14 days from the date of the Board's Order, notify in writing the 10 discriminatees identified in Lists A and B above that any future job applications will be considered in a nondiscriminatory manner.

WE WILL make employee Johnny Smith whole for the loss of wages or benefits sustained by him by reason of our refusal to permit him to work an overtime day, with interest.

WE WILL remove from our records all reference to the actions taken against the 10 discriminatees in Lists A and B and Johnny Smith and advise them in writing that this has been done, and that such acts shall not be used against them in any manner in the future.

PAN AMERICAN ELECTRIC, INC.

Linda M. Kirchert, Esq. and Rosalind E. Eddins, Esq., for the General Counsel.

Michael D. Lucas, Executive Assistant to the President of IBEW, of Washington, D.C., for the International IBEW.

John Hopkins, Organizer, of Monroe, Louisiana, for the Charging Party, Local 446.

Wayne A. Divine, Assistant Business Manager and Organizer, of Jackson, Mississippi, for the Charging Party, Local 480.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. These cases were heard before me on June 5 and 6, 1995, in Jackson, Mississippi, pursuant to a consolidated complaint issued by the Acting Regional Director of Region 26 of the National Labor Relations Board (the Board) on March 10, 1995, in Case 26-CA-16607 (formerly Cases 15-CA-13057 and 15-CA-13060). These cases were consolidated for litigation by order of the General Counsel dated April 12, 1995. The complaint in Case 15-CA-13060 is based on an amended charge filed by Local Union No. 446 (Local 446 or Charging Party Local 446) of the International Brotherhood of Electrical Workers (the IBEW or the International) on April 5, 1995. The complaint in Case 26-CA-16607 (formerly 15-CA-13057) is based on an amended charge filed by Local Union No. 480 (Local 480 or Charging Party Local 480) on March 9, 1995. The complaint in Case 15-CA-13060 involving Local Union 446 as amended at the hearing alleges that Respondent Pan American Electric, Inc. (the Respondent or the Company) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by refusing to permit John Hopkins, Lonnie Shows, and Curtis Bullock to complete applications for employment with Respondent because of their union membership and/or activity, and by failing and refusing to hire Ronald Williams, Hopkins, Shows, and Bullock. The complaint further alleges that Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union membership, activities and sympathies, posting a "no hiring" sign at their Monroe, Louisiana jobsite in order to discourage union members from applying, and informing its employees that it would refuse to consider the applications of union members. The complaint in Case 26-CA-16607 as amended at the hearing involving Local 480 alleges that Respondent acting through its supervisor and agent, Danny Hendrix, violated Section 8(a)(1) of the Act by informing its employees that he was refusing to give employment applications to applicants because of their union activities, membership, and affiliation, and by refusing to give said applications to the aforesaid applicants, and by informing them that he had received training to maintain strict hiring practices directed at screening out union applicants, by interrogating applicants for employment regarding their union activities, membership, and affiliation, by informing applicants and employees that he did not hire applicants for employment because of their union activities, membership, and affiliation, by altering Respondent's hiring practices by asking applicants for employment to back-date employment applications for discriminatory purposes and by placing a "not hiring" sign at Respondent's jobsite after learning union applicants were on the construction site seeking employment with another employer. The complaint also alleges that Respondent acting through its supervisor and/or agent, Trent King, violated Section 8(a)(1) of the Act by informing an employee that Respondent refused applications to applicants because of their union activities, membership, and affiliation. No evidence was presented concerning this allegation and I make no finding of a violation concerning this allegation of Trent King's conduct. The complaint further alleges that Respondent violated Section 8(a)(1) and (3) of the Act by refusing and failing to offer overtime to its employee, Johnnie

Smith, because of his union activities, membership, and affiliation. The complaint also alleges that Respondent refused to consider for hire or to hire Sammy Yelverton, Carl Roberts, Wayne Divine, James Hill, Scott Phillips, Jim Bounds, and George Yelverton because of their union affiliation in violation of Section 8(a)(1) and (3) of the Act. The complaints are joined by the answers of Respondent as amended at the hearing wherein it denies the commission of any unfair labor practices. At the hearing Respondent also asserted Section 10(b) of the Act as an affirmative defense to the amendment permitted by the undersigned to be made by the General Counsel alleging Respondent's refusal to permit Johnnie Smith to work overtime as a violation of Section 8(a)(3). I find this defense must fail as this violation is closely related to other complaint violations and occurred within 6 months of the filing of the charge. Respondent's objection at the hearing was treated as an affirmative defense and a denial and Respondent was permitted the opportunity to meet this allegation. See *Redd-I, Inc.*, 290 NLRB 1115 (1988), and *BRC Injected Rubber Products*, 311 NLRB 66 fn. 16 at 71 (1993).

On the entire record in this proceeding, including my observations of the witnesses who testified herein, and after due consideration of the briefs filed by the General Counsels, the Charging Party International, and by the Respondent, I make the following

FINDINGS OF FACT¹

I. JURISDICTION

A. The Business of Respondent

The complaints allege, Respondent admits, and I find that at all times material, Respondent has been a corporation with an office and place of business in Nashville, Tennessee, that it has been engaged in the business of electrical contracting in the building and construction industry at a jobsite in Monroe, Louisiana, (North Monroe Hospital Pavilion project) and at the Levi Strauss project in Gluckstadt, Mississippi, that during the 12-month period prior to the filing of the complaints, Respondent in conducting its business operations described above, performed services in excess of \$50,000 in states other than the States of Louisiana and Mississippi and purchased and received at its Monroe, Louisiana, and Gluckstadt, Mississippi jobsites goods valued in excess of \$50,000 directly from points outside the States of Louisiana and Mississippi and that it has been an employer within the meaning of Section 2(2), (6), and (7) of the Act.

B. The Labor Organization

The complaints allege, Respondent admits, and I find that Local Unions 446 and 480 of the International Brotherhood of Electrical Workers are and have been at all times material, labor organizations within the meaning of Section 2(5) of the Act.

¹ Certain errors in the transcript have been noted and corrected. Regarding G.C. Exh. 16, the court reporter's notation that this exhibit was received is corrected to indicate that this exhibit was rejected in part (as to the payroll record of Gerald R. Smith), and otherwise received (Tr. 352-353).

With regard to G.C. Exh. 17, the court reporter's notation that this exhibit was rejected is corrected to indicate that it was received (Tr. 356).

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent operates as a nonunion general contractor involved in electrical contracting. These cases involve the hiring and employment practices engaged in by Respondent at its two jobsites involved herein in late 1994 and early 1995, in response to efforts of the two Charging Party Unions to have its members seek employment in order to "salt" the jobsites with union members in an attempt to organize Respondent's employees on behalf of the two Local Unions. Salting is a practice utilized by the International Brotherhood of Electrical Workers (the International) and its local unions wherein its members apply for work at nonunion employers engaged in the construction industry in order to organize their employees. The practice is fostered and supported by the IBEW and its local unions and permission is granted to union members to work at nonunion sites at below union scale wages and without benefits. In some cases the local unions pay the premiums for the union health insurance benefit usually covered by a contractor who is signatory to a labor agreement with the unions. Additionally, in some cases the applicants for employment are paid business agents and paid organizers for the unions. The Respondent contends that union members who sought employment at its jobsites in order to organize them and that paid union business agents and organizers paid by the Union were not bona fide applicants for employment. In the recent case of *NLRB v. Town & Country Electric*, 34 F.3d 625 (8th Cir. 1994), enfd. 516 U.S. 85 (1995), the United States Supreme Court upheld the Board's position that paid union organizers are employees within the meaning of Section 2(3) of the Act. The Court held that the language of the Act "is broad enough to include those company workers whom a union also pays for organizing" and "the Board's broad literal interpretation of the word 'employee' is consistent with several of the Act's purposes, such as protecting the right of employees to organize for mutual aid without employer interference," citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945), and "encouraging and protecting the collective-bargaining process," citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984). The Court also rejected arguments that salts "might try to harm the company perhaps quitting when the company needs them, perhaps disparaging the company to others, perhaps even sabotaging the firm or its products." The Court noted that the union's salting resolution in that case contained, "nothing that suggests requires, encourages or condones impermissible or unlawful activity." The Court also noted that, "[i]f a paid union organizer might quit, leaving a company employer in the lurch, so too might an unpaid organizer, or a worker who has found a better job, or one whose family wants to move elsewhere. And if an overly zealous union organizer might hurt the company through unlawful acts, so might another unpaid zealot (who may know less about the law) or a dissatisfied worker (who may lack an outlet for his grievances). This does not mean they are not 'employees.'" The Court noted further that the law offers alternative remedies for those concerns such as "fixed-term contracts, rather than hiring them 'at will'" or negotiating "with its workers for a notice period," and that "[a] company faced with unlawful (or possibly unlawful) activity can discipline or dismiss the worker, file a complaint with the Board, or notify law enforcement authorities." The foregoing clearly settles the issue in this proceeding regarding whether employees who are paid union or-

ganizers or who intend to act as “salts” are “employees” under the Act. Clearly they are employees entitled to the protections of the Act. I find nothing in the evidence presented by the Respondent which would deny the employees in these cases the protections of the Act.

*B. Case 15-CA-13060; The Levi-Strauss Project
Gluckstadt, Mississippi*

Wayne Divine, an assistant business manager of and union organizer for Local 480, testified he had learned of the opening of an account by Respondent with the Mississippi Employment Security Division seeking electricians and helpers for the Gluckstadt, Mississippi project. He enlisted Johnnie Smith, an unemployed electrician and a member of the Union, to act as a covert “salt” by not disclosing his affiliation with the Union and going to the project site and applying for an electrician’s position. Smith went to the site on September 1, 1994, and applied. He filled out an application and listed nonunion employment references in order to conceal his affiliation with the Union. Smith was hired on September 12, 1994. During his period of employment by Respondent the Union paid his union health insurance premiums but did not otherwise compensate Smith.

On about September 20, Smith learned that Respondent was hiring. On September 22, 1994, Sammy Yelverton (also an assistant business manager of and organizer for Local 480) along with unemployed electrician and fellow union member, Carl Roberts, went to the jobsite openly wearing union insignia and identification such as a T-shirt and buttons, identifying themselves as Local 480 union members and organizers. Yelverton testified he and Roberts saw some employees taking a break on their arrival about 10:30 a.m. and he asked where the man doing the hiring was and they directed him to the Respondent’s jobsite office. At that time another man on the project hurriedly ran to the jobsite and went into the office before him. Yelverton pushed the door open and entered also, at which time he heard the man tell Job Superintendent Danny Hendrix that there were union men on the site. Yelverton asked Hendrix if they could fill out applications and Hendrix said the Respondent was not hiring and was not accepting applications, but that it would be hiring in December and the men should return then to fill out applications. Yelverton and Roberts left.

Johnnie Smith was on the site when this occurred. He testified that Hendrix had earlier (around September 20) said he would need to hire more electricians as the general contractor (Flour Daniels) wanted him to build up to 10 to 12 electricians and 6 helpers and that if he needed additional temporary help, he would get it from Labor Finders, Incorporated. After the union members left on September 22, Hendrix put up a sign that stated, “We are not taking applications at this time.” Hendrix told Smith and employees King and Robert Taylor that he had refused to give applications to the union members and had been trained how “to keep to strict hiring practices to keep from hiring union applicants” at a seminar held by Respondent. Smith asked Hendrix why he had not hired these men or taken their applications. Hendrix replied he could not take any more applications [or] hire any more electricians because he had refused to permit the union members to file applications. Hendrix told Smith and the other employees that if they knew of any good electricians they should send them to him.

On about September 20, 1994, when Smith had learned that Respondent was hiring he called Wayne Divine. He and Divine

devised a story to be used by Divine and himself to seek to have Divine fill out an application saying that Smith had recently run into Divine at a Wal-Mart store and that he had worked with Divine in the past as an electrician and had told him Respondent was hiring. Divine and unemployed union member and electrician James Hill went to the jobsite on September 26, without any indicia of union membership displayed and sought out Hendrix. Divine told Hendrix he knew Smith. Hendrix called Smith over and asked him if he knew them. Smith said that he knew Divine but did not know the other one (Hill). Smith then returned to work while Hendrix asked Divine and Hill whether they were union men and Divine said they were not. According to Divine and Hill, Hendrix told them that he had turned away some union men who had wanted to file applications and the only way he could accept their applications without getting into trouble would be if they were willing to backdate their applications and Hill and Divine both told Hendrix they would agree to do so. Hendrix also told Divine and Hill that he had been to a training session on how to avoid hiring union members as employees. Hendrix gave a different version of the conversation. He testified that he had told them that the only way he could take their applications would be to backdate them and that he was not about to do that. He did not deny interrogating them as to whether they were union members or to commenting concerning training he had received about how to avoid hiring union members. I credit Divine’s and Hill’s testimony concerning this conversation. I find it implausible that Hendrix would bring up the subject of backdating applications if he did not intend to offer Divine and Hill the opportunity to do so in order to justify their hire while refusing to permit open union supporters to submit applications. I additionally credit Smith’s testimony concerning the above comments made by Hendrix.

As Smith was returning to work after Hendrix had asked him whether he knew Divine and Hill, electrician Robert Taylor said that the two men talking to Hendrix were union men. Smith attempted to persuade Taylor that he was mistaken but Taylor reasserted that they (Divine and Hill) were union members and sought to distract Hendrix from the conversation in order to warn him by asking him to find an item. During this conversation Hendrix had invited Divine and Hill into the job shack in order to fill out applications but after rejecting several attempts by Taylor to distract him, he finally left to talk to Taylor and told Divine and Hill to go into the job shack which they did. Shortly thereafter, Hendrix entered the job shack and told Divine and Hill that he was not taking any applications and pulled a stack of them out of his drawer and told them that he would be hiring in December. Divine and Hill then left. Hendrix’s version is that he asked Divine and Hill to enter the trailer to explain that he was not hiring now but would be in December. I credit Smith’s, Divine’s, and Hill’s testimony as set out above over the testimony of Hendrix. However, I note that Smith mistakenly identified King as the person who had warned Hendrix whereas Hendrix’s testimony correctly identified Taylor as the person who was looking for an item.

Smith testified further that immediately following this, he apologized to Hendrix for having referred Divine to him and told Hendrix he did not know that Divine was a union member. Hendrix told him not to worry as he had not taken their applications. At that time King told Hendrix that he knew most of the union electricians in the area and offered to screen the applications in the future. The record is silent as to whether or not

Hendrix accepted the offer although he did subsequently hire employees referred by King and Taylor. I credit Smith's testimony as set out above.

Smith testified that Hendrix met with the employees on September 26, in a safety meeting and told them he was no longer taking applications and that they should not pass out applications to anyone "that walked up and asked about a job," and to tell them that the Respondent was not taking applications. Smith "asked him didn't we need the help." Hendrix responded that he could not hire anyone after refusing to give the union applicants an application as this would be a "Labor Board violation." On the day after the September 26 meeting Smith observed signs posted on the office trailer that said, "we are not taking applications at this time." A couple of days after the sign went up King told him, "[T]here were union guys out there trying to put in applications." The sign remained on the office trailer until November 9 or 10. In late October he observed Gary Hamilton filling out an application. Hamilton had been referred by King and Taylor. Hamilton and Wayne Smith were hired in early November. In November a second sign was put up which stated, "We are accepting applications" and designated that they were being taken between 8 to 9 a.m. Gary Cuthen applied for employment around lunchtime around November 10, and was hired. I credit Smith's testimony as set out above.

On September 28, 1994, Divine brought unemployed union members and electricians Jim Bounds and Scott Philips to the jobsite openly wearing union paraphernalia and logos and told them to file their applications for jobs as electricians. Divine waited by another vehicle while the others went to the job shack where they were told by Hendrix that Respondent was not taking applications. Hendrix saw Divine who waived to him.

On January 4, 1995, George Yelverton, a cousin of Sammy Yelverton, went to the jobsite with openly displayed union paraphernalia and logos and entered the job shack and talked to an unknown man who was on the telephone and asked to see the man who was doing the hiring. The unknown man told him that the job superintendent who was in charge of hiring was not there that day but would be in tomorrow. Yelverton did not return the next day.

On January 10, 1995, Sammy Yelverton, Divine, and several unemployed union members, including Vaughn Culverson and Bernie Suggs, went to the jobsite and applied for jobs as electricians with another contractor on the project. Smith testified that King and Taylor told Hendrix there were union men on the project and that Hendrix then hurriedly went through his desk and took out a no hiring or no applications being taken sign and put it on the outside of the job shack. When the union members arrived at the shack they observed this sign and turned away without applying.

All of the union members who applied in all of these instances except Divine and Sammy Yelverton were unemployed electricians with more than 3 years of industrial experience at the time they applied. All who testified in this proceeding testified they were seeking work and would have accepted a job as an electrician if it had been offered. Divine testified that he had told the members to accept the positions if they were hired by Respondent. Divine and Yelverton also had in excess of 3 years' industrial experience.

Hendrix testified that he arrived on the jobsite on August 17, 1994, to commence the Levi-Strauss project and immediately

contacted the State of Mississippi Employment Security office and opened an account asking them to send him journeyman electricians with 3 years' experience and apprentices (helpers) with 1 year of experience. On the following Monday, August 23, Kenneth Breisch and Robert Taylor came to the jobsite by referral of the Mississippi State Employment Security Office and were put to work. The third employee hired was Johnny Smith who he assumed was a "walk on" and he hired Trent King after this on September 6. At this point he had enough employees for the project. He officially stopped hiring when he called the Employment Security office on September 20, and told them to close his account until further notice as by that time he had "at least eleven to fifteen applications on file that I knew I would never be able to hire, and our company policy is not to take applications when you don't have positions open." On September 20, he "also put signs on the doors and windows of his office trailer stating that we were not accepting applications at this time." He did not accept any applications after September 20 until he reopened the account on October 26. Although at the time he had arrived on the jobsite, the General Contractor, Fluor Daniels, had informed him he should build up to 15 employees, he believed he could meet the work deadlines with the number of employees he had at that time. Three days after he closed the account on September 20, he received a printout from the Mississippi Employment Security office which printout indicated only the date that he had opened the account. The printout showed the names of Robert Taylor, Kenneth Breisch, and Wayne Divine as having been referred by the unemployment office to Respondent and the date of the referral for each. After October 26, he put signs on his trailer that he was accepting applications between the hours of 8 to 9 a.m., Monday through Thursday as at that time Respondent was on a four 10-hour days per week schedule. After October 26, he accepted applications. He left the hiring sign on the trailer until January 13 (1995).

Smith testified that on November 17, he disclosed to Hendrix that he was a union member and was there to organize the employees on behalf of the Union and that Hendrix commented that he knew he had a union employee but did not know who it was. As noted above the Respondent worked its employees on a 4-day schedule of 10 hours per day from Monday to Thursday with Friday being worked as an overtime day. Smith testified that he was the only employee not given overtime the next day which was a Friday after the day he disclosed his union affiliation to Hendrix. On the same day he disclosed his union membership to Hendrix, Smith began to openly distribute union literature at the workplace and was told by Hendrix at that time and at a meeting of employees held later that day by Hendrix that this was prohibited. Subsequently at a later meeting held by Hendrix, Hendrix told the employees that union literature could not be distributed on their worktime except for lunch and breaks or in work areas. This was in compliance with its lawful solicitation and distribution policy. Smith subsequently engaged in four strikes and picketed on behalf of himself because of the denial of overtime and on behalf of the employees because of Respondent's failure to pay its employees at union scale. No action was taken against him for engaging in these strikes and picketing. At the time of the hearing he remained on strike.

Analysis

I find that the General Counsel has established a prima facie case of violations of Section 8(a)(1) and (3) of the Act as

Sammy Yelverton and fellow union member Carl Roberts were unlawfully refused applications on September 22, although Respondent was hiring electricians at that time but suddenly stopped doing so upon the appearance of the open union members and organizers. It is clear from the testimony of Smith which I credit that Hendrix was hiring electricians at that time but abruptly ceased hiring in order to avoid hiring union members. I credit Smith's un rebutted testimony that Hendrix attributed the turning away of the union members to their membership in the Union and boasted concerning his recent training by Respondent of how to avoid hiring union members. I do not credit Hendrix's purported explanation for his cessation of hiring which testimony I find was uncorroborated and contrived. Initially, I found Smith to be a truthful witness who testified in a forthright manner although there was some confusion in his testimony concerning dates. I find little support for Respondent's position in this regard as Hendrix did not deny attributing the refusal to take the applications of Yelverton and Roberts because of their union affiliation, nor did he deny boasting of training he had received from Respondent concerning how to avoid hiring union members. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by telling Smith and the other employees that he had refused to permit Yelverton and the other union members to file applications on September 22, and of boasting of his training to avoid hiring union members as the foregoing conduct by Hendrix was violative of the employees' rights under Section 7 of the Act. These violations establish knowledge and antiunion animus as the motivating factor for the refusal by Hendrix to permit the union members to file applications and hire them. I also find that Respondent has failed to rebut the prima facie case established by the General Counsel and has failed to prove that it would have refused to permit them to file applications and would have refused to hire them in the absence of the unlawful motive. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), and *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

I also find that the General Counsel has established a prima facie case of a violation of Section 8(a)(1) and (3) of the Act by Respondent's refusal to permit Divine and Hill to file applications and to hire them as the credited testimony as set out above shows Respondent's actions were motivated by its animus against discovered union adherents following Taylor's conversation with Hendrix which interrupted the offering of applications by Hendrix and which interruption was followed by the refusal to permit them to file applications. I find no merit in Respondent's argument that the Respondent told them to return in December. As the record shows Respondent hired additional electricians in the interim. I find the direction to apply in December was merely a stalling tactic to ward off the filing of applications by Divine and Hill. I also find that the Respondent's written policy of not taking applications more than 45 days in advance of projected hiring is not relevant as it was not followed by Hendrix and clearly is an afterthought utilized to bolster Respondent's position in this case. Rather, I find the comments made to Smith by Hendrix that he could not take additional applications from potential employees because he had sent the original open union adherents away to be the crucial point as well as his comments that he had received training to avoid hiring union members. I find Respondent has failed to rebut the established prima facie case by the preponderance of

the evidence. *Wright Line*, *supra*; and *Roure Bertrand Dupont*, *supra*.

With respect to the occasion when Divine brought unemployed electricians and union members Jim Bounds and Scott Phillips, who openly displayed their union affiliation, out to the site on September 28, and they were turned away by Hendrix, I find that the General Counsel has also established a prima facie case that Hendrix's refusal to permit them to file applications and to hire them was motivated by Respondent's antiunion animus. I find the Respondent has also failed to rebut the prima facie case established by the preponderance of the evidence and that Respondent thereby violated Section 8(a)(3) and (1) of the Act. *Wright Line*, *supra*; and *Roure Bertrand Dupont*, *supra*.

George Yelverton testified he wore union insignia and logos identifying him as a union member and organizer on behalf of Local 480 and spoke to an unidentified person at the job shack who was then on the telephone on January 4, 1995, who told him that only the job superintendent (Hendrix) could give out applications and that Hendrix was out but would be back tomorrow. I find the General Counsel has failed to establish a prima facie case of a violation in this instance as it is undisputed that Hendrix was the only management official who had authority to hire at the site and there was no identification of the person on the phone and George Yelverton did not return the next day or at any other time.

With respect to the occasion when Sammy Yelverton took several employees on the jobsite on January 10, 1998, I credit Smith's testimony that Hendrix's hurriedly made copies of signs stating that Respondent was not then taking applications and posted them on its job trailer. I further credit the testimony of Sammy Yelverton that the union members with him on the jobsite on that day, did not apply as a direct result of the posting of the signs. It is obvious that the posting of the signs had the desired effect of turning away the union members from applying. However, the facts involving the individual employees were not fully developed at the hearing and I make no finding of discrimination against these employees.

I also find that Respondent violated Section 8(a)(1) of the Act by the interrogation of Divine and Hill by Hendrix as to whether they were union members and by his comments to employees that he had attended a seminar and learned how to avoid hiring union members and by his comments that he had denied union members applications.

C. The North Monroe Hospital Project

The evidence in this case disclosed that Respondent was employed as a subcontractor to do the electrical work on the North Monroe Hospital Project (a commercial job) and commenced its activities on this project in early October 1994. Ted Stanton, Respondent's job superintendent, testified he arrived on the project in September 1994, and that an advertisement was placed in the local newspaper in Monroe, Louisiana seeking journeymen electricians and helpers. Respondent hired three electricians and four helpers on the project. Respondent hired electricians Tommy Brown on October 10, Ronald Beaudion on October 12, and Jason Freeland on October 26. Respondent hired as helpers Luther Layton and Jill Stanton (Ted Stanton's wife) on October 10, Jimmy Burns on October 12, and Timothy Rogers on November 22.

Ronald Beaudion was interviewed by Stanton October 4, a couple of days after he had replied in response to the advertisement. Beaudion testified his experience was primarily in-

dustrial. He testified that during his initial interview, Stanton asked him whether he was a union member and he replied that he was not, whereupon Stanton told him that he would be hired if he passed the drug test and set up the test and upon passing the test he was hired on October 10. Stanton denied having interrogated Beaudion concerning union membership. I credit Beaudion, who I found a believable witness with no stake in the outcome of this proceeding. I accordingly find that Respondent violated Section 8(a)(1) of the Act as such interrogation was inherently coercive and violative of Beaudion's rights under Section 7 of the Act.

On October 5, Lonnie Shows and John Hopkins went to Respondent's North Monroe jobsite. Shows was the full-time business manager of Local 446 and Hopkins a volunteer unpaid organizer for the Union who had been off work because of health reasons prior to this. Shows and Hopkins testified they arrived at the jobsite on the morning of October 5 and entered the job trailer where Ronald Williams, a former member of the Union, was filling out an application for an electrician's position. They greeted Williams and shook hands with him, in the presence of Ted Stanton, as they knew him as a former member of the Union. They then talked to Stanton and asked him to become a signatory to a labor agreement with the Union and he said he would need to check with the home office in Nashville according to their testimony which I credit over that of Stanton who testified he declined to sign the agreement at that time. Shows testified he asked for an application to take with him to fill out later and Stanton declined. Shows testified that because of his duties as a full-time business manager, he was too busy to fill out an application at that time. Hopkins did not ask for an application. Both Shows and Hopkins told Stanton they had some good electricians at the union hall and would send them out tomorrow to apply and Stanton told them he would be taking applications the following morning between 7 and 8 a.m. However, when they arrived at 10 minutes before 8 a.m. the following day Stanton had put up a not hiring sign. It is undisputed that Stanton put up the sign and that he called the newspaper on October 5 to cancel the advertisement for electricians and helpers. At the hearing Stanton testified that he had 18 applications and did not need any more. Hopkins testified he was unemployed and looking for work. Shows on cross-examination testified at length concerning his duties as a full-time business agent and conceded they occupied all his time but contended he would have accepted a job if hired. Neither Shows nor Hopkins were permitted to file applications.

Williams testified that after Shows and Hopkins left, he told Stanton that he had been a member of the Union in the early 80s but no longer was a member. Stanton told him, "I figured you must have knew them, you know. You all were shaking hands and talking to them (Williams) said, Yes. Then I asked him again, . . . when I might find could find out when or if he was going to hire me. . . . And (he) said, well, he should know something in a couple of days, a few days. So I said, well, I said, if I don't hear from you, I will call you back in a couple of days. And he said, Okay, fine. That would be okay." Williams called back, 3 or 4 days later, and Stanton told him he was still reviewing and taking more applications and had not made a decision yet. Stanton told him when he found out something, he would call Williams. Stanton did not contact Williams. Williams testified he had 13 years' experience as an electrician including commercial work.

Curtis Bullock, testified he is a union member and has 14 years' experience as an electrician. On October 7, he was unemployed and called the union hall on the phone to find out if there was any work available. Hopkins told him to come by the union hall and when he arrived there around 9:30 a.m. Hopkins told him to apply at the North Monroe Hospital project. He arrived there after 10:30 a.m. and saw a sign posted on Respondent's office that Respondent was not accepting applications. He went into the office and spoke to a man named Terry in the office. He asked Terry if Respondent was hiring and Terry told him they were not hiring. Terry also said that the person doing the hiring was at lunch. He asked Terry for an application and Terry said he was not giving out applications at that time. He was prepared to go to work that day. Terry told him to check back with the person who was doing the hiring. He did not do so.

Thus, whereas Hopkins, Shows, and Bullock were denied applications and Williams was not hired, other applicants with substantially less commercial experience were hired on the spot. Additionally, Beaudion testified he quit the job in mid-November as Respondent was using helpers to do electrician's work and he feared that this would result in bodily injury or damage to property. Respondent had received 18 applications prior to its cessation of taking of applications on October 5.

Analysis

I find that the General Counsel has established a prima facie case that Respondent violated Section 8(a)(1) and (3) of the Act by its refusal to permit Hopkins, Shows, and Bullock to apply for employment and to hire Hopkins and Shows and Bullock and by its failure to hire Williams. I find that Respondent violated Section 8(a)(1) of the Act by the posting of the no hiring sign on the job trailer on October 5. I find that Respondent's animus has been established by the unlawful interrogation of Beaudion as to whether he was a member of the Union. I find that Respondent's knowledge of Shows' and Hopkins' affiliation with the Union is undisputed and I find that the evidence is sufficient to establish that Stanton perceived Williams as a union supporter by reason of his acquaintance with Shows and Hopkins and by reason of Williams' admission to Stanton that he was a former union member. Furthermore, the pulling of the advertisement by Stanton the same afternoon of the appearance of Shows and Hopkins on October 5, and the placing of the no hiring sign the next morning establish that Stanton hurriedly responded to the appearances of union members by withdrawing from its hiring mode in order to preclude the hiring of union supporters or members. With respect to Business Manager Shows I find that he was a bona fide applicant for employment although I recognize that he testified he has so many responsibilities in his job as a business manager that he did not have time to fill out an application or arguably to go to work as an electrician. However, Respondent's unlawful conduct in interrupting its hiring in order to avoid hiring union members or supporters precluded affording Shows the opportunity to apply. I find that the Respondent has failed to rebut the prima facie cases of violations of the Act by the preponderance of the evidence and has failed to establish that it would have not permitted Hopkins and Shows and Bullock to file an application and would not have hired Hopkins, Shows, and Bullock in the absence of their union membership and that it would not have hired Williams in the absence of Respondent's perception of Williams as a union supporter. *Wright Line*, supra; and *Roure Bertrand Dupont*, supra.

CONCLUSIONS OF LAW

1. Respondent Pan American Electric, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Locals 480 and 446 and the International IBEW are labor organizations within the meaning of Section 2(5) of the Act.

3. With respect to its Levi-Strauss project in Gluckstadt, Mississippi, I find as follows:

(a) Respondent violated Section 8(a)(1) of the Act through its supervisor and agent, Danny Hendrix, by:

(1) Informing employees that Hendrix refused to give employment applications to applicants because of their union activities, membership, and affiliation.

(2) Informing employees that he had received training to maintain strict hiring practices directed at screening out union applicants.

(3) Interrogating applicants for employment regarding their union activities, membership, and affiliation.

(4) Informing applicants and employees that Hendrix did not consider for hire prior applicants for employment because of their union activities, membership, and affiliation.

(5) Altering Respondent's hiring practices by asking applicants for employment to backdate employment applications for discriminatory purposes.

(6) Placing a not hiring sign at Respondent's jobsite after learning union applicants were on the construction site seeking employment with another employer.

(b) Respondent violated Section 8(a)(3) and (1) of the Act when it refused and failed to offer overtime to its employee Johnnie Smith, because of his union activities, membership, and affiliation.

(c) Respondent violated Section 8(a)(3) and (1) of the Act when it refused to take applications from and to hire Sammy Yelverton, Carl Roberts, Wayne Divine, Scott Phillips, James Hill, and Jim Bounds.

(d) Respondent did not violate the Act with respect to George Yelverton as the evidence is insufficient to show that he was refused the opportunity to apply for work.

4. With respect to its North Monroe Hospital project in Monroe, Louisiana:

(a) Respondent violated Section 8(a)(1) of the Act by its interrogation of applicant Ronald Beaudion concerning his union membership.

(b) Respondent violated Section 8(a)(3) and (1) of the Act by refusing to permit Lonnie Shows, John Hopkins, and Curtis Bullock to complete employment applications and by refusing to hire Shows, Hopkins, Bullock, and Ronald Williams.

(5) The above-unfair labor practices in connection with the business engaged in by Respondent as set out above have the effect of burdening commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (3) of the Act, it shall be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Having found that Respondent unlawfully refused to hire applicants Sammy Yelverton, Carl Roberts, Wayne Divine, Scott Phillips, James Hill, Jim Bounds, and Lonnie Shows, John Hopkins, Curtis Bullock, and Ronald Williams, it shall be ordered to hire them to substantially equivalent positions as close as possible to the locations at which they applied for work. In addition, Respondent shall be ordered to make them whole for any loss of earnings and other benefits with interest, which they may have suffered as a result of Respondent's unlawful discrimination against them from the dates they would have been hired but for the unlawful discrimination, the dates to be determined at the compliance stage of this proceeding. Respondent shall also be ordered to make whole Johnny Smith for the days overtime pay and any benefits with interest he lost as a result of Respondent's unlawful discrimination against him. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In accordance with *Foley Material Handling Co.*, 317 NLRB 424 (1995), this portion of the remedy will be subject to resolution at the compliance proceeding of the issues outlined in *Dean General Contractors*, 285 NLRB 573 (1987), and consistent with that decision the Respondent shall have the opportunity in compliance to show that under its customary procedures, the discriminatees would not have been transferred to other projects after the completion of these projects. See also *Brown & Root USA, Inc.*, 319 NLRB 1009 (1995). Respondent shall also be ordered to expunge its records of any reference to the unlawful refusals to permit them to apply and to hire the discriminatees and the unlawful denial of the overtime day to Smith and to inform these employees that the unlawful conduct will not be used against them in any manner in the future. See *Sterling Sugars*, 261 NLRB 472 (1982). Respondent shall also be ordered to preserve and make available to the Board or its agents, on request, payroll and other records to facilitate the computation of backpay and reimbursement due. As the Respondent has completed the projects involved in this case, it shall be ordered, in addition to posting an appropriate notice at its home office in Nashville, Tennessee, to mail copies of the notice to all known applicants at their home addresses including the discriminatees and all current and former employees it employed on these projects in 1994 and 1995.

[Recommended Order omitted from publication.]