

Kaminski Electric & Service Co., Inc. and International Brotherhood of Electrical Workers Local 1701 a/w International Brotherhood of Electrical Workers, AFL-CIO. Cases 25-CA-23807 (1-2) and 25-CA-24059(1-3)

September 29, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On October 31, 1997, Administrative Law Judge Robert T. Wallace issued the attached decision. The General Counsel filed limited exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions, except as set forth below, and to adopt the recommended Order as modified and set forth in full below.

The issue presented on exceptions in this case is whether the judge correctly dismissed an allegation that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire union-affiliated applicants Gerald Frey and Gerald Snodgrass. For the reasons set forth below, the Board has decided to remand this issue to the judge for further consideration in light of the Board's recent decision in *FES*, 331 NLRB 9 (2000), which set forth the framework for analysis of refusal-to-consider and refusal-to-hire allegations. The remand may include, if necessary, reopening the record to obtain evidence required to decide the case under the *FES* framework.

The Respondent is a nonunionized electrical contractor in Owensboro, Kentucky. From January 1 through 22, 1995,² it advertised in a local newspaper for electricians.³ In early February, the Union forwarded to the Respondent employment applications of five union members. By letter to the Union dated February 13, the Respon-

dent's president, Chester Kaminski (Kaminski), declined to interview any of the five applicants.⁴ Kaminski stated, however, that he would retain their applications on file in case the Respondent's circumstances changed. Kaminski also stated that the Respondent preferred to conduct matters related to hiring directly with prospective employees. Accordingly, he requested in his letter that in the future individuals desiring employment apply in person at the Respondent's office.

On February 17, Gerald Frey and Gerald Snodgrass arrived at the Respondent's office wearing hats and jackets bearing the Union's logo. They identified themselves to Kaminski as journeymen electricians licensed in the town of Owensboro and requested applications for employment. Kaminski told them that the Respondent was not currently accepting applications. Later the same day, Kaminski arranged to have the Kentucky Cabinet for Workforce Development (the Kentucky Cabinet) refer applicants to the Respondent for hire as helpers or journeymen electricians. The Kentucky Cabinet subsequently posted a job announcement for helpers and journeymen electricians to work for the Respondent.

On February 22, Kaminski began interviewing applicants referred by the Kentucky Cabinet. Richard Sparks was among the applicants interviewed on February 22. During the interview, Kaminski told Sparks that the Respondent was hiring electricians and helpers for a project which was expected to greatly increase its employee complement. Specifically, Kaminski was referring to the Respondent's anticipated contract to perform a large amount of electrical work at the Premium Allied Tool jobsite (the PAT project).

Frey applied at the Kentucky Cabinet on March 21 for employment as an electrician or helper. His application clearly revealed both his qualifications for the positions and his union affiliation. His application stated that he was a journeyman electrician with 4 years of training through the National Joint Apprenticeship Program. His application also listed relevant work experience. For references, Frey listed a union business agent and an organizer. The Kentucky Cabinet forwarded Frey's application to the Respondent, but the Respondent never contacted Frey.

Sometime in March, the Respondent received notice that its bid on the PAT project had been accepted. Between March 27 and late July, the Respondent made offers of hire to approximately 23 new employees.⁵ Three

¹ No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by promulgating and maintaining a rule prohibiting employees from discussing their wages with other employees, by admonishing and threatening employees with discharge for discussing their wages with other employees, and by admonishing an employee for discussing the Union with other employees while working. Nor were any exceptions filed to the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by failing and refusing to consider applicants for hire because of their affiliation with the Union, by changing its hiring procedures and practices to avoid receiving applications from union-affiliated applicants, by disciplining employees for engaging in union activity, and by discharging employees because of their union activity.

² All dates hereinafter are in 1995 unless otherwise specified.

³ The Respondent hired Keith Fireline in the third week of January.

⁴ The Respondent's failure to hire these individuals was not alleged as a violation.

⁵ The Respondent hired Dalton Goodrich and Marvin Bickwermert Sr. around the fourth week of March; James Bratcher, Richard Judge, Clarence Wilkins, and Richard Bennet around the second week of

were licensed electricians, the remainder helpers. James Bratcher and David Cheek were among the three electricians hired for the PAT project. Unlike Frey and Snodgrass, neither Bratcher nor Cheek possessed an Owensboro electrical license. Kaminski promised each of them a raise if they would obtain a local license.⁶

The judge found that the Respondent violated Section 8(a)(3) of the Act by refusing to consider Frey and Snodgrass for hire because of their union affiliation. He further found that the Respondent committed additional violations of 8(a)(3) by changing its hiring procedures to have the Kentucky Cabinet, and later a local temporary employment agency, refer prospective employees in order to avoid more union-affiliated applicants. However, in view of the fact that the Respondent did not hire anyone between mid-January and mid-March, the judge found that the Respondent did not “necessarily” violate Section 8(a)(3) of the Act by refusing to hire Frey and Snodgrass. The judge deferred to compliance the issue of whether the Respondent would have hired Frey or Snodgrass for subsequent openings, absent the discriminatory refusal to consider.

We do not adopt the judge’s dismissal of the refusal-to-hire allegation. As set forth below, an analysis of this allegation under the standards set forth in *FES* shows that the General Counsel has met his burden of establishing the necessary elements of a refusal-to-hire violation, but that a remand is necessary for the judge to make findings regarding whether the Respondent would have not hired Frey and Snodgrass in the absence of their union activity or affiliation for job openings after mid-March.

In *FES*, the Board held that the General Counsel must establish the following elements to meet its burden of proof in a discriminatory refusal-to-hire case:

- (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct;
- (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimina-

tion; and (3) that antiunion animus contributed to the decision not to hire the applicants.⁷

We find that the above elements have been established in this case. Thus, the record shows that on the same day the Respondent rejected Frey and Snodgrass’ attempt to apply for jobs as helpers and journeymen electricians, it arranged to have the Kentucky Cabinet refer applicants to it for those positions. Five days later, the Respondent began interviewing applicants in anticipation of its future hiring needs for the PAT project, and on March 21, Frey submitted an application through the Kentucky Cabinet, which was forwarded to the Respondent.⁸ Between March 27 and late July, the Respondent hired at least 23 other applicants as helpers and electricians. These facts demonstrate at least that the Respondent had concrete plans to hire helpers and electricians when it refused Frey and Snodgrass’ attempt to apply for those positions.⁹

The record also establishes that Frey and Snodgrass had experience and training relevant to the positions for hire. Both were journeymen electricians, licensed in the town of Owensboro. Frey had worked as a licensed journeyman since 1982, Snodgrass since May 1994.

Further, the record shows that the Respondent’s anti-union animus contributed to its decision not to hire the applicants. The Respondent’s animus is demonstrated by the findings, not excepted to, that the Respondent unlawfully refused to consider Frey and Snodgrass because of their affiliation with the Union and that the Respondent unlawfully changed its hiring practices in order to avoid more union-affiliated applicants. Based on the foregoing, we find that the General Counsel has met his burden of establishing the necessary elements of an unlawful refusal to hire under the *FES* framework.

Once the General Counsel has established his case, the burden shifts to the Respondent to demonstrate that it would not have hired the applicants even in the absence of their union activity or affiliation. In *FES*, the Board held that the issue of whether the alleged discriminatees would have been hired but for the discrimination against

⁷ *FES*, supra, slip op. at 4.

⁸ Although Frey was a licensed journeyman electrician, he stated on his application that he was applying for a position as “an electrician or helper.” According to Kaminski, he often hired applicants as helpers who had a lot of electrical experience.

⁹ In his February 13 letter to the Union, Kaminski affirmatively stated that he would retain on file applications submitted by union members. Thus, we additionally note that had the Respondent followed its usual procedures, Frey and Snodgrass’ applications would have been either under active consideration by the Respondent or at least residing in the Respondent’s files when the Respondent hired other applicants as helpers and electricians.

April; Debbie Bryant, David Cheek, James Anderson, and Jeff Donovan around the fourth week of April; Marty Oberst, around the first week of May; Gary Brown and Jeff Scott around the first week of June; Anthony Brown, Richard Loyd, and John Gainor around the second week of June; Tom Pickerell, David Carrico, Chad Fazio, and Tim Therber around the third or fourth week of June; Claude Turner around the first week of July; and Charlie Hawkins and Marvin Bickwermert Jr. around the third week of July.

⁶ The third electrician hired for the project was Marty Oberst. The record does not reveal his qualifications.

them must be litigated at the hearing on the merits.¹⁰ Although there was record evidence that the Respondent hired helpers and electricians between March 27 and late July, the judge made no findings with regard to whether the Respondent met its burden of establishing that Frey and Snodgrass would not have been hired even in the absence of their union activity or affiliation. Indeed, there was no necessity for the judge to make such findings because, in accord with pre-*FES* cases, he left this issue for compliance proceedings with respect to the refusal-to-consider violation that he found. However, as the Board stated in *FES*, “matters which can be litigated at the unfair labor practice stage, must be litigated at that stage and cannot be deferred to compliance.” *FES*, supra, slip op. at 10.

Accordingly, we shall sever the refusal-to-hire allegation from the rest of this proceeding and remand it to the judge for further consideration of whether, under *FES*, the Respondent has demonstrated that it would not have hired Frey and Snodgrass for job openings after mid-March, even in the absence of their union activity or affiliation. This remand shall include, if necessary, reopening the record to obtain evidence required to decide the case under the *FES* framework. We shall also sever and remand the refusal-to-consider violation, even though no exceptions were filed to that finding, because the remedy we would order for that violation would be subsumed within the remedy for a refusal-to-hire violation.¹¹

None of the judge’s remaining findings implicate our decision in *FES*, nor have the parties excepted to these findings. Accordingly, as there is no reason to delay the resolution of those issues pending the outcome of the limited remand we are ordering, we shall issue a final Order with respect to the remaining violations found by the judge.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Kaminski Electric & Service Co., Inc., Owensboro, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act by promulgating and maintaining rules prohibiting employees from discussing wages with

other employees; admonishing employees and threatening them with discharge for discussing wages with other employees; and admonishing employees for discussing the Union while working.

(b) Disciplining and discharging employees because they engaged in union activity.

(c) Discriminatorily changing its hiring procedures and practices to avoid receiving applications from union-affiliated applicants.

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

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

(a) Within 14 days from the date of this Order, offer James Bratcher and David Cheek full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make James Bratcher and David Cheek whole for any loss of earnings and other benefits they may have suffered by reason of the discrimination against them.¹²

(c) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful discipline and discharges of James Bratcher and David Cheek, and within 3 days thereafter notify them in writing that this has been done and that the discipline and discharges will not be used against them in any way.

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

(e) Within 14 days from the date of this Order, resume accepting applications and interviewing job applicants at its Owensboro, Kentucky facility.

(f) Within 14 days of service by the Region, post at its Owensboro, Kentucky facilities and all current jobsites and mail to all former employees employed at prior job sites and to named discriminatees, copies of the attached notice marked “Appendix.”¹³ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent’s authorized repre-

¹² Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

¹³ 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.”

¹⁰ *FES*, supra, slip op. at 4.

¹¹ We are not remanding the refusal-to-consider violation itself for further consideration by the judge.

sentative, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to the named discriminatees, and all current employees and former employees employed by the Respondent at any time since February 17, 1995.

(g) 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 the Respondent has taken to comply.

IT IS FURTHER ORDERED that the issues of whether the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider and/or hire union-affiliated applicants are severed from the rest of this proceeding and remanded to the administrative law judge for appropriate action as set forth above. The administrative law judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

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 interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act by promulgating and maintaining rules prohibiting employees from discussing wages with

other employees; admonishing employees and threatening them with discharge for discussing wages with other employees; and admonishing employees for discussing the Union while working.

WE WILL NOT discipline or discharge employees because they engaged in union activity.

WE WILL NOT discriminatorily change our hiring procedures and practices to avoid receiving applications from union-affiliated applicants

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

WE WILL, within 14 days from the date of the Board's Order, offer James Bratcher and David Cheek full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make James Bratcher and David Cheek whole for any loss of earnings and other benefits they may have suffered by reason of the discrimination against them, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to our unlawful discipline and discharges of James Bratcher and David Cheek, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discipline and discharges will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, resume accepting applications and interviewing job applicants at our Owensboro, Kentucky facility.

KAMINSKI ELECTRIC & SERVICE CO., INC.

Miriam C. Delgado, Esq. and *Raifael Williams, Esq.*, for the General Counsel.

William G. Craig, Esq., for the Respondent.

Gary Osborne, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge. I heard this case on January 8, 9, and 10, 1997, in Owensboro, Kentucky. The orders consolidating cases and consolidated complaints issued on August 17, 1995, and July 31, 1996, as amended at hearing. They are based upon unfair labor practice charges filed by the International Brotherhood of Electrical Workers Local 1701, a/w International Brotherhood of Electrical Workers, AFL-CIO (IBEW Local 1701, the Union, or the Charging Party) on March 20, July 3, and October 25, 1995.

The complaints allege that Kaminski Electric & Service Co., Inc. (Respondent or Kesco) violated Section 8(a)(3) and (1) of the Act by discriminatorily failing and refusing to hire or con-

sider for hire certain applicants for employment, by discriminatorily changing its hiring practices, by promulgating rules prohibiting employees from discussing their wage rates with other employees and disciplining and threatening with discharge employees who violated that rule or otherwise engaged in union and protected concerted activities, and by discriminatorily discharging employees and/or failing and refusing to reinstate unfair labor practice strikers upon their unconditional offers to return to work. Respondents timely filed answers deny the commission of any unfair labor practices.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Respondent and the General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with its office and place of business in Owensboro, Kentucky, is engaged in the service, repair, and installation of electrical and heating, ventilating, air-conditioning, and refrigeration equipment. In the 12-month period ending February 28, 1995, Respondent, in the course of its business operations, performed services valued in excess of \$50,000 both for enterprises located outside the Commonwealth of Kentucky and for enterprises located within that Commonwealth which were directly engaged in interstate commerce. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. Background

Kesco is a never-unionized electrical contractor. Its president is Chester Kaminski (Kaminski); other officers include his wife and sons, Joseph and Christopher.

Kesco's normal employee complement is about five electricians and helpers. In late March or early April 1995² it secured a contract to perform work at the Premium Allied Tool jobsite (the PAT site). That contract, the largest Kesco had ever undertaken, required that it expand its work force to as many as 24 electricians and helpers. The PAT project lasted from April until October. Joseph Kaminski (Joseph) was the Kesco's on-site supervisor.

B. Union Contacts and Applications

Kesco began advertising for electricians in a local newspaper at the start of 1995; the ads ran from January 1 through 22. According to Kaminski, Kesco was seeking only one electrician.³ In about the same period of time, Gary Osborne, the or-

ganizer for IBEW Local 1701, offered Kesco the Union's services in providing electricians. Kaminski declined his offer, telling Osborne that he preferred to do the hiring himself. Kesco hired Keith Fireline in the third week of January; Dalton Goodrich and Marvin Bickerwert Sr. were the next employees hired. They came on the third week of March.

On February 3, Kaminski issued a memorandum regarding "efforts or rumors of efforts" of union organizational activity. In it, he promised compliance with applicable laws but warned that union activity would not shield employees who violate company rules, policies, and procedures. He also advised that they were not required to "join, talk with or otherwise participate in union organizing activities." He invited

[a]ny employee who considers himself or herself harrassed [sic] or otherwise subjected to inappropriate behavior [to] report same to *ME* and I, with the assistance of professional advisers, will take immediate and proper action. [Emphasis in original.]

On February 8, Osborne sent employment applications of three journeymen electricians, Michael Likens, Alan Rafferty, and Timothy Blandford, to Kesco. On February 10, Osborne submitted two more applications, those of David Carrico and Glenn McCann. In his cover letters he stated:

Enclosed, please find Employment Applications from members of the I.B.E.W. Each of these applicants have [sic] experience in the trade,⁴ are residents of this area, have passed a Journeyman examination given by a duly constituted Construction Local Union or have certified as Journeymen by a Joint Apprenticeship & Training Committee and are willing to work under the same terms and conditions which you have extended to other employees who are qualified in the trade.

He asked that Kaminski notify him if the applications were deficient in any way "so that remedial action may be taken" and suggested that the employer contact them through the Union office.⁵

Each of the applicants had noted that his current or most recent hourly wage was \$18.30 per hour, presumably the union scale. Only one, McCann, was currently unemployed. Each application revealed ties to the Union.

Kaminski acknowledged receipt of the applications on February 13. In his response, he disclaimed any discriminatory intent but stated:

I am not able to give much credibility to your statement that the applicants "are willing to work under the same terms and conditions" upon which we extend employment to others.

. . . this Company does not have any interest in interviewing prospective employees who, although qualified, have current employment elsewhere in the community at a substantially higher wage than we pay like-qualified employees.

¹ The General Counsel's unopposed motion to correct the transcript is granted.

² All dates hereinafter are 1995 unless otherwise specified.

³ Counsel for the General Counsel introduced the advertisements, GC Exh. 41, stating that they were for "a position or positions." The ads which are highlighted in that exhibit, list box numbers, not named employers, and seek "electricians-3 yrs experience in construction or licensed." Other ads in each of the papers seek a single "electrician for

local company," listing a different box number. That the call for "electricians," rather than the call for a single electrician, was Kesco's is implied by the highlighting but not established on this record.

⁴ The first three applicants each had 15 or more years experience; each of the last two had at least 4 years' experience.

⁵ Each letter was copied [cc] to the NLRB Regional Office.

He rejected them all but promised to retain the applications on file and to contact them if Kesco's circumstances changed in the future.

Finally, Kaminski stated:

Hereafter, if you truly believe an individual might desire employment with our Company, please have the individual come to our office and make application, personally, completing the usual procedures we use in the employment process. You will recall that you asked me once whether we desired to use your organization to obtain employment applications or to fill vacancies in our work force. I said at that time that our small organization conducts these activities directly with the prospective employees and that will continue to be our policy.

On February 17, Gerald Frey and Gerald Snodgrass, both members of Local 1701, appeared at Kesco's office, after Osborne suggested that they make application there. They walked in, wearing hats and jackets openly bearing the Union's logo. They asked Kaminski if they could complete applications and stated that they were qualified electricians, licensed locally and willing to work for Kesco. Kaminski told them that he was not accepting applications at that time.⁶

That same day, after Frey and Snodgrass reported their lack of success at the Kesco office, Osborne replied to Kaminski's earlier letter. He assured Kaminski that his applicants were "ready, willing and able to work under the same terms and conditions that you presently offer your employees." He also assured Kaminski that he expected each applicant who was currently employed to be unemployed by week's end.

With respect to Kaminski's statement that applicants Osborne believed to be truly desirous of employment should come down and make personal applications, Osborne noted that he sent two sincere applicants, Frey and Snodgrass, in to do just that. He asked that, if Kesco had changed its hiring procedures, Kaminski notify him of the procedures now required. If, however, Frey and Snodgrass were denied applications because of their open union affiliation, Osborne stated, Kesco was in violation of the Act.

C. New Hiring Procedures

On February 17, after Frey and Snodgrass had unsuccessfully attempted to make application, Kaminski went to the Kentucky Cabinet for Work Force Development⁷ to request that that agency receive applications for Kesco and then refer the applicants to him.⁸ Thereafter, Kaminski referred all applicants

⁶ Kaminski testified at one point, Frey and Snodgrass came in at a point in time when he was trying to get his employees off to their various assignments, when the only company representatives present were himself and his secretary. Subsequently, he explained the difference in the treatment accorded these putative applicants and Bratcher, then a nonunion affiliated applicant (discussed in greater detail, *infra*), stating, "[T]hey came in and interfered with the progress of work at hand."

⁷ Apparently, this is a division of, or another name for, the Kentucky Department of Human Resources.

⁸ He did this, he claimed, because he had seen signs posted in other area businesses announcing that applications were received through this agency and, he said, it "occurred to me that it would be a lightening the load of my handling and receiving of applications." It was, he claimed

who showed up at his door to an individual at the Kentucky Cabinet. There, applications were completed and referred back to Kaminski.

When Richard Sparks was laid off by a union contractor on February 21, Osborne suggested that he go to the Kentucky Cabinet office where there was a posting of jobs for electricians. He did so⁹ and, without completing an application, was referred by that agency to Kesco for an interview.¹⁰ He appeared for his interview with Kaminski the following day, having donned his union-logo adorned jacket and hat. During that interview, in which his job skills were both discussed and demonstrated, he completed an application wherein the references to his IBEW apprenticeship and employment by union contractors further revealed his union ties. He heard nothing further from Kesco.

In a March 7 letter, Kaminski informed Osborne of Kesco's use of the Kentucky Cabinet office for the referral of applicants. He assured Osborne that "[I]nvolvement in organization or other labor union activities is not and will not be a consideration, affirmatively or negatively, with respect to any application."

Beginning in early April, Kaminski also went to a "temp" agency, Temporary Professionals, Inc. (TPI) for the referral of electricians. He explained his motivation, saying, "After having told Gary [Osborne] that I didn't want his help, I didn't want to advertise again in the newspaper and [have] him presume that I needed his help again . . . I had already told him I didn't want his help and I didn't want him to presume I needed his help . . . I told him I preferred to hire people myself and not have his help to hire people." He also testified that using TPI "was a non-public way of having employees at my fingertip . . . then I wouldn't have to advertise in the paper. And I wouldn't have a deluge of either on-site visitors or mail applications."

While the electricians referred by TPI were paid and insured by TPI and were ostensibly TPI's employees, each was inter-

in his affidavit, "not meant to be our only exclusive way of hiring individuals. It would just give me a valid reason for not having to deal with people at our front door when I was trying to do something else." I believe that his subsequent explanation of why he sought workers through a "Temp" agency, discussed *infra*, is more indicative of his motivation.

⁹ The implication of the record is that Sparks had not disclosed his union affiliation when he first appeared at the Kentucky employment office. He testified that, for his return for the interview at the Kentucky Cabinet office, he put on his jacket and hat with the union logos. Even if he had disclosed his union affiliation to the State agency's clerk when he first appeared there, such a disclosure would not inure to Respondent's benefit unless I were to assume that Kaminski had enlisted that agency in a plan to discriminate, or that the agency took it upon itself to notify employers when applicants professed union support. I am unwilling to make such assumptions.

¹⁰ Initially, Sparks was told that while Kesco would be interviewing applicants at 1 p.m. on that day, all of the available times were already booked. He was subsequently called to an interview when there was a cancellation. In the course of that interview, Kaminski told him that he was hiring for a job that would greatly increase Kesco's employee complement and that some of those hired might be retained after that job was completed. His credibly offered testimony is un rebutted.

viewed by Kaminski and each was required to sign an acknowledgment of temporary status, as discussed below.

In early April, Kesco began requiring those employees it hired, and those referred from TPI, to sign acknowledgments that they were temporary employees. This was, he claimed, based upon his counsel's advice as the best way to minimize unemployment insurance costs. The forms state that the applicant was being considered for "TEMPORARY EMPLOYMENT to work for a period which is expected to be less than SIXTY (60) days," for work primarily on the PAT jobsite. (Emphasis in original.) They refer to a stated start and completion date for the employment which was to be "the time Kesco requires temporary employees in addition to its permanent employees"; however, Kaminski did not fill in the expected completion dates on the lines provided on the forms.

D. Hiring

Respondent's compilation of its hiring reveals that, after it had hired Goodrich and Bickerwert Sr. in the latter half of March, it next hired R. Judge, C. Wilkins, and R. Bennett, all during April. It then hired James Bratcher.

Bratcher had heard that Kesco might be hiring and dropped in at its office about mid-April. He asked Kaminski if any help was needed. Kaminski interviewed Bratcher at that time and offered him employment at \$9 per hour with the promise of a raise to \$10 if he took the State's journeyman examination. Bratcher was then directed to the Kentucky Cabinet office to complete an application. After complying, his application was returned to Kesco by facsimile transmission and Bratcher was told that his employment would depend on Chester Kaminski's discussions with Joseph Kaminski. Later that same day, Kaminski told Bratcher to report to the shop the next day. Among the forms completed at that time was the acknowledgment of the temporary nature of his employment, as described above. From that form, and from his conversation with Kaminski, Bratcher was aware of the limited duration of the job for which he was hired. He knew that it would be only a few months; the form spoke of an expectation that it would be less than 60 days but he was not given any specific cutoff or termination date.

Bratcher had been a union member in the 1960s and 1970s; he was not affiliated with any union when he applied for work with Kesco and there was no discussion of unions when he was interviewed. He and Kaminski had known each other for many years and had worked together 30 years ago.

Respondent's next three hires, in late April or early May, were D. Bryant, J. Anderson, and M. Oberst. The first two apparently came through the Kentucky Cabinet office; Oberst was referred by TPI.

About April 25, Bratcher told David Cheek that Kesco was hiring. Cheek appeared at Kesco's office, seeking to complete an application. He was referred to the Kentucky Cabinet where he filled out the application and submitted it with a resume. He was called in to the Kesco office on the following day, interviewed by Kaminski and offered a job at \$9 per hour with an assurance of a raise of an undisclosed amount if he applied for his journeyman's license.

Cheek had been a union member from 1981 to 1986. He believed that he discussed his past relationship with the union in his interview. He was told that the job was temporary and signed the acknowledgment of his temporary status. He had no recollection that any outside limit on the term of his employment was stated.

Respondent took on 13 more employees for the PAT job after Cheek. Of these, eight were referrals by TPI, according to TPI's invoices for their services. The remainder came through the Kentucky Cabinet; there was no consistent procedure. Thus, Timothy Thurber called Kaminski and was referred by him to the State's employment office while Thomas Pickerill, was sent by Kaminski's secretary to TPI as the only place from which they were hiring.¹¹

David Carrico is a union member who was sent to TPI, along with a Mike Williams, by Osborne. They made appointments for June 16 and appeared there wearing shirts bearing IBEW logos and buttons identifying them as union organizers. TPI's representative, David Owens, greeted them with the query, "Are we being recorded?" They assured him that their meeting was not being recorded and Owens told them that anything he had was at substantially lower wages than they were used to. They told him that they understood that and, when Williams was asked why he would want such a job, he stated that it was better than being unemployed, which was his then-current situation. Owens said that the work might not be electrical; Williams said he would take anything but Carrico told Owens that he only wanted work as an electrician. They submitted applications.

On June 20, Osborne wrote TPI, pointing out that he had sent Carrico and Williams "to help you with your man power needs for electricians." He described their qualifications, assured Owens that any union activity in which they might engage would be conducted within legal parameters and would not interfere with their productivity and "reserve[d] the right to bring . . . [TPI's] failure or refusal [to consider them for employment] to the attention of the National Labor Relations Board."

Owens called both Carrico and Williams on June 21 and referred them to the Kentucky Cabinet office to complete applications. They complied on June 22, again wearing the Union-sponsored tee shirts and organizer buttons. Owens called Carrico again on June 23 and told him to report to Kesco for an interview on June 23.¹² Carrico appeared, attired as he had been at TPI and at the State office, met with Kaminski, demonstrated a job skill (pipe bending), was hired and was assigned to a jobsite at the Owensboro airport for the day. He asked and was told that his rate of pay would be determined by TPI and that the job was temporary. After one day at the airport, he was assigned to the PAT jobsite.

¹¹ Pickerill asserted that the secretary first referred him to the Kentucky Cabinet but then referred him to TPI after inquiring about whether he had worked on union or nonunion jobs. The secretary, who disputes asking this question, is not alleged to be a supervisor or agent on Respondent's behalf and I need not resolve this insignificant credibility issue.

¹² The record does not reveal what, if anything, happened to Williams.

Of those hired by Kesco or by TPI for Kesco since late March, and required to sign the temporary employment acknowledgments, five worked beyond 60 days: Dalton Goodrich (late March to the end of August), Marvin Bickerwert Sr. (late March to sometime in 1996), Marty Oberst (hired in late April and still employed as of the date of the hearing), Gary Brown (hired in May and still employed as of the date of the hearing), and Jeff Donovan (May through mid-August). Oberst and Brown are now deemed regular full time employees.

E. Bratcher and Cheek—Pay Raises, Reprimands, and Terminations

Kesco had few fixed practices regarding wage increases; raises were granted on the basis of periodic appraisals or when requested by an employee. Generally, raises were in the range of 50 to 75 cents per hour and signified satisfaction with the work performed, skills, and attendance. New regular hires were generally told that they would have to prove satisfactory for 90 days and temporary employees that they would be evaluated at the end of 60 days for continued employment. If retained, they would get a raise.

As previously noted, Bratcher and Cheek started work at \$9 per hour. About May 11, after he had been working only a couple of weeks, Cheek asked Kaminski for a \$3-per-hour raise, stating that he was having trouble “making it” at \$9 per hour. Kaminski said that he would have to check with his son, Joseph. On May 15, Cheek reiterated his request, seeking an answer by noon. Shortly before that time, Chester Kaminski returned to Cheek and told him that his request was granted. Bratcher, who had never requested a raise, got a \$3-per-hour increase at the same time. These raises, Kaminski said, were warranted by the fact that they had both been making \$12 per hour before their Kesco employment. In granting the increases, Kaminski recalled telling them not to discuss their wages with their fellow employees because he “didn’t want to create an avalanche” of other employees seeking similar raises, to “keep it confidential.”¹³

Notwithstanding whatever it was that Kaminski’s directed, when the subject of wages came up at lunch among the employees on May 16, Cheek told others that he was being paid \$12 per hour. Later that day, Kaminski repeated to Bratcher that he “didn’t want this to escalate,” that he didn’t believe it was Cheek’s or his fault and that “he was going to have to let somebody go.” Cheek, who was approaching them at that moment, heard the statement.¹⁴

¹³ The employees do not recall him making this statement. They recall only that Kaminski said that “he didn’t want this to escalate.” Cheek took this to mean that Kaminski did not want Cheek to ask for more money. Bratcher did not glean any meaning from it. It is clear from subsequent events that Kaminski intended whatever he told them to be a prohibition against discussions of their wage rates with their fellow employees.

¹⁴ Chester Kaminski denied telling either of them that he was going to fire them for talking about the raises or that he had said anything to the effect that he would have to let someone go because other employees had started to ask for raises. Rather, he claimed, if he said anything about letting anybody go, it was in the context of the “morale problem[s]” and “big headache” he anticipated from having to explain why he could not give everyone a \$3 raise. I find both Bratcher and Cheek

After that conversation (according to Cheek’s recollection), Cheek and Bratcher sought out Osborne to inquire about representation. He gave them union literature to distribute and union tee shirts and organizer buttons to wear. They began wearing the union garb on May 18, picketed the PAT site briefly on that day with signs asserting that Kesco paid low wages, and, from May 22 to 26, distributed the handbills before and after work and during the lunchbreak.

On May 26, Kaminski issued a memo, essentially identical to the one he had issued on February 3, concerning the organizing activities.

At some point, Kesco’s electricians began to work Saturdays on the PAT project.¹⁵ Bratcher acknowledged that he knew, in May, that such work was expected.¹⁶ Cheek and Bratcher failed to show up for work on Saturday, May 27. Believing that no work would be scheduled on the Saturday of the long Memorial Day weekend, they had also failed to call in to report their absences 30 minutes before the start of the shift, as is required by Respondent’s rules.

About June 1, Kaminski came to Bratcher and Cheek at the PAT site with a ledger book containing notations concerning their purported conduct. He presented Bratcher with a page stating:

(1) Disclosure of Information about Rate Increase of \$3.00 Granted 15 May to Delwin.

(2) Failure to Call In 30 Min Before Shift Time on Saturday 27 May 1995 Absent.

Cheek was presented with a page setting out those same two purported violations along with a third:

(3) Organizing Activity on Company Time.

They were asked to initial each entry, and did so. This is the procedure, which Kaminski uses to reprimand employees; others have been so reprimanded, including for violations of the call-in rule.

With respect to the reprimand of Cheek for allegedly organizing on company time, the record is clear that Respondent permits its employees to engage in all manner of conversations while they are working. Kaminski testified that another employee had told him “what was going on . . . that David Cheek had buttonholed Delwin Cheek [a distant relative] and was discussing the Union.” While no time interval was indicated to Kaminski, he took that to mean that Cheek “was interfering with the job progress.” Cheek credibly denied having any lengthy conversations about the Union while working or having any union-related discussions, which interfered with the work. That testimony is uncontradicted by any probative testimony.

more candid and accurate in their recollections than Chester Kaminski; I also find his explanation to make little sense and to sound more like an admission of a threat than a denial.

¹⁵ Chester Kaminski, after a review of Company records, testified that regular Saturday work began in late June. He later testified that Saturday work may have been required in April, May, and June; he did not check with his son, Joseph, who was the supervisor on the site, and Joseph did not testify.

¹⁶ Cheek, however, claimed that he had never been told that Saturdays were a scheduled workday.

Kaminski never questioned David Cheek about the alleged incident.

On June 10, a union meeting was held in Cheek's home. Osborne, Bratcher, Cheek, and several other employees attended.

On June 16, in what was asserted to be a protest against the reprimands issued them about June 1, Bratcher engaged in a strike, carrying picket signs proclaiming that Kesco had committed unfair labor practices.¹⁷ He picketed for about an hour; Cheek did not join him in that picketing on that first day. While he was picketing, Kaminski told him that June 16 would be his last day of work and that Cheek's last day would be June 23. Kaminski also told him to turn in various items of Company property.¹⁸

Bratcher and Cheek picketed together, from the start of the workday on June 17. While they were picketing, Kaminski drove up, with his sister, and gave each of them a form to sign. The form given to each asked, "What's Happening?" and stated:

Accordingly with our temporary employment agreement, your last day will be *June 16th*. [Bratcher, *June 23rd* for Cheek]. Do you want to work or not?
It's your choice: Yes _____ No _____

James Bratcher [David Cheek]

Both refused to sign and Kaminski so noted on each letter. Upon his refusal, Cheek credibly testified, Kaminski asked him to turn in his keys, hard hat, and other equipment.

On June 21, Bratcher and Cheek returned to the jobsite and told Joe Kaminski that they were offering to return to work, "unconditional[ly]" Joe left them to go and call his father. When he returned, he told them that someone would be contacting them.

Kaminski acknowledged that his son had told him of their offers to return to work. He purportedly told Joe that "Bratcher's time had expired" and that "Cheek's time had expired or was about to" and, therefore, he didn't see any point in re-employing them.¹⁹

Respondent never contacted either Bratcher or Cheek in regard to their offers to return to work. Most of the employees hired for the PAT project were terminated at its conclusion. Some, however, were offered regular employment.

¹⁷ The signs and apparently the instructions for picketing, were provided by Osborne.

¹⁸ Chester Kaminski did not dispute Bratcher's testimony regarding this June 16 conversation. He acknowledged asking whether Bratcher (and, he claimed, Cheek, who was not there according to both employees) would work. Bratcher was a candid witness who demonstrated a good memory of the facts, and I credit him.

¹⁹ He also testified that Joe may have offered to have them come and speak to him. They should have come to him, Chester Kaminski said, because when he had spoken to them on June 16, he "offered them to go back to work" and, "if they chose to go back to work, then [he thought] it's up to them to see [him]" about doing so.

F. Analysis

1. Refusal to hire or consider for hire

The complaint alleges that Respondent discriminatorily failed and refused to hire or consider for hire Frey and Snodgrass, the two union member applicants who appeared at the Kesco office on February 17.²⁰ I find that Respondent discriminatorily refused to consider them for hire, in that it refused to accord these overtly union-affiliated and ostensibly qualified and sincere applicants the same privileges it was according at that same time to applicants who did not appear to be union-affiliated, i.e., the opportunity to submit applications and be interviewed. Inasmuch as Respondent did not hire anyone between mid-January and mid-March, I do not find that there was necessarily a discriminatory refusal to hire.²¹

In reaching this conclusion, I note that, only four days earlier, Kaminski had told the union's organizer that, "if you truly believe an individual might desire employment with our Company, please have the individual come to our office and make application personally." Following Osborne's instructions, Frey and Snodgrass did precisely as Kaminski had directed, only to have their efforts summarily rebuffed. Moreover, Kaminski's animus toward them is revealed in his unsupported accusation that they, unlike others who received interviews or were directed to someone who would take their applications, "came in and *interfered* with the progress of work at hand." There was no evidence of interference.

Animosity and inconsistency is further revealed in Kaminski's almost immediate resort, after union-member applications and applicants began to appear at his door, to the device of requiring all applicants to go through the Kentucky Cabinet, discussed in greater detail *infra*. And, it is revealed in his willingness to interview applicants, including Sparks,²² only four days later, at the Kentucky Cabinet office, in preparation for what he described to Sparks as significant future hiring. It is further revealed by the fact that, notwithstanding both of the foregoing actions, Kaminski had misled Frey and Snodgrass by telling them that Kesco was not accepting applications, thereby discouraging them from making further efforts to apply.

The foregoing evidence of union activity, knowledge, and Respondent's animus (which is further revealed in other conduct described hereinafter), viewed together with Respondent's inconsistent conduct, establishes that the employees' protected conduct was a motivating factor in the refusal to consider them for hire.

Kaminski's only explanation for his casual dismissal of Frey and Snodgrass was that he was busy at the moment they ap-

²⁰ No similar allegations are made with respect to the mailed-in applications or the walk-in application by Sparks.

²¹ See *Casey Electric*, 313 NLRB 774 (1994). I shall leave to compliance the determination of which of these discriminatees, if either, would have been hired had Respondent not discriminatorily refused to accept their applications and/or interview them. *H. B. Zachry Co.*, 319 NLRB 967 (1995).

²² That Sparks came in to the interview wearing the union jacket and hat does not require a different conclusion. A refusal to interview him at that juncture would simply have made Respondent's discriminatory motivation too obvious.

peared. His preoccupation with getting his small crew off to their assignments may have justified a delay before providing them with applications and/or interviewing them; however, they could easily have been told to wait, or to come back later. It does not justify the out-of-hand rejection and misleading information, concerning Respondent's hiring posture which they received. I find that General Counsel has sustained his burden of establishing, by a preponderance of the evidence on the record as a whole, that Respondent failed and refused to consider Frey and Snodgrass for employment. Respondent's evidence fails to rebut that conclusion.²³

2. Kesco's new hiring procedures

Within days of having received the first union-sponsored applications and applicants, Respondent adopted a new policy, one requiring that applicants first go to the Kentucky Cabinet to submit applications. It subsequently purported to remove itself even further from the hiring process by arranging for TPI to provide electricians on a contract basis. I find that the General Counsel has met its burden of establishing that discrimination was a motive for these actions. In so finding, I note that Kaminski had, only shortly before the first, told the Union's organizer that his services in providing employees was unnecessary because Kaminski preferred to do it himself. He reiterated that position only nine days before enlisting the aid of the Kentucky Cabinet, stating, "[O]ur small organization conducts these activities [receiving applications and interviewing] directly with the prospective employees *and that will continue to be our policy.*" (Emphasis added.)

A virtual "smoking gun" as to motivation, moreover, is revealed in Kaminski's explanation for going to TPI for electricians. He had already found out that his use of the Kentucky Cabinet did not adequately insulate him from union-referred applicants. Recourse to TPI was a means of hiring, which he admittedly believed, would allow him to deny the Union knowledge that he was hiring and keep it from offering him employees.

Respondent's claim that it adopted these procedures to lighten its burden with respect to the hiring process does not withstand scrutiny. When employees came to him through either the Kentucky Cabinet or TPI, Kaminski continued to review applications and interview. He even interviewed those electricians who were employed by TPI. Respondent, moreover, offered no evidence to indicate any diminution in the number of applications it handled. General Counsel has met his burden of proof on discriminatory motivation. Respondent has failed to rebut that evidence.

3. Bratcher and Cheek

Employee discussions about their wages is an "inherently concerted activity clearly protected by Section 7 of the Act." It is a violation of Section 8(a)(1) to promulgate a rule prohibiting such discussions, advise employees that such discussions are

²³ *Atlanta Motor Lines*, 308 NLRB 909, 915 (1992); *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

prohibited, inform employees that they had violated such a rule or to discipline employees for doing so.²⁴

Kaminski intended to promulgate such a rule, at least with respect to the raise given Bratcher and Cheek, in mid-May, when he told them that he "did not want this to create an avalanche (or escalate)." As it is the reasonably anticipated effect of an employer's statements, not their intent, which determines whether they are coercive and, since the employees did not hear or understand his admonition, I find no violation at that moment. However, Kaminski's subsequent actions, repeating the nonescalation statement in the context of a threat that, because the wages were disclosed, someone would have to be fired, and then issuing reprimands to both employees for have made such disclosures, are clearly acts which interfere with, restrain, and coerce employees in the exercise of Section 7 rights and thus violative of Section 8(a)(1).

The timing of those reprimands, 2 weeks after the fact but only days after they had openly engaged in union activities, gives rise to an inference that those reprimands were motivated by their union activity. Respondent offered no coherent explanation for the delay in issuance and, accordingly, I find that they were issued because of that union activity and thus violative of section 8(a)(3).

I also find the reprimand of Cheek for "Organizing activity on Company time" violative of Section 8(a)(3) and (1). Respondent permitted all manner of employee conversations at work; it offered no evidence that Cheek had engaged in any conversations, which interfered with the work other than a hearsay statement that Cheek had "buttonholed" someone. Even that was not investigated and Kaminski did not question Cheek about the alleged infraction before issuing the reprimand. Moreover, Cheek credibly denied having impeded the work by any such discussions. Even if Kaminski had a good faith belief that Cheek had engaged in improper union activity, his conduct is violative. This issue is governed by the *Burnup & Sims* and *Rubin Bros. Footwear* line of cases, which provides:

Where an employee is disciplined for having engaged in misconduct in the course of union activity, the employer's honest belief that the activity was unprotected is not a defense if, in fact, the misconduct did not occur. *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964); *Rubin Bros. Footwear, Inc.*, 99 NLRB 610 (1952).

While I am suspicious of Respondent's motive in reprimanding Bratcher and Cheek for their failure to call in before absenting themselves on Saturday, May 27, I find that, on the record as a whole, the inference of discriminatory motivation as to those warnings is not warranted. Thus, I note that Bratcher was aware that Saturday work was expected; the failure to show up, or call in, on that particular Saturday was caused by a misunderstanding regarding the holiday weekend. I also note that Respondent had issued similar reprimands to other employees for the same infraction on other dates and that this reprimand, unlike the one for disclosing their wages, followed immediately upon knowledge of the infraction.

²⁴ *Automatic Screw Products Co.*, 306 NLRB 1072 (1992).

On June 16, avowedly in protest of the foregoing conduct, Bratcher and Cheek went on strike. Kaminski came to them, asked them if they were going to work and, when they refused, terminated them. To the extent that a *Wright Line* analysis is called for in such circumstances, I am compelled to find that General Counsel has shown, by at least a preponderance of the evidence, that they were terminated for engaging in that strike, a statutorily protected activity.

Respondent, however, contends that they were terminated because their periods of temporary employment were up, not because they struck. Its contentions in this regard are not persuasive. The temporary employment forms, which they had signed, stated that the employment was “expected to be less than SIXTY (60) days.” They did not say that the employment would not exceed 60 days. Indeed, the employees’ tenure was tied not to a fixed period of time but rather to the duration of the project for which they were hired. Thus, the acknowledgment went on to state, “Applicant will work primarily on the contract with PREMIUM ALLIED TOOL which requires KESCO to employ temporary work [sic] for whom KESCO will not have permanent employment positions.” The form called for the inclusion of an “expected commencement and completion” date, which was the “period being the time KESCO requires temporary employees.” However, in no case was the “Expected Finish Date” placed upon the form. Kesco’s employees worked on the PAT site until October.

Moreover, of the employees required to execute the acknowledgments, five worked beyond 60 days and two became regular employees. Given the quality of their work, as evidenced by the extraordinary pay raises they had received, there is every likelihood that Bratcher and Cheek would also have been retained, at least through the end of the PAT project. Nothing in the terms of their hire, and certainly not the forms they signed, mandated that they be terminated on any given date. The letter Kaminski gave each of them as they picketed even asked, “Do you want to work or not? It’s your choice.” Thus, they were asked to choose between striking and discharge and were discharged when they chose to continue their strike.

Accordingly, I find that they were discharged on June 16 because of their union activity, in violation of Section 8(a)(3).²⁵

²⁵ Bratcher and Cheek made an unconditional offer to return to work on June 21. Given the circumstances of their discharges, I find it unnecessary to reach the issue of whether the strike in which they were engaged was in protest of unfair labor practices or converted at the moment of their discharges to an unfair labor practice strike.

CONCLUSIONS OF LAW

1. By promulgating, maintaining, and advising employees about rules prohibiting employees from discussing their wages with other employees, by reprimanding and threatening employees with discharge for discussing their wages with other employees, and by reprimanding an employee for discussing the union while working the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By failing and refusing to consider union-affiliated job applicants for hire, by changing its hiring procedures and practices to avoid receiving applications from union-affiliated job applicants, by disciplining employees because they had engaged in union activity and by discharging employees because of their union activity, the Respondent has violated Section 8(a)(3) and (1).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent may introduce evidence, at the compliance stage of this proceeding, concerning how long James Bratcher and David Cheek would have remained employed and whether or not they would have been among those retained in its permanent work force. If Respondent establishes at the compliance stage that they, or either of them, would not have been retained to or beyond the end of the PAT project, Respondent’s obligation will be to consider them eligible for employment on future projects, on application, on a nondiscriminatory basis. Evidence may be considered both concerning Respondent’s reinstatement obligations toward them and the date when its backpay liability toward them may have terminated. See *Dean General Contractors*, 285 NLRB 573, 574 (1987).

In like vein, it shall be a matter for compliance to determine whether Gerald Frey and/or Gerald Snodgrass would have been hired, and how long they would have been retained, if the Respondent had interviewed them applying nondiscriminatory hiring criteria. See *H. B. Zachry Co.*, supra.

[Recommended Order omitted from publication.]