

Colburn Electric Company and International Brotherhood of Electrical Workers, Local Union 995, AFL-CIO, CLC. Cases 15-CA-13614 and 15-CA-13617

July 16, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS
TRUESDALE
AND WALSH

On February 20, 1998, Administrative Law Judge Keltner W. Locke issued the attached decision. The General Counsel and the Respondent each filed exceptions and a supporting brief, and the General Counsel filed an answering brief to the Respondent's exceptions.

On May 11, 2000, the Board issued its decision in *FES*, 331 NLRB 9, setting forth the framework for analysis of refusal-to-hire and refusal-to-consider allegations such as those involved in this case. Thereafter, on June 22, 2000, the Board invited the parties to file supplemental briefs so that they could address "the *FES* framework as it applies to the record in this case." The General Counsel subsequently filed a supplemental brief.

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,¹ and conclusions and to adopt the recommended Order, as modified and set forth in full below.²

In this proceeding, the judge found that the Respondent did not, as alleged, violate Section 8(a)(3) and (1) of the Act by changing its application policy and hiring practices, by refusing to consider for hire and to hire applicants Kendrick Russell, Wallace Roland Goetzman, and Donald Longuepee, and by discharging employees

Eugene Cage, Patrick Clary, and Michael Simoneaux.³ The judge concluded, however, that the Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining a discriminatory no-solicitation rule,⁴ by requiring employees to signify their assent to this unlawful rule, and by threatening employees with discharge if they engaged in union activities, and violated Section 8(a)(3) and (1) of the Act by issuing a written warning to employee Clifford Zylks and by discharging Zylks because of his union activities. We agree with all of the findings the judge made, but we address at further length his conclusions regarding the Respondent's changes to its application policy and hiring practices, as well as its alleged refusals to consider for hire and to hire Russell, Goetzman, and Longuepee.

A. Relevant Facts

During late 1995,⁵ the Respondent was performing work as an electrical subcontractor to Nabholz Construction Co., the general contractor at the "Tanger Mall" jobsite in Gonzales, Louisiana. On November 28, the Respondent, a nonunion contractor, placed an advertisement in a local newspaper soliciting qualified electricians and urging them to contact an "800" phone number the Respondent maintained at its home office in Tulsa, Oklahoma. The judge found that "a large number of applicants" nevertheless visited the jobsite seeking employment. The Respondent's job superintendent, Robert Jackson, hired union salt Clifford Zylks on November 28 and three more employees, including Simoneaux, on November 29, and they all began work the day after the Respondent hired them. Jackson also promised a number of other applicants electricians' jobs that would begin after a shipment of light fixtures arrived.

On December 1, the Union's business manager, Kendrick Russell, visited the jobsite. In response to Russell's questions, Jackson said that the Respondent had about 6 weeks of work remaining on the project and then "we're gone." Jackson added that he was waiting on a shipment of light fixtures to arrive and we "might be needing a few" electricians, but that the Respondent was

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's credibility resolutions that discredit testimony by employee Patrick Clary, we do not rely on Clary's purported violation of the witness sequestration rule imposed during the hearing. Rather, we affirm the judge's credibility resolutions as to Clary's testimony based on his findings regarding this witness' demeanor. See JD II, F, par. 14.

² We shall modify the recommended Order and issue a new notice in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container*, 325 NLRB 17 (1997). In doing so, we modify the judge's recommended Order and notice to reflect that the Respondent's overly broad no-solicitation rule included a provision extending its unlawful prohibition to "working hours." See fn. 4, *infra*.

³ Although he adopts the judge's findings that the Respondent lawfully discharged employees Eugene Cage and Michael Simoneaux, Chairman Hurtgen disagrees with the judge's conclusions that the General Counsel established a prima facie case under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

⁴ In adopting the judge's finding that the Respondent's no-solicitation rule discriminatorily prohibited employees from engaging in union activities, we note that there were no exceptions filed to the judge's failure to find the Respondent's discriminatory no-solicitation rule overbroad because it extended this to "working hours." See *Our Way*, 268 NLRB 394, 394-395 (1983).

⁵ All dates are in 1995, unless otherwise noted.

“going to crank up with what we got right now but . . . see how it goes.” Russell then informed Jackson that he was going to bring some “guys that are unemployed” and “we are going to try and organize your company.” Jackson responded, “that’s obvious.” When Russell asked if the Respondent had “any problem hiring union electricians,” Jackson said that he had no objection.

About December 1, after Russell’s visit, Jackson telephoned the Respondent’s owner, Samuel Colburn, at company headquarters in Tulsa to discuss the status of the Tanger Mall project. Colburn “threw a hissy” when Jackson reported that he had promised jobs to about 9 or 10 applicants who had replied to the Respondent’s newspaper advertisement. Colburn asked Jackson “how can you put that many people in one little building and work them?” When Jackson asked what he should do, Colburn replied that Jackson should call the applicants to whom he had promised employment and tell them to report for work after the light fixtures arrived. Colburn also told Jackson not to take any more applications. The judge found, based on Jackson’s and Colburn’s credited testimony, that the Respondent had hired all the electricians it needed for the Tanger Mall jobsite by this time.

On December 4, Russell again visited the Respondent’s jobsite and brought Goetzman and Longuepee with him in order to apply for work. Jackson told them that, after the Respondent had placed the newspaper advertisement seeking electricians, he “probably had 30 or 40 people running in and out of this job filling out applications.” He explained that Nabholtz Construction, based on insurance concerns, had ordered the Respondent to meet job applicants offsite. Jackson told Russell that he needed to contact the Respondent’s main office in Tulsa and referred him to an “800” telephone number on a sign that Jackson had posted on the Respondent’s trailer. Thus, Russell and the two applicants who had accompanied him to the jobsite did not receive application forms on December 4.⁶

Later on December 4, Jackson telephoned Russell and suggested that they meet at a restaurant near the jobsite. The next day, Russell went alone to the restaurant and completed a job application. When Russell asked Jackson about Goetzman and Longuepee, Jackson replied, “I think we’re not going to take any more applications.” On December 6, Jackson’s wife, Francine, who worked with him on the jobsite, went to the same restaurant and took applications from about six other applicants, including alleged discriminatee Clary, to whom Jackson had

promised jobs the previous week before Russell visited the jobsite.

The judge found that the Respondent does not maintain a file of completed applications on hand for the purpose of keeping track of job applicants for future consideration. Rather, the Respondent, on hiring new employees, requires them to complete applications as it begins to compile their personnel files.⁷

B. Refusal to Consider for Hire Allegations

In *Wright Line*,⁸ the Board formally set forth a test of causation for all cases alleging violations of Section 8(a)(3), or violations of Section 8(a)(1) turning on employer motivation. Under the *Wright Line* test, in order to establish that an employer unlawfully discharged an alleged discriminatee, the General Counsel must show by a preponderance of the evidence that the protected activity was a motivating factor in the employer’s decision to discharge. Once the General Counsel has made the required showing, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of the protected union activity.

Regarding the present case, *Wright Line*, supra, establishes the analytical framework for resolving alleged 8(a)(3) violations raised by refusal to consider for hire allegations. Based on the *Wright Line* burdens of proof, the recent decision in *Wright Line*, supra, sets forth the specific criteria that the General Counsel has to meet in order to demonstrate a prima facie case of a violation. Thus, *FES* imposes on the General Counsel the burden to show: “(1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment.”⁹ Once the General Counsel has met both prongs of the *FES* test, the burden shifts “to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.” The Board will find a violation if the respondent cannot meet this burden.

1. Alleged Discriminatory Change in Policy by Refusing to Accept Applications at Jobsite

The complaint alleges that, about December 4, the Respondent violated Section 8(a)(3) and (1) of the Act by changing its policy in refusing to accept job applications at its jobsite in order to discriminate against union-

⁶ Additionally, the judge noted that “the record suggests that Jackson had run out of application forms, and had none to provide when the three men visited.”

⁷ The judge further found that, although the Respondent ultimately gave Russell an application without any intention to hire him, the Respondent deviated from its established policy as a precaution because Russell was a business agent.

⁸ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

⁹ *FES*, supra at 15.

affiliated applicants. In recommending dismissal of this allegation, the judge analyzed this issue under *Lancet Arch*¹⁰ in which the Board found a violation of Section 8(a)(3) and (1) even though the employer had not been hiring when the conduct occurred. The Board in *FES* superseded *Lancet Arch* by setting forth a new test that encompasses all refusal to consider allegations relating to the hiring process. Thus, *FES* provides the proper analysis for determining whether the Respondent unlawfully changed its application policy.

Applying the framework of *FES* to the present situation, we agree with the judge that the Respondent's conduct was not unlawful. Here, the judge credited Jackson's testimony that the general contractor had demanded, for insurance reasons, that the Respondent no longer accept applications at the jobsite before these union applicants sought employment on December 4. The credited evidence further shows that Colburn had told Jackson not to take any further job applications by this time because the Respondent had previously hired all the employees it required for this job. Finally, the evidence shows that the Respondent does not instruct job applicants to complete employment applications until after the Respondent has decided to hire them. In these circumstances, we conclude that the General Counsel has not met its burden of establishing, pursuant to *FES*, supra, "that the respondent excluded applicants from a hiring process" by declining to give them applications on December 4.¹¹ We shall therefore dismiss this complaint allegation.

2. Alleged Discriminatory Change in Hiring Practices by Accepting Applications at a Location near the Jobsite

The complaint further alleges that, about December 6, the Respondent violated Section 8(a)(3) and (1) of the Act by accepting applications at a location near the jobsite. As stated, the framework for considering this allegation is the refusal to consider for hire test set forth in *FES*.

Applying *FES* here, we find that the Respondent did not exclude union applicants from the hiring process by changing the situs for accepting job applications to a nearby restaurant. We reiterate that the Respondent took this action based on a demand from the general contrac-

tor which had insurance concerns regarding the presence of job applicants at the jobsite. Further, as noted, the Respondent's hiring had been completed and the filling out of applications merely documented hiring decisions already made.¹² Thus, for reasons identical with those supporting dismissal of the previous allegation, we conclude that the General Counsel did not meet the first prong of the *FES* test.¹³

3. Refusing to Consider for Hire Russell, Goetzman, and Longuepee

The complaint also alleges that, about December 4, the Respondent refused to allow these individuals to submit applications at the jobsite and, thus, refused to consider them for employment. The judge applied the framework in *The 3E Co.*¹⁴ and *Ultrasystems Western Constructors*¹⁵ in considering whether the Respondent's conduct violated Section 8(a)(3) and (1) of the Act. *The 3E Co.* and *Ultrasystems* required, inter alia, the General Counsel to show that the employer either was hiring or had concrete plans to hire at the time of its alleged refusal to consider the applicant for hire. Because the General Counsel had not shown that the Respondent was hiring at the time that Russell, Goetzman, and Longuepee sought employment, the judge applied existing precedent and concluded that the Respondent had not unlawfully refused to consider them for employment.

As stated, the Board in *FES* set forth a new test for refusal to consider allegations and also implicitly overruled *3E* and *Ultrasystems* to the extent they are inconsistent with *FES*. Contrary to those earlier cases, the Board held in *FES* that:

A refusal to consider an applicant on the basis of union activity or affiliation has at least two independent consequences, either of which would warrant a remedy, given the purposes of the National

¹² There is no showing that the change in practice prejudiced applicants with union affiliations or interfered with the exercise of their Sec. 7 rights in any manner. Indeed, after the Respondent accepted an application from Russell at the restaurant about December 5, Jackson's wife went to the same restaurant the next day and received completed applications from employees (including paid union organizer Patrick Clary) to whom Jackson had promised jobs before the advent of the Union.

¹³ In adopting the judge, we find it unnecessary to pass on the judge's statement at fn. 31 of his decision that "[t]he absence of an alleged discriminatee would . . . preclude a finding" that there has been discrimination in violation of Sec. 8(a)(3). It is well established that an identifiable class of unnamed individuals can also constitute discriminatees within the meaning of this provision. See generally *Grand Rapids Press*, 325 NLRB 915 (1998), enfd. mem. 208 F.3d 214 (6th Cir. 2000).

¹⁴ 322 NLRB 1058, 1061-1062 (1977), enfd. mem. 132 F.3d 1482 (D.C. Cir. 1997).

¹⁵ 316 NLRB 1243, 1243-1244 (1995).

¹⁰ 324 NLRB 191 (1997).

¹¹ Although the General Counsel further argued that the Respondent unlawfully changed its practice on the advent of the Union by requiring applicants to contact its main office in Tulsa, we agree with the judge, particularly given Nabholz' insurance concerns, that the Respondent's conduct did not constitute a "material change" as an earlier newspaper advertisement had also informed applicants to call this same "800" number.

Labor Relations Act. First, the refusal excludes applicants from the hiring process, whether or not job openings are available at the time of the application. Such excluded applicants are then not within the pool of applicants for whom future jobs may become available. There is no question that an obstruction of this sort constitutes discrimination “in regard to hire” even if there are no job openings at the time it is imposed. Second, such a discriminatory refusal is a deterrent to employees’ engaging in their right of self-organization.

331 NLRB at 16.

Thus, based on the two-pronged conjunctive test stated in *FES*, a discriminatory refusal to consider now violates Section 8(a)(3) of the Act even when the employer is not hiring any employees.¹⁶ The proper analysis is whether the employer excluded applicants from the hiring process and, if so, whether the employer treated them in this manner based on antiunion considerations. The General Counsel has failed to meet this burden with respect to the first prong of the *FES* test in this instance.

Here, the general contractor, Nabholz Construction, had ordered the Respondent to discontinue taking applications at the jobsite for insurance reasons. Thus, the Respondent, for legitimate cause, began meeting with job applicants at a nearby restaurant. Also, by the time these alleged discriminatees applied for employment, the Respondent had hired all the employees it needed to complete the job. The Respondent’s employment practice is to receive job applications only from employees whom the Respondent has hired. Although the Respondent did permit Russell, about December 5, to submit a job application even though the Respondent had no plans for additional hires at that time, the judge found that the Respondent made an exception to its existing practice because of Russell’s status as a paid union official. The refusal by the Respondent’s hiring official, Jackson, to accept further applications from Goetzman and Longuepee at the jobsite is entirely consistent with the Respondent’s general hiring policies.

Thus, for reasons identical with those supporting dismissal of previous refusal to consider for hire allegations, the General Counsel did not meet his burden to establish, based on the credited evidence, that the Respondent had unlawfully excluded the alleged discriminatees from the hiring process. Therefore, we shall also dismiss this complaint allegation.

¹⁶ *FES*, supra.

C. Refusal to Hire Allegations

Based on the *Wright Line* burdens of proof, *FES* establishes the criteria that the General Counsel has to meet in order to demonstrate a prima facie case of unlawful refusal to hire. The General Counsel has the burden of establishing on the merits under *FES*:

- (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.

331 NLRB at 12. [Footnotes omitted.]

Once the General Counsel has met these *FES* requirements, the Respondent has the burden of showing that it would not have hired the applicants even in the absence of their union activity or affiliation and, if the Respondent cannot meet this burden, the Board will find a refusal to hire violation.

The complaint alleges that, since about December 4, the Respondent has refused to hire applicants Russell, Goetzman, and Longuepee. Here, as stated, the judge credited testimony by Jackson and Colburn that the Respondent had hired a sufficient number of employees to finish the Tanger Mall job before the union applicants sought work about December 4. As the judge found, the Respondent had made commitments to hire a number of employees, but was waiting for light fixtures to arrive at the jobsite before putting the new hires to work. Thus, we find that the General Counsel has failed to establish the first prong of the *FES* test that the Respondent was hiring at the time of the alleged unlawful refusal to hire. We need not consider the other prongs of this conjunctive test. Accordingly, we shall also dismiss this complaint allegation.

ORDER

The National Labor Relations Board orders that the Respondent, Colburn Electric Company, Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining in effect a rule prohibiting employees from discussing the Union or engaging in other union activities during working hours, compelling employees to sign or agree to abide by such an unlawful rule, or otherwise threatening employees with discharge or other

adverse employment action if they discuss union-related matters during working hours.

(b) Issuing written warnings to its employees because they engaged in union activities during working hours.

(c) Discharging any employee who joined, formed, or assisted the Union or engaged in concerted activities, because the employee refused to assent to a rule unlawfully restricting his right to engage in such protected activities during working hours, and/or to discourage employees from engaging in such activities.

(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) Rescind the rule it promulgated on or about December 21, 1995, which prohibited employees, under penalty of discharge, from engaging in union activities during working hours.

(b) Within 14 days from the date of this Order, rescind the written warning issued to employee Clifford Zylks and remove from its files any references to it or to Zylks' subsequent unlawful discharge, and, within 3 days thereafter, notify him in writing that this has been done and that this unlawful action will not be used against him in any way.

(c) Within 14 days from the date of this Order, offer employee Clifford Zylks full reinstatement to his former job or, if this job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(d) Make Clifford Zylks whole for any loss of earnings and other benefits he suffered as a result of the unlawful discrimination against him, with interest.

(e) 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, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by Region 15, post at its various facilities copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative,

shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, 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 December 21, 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 that the Respondent has taken to comply.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT maintain in effect a rule prohibiting our employees from discussing the Union or engaging in other union activities during working hours, compelling our employees to sign or agree to abide by such an unlawful rule, or otherwise threatening our employees with discharge or other adverse employment action if they discuss union-related matters during working hours.

WE WILL NOT issue written warnings to our employees because they engage in union activities during working hours.

WE WILL NOT discharge any employee who joined, formed, or assisted the Union or engaged in concerted activities, because the employee refused to assent to a rule unlawfully restricting his right to engage in such protected activities during working hours, and/or to discourage employees from engaging in such activities.

¹⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

WE WILL, within 14 days from the date of this Order, rescind our unlawful no-solicitation rule promulgated on or about December 21, 1995, which prohibited employees, under penalty of discharge, from engaging in union activities during working hours.

WE WILL, within 14 days from the date of this Order, rescind the written warning issued to employee Clifford Zylks and remove from our files any references to it or to Zylks' subsequent unlawful discharge, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that these unlawful actions will not be used against him in any way.

WE WILL, within 14 days from the date of this Order, offer Clifford Zylks full reinstatement to his former job or, if this job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Clifford Zylks whole for any loss of earnings and other benefits he suffered as a result of discrimination against him, with interest.

COLBURN ELECTRIC COMPANY

Andrea J. Goetze, Esq., for the General Counsel.

Phil Frazier, Esq. (Frazier, Smith & Phillips, P.A.), of Tulsa, Oklahoma, for the Respondent.

K. E. Russell, of Baton Rouge, Louisiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. In this case, the General Counsel of the National Labor Relations Board (the General Counsel) alleges that Colburn Electric Company (the Respondent or the Company) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The General Counsel contends that these violations included issuing a warning to and then discharging an employee, discharging three other employees, refusing to allow certain job applicants to fill out applications, and refusing to consider these applicants for employment, to discourage membership in or activities on behalf of the Charging Party, International Brotherhood of Electrical Workers, Local 955, AFL-CIO. The General Counsel further contends that the Respondent violated the Act by putting into effect a rule prohibiting union activity during working time, and by threatening employees with discharge if they did engage in union activity during working time.

I find that Respondent violated the Act by issuing a written warning to one employee and then discharging him, by promulgating the rule prohibiting union activity during working time, and by threatening employees with discharge if they engaged in union activity during working time. Otherwise, I find that the Respondent did not violate the Act.

I heard this case on April 15–18, 1997, in Baton Rouge, Louisiana.¹ After the hearing, the parties filed briefs,² which I have considered.³

¹ Portions of the transcript of that hearing indicate that a “Judge Locke” is presiding, and other portions refer to a “Judge Keltner.” They are the same person. Certain errors of the transcript are noted and corrected.

² In addition to filing a brief, the Charging Party has also filed a letter on behalf of witness Patrick M. Clary, whom Respondent subpoenaed to appear at the hearing and produce certain records. The Charging Party states that although Clary appeared and testified, the Respondent has not paid Clary the witness fee and mileage required by the Board’s regulations. The Charging Party’s letter attached a copy of the subpoena duces tecum, which was addressed to Clary at the Charging Party’s union hall. It also bore Clary’s residential address in Walker, Louisiana.

The Charging Party asks that I order the Respondent to pay Clary mileage at 32 cents per mile for an asserted round-trip journey of 1480 miles between “his job in Oklahoma City, Oklahoma to Walker, Louisiana and back.” The Charging Party also asks that I order Respondent to pay Clary a witness fee of \$40 per day for each of the 4 days of the hearing, for a total of \$633.60.

The Respondent’s counsel opposed this request in a letter which acknowledged that Respondent had subpoenaed Clary. Respondent’s letter seems to imply that although the Charging Party did not expressly petition to revoke the subpoena served on Clary, as it did for certain other witnesses, “the revocation dealt only with subpoena numbers and not with individuals.”

The fact remains that Clary received a subpoena compelling his appearance, and he showed up. He is entitled to mileage and a witness fee.

However, and contrary to the Charging Party’s position, Clary is not entitled to round-trip mileage between his home in Walker, Louisiana, and a jobsite in Oklahoma. The subpoena did not compel him to travel from his home to Oklahoma; rather, it required him to travel from his home to the courtroom in Baton Rouge.

He is also not entitled to a witness fee for all 4 days of the hearing. The Respondent’s letter, in reply to the Charging Party’s, states that “the union was advised on the first day [of hearing] that Mr. Clary would not be called as a witness for the respondent.” The Charging Party has not contradicted this statement, and this representation of an officer of the court is entitled to reliance. Clary’s later testimony, on day three of the hearing, was on behalf of the General Counsel, not the Respondent. Therefore, I find that Clary is entitled to a witness fee for 1 day and mileage between his home in Walker, Louisiana, and the courtroom in Baton Rouge. I direct that the Respondent, in accordance with Sec. 102.32 of the Board’s Rules and Regulations, pay to Clary this witness fee and mileage at the same rates that are paid witnesses in the courts of the United States.

³ At the hearing, I excluded certain tape recordings offered by the General Counsel on the basis that they were unintelligible. I also rejected from evidence some of the transcripts made by the witnesses who also made the recordings in question, on the basis that the poor quality of the recording did not assure the reliability of the transcript.

The General Counsel’s posthearing brief urges me to reconsider, arguing that although the probative value of a recording may be evaluated based upon what can be heard on the tape, this is not the standard for its admissibility. However, I do not believe that an unintelligible tape has significant relevance, let alone probative value. To the extent that small bits and pieces of the recording may be understood, in isolation and absent context, I believe the limited probative value is outweighed by the dangers of unfair prejudice and confusion. Rule 403, Federal Rules of Evidence.

FINDINGS OF FACT

I. STATUS OF THE PARTIES

Respondent has admitted facts establishing that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and subject to the jurisdiction of the National Labor Relations Board (the Board). I so find.

Respondent has also admitted that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act, and I so find. Additionally, Respondent has admitted, and I find, that Owner Sam Colburn and Job Foreman Robert Jackson are supervisors and agents of the Respondent within the meaning of Section 2(11) and (13) of the Act. Respondent also has admitted, and I find, that at all times material to this case, Francine Jackson was an agent of Respondent within the meaning of Section 2(13) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

This case involves events on and around the Company’s “Tanger Mall” jobsite in Gonzales, Louisiana. In December 1995, the Respondent was performing work there as an electrical subcontractor to Nabholz Construction Co., the general contractor.

Foreman Robert Jackson was Colburn Electric’s person in charge at this jobsite. His wife, Francine Jackson, worked with him as an “electrician’s helper, secretary, and parts runner.” The Respondent had a construction trailer on the jobsite, which served as the Jacksons’ office.

Respondent’s employees at this jobsite were not represented by a union. However, the Charging Party began a campaign to organize the Colburn Electric employees.

A number of electricians with union affiliations obtained employment with the Respondent, but did not reveal their union ties when they began work. At least two of these employees were also paid union organizers.

The material facts concern the ensuing union activities, and the Company’s actions alleged to be unlawful responses to that union activity. For clarity, the unfair labor practice allegations raised by the complaint⁴ will be discussed in chronological order.

To receive into evidence written transcripts of tape recordings which are wholly or partially unintelligible would compound the danger of unfair prejudice and confusion, particularly where, as here, the person making the transcripts has been closely identified with, and paid by, one of the parties to this proceeding, the Charging Party.

Additionally, it is important to note that the tapes and transcripts I rejected were made by two witnesses, Clary and Zylks, whose testimony I did not credit. The poor audio quality of these tapes makes it impossible to tell, by listening, whether the content has been edited or altered. For the same reasons I found the testimony of these witnesses to be unreliable, I conclude that, absent some extrinsic evidence that the tapes are reliable and complete, the tapes and transcripts made by these witnesses should not be considered reliable. The record does not contain such evidence. Therefore, I adhere to my rulings at the hearing.

⁴ By “Complaint,” I refer to the order consolidating cases, consolidated complaint and notice of hearing (GC Exh. 1(1)), as amended orally at the hearing.

A. December 4, 1995 Change in Application Policy

Complaint paragraph 12 alleges that about December 4, 1995, “Respondent changed its application policies by refusing to accept applications at its jobsite.” Complaint paragraph 22 alleges that by this action, the Respondent “has been discriminating, in regard to the hire or tenure or terms or conditions of employment of its employees” in violation of Section 8(a)(3) and (1) of the Act.

In its answer, Respondent admitted the allegations in complaint paragraph 12 “insofar as taking job applications on the jobsite. However, affirmatively answering, Respondent alleges and states that employees seeking to apply for work could make that wish known at jobsite and the application was provided and completed off the jobsite.” (GC Exh. 1(n).)

Foreman Robert Jackson, who was in charge of the Company’s work at the Gonzales, Louisiana site, did the hiring for that job. In response to a newspaper advertisement on November 28, 1995, a large number of applicants contacted Jackson. He promised a number of them jobs, to begin at a later time, after a shipment of fixtures arrived, when more electricians and helpers would be needed.

It appears that Jackson promised jobs to too many people. At least, that was Owner Samuel Colburn’s reaction when Jackson called Colburn at the company headquarters in Oklahoma, and told Colburn what he had done. This telephone conversation took place on about December 1, 1995.

Colburn credibly testified that when Jackson reported that he had promised jobs to another 9 or 10 persons Colburn “threw a hissy,” asking Jackson “how can you put that many people in one little building and work them?” (Tr. 627.)

According to Colburn, Jackson responded with a question: “Well, what am I going to do? I’ve already promised them the job?” At this point, the Company was expecting a large shipment of light fixtures to be installed at this jobsite. Colburn replied that Jackson should call the applicants he had promised employment and tell them to come to work after the fixtures arrived. (Tr. 627.) Colburn also told Jackson not to take any more applications. (Tr. 628.)⁵

Also on December 1, 1995, Union Business Manager Kendrick Russell visited Jackson at the Gonzales, Louisiana jobsite. No one else was present while they talked. Unknown to Jackson, Russell tape recorded their conversation.⁶

⁵ Based on my observations of the witnesses, I credit both Colburn and Jackson. Colburn’s testimony also explains a puzzling statement Jackson made at the beginning of the hearing after the General Counsel called him as a witness. Jackson testified that he did not get worried about having employees work too much overtime, even though overtime cost more. (Tr. 68–69.) Jackson’s toleration of overtime appears more understandable in light of the admonition he received from Colburn after promising jobs to too many applicants. Simply paying for some extra overtime was a better alternative to Jackson than hiring too many workers and risking another “hissy” from his boss.

⁶ Russell visited the jobsite before Jackson telephoned Colburn in Oklahoma, which Jackson mentioned to Colburn. (Tr. 625.) The sequence of events explains why Jackson said to Russell that they would probably be hiring. It was before he experienced Colburn’s “hissy” about hiring too many workers.

In response to Russell’s questions, Jackson said that there remained about 6 weeks of work on the project and then “we’re gone.” Jackson said he was waiting on a shipment of lights to arrive and “might be needing a few” electricians, but “It just depends . . . we are going to crank up with what we got right now but huh see how it goes.” Jackson then added, “But well, probably be needing some more.”

Russell then told Jackson he was going to bring some “guys that are unemployed,” to which Jackson replied, “That will be fine.” Russell then said, “We are going to try and organize your company. Want you to know that.” Jackson responded, “That’s obvious.”

When Russell asked if they had “any problem hiring union electricians,” Jackson replied, “I don’t have a problem with that.” (GC Exh. 22.)⁷

On December 4, 1995, Russell and two other persons, Roland Goetzman and Donald Longuepee, met with Jackson at the Colburn jobsite.⁸ Also present was a man identified as “Kenny,” who represented the general contractor, Nabholz Construction.⁹

Again, without telling Jackson, Russell tape recorded the conversation.¹⁰ According to the transcript of that recording, Jackson told them that Nabholz Construction was having insurance problems, and that Colburn Electric could no longer take applications for employment at the jobsite. Jackson explained that following the newspaper advertisement he “probably had 30 or 40 people running in and out of this job filling out applications.” Because of this traffic, the general contractor “put a stop” to Colburn Electric taking job applications on site.¹¹

Jackson also said that the applicants needed to contact Colburn Electric’s main office in Tulsa, and that this telephone

⁷ The tape recording itself is GC Exh. 21. The transcription of that recording is GC Exh. 22.

⁸ Complaint par. 12 did not identify the individuals who are alleged to be the victims of the discrimination this paragraph alleges. However, the evidence establishes that they were Russell, Goetzman, and Longuepee, who were alleged to be discriminatees in complaint paragraph 14. (The complaint identified Roland Goetzman as “Wallace Roland Goetzman.”) While complaint par. 12 alleges that the Respondent refused to accept applications from certain unnamed job seekers, par. 14 alleges that the Respondent discriminated against Russell, Goetzman, and Longuepee by refusing to consider them for hire and by refusing to hire them. Neither Goetzman nor Longuepee testified at the hearing.

⁹ It appears that this person was Kenny Nokes, the general contractor’s job superintendent at the site. (Tr. 564.) Nokes did not testify, although the general contractor’s construction superintendent, Gerald Dees, did.

¹⁰ Russell recorded this conversation on the same tape as the December 1, 1995 conversation. GC Exh. 21. GC Exh. 22 includes the transcript of both.

¹¹ During this meeting, the general contractor’s representative cautioned Russell, Goetzman, and Longuepee that they must wear hard hats on the site, another insurance requirement. Apparently, Russell doubted that there really was such a hard hat rule, because before he left, he approached two workers and asked them about it while his tape recorder was running. Both men affirmed that they were supposed to wear hard hats. (GC Exh. 22.)

number appeared on a sign which Jackson had posted on the trailer. (GC Exh. 22.)¹²

It does not appear that the Company gave Russell, Goetzman, and Longuepee application forms when they visited the Colburn Electric trailer on December 4, 1995. On the other hand, the record suggests that Jackson had run out of application forms, and had none to provide when the three men visited.¹³

For the same reasons discussed in the next section, below, with respect to allegations in complaint paragraph 13, I conclude that on December 4, 1995, Respondent did not accept applications from Goetzman and Longuepee. It did later accept an application from Russell but never accepted applications from Goetzman or Longuepee.

The complaint alleges that by refusing to accept applications at its jobsite on December 4, 1995, the Respondent violated both Section 8(a)(1) and (3) of the Act. If this conduct does violate Section 8(a)(3), then the General Counsel does not have to prove that it also violates Section 8(a)(1). Discrimination in violation of Section 8(a)(3) may be presumed to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights, and thereby violate Section 8(a)(1).¹⁴

On the other hand, even if the alleged conduct does not constitute discrimination which violates Section 8(a)(3), it still may be unlawful under Section 8(a)(1) if it interferes with, restrains, or coerces employees in the exercise of their Section 7 rights. Before evaluating whether the evidence establishes a violation of Section 8(a)(1) independent of any 8(a)(3) violation, I will consider the 8(a)(3) allegation.

As discussed below, Board precedent makes clear that an employer can discriminate against a job seeker by refusing to accept an application from him, and that, depending on the motivation, such discrimination can violate Section 8(a)(3). Such a violation is quite distinct from discrimination arising from a refusal to consider the applicant for hire, and does not

require the same elements of proof. Therefore, even though the two paragraphs concern the same people in the same situation on the same date, complaint paragraph 12, alleging a refusal to accept applications from job seekers, describes a separate 8(a)(3) violation from complaint paragraph 14, which alleges that Respondent refused to hire or consider for hire Russell, Goetzman, and Longuepee.

The difference between an 8(a)(3) violation arising from a refusal to consider an applicant for employment, and an 8(a)(3) violation arising from a refusal to accept his job application, becomes apparent from *Lancet Arch, Inc.*, 324 NLRB 191 (1997).¹⁵ This decision warrants reading with care to appreciate all its subtleties.

The judge in *Lancet Arch* cited *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), as a basis for his conclusion that the employer's refusal to provide applications to job seekers violated Section 8(a)(3). However, he did not describe in detail how he evaluated the facts under the *Wright Line* framework. Moreover, the judge's decision in *Lancet Arch* also cited *Ultrasystems Western Constructors*, 310 NLRB 545 (1993), as modified at 316 NLRB 1243 (1995), which provides another test different from that in *Wright Line*.

The *Wright Line* framework guides the analysis of facts in a wide range of alleged 8(a)(3) violations. By comparison, the *Ultrasystems* test is more limited in application, describing the elements the General Counsel must prove to establish that an employer has engaged in an unlawful refusal either to hire or to consider a job applicant for hire.

The evaluation process in *Wright Line* requires the General Counsel to prove, among other things, that there has been an adverse employment action, as one element necessary to establish a violation of Section 8(a)(3). The *Ultrasystems* test does not specifically require the General Counsel to prove the occurrence of such an adverse employment action, but it does require a showing that at the time of the alleged refusal to consider or hire an applicant, the employer either was hiring or had concrete plans to do so. This "hiring or planning to hire" requirement appears to serve the same function as the "adverse employment action" criterion of the *Wright Line* test. It assures that a finding of discrimination is based on the denial or loss of something actual, such as the opportunity to compete for a job that was actually going to be filled.

In *Lancet Arch*, the Board found a form of discrimination in the hiring process even though the employer had not been hiring when it occurred. Thus, in modifying the judge's remedy in *Lancet Arch*, 324 NLRB 191 at fn. 3, the Board stated that:

¹² The General Counsel argues that by requiring applicants to contact its main office in Tulsa, the Respondent was changing its hiring procedures on December 4, 1995, in response to the Union's efforts. (GC Br. at pp 9-10.) However, the Company's November 28, 1995 "help wanted" advertisement, published before the Union's efforts became apparent, listed the "800" number of Colburn Electric's office in Tulsa, and instructed applicants to "ask for Rick." (GC Exh. 34.) The fact that the Company later publicized this procedure with a sign rather than another newspaper advertisement does not signify a material change. When Business Manager Russell telephoned the Tulsa office on December 4, 1995, he similarly was connected with "Rick." (GC Exh. 24.)

¹³ After the meeting, Russell telephoned Colburn Electric's main office, as Jackson had suggested, and secretly tape recorded this conversation. A man named "Rick" at Colburn Electric told Russell that Jackson had run out of application forms the previous week, and told people who wanted applications that they could return the following week to get them. See GC Exh. 24, transcript of GC Exh. 23. This evidence tends to corroborate Jackson's testimony, which I credit, that he had no applications. (Tr. 137.)

¹⁴ Sec. 8(a)(3) prohibits an employer from encouraging or discouraging membership in any labor organization by discrimination in regard to hire or tenure of employment or any term or condition of employment. See 29 U.S.C. § 158(a)(3).

¹⁵ It is true that in *Lancet Arch*, the Board affirmed a judge's finding that an employer had violated Sec. 8(a)(3) by refusing to *provide* employment application forms to union members, rather than by refusing to *accept* such applications. However, refusing to give a job seeker a blank application form appears to have the same gravamen as refusing to accept an application from him. Either act prevents the person from having his application on file, and I assume that both would require similar elements of proof. Therefore, I will consider the *Lancet Arch* decision carefully to understand what elements of proof the Board requires to establish this kind of violation of Sec. 8(a)(3).

[I]t was not alleged that there were available positions for the five union members, nor claimed or established on the record that the Respondent refused to consider the five for hire. In these specific circumstances, where the 8(a)(3) allegation was expressly restricted to the Respondent's failure to proffer employment applications, we have modified the Order and notice to delete the judge's additional "consider for hire" language.

The Board therefore ordered that the respondent in *Lancet Arch* give employment application forms to the five discriminatees, but did not order that the respondent consider them for employment.

The *Lancet Arch* decision therefore provides important guidance on when an employer's refusal to provide a job seeker with an employment application, and presumably an employer's refusal to accept such an application, violates Section 8(a)(3) of the Act. It indicates that such a violation can occur even when the employer is not hiring and does not have concrete plans to hire.

It thus makes a significant distinction between an 8(a)(3) violation based on a refusal to hire or consider for hire, which does require proof that the employer was hiring or planning to, and an 8(a)(3) violation based on a refusal to give out an employment application form, which, it appears from *Lancet Arch*, does not require such proof. In view of my finding here that Colburn Electric was not hiring or planning to hire on December 4, 1995, I must pay careful attention to the rationale of the *Lancet Arch* decision and analyze the present facts in the same way.

Since the evidence in *Lancet Arch* did not establish that the employer was hiring or planning to, I infer that the Board's decision was not predicated on the *Ultrasystems* framework, which does require such proof. Because the Board did not use the *Ultrasystems* criteria, and did not describe a new standard, I will assume that the Board applied its well established *Wright Line* test in *Lancet Arch*. This test requires proof of an adverse employment action, so the Board must have concluded that the *Lancet Arch* employer's refusal to give job seekers the requested application form satisfied its definition of such an "adverse employment action."

The *Wright Line* requirement of an "adverse employment action" entails a showing that some harm has occurred to the discriminatee's employment status. In the case of a job applicant, that harm presumably would involve some reduction in the likelihood that the applicant would be hired. Therefore, in *Lancet Arch*, the Board must have determined implicitly that refusal to give out application forms substantially diminished the applicants' prospects for employment in the future, if not at the moment.

Such a conclusion would flow from the usual way in which businesses use employment application forms. They keep them on file in case a job opening might occur sometime in the future, and then refer to the applications as needed. Quite obviously, refusing to allow an applicant the right to complete and submit an application effectively excludes him from such future consideration. His proxy, the employment application, is not standing in line at the personnel office door.

In the usual way businesses treat employment applications, denial of the right to complete and file this document certainly does affect an applicant's employment opportunity adversely. However, Colburn Electric did not use employment applications the way most businesses do.

The evidence establishes that Colburn Electric did not rely on such applications as a way of keeping names on file for future consideration, or even as a tool to use in comparing job applicants and selecting the most suitable. Rather, the Respondent here used employment application forms to document hiring decisions already made. A new employee turned in the written application after being offered the job and around the time he reported for work, much as a new employee would submit a tax withholding form.

In this unusual circumstance, whether or not the Respondent accepted a job application form would have no effect on the job seeker's prospects for employment in the future. Instead of reviewing old employment applications, when Colburn Electric needed employees it advertised for them in the newspaper. This practice may be well suited to the Respondent's needs as a construction contractor with frequently changing jobsites. However, it means that being considered for employment did not depend on whether or not the job seeker had an application on file.

Under these conditions, unlike the more typical situation in *Lancet Arch*, refusing to accept an application form does not remove the job seeker's proxy from a pool to be considered later when openings arise. Therefore, I conclude that Respondent's refusal to accept applications from Goetzman and Longuepee did not constitute an "adverse employment action" within the meaning of *Wright Line*.

The *Wright Line* framework requires the General Counsel to prove four elements to establish a prima facie case. First, the General Counsel must show the existence of union or protected activities. Here, one applicant was the Union's business manager, who brought along the other two job seekers. Clearly, they were all identified with the Union. I find that the General Counsel has satisfied the first *Wright Line* requirement.

Second, *Wright Line* requires proof that the employer knew about the protected activities. Union business manager told Jackson, "we are going to try and organize your company" and Jackson replied "That's obvious." The General Counsel has established the second *Wright Line* element.

However, the General Counsel has not established the third requirement, that there has been an adverse employment action. As discussed above, I have concluded that the Respondent's refusal to accept applications did not cause or constitute an "adverse employment action." I believe this conclusion is consistent with the Board's decision in *Lancet Arch*, and therefore recommend that the 8(a)(3) allegation raised by complaint paragraph 12 be dismissed.¹⁶

¹⁶ It is not necessary to go further with the *Wright Line* analysis because failure to prove any of the four requirements results in failure to establish a prima facie case. However, should the Board disagree with my conclusion at the third step, I note that I would find that the General Counsel also has not established the fourth element, a link or nexus between the adverse employment action and the protected activities. Based on the credited evidence, I conclude that the Respondent did not

However, the refusal to accept applications must also be analyzed to determine whether it constitutes an independent violation of Section 8(a)(1).¹⁷ The General Counsel contends that the Respondent changed its application procedure as a device to make it more difficult for electricians affiliated with the Union to apply. Thus, the General Counsel cites *M & M Electric Co.*, 323 NLRB 361 (1997).

In *M & M Electric Co.*, an electrical contractor changed its hiring practices when a union began trying to organize its employees. Previously, this employer had accepted all applications for employment. However, the new practices it implemented included hiring former employees first, hiring employees recommended by other employers or by other nonunion contractors or who had been observed by the employer's representatives on a jobsite, and hiring from unknown applicants as a last resort.

In a decision affirmed by the Board, the judge found that these changes ensured that Respondent was "able to screen out union adherents by merely telling them Respondent is not hiring and refusing to give them applications." *Id.* at 370.

The facts in that case contrast sharply with the facts I find here. Colburn Electric did not change its hiring practices in a way that narrowed the area of consideration to those applicants unlikely to be associated with the Union. It simply stopped considering all applicants because it already had found the workers it needed.

It is not unlawful for an employer to stop hiring when it has already hired, or made commitments to hire, too many people. Similarly, the law does not require an employer to go through the motions of the hiring process, or pretend to be hiring, when management has decided that more employees aren't needed.

The record may suggest that Owner Colburn and Foreman Jackson had somewhat different opinions about how many employees would be needed. It would not be the first time that a supervisor in the field and his superior at headquarters reached different conclusions about how to proceed. There is nothing either surprising or suspicious about that.

At his Tulsa headquarters, Colburn certainly had a closer view of the accounting ledgers and balance sheets than of the dangling cables and boxes of supplies which his foreman saw at

accept employment applications on December 4, 1995, because it had already decided whom it would hire. Since applications were used to document hiring decisions already made, and not as a tool for making those decisions, it would serve no purpose for Respondent to accept applications from Goetzman and Longuapee. Jackson later accepted an application from Russell. However, I find that he did so not because the Respondent expected to hire any more employees for this job, but because Russell was the Union's business manager, and the Respondent wished to be cautious.

¹⁷ In the case of an 8(a)(1) violation, it is the message itself, whether communicated in the form of a statement or signified by an act of discrimination, which may violate the law by interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Sec. 7 of the Act. To determine whether the alleged changes in hiring practices violate Sec. 8(a)(1), I must focus on whether those changes reasonably would tend to interfere with, restrain, or coerce employees in the exercise of Sec. 7 rights, and not on what motivated the Respondent to make the alleged changes.

the Louisiana jobsite. So it is understandable that he and Jackson would be concerned about different things. While Jackson focused on getting the project done on time, Colburn pondered over the cost.

It is also understandable that Colburn's opinion prevailed. He was the boss. And it is equally understandable, particularly after Colburn's "hissy," that when Jackson received the order not to offer jobs to any more people, he followed it.

Apart from declining to accept applications after it had made its hiring decisions, the Respondent did not change its hiring practices in other ways which would make it less likely or convenient for job seekers with union affiliations to apply. The other possible changes in Respondent's hiring practices warrant some discussion.

The orders Jackson received from the home office included a requirement that applicants be instructed first to call the Tulsa headquarters. That certainly gave higher management information needed to oversee the hiring process from a distance, and helped assure that it did not again get out of hand. However, having the job seeker initiate the hiring process with a call to Respondent's headquarters does not, in any obvious way, make it less likely for someone with union connections or sympathies to apply. Moreover, as noted above, it was not really a new requirement. The November 28, 1995 "help wanted" advertisement which generated so much response also listed a number to contact at the Respondent's Tulsa headquarters.

The heavy response to that November 28 advertisement, so much greater than the response to a previous advertisement, appears to have caused more than one unexpected effect. It certainly played a role in Jackson's making employment commitments to too many people. It also generated a lot of foot traffic at the jobsite, as applicants went to the company trailer seeking employment.

The presence of so many visitors in a hard hat area raised the concerns of the general contractor and its insurance carrier. So the general contractor told Colburn Electric to interview the applicants elsewhere. This change in interview location, discussed further below, also did not make it less likely or less convenient for job seekers with union sympathies or affiliation to apply.¹⁸

Moreover, the changes made by Colburn Electric were both more limited than, and qualitatively different from, the changes made by the respondent in the *M & M Electric Co.* case. The respondent there figuratively put on blinders, looking only to those sources unlikely to yield prounion workers. Colburn Electric took no such step.

The record does not establish that the Respondent began casting its nets in different waters, and the General Counsel does not allege that the Respondent made this kind of change. Instead, the General Counsel contends that Colburn Electric stopped giving out application forms. It certainly did, after it had decided whom it would hire as soon as the shipment of light fixtures arrived. It is difficult to conclude that refusing to

¹⁸ Although unlawful motivation is not an element of an 8(a)(1) violation, the complaint has alleged the changes in hiring practices to violate Sec. 8(a)(3), as well. I find that Respondent made such changes for nondiscriminatory reasons unrelated to the Union.

give out applications to anyone, which I find to have been the case on December 4, 1995, selectively excluded applicants who favored the Union or tended to do so.

In sum, Respondent never changed its hiring practices in a way that would reduce the likelihood of netting prounion applicants. It did not limit consideration to its previous employees or give preference to those who worked in non-unionized job settings, as the respondent in *M & M Electric Co.* had done. I find that the General Counsel has failed to establish that Respondent violated the Act as alleged in paragraph 12 of the complaint. Therefore, I recommend that this allegation be dismissed.

B. December 4, 1995—Alleged Refusal to Allow Job Applicants to Fill Out Applications and Alleged Refusal to Consider These Applicants for Employment

Paragraph 13 of the complaint alleges that about December 4, 1995, the Respondent refused to allow job applicants Kendrick E. Russell, Wallace Roland Goetzman, and Donald E. Longuepee to fill out applications at the jobsite. Respondent denied this allegation.

Complaint paragraph 14 alleges that since about December 4, 1995, Respondent refused to consider these same individuals for employment and refused to employ them. In its answer, Respondent admitted this allegation.

Paragraph 22 of the complaint alleges that the conduct described in paragraphs 13 and 14 violated Section 8(a)(1) and (3) of the Act.

As discussed above, the general contractor, Nabholz Construction, had ordered the Respondent to discontinue its practice of taking applications at the jobsite because Nabholz and its insurer were concerned about the number of people walking around the jobsite without hard hats. (Tr. 553.)¹⁹

The Company then began meeting with job applicants at a nearby fast food restaurant,²⁰ and posted a sign to this effect on the trailer it used as an office at the jobsite. It would meet with all applicants, regardless of union affiliation or sympathies, at this same place.²¹

¹⁹ I base this finding in part on the credited testimony of Gerald Dees, the general contractor's representative at the jobsite. However, because motive is not an element of an 8(a)(1) violation, the reason for the change in application procedure did not affect whether or not it was lawful under this section of the Act.

²⁰ The general contractor's project superintendent, Gerald Dees, credibly testified that this fast food restaurant was about 50 feet from the jobsite. (Tr. 553.)

²¹ The General Counsel contends that the Respondent's bookkeeper at the jobsite, Francine Jackson, told a job applicant, Patrick Clary, that they had to complete the application at a fast food restaurant because the Union had been "messing with them." When he applied for work, Clary did not disclose that he was a union organizer and also did not tell Francine Jackson that he was tape recording the conversation.

This tape recording is of very poor quality. Much of it is unintelligible, and, I find, it has little if any probative value. Moreover, for reasons discussed below, I do not credit Clary's testimony. I do not find that Francine Jackson made the statement attributed to her. However, even were I to assume that Francine Jackson made such a statement, it would not affect my conclusion that Respondent did not violate Sec. 8(a)(1) by taking applications at the restaurant rather than in its trailer on the jobsite.

Later, on December 4, 1995, Jackson telephoned Russell and asked him to meet at 9 a.m. the next day at Shoney's Restaurant, so that Jackson could give Russell an application to fill out. Jackson clearly made this contact after conferring with Colburn Electric management in Tulsa.²² According to a tape recording which Russell made when Jackson phoned him, Russell asked "what about the other 2 guys," to which Jackson replied, "They didn't say anything to me about the other two guys." (GC Exhs. 24 and 25.)

Russell completed the application during his meeting with Jackson at the restaurant. He then asked, "What about the other two guys?" Jackson replied, "I think we're not going to take any more applications." (GC Exhs. 26 and 27.)

I find that the Respondent did not refuse to allow Russell to fill out an application, as alleged in complaint paragraph 13 although it did not allow him to submit one at the jobsite. Instead, it received one from him at a restaurant about 50 feet from the jobsite. However, the Respondent did refuse to allow Goetzman, and Longuepee to submit applications, as alleged.

Respondent admits, and I find, that it refused to consider Russell, Goetzman, and Longuepee for employment, and refused to employ them. As noted above, these job applicants clearly fell within the category of "employees" protected by the Act.²³

For the reasons stated in the section above, I have found that Respondent's refusal to allow Goetzman and Longuepee to submit job applications did not constitute a violation of Section 8(a)(1) or Section 8(a)(3). Now, I must determine whether Respondent's refusal to consider and to hire Goetzman, Longuepee, and Russell constituted unlawful discrimination under the Act. Analytically, an unlawful refusal to consider an applicant for employment should be distinguished from an unlawful refusal to hire, so I will begin with Respondent's admitted refusal to consider the three job applicants.

In *Ultrasystems Western Constructors*, 316 NLRB 1243 (1995), the Board applied a four-part test to determine whether an employer unlawfully had refused to consider job applicants. The Board later affirmed a judge's decision using this same test in *The 3E Co.*, 322 NLRB 1058 (1997).

Under the framework applied in *Ultrasystems* and *The 3E Co.*, the General Counsel may establish that an employer has refused to consider a job applicant, in violation of Section 8(a)(3) and (1) of the Act, by proving the following four elements: (1) the employer is covered by the Act; (2) the employer at the time of the purportedly illegal conduct was hiring or had concrete plans to hire employees; (3) antiunion animus contrib-

²² In her capacity as secretary at the jobsite, Francine Jackson kept a log which confirms that Owner Samuel Colburn instructed her husband, Robert Jackson, to call Russell and arrange to give him an application. An entry for December 4, 1995, states, in part, "Sam [Colburn] called Bob [Jackson] later that afternoon and told Bob to get in touch with Ricky Russell and set up an appointment." R. Exh. 5. I do not conclude that by making this appointment, the Respondent was signifying that it again had plans to hire. Rather, I find that Colburn was being cautious because Russell was a union official.

²³ Additionally, the fact that Russell was also the Union's business manager did not affect his status as an "employee" protected by the Act. *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995).

uted to the decision not to consider, interview, or hire an applicant; and (4) the applicant was a bona fide applicant.

The Respondent has admitted that it is an employer covered by the Act. Therefore, the first requirement has been satisfied.

Second, the General Counsel must prove that at the time of the purportedly illegal conduct, the Respondent was hiring or had concrete plans to hire employees. On December 4, 1995, the Respondent did have plans to hire employees, but already had decided whom it would hire and had made oral commitments to those individuals. Foreman Jackson credibly testified that he made these commitments on or before November 30, 1995. (Tr. 103–104.)²⁴

Owner Colburn's testimony, which I also credit, indicates that he thought Jackson had made commitments to too many applicants, but nonetheless, he instructed Jackson to tell these applicants to come to work after a shipment of light fixtures arrived. The record convincingly establishes that Jackson followed these instructions.

Because these individuals did not submit written applications until shortly before they began employment, the Respondent's records do not reflect when Jackson extended the oral commitment to each of them. However, I do not find that the absence of written confirmation detracts from Jackson's credibility.²⁵

²⁴ The testimony of Patrick M. Clary, a witness for the government, corroborates Jackson. Clary saw the Company's November 28, 1995 "help wanted" advertisement, telephoned the main office number given in the advertisement, and received instructions to report to the jobsite. That same day, Clary went to the jobsite and met with Jackson.

Clary testified that at this meeting with Jackson on November 28, Jackson said he could use Clary as soon as a shipment of light fixtures arrived. (Tr. 486.) He did not file a written application at that time, but did so after receiving a telephone message from the Company on December 5. He began work the next day. (Tr. 487–488.)

²⁵ Jackson's testimony that he made oral commitments to hire certain applicants could be open to challenge as simply too convenient. However, there are reasons to believe him in addition to my observations of his demeanor while testifying.

As noted above, Patrick M. Clary, a witness for the General Counsel, gave testimony which corroborated Jackson's version. The Complaint alleges Clary to be a discriminatee, and therefore, it was not in his interest to give testimony supporting the Respondent's theory. Moreover, another alleged discriminatee who testified for the General Counsel, Eugene Cage, gave testimony largely consistent with Jackson's version except that, according to Cage, Jackson merely told him to "check back within a week" rather than explicitly promising him a job. (Tr. 345.) However, Jackson did hire Cage, and did not require him to complete a job application until the time Cage reported to work. Therefore, the testimony of both Clary and Cage indicates that persons hired did not file written applications until right before they reported for duty.

The absence of written documentation is also consistent with the fact that Respondent is a relatively small employer, rather than a large company with an elaborate personnel staff. In the fashion of a "Mom and Pop" business, Jackson supervised the electricians at the jobsite and his wife handled the paperwork.

Just as a lack of staff may have discouraged paperwork, the "culture" of the industry itself would appear consistent with doing a minimum of record keeping. Skilled craftsmen may well place a higher value on getting things done than on writing things down, and may deem a written job offer unnecessary when "a man's word is his bond." When Owner Colburn learned that Jackson had made commitments to

Under the second requirement of the test applied in *Ultrasystems* and *The 3E Co.*, the General Counsel bears the burden of proving that at the time of the purportedly unlawful conduct, the employer was hiring or had concrete plans to hire employees. However, the General Counsel has not proven that, as of December 4, 1995, the Respondent was hiring or intended to hire anyone other than the individuals it had previously selected, but who could not be put to work until the shipment of light fixtures arrived.

The law does not require that the Respondent revoke these hiring decisions and instead offer employment to the three men who showed up later seeking work. Consummating a previously made hiring decision follows the selection process in the same way that presentation of the winner's trophy comes after the race itself. It does not entail a fresh contest among applicants, or a new choice of whom to employ. An applicant cannot be excluded unlawfully from being considered unless he seeks to be a candidate while the selection process is going on or about to start. In this case, it was already over.

In sum, I find that the General Counsel has not carried its burden of proving that at the time of the allegedly unlawful action, the Respondent was hiring or had concrete plans to hire employees. I conclude that Respondent did not violate the Act by refusing to consider Russell, Goetzman, and Longuepee for employment.²⁶

The complaint also alleges that since about December 4, 1995, the Respondent refused to employ Russell, Goetzman, and Longuepee. This allegation may be analyzed under the framework established in *Wright Line*, supra.

The evidence clearly establishes the first two elements that the General Counsel must prove to make a prima facie case. When he spoke with Jackson on December 1, 1995, Russell plainly stated his intent to organize the Respondent's employees. Thus, the General Counsel has established both that the alleged discriminatees were engaged in union activities, and that the Respondent knew about it.

At the third step, *Wright Line* requires the General Counsel to prove that the Respondent took an adverse employment action. Respondent has admitted that it refused to hire Russell, Goetzman, and Longuepee. As noted above, these three men unquestionably are "employees" as that term is used in the Act, and fall within its protection. However, the question of what

hire more people than Colburn thought necessary, he did not tell Jackson to go back on his word. Instead, he instructed Jackson to put those people to work after the light fixtures arrived. Considering all of these circumstances together, the absence of paperwork documenting the hiring commitments does not change my impression that Jackson was a truthful witness, and I credit his testimony.

²⁶ In case the Board disagrees with my conclusion at step 2 of the *Ultrasystems* analysis, I make the following findings with respect to the issues raised at the third and fourth steps. At step 3, I find that the government has not established, by a preponderance of the evidence, that animus against the Union motivated the Respondent in excluding Russell, Goetzman, and Longuepee from consideration. At step 4, I find that these individuals were employed in the electrical construction industry and were bona fide job applicants. See *Blaylock Electric*, 319 NLRB 928 fn. 1 (1995); *Windemuller Electric*, 306 NLRB 664 (1992).

constitutes an “adverse employment action” for this particular type of employee is a bit more difficult.

Before deciding whether the Respondent has taken some action adverse to their employment status, it is necessary to determine what that status entails. Because the men are job applicants, their legal status as “employees” under the Act does not entitle them to a paycheck or, necessarily, to be hired. However, it does entitle them to be treated in a manner free of any discrimination based on their union activities, affiliation, or sympathies.

If an employer decided to hire more workers, but rejected certain applicants because of their union ties, that action would deprive them of the legal rights they enjoyed as “employees” under the Act. Therefore, it would constitute an “adverse employment action.” On the other hand, when an employer hires no one, there is no employment action, adverse or otherwise.

The Board has held that a necessary element of proving a refusal to hire allegation involves showing that the employer was hiring at the time. In *GM Electric*, 323 NLRB 125, 128 (1997), the Board listed the elements which, “combined with the proof of animus, make out a prima facie case that hostility to union activity or affiliation was a motivating factor in an employer’s failure to hire: union activity, employer knowledge, and timing, and the availability of jobs for the applicants.”

In *Bay Control Services*, 315 NLRB 30 (1994), the Board adopted a judge’s finding that an employer did not violate Section 8(a)(3) of the Act by refusing to hire certain union members on the dates alleged, but rejected portions of the judge’s reasoning. Instead, the Board stressed that, “as the judge found, there was no showing that there were jobs available for new hires on those dates.” *Id.* at 30, fn. 2.

In this case, the General Counsel has not proven that the Respondent was hiring employees on December 4, 1995. Rather, the record shows that Foreman Jackson had made commitments to hire certain applicants, but had to wait until the light fixtures arrived before putting them to work. Considering that Owner Colburn believed Jackson had extended commitments to too many workers, and told Jackson not to take any more applications, the prospects that Jackson would be hiring others in the future were not great.

Moreover, once the light fixtures were installed, the need for workers would diminish. Although some tasks, such as fixing defects noted on the “punch list” would require some employees, the work force would not be expanding. Jackson told Russell on December 1, 1995, that about 6 weeks work remained on the project and then, Jackson said, “We’re gone.” (GC Exh. 22.)

In sum, the evidence does not establish either that Respondent was hiring on December 4, 1995, or had concrete plans to do so. Therefore, I cannot find that Respondent took any adverse employment against Russell, Goetzman, or Longuepee by failing to offer them jobs. The General Counsel has not proven the third *Wright Line* element, and therefore has not established a prima facie case.

Additionally, I conclude that the evidence fails to establish any independent violation of Section 8(a)(1). I recommend that these allegations be dismissed.

C. Jackson’s Alleged December 5, 1995 Statement that Respondent Would not Hire Employees Because of their Union Membership, Activities, or Sympathies

Complaint paragraph 7 alleges that about December 5, 1995, the Respondent, by Foreman Jackson, at its jobsite, advised its employees that it would not hire individuals because of their union membership, activities, or sympathies. To prove this allegation, the General Counsel relies on a tape recording of a conversation Clifford Zylks testified he had with Jackson on that date. (GC Exh. 28.)

The Union paid Zylks as a full-time organizer during the same period he was on the Respondent’s payroll as an employee. Zylks testified that his December 5, 1995 conversation with Jackson took place at the jobsite, and that two other persons, Steve Palmer and Francine Jackson, were also present. (Tr. 376.) Zylks did not tell Foreman Jackson that he was recording their conversation.

The General Counsel played the tape at the hearing. Most of it was unintelligible, and although I received the recording into evidence, I rejected a transcript which Zylks testified he made from the tape.²⁷ Much of the tape was unintelligible, making it difficult to determine the accuracy of the transcript Zylks made.²⁸

Apart from the question of what was said, the tape leaves unresolved who said it. Zylks testified that four individuals were present during this conversation, and three of them were men. I have not credited Zylks and do not consider his testimony reliable, but even assuming that Zylks made the tape at the time and place he testified, the distorted sound quality makes it difficult to distinguish among the voices. Moreover, the frequent unintelligible portions of the tape interrupt the normal flow of words in a conversation, leaving the understandable parts without context.²⁹

²⁷ Because the General Counsel played the tape during the hearing, some of the words spoken on it appear in the hearing transcript prepared by the court reporter, but the transcript simply describes many portions as “inaudible.” (Tr. 456–464.) From my own review of the tape recording, I am not certain about the accuracy of the hearing transcript. However, I have not ordered the transcript corrected because the poor quality of the recording leaves uncertainty as to what actually had been said on the tape.

²⁸ Although Respondent objected to admission of tape recordings and transcripts on the basis that they were made without Jackson’s knowledge or consent, I received into evidence a number of recordings and transcripts over those objections. Under Board precedent, the tape recordings clearly are admissible. *Williamhouse of California, Inc.*, 317 NLRB 699 (1995); *Wellstream Corp.*, 313 NLRB 698, 711 (1994); and *Plumbers Local 598 (Rust/W.S.H.)*, 255 NLRB 450, 462–464 (1981). I rejected Zylks’ transcript of the December 5, 1995 conversation not because he had made the recording without Jackson’s knowledge and consent, but rather because the evidence did not establish that the transcript (GC Exh. 29) reliably reduced to writing what actually had been said. The danger of unfair prejudice and confusion warranted its exclusion. See Fed.R.Evid. 403; see also fn. 3, above.

²⁹ As noted above, the poor audio quality also makes it impossible to tell, by listening, whether the tape had been edited or altered. Based on my observations of the witnesses, I have not credited Zylks, and my doubts about his testimony also make me cautious about placing trust in his tape.

Zylks' testimony does not resolve these questions, and other evidence does not support finding the violation alleged. Thus, the General Counsel called Jackson as a witness before Zylks testified, and did not ask him about the purported conversation or the tape.

The Respondent called Francine Jackson to testify, but she did not refer to the alleged conversation. Although the General Counsel asked her if her husband had had a conversation about the Union with another employee, David West, the General Counsel did not inquire about the December 5, 1995 conversation on Zylks' tape. The other witness to that conversation, David Palmer, did not testify at all.

The tape recording also stated that the date was December 4, 1995, but Zylks testified that this date on the tape was wrong. (Tr. 456.) That, too, calls into question its reliability. Additionally, based on my observations of the witnesses, I do not credit Zylks' testimony.

In sum, the credited evidence does not establish that Jackson made the statements alleged in paragraph 7 of the complaint. Therefore, I recommend that this allegation be dismissed.

D. Respondent's Alleged Change of Hiring Practices on December 6, 1995

Complaint paragraph 15 alleges that about December 6, 1995, Respondent changed its hiring practices by accepting applications at a Wendy's restaurant located next to its jobsite. The complaint further alleges that this change violated both Section 8(a)(1) and (3) of the Act.

There is no dispute that sometime in early December 1995 Respondent began interviewing job applicants at a restaurant about 50 feet from the jobsite, rather than at the jobsite itself. The credited evidence³⁰ establishes that the general contractor, acting upon insurance concerns, told Colburn Electric that job applicants should be interviewed off the construction site.

Paragraph 15 does not allege that any specific person has been discriminated against "in regard to hire or tenure of employment or any term or condition of employment." 29 U.S.C. § 158(a)(3). Moreover, no paragraph of the complaint fills in the necessary information missing from paragraph 15, the name of an individual who suffered an adverse employment action, a required element of the General Counsel's case under *Wright Line*.³¹ Not only does the complaint fail to plead that any person has suffered such an adverse employment action because of the change alleged in paragraph 15, the evidence does not establish that such harm has occurred.

There is also another barrier to establishing that the change alleged in complaint paragraph 15 violates Section 8(a)(3). Apart from the necessity of showing that the respondent has

³⁰ Based on my observations of the witnesses, I have credited Gerald Dees, of Nabholz Construction, the general contractor at the jobsite, and Jackson's testimony, which is consistent with Dees' testimony.

³¹ Even assuming that the 8(a)(3) discrimination alleged in complaint par. 15 should be evaluated in accordance with *Lancet Arch*, which does not require a showing that the Respondent was hiring or planning to hire, Sec. 8(a)(3) still requires a showing that someone has been subjected to some form of discrimination. The absence of an alleged discriminatee would, in my view, preclude a finding that there has been such discrimination.

engaged in discrimination, as manifested by an adverse employment action, Section 8(a)(3) also requires proof that such discrimination encouraged or discouraged membership in a labor organization.

The evidence does not establish that moving the location for interviews and applications a short distance to the fast food restaurant discouraged prounion applicants, or any applicants, from going there for an interview. The evidence does suggest that at times the jobsite was muddy, and to that extent at least, the fast food restaurant reasonably would seem more inviting than the construction site trailer.

With respect to the issue of animus, I find that the Respondent changed where it accepted applications and interviewed applicants because the general contractor told it to do so, and not from any antiunion motivation. For all of these reasons, I recommend that the 8(a)(3) violation alleged in complaint paragraph 15 be dismissed.

Because evidence of unlawful motivation is not an element of an 8(a)(1) violation, I need not and will not consider the Respondent's reasons for interviewing applicants at the fast food restaurant when I determine whether this section of the Act has been violated. I find no objective basis for concluding that moving the location of job interviews 50 feet from the jobsite reduces the likelihood that prounion workers will apply for or be interviewed for a job. Similarly, the evidence does not establish that relocating job interviews this short distance imposes any increased burden on any applicant, whether sympathetic to the Union or not.

To violate Section 8(a)(1), the conduct at issue must in some way interfere with, restrain, or coerce employees in the exercise of their right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in other activities for their mutual aid and protection, or to refrain from such activities. The evidence does not establish that interviewing a job applicant at the restaurant rather than in the trailer nearby would have any tendency to interfere with, restrain, or coerce employees in the exercise of any of these rights. Therefore, I also recommend that the 8(a)(1) allegation be dismissed.

E. Alleged December 7, 1995 Interrogation of Employees by Foreman Robert Jackson (Allegation Withdrawn at Trial)

Complaint paragraph 9 had alleged that on December 7, 1995, the Respondent, by Foreman Robert Jackson, interrogated employees about their union membership, activities, and sympathies, in violation of Section 8(a)(1) of the Act. The General Counsel withdrew this allegation at trial. Although I need not make any findings about the allegation, I mention it here for clarity and completeness.

F. December 13, 1995 Discharge of Employees Patrick M. Clary and Michael Simoneaux

Paragraph 16 of the complaint alleges that on about December 13, 1995, the Respondent discharged employees Patrick M. Clary and Michael Simoneaux. The complaint alleges that these discharges violated Section 8(a)(1) and (3) of the Act.

The Respondent admits discharging Clary and Simoneaux, but states that the discharges were for causes unrelated to these employees' protected activities. I will discuss these discharges in alphabetical order.

On about December 4, 1995, the general contractor directed Colburn Electric to put up gate signs at the jobsite, so that one gate would be labeled for use by the Respondent's personnel, and the other gate would be used by all others. This appears to have been a "reserve gate" system of the sort typically used to assure that picketing directed against one subcontractor will not cause the employees of other subcontractors, not involved in the labor dispute, to cease work. The general contractor told Colburn it wanted the gate signs up by Monday, December 6, 1995.

On December 12, 1995, Foreman Jackson was at the jobsite as employees came to work, watching to make sure that Colburn Electric's employees used the gate reserved for them. According to Jackson, whom I credit, he warned Clary not to go through the wrong gate, but Clary did so anyway.

Clary's version is somewhat different from Jackson's, although he did admit going through the wrong gate. However, Clary claimed that he had already gone through this gate when Jackson told him he go through the Colburn gate. Clary further testified as follows:

A. He [Jackson] told me to go through the gate marked "Colburn." And I turned and I said, "Bobby, we talked about this yesterday."

And he said, "Go on into work." So I turned and went into work.

Q. Which gate did you use?

A. Actually, I was already past what they had called the gate. It was just the sidewalk. [Tr. 503.]

I do not credit Clary's testimony, in part because it appears to have an internal inconsistency. As quoted above, Clary stated that when Jackson told him to go through the gate marked "Colburn," he replied, "Bobby, we talked about this yesterday." But elsewhere in Clary's testimony, he denied that Jackson had talked with him about the gates. Instead, Clary claimed, he and Jackson merely had talked about "we both were going to be civilized and there was going to be no trouble on this job." (Tr. 502.)

Obviously, it was in Clary's interest to deny that Jackson previously had told him to use the Colburn gate, just as it was in Clary's interest to claim that he had already gone through the wrong gate before Jackson told him to use the Colburn gate. Otherwise, Clary would be admitting that he had been instructed to use the Colburn gate and had violated that instruction.

However, Clary's denial that he had been told in advance to use the Colburn gate does not have the ring of truth. If Jackson hadn't told Clary about the gates, it seems strange that, when Jackson told Clary to go through the Colburn gate, Clary would respond "we talked about this yesterday." That reply simply doesn't make much sense if they hadn't discussed use of the Colburn gate.

It is not very plausible that Jackson would go to the trouble of establishing a reserve gate system and then fail to tell his

employees to use it. Indeed, Jackson's presence as employees came to work signifies the importance attached to their use of the proper gate. I find Clary's testimony, indicating that Jackson had not previously told him to use the Colburn gate, inherently unlikely.³²

Moreover, there are other significant reasons for my decision not to believe Clary. At the beginning of the hearing, the General Counsel invoked the rule requiring sequestration of witnesses, and I imposed that rule in the manner specified by the Board in *Greyhound Lines*, 319 NLRB 554 (1995). However, Clary testified that before he took the witness stand, he examined an exhibit for about 30 minutes and made notes.

It is not entirely clear whether Clary obtained this exhibit from the Union's representative or from counsel for the General Counsel, but Clary testified that after he looked at the exhibit, he gave it to counsel for the General Counsel. Neither the Union nor the General Counsel had asked my permission to show the exhibit to Clary before he testified.

This exhibit was not a transcript. However, I conclude that showing the exhibit to Clary created a danger to testimony which was to be prevented by my instruction that "counsel for a party may not, in any manner, including the showing of transcripts, inform a witness about the content of the testimony given by a preceding witness without express permission of the administrative law judge." (Tr. 35-36.)³³

³² Other parts of Clary's testimony cast doubt on his credibility. He testified that he told Foreman Jackson that the union members "were there to show him the quality of work that we could do but that we weren't going to try to organize Colburn Electric." (Tr. 501, emphasis added.) Yet Union Organizer Russell's letter to Jackson identified Clary as a member of the "Organizing Committee." (R. Exh. 21.) In fact, Russell testified that Clary was a full-time organizer (Tr. 322) and Clary admitted on cross-examination that he had been a paid organizer for the Union. (Tr. 517.) Considering that when Clary made the "we weren't going to try to organize" statement the Union was paying him to be a full-time organizer, the untruthfulness of this declaration is palpable. A person's truthfulness off the stand may affect his credibility as a witness, and I find that it does so here.

³³ The General Counsel's brief argues that showing an exhibit to Clary did not violate the sequestration order because the prohibition only concerns testimony, and the exhibit was not testimony. The exhibit provided to Clary was the daily log kept by Francine Jackson, who served as secretary at the jobsite, based on information provided by her husband, Foreman Robert Jackson. (R. Exh. 5.) It often constituted their contemporaneous, or almost contemporaneous notes about the events which are at issue in this case. Many of these events involved Clary.

Although the log was not itself testimony, it summarized Jackson's account of these events and thus provided important information about the essence of his testimony. Robert Jackson testified before Clary, and thus was a "preceding witness" within the meaning of the sequestration order.

The General Counsel's brief further contends: "No risk of fabrication of testimony occurred because Clary could not know what other witnesses had said about [the exhibit he examined] or its contents, or even, arguably, that it was a formal exhibit that had been admitted." However, I believe it is unlikely that Clary would have examined the log for 30 minutes, and made notes about it, if he had no knowledge of its significance.

The sequestration rule protects not only against the risk of deliberate fabrication, but also against the possibility that the witness' recollection

Examining the exhibit for 30 minutes was long enough to have had an effect on the witness's testimony. More seriously, the fact that Clary made notes from the exhibit raises the possibility that he wanted his testimony to be affected by it. I need not determine whether the sequestration order literally was violated to conclude that Clary's study of this exhibit before testifying raises a question about his credibility.

For this reason, as well as the other reasons discussed above and my observations of all the witnesses, I do not credit Clary's testimony. Instead, I find that when he came to work on December 12, he disobeyed Foreman Jackson's instruction and entered the jobsite through the gate reserved for the workers of other employers.

Later on December 12, 1995, during his lunch period, Clary, along with Clifford Zylks, Herbert (Bo) Brown, and Eugene Cage, picketed the jobsite. Clary testified the picket sign stated that Colburn Electric did not provide him or his family with health insurance. The next day, Jackson discharged Clary, giving as a reason that Clary had not used the Colburn gate on the previous day.

It appears that Clary was the first person discharged for failing to use the Colburn gate, but he was not the last. Jackson credibly testified that he also terminated the employment of Angelo Konstantinides and Eugene Cage for similar infractions. There is no evidence that Konstantinides engaged in any union activity.

I will evaluate Clary's discharge under the standards the Board promulgated in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). At the first step of the *Wright Line* analysis, the General Counsel must establish that the alleged discriminatee engaged in union or other protected activities. Clary was a member of the Union's organizing committee and the day before his discharge, he picketed the jobsite during his lunch period. Therefore, I find that the General Counsel has satisfied the first *Wright Line* requirement.

The General Counsel next must establish that the Respondent knew of Clary's protected activities. On December 11, 1995, the Union delivered to the Respondent a letter stating, in part, "Please be advised that IBEW Local Union 995 is engaged in organizing activity with your company, Colburn Electric Co., which is protected under Section 7 of the National Labor Rela-

may be affected even without his conscious assent. Clary was a paid union organizer as well as an alleged discriminatee seeking reinstatement, and thus had an interest in the outcome of this case on the personal as well as the professional level. Reading this log prepared by his adversaries, right before he took the stand, predictably could have an impact on his state of mind, and therefore, on the tenor of his testimony.

In arguing that showing the log to Clary did not violate the sequestration order, the General Counsel's brief further states that "Clary was shown documents counsel for the General Counsel could reasonably expect to be part of his cross-examination. Therefore, the showing to Clary of R Exh. 5 did not violate the sequestration rule." However, it is not entirely clear to me how Clary could have been cross-examined, let alone impeached, with a document he had not prepared, signed, initialed, adopted, or even seen until the day of hearing.

tions Act." The letter identified Clary as a member of the organizing committee. (R. Exh. 21.)

The Respondent received this letter the day before it discharged Clary. Moreover, Clary's picketing was an open activity which would have been hard to miss.

Additionally, the log kept by Francine Jackson, based on information provided by her husband, Foreman Robert Jackson, provides evidence that management knew about Clary's organizing activities. An entry dated "12-12" states, in part, "Steve Vandura came to Bob & I and told us Mike Clary was talking about joining the union to him. Between that time slot. On Colburn Co. Time. He said he would testify that, that was not the first time." (R. Exh. 5.)

The log entry for this date also records the picketing by Clary and others during the lunchbreak. It then states, "Later that afternoon Bob & I were informed that Mike Clary was talking union on Colburn Elec. time to other guys." (R. Exh. 5.)

In sum, the evidence makes a very strong case of employer knowledge. Therefore, I find that the General Counsel has met its burden at the first two steps of the *Wright Line* analysis.

At the third step, the General Counsel must establish that the Respondent took an adverse employment action against the alleged discriminatee. Clearly it did. It discharged him. The General Counsel has satisfied the third step of the *Wright Line* analysis.

Finally, the General Counsel must show a nexus or link between the alleged discriminatee's protected activities and the adverse employment action. Here, the timing is quite suspicious and I find that it is sufficient to establish the necessary link. Additionally, the fact that the log kept by the Jacksons reflects both Clary's protected activities and, a little later, Clary's discharge, gives rise to a suspicion that the two were related.

Therefore, I find that the General Counsel has established a *prima facie* case. The burden now shifts to the Respondent to show that it would have taken the same action against Clary even in the absence of protected activity.

The Respondent discharged Clary because he disobeyed the foreman's instruction and entered the jobsite using the gate reserved for employees of other companies. To analyze the seriousness of this misconduct, I start with the principle that an employer may require that its employees enter and leave through the gate designated for their use. An employer may also discharge an employee for disobeying a lawful order, which is insubordination.

In the case of reserve gates at construction sites, if an employee of the company with which a union has a labor dispute fails to use the gate reserved for the employees of that company, and instead uses the gate reserved for neutral employers, that action taints, or makes invalid, the neutral gate. When that happens, the union which has the dispute with the one employer lawfully may picket the gate reserved for neutrals.

In this case, if Colburn's employees used the gate reserved for the general contractor and other subcontractors, rather than their own gate, then the union lawfully could picket the general contractor and other subcontractors at their gate. If employees of those companies honored the picket line, then it could shut

down the entire project. Therefore, Colburn Electric had very important reasons for imposing a strong penalty on any of its employees who used the wrong gate.

The General Counsel has not argued that Clary had a right to use the neutral gate, but instead has contended that the Respondent seized on Clary's use of the wrong gate as a pretext. However, for the same infraction, the Respondent also discharged at least two other employees, including one with no known union activities and no known ties to the Union. The Respondent took very seriously its duty to preserve the integrity of the gates. Its ability to continue to do work at the jobsite presumably depended on it.

Clary's work as a paid union organizer did not grant him a privilege to use the wrong gate, and thereby destroy the reserve gate system because the Union didn't like it. He was also a Colburn Electric's employee, and as an employee, he had to abide by the same nondiscriminatory company rules that other employees had to follow. See *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995). When he broke the rule, he received the same penalty that other employees received regardless of whether they had or had not engaged in union activity.

The evidence therefore does not establish that Clary received harsher treatment than another employee, without protected activity, who broke the same rule. That fact would lead to the conclusion that the Respondent has overcome the General Counsel's prima facie case. However, and although the General Counsel does not argue the case in precisely this way, I believe it is also appropriate to consider whether the discharges of other employees might have been a kind of "cover" to make the termination of Clary's employment appear legitimate and nondiscriminatory.³⁴

The evidence, after all, clearly documents both Clary's protected activities and management's awareness of those activities, and his discharge follows rather quickly after Clary picketed the jobsite during his lunch hour, an open example of protected union activity expressly noted in the Jacksons' log. Moreover, the rule in question, to enter and leave by the gate reserved for Colburn Electric employees, not only was a recent rule but was itself the result of the Union's activity at the jobsite.

In these circumstances, I believe it is appropriate to ask whether the gate rule itself was a seine devised to catch and remove the union "fish" but which happened to ensnare some nonunion ones as well. I conclude that it was not.

If the rule had concerned some relatively unimportant matter, but carried the discharge penalty for violation, its motivation would be suspicious. However, the gate rule was of vital importance to Respondent's continued presence at the jobsite.

Specifically, if the neutral gate, used by persons associated with companies other than Colburn Electric, were tainted, then it would be lawful for the Union to picket at that gate and the

³⁴ The fact that an employee or employees with no union affiliation or activity received similar discipline will not make an employer's action lawful if the true reason for the adverse employment action is to punish some other members of the affected group for engaging in union activity or to discourage employees from such activity. See, e.g., *Mini-Togs, Inc.*, 304 NLRB 644, 648 (1991).

entire project might be shut down. The general contractor would have little choice but to expel the Respondent from the project.

A neutral gate becomes tainted through a "pattern of destruction," for example, when employees of the primary employer, with which a union has a dispute, use the gate reserved for neutral employers. See, e.g., *Oil Workers Local 3-689 (Martin Marietta)*, 307 NLRB 1031 (1992). Colburn Electric had a compelling interest, therefore, in assuring that its employees entered and left the jobsite strictly through its own gate, so that they did not destroy the neutrality of the gate reserved for other companies and their workers.

Colburn Electric's employees had to be impressed with the requirement that they must use only their own gate, because taking a shortcut which seemed merely convenient to them could have lasting adverse consequences for the Company's future on the project. In these circumstances, the penalty of discharge for a first offense was commensurate with the seriousness of the violation, and with the harm which Colburn itself could suffer if the gate violation occurred. Thus, the gate rule served a legitimate, not a pretextual purpose.

Additionally, Clary's open defiance of Jackson's instruction to use the Colburn gate established his propensity to ignore this rule in the future. His repeated disregard of the correct gate easily could establish the pattern of destruction necessary for the Union to picket lawfully at all gates. Clary, by himself, not only could destroy the gate system but seemed inclined to do so but demonstrated an intention to do so by disobeying a direct order to use the proper gate.

The way Clary flouted his supervisor's instruction suggests that he intended to continue to use the neutral gate and thereby destroy its usefulness. Clary's role as a paid organizer for the Union is consistent with such an intention. I find that he acted from this motivation, and that his choice to use the neutral gate was deliberate.³⁵

I find that by imposing the same penalty on Clary it imposed on others who violated the gate rule, the Respondent was furthering its legitimate business interests, and not using the rule as a ruse or cover for unlawful discrimination.

In sum, I find that Respondent has carried its burden of showing that it would have discharged Clary for this infraction regardless of his union affiliation and activities. Therefore, I recommend that the allegation that Respondent discharged Clary in violation of Section 8(a)(1) and (3) of the Act be dismissed.³⁶

³⁵ Clary's status as a Colburn Electric employee gave him a power to destroy the neutral gate that other paid union officials who were not Colburn employees did not possess. He could destroy the neutral gate simply by using it. Regardless of his simultaneous loyalty to the Union as its paid organizer, Clary did not have the right to use his special status as a Colburn Electric employee to destroy the reserve gate system. Such conduct does not fall within the protection of the Act.

³⁶ I do not consider it significant that Jackson waited until the day after the infraction to discharge Clary for it. Clary was the first person to be disciplined for violating this rule and also had engaged in open union activity. It is entirely reasonable that a foreman would want to "sleep on it," and perhaps consult higher management, before taking action in so delicate a situation.

With respect to the discharge of Michael Simoneaux, the General Counsel characterized Simoneaux as a known union activist. However, the evidence does not establish that Simoneaux was a union activist, although, by his own admission, Foreman Jackson apparently thought Simoneaux was. (Tr. 72.)

Simoneaux did not testify. Zylks and Clary testified that on December 13, 1995, at the jobsite near the “gang box” (where tools are kept), Clary gave Simoneaux a union authorization card Simoneaux signed and gave back to Clary. According to Zylks and Clary, Foreman Jackson came up behind Simoneaux as he was filling out the card. (Tr. 387–388.)

Based on my observations of the witnesses, as well as for the additional reasons discussed above, I do not credit the testimony of either Clary or Zylks. Another witness, Herbert (Bo) Brown, testified that on the day he was discharged, Simoneaux had a conversation with Zylks about joining the Union. However, Brown did not indicate that Clary was involved in this conversation. Brown also did not testify either that Simoneaux signed a union card or that Jackson was in the area when Simoneaux did so. (Tr. 218.)³⁷

As noted, Simoneaux did not testify and from Brown’s testimony, which I credit, I find no basis for concluding that Jackson saw Simoneaux sign a union card. It would be expected that Jackson, as foreman, would be all around the jobsite, so his presence near the “gang box” would not be out of the ordinary. Similarly, the evidence does not establish that the presence of two electricians talking at the “gang box” would be an unusual event, or likely to excite suspicion of union activity.

In sum, I find the evidence insufficient to establish that management knew that Simoneaux had discussed the Union with Zylks or Clary. The evidence also is insufficient to establish that Simoneaux had signed a union authorization card. Additionally, Union Organizer Russell’s December 11, 1995 letter to Jackson did not list Simoneaux as a member of the Union’s organizing committee, and I find that he was not.³⁸

Applying the *Wright Line* standards, I find that the General Counsel has satisfied the requirement at step 1 by showing that Simoneaux discussed the Union with another employee. Such conversation is protected by the Act.

At the second step, the General Counsel must establish that the Company knew that Simoneaux was engaged in protected activities. The General Counsel has met this burden, but in a manner which is not without irony. The General Counsel

³⁷ Brown’s testimony also raises some questions about his accuracy as a witness. For example, Brown testified on direct examination that although he had attendance problems while working at Colburn, he had not been disciplined for them. Yet on cross-examination, he admitted he received a warning about attendance. Additionally, although Union Organizer Russell’s December 11, 1995 letter to Jackson identified Brown as a member of the organizing committee, Brown testified, “I did not agree to become a member of an organizing committee.” (Tr. 232.)

It would seem in Brown’s interest to admit that he was a member of the organizing committee, so his testimony that he did not agree to be on the organizing committee is certainly not self-serving. In sum, I find that Brown was an honest witness but with a less-than-perfect memory.

³⁸ However, as discussed below, the evidence does establish management’s belief that Simoneaux was engaged in union activities.

called Foreman Robert Jackson to testify. The examination included the following:

Q. Do you remember an employee by the name of Michael Simoneaux?

A. Yes.

Q. And how did his employment relationship with Colburn end?

A. He was fired.

Q. And you knew he was engaged in union organizing on the job at the time you fired him, right?

A. Yes

[Tr. 72.]

By this admission from a supervisor, the General Counsel has established that the foreman knew something that may not have been the case. At least the record, far from establishing that Simoneaux was an organizer, merely suggests that Simoneaux was an employee receptive to being organized. Yet if management believed that Simoneaux was a union organizer, that belief is sufficient to satisfy the second step of the *Wright Line* analysis.

At step 3, the General Counsel must prove that the Respondent took an adverse employment against Simoneaux. The Respondent did. It discharged him.

At the last step, the General Counsel must establish some link or nexus between the protected activities of the alleged discriminatee and the adverse employment action. In the case of Simoneaux, that link is tenuous at best, because Simoneaux’s only protected activity established by the evidence was talking to another employee about the Union. Moreover, the record does not establish that the Respondent was aware of this activity.

If there is any link, it must spring from the fact that the Respondent believed Simoneaux to be an organizer, and that other employees were engaging in protected activity, most notably picketing the jobsite. Although this is a relatively weak link, I find that it is sufficient to carry the General Counsel’s burden at step 4. Therefore, I find that the General Counsel has established a *prima facie* case.

The burden then shifts to the Respondent to establish that it would have discharged Simoneaux in any event, even if he had not engaged in protected activities.

Jackson testified that he discharged Simoneaux for not showing up for work. I credit this testimony, and also credit Jackson’s uncontradicted testimony that he told Simoneaux this reason during the discharge interview.

Based on my observation of the witnesses, I find that Jackson was telling the truth. He impressed me as being scrupulously honest, and his testimony is consistent with that impression. For example, Jackson admitted that he “knew” Simoneaux to be a union organizer, even though that admission clearly was not in his interest.

Without this testimony, that Jackson “knew” Simoneaux to be a union organizer, the General Counsel would not have been able to establish the second *Wright Line* requirement and therefore would not have established a *prima facie* case with respect to Simoneaux. I credited the testimony because, based upon his demeanor, I found Jackson to be telling the truth. Similarly, I

credit his testimony that the reason he discharged Simoneaux was because of Simoneaux's absences, not his union activity.

The General Counsel contends that a log kept by Francine Jackson, based on information provided by her husband, Foreman Robert Jackson, contains a suspicious entry with respect to the Simoneaux discharge. For Friday, December 8, under the words "Rec'd shipment of park lot poles" appear words which have been scratched out, but most of which are still legible. The words state "Bob fired Michael Simoneaux for not calling in for [illegible] days." (R. Exh. 5.)

However, another, longer entry regarding the Simoneaux discharge appears in the log for December 13, the day on which Simoneaux's employment was terminated. An obvious explanation would appear to be that Francine Jackson began to write on the wrong page, realized her mistake, and scratched through the entry. However, the General Counsel did not ask about this entry while cross-examining Francine Jackson about the log.

In these circumstances, I attribute no significance to the scratched-through log entry. I find that the Respondent has met its burden of rebutting the General Counsel's prima facie case with respect to the discharge of Michael Simoneaux. Therefore, I recommend that this allegation be dismissed.

G. December 14, 1995 Discharge of Eugene Cage

Complaint paragraph 17 alleges that on about December 14, 1995, the Respondent discharged employee Eugene Cage. The complaint alleges that this action violated Section 8(a)(1) and (3) of the Act.

The Respondent's answer admits that it discharged Cage, but denies that it violated the Act. Rather, it asserts that it discharged Cage for "just cause" unrelated to Cage's protected activity. I will analyze this allegation in accordance with the *Wright Line* criteria.

At step 1, the General Counsel has established that Cage engaged in protected union activity. On December 11, 1995, the Union delivered a letter to Foreman Jackson, which identified the members of its organizing committee, and included Cage's number. On that same day, he testified, he began wearing a union badge.

Cage participated in the picketing of the Colburn Electric gate on December 12, 1995, and later engaged in an ostensible "unfair labor practice strike" which he testified occurred during part of the workday on December 13, 1995. Thus, the General Counsel clearly has proven the first *Wright Line* element.

The General Counsel has also satisfied its burden at step 2 of the *Wright Line* analysis. Picketing is an open activity which would be obvious to management. Additionally, Foreman Jackson admitted that he knew that Cage had been engaged in Union organizing at the time of Cage's discharge.

The General Counsel also has met the step 3 requirement of showing an adverse employment action. The Respondent has admitted discharging Cage.

Finally, the General Counsel has established the step 4 requirement of showing a link or nexus between the protected activity and the adverse employment action. The discharge came the day after Cage's picketing, and thus the timing itself is sufficient to provide the necessary nexus. I conclude that the General Counsel has established a prima facie case.

The Respondent asserts that it discharged Cage for the same reason it discharged Clary and Konstantinides, failure to use the Colburn Electric gate after the Respondent, at the direction of the general contractor, established a gate reserved for its use.

On direct examination, Cage testified that when Foreman Jackson fired him, Jackson did not explain or give any reason for the action. According to Cage, Jackson "didn't give me no reason why he fired; he just said I was fired." (Tr. 351.) Then, on cross-examination, Cage admitted that Jackson told him he was discharged for using the wrong gate "two or three days ago." (Tr. 355.)³⁹

Cage denied being an organizer and denied being a member of the Union's organizing committee. (Tr. 355.) Yet the Union identified Cage as being on the organizing committee in its December 11, 1995 letter to the Respondent. (R. Exh. 21.)

Cage's protected activity, wearing a union badge, picketing, and participating in an "unfair labor practice strike," clearly identified him with the organizing effort. Moreover, as an alleged discriminatee, it was in his interest to demonstrate that he had engaged in protected activity, and not in his interest to disclaim a role in organizing.⁴⁰

These contradictions, and particularly Cage's denial on direct examination that Jackson gave a reason for his discharge, followed by his admission on cross-examination that Jackson provided such an explanation, undercut the credibility of Cage's testimony. For this reason, and based on my observations of the witnesses, I credit Jackson's testimony, rather than that of Cage. Although I believe Cage was an honest witness and sincerely tried to recall the events as they happened, the inconsistencies in Cage's testimony persuade me that Jackson's is more reliable.

Jackson testified that he discharged Cage for "walking off the job other than through our gate." (Tr. 111; see also Tr. 72.) I find that Cage did fail to use the gate reserved for Colburn Electric employees when he left the jobsite on December 13, 1995.⁴¹

³⁹ On recross-examination, Cage testified that he was not sure but thought the day of his discharge was a Monday. According to the log kept by Francine Jackson, her husband discharged Cage on Friday, December 15, 1995 "for not using our entrance on 12-13." (R. Exh. 5.)

⁴⁰ Additionally, in response to a question on redirect examination, Cage said that he did not participate in any union activity on a voluntary basis, but in response to the next question, agreed that he participated in union activity because he wanted to do so. (Tr. 362.) However, I believe that these responses resulted merely from misunderstanding the question.

⁴¹ Although signs marked the entrances to the jobsite, there was no fence to prevent workers from entering or leaving at locations other than the designated gates. I find that Cage walked off the job without using either the gate designated for Colburn Electric employees or the gate reserved for others.

Cage denied using the wrong gate but he did not specifically deny leaving the jobsite without going through a gate at all. Therefore, a finding that Cage failed to use the gate reserved for Colburn Electric does not require a choice between the testimony of Cage and Jackson. However, to the extent that the testimony of these witnesses is in conflict, for the reasons discussed above I credit Jackson.

It may also be noted that Cage engaged in picketing on December 13, 1995, after which he returned to work. There is no contention that

For the reasons discussed above with respect to the discharge of Clary, the Respondent had a legitimate, important interest in making sure that the reserve gate system it had established remained untainted. It discharged employees for failing to use the Colburn Electric gate regardless of their union activity or lack of it. Therefore, I find that Respondent has established that it would have discharged Cage even in the absence of union activity, and has carried its burden of rebutting the General Counsel's prima facie case. I recommend that the allegations that Respondent unlawfully discharged Eugene Cage be dismissed.

H. December 21, 1995 Alleged Promulgation of Rule Prohibiting Discussion of Union During Working Hours

Complaint paragraph 10 alleges that Respondent violated Section 8(a)(1) of the Act on about December 21, 1995, by promulgating and maintaining at its jobsite a rule prohibiting its employees from talking about union matters during working hours.

Respondent has denied this allegation. However, Foreman Jackson testified that he called a meeting of employees and asked them to sign a document stating: "To Whom It May Concern. There has been union activities going on during working hours. THIS WILL NOT BE TOLERATED. THIS IS A WARNING. If this happens again anytime except breaks or lunch you will be fired." (R. Exh. 8.) He told the employees to sign this document, and 10 of them did.

I find that this rule violates Section 8(a)(1) of the Act.

The Respondent contends that, in accordance with the principle that "working time is for work," it lawfully may prohibit the employees from discussing the Union during such working time. However, Respondent cannot credibly claim that the rule assures that working time will be spent doing work, because the rule, on its face, does not prohibit employees from discussing any subject other than the Union.

Applying an objective standard, the words of the rule cannot reasonably be understood as a requirement that employees work rather than talk during working time. Thus, the rule does not threaten employees with discharge no matter how much time they spend talking about sports, deer hunting, the weather, or any topic except the Union. However, the rule states that they may not discuss the Union during working time and will be discharged if they do.

I find that the Respondent interfered with, restrained, and coerced employees in the exercise of rights protected by Section 7 of the Act by promulgating this rule, and thereby violated Section 8(a)(1) of the Act. I further find that Respondent violated Section 8(a)(1) by requiring employees to sign the notice of this rule. See, e.g., *Heck's, Inc.*, 293 NLRB 1111, 1119-1120 (1989).

The General Counsel further argues that Respondent has allowed employees to engage in solicitations unrelated to the

when Cage failed to use the Colburn Electric gate, it was while on his way to picket rather than later, after he had finished work for the day. Moreover, it would not save Cage time to leave the jobsite at a location other than the Colburn gate if he were on his way to picket near the Colburn gate. Therefore, I conclude that when Cage failed to use the Colburn gate on December 13, 1995, it was at the end of his workday.

Union during working time. In particular, the General Counsel points to the testimony of Clifford Zylks that he sold candy to other employees during working time, and to the testimony of Herbert Brown that a vendor came on the jobsite and sold shrimp to employees during working time, without objection from Foreman Jackson.

The rule in question is manifestly unlawful on its face, and evidence of other solicitations is not needed to establish a violation. However, I do credit Brown's testimony that Foreman Jackson allowed employees to use working time to buy shrimp from a vendor, earlier the same month that Jackson promulgated the unlawful rule.⁴² The evidence does not establish that Respondent later issued any rule restricting such solicitations at the jobsite.

In sum, I recommend that the Board find that Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 10 of the complaint.

I. December 21, 1995 Discipline and Discharge of Clifford Zylks

Paragraph 18 of the complaint alleges that on about December 21, 1995, the Respondent issued a written warning to employee Clifford Zylks. Paragraph 19 of the complaint alleges that on about December 21, 1995, the Respondent discharged Zylks. The complaint alleges that these actions violated Sections 8(a)(1) and (3) of the Act.

The Respondent admits that it gave Zylks a warning and discharged him on December 21, 1995. However, Respondent's answer states that it discharged Zylks for "just cause" unrelated to protected activity.

Foreman Jackson testified that on December 20, 1995, he received a written complaint from an employee, David Houstein, that Zylks was bothering him. Houstein's complaint stated, "I am tired hereing [sic] Cilff [sic] talking about the Union. I ask him to stop about Union. So we could go back to work. He was talking to some Carpenter about the Union. He said (F—k work)? I'm talking Union. It's impossible to work with him." (R. Exh. 7, emphasis in original.)⁴³

Jackson decided to think about this matter before taking any action. The next day, he called a meeting of employees at which he announced the rule, discussed above, prohibiting employees from discussing the Union during working time. Jackson testified that he told Zylks "he could no longer harass

⁴² I do not find that Jackson allowed Zylks to sell candy during working time. As discussed above, I do not credit Zylks' testimony. Moreover, even assuming that Zylks did ask Jackson if he wanted to buy candy, and even assuming that Jackson replied that he did not but that some of the employees might, as Zylks testified, this evidence would not establish that Jackson intended to allow Zylks to sell the candy during working time rather than during lunch and breaks.

⁴³ Houstein did not testify. Gerald Dees, the general contractor's construction superintendent, testified that he saw an incident in which Houstein was on a ladder and Zylks was on the floor below talking to Houstein. Dees credibly testified that Houstein said, "Damn it. Shut up. I'm tired of hearing that union bullcrap. If you don't shut up, I'm walking off the job." (Tr. 556.) Although I find that this incident took place, Dees' testimony is not specific as to when it occurred, and I cannot conclude that it was the incident which resulted in Houstein's written complaint to Jackson.

my employees or conduct union business on Colburn Electric's time. He refused to do that. He told me he would conduct union business any time that he felt like it." And therefore, Jackson testified, "I fired him." (Tr. 148.)

Although, based on my observations of the witnesses, I would credit Jackson to resolve any conflict in the testimony, Zylks' account of his discharge does not contradict Jackson's version. On cross-examination, Zylks described the meeting at which Jackson announced the rule prohibiting discussion of the Union during working time. In part, Zylks testified as follows:

Q. BY MR FRAZIER. And you told him, did you not, and the other hands, that you were going to talk union business any time somebody wanted to talk union business, correct?

A. Yes, sir. I told him I was going to talk about the union.

Q. And that was in direct violation of what he had asked you not to do, correct?

A. Yes, sir. [Tr. 451.]

I find that Jackson discharged Zylks because Zylks had discussed the Union with other employees during working time, and because Zylks refused to promise that he would not do so in the future.

The General Counsel clearly has established the first *Wright Line* requirement. Zylks engaged in extensive union activity. Moreover, the Respondent has admitted, through Foreman Jackson, that it knew about Zylks' union activity. In this instance, an employee's complaint about Zylks' union activity precipitated the meeting which culminated in Zylks' discharge.

Both a warning and a discharge are adverse employment actions, thus satisfying the third *Wright Line* requirement. At the final step, there is a clear, unequivocal link between Zylks' protected activities and the warning and termination. The General Counsel has made not merely a prima facie case, but a very compelling one.

The Respondent appears to base its defense largely on the premise that it had a right to promulgate the rule selectively banning union activity during working time, and therefore had the right to discipline an employee who refused to abide by this rule. However, as discussed above, the rule is unlawful. Asking employees to pledge their allegiance to such an unlawful rule also coerces them in the exercise of their Section 7 rights.

An employer may not selectively prohibit the discussion of unionization. Under certain circumstances, an employer lawfully may restrict employee solicitation and distribution in a nondiscriminatory manner, but the evidence does not establish that the Respondent had ever placed in effect such a neutral rule.⁴⁴

⁴⁴ The Respondent elicited testimony from Foreman Jackson indicating that employees would be subject to discipline if they were talking rather than working, regardless of what they were discussing. (Tr. 193.) However, this testimony does not establish that Respondent had ever announced such a rule to its employees. I find that, apart from the discriminatory rule it promulgated on December 21, 1995, the Respondent did not have any no-solicitation or no-distribution rule in effect at this jobsite at any time material to the complaint.

Clearly, the evidence does not establish that Respondent disciplined or discharged Zylks for violation of a nondiscriminatory no-solicitation or no-distribution rule. Rather, as Jackson testified, Zylks "told me he would conduct union business any time that he felt like it. And therefore, I fired him." (Tr. 148.)

By his own testimony, Jackson did not discharge Zylks because Zylks had persisted in talking with another employee when that employee wanted to get work done. Jackson also did not discharge Zylks because Zylks refused to promise he would not, in the future, go on speaking to an employee at work after that employee asked not to be distracted.

Instead, Jackson discharged Zylks because Zylks would not abide by a rule which discriminatorily prohibited discussion of the Union during working time. To overcome the General Counsel's prima facie case, the Respondent must show that it would have discharged Zylks even in the absence of union activity. It cannot make such a showing when the very reason for the discharge was Zylks' intent to continue his union activity.

A similar analysis also applies to the warning Respondent gave to Zylks before discharging him. I recommend that the Board find that Respondent violated Section 8(a)(3) and (1) as alleged in paragraphs 18 and 19 of the complaint.

J. Alleged Threats of Discharge in December 1995

Complaint paragraph 11, as amended orally at the hearing, alleges that on December 21 and 28, 1995, and on another date in December 1995 not known more precisely, Respondent, by Foreman Jackson, threatened employees with discharge if they engaged in union activities. The Respondent has denied these allegations.

The evidence establishes very convincingly that on December 21, 1995, Jackson did threaten employees with discharge if they engaged in union activities. Indeed, Jackson required them to sign a warning not to engage in union activities "during working hours," and this announcement concluded with the words, "If this happens again anytime except breaks or lunch, You Will Be Fired." (R. Exh. 8, emphasis in original.) The record also establishes that Jackson made a similar threat of discharge orally at the time he announced this rule to employees and made them sign it. (See Tr. 221.)

I have found that at this time, Respondent did not have in effect any valid, nondiscriminatory rule restricting solicitations during working time. Employees were free to discuss whatever they wished to talk about, except the Union. Both the oral and written threats to discharge employees if they discussed the Union clearly interfered with, restrained, and coerced employees in their rights guaranteed by Section 7 of the Act. Equally clearly, these threats, which Jackson made on December 21, 1995, violated Section 8(a)(1) of the Act.

With respect to the allegation that Jackson made a similar threat on December 28, 1995, Herbert Brown testified that on the day he was laid off,⁴⁵ Jackson "told me if I said anything

⁴⁵ Brown's memory appeared to be uncertain as to the exact date of his layoff. On cross-examination, he testified it was just before Christmas, but when asked if it could have been just after Christmas, answered, "It could have been." (Tr. 227.) Based on the record as a whole, I find that Brown's last day at work was December 28, 1995.

about organization again, he was going to fire me. But, he told me we were all going to have a layoff, 'So, you will be laid off today.'" (Tr. 222.)⁴⁶

I conclude that Brown was an honest witness, although his memory may have limited his ability to give precise information about these events, which occurred almost a year and a half before the hearing. Additionally, Respondent has not denied that Jackson made employees sign the warning on December 21, 1995, and the additional statement, on the day of Brown's layoff, is similar.⁴⁷ I credit Brown's testimony, and find that Jackson did threaten to discharge him on about December 28, 1995, if Brown said anything further about union organization.

As to the third allegation that Jackson threatened employees with discharge, Brown testified that it took place sometime between December 21 and 28, 1995. I credit his testimony, and find that sometime during this week, Jackson threatened employees with discharge if they discussed the Union during working time. This statement also violated Section 8(a)(1) of the Act.

It is clear that Jackson believed that he could lawfully forbid employees from discussing the Union during working time. Indeed, the Respondent, not the General Counsel, introduced into evidence the written threat which I find to be violative. (R. Exh. 8.)

However, neither motivation nor good faith is an element of proof for an 8(a)(1) violation. The chilling effect of the threats in question does not depend on what Jackson had in his head or heart. Rather, that effect must be judged objectively, based on the contents of the statement itself. Applying such a standard, I find that the threats here clearly interfered with, restrained, and coerced employees in the exercise of protected rights.

Therefore, I recommend that the Board find that the Respondent violated the Act, as alleged in complaint paragraph 11.

⁴⁶ The complaint does not allege that the Respondent's layoff of Brown violated the Act.

⁴⁷ Brown's testimony does not indicate that Jackson qualified this "don't talk about organizing" statement by limiting the prohibition to working time. However, even if Jackson included this qualifier, it doesn't matter. Even with the words "on working time," the threat still interferes with, restrains, and coerces employees in violation of Sec. 8(a)(1).

CONCLUSIONS OF LAW

1. Colburn Electric Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local Union No. 995, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by the following acts: on about December 21, 1995, promulgating and maintaining at its jobsite a rule prohibiting its employees from talking about union matters during working hours; on about December 21, 1995, requiring employees to sign or signify their assent to this unlawful rule; on or about December 21 and 28 and on another date in December 1995, not known more precisely, threatening employees with discharge if they engaged in union activities; on or about December 21, 1995, issuing a written warning to employee Clifford Zylks and then discharging him because Zylks joined, formed, or assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities, or because he refused to assent to a rule unlawfully restricting his right to engage in union activities during working time.

4. The Respondent violated Section 8(a)(3) of the Act by the following acts: On or about December 21, 1995, issuing a warning to employee Clifford Zylks and then discharging him because Zylks joined, formed, or assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

5. The Respondent did not violate the Act in any other manner alleged in the complaint.

REMEDY

To remedy the unfair labor practices found here, I recommend that Respondent be ordered to rescind the rule it promulgated on December 21, 1995, prohibiting employees, under penalty of discharge, from discussing unionization or engaging in other union activities during working time; to rescind the warning it issued to employee Clifford Zylks on about December 21, 1995; to reinstate Zylks to his former position of employment or, if that position no longer exists, to a substantially equivalent position of employment, and make him whole, with interest, for all losses he suffered because of Respondent's unlawful discrimination against him.

[Recommended Order omitted from publication.]