

Moses Electric Service, Inc. and its agent Express Personnel Services and International Brotherhood of Electrical Workers, Local Union No. 480, AFL-CIO. Cases 26-CA-17100 (formerly 15-CA-13483), 26-CA-17214 (formerly 15-CA-13632), and 26-CA-17904

July 16, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE,
AND WALSH

On December 31, 1997, Administrative Law Judge Pargen Robertson issued the attached decision in this proceeding. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief.

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 cases. On June 7, 2000, the Board remanded this case to the judge for further consideration in light of *FES*, including, but not limited to, the determination of whether the applicants had the training and/or experience relevant to the announced or generally known requirements of the openings or whether those requirements were not uniformly adhered to or were either pretextual or pretextually applied.

On March 29, 2001, the judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the decision, the supplemental 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 Orders as modified and set forth in full below.²

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.

² Counsel for the General Counsel brought to the attention of the judge the fact that the supplemental decision did not include discriminatee Stephen Alexander. The judge explained in an Erratum issued April 16, 2001, that he limited his supplemental decision to the *FES* issues and that he did not consider Alexander to be included in the remand. The judge stated that his "findings, conclusions, remedy and order in the original decision [remain] unchanged as to Stephen Alexander." As indicated above, we adopt the judge's finding in his original decision that Alexander was unlawfully discharged, and we have in-

In *FES*, supra, the Board held that to establish a discriminatory refusal to hire, the General Counsel must show the following at the hearing on the merits:

- (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. [Footnotes omitted.]

[Supra at 12.] Once the General Counsel has established these elements, the burden shifts to the employer to show that it would not have hired the applicants even in the absence of their union affiliation or activities. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

Here, the judge found, and we agree, that the General Counsel met his burden under *FES* with respect to each applicant. Further, based on his credibility resolutions, the judge rejected the Respondent's reasons for not hiring each applicant. As stated in footnote 1, supra, the Respondent has not shown that the judge's credibility findings are contrary to the clear preponderance of all the relevant evidence. Accordingly, we find that the Respondent failed to meet its burden of showing that it would not have hired each of the applicants in the absence of their union affiliation. Therefore, we agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to hire each of the applicants.

ORDER

The National Labor Relations Board orders that the Respondent, Moses Electric Service, Inc., and its agent Express Personnel Services, Jackson, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to hire job applicants on the basis of their union affiliation or other protected activities.

(b) Discharging and refusing to reinstate its employees because of their protected or union activities.

cluded appropriate remedial relief for him in our Order. The judge's recommended Orders have also been modified in conformance with *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 325 NLRB 17 (1997).

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

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

(a) Within 14 days from the date of this Order, offer Mike Albritton, Wayne Divine, Jeff Grimes, James Horn, Robert Lindsey, Brooks Martin, Carl Roberts, Mike Pickett, John Smith, Jamie Steele, Steve Upton, and Sammy Yelverton reinstatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

(b) Make Mike Albritton, Wayne Divine, Jeff Grimes, James Horn, Robert Lindsey, Brooks Martin, Carl Roberts, Mike Pickett, John Smith, Jamie Steele, Steve Upton, and Sammy Yelverton whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them, in the manner set forth in the remedy section of the supplemental decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire Mike Albritton, Wayne Divine, Jeff Grimes, James Horn, Robert Lindsey, Brooks Martin, Carl Roberts, Mike Pickett, John Smith, Jamie Steele, Steve Upton, and Sammy Yelverton and, within 3 days thereafter notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

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

(e) Make Stephen Alexander whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against him, in the manner set forth in the remedy section of the original decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of and refusal to reinstate Stephen Alexander and, within 3 days thereafter notify him in writing that this has been done and that the discharge and refusal to reinstate will not be used against him in any way.

(g) 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.

(h) Within 14 days after service by the Region, post at its facility in Jackson, Mississippi, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. 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 May 2, 1995.

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

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT fail and refuse to hire job applicants on the basis of their union affiliation or other protected activities.

WE WILL NOT discharge and refuse to reinstate our employees because of their protected or union activities.

³ 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 you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the date of the Board's Order, offer Mike Albritton, Wayne Divine, Jeff Grimes, James Horn, Robert Lindsey, Brooks Martin, Carl Roberts, Mike Pickett, John Smith, Jaime Steele, Steve Upton, and Sammy Yelverton reinstatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges.

WE WILL make Mike Albritton, Wayne Divine, Jeff Grimes, James Horn, Robert Lindsey, Brooks Martin, Carl Roberts, Mike Pickett, John Smith, Jaime Steele, Steve Upton, and Sammy Yelverton whole for any loss of earnings and other benefits suffered as a result of our unlawful discrimination against them.

WE WILL, within 14 days of the date of the Board's Order, remove from our files any reference to our unlawful refusal to hire Mike Albritton, Wayne Divine, Jeff Grimes, James Horn, Robert Lindsey, Brooks Martin, Carl Roberts, Mike Pickett, John Smith, Jamie Steele, Steve Upton, and Sammy Yelverton, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

WE WILL, within 14 days of the date of the Board's Order, offer Stephen Alexander full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Stephen Alexander whole for any loss of earnings and other benefits suffered as a result of our unlawful discrimination against him, less any interim earnings, plus interest.

WE WILL, within 14 days of the date of the Board's Order, remove from our files any reference to our unlawful discharge of and refusal to reinstate Stephen Alexander, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge and refusal to reinstate will not be used against him in any way.

MOSES ELECTRIC SERVICE, INC. AND
ITS AGENT EXPRESS PERSONNEL
SERVICE

Michael W. Jeannette, Esq., for the General Counsel.
William I. Gault Jr., Esq. and *David Thomas, Esq.*, of Jackson,
Mississippi, for the Respondent.

Wayne A. Divine, of Jackson, Mississippi, for the Charging Party.

DECISION

PARGEN ROBERTSON, Administrative Law Judge. This hearing was on August 12, 13, and 14, 1996, in Jackson, Mississippi. The charges were filed between October 20, 1995, and February 13, 1997. Cases 26-CA-17100 and 26-CA-17214 were amended on August 23, 1996; and Case 26-CA-17904 was amended on April 8, 1997. An amended consolidated complaint issued on April 22, 1997.

I. JURISDICTION

Respondent (Respondent or Moses Electric) admitted that it is a corporation, with an office and place of business in Jackson, Mississippi, where it is an electrical contractor. It admitted that during the 12 months ending July 31, 1996, it performed services valued in excess of \$50,000 in States other than Mississippi and it received at its Jackson place of business goods valued in excess of \$50,000 from directly outside Mississippi. During the hearing Respondent admitted that it is an employer engaged in commerce as defined in the Act.

II. LABOR ORGANIZATIONS

Respondent admitted that International Brotherhood of Electrical Workers, Local Union No. 480, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE ALLEGATIONS

A. Refusal-to-Hire Allegation

The General Counsel alleged that Respondents failed and refused to hire Jeff Grimes, Wayne Divine, Sammy Yelverton, Carl Roberts, Robert Lindsey, James Horn, Mike Albritton, Jamie Steele, John Smith, Brooks Martin, Steve Upton, and Mike Pickett because of their union affiliation.

Moses Electric used the services of Express Personnel Services (Express Personnel) in acquiring electrician employees. All the alleged discriminatees filed applications with Express Personnel beginning in May 1995. Some had filed earlier applications with Express Personnel.

Wayne Divine, Sammy Yelverton, James Horn, Mike Albritton, Jamie Steele, John Smith, Brooks Martin, Steve Upton, and Michael Pickett filed application with Express Personnel in 1995. At the top of the first page of the applications each of the above-named applicants wrote union organizer.

Jeff Grimes, Robert Lindsey, and Carl Roberts filed applications with Express Personnel during May 1995.

Although Express Personnel does not contest receipt of the applications, Moses Electric contends that it did not receive those applications from Express.

B. Discussion

The General Counsel alleged that Respondent refused to hire job applicants, because of the Union and especially because the applicants were thought to be union organizers. See *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995); *Town & Country Electric*, 309 NLRB 1250 (1992); *Fluor Daniel, Inc.*, 311 NLRB 498 (1993); *Casey Electric*, 313 NLRB 774 (1994).

Applicants as potential employees, are accorded the protection of the Act. *NLRB v. Mount Desert Island Hospital*, 695 F.2d 634, 638 (1st Cir. 1982).

As to whether Respondent illegally refused to employ some or all of the alleged discriminatees, I shall first consider whether the General Counsel proved prima facie that one of the reasons why Respondent refused to hire any of the alleged discriminatees was union activity. If I find in support of the General Counsel then I shall consider whether Respondent proved that it would have refused to hire the alleged discriminatees in the absence of his union activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

See also *J. E. Merit Constructors*, 302 NLRB 301, 303-304 (1991), where in a refusal-to-hire allegation the test applied included a requirement that the General Counsel prove (1) the applications were filed during hiring stages; (2) the Respondent knew of their source; (3) it harbored union animus; and (4) it acted on that animus in failing to hire any from this group.

1. Were the applications filed during hiring stages?

a. Did the applicants apply for work?

The evidence is not in dispute as to the alleged discriminatees applying for work with Express Personnel on the dates shown above.

Findings and Conclusions

I find that the alleged discriminatees filed applications at Express Personnel on the following dates: Jeff Grimes on May 2, 1995; Wayne Divine and Sammy Yelverton on May 4, 1995; Robert Lindsey and Carl Roberts on May 5, 1995; James Horn on May 22, 1995; Mike Albritton and Jamie Steele on May 25, 1995; John Smith on May 30, 1995; Brooks Martin on June 7, 1995; Steve Upton on June 28, 1995; and Michael Pickett on July 26, 1995.

b. Was Respondent hiring?

Joint Exhibit 1 shows that Respondent hired 87 electricians between May 15, 1995, and July 21, 1997. Twenty-seven electricians were hired in 1995 after May 15.

Thomas Allen, a master journeyman electrician, applied for work with Express Personnel Services in Jackson on May 1, 1995. He was interviewed and tested for drugs. Allen did nothing to indicate that he had any connection with the Union. About 2 weeks later he was phoned from Express Personnel and asked if he was available to interview with Moses Electric. Allen said that he was not available at the time suggested. Express phoned back and asked Allen if he was able to start work 2 days later. Allen declined saying that he had taken another job and had been injured.

Jeff Grimes has been a journeyman electrician for 10 years. He has been a member of the Union since 1983. On May 2, 1995, Grimes went to Express Personnel where he was interviewed and given a drug test. Grimes did nothing to show that he was connected with the Union. Tracy Elkins at Express, told Grimes that Moses Electric was hiring. Grimes, Tommy Dearing, Kenny Fitzhugh, and Robert Lindsey went to Moses Electric and applied for work. Dearing introduced Grimes to Dianne

Cook. Cook interviewed and gave Grimes an aptitude test. Dianne Cook told Grimes that Moses Electric was definitely looking for electricians. Cook suggested that Grimes would run a truck making service calls and that he would be on call 24 hours a day. Grimes told Cook that would not be a problem. Dianne Cook told Grimes that they were hiring through Express Personnel and Grimes told her that he had already been to Express and taken their drug test.

Charles Leggett was president of Respondent until 1996. Leggett testified that before Shaw Case came on board in Respondent's human resources in 1996, Respondent hired its electricians through Express Personnel. Respondent also used other employment services to employ electricians, including Snelling and Jackson Temporaries. Leggett admitted that from time to time he looked through Dianne Cook's list showing electricians applicants that had come to Respondent seeking work.

Charles Leggett testified that Respondent hired some former employees during 1995. Former employees were not required to fill out applications. Respondent occasionally would not check their references. David Dunn phoned a number of electricians around July 1995 because they were on a list of former employees. Dunn asked them to come back and work for Respondent.

Dunn was Respondent's project manager plus human resources until Respondent hired Shaw Case. At that time his duties including interviewing applicants and, after background checks were completed, assigning the applicants to jobs. Dunn was involved in hiring of some former employees including Terry Johnson, Dan Currey, Eddie Orlanski, Mark McLaurin, and James Loden in the summer and fall of 1995.

Shaw Case testified that he started working for Respondent around August 1996. He was the human resources manager. Before Respondent, Case worked for Snelling Personnel. Case agreed that while he was with Snelling he referred Bo Lot, Mike Finely, Randy Rogers, Calvin Brown, and James Hughes to Moses Electric.

Respondent did not advertise in newspapers for electricians. Charles Leggett testified that Respondent may have asked Express Personnel to place ads in newspaper for electricians because they were needed by Respondent.

Roger Swartz was a superintendent at Respondent from April 1996 until March 1997. After finding their number in the phone book Swartz called Respondent and talked to Dianne Cook. Swartz asked Cook if Respondent was taking applications. She asked about his experience. Cook said the personnel manager was not in. Within an hour David Dunn phoned Swartz and asked him about his past experience. During the following week, Swartz faxed his resume to Dunn. After that week Swartz went to Respondent and took a test. He was told by Dunn that the computer would grade his test but that from their talking Dunn said that he knew Swartz would pass. He said they had a superintendent that had scored only a 20 on the test. Dunn told Swartz to report to work on April 9, 1996. During the time between then and April 9, Dunn phoned and told Swartz what he had scored on the test.

When Swartz reported for work, Dunn sent him to Express Personnel to complete some paperwork and take a urinalysis.

Swartz did that and reported back to Dunn where he was assigned to a job in Yazoo City.

Swartz worked on several jobs for Respondent including some on which he was superintendent. He had trouble keeping a sufficient number of quality electricians. Occasionally, the project manager would send an electrician and instruct Swartz not to leave him by himself.

On one occasion while in front of the receptionist area at Respondent's office along with Gary Chamely, Charles Leggett and Sam Kimbrough, Swartz asked why Respondent did not run an ad in the paper because no good electrician needs to go through the temporary personnel agencies. Swartz testified that either Charles Leggett or Sam Kimbrough replied that if they run an ad (Local) "480 would send 200 electricians in there to fill out an application."

When asked about telling Swartz that he would not put an ad in a newspaper, Leggett testified that he did not recall making such a statement but that he may have done so.

Findings and Credibility

I have considered the testimony of the various witnesses in view of their demeanor and the full record. I was impressed with the demeanor of Thomas Allen, Jeff Grimes, and Roger Swartz and I credit their testimony. I do not credit the testimony of Charles Leggett to the extent it conflicts with other testimony. Among other things, I was not impressed with his demeanor and I found Leggett's testimony that Respondent is not concerned with an applicant's union connections was incredible in view of comments regarding unions in Respondent's handbook. I credit the admissions of Leggett, David Dunn, and Shaw Case to the extent their testimony tends to show that Respondent was hiring electricians during 1995.

Conclusions

The credited testimony of Thomas Allen and Jeff Grimes proved that Respondent was definitely looking to hire electricians during May 1995. Moreover, the record was not in dispute but that Respondent actually hired 27 electricians from May 15 through the end of 1995. I find that the credited evidence established that Moses Electric was hiring electricians at various times from early May 1995.

Was Express Personnel Hiring for Moses Electric?

Between May 15, 1995, and September 3, 1996, 22 out of a total of 46 electricians hired by Respondent, were referred to Respondent by Express Personnel.

Express Personnel ran advertisements for electricians and/or electrician helpers in the local newspaper beginning on May 10, 1995, and extending through October 11, 1995. Although Tracy (Elkins) Parks testified that Express Personnel was seeking only electrician helpers, most of the newspaper advertisements clearly included electricians as well as electrician helpers.

On May 4, 1995, Wayne Divine applied for work at Express Personnel along with Sammy Yelverton, Eddie Moody, Gerald Smith, and Bobby Born. Divine was interviewed by Tracy Elkins and given a drug test. Elkins told him they were hiring at Moses Electric.

On May 5, 1995, Sammy Yelverton went to Moses Electric along with union members Robert Lindsey and Carl Roberts.

The three spoke with Dianne Cook. Sammy Yelverton introduced them to Cook as being from the IBEW in Jackson. Yelverton tape recorded the conversation with Cook. Cook told the three that Respondent did all its hiring through Express Services and they needed to go to Express and see Tracy. Cook said that Tracy would get in touch with Leggett there at Respondent about their applications. Cook asked and was told that all three of them were journeymen. Dianne Cook wrote down each of their names and phone numbers. She said that she would pass that information on to Leggett.

Divine phoned Tracy Elkins on May 9, 1995, and recorded the conversation. Tracy Elkins told Divine that Moses Electric had all the applications and was reviewing them.

On May 10, 1995, Divine phoned Moses Electric and talked with Dianne Cook. Cook asked him about his work experience. She said that she had a list from Express Personnel and Divine's name was on the list.

As shown above, Wayne Divine has continued to check on his application but he had not been contacted about going to work. He tape recorded a phone conversation with Dianne Cook on June 20, 1995. Divine told Cook that he was out of Local 480. Dianne Cook told Divine that Respondent did all its hiring through Express and that he should go there and see Tracy. Divine told Cook that he had already gone to Express and talked with Tracy. Cook asked if she had not already talked with Divine. She asked for his address and phone number. Cook told Divine that she was going to go ahead and put him on her list and tell Leggett.

Divine phoned Express Personnel that same day and recorded that conversation. He was told that he was on the Express list.

As shown above Sammy Yelverton continued to check on work during 1995, 1996, and 1997 with Express Personnel and with Dianne Cook at Moses Electric. He also talked with Shaw Case when Case was with Snelling. Case told him that the newspaper ads for electricians concerned work with Moses Electric. Sammy Yelverton testified that he checked with Moses on February 24, 1997, with Benny Suggs, Wayne Divine, Larry Watts, and Jerry Webb. On that occasion, Yelverton asked to be placed on Respondent list of electricians seeking work. Shaw Case, who was then working with Respondent, told them that everyone interested in working for Respondent was required to sign in each week in order to be considered for work that week. Neither Yelverton nor any of the 11 alleged refusal-to-hire discriminatees, was ever offered a job at Respondent.

In May 1995, Kenneth Fitzhugh went out to Moses Electric and talked with Dianne Cook. He recorded the conversation. Cook told Fitzhugh that Respondent did all its hiring through Express Services and that he needed to go there and talk with Tracy. She said that Tracy would turn his application in to Leggett there at Respondent.

Thomas Allen applied for work with Express Personnel Services in Jackson on May 1, 1995. Allen did nothing to indicate that he had any connection with the Union. About 2 weeks later Express Personnel suggested he interview with Moses Electric. Allen was not available for the interview but Express Personnel phoned back and asked Allen if he was able to start work. Allen

declined saying that he had taken another job and had been injured.

Jeff Grimes went to Express Personnel where he was interviewed and given a drug test. Grimes did nothing to show that he was connected with the Union. Tracy at Express Personnel told Grimes that Moses Electric was hiring. Grimes, Tommy Dearing, Kenny Fitzhugh, and Robert Lindsey went to Respondent and applied for work. Dearing introduced Grimes to Dianne Cook. Dianne Cook told Grimes that Moses Electric was definitely looking for electricians. Cook suggested that Grimes would run a truck making service calls and that he would be on call 24 hours a day.

Dianne Cook testified that she worked at Moses Electric from 1992 until January 1997. In 1995, whenever applicants came to Respondent, Cook took each applicant's name and address then referred each applicant to Express Personnel. She maintained those names and addresses in a folder which was available to Respondent. She testified that a Grimes came to Respondent with Dearing.

Stephen Scully is the owner of the Express Personnel franchise in Jackson. Express Personnel is a staffing company. They actually employ various craftsmen for referral to different clients. Express Personnel did refer electricians to Respondent among other clients. They did not have a written contract with Respondent but an agreement to charge 40 percent for the Respondent referrals. Express Personnel does not screen electrician applicants on the basis of ability through tests. However, Express does try to check a minimum of two of each applicant's references. In practice they are not able to always check two references. In May 1995, Express Personnel's supervisors included Tracy (Elkins) Parks. Tracy Elkins was primarily responsible for the Moses Electric account.

Charles Leggett was president of Respondent until 1996. Respondent hired its electricians through Express Personnel. On occasion Respondent would contact an applicant's references after interviewing the applicant. Respondent also used other employment services to employ electricians including Snelling and Jackson Temporaries. Leggett admitted that from time to time he looked through Dianne Cook's list showing electricians applicants that had come to Respondent seeking work.

Norma Meltin was construction secretary to Respondent COO Sam Kimbrough from October 1995 until October 1996. She was told to refer job applicants to Tracy at Express Personnel.

Respondent did not advertise in newspapers for electricians. Charles Leggett testified that Respondent may have asked Express Personnel to place ads in newspaper for electricians because they were needed by Respondent.

Charles Leggett denied that Respondent received job applications from Express Personnel for Wayne Divine, Sammy Yelverton, Carl Roberts, Robert Lindsey, Mike Albritton, James Horn, Jamie Steele, John Smith, Brooks Martin, Steve Upton, Mike Pickett, and Jeff Grimes.

On one occasion, Roger Swartz asked Gary Chamely, Charles Leggett, and Sam Kimbrough why Respondent did not run an ad in the paper because no good electrician needs to go through the temporary personnel agencies. Either Charles Leggett or Sam Kimbrough replied that if they run an ad (Local

"480 would send 200 electricians in there to fill out an application."

Findings and Credibility

As shown above, I have considered the testimony of the various witnesses in view of their demeanor and the full record. I was impressed with the demeanor of Wayne Divine, Sammy Yelverton, Kenneth Fitzhugh, Thomas Allen, Jeff Grimes, Dianne Cook, Roger Swartz, and Norma Meltin. To a large extent their testimony is not in conflict. As shown herein, I do not credit the testimony of Tracy (Elkins) Parks or Charles Leggett other than admissions or testimony that accords with credited evidence.

In some instances tape recordings were introduced. As to those matters I credit the tape recording in full and do not credit any testimony that conflicts with the recording.

Conclusions

The full record illustrated that Respondent was hiring electricians through Express Personnel during 1995 and 1996.

There is a dispute as to what happened to the applications of the alleged discriminatees after those applications were filed with Express Personnel. Charles Leggett testified that Express Personnel did not refer the alleged discriminatees' applications to Respondent.

However, there is evidence that Respondent knew of the applications of the alleged discriminatees. Jeff Grimes credibly testified that he talked with Dianne Cook at Respondent around May 2, 1995. Cook told Grimes that Respondent was definitely looking for electricians and that Respondent hired through Express Personnel. Wayne Divine credibly testified that when he was interviewed by Tracy Elkins at Express Personnel on May 4, 1995, Elkins told him that Express was hiring for Moses Electric. In a tape recorded conversation on May 5, 1995, Dianne Cook told Sammy Yelverton, Carl Roberts, and Robert Lindsey that Respondent was hiring through Express Personnel and that Express would get in touch with Charles Leggett if Yelverton, Roberts, and Lindsey filed applications at Express. Cook told the three that she would inform Leggett that they had come in looking for work.

In another tape recorded conversation, Dianne Cook talked with Kenneth Fitzhugh on May 5, 1995. Cook told Fitzhugh that Respondent did all its hiring of electricians through Express Personnel, that Fitzhugh should apply at Express Personnel and that Express would send his application to Leggett at Respondent. Cook wrote down Fitzhugh's name, the fact that he was a journeyman and his phone number. In another tape recorded conversation, Tracy Elkins told Wayne Divine on May 9, 1995, that she had sent Charles Leggett at Respondent all their applications. On May 10, Divine talked with Dianne Cook at Respondent. Cook told him that she had a list of applicants from Express Personnel and that Divine's name was on the list.

Around mid-May 1995, Express Personnel asked Thomas Allen if he was immediately available to start work with Moses Electric. During a recorded phoned conversation on June 20, 1995, Dianne Cook told Wayne Divine that she would put his name on her list to give to Charles Leggett. Divine phoned

Express Personnel that same day. Express acknowledged to Divine that his name was on their list.

In view of the full record and especially the above evidence, I find that Express Personnel did act on behalf of Moses Electric in taking the applications of the 12 alleged discriminatees during 1995 and referring those applications to Respondent for consideration. In making that determination I have fully considered comments and actions by Dianne Cook and Tracy (Elkins) Parks. Cook and Parks were the two employees of Respondent and Express, that were directly involved in the selection of electricians for Respondent. Their comments and actions established that Express was referring electricians to Respondent and that Express had informed Respondent of the applications of the alleged discriminatees. I find that the above and the full credited record proved that Express Personnel was acting as agent for Moses Electric at material times, in the employment of electricians. *Harvey Mfg., Inc.*, 309 NLRB 465 fn. 4 (1992); *M. K. Morse Co.*, 302 NLRB 924 (1991); *Alliance Rubber Co.*, 286 NLRB 645 (1987).

2. Did Respondent know the alleged discriminatees were affiliated with the Union?

Wayne Divine, the Union's assistant business manager, has applied for work at Express Personnel beginning in 1994.

Divine and Sammy Yelverton filed applications with Express Personnel on May 4, 1995. Wayne Divine, Sammy Yelverton, Eddie Moody, Gerald Smith, and Bobby Born were each wearing a 3-inch badge that read "I'm a union organizer—IBEW, Local 480." Divine was interviewed by Tracy Elkins and given a drug test. Elkins told him they were hiring at Moses Electric. James Horn filed a May 22, 1995 application. Mike Albritton and Jamie Steele filed applications on May 25, 1995. John Smith filed an application on May 30, 1995. Brooks Martin filed an application on June 7, 1995. Steve Upton filed a June 28, 1995 application. Michael Pickett filed an application on July 26, 1995. At the top of the first page on each of those applications, the respective applicant wrote *union organizer*.

Sammy Yelverton was interviewed at Express Personnel by someone named Scott. Yelverton had written union organizer on his application and Scott asked Yelverton what that meant. Yelverton replied that he intended to try and organize Moses Electric but that would not interfere with his work for Respondent and he would do organizing during breaks, before and after work. Scott told Yelverton that his application looked good. Express Personnel administered a drug test to Yelverton.

Yelverton had met with Charles Leggett, president of Moses Electric, in early April 1995 in regard to a boat Leggett was selling. During their conversation Yelverton asked Leggett about Moses Electric signing a working agreement with the Union. Leggett said that he did not believe he wanted anything to do with it, that he felt that Laverne Tucker wanted to put him out of business. Yelverton told Leggett that Tucker was no longer with the Union and that the Union would treat Leggett fairly.

In May 1995, Yelverton along with Mike Albritton, Jami Steele, Wayne Divine, and Tommy Dearing went to Express Personnel. Albritton and Steele filled out job applications and wrote union organizer at the top of the first page of their appli-

cations. Yelverton, Divine, and Dearing asked if their applications were still active. They were told the applications would be active for 1 year.

Findings and Credibility

As shown above, I have considered the testimony of the various witnesses in view of their demeanor and the full record. I credit the testimony of Wayne Divine, Sammy Yelverton, Kenneth Fitzhugh, and Roger Swartz. To a large extent their testimony is not in conflict.

In some instances tape recordings were introduced. As to those matters I credit the tape recording in full and do not credit any testimony that conflicts with the recording.

As shown above I do not credit the testimony of Charles Leggett to the extent it conflicts with other testimony.

Conclusions

In view of that evidence and my findings above, I find that Respondent and Express Personnel knew at the time of their applications, that Divine, Yelverton, Horn, Albritton, Smith, Steele, Martin, Upton, and Pickett were union organizers. That information was written at the top of the first page of each of those applications.

Robert Lindsey and Carl Roberts went to Moses Electric with Sammy Yelverton on May 5, 1995. Yelverton had submitted an application to Express Personnel on May 4 that identified him as a union organizer and showed that he was presently employed by the Union. When Yelverton met with Dianne Cook at Respondent on May 5 he said that he, Lindsey and Roberts were with the IBEW here in Jackson. That conversation was recorded and is in evidence. After leaving Respondent, Lindsey and Roberts submitted their applications to Express Personnel that same day. Robert Lindsey wrote on his application that he graduated from J.A.T.C., Local Union # 480. Carl Roberts wrote on his application that he graduated from NECA, IBEW Local 480.

Jeff Grimes filed an application with Express Personnel on May 2, 1995. Grimes has been a journeyman electrician for 10 years. He has been a member of the Union since 1983. On May 2, 1995, Wayne Divine at the Union suggested to Grimes that Express Personnel was advertising for journeyman electricians in the local newspaper. Grimes went to Express Personnel where he was interviewed and given a drug test. Grimes did nothing to show that he was connected with the Union. Tracy at Express Personnel told Grimes that Moses Electric was hiring. Grimes returned to the union hall where he met Tommy Dearing. He and Dearing along with Kenny Fitzhugh and Robert Lindsey went to Respondent and applied for work. Dearing introduced Grimes to Dianne Cook. Dianne interviewed and gave Grimes an aptitude test. Cook told him that Respondent was definitely looking for electricians. Dianne Cook suggested that Grimes would run a truck making service calls and that he would be on call 24 hours a day. Grimes told Cook that would not be a problem. Cook told Grimes that they were hiring through Express Personnel and Grimes told her that he had already been to Express and taken their drug test.

Dianne Cook testified that she recalled Grimes coming to Respondent looking for work with Tommy Dearing.

Jeff Grimes did not hear from Respondent. He phoned Express Personnel every week over a 4-week period but was never connected to Tracy. He told her supervisor that he was still interested in work. He was told that he was being put on a list. On the last occasion that Grimes called he told Tracy's supervisor that he felt they weren't sending him for interviews because they felt he was a union activist and that he planned to file charges against them. That testimony which was not disputed, shows that from early June 1995, Express Personnel knew that Grimes suspected that he was not being referred for work because of the Union and that he planned to file charges against Express.

In view of the above I find that Respondent was aware that all 12 alleged discriminatees were affiliated with the Union and that alleged discriminatee Jeff Grimes may file charges because of his failure to be referred for work.

3. Did Respondent harbor union animus?

Moses Electric employee handbook includes the following at section 1.5:

1.5 A FEW WORDS ABOUT UNIONS

Our Merit Shop Firm, like more than eighty percent of all businesses and institutions throughout the United States, is union-free. There is always a chance, however, that in the future a labor organization will try to persuade some of our employees to sign union authorization cards. For this reason, it is important that you understand our position concerning unions.

To say it simply and clearly, while you have the legal right to join a labor union, you also have the legal right NOT to join a union. We believe that remaining union-free has definite advantages for you, our employees. For instance, along with labor unions can come many changes such as: (a) restrictions on your individual freedom to discuss and solve your problems directly with us and without union involvement; (b) your compulsory union membership and dues; (c) union discipline, fines, suspension and expulsion from membership; (d) union control over you through the union's constitution and bylaws; (e) union politics; (f) union coercion and violence; (g) union hypocrisy; (h) union strikes and strike assessments; and (I) resulting job replacements, sometimes temporarily, sometimes forever. In other words—unions have fostered turmoil, job insecurity, dollars out of workers' pockets, and loss of independence.

So if a labor union organizer ever asks you to sign a union authorization card, remember that it is a legally binding document in which you sign away your right of individual freedom in our workplace for exclusive representation by that union. We hop you would hesitate—and think carefully—before signing any such union pledge card. It could be your first step into the turmoil described above. It might be like signing a blank check and giving it to a stranger.

We have the ability, the desire, the expertise, and the personnel to solve our problems and move forward by working together in the Merit Shop Way—without interference from union outsiders. Based on these facts, we be-

lieve a labor union is unnecessary and unwanted here at Moses Electric Service, Inc.

Charles Leggett admitted that Mississippi is a right-to-work State and that Respondent employees can not be forced to join a labor organization.

Norma Meltin was construction secretary to Moses Electric COO Sam Kimbrough from October 1995 until October 1996. After Shaw Case was hired around August 1996 Meltin overheard a conversation in the hallway near her office involving Hux, Kimbrough, Leggett, and Shaw Case. They instructed Shaw Case to find out if applicants had any union affiliation.

Roger Dale Swartz Jr. was a superintendent at Respondent from April 1996 until March 1997. Swartz had trouble keeping a sufficient number of quality electricians. Occasionally, the project manager would send an electrician and instruct Swartz not to leave him by himself.

On one occasion while in front of the receptionist area at Respondent's office along with Gary Chamely, Charles Leggett, and Sam Kimbrough, Swartz asked why Respondent did not run an ad in the paper because no good electrician needs to go through the temporary personnel agencies. Swartz testified that either Charles Leggett or Sam Kimbrough replied that if they run an ad (Local) "480 would send 200 electricians in there to fill out an application."

As shown herein, Sammy Yelverton met with Charles Leggett in early April 1995 and Yelverton asked Leggett about Respondent signing a working agreement with the Union. Leggett said that he did not believe he wanted anything to do with it, that he felt that Laverne Tucker wanted to put him out of business. Yelverton told Leggett that Tucker was no longer with the Union and that the Union would treat Leggett fairly.

Leggett testified that Sammy Yelverton's testimony regarding a conversation between the two of them when Leggett was trying to sell a boat was totally false. He admitted that Yelverton did talk to him about his boat and that Yelverton said there was another matter that he would like to discuss with Leggett. Leggett replied, "[W]e'll talk about that later" and that was the end of the conversation.

Findings and Credibility

As shown above, I have considered the testimony of the various witnesses in view of their demeanor and the full record. I credit the testimony of Norma Meltin, Sammy Yelverton, and Roger Swartz in view of their demeanor and the full record. In view of his demeanor I do not credit the testimony of Charles Leggett. His testimony was frequently inconsistent with established evidence including comments in Respondent's employee handbook. Additionally, I do not credit the testimony of Tracy (Elkins) Parks in view of her demeanor and the full record.

Conclusions

The above evidence established that Respondent was strongly opposed to the Union. Contrary to the testimony of Charles Leggett, I find that Respondent was motivated by union animus.

4. Did Respondent refuse to hire the applicants because of its animus?

As shown above either Charles Leggett or Sam Kimbrough told Roger Swartz that if Moses Electric ran ad Local "480 would send 200 electricians in there to fill out an application."

When Sammy Yelverton talked with Charles Leggett in early April 1995, Leggett said that he did not believe he wanted anything to do with the Union and that he felt that Laverne Tucker wanted to put him out of business. Yelverton told Leggett that Tucker was no longer with the Union and that the Union would treat Leggett fairly.

After Shaw Case was hired around August 1996, Norma Meltin overheard a conversation in the hallway near her office involving Hux, Kimbrough, Leggett, and Shaw Case. They instructed Shaw Case to find out if applicants had any union affiliation.

Findings and Credibility

As shown above, I have considered the testimony of the various witnesses in view of their demeanor and the full record. I credit the testimony of Roger Swartz, Sammy Yelverton, and Norma Meltin in view of their demeanor and the full record. I do not credit the testimony of Charles Leggett or Tracy (Elkins) Parks.

Conclusions

The above and the full record show that Respondent was set on a course of refusing to hire people shown to be interested in organizing for the Union. As shown above the alleged discriminatees applied for work with Respondent, Respondent knew of their union affiliation, Respondent was strongly opposed to the Union and expressed a willingness to break the law and avoid hiring union people. In view of that evidence, I find that the General Counsel made a prima facie case that Respondent refused to hire any of the alleged discriminatees because of the Union. *Fluor Daniel, Inc.*, 311 NLRB 498, 500 (1993).

5. Would Respondent have refused to hire the alleged discriminatees in the absence of union affiliation?

I shall consider whether the record shows that Respondent would have failed to employ the alleged discriminatees in the absence of the Union. See *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Northport Health Services v. NLRB*, 961 F.2d 1547 (11th Cir. 1992).

Respondent argued that Respondent had a nondiscriminatory hiring policy in place in the summer of 1995, that it consistently applied that policy and that none of the alleged discriminatees were hired under its policy.

Respondent called William Hux who testified that Respondent's hiring policy was to first look to transfer current employees; secondly to look to employ former employees; third to look to referrals from supervisors; fourth to referrals from current employees; and finally to look to outside sources.

The record evidence called Hux's testimony into question. The undisputed testimony of Hux as well as others including Charles Leggett, showed that Respondent did all its hiring through Express Personnel and other employment services.

As to the testimony that Respondent first looks to transfer current employees. However, the credited record proved that Respondent hired from outside beginning as early as May 15, 1995. As shown above, Hux contended that after transfers, Respondent looked to hire former employees, to supervisor referrals, to current employee referrals, and to outside sources. However, Respondent conceded that "any and all prospective applicants who contacted Respondent directly were referred Express to fill out an application." That included even those former employees of Respondent that were seeking to be re-hired.

Joint Exhibit 1 shows that Respondent hired or promoted 27 employees to electrician positions in 1995 after May 15. Fourteen of those 27 were referred to Respondent by Express or Snelling employment services. Three of those referred by Express were former employees of Respondent. A total of 7 of the 27 were former Respondent's employees.

After testifying as to Respondent's policy in filling vacant positions, William Hux testified that Bo Lott and Mike Finely were hired after submitting applications to Snelling in their Monroe, Louisiana office. Lott and Finely as well as other applicants, R. J. Campbell, James Fleming (a promotion), and Bobby Floyd, were from Greenwood, Mississippi, and could work on a project in Greenwood without costing Respondent per diem. Mike Jackson was hired because he lived in McComb, Mississippi, and could work on a project there without charging Respondent per diem. Calvin Brown lived in Yazoo City. Respondent avoided per diem charges by hiring Brown and assigning him to work on a project in Yazoo City.

Randy Rogers (referred by Snelling) was hired as a service technician because he had particular qualities for that job. James Hughes, another referral from Snelling was also hired because he appeared to have particular qualities as a service technician. As noted above, alleged discriminatee Jeff Grimes was not selected as service representative even though Dianne Cook expressed that Grimes was well suited for the position.

Larry Gill was hired because Respondent could get him for \$10.50 an hour. However, Charles Leggett testified that Respondent did not reject applicants even though they asked for too much money on their application.

Hux testified that Jerry Tillery was actually hired as a supervisor instead of an electrician and that Dennis Mink was referred by a supervisor. Mink was referred by COO Sam Kimbrough and Mink had previously worked for Respondent.

Nevertheless, Hux's testimony does nothing to explain why the above-mentioned applicants were selected instead of any of the alleged discriminatees. As shown herein, Respondent took the position that it never received any of the 12 alleged discriminatees' applications. Therefore, Respondent could not determine how those applicants compared with others in regard to where Respondent had projects that needed electricians or whether Respondent could get a good electrician at a cheap price.

The full record proves that Respondent engaged in pretext. The credited evidence as shown above, proved that Respondent was in need of electricians at various times after May 2, 1995; that Respondent attempted to hire electricians through Express Personnel and through newspaper advertisements run by Ex-

press Personnel; and that Respondent hired some and attempted to hire others that responded to those ads and were not referrals by supervisors and employees. The record proved that Respondent was aware of the applications of the 12 alleged discriminatees but refused to consider for employment or even interview any of those applicants. Despite its showing that factors other than its alleged hiring priorities, played a part in its hiring decisions, Respondent refused to consider any similar or additional qualifications of the alleged discriminatees. *Wright Line*, supra; *Waste Steam Management*, 315 NLRB 1088 (1994); *Harmony Corp.*, 301 NLRB 578 (1991); *Pitt Ohio Express*, 322 NLRB 867, 868 (1997).

I find that the General Counsel has proved that Respondent refused to consider the employee applications of Jeff Grimes, Wayne Divine, Sammy Yelverton, Carl Roberts, Robert Lindsey, James Horn, Mike Albritton, Jamie Steele, John Smith, Brooks Martin, Steve Upton, and Mike Pickett because of their union affiliation and Respondent failed to prove that it would have rejected consideration of those applications in the absence of union affiliation. *Wright Line*, supra.

Respondent argued that the alleged discriminatees are not entitled to preferential treatment over other applicants. However, as found above, the discriminatees were not afforded equal treatment. Unlike others not shown to Respondent to be affiliated with the Union, the alleged discriminatees were given no consideration toward employment. Respondent argued that the Union's employees were not bona fide applicants. However, under similar circumstances the Board and the courts have refused to find union organizers are not bona fide applicants. *Bay Control Services*, 315 NLRB 30 fn. 2 (1994); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Wright Line*, supra.

Respondent also argued that Sammy Yelverton failed in Respondent's test and that Yelverton lied on his job application. However, the record showed that Respondent has hired others that failed in their test. Charles Leggett admitted that a project manager had placed one employee on the payroll even though the employee failed the test. As shown above Roger Swartz credibly testified that David Dunn told him that one supervisor had been employed even though he scored 20 on the test. That is 25 points below the minimum acceptable score of 45. As to Yelverton lying on his application, that matter arose when Yelverton talked with Shaw Case and filed an application directly with Respondent on March 3, 1997, after the instant charges were pending. The issue of disqualification for employment on the basis of that application may, if relevant, arise in compliance proceedings. Here, I find that Respondent's refusal to consider Yelverton as well as the other alleged discriminatees, for employment after his May 4, 1995 application was illegal.

IV. THE ALLEGED ILLEGAL DISCHARGE OF STEPHEN ALEXANDER

The General Counsel alleged that Respondent discharged Stephen Alexander on January 9, 1997, because of his union and protected concerted activities.

Stephen Alexander testified that he has been an electrician for over 6 years. He has been a journeyman for 19 months. At

the time of the hearing Alexander had been a member of the Union for 7 months. Alexander was not hired by Respondent after he filled out a job application with Express Personnel in Jackson on April 18, 1995. Charges in Case 26-CA-17100 (formerly 15-CA-13483), filed on October 20, 1995, alleged that Respondent and Express Personnel illegally refused to employ several alleged discriminatees including Steve (sic) Alexander. The charge listed five named applicants on March 28, 1994; one named applicant on May 1, 1995; six named applicants on May 4, 1995; one named applicant on May 9, 1995; one named applicant on May 18, 1995; one named applicant on May 22, 1995; five named applicants on May 25, 1995; two named applicants on May 30, 1995; one named applicant on June 7; one on June 8; one on June 28; two named applicants on July 26; and one named applicant on August 10, 1995. Steve Alexander was one of the two named alleged discriminatees on July 26, 1995.

In the summer of 1996, Wayne Divine asked Alexander to do some organizing for the Union. Alexander went to Respondent where he saw an acquaintance, William Hux. Back in the late 1980s Alexander and Hux worked for a company called Interoffice. Hux told Alexander that Respondent did all their hiring through Express Personnel. On August 28, 1996, Alexander filed an application at Express Personnel. On that same afternoon Alexander was phoned by David Dunn. Dunn, a project manager, handled Respondent's human resources before Shaw Case. Dunn asked Alexander to come by Moses Electric for an interview and a test. Alexander did that and he was hired.

Alexander did nothing to indicate to Hux, Dunn, or Express Personnel that he was connected to the Union.

Charles Leggett testified that Respondent hired Stephen Alexander in August or September 1996 knowing that Alexander had been listed as a discriminatee on a prior unfair labor practice charge.

Alexander continued to work for Respondent without incident until December 1996. Then the Union wrote Moses Electric that "Stephen S. Alexander, an employee of (Moses)" was a union organizer.

Alexander was discharged on January 9, 1997. His separation notice was checked "unacceptable conduct," and "violation of company policy" was written in under remarks. The form showed that Alexander was not eligible for rehire and the written remark was "repeated violation of company policies."

Discussion

In consideration of the alleged illegal termination of Alexander, I shall first consider whether the General Counsel proved prima facie that one of the reasons for the action was union activity. If I find in support of the General Counsel then I shall consider whether Respondent proved that it would have discharged Alexander in the absence of his union activities. *Wright Line*, supra; *NLRB v. Transportation Management Corp.*, supra. See *Electromedics, Inc.*, 299 NLRB 928 (1990), affd. 947 F.2d 953 (10th Cir. 1991).

I shall consider (1) whether the alleged discriminatee engaged in union activities; (2) whether Respondent had knowledge; (3) whether Respondent's actions were motivated by union animus; and (4) whether Alexander's discharge had the

effect of encouraging or discouraging membership in a labor organization. *Electromedics, Inc.*, 299 NLRB at 937.

A. Did Alexander Engage in Union Activities?

Steve (not Stephen) Alexander was named as one of several alleged discriminatees in an unfair labor practice charge (Case 26–CA–17100) filed against Respondent and Express Personnel on October 20, 1995. That charge involved refusal-to-hire allegations. Alexander had not been an employee of Respondent.

In the summer of 1996, Wayne Divine asked Alexander to do some organizing for the Union. Divine told Alexander that Respondent was hiring. As shown above Alexander went to Respondent then to Express Personnel, where he applied for work but he did nothing to show that he was affiliated with the Union.

In December and January, Alexander wore items to work that demonstrated support for the Union. On December 13, 1996, the Union wrote Respondent that one of their employees, Stephen Alexander, is a union organizer.

Findings and Credibility

There was no dispute in the record as to the above-mentioned facts.

Conclusions

I find that the record evidence shows that Stephen Alexander engaged in union activity.

B. Did Respondent Know of Alexander's Union Activities?

As mentioned above, Alexander was named as one of many alleged discriminatees in an unfair labor practice charge filed against Respondent on October 20, 1995. He was listed as "Steve Alexander." That charge was amended on August 23, 1996, and Alexander's name was not listed in the amended charge.

Charles Leggett testified that Respondent hired Stephen Alexander in August or September 1996 knowing that Alexander had been listed as a discriminatee on a prior unfair labor practice charge.

The Union wrote and faxed Moses Electric on December 13, 1996, that Respondent's employees were interested in authorizing the Union to represent them. That letter included the following paragraph:

Additionally, we wanted to notify you that Mr. Stephen S. Alexander, an employee of yours, is an organizer for the union. I am sure that you will afford him every protection guaranteed by the federal labor laws and will not otherwise interfere in his employment relationship with you on account of his union affiliation.

During December 1996, Alexander wore a union pencil clip in his belt buckle or in his shirt pocket. His foreman, Ferd Rogers, saw the union pencil clip.

On January 4, 1997, Alexander reported to work overtime at a Respondent jobsite at Albertsons Store in Jackson. Alexander was wearing an IBEW shirt under his jacket. The shirt became apparent when Alexander removed his jacket around 9 a.m. After lunch an employee named Scott Hemphill was coming

toward Alexander. Hemphill was on a scissor lift. Hemphill yelled out "IBEW." Alexander asked Scott if he wanted to join. Scott replied, "No, fuck you. Fuck Wayne Divine and fuck IBEW." Alexander asked Scott if there was a problem there. Scott replied, "We don't want a fucking union. All ya'll can kiss my ass." Hemphill got off his scissor lift. Alexander saw his superintendent, Jeff Jones, but Jones seemed to ignore the occurrence.

Alexander's supervisor on that job was Jeff Jones. Jones testified that he did not witness the confrontation between Alexander and Hemphill but he admitted that he did hear Hemphill yell, "[y]ou can tell Wayne Divine to suck my dick." Jones admitted that he came up in time to see Alexander walk away from Hemphill. Alexander walked past Jones, went over and picked up all his tools and told Jones that he had had enough and was leaving.

Findings and Credibility

As shown above, I find Charles Leggett was not a credible witness. I do not credit his testimony that Respondent was aware that Alexander had been named as a discriminatee in an unfair labor practice charge. The Case 26–CA–17100 charge alleged that Respondent and Express Personnel had refused to employ a number of individuals including several paid union agents. Steve Scully, owner of Express Personnel, testified that Express received thousands of applicants. Alexander, unlike other alleged discriminatees was not an employee of the Union and, as shown above, his first name was misspelled in the charge. However, William Hux also testified that Respondent was aware that Alexander had been named in the October 1995 charge. I do not discredit Hux.

The evidence regarding the Union's December 13, 1996 letter to Respondent is undisputed and credited. I was impressed with the demeanor of Stephen Alexander. In view of his demeanor and the full record I credit his testimony regarding the January 4, 1997 incident at the Albertsons store jobsite in Jackson. Both Alexander and Supervisor Jeff Jones testified to the effect that even though Jones was present when Alexander walked away from Scott Hemphill, Jones did nothing.

Conclusions

Despite my determination that Alexander was named in a charge filed on October 20, 1995, and that Respondent was aware of that charge, the record shows that Respondent did not learn that Alexander was a union organizer until it received the Union's December 13, 1996 letter.

C. Was Respondent Motivated by Union Animus and did Alexander's Discharge have the Effect of Discouraging Union Activities?

As shown above, the Moses Electric employee handbook includes the following at section 1.5:

1.5 A FEW WORDS ABOUT UNIONS

Our Merit Shop Firm, like more than eighty percent of all businesses and institutions throughout the United States, is union-free. There is always a chance, however, that in the future a labor organization will try to persuade some of our employees to sign union authorization cards.

For this reason, it is important that you understand our position concerning unions.

To say it simply and clearly, while you have the legal right to join a labor union, you also have the legal right NOT to join a union. We believe that remaining union-free has definite advantages for you, our employees. For instance, along with labor unions can come many changes such as: (a) restrictions on your individual freedom to discuss and solve your problems directly with us and without union involvement; (b) your compulsory union membership and dues; (c) union discipline, fines, suspension and expulsion from membership; (d) union control over you through the union's constitution and bylaws; (e) union politics; (f) union coercion and violence; (g) union hypocrisy; (h) union strikes and strike assessments; and (l) resulting job replacements, sometimes temporarily, sometimes forever. In other words—unions have fostered turmoil, job insecurity, dollars out of workers' pockets, and loss of independence.

So if a labor union organizer ever asks you to sign a union authorization card, remember that it is a legally binding document in which you sign away your right of individual freedom in our workplace for exclusive representation by that union. We hop you would hesitate—and think carefully—before signing any such union pledge card. It could be your first step into the turmoil described above. It might be like signing a blank check and giving it to a stranger.

We have the ability, the desire, the expertise, and the personnel to solve our problems and move forward by working together in the Merit Shop Way—without interference from union outsiders. Based on these facts, we believe a labor union is unnecessary and unwanted here at Moses Electric Service, Inc.

Charles Leggett admitted that Mississippi is a right-to-work State and that Respondent employees can not be forced to join a labor organization.

Norma Meltin was construction secretary to Sam Kimbrough from October 1995 until October 1996. At that time Kimbrough was the COO at Respondent. Meltin worked in the same building with Diane Cook as well as Sam Kimbrough and Shaw Case. After Shaw Case was hired around August 1996, Meltin overheard a conversation in the hallway near her office involving Hux, Kimbrough, Leggett, and Shaw Case. They instructed Shaw Case to find out if applicants had any union affiliation.

Roger Dale Swartz Jr. was a superintendent at Respondent from April 1996 until March 1997. Swartz had trouble keeping a sufficient number of quality electricians. On one occasion while in front of the receptionist area at Respondent's office along with Gary Chamely, Charles Leggett, and Sam Kimbrough, Swartz asked why Respondent did not run an ad in the paper because no good electrician needs to go through the temporary personnel agencies. Swartz testified that either Charles Leggett or Sam Kimbrough replied that if they run an ad (Local) "480 would send 200 electricians in there to fill out an application."

Findings and Credibility

As shown above, I do not credit the testimony of Charles Leggett. I do credit the testimony of Norma Meltin in view of the full record and her demeanor. As shown here I credit Roger Swartz. Even though he was discharged by Respondent his testimony was supported by the credited record. I credit his testimony in view of his demeanor and the full record.

As to the testimony of Stephen Alexander and especially the January 4 incident, I was impressed with Alexander's demeanor. His testimony was in line with the overall record and there was no conflicts between the credited evidence and Alexander's account of the January 4 incident.¹ Jeff Jones' testimony about that incident was incomplete. Jones admitted that he was not present during the bulk of the confrontation between Alexander and Scott Hemphill. To the extent Jones overheard remarks by Hemphill and witnessed what occurred after he became aware of the incident, his testimony tends to support Alexander. Hemphill did not testify.

Conclusions

The testimony of Meltin, Swartz, the antiunion message in Respondent employees handbook, and my findings above of 8(a)(3) violations convince me of Respondent's animus.

As to the question of whether Respondent was motivated by its animus to discharge Stephen Alexander, the record shows:

Stephen Alexander worked without being disciplined until Respondent learned around December 13, 1996, that he was a union organizer. On January 4, 1997, Stephen Alexander wore a IBEW shirt to work and had a dramatic confrontation with a fellow employee. The credited evidence showed that Alexander did nothing to cause or prolong that confrontation. Instead Alexander broke off the confrontation by leaving. After lunch when Alexander was wearing the IBEW shirt, another worker, Scott Hemphill, came toward Alexander. Hemphill was on a scissor lift. Hemphill yelled out "IBEW" and "No, fuck you. Fuck Wayne Divine and fuck IBEW." Scott Hemphill said, "We don't want a fucking union. All ya'll can kiss my ass." Hemphill got off his scissor lift. Alexander's supervisor, Jeff Jones, seemed to ignore the occurrence. Hemphill was described as being probably 6'4" and 250 pounds. Alexander is 5'10" and weighs about 150 pounds. Alexander turned and walked away. He went over near Supervisor Jeff Jones, got his tools and said that he had enough for one day. He left.

On Monday, January 6, Alexander reported to his normal job for Respondent at Northwest Rankin. He told his supervisor there had been an incident at his overtime job at Albertsons on Saturday, and that he would like to talk to someone at Respondent about the incident. That afternoon he was first told to go ahead and talk to someone at the office. Later he was told by Supervisor Cecil Peden that no one would be at the office for him to talk with.

Alexander credibly testified that he never received a warning or reprimand while working for Respondent. On Wednesday,

¹ In determining what occurred on January 4, I have discounted the testimony of William Smitherman. Despite Smitherman's testimony Respondent proved that Smitherman did not work on January 4. For that reason I find that Smitherman's testimony neither contributed not distracted from the record evidence regarding January 4, 1997.

January 8, work at the Northwest Rankin job was rained out. The next day it was still raining and Alexander drove to the Respondent shop. He saw David Dunn who told him he had been rained out and to call Shaw Case at 9 o'clock. Alexander phoned Shaw Case and was told that he had been terminated for violation of company policy. Alexander asked what policy had he violated. Case said, "Can't tell ya. It's none of your business."

Respondent alleged at the hearing that it discharged Alexander for unacceptable conduct. Respondent pointed to three incidents including Alexander's walking away from the union related confrontation on January 4, as the bases for its determination to discharge Alexander. The only incident that occurred after the January 4 confrontation with a fellow employee, was Alexander leaving work a few minutes early on January 6. According to Supervisor Peden, Alexander left work 12 minutes early. Alexander, on the other hand, contends that he left 2 minutes early.

Alexander testified that he was aware of other employees that left work early. He testified that other employees were not wearing hardhats on the same day he was called down by David Dunn.

I am convinced in view of Respondent's animus, the incidents leading to Alexander's discharge, the timing of his discharge within a month after learning he was a union organizer and within a week after Alexander wore a IBEW shirt to work, and the full record, that Respondent was motivated to discharge Alexander because of its union animus.

D. Would Respondent have Discharged Alexander in the Absence of Union Activities?

Respondent contended that it treated Alexander in the same manner it treated other employees. He was discharged because of absenteeism.

Human Resource Manager Shaw Case testified that Alexander was discharged because he broke the Company's absenteeism and attendance policy. Case pointed to several incidents. On December 20, 1996, Alexander told the person in charge that he had worked his 40 hours and was going home. After requesting overtime on January 4, Alexander left his job before his time set for finishing work. Finally, on the following Monday, January 6, 1997, Alexander left his job early at 3:18 p.m. He was scheduled to leave at 3:30 p.m. After learning of the January 6 incident Case decided to discharge Alexander because of the three above-mentioned incidents. He told Alexander that he was being discharged for violation of company policy. Case testified that the Union had nothing to do with Alexander's discharge.

Respondent submitted separation notices showing that it has discharged several employees for attendance problems. Richard Hilliard was discharged on November 5, 1996, for unacceptable performance and unacceptable attendance. Michael Hudson was discharged on February 14, 1997, for unacceptable performance and unacceptable conduct. The comment was that he "walked off job site. Left early." Mike McDonald was fired on June 20, 1997, for unacceptable conduct and unacceptable attendance with the comment "left the job site." Joe Bates was fired on February 13, 1997, for unacceptable performance,

unacceptable conduct and unacceptable attendance. His separation notice included the comment "no show 2/17/97 & 2/18/97." Mike Newell was also shown as a no show for February 17 and 18. Newell was fired on February 12, 1997. Robert Puckett was fired on January 29, 1997, with the comment "no show no call 1/8/97-1/29/97." Eric Greenlee was fired on January 30, 1997, with the comment "not reliable." Burt Darling was fired on February 7, 1997, with the comment "slow & unreliable." Francis Dextra was fired on February 14, 1997. Dextra's separation sheet included the comment "Missed 2/11/97, Late 2/10/97, Missed 2/12/97, no call no show 2/13/97." Roby Humphrey was fired on February 24, 1997, for unacceptable attendance. Billy Kinds, fired March 25, 1997, for unacceptable attendance was marked "no show—no call." Shane Curtis was fired May 19, 1997, for unacceptable attendance. Danny Nelson was fired on June 11, 1997, for unacceptable conduct and unacceptable attendance. Michael Daniel was fired on June 20, 1997, for unacceptable performance, unacceptable conduct, and unacceptable attendance with the comment "no show—no call absenteeism." Ronica Hilliard was fired March 14, 1997, for unacceptable attendance with the comment "no show no call." Trennis Gooden was fired March 11, 1997, for unacceptable attendance with the comment "Not reliable 2 days—no call no show 3/10/97-3/11/97." William Smitherman was also terminated because of absenteeism. Smitherman's separation notice includes the remark "no show no call 1/28/97-1/29/97."

Findings and Credibility

There is remarkably little conflict in the evidence regarding the absenteeism record of Stephen Alexander. Both Alexander and his foreman had similar recollections of the incident on December 20. Alexander's testimony of the January 4 incident is essentially undisputed. As to the January 6 incident, both Alexander and Peden agree that Alexander left work before the 3:30 p.m. quitting time. As shown here, I find that Alexander was a credible witness. To the extent there are conflicts I credit the testimony of Stephen Alexander.

Conclusions

The General Counsel contends that Respondent's version of why Alexander was fired is a fabrication. Even though Alexander did say to his foreman that he would leave after getting his 40 hours on December 20, the foreman did not disagree. In fact Foreman Fern Rogers nodded his head in agreement. Moreover, nothing was said or done to show that Respondent was unhappy over the incident. Fern Rogers noted in his job diary that Alexander had left early that day but made no recommendation for disciplinary action. Alexander was not disciplined in any manner.

As to the January 4 incident, the General Counsel and the Union argued in their briefs that Alexander left to avoid a possible fight and that the other employee involved, Scott Hemphill, was disciplined for using profane language. The evidence is undisputed that Alexander was confronted by Scott Hemphill because Alexander was wearing an IBEW shirt. Hemphill yelled "IBEW" at Alexander. Alexander asked Scott if he wanted to join. Scott replied, "No, fuck you. Fuck Wayne Divine and fuck IBEW." Alexander asked Hemphill if there was a problem there. Hemphill replied, "We don't want a fucking

union. All ya'll can kiss my ass." Hemphill got off his scissor lift. Alexander turned and walked away. He went over near Supervisor Jeff Jones, got his tools and said that he had enough for one day and left.

On Monday, January 6, Alexander told his supervisor there had been an incident while he was working another job at Albertsons on Saturday, and that he would like to talk to someone at Moses about the incident. That afternoon he was first told to go ahead and talk to someone at the office. Later he was told by Supervisor Cecil Peden that no one would be at the office for him to talk with.

That evidence as well as the testimony of Supervisor Jeff Jones shows that Respondent did nothing to determine whether Alexander should have been disciplined for leaving the job on January 4. In fact Jones admitted that he overheard Hemphill use profane language.

The only evidence that anything was ever said to Alexander about an absenteeism problem involved his leaving work a few minutes early on January 6. Even though Respondent now contends that Alexander was issued a warning for that incident, the credited evidence shows that the only thing that occurred was a comment by Supervisor Cecil Peden. On the morning of January 7, Peden said to Alexander, "[Y]ou left early yesterday." Peden contended Alexander left at 3:18 p.m. rather than the scheduled 3:30 p.m. Alexander testified that he left at 3:28 p.m.

While absenteeism is not one of the listed major offenses in Respondent's disciplinary policy, two of the major offenses are "threatened or actual physical violence" and the use of profane or abusive language. The record shows that Scott Hemphill may have engaged in both those major offenses on January 4 and received only a verbal warning.

The General Counsel pointed to other instances where Respondent (through Shaw Case the same person that discharged Alexander), applied its absenteeism policy differently than in the case of Alexander. On January 30, 1997, Larry Dixon received a verbal warning from Shaw Case. Case wrote on the warning form, "Told him that absences were excessive. At least one a week for the past two months. Told him that he had to straighten out the problem w/ absenteeism & tardiness."

Shaw Case issued a verbal warning to Seth Fuller on July 2, 1997. Case wrote on the warning, "Seth has run late or missed work a few times in the past month. Seth was warned about his consistent absences & told to obey the policies just like everyone else." Respondent argued that the situations with Dixon and Fuller involved excused absences. However, there was nothing in the record that distinguished those employees from Alexander.

In view of the full record I find that Respondent failed to prove that it would have discharged Stephen Alexander in the absence of his union affiliation. The record showed that Alexander was involved in two notable incidents regarding the Union. On December 16, 1996, Respondent received the Union's December 13 letter stating, among other things, that employee Stephen Alexander was a union organizer. On January 4, 1997, Alexander wore a IBEW shirt to work and was violently confronted by another employee. At the time of those two incidents Alexander had not been disciplined. However, after only 2 workdays following his wearing an IBEW shirt, Alexander was

fired. The record shows that Respondent had allowed more serious infractions of its absenteeism policy by other employees with nothing more than verbal warnings.

The record as shown above, proved that the General Counsel proved that Respondent was motivated to discharge Stephen Alexander by its union animus and the record failed to show that Alexander would have been discharged in the absence of his union affiliation.

CONCLUSIONS OF LAW

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

2. International Brotherhood of Electrical Workers, Local 480, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent by discharging its employee Stephen Alexander and thereafter failing and refusing to employ Alexander, has engaged in conduct violative of Section 8(a)(1) and (3) of the Act:

4. Respondent by refusing to hire or, in the case of Alexander, to rehire, any of the following employees because of their union affiliation and preference has engaged in conduct violative of Section 8(a)(1) and (3) of the Act:

Jeff Grimes	Jamie Steele
Carl Roberts	Steve Upton
Mike Albritton	Sammy Yelverton
Brooks Martin	James Horn
Stephen Alexander	John Smith
Wayne Divine	Mike Pickett
Robert Lindsey	

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6), (7), and (8) of the Act.

THE REMEDY

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

As I have found that Respondent has illegally refused to hire any of the below named employees in violation of sections of the Act, I shall order Respondent to offer those employees immediate and full employment to the positions for which they applied and are qualified or, if those positions no longer exist, to substantially equivalent positions:

Jeff Grimes	Jamie Steele
Carl Roberts	Steve Upton
Mike Albritton	Sammy Yelverton
Brooks Martin	James Horn
Stephen Alexander	John Smith
Wayne Divine	Mike Pickett
Robert Lindsey	

I have also found that Respondent illegally discharged, and thereafter refused to employ Stephen Alexander. I shall order Respondent to offer immediate and full employment to Alex-

ander to his former position or, if that position no longer exists, to a substantially equivalent position.

I further order Respondent to make the above-mentioned employees whole for any loss of earnings suffered as a result of the discrimination against them. Backpay shall be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Despite the above findings, the record failed resolve several issues that may be relevant to the initial employment of the discriminatees (except Alexander who was discharged rather than denied initial employment), and make whole portions of the remedy. Those issues which may include among others, when each alleged discriminatee would have been hired in the absence of union activities under Respondent's normal nondiscriminatory practices and if and when each alleged discriminatee may have been laid off in the absence of union activities under Respondent's normal nondiscriminatory practices, may be considered in compliance proceedings if necessary. *Casey Electric*, 313 NLRB 774 (1994); *Dean General Contractors*, 285 NLRB 573 (1987).

[Recommended Order omitted from publication.]

Michael W. Jeannette, Esq., for the General Counsel.

William I. Gault Jr., Esq. and *David M. Thomas II, Esq.*, of Jackson, Mississippi, for the Respondent.

Wayne A. Divine, of Jackson, Mississippi, for the Charging Party.

SUPPLEMENTAL DECISION

PARGEN ROBERTSON, Administrative Law Judge. The National Labor Relations Board remanded the decision (JD(ATL)-16-95) in this matter on June 7, 2000, for consideration in light of its decision in *FES*, 331 NLRB 9 (2000). The parties responded to an order to show cause and filed briefs following an order dated August 7, 2000. I found that all the issues raised in *FES* had been covered in my original decision with the exception of the question of whether the alleged discriminatees would have been considered for hire, and actually hired, if Respondent had examined each of their applications in a nondiscriminatory manner. On October 5, 2000, I ordered a limited reopening of the hearing (GC Exh. 90L) for the sole reason of dealing with that issue.

Pursuant to my Order a hearing was held in Jackson, Mississippi, on January 24, 2001. I have considered the full record and briefs filed by the General Counsel and Respondent in reaching this decision. My review of the underlying decision is limited. The Board has established that the administrative law judge is limited to considering only those matters specified by the Board's Order. *Monark Boat Co.*, 276 NLRB 1143, 1143 fn. 3 (1985), *enfd.* 800 F.2d 191 (8th Cir. 1986).

At the hearing the parties stipulated the relevant appropriate time period for comparison purposes is the period May 1 to December 31, 1995, and that Charles Leggett was involved in the hiring.

Respondent's president and owner, Charles Leggett,¹ was responsible for hiring. He testified that Respondent looks for applicants that have prior experience in commercial work; that are willing to work at Respondent's wage level; and that demonstrate the capability of becoming a long-term employee. Additionally, Leggett testified that because of shifting work times, its employees are not permitted to work for other people while employed by Respondent.² Commercial work is distinguishable from industrial work in that a lot of industrial work involves turnaround and such, where the employees work for short periods of time. Since Leggett moved to Jackson³ in 1988 all Respondent's work has been commercial. Leggett testified that Respondent's selection of employees followed a schedule. The first source of hires was transfers from other of its jobs. The second source was rehires. The third source was management referrals and the next source was referrals from employees. Only after exhausting all the above sources, did Respondent consider applications from other sources.⁴

Leggett testified that he would not have hired Michael Albritton (GC Exh. 2), if he had received Albritton's application⁵ because the application is incomplete. The driver's license number is not included. Additionally, the application shows that Albritton lives in Summit, which is a long way from Jackson. Leggett testified that Albritton said he would commute 100 miles but Respondent has not had good experience with employees that commute that far. Also, it appears that most of Albritton's work experience is in industrial work and Respondent was not interested in hiring industrial electricians. Only one reference was verified on Albritton and that reference said they would not rehire Albritton. Albritton failed to list any education and training. As to Wayne Divine (GC Exh. 3), Leggett testified that he would not have hired Divine because he knew that he was a full-time employee as business manager of the Union. Also, Divine had not worked as electrician in a long time (6 years) and his experience was industrial. The application did not show but Leggett knew, that Divine had worked for Woody Overly and Overly had fired him. Wayne Divine testified that he had been fired by Overly but it was because of his union activity and unfair labor practice charges were filed regarding that discharge. The matter was heard before an administrative law judge and eventually settled.⁶ On cross-examination, Leggett admitted that he said nothing on his pre-hearing declaration (GC Exh. 90(h)) about why he would not have hired Divine. Leggett testified that he would not have hired Jeff Grimes (GC Exh. 4) because Grimes did not include

¹ Leggett was president and chief executive office for Respondent between 1989 and 1997 (GC Exh. 90(h)).

² See R Exh. 21, which was received in the original hearing and purports to show Respondent's hiring policies from March 30, 1994.

³ All of Leggett's testimony regarding Respondent involved a time after he came to Jackson.

⁴ The other sources included referrals by Express Personnel Services but occasionally one of their referrals would be a former Respondent employee (i.e., a rehire).

⁵ Leggett denied that he received the alleged discriminatees' applications in the original hearing. I discredited his testimony in that regard in my decision (JD(ATL)-16-95).

⁶ *Overley Electric Co.*, 319 NLRB 1232 (1995).

his driver's license number on his application; his experience was plant maintenance work; Grimes showed that he did not like night shift; a reference check showed that Grimes would be rehired with reservation; Grimes indicated that his maximum commute distance would be 40 miles and that would limit his availability on jobs outside Jackson since Grimes lived in Florence; and Grimes did not sign his application. That showed Leggett that Grimes did not follow instructions very well and Respondent had had difficulty with employees that did not follow instructions. On cross-examination Leggett admitted that he said nothing on his prehearing declaration about refusing to hire Grimes because Grimes indicated he would not work the night shift or about Grimes being unwilling to commute over 40 miles.

Charles Leggett testified that James Horn (GC Exh. 5), listed his minimum hourly salary as \$15, which is more that Respondent usually pays (i.e., \$12); and his experience was industrial work. Additionally, Horn did not list his driver's license number. Leggett testified that he would not hire Robert Lindsey (GC Exh. 6) and Sammy Yelverton (GC Exh. 12) because he had a conversation where Scott Casey told him that he had a problem and had fired them both for insubordination "probably around '93, '94, somewhere about that time." Yelverton did not show that he had worked for Casey Electric even though Leggett knew he had. Yelverton's application did not include any experience similar to the work performed by Respondent; Yelverton did not list his driver's license number;⁷ and he had worked at a higher wage rate than Respondent was willing to pay. On cross-examination Leggett admitted that he said nothing on his prehearing declaration about why he would not have hired Sammy Yelverton. Robert Lindsey had been laid off as a ROF after 2 months which showed Leggett that Lindsey was not a very productive employee; and Lindsey's experience was all in high paying industrial work. On cross-examination, Leggett admitted that he said nothing on his prehearing declaration about why he would not have hired Lindsey. Brooks Martin would not have been hired if Leggett had examined his application (GC Exh. 7) because he had worked a long time on a nuclear power house.⁸ Leggett testified that Martin, "[P]robably didn't know how to do anything but nuclear power house work," and his other work history appears to be incomplete. Martin did not include his pay for the other two jobs listed on the application. Moreover, Martin lives in Brandon and shows the maximum commute as 50 miles and that may cause a problem if Respondent wanted to work him outside Jackson. On cross-examination Leggett admitted that he said nothing on his declaration (GC Exh. 90(h)) about Martin being willing to commute only 50 miles or that Martin had an incomplete pay history on the application. Leggett testified that he would not have hired Carl Roberts if he had received Roberts' application (GC Exh. 8). Roberts listed the minimum acceptable salary as

\$14.40 and Respondent was paying only \$12 an hour. Also, Roberts indicated that he was available for only 1 year; and Roberts did not list the pay he had received from prior employers or the years he worked for those employers. On cross-examination, Leggett admitted that he said nothing in his prehearing declaration about Roberts not listing his employment history as a reason why he would not have hired Roberts.

Leggett testified that Michael Pickett (GC Exh. 9) showed his previous work was maintenance work and Pickett did not sign his application but that if Respondent had been hiring the day it received his application he may have hired Pickett. On cross-examination Leggett admitted that in his prehearing declaration, he only listed Pickett's education as a reason why he may not hire Pickett. As to Johnnie Smith (GC Exh. 10), Leggett would not have hired him if he had received his application because Smith's minimum salary requirement was too high (\$14.40), and Smith's work experience was industrial. Moreover, Smith listed his last job as paying \$23.20 per hour. Leggett would not have hired Jamie Steele (GC Exh. 11), because Steele listed his minimum pay at \$14.40 an hour; Steele did not finish high school and his work experience was mostly industrial work. Leggett would not have hired Steve Upton if he had received Upton's application (GC Exh. 13) because all Upton's experience was in nuclear power; he had made \$17 to \$20 an hour; and he had a lot of jobs that lasted for short periods of time. On cross-examination Leggett admitted that Smith's application does show he had industrial/comm. experience. The only reason given on Leggett's declaration for refusing to hire Steele was his salary "far exceeding what Moses would pay." Leggett's prehearing declaration did not include anything about Smith living in McComb and commuting to Jackson, or about Smith not finishing high school or vo-tech classes in electronics.

Charles Leggett testified that the most important factor in considering application would be whether the applicant had commercial work experience. Leggett admitted that Respondent did some, but very little, industrial work.

Union organizer, Wayne Divine, testified that he was familiar with various contractors and the type of work performed by those contractors. He testified that several contractors including Rust Engineering, Pie, Silvey, Triad, EMI, and Computer Aided Systems, Incorporated engaged primarily in industrial work. Energy Erectors is a line construction outfit, meaning line distribution, pole work, and distribution stations. Energy Erectors' work is not related to commercial work. G and C Electric does about 80-percent residential and some light commercial work. Fountain Construction does commercial and industrial work. Jordan is a commercial contractor.

Credibility and Findings

The sole issue here concerns whether Respondent would have hired the alleged discriminatees if it had considered their respective applications in a nondiscriminatory fashion. I found in my underlying decision that Respondent was hiring at material times; that it hired 87 electricians between May 15, 1995, and July 21, 1997; and that 27 electricians were hired in 1995 after May 15.

⁷ Leggett testified that Respondent checks out applicants driving records and it is not interested in hiring anyone with DUIs and by failing to list a driver's license number the applicant makes it more difficult for Respondent to check that driver record.

⁸ The notation on the application, "Bechtel, Port Gibson" shows nuclear power work.

Respondent elected to deal with the nondiscriminatory consideration issue through the testimony of its chief executive officer at material times, Charles Leggett. Leggett testified in the original hearing that he did not receive the applications of the alleged discriminatees. I did not credit Leggett's testimony. Instead I found that Respondent had received the applications. Even though I did not credit the testimony of Charles Leggett in my underlying decision, I shall consider his testimony especially in view of Respondent's reliance on his testimony to prove its entire remand case. In that regard I have considered the full record including the original record, Leggett's full testimony, his demeanor and the arguments made in the respective briefs.

Leggett testified that initially Respondent looks to several factors including prior experience in commercial work, a demonstrated willingness to work at Respondent's wage level, the capability of becoming a long-term employee, and whether the applicant is otherwise employed. Charles Leggett also testified that applicants are considered in relation to how they were recommended to Respondent. Those employees that are transferring from other of Respondent's jobs are considered first; then applicants that formerly worked for Respondent; then applicants recommended by management; then applicants referred by other employees and finally applicants from other sources. There was no evidence that Respondent's standards for determining whether to hire an applicant were illegal per se. Instead the evidence dealt with whether Respondent actually applied those standards in a nondiscriminatory manner.

With one exception Leggett testified to the effect that he would not have hired any of the alleged discriminatees at any time during the material period. The one exception involved Michael Pickett. In view of Leggett's testimony in the initial hearing that he did not receive the alleged discriminatees' applications, it is impossible to determine when Leggett considered or refused to consider Pickett's application. Moreover, in view of Leggett's claim that he did not receive the applications, Respondent did not rely on testimony by Leggett that he considered an application for only 30 days⁹ after receipt. It would be impossible to determine when that 30 days started as to each applicant since Leggett claimed he did not receive the applications at any time. Leggett did not testify to the effect that another person or persons were selected for specific jobs during the material period, because the selected applicant was more qualified than any alleged discriminatee that Respondent considered at that time. Again, in view of his earlier testimony that he did not receive the alleged discriminatees' applications, such testimony would not have made sense. In effect, Leggett claimed that he would not have hired any of the alleged discriminatees at any time¹⁰ regardless of whether any of the alleged discriminatees was more qualified than applicants actually hired, because of nondiscriminatory factors. Because of the nature of that claim it is clear that credibility is a key consideration.

⁹ Despite Leggett's testimony the purported written hiring policies (R Exh. 21) shows that applications remain on file for only 10 days.

¹⁰ Excluding of course, the possibility that he may have hired Michael Pickett.

In regard to whether the alleged discriminatees would have been hired if Respondent had considered their applications in a nondiscriminatory manner, several of the reasons given by Charles Leggett to support Respondent's refusal to hire, are common as to more than one of the alleged discriminatees. For example, Leggett testified about his reluctance to hire anyone with industrial or other noncommercial experience including Michael Albritton, Wayne Divine, James Horn, Sammy Yelverton,¹¹ Robert Lindsey, Brooks Martin,¹² Johnnie Smith, Jamie Steele, and Steve Upton.¹³ However, evidence in the original hearing showed that several applicants hired by Respondent had demonstrated industrial, nuclear power and other noncommercial electrical work on their respective applications. Those included R. J. Campbell (GC Exh. 25), Edward Van Currey (GC Exh. 35),¹⁴ Michael Finley (GC Exh. 40), Bobby Floyd (GC Exh. 27), Donald Fontaine (GC Exh. 34), James Hughes (GC Exh. 43), Mark Jackson (GC Exh. 30), Mark McLaurin (GC Exh. 37),¹⁵ Daniel Nelson (GC Exh. 31), Eddie Orlinski (GC Exh. 38), Don Pratt (GC Exh. 26), and Randy Rogers (GC Exh. 41). Leggett testified that he would not hire some of the alleged discriminatees because they had made higher wages at prior jobs or requested a minimum salary that exceeded, the \$12 an hour he was willing to pay. Those alleged discriminatees included James Horn, Sammy Yelverton, Robert Lindsey, Carl Roberts, Johnnie Smith, Jamie Steele, and Steve Upton. However, Respondent did hire other applicants that had earned over \$12 an hour with prior employers including Calvin Brown (GC Exh. 42), R. J. Campbell (GC Exh. 25), Edward Van Currey, Michael Finley, Bobby Floyd, Donald Fontaine, Mark Jackson, and Terry Johnson (GC Exh. 33), James Loden (GC Exh. 36), Mark McLaurin, Dennis Mink (GC Exh. 70), and Eddie Orlinski. Charles Leggett testified that he would have refused to hire several applicants including Albritton, Grimes, Horn, and Yelverton because their drivers' license information was incomplete. However, The General Counsel pointed out in his brief that Respondent hired Calvin Bidy (GC Exh. 22), Donald Fontaine, Lewis Johnson, and James Loden (GC Exh. 36), and Dennis Mink (GC Exh. 70) even though all either failed to mark they had a driver's license or failed to include their driver's license number, on their respective applications.

As to Leggett's testimony regarding the individual alleged discriminatees, the above findings regarding industrial experience, high wages and drivers' licenses demonstrate that Leggett was not truthful in his testimony that he would not have considered Albritton for those reasons. Respondent had actually hired others with similar applications. Leggett also testified that he would not have hired Albritton because he lived too far away

¹¹ Leggett testified that Yelverton's application showed that his work experience was not the type work desired by Respondent.

¹² Leggett testified that Martin's application showed that he had worked a long time on a nuclear power house.

¹³ Leggett testified that all of Upton's experience had been in nuclear power.

¹⁴ Currey showed one of his employers, H&H Elect. as "Industrial-commercial."

¹⁵ McLaurin failed to fill out any of the information about previous employers.

but Albritton stated on his application that he would commute up to 100 miles. Leggett testified that one of Albritton's former employers had given him a negative reference. Albritton had quit at EMI and EMI indicated it would not be interested in rehiring him. However, the General Counsel pointed out that Respondent had hired several employees that lived significant distances from Jackson. For example R. J. Campbell lived in Grenada, Mississippi (GC Exh. 25); Michael Chesteen lived in Greenwood, Mississippi (GC Exh. 23); and Bobby Floyd also lived in Greenwood, Mississippi (GC Exh. 27). Leggett testified he would not have hired Albritton because he did not have any education or training. Albritton's application showed he finished high school. Respondent actually hired Calvin Bidy and Mark Jackson (GC Exh. 30), and Donald Smith even though none of the three listed either high school or electrical training on their application. Four other applicants hired by Respondent listed high school but no electronics or electrical theory including Michael Finley, Donald Fontaine, and James Hughes (GC Exh. 43), and Eddie Orlinski (GC Exh. 38).

Leggett testified for the first time, that he would not have hired Wayne Divine because Divine had a full-time job with the Union and it was Respondent's policy not to hire anyone with full-time jobs with another employer. Leggett did not allege that as a reason for not hiring Divine in his prehearing declaration. The General Counsel pointed out that the Board issued a decision after Leggett's prehearing declaration, upholding an employer's refusal to hire because the applicant had a full-time job where the employer had an established rule against hiring in that situation.¹⁶ Moreover, Respondent hired Mark Jackson (GC Exh. 30) even though Jackson stated on his application that he was currently employed full time.¹⁷ The record supports the General Counsel's argument that Respondent did not apply its alleged 1994 policy before it received the applications of Wayne Divine and Sammy Yelverton. Charles Leggett testified he would not have rehired Jeff Grimes for several reasons including some that were not included in Leggett's prehearing declaration as to why he would not have hired Grimes, including the allegation Grimes did not write his driver's license number on the application. As shown above, Respondent hired other applicants not shown to support the Union, even though there were problems, omissions, and in some cases, no question on the application form, regarding driver's licenses. Leggett testified that Grimes' experience was

in maintenance but as shown above Respondent hired others with maintenance and industrial experience. Leggett testified that he did not hire Grimes because a reference check indicated an unfavorable reference the check showed that Grimes did not like the night shift. It is noted on Grimes' application (GC Exh. 4) that a previous employer, Riverwood, stated that Grimes did not like the night shift and that it would rehire Grimes with some reservations. However, others, including Don Smith received an unfavorable reference and Smith stated on his application that he did not like working long hours (GC Exh. 29). R. J. Campbell was terminated by Rust for being unable to perform duties and Randy Rogers was hired even though a reference stated "NO REHIRE—rhl drinker" (GC Exh. 41). Leggett testified he would not hire Grimes because he limited his commute to 40 miles and did not sign his application, but Leggett did not include either of those reasons for not hiring Grimes in Leggett's prehearing declaration.

James Horn was allegedly not rehired according to Leggett, because his minimum salary was too high (\$15); Horn had industrial experience; and because of Horn's short tenure with previous employers. As to the first item, Horn's application shows that he was open as to a minimum salary even though his four previous jobs had paid more than \$12. Moreover, I have already found that Respondent did not reject applicants because they asked for too much money (JD(ATL)—16—95). As shown above Respondent did hire applicants with industrial or maintenance experience and Leggett failed to list that as a reason for rejecting Horn in his prehearing declaration. As to short tenure, Respondent hired Currey (GC Exh. 35), Fontaine (GC Exh. 34), Johnson (GC Exh. 33), and Loden (GC Exh. 36) even though all had worked a short-term job for Respondent in 1994 (Tr. 425—426).

Charles Leggett allegedly would have refused to hire Robert Lindsey because he and Sammy Yelverton had been fired from Casey Electric; and because Lindsey did not list his driver's license number. Leggett failed to list either of those reasons for not hiring Lindsey, in his prehearing declaration. Moreover, as shown above, Respondent did not apply either of those two criteria in a nondiscriminatory manner. Leggett testified he would not have hired Brooks Martin because he had industrial experience. As shown above Respondent did not apply that criteria in a nondiscriminatory fashion. Charles Leggett testified that Martin failed to list his salary with prior employers and Martin gave a maximum commute distance of 50 miles but Leggett failed to include those reasons when he gave his prehearing declaration. As to Michael Pickett, Leggett testified that he might have hired Pickett if he had his application when he was hiring but that was different from testimony in Leggett's prehearing declaration where he said he would not have hired Pickett because of his maintenance or industrial experience. As to Carl Roberts, Leggett testified that he would not hire him because Roberts indicated he would prefer a 1-year assignment and Roberts failed to list his pay with prior employers. However, as shown herein, Leggett hired others that failed to fully complete their applications. Johnnie Smith was allegedly not considered for hire because of his \$14.40 salary requirement and demand for a minimum of 40 hours a week. However, as shown herein, Respondent hired several applicants that failed to

¹⁶ *Little Rock Electrical Contractors*, 327 NLRB 932 (1999).

¹⁷ Record evidence established that applicants including Divine, Yelverton and Mark Jackson were fully employed elsewhere at the time of their respective applications. Respondent argued that in light of recent case law, it is justified in applying its preexisting rule against hiring anyone with another full-time job. However, there was no showing as to why there was a distinction in the treatment of Jackson as opposed to Divine and Yelverton. Perhaps Divine and Yelverton were unwilling to give up their full-time jobs with the Union if hired by Respondent and perhaps Jackson was willing to give up his full-time job elsewhere if employed by Respondent but the record failed to show those possibilities were ever investigated and known by Respondent. What the record did show was disparity in the treatment of Divine and Yelverton as opposed to Jackson and Respondent failed to justify that disparity.

list a minimum salary and Leggett failed to include the allegation regarding Smith's wanting a minimum of 40 hours a week in his prehearing declaration. Leggett testified he would have rejected Jamie Steele because Steele wanted a \$14.40 minimum salary; Steele lived too far from Jackson in McComb; Steele had industrial experience; and Steele failed to finish high school. However, Leggett's testimony conflicts with his prehearing declaration where he listed only the \$14.40 minimum salary from the above reasons for not hiring Steele. As noted above, the record shows that Respondent applied all the criteria allegedly applied to Steele in a discriminatory manner. Charles Leggett testified that he would not have hired Sammy Yelverton because Yelverton, like Lindsey, had been terminated by Casey Electric; Yelverton was already employed full time by the Union; Yelverton listed too high a salary rate by previous employers; he had industrial experience; and he failed to list his driver's license number. Leggett did not include those reasons for rejecting Yelverton in his prehearing declaration. As shown above, the record shows that Respondent applied those criteria in a discriminatory manner. As to the claim that he rejected Yelverton because of his full-time employment with the Union, that like in the case of Wayne Divine, appeared to be a recent fabrication following the decision in *Little Rock Electrical Contractors*, supra.¹⁸ Leggett allegedly would not have considered Steve Upton because of Upton's limited experience at a nuclear power facility. However, that reason for not hiring Upton was not included in Leggett's prehearing declaration.

In view of the above, the entire record, his demeanor, the numerous conflicts in his testimony during the instant hearing and earlier testimony and conflicts between his testimony and other records, I do not credit the testimony of Charles Leggett. Therefore, I find that the credited evidence did not show that Respondent would have refused to consider or hire, the alleged discriminatees if it had considered their applications in a non-discriminatory manner. Moreover, the full record reveals that Respondent discriminatorily applied the criteria it allegedly would have used in determining not to consider or hire the alleged discriminatees. Respondent's records in evidence illustrated that other applicants were hired even though application of the criteria set out by Respondent's witness, would have resulted in Respondent refusing to consider for hire, or hiring, those applicants. In other words, the record showed that the standards set out by Charles Leggett were discriminatorily applied to the alleged discriminatees and those standards were not applied to other applicants that were hired. In view of the full

¹⁸ See also *Architectural Glass & Metal Co. v. NLRB*, 107 F.3d 426 (6th Cir. 1997).

record, I find that Respondent would not have refused to consider for hire, or to hire, any of the alleged discriminatees if it had considered their applications on a nondiscriminatory basis.¹⁹

ADDITIONAL CONCLUSIONS OF LAW

Respondent by refusing to hire any of the following employees because of their union affiliation and preference has engaged in conduct in violation of Section 8(a)(1) and (3) of the Act:

Michael Albritton	Michael Pickett
James Horn	Steve Upton
Carl Roberts	Jeff Grimes
Jamie Steele	Brooks Martin
Wayne Divine	Johnnie Smith
Robert Lindsey	Sammy Yelverton

The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6), (7), and (8) of the Act.

THE REMEDY

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

As I have found that Respondent has illegally refused to hire any of the below named employees in violation of sections of the Act, I shall order Respondent to offer those employees immediate and full reinstatement to the positions for which they applied and are qualified or, if those positions no longer exist, to substantially equivalent positions. I further order Respondent to make those employees whole for any loss of earnings suffered as a result of the discrimination against them. Backpay shall be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Michael Albritton	Michael Pickett
James Horn	Steve Upton
Carl Roberts	Jeff Grimes
Jamie Steele	Brooks Martin
Wayne Divine	Johnnie Smith
Robert Lindsey	Sammy Yelverton

[Recommended Order omitted from publication.]

¹⁹ *Nelson Electrical Contracting Corp.*, 332 NLRB No. 17 (2000) (not reported in Board volumes).