

**Wayne Erecting, Inc. and Bridge, Structural, Ornamental & Reinforcing Iron Workers Local Union No. 8, AFL-CIO.** Case 30-CA-13915

April 30, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS  
LIEBMAN AND HURTGEN

On September 23, 1998, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions, a supporting brief, and an answering brief to the Charging Party's cross-exceptions, and the Charging Party filed cross-exceptions, a supporting brief, and a brief in opposition to the Respondent's exceptions.

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,<sup>1</sup> and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent did not violate Section 8(a)(3) of the Act by refusing to hire 20 applicants for employment. He also found, however, that the Respondent violated Section 8(a)(3) by refusing to consider Brent Emons for employment.<sup>2</sup> We agree with these findings. The judge further found that the record did not show that the Respondent's refusal to hire Emons for employment violated Section 8(a)(3). We do not adopt this latter finding but instead remand the issue of the refusal to hire Emons for employment for further consideration in light of the Board's decision in *FES*, 331 NLRB 9 (2000), which issued after the judge's decision in this case.

In *FES*, the Board set forth the framework for analysis of both refusal-to-hire and refusal-to-consider allegations. In order to establish a discriminatory refusal-to-consider violation under the *FES* framework, the General Counsel must show:

- (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed

to the decision not to consider the applicant for employment.<sup>3</sup>

In order to establish a discriminatory refusal-to-hire violation, the General Counsel must establish the following elements:

- (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 discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.<sup>4</sup>

Once the General Counsel has met his initial burden for the refusal to consider and refusal to hire, respectively, the burden shifts to the respondent to show that it would not have considered or hired, respectively, the applicants even in the absence of their union activity or affiliation.<sup>5</sup>

Applying this analysis here, it is clear that the judge's finding concerning the 20 applicants would not change because the credited evidence establishes that the Respondent did not receive their applications. Accordingly, we shall adopt the judge's dismissal of this portion of the complaint.

We also find that the judge's analysis of the allegation that the Respondent unlawfully refused to consider Emons for employment was consistent with *FES*. Thus, we find that the General Counsel's burden was satisfied by the credited evidence establishing that the Respondent received Emons' application, and by Don Hart's comment that the Respondent excluded Emons from the hiring process because of his union activity and affiliation.<sup>6</sup> In addition, as the Respondent's defense consists solely of its contention—rejected on credibility grounds—that Emons' application was never received, the Respondent has not met its *FES* burden of showing that Emons would not have been considered for employment even in the absence of his union affiliation and activity.

<sup>1</sup> The Respondent and the Charging Party have 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 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We note that the complaint did not allege a refusal to consider Emons. However, the Respondent does not make a procedural objection on this ground, and it appears that the matter was fully litigated.

<sup>3</sup> *FES*, supra at 15.

<sup>4</sup> *FES*, supra at 12.

<sup>5</sup> *Id.* at 15 and 12, respectively.

<sup>6</sup> Hart told Emons that the Respondent would not hire Emons because Emons would "tell us all to join the union." The judge also found that Hart told Emons that the Respondent's president, Wayne Slawson, was "pissed off at you guys" because the Union would not let Slawson in before he started the Company.

Although we adopt the judge's finding that the Respondent unlawfully refused to consider Emons for employment, we do not adopt his finding that the Respondent did not violate the Act by refusing to hire Emons. The judge found that the evidence did not support finding such a violation, but did not make the factual findings required under the *FES* framework. Although pre-*FES* cases allowed for some of these findings to be made in the compliance proceedings after a refusal-to-consider violation is found, under *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 at 18.

Accordingly, we shall sever the allegation concerning the refusal-to-hire Emons and remand it to the judge for further consideration under the *FES* framework. This remand shall include, if necessary, reopening the record to obtain evidence required to decide the case under *FES*. In addition, although we adopt the judge's finding that the Respondent unlawfully refused to consider Emons, we shall sever and remand that violation as well because the remedy we would order for that violation would be subsumed within the remedy for a refusal-to-hire violation.<sup>7</sup> We shall issue a final order, however, with respect to the dismissal of the 20 refusal-to-hire allegations discussed above.

#### ORDER

IT IS 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 Brent Emons are severed from the rest of this proceeding and remanded to the administrative law judge for appropriate action as set forth above. The 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.

IT IS FURTHER ORDERED that with respect to all other issues the recommended Order of the administrative law judge is adopted and the complaint is dismissed.

*Benjamin Mandelman, Esq.* and *J. Edward Castillo, Esq.*, for the General Counsel.

*Fred G. Groiss, Esq.*, of Milwaukee, Wisconsin, for the Respondent.

*Michael J. Stapp, Esq.*, of Kansas City, Kansas, for the Charging Party.

<sup>7</sup> We are not remanding the refusal-to-consider violation itself for further consideration by the judge.

#### DECISION

##### STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin, on June 8, 1998. The complaint alleges that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire a group of named employees because of their membership in and activities on behalf of the Charging Party Union (the Union). Respondent filed an answer denying the essential allegations in the complaint. After the close of the hearing, the parties filed briefs, which I have read and considered.<sup>1</sup>

Based on the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

##### FINDINGS OF FACT

###### I. JURISDICTION

Respondent, a corporation, with an office and place of business at Big Bend, Wisconsin, is engaged in business as a machinery, equipment, and erection contractor in the construction industry, performing commercial and industrial construction. I find, in accordance with a telephone conference call concession by Respondent's counsel, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.<sup>2</sup>

The Union is a labor organization within the meaning of Section 2(5) of the Act.

###### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. The Facts

Respondent is a nonunion company, which employs ironworkers and laborers in the erection and repair of steel-frame buildings. Its president, Wayne Slawson, started the Company about 10 years ago, after being rejected by the Union for membership or admission into its apprenticeship program. Slawson testified that he blamed Union Business Manager Brent Emons for his rejection and for treating him unfairly at that time. The Union has tried twice to organize Respondent, but has been unsuccessful, apparently losing representation elections in 1991 and again in 1992.

On May 21, 1997, Emons went to Respondent's jobsite at a Kohl's Food Store on Oakland Avenue in Milwaukee in an

<sup>1</sup> This is basically a salting case. Salting has been defined as "the act of a trade union in sending a union member or members to an unorganized jobsite to obtain employment and then organize the employees." *Tualatin Electric*, 312 NLRB 129, 130 fn. 3 (1993); and *Tualatin Electric v. NLRB*, 84 F.3d. 1202, 1203 fn. 1 (1996), enforcing Board decision. The quoted footnotes speculate that the term "salting" may be derived from the expressions "salting a mine" or "salting the books," which are described as implying a fraudulent intent. There is, however, a more neutral meaning for the term: "To sprinkle" or "to intersperse with." See Webster's *Third New International Dictionary* (unabridged, 1961). The term "seeding" was also used in this case to mean the same thing as "salting."

<sup>2</sup> I also note that, in an earlier representation case involving Respondent (Case 30-RC-5414), the Board found that Respondent was an employer within the meaning of the Act.

attempt to seek employment. Emons had left his position as union business manager in 1993 and worked for 3 years “in the field” as an ironworker. On this occasion, Emons introduced himself to Respondent’s foreman, Don Hart, and asked if Respondent was hiring. Hart responded that Respondent would be hiring in the future. Emons, who told Hart that he was a certified ironworker with 20 years of experience, asked for an application. Hart gave him one and agreed that Emons could mail the completed application to Respondent’s mailing address, which Hart confirmed by giving him a business card listing Respondent’s name and post office box in Big Bend, Wisconsin.<sup>3</sup>

Emons filled out the application and gave it to Union Organizer Jim Jorgensen, who testified that he obtained blank copies of the same application form from an office supply store. According to Jorgensen, he had a number of out-of-work union members fill out additional application forms. Jorgensen testified that he then had the 21 completed applications mailed, by regular mail, to Respondent’s post office box. Respondent vigorously denies receiving any such applications at its post office box, primarily through the testimony of Wayne Slawson and his wife, Donna, who serves as vice president and secretary of Respondent.

The central issue in this case is whether the above applications were indeed mailed by the Union to the Respondent. That issue essentially turns on the credibility of the relevant witnesses. I shall discuss the witnesses’ credibility in greater detail later in this decision.

At the end of June, Emons and Jorgensen, who were picketing Respondent over alleged substandard wages on a jobsite in Kenosha County, spoke briefly to Hart. Their conversation was not tape recorded and none of the witnesses was clear on what exactly transpired on that occasion. I am, therefore, unable to make any findings of fact as to that conversation. Indeed, because of the ambiguity, imprecision, and self-serving nature of the testimony of Emons, Jorgensen, and Hart, I found it difficult to credit any of them fully as to their conversations, in the absence of corroboration by the transcripts of taped conversations. Of the three, Emons seemed the most reliable witness, but, in all the circumstances, I cannot credit even his testimony as to the unrecorded conversation between the three men at the end of June.

In a brief taped conversation between Jorgensen and Hart on July 18, 1997, Jorgensen asked about Emon’s application. Jorgensen received a noncommittal response and then asked whether Hart had an application for him. Hart responded that he was “all out of them.”

<sup>3</sup> Emons’ account of this conversation was confirmed by the transcript of a tape recording of the conversation secured by Emons and introduced into evidence without objection from Respondent. Hart, who was unaware that his conversation with Emons had been taped, gave a different account, which I do not credit. Indeed, because Hart’s accounts of several recorded conversations were decidedly different from the transcripts of those conversations, because Hart often could not recall conversations and events, and because Emons seemed a more reliable and candid witness, I credit Emons rather than Hart where their testimony conflicts.

On July 21, 1997, in another taped conversation, Emons spoke to Hart about his job application. Emons said that he was “[w]aiting for you guys to call me for a job.” Hart said that Respondent was only looking for “pop riveters.” Emons responded that he could perform that work and had his “own pop gun.” Hart initially said Respondent was not “hiring anybody yet,” but then conceded that Respondent had hired two individuals who had previously worked for Mitsche, another non-union employer. Emons then asked to be considered for future hiring. Hart responded, “What is this . . . . What is this called, you know, seeding, is that what it is, or what?” Hart then stated that he thought “union guys couldn’t work for us,” an apparent misunderstanding of union rules, which he believed precluded a union member from working for a nonunion employer. Emons insisted that there was no such prohibition, stating, “No, I can work for you.” Hart replied that he did not “do the hiring and firing” and that Wayne Slawson did. Emons then said that he assumed Respondent had received his application. Hart made no verbal response, but Emons credibly testified that Hart nodded his assent.<sup>4</sup>

Emons then said that he did not know why Respondent would not hire him. Hart responded that it was “because you’ll tell us all to join the union . . . you know we’re kind of pissed off at you guys . . . because you wouldn’t let [Wayne Slawson into the Union] before he started his company.” This was a reference to an incident discussed above where Slawson was denied entry into the Union or its apprenticeship program, for which Slawson blamed Emons. The conversation ended with Emons telling Hart that Hart should tell Slawson that he was still interested in a job with Respondent.

Emons has never been contacted by anyone from Respondent about his application. Nor did he ever go to or call Respondent’s office to ask about the status of his application. Hart, who conceded he had no question that Emons was competent and qualified to perform Respondent’s ironworker’s work, reported to Wayne Slawson that Hart had given Emons a blank job application. Hart, who consulted with Slawson on a daily basis, also undoubtedly reported some of his followup conversations about the Emons application to Slawson. He himself testified that he specifically reported that Jorgensen had asked about Emons’ application.

On about July 14, 1997, on a Kenosha jobsite, Hart had a conversation with Ron Slawson, Wayne’s father and a supervisor for Respondent, who often visited jobsites as a “troubleshooter.” Slawson told Hart, “Just make sure today that you don’t hand out any applications to the wrong people.” At that,

<sup>4</sup> I make this finding not only because I found Emons’ testimony more reliable than that of Hart, but also because the transcript of the tape recording is consistent with some kind of nonverbal response (see GC Exh. 3). Nor was Hart, who testified before Emons, recalled to refute Emons on this point. Moreover, in the taped conversation, Hart did not deny that Respondent had received the application in circumstances where such denial would be expected if true. As shown below, Hart had spoken to, and was in contact with, Slawson about Emons’ application. Indeed, he answered Emons by referring to Slawson’s problems with Emons when Slawson tried to get into the Union, and he candidly mentioned union reasons for the failure to consider Emons for hire.

both Hart and Slawson laughed or chuckled and Hart promised not to hand out any more applications. As Slawson left, he said, “[w]atch out for them seeds” or something to that effect.<sup>5</sup>

On about July 15, an unidentified job applicant approached Hart and a group of other employees at the jobsite, while they were eating lunch. Hart said that Respondent was looking for employees and asked where he was from and what kind of work experience he had. Hart did not give the applicant, who was from Florida, an application because he said he got into trouble for handing out an application to the wrong person. Instead, Hart gave the applicant Respondent’s office number and told him to call Wayne Slawson. Hart later told a group of employees something to the effect that he did not think this applicant was a union seed or a union member.<sup>6</sup>

Hart later had a telephone conversation with Wayne Slawson that was overheard by former employee Richard Novak. Novak testified that Hart told Slawson something about checking the applicant, whom Novak identified as the person from Florida referred to above, to see if “he was a union seed.” Novak, who was hired by Respondent in early 1997 and worked for it from June 9 to July 18, 1997, also testified about two other similar conversations. On June 10, after work, Novak was part of a group of employees to whom Don Hart mentioned that he “suspected a union member of putting in an application and he could possibly be a union organizer or a union seed.” On that occasion, Hart also told Novak that he did not have to worry about Novak “being a union member.” Novak also testified that, on July 15, 1997, he overheard a telephone conversation between Hart and Wayne Slawson in which Hart told Slawson something about checking the application to see if “he was a union seed.”<sup>7</sup>

It is not disputed that Respondent hired some ironworkers in June 1997 and thereafter, but did not hire or apparently even consider for hire the union members whose applications were allegedly mailed to Respondent. It is also not disputed that Emons and the other individuals who signed applications were qualified ironworkers.

#### B. Discussion and Analysis

As mentioned above, the pivotal issue in this case is whether the Union mailed 21 job applications to Respondent. The General Counsel has the burden of proof on that issue. In attempt-

<sup>5</sup> Ron Slawson was a former union member and had known Brent Emons for many years.

<sup>6</sup> The above was based on the credible testimony of Steve Murphy, who was formerly employed by Respondent on two different occasions. His testimony, which was based on overhearing the July 14 conversation and being a part of the group in the second conversation recited above, survived and indeed was enhanced on cross-examination. Murphy’s testimony was corroborated in part by contemporaneous notes, and was not contradicted by either Hart or Ron Slawson. Respondent’s failure to elicit testimony on this point gives rise to an adverse inference that Hart and Ron Slawson would have given testimony damaging to Respondent. See *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

<sup>7</sup> Novak’s testimony in this respect is also not contradicted. Moreover, it is compatible with other evidence in this case and is consistent with his contemporary notes. I, therefore, credit Novak’s account, as set forth above.

ing to prove that the applications were mailed, the General Counsel relies primarily on the testimony of Union Organizer Jim Jorgensen. I am unable to credit that testimony. Accordingly, except for one application—that of Emons—I find that the General Counsel has failed to show, by a preponderance of the credible evidence, that the applications were mailed.<sup>8</sup>

Emons testified that, after he received a blank application from Hart on May 21, he filled it out and submitted it to Jorgensen “one or two days” later. Jorgensen testified that when he received the application from Emons, he went to an office supply store and bought blank forms of the same application and had them filled out by out-of-work union members. Except for Emons, none of the other applicants testified in this proceeding.

Jorgensen testified that he “mailed” the 21 completed applications, including that of Emons, to Respondent. Jorgensen concededly did not mail the applications by certified mail or return receipt requested. The only documentary evidence in support of such mailing was as follows: a copy of each application; a cover sheet for each, setting forth the name, address, and phone number of the applicant and the date the application was allegedly mailed; a copy of a covering letter to Respondent, dated May 29, 1997, and allegedly mailed with one or two applications, describing the applicants as qualified; and a blank envelope with the Union’s preprinted return address, purportedly to show the type of envelopes in which the applications were placed. Jorgensen testified, in accordance with the cover sheets he allegedly prepared, that he sent the 21 applications, with no more than 2 applications per envelope, on May 21, 22, 23, 26, 27, and 29 and June 2, 3, and 6, 1997. According to Jorgensen, he addressed each envelope in his own handwriting, “put two 32 cent stamps” on each and “mailed it.” (Tr. 115.)

The documentary evidence in support of the mailing, however, is questionable. For example, two of the cover sheets indicate that the applications were mailed before they were filled out and signed, one 10 days before (GC Exhs. 6(b), (f)). One of the applications was unsigned and undated, and several others from applicants who lived in the Green Bay area were allegedly mailed on the day they were signed. Jorgensen also testified that he typed the May 29 letter himself. But, despite several typos, the letter contains the initials “JJ:js,” indicating the author, Jim Jorgensen, and a different typist. I find, contrary to Jorgensen’s testimony, that he did not type the letter himself. I find this significant because Jorgensen purportedly typed out the cover sheets for the applications on his own computer and he tried to give the impression that he prepared all the envelopes himself. I doubt he did so personally, in part because his testimony about the letter conflicts with the letter itself, but also because of my assessment of his overall testimony.

Jorgensen’s testimony about mailing the applications also seemed evasive. Initially, he was perfectly willing to give the

<sup>8</sup> The Charging Party argues in its brief that when a letter is mailed, even by regular mail, the Board presumes that it is received. Without commenting on the validity of this proposition, I believe the argument misses the point. Before the alleged presumption attaches, someone has to prove that the letter was mailed. It is this initial proof that is at issue here.

impression that he had placed the envelopes containing the applications in a mail box, physically mailed them or handed them to a postal service employee. But it became clear, after further questioning, that his claim was that he simply placed them on a secretary's desk, where outgoing mail was ordinarily picked up by a postal service employee. Jorgensen did not drop anything in a mail box or hand anything to a postal employee. He was not even present when these items of mail were allegedly picked up; nor did any other employee or secretary testify he or she was present when any particular piece of mail addressed to Respondent, whether or not it contained applications, was picked up by the postal service.

Another part of Jorgensen's testimony does not ring true. For example, he testified that he had a conversation with Hart on June 12 in Racine, in which Hart volunteered, "What's with the applications?" and Jorgensen responded, "We want to go to work." I find the likelihood of that exchange improbable, in view of Hart's guarded reaction to Jorgensen's inquiry in the taped conversation between them on July 18, which dealt with Emons' application. On that occasion, Jorgensen initiated the conversation about applications and only asked about Emons' application, telling Hart that Emons had sent him. Indeed, when Hart testified about a conversation between him and Jorgensen, he testified that Jorgensen asked about applications and he replied, "What applications?" I find Hart's testimony in this respect more plausible than Jorgensen's. In none of the tape recorded conversations did Hart ever initiate the subject of applications. Rather, in the tape recordings, Jorgensen and Emons raised the topic, and they asked about only one application—that of Emons. Those taped conversations are the most reliable and objective indicators of the focus of the parties' discussions. One would expect the union officials, who knew the conversations were being taped, to discuss the other applications—and in some detail—if they wanted to cinch a case against Respondent with respect to those applications. Their failure to do so, and their exclusive focus on Emons' application in the taped conversations, casts further doubt on the veracity of the Union's claims that it mailed the other applications to Respondent.<sup>9</sup>

There is, to be sure, other evidence that arguably supports the General Counsel's position. For example, credible evidence supports the inference that Hart confirmed that Emons' application was received. As I have indicated, however, that evidence does not support the inference that other applications were mailed and received. Nor is such a broader inference required by consideration of the evidence concerning overheard conversations between Hart and the Slawsons, and Hart's statements about giving applications to suspected union salts or seeds. That evidence, based on the uncontradicted testimony of employees Murphy and Novak, merely shows Respondent's animus and concern over applications from union people. But that

<sup>9</sup> I do not believe that Jorgensen's purported contemporary handwritten notes of his June 12 conversation with Hart warrant crediting his testimony that Hart initiated the discussion about applications, given the doubts I have about Jorgensen's general reliability as a witness. The notes are sketchy, hard to read and, like his testimony, devoid of the context needed to regard them as useful in making a credibility determination.

could have been and was, in my view, based on its reaction to the application of Emons, a union leader who was known to and abhorred by Wayne Slawson. Nothing in that evidence establishes that a group of applications, rather than a single application, was mailed and received. In all the circumstances, I am unable to conclude from the evidence that tends to support the receipt of Emons' application the further finding that 21 applications were received. In short, the General Counsel has not shown by a preponderance of the credible evidence that 21 applications were mailed and received.

As indicated above, however, I believe the General Counsel has proved, by a preponderance of the credible evidence, that the Emons application was mailed. Emons had asked for and received a blank application. He filled it out, and Jorgensen and Emons asked Hart about the completed application in two tape recorded conversations. I find it likely in these circumstances that the Emons application was mailed. That much of Jorgensen's testimony I can credit. Some of the evidence I have discussed above, including Hart's remarks to Emons and his overheard conversations about union applications, also supports the inference, which I make, not only that the Emons application was mailed but that it was received. After all, Hart spoke to Slawson about the Emons application; and he did not say, in his July 21 conversation with Emons, that it was not received, a fact I think he would have mentioned had that been the case. Indeed, Hart nodded confirmation that the application had been received and gave a discriminatory reason for why Emons was not considered for hire. Moreover, I do not credit Wayne Slawson's denial that he received Emons' application. In addition to the other evidence I have mentioned above, I found his testimony poisoned by his animus against Emons. In this respect, I do not pass on the testimony of Wayne's wife, Donna, whom I had no reason to discredit. She worked only part time and only picked up the mail from Respondent's postal box on some occasions. Her testimony alone, however, does not rescue Respondent from an adverse finding on this issue.

Having found that Emons' application was received by Respondent, I have no difficulty concluding that Respondent failed to consider him for employment for discriminatory reasons. Respondent's only defense at the hearing was its claim that it had not received any of the applications. Moreover, it is uncontested that Emons was qualified to work in jobs for which other people were hired during the relevant time period. Respondent's union animus is established by the evidence that Respondent was concerned about union salts and Hart's own remarks to Emons. Indeed, the tape recorded conversation of July 21 shows both animus and causation. Hart's response to Emons as to why Respondent would or did not consider him for hire is about as clear an admission as one is likely to see in a litigated case: "[Y]ou'll tell us all to join the union." Accordingly, I find that by failing to consider Emons for employment because of his union affiliation, Respondent violated Section 8(a)(3) and (1) of the Act. See generally *M. J. Mechanical Services*, 325 NLRB 1098 (1998).<sup>10</sup>

<sup>10</sup> The complaint alleges only an unlawful refusal to hire, but it encompasses the lesser included offense of an unlawful refusal-to-consider for hire, which is all that the evidence in this case supports, in

## CONCLUSIONS OF LAW

1. By discriminatorily failing and refusing to consider applicant Brent Emons for hire because of his union affiliation and activities, Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(3) and (1) of the Act.

2. Respondent has not otherwise violated the Act as alleged in the complaint.

## REMEDY

Having found that the Respondent has engaged in an unfair labor practice in violation of the Act, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act. Respondent will be ordered to consider Brent Emons for hire on a non-discriminatory basis and to provide him with backpay and other losses he may have suffered but for its unlawful conduct, in conformity with Board law, as described in *M. J. Mechanical Services*, supra, and cases there cited and discussed.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended<sup>11</sup>

## ORDER

The Respondent, Wayne Erecting, Inc., Big Bend, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to consider for hire applicants on the basis of their union affiliation or based on Respondent's belief or suspicion that they may engage in organizing activity once they are hired.

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

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

(a) Make whole applicant Brent Emons for any losses he may have suffered by reason of Respondent's discriminatory refusal to consider him for hire, as determined in the compliance stage of this proceeding. Offer Emons, if he would currently be employed but for the Respondent's unlawful refusal to consider him for hire, employment in the position for which he applied. If that position no longer exists, Respondent must offer him a substantially equivalent position, without prejudice to his seniority or any other rights or privileges to which he would have been entitled if he had not been discriminated against by Respondent.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to

my view. See *WestPac Electric*, 321 NLRB 1322 (1996). In any event, the matter was fully litigated.

<sup>11</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its Big Bend, Wisconsin office, copies of the attached notice marked "Appendix."<sup>12</sup> Copies of the notice, on forms provided by the Regional Director for Region 30, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 21, 1997.

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

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to consider for hire applicants on the basis of their union affiliation or based on our belief or suspicion that they may engage in organizing activity once they are hired.

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 make whole, with interest, Brent Emons if it is determined in an NLRB compliance proceeding that he suffered economic loss as a result of our failure and refusal to consider him for hire.

<sup>12</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

WE WILL offer Brent Emons employment in the position for which he applied, if it is determined that he would be currently employed by us, but for our unlawful refusal to consider him for employment. If that position no longer exists, we will offer him employment in a substantially equivalent position without prejudice to seniority or any other rights or privileges to which

he would have been entitled if we had not discriminated against him.

WE WILL notify Brent Emons in writing that any future job application will be considered in a nondiscriminatory manner.

WAYNE ERECTING, INC.