

Masiongale Electrical-Mechanical, Inc. and Indiana State Pipe Trade Association and United Association Local 172, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipe-Fitting Industry of the United States and Canada, AFL-CIO and Indiana State Pipe Trades Association and United Association Local 661, A/W United Association of Journeymen and Apprentices of the Plumbing and Pipe-Fitting Industry of the United States and Canada, AFL-CIO. Cases 25-CA-25119, 25-CA-25246, 25-CA-25446, and 25-CA-25731

December 20, 2001

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND WALSH

On October 2, 2000, Administrative Law Judge Bruce D. Rosenstein issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed limited exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has considered 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 conclusions² and to adopt the recommended Order as modified and set forth in full below.³

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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent correctly observes in exceptions that the judge erred in stating that, unlike all of the union applicant discriminatees in this case, *none* of the nonunion employees whom it hired in the period from January 1995 to August 1998 had indicated on their applications that they had plumbing licenses or experience as journeymen plumbers. The record shows that the applications of as many as 14 nonunion applicants indicated that they had licenses. This factual error does not affect the validity of the judge's analysis, however, because at least 40 of the nonunion applicants hired—twice as many as the 20 union applicants not hired or considered for hire—still did not state that they held licenses or had journeyman experience.

² Consistent with the judge's analysis of the issues presented on remand, Conclusion of Law 3 should have stated that the Respondent unlawfully refused to employ *and* consider (rather than *or* consider) for hire each of the named discriminatees.

³ We shall modify the language of the recommended Order and notice to place the remedial provisions in their traditional order and, as requested in the General Counsel's limited cross-exceptions, to include language omitted from the judge's recommended notice. We shall also modify the remedial recordkeeping provision in the recommended

For the reasons more fully articulated in the judge's decision, we agree that the Respondent unlawfully failed to hire and consider for hire 20 union applicants. See *FES*, 331 NLRB 9 (2000), and *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Contrary to our dissenting colleague, we find that the Respondent's professed reliance on certain hiring rules was a discredited, post hoc pretext for its real discriminatory motivation.

On March 28, 1997,⁴ union organizer Thomas Neal submitted to the Respondent the applications of 13 union members as well as his own application.⁵ Each of these applications had been completed and signed in January. The application form used by these applicants stated, "Applications will be considered current for 30 days." The form offers no further clarification as to whether the 30 day period began on the application date or on the submission date.⁶ The Respondent's sole witness, owner Ken Masiongale, claimed that he immediately rejected the 13 applications because they were more than 30 days old when submitted. The judge specifically discredited this testimony. As previously stated, we find no basis for reversing the judge's credibility resolutions.

Furthermore, it is clear from the credited evidence that the Respondent did not require applicants even to fill out an application form as a prerequisite to being hired as a plumber or plumbers assistant. Some individuals, including covert union applicants, were hired "on the spot" without prior review of any application forms.

For instance, union organizer Neal delivered his job application with the batch of applications on March 28. As previously stated, Masiongale admits to having disregarded these applications immediately upon receipt. Neal, however, called the Respondent on April 15 to inquire about his application. The Respondent's receptionist took his name and number, informing him that he would have to talk to the owner. That evening, Respondent's superintendent, Michael Woods, left a voice message for Neal. Neal phoned Woods on April 17. Neal told Woods that he had a plumber license and prior related experience. Woods offered Neal a job at \$14 per hour and told him to report on Monday morning at a particular jobsite.

Later that evening, Neal called Woods to inform him that he had a friend, Anthony Bane, who also had a

Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

⁴ Unless otherwise noted, dates are in 1997.

⁵ There is no dispute that during the relevant time period the Respondent filled in excess of 20 plumber positions.

⁶ We note that the Respondent relied on its 30-day rule only in defense of its failure to hire or consider for hire the 13 union applicants whose applications were filed on March 28, 1997.

plumber's license and was interested in working. Woods said that Bane should call him, which Bane did. During this phone conversation, they agreed that Bane would also be hired at \$14 per hour and should report to work at the jobsite with Neal the following Monday. Although both men were asked to provide their driver's license numbers for background checks, neither submitted a written job application before being hired. The only application on file for Neal was the so-called "stale" application completed in January and submitted in March. Neither applicant revealed his union affiliation during this application process. In sum, Respondent hired Bane without first requiring him to fill out any forms, and it hired Neal either without requiring an application or by relying on the "stale" application Masiongale claims to have disregarded. In any case, Respondent's actions clearly undercut its articulated defense of reliance on a neutral practice of requiring "fresh" applications in order to hire plumbers.⁷

Similarly, when covert union organizers Jeffrey Jehl and Gary Gravit had earlier applied for work in December 1996, they were both hired without benefit of any prior review of written applications. Although Gravit was given a job application to take with him and fill out, he was hired by phone prior to submitting it. Despite having no plumbing license, Jehl was hired on the spot when Gravit brought him to the jobsite unannounced on his first day of work. The record therefore indicates that the Respondent did not rely on written application forms—whether "fresh" or "stale"—when making hiring decisions concerning these applicants who had not made their union affiliations known to the Respondent.

We note further that the Respondent did not offer any affirmative evidence to demonstrate it relied on a "staleness" criteria to reject any applicants other than the overt union applicants in question. Therefore, we affirm the judge's credibility-based finding that the Respondent's reliance on a so-called "30-day rule" was a post hoc, pretextual justification for its refusal to hire any union applicants.

The Respondent's claim that it failed to hire another seven union applicants because of a rule disqualifying persons with a history of higher wages is similarly un-

founded. The record indicates the Respondent did hire nonunion applicants who had similarly high wage histories during the relevant time period.⁸ Furthermore, the version of the application form used by four discriminatees who applied for work with the Respondent in August did not even request wage history information, and it was not volunteered by the discriminatees.

In short, we disagree with the dissent's premise that the Respondent has met its *Wright Line* burden of showing that, notwithstanding its manifest union animus, its rejection of the 20 union-affiliated job applicants was based on valid, neutrally-applied hiring criteria. There is no need here to contest the dissent's discussion of the general legitimacy of a 30-day rule or a wage history rule in the construction industry. The question is not whether the Respondent showed that it *could* have lawfully failed to hire or consider for hire these union applicants, but rather whether the Respondent showed it *would* have done so in the absence of the protected activity. See, e.g., *Filene's Basement Store*, 299 NLRB 183, 185 (1990). In the circumstances of this case, we agree with the judge that the Respondent's alleged legitimate reasons for failing to hire or consider the union applicants were pretextual.

Indeed, we find that the Respondent's own evidence tends to prove rather than disprove the complaint's theory of discriminatory antiunion motivation. As previously stated, the Respondent's hiring records disclose instances in which it hired apparent nonunion applicants without regard for the alleged hiring criteria. We are not persuaded by our dissenting colleague's attempts to explain or minimize these deviations, but that matters little in the ultimate analysis. The Respondent's evidence still *does not show even a single instance* when it failed to hire an apparent nonunion applicant for any reason. Conversely, this evidence shows only that it failed to hire known union applicants. Furthermore, the Respondent's unlawful imposition of additional hiring criteria when it learned that it had unwittingly hired covert union applicants Neal and Bane underscored the extent of its willingness to invent or distort hiring criteria in order to avoid hiring union members. Far from proving reliance on legitimate, nondiscriminatory criteria in its hiring practices, the Respondent has really demonstrated only that it has refused to hire any known union applicants. We therefore affirm the judge's findings that the Re-

⁷ Although the Respondent required both Neal and Bane to fill out application forms when they reported for work on April 21, the hiring decisions were made prior to any evaluation by the Respondent of these "fresh" applications. Both Neal and Bane were unlawfully terminated by the Respondent after being subjected to a series of independent 8(a)(1) violations, subsequent to the Respondent learning that they were both union organizers. *Masiongale Electrical-Mechanical*, 331 NLRB 534 (2000). These violations included the imposition of new hiring policies requiring Neal and Bane to submit to background checks and to interviews with a private investigator.

⁸ For example, the job applications of hired plumbers John Seering and Brett Williams show that they earned \$24.50 and \$23 per hour, respectively, on prior jobs. The job applications of at least six other applicants hired by the Respondent contained wage histories that included wages in the \$16–17 per hour range. These also exceed the Respondent's purported maximum range of \$13–15 per hour.

spondent's refusal to hire and to consider the 20 overt union member applicants violated Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified and set forth in full below, and orders that the Respondent, Masiongale Electrical-Mechanical, Inc., Muncie, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire applicants and to consider them for hire because of their union affiliation;

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

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

(a) Within 14 days from the date of this Order, offer William Rogers, Christine Britton, Geoff Paluzzi, Rodney Boyle, Mark Darnell, Charles Atkinson, Jeryl Cooke, Edward Meinzen, Merlin Rice, Charles Gates, Joseph Beatson, James Poulson, Roger Hodson, Bruce Morehouse, Duane Harty, Michael Bowen, Denny Smith, William Fortwengler, James Salmon, and Stacey Stockton, instatement 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 to which they would have been entitled if the Respondent had not discriminated against them.

(b) Make the above-named discriminatees whole for any loss of pay and benefits they may have suffered as a result of the discrimination against them, to be computed in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire and consider for hire the above-named discriminatees and, within 3 days thereafter notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

(d) Within 14 days from the date of this Order, notify the above-named discriminatees in writing that any future job application will be considered in a nondiscriminatory way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, 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 determine the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Muncie, Indiana, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 16, 1996.

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

CHAIRMAN HURTGEN, dissenting.

Contrary to my colleagues and the judge, I find that the General Counsel has not met his burden of establishing either that the Respondent unlawfully failed to consider or to hire the 20 alleged discriminatees. Specifically, I find that the General Counsel failed to overcome the Respondent's rebuttal showing that it did not consider or hire the 20 applicants because their applications were "stale" or because of their high wage-rate history. Accordingly, I would dismiss these Section 8(a)(3) allegations.

It is well settled that an employer does not violate the Act where it rejects applicants for employment based on facially valid and evenly applied hiring criteria. Among such lawful criteria are limitations on the period during which applications will be considered. For example, the Board has held that an employer may lawfully maintain and apply a rule that applications for employment will remain active for only 30 days. See, e.g., *Eckert Fire Protection*, 332 NLRB 198, 199 (2000). The rationale behind such a rule is that employees in the construction

⁹ 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."

industries are an often-transient group who will seek work wherever it may exist. “They frequently move from job to job, applying even out of their home states, and accept jobs without notice to the employers to whom they may have applied.” *Id.* at 218. This makes it inefficient and impractical for employers to consider stale applications. This was recognized by the Sixth Circuit in *NLRB v. Windemuller Electric*, 34 F.3d 384 (6th Cir. 1994), which noted that applications to construction site jobs that were about 3 months old, were “hoary with age” by industry standards, and it was unlikely that such stale applicants would seriously be considered where the applicants had not contacted the employer since filing.

Similarly, the Board has found that an employer does not violate the Act when it rejects applicants because the wage rates previously earned by those applicants exceed that which the employer is offering. *Wireways, Inc.*, 309 NLRB 245, 246 (1992); *Northside Electrical Contractors*, 331 NLRB 1564 fn. 2 (2000). The rationale behind a wage-history policy is that it prevents employee turnover. As recognized in *Wireways*, if an employer “offered an employee a job at less wages than the employee was accustomed to receiving, the employee would either be less productive or would leave for the first job paying more.” *Id.* at 250. Similarly, the wage policy reduces the time an employer need spend in negotiating with employees over wage rates. *Id.*; See *Clock Electric, Inc. v. NLRB*, 162 F.3d 907, 915 (6th Cir. 1998), where applicant Gelski was hired rather than higher wage earners with whom the employer would have had to negotiate downward. (“It was evident from the face of Gelski’s application that expenditures of time or resources on starting wage negotiations would be unnecessary.”)

Such 30-day application cutoffs and wage-history policies have been found to justify a refusal to consider or hire applicants who do not satisfy these criteria, absent evidence that the criteria have been discriminatorily motivated or disparately applied in order to avoid hiring union applicants. Here, in defense to the complaint allegations, the Respondent has shown that its failure to consider or hire the 20 alleged discriminatees was based on their failure to meet Respondent’s hiring criteria. The General Counsel failed to establish that no such criteria existed, or that the criteria were disparately applied.

1. 30-day rule

At all relevant times, the Respondent’s preprinted application form clearly stated that applications for employment would be considered current for only 30 days.¹

¹ The Respondent’s application forms—which otherwise appeared to be generic, preprinted forms, contained specific Masiongale hiring provisions. Included in Masiongale’s hiring provisions—which were

The record clearly establishes that the applications of 13 of the alleged discriminatees were untimely under the express terms on the application form.² Thus, the 13 each completed an application form in early January 1997 and tendered the form to the Union. The Union then dropped off this batch of 13 applications at the Respondent’s office on March 28, 1997, well after the 30-day period specified on the application form. The Respondent testified, without contradiction, that it placed these “stale” applications in its inactive files.³

Although the judge rejected the Respondent’s “stale” application defense, he pointed to no evidence—nor, indeed, any claim by the General Counsel—that the 30-day rule was discriminatorily adopted or disparately enforced. Rather, the judge rejected the 30-day rule solely on the basis that it was a “belated defense . . . never mentioned to the employees when they filed their application . . . or anytime thereafter.” I find no factual or legal support for this conclusion. First, these applicants never presented themselves to the Respondent when submitting their applications. Rather, the Union merely dropped off their applications in a batch, long after the forms were completed. In these circumstances, I find that the failure of the Respondent to personally notify these 13 individuals, with whom it had never had contact, does not undermine its defense. See, e.g. *NLRB v. Windemuller Electric*, *supra* at 34 F.3d 388 (“unlikely [employer] would seriously consider applications . . . where the applicants had not contacted the Company since filing.”) Further, as a legal matter, the failure of the Respondent to notify the 13 that their applications were untimely would support a violation if the Respondent acted disparately, i.e., informed nonunion applicants when their applications were “stale,” while not notifying the union applicants. There was neither claim nor evidence of such disparate treatment.

The majority attempts to treat the judge’s unsupported rationale as a “credibility finding.” It is nothing of the sort. There was a 30-day rule, and these applicants failed to meet it. The relevant inquiry is whether the Respon-

set forth in clear, legible print, distinct from the rest of the application form, was the provision that applications would be considered current for 30 days. Further, these Masiongale hiring regulations—including the 30-day provision—were inserted immediately above the space on the application where applicants were required to sign the form.

² These were the applications of Charles Atkinson, Joseph Beatson, Michael Bowen, Rodney Boyle, Jeryl Cooke, Mark Darnell, Charles Gates, Duane Hart, Roger Hodson, Edward Meinzen, Bruce Mourhouse, James Poulson, and Merlin Rice.

³ These applications were “stale” because more than 30 days had elapsed from the time that they were filled out by the applicant. That is, the time of “filling out” (rather than the time of deposit with the employer) is critical, for that former time is the time that the applicant manifests his interest in employment.

dent, as it claims, uniformly applied its 30-day rule to all applicants, union and nonunion alike. If it did, then the 8(a)(3) violations as to the 13 will fail. Thus, having raised and established this defense—which is amply supported by the literal language of the application form itself—the burden then shifted to the General Counsel to establish that there was no 30-day rule, that it was disparately applied, or that nonunion applicants (unlike the discriminatees) were informed when their forms became outdated. No such evidence was introduced. Having failed in this burden, I find that the 8(a)(3) violations cannot stand as to these 13 alleged discriminatees.

My colleagues' seek to undermine the efficacy of the Respondent's 30-day rule by arguing that the Respondent hired some individuals before it received their written applications. Although my colleagues do not identify the individuals for whom they make this claim, I shall assume that they are referring to the few applicants who testified that they: contacted the Respondent about obtaining work; were told to come in; and thereafter submitted written applications. Even assuming that this occurred, I fail to see its relevance to the 30-day rule.

In this regard, I wish to make two points. First, as testified to by Respondent owner Masiongale, in the construction industry, applications that are even 30 days old are considered stale. In order to avoid the wasted time and effort of contacting many applicants who are no longer available or interested in employment, the Respondent does not consider applications that are more than 30 days old.⁴ Certainly, this "staleness" concern is not implicated where the applicant personally initiates the contact with the Respondent and is promptly invited to come in for work. Indeed, in that case the applicant's interest and availability is anything but stale.

Second, the fact that a few applicants filled out the application forms *after* purporting to obtain job offers from the Respondent does nothing to undermine the 30-day rule. At issue is whether stale applications are considered. As discussed above, these few applicants had indicated a present desire for work. A written application was required, and this requirement was met.

In sum, where an applicant personally indicates a present intention to work, the Respondent need not be concerned about whether there is an interest at that time. However, where, as here, the Union submits stale applications, the Respondent is legitimately concerned about whether there is a current interest on the part of the applicant.

⁴ See also *Eckert Fire Protection*, supra, where "Respondents had a policy that they would not consider job applications over 30 days on the ground that they were not 'fresh'."

2. Wage history rule

Similarly, I find that the 8(a)(3) allegations fail as to the remaining seven applicants⁵ who, the Respondent claims, were not considered or hired because their applications disclosed that, in their most recent employment, that they were paid wages far in excess of the \$13 to \$15 per hour that the Respondent was offering. Again, the General Counsel did not carry his burden of rebutting this meritorious defense. The Respondent's owner, Ken Masiongale, testified that he did not hire the seven because of their high wage rates. This testimony was not contradicted or discredited. Indeed, the record demonstrates that these seven alleged discriminatees had listed, on their applications, that they were most recently employed at wage rates in the range of \$21 to \$24 or more per hour, or with known union contractors. The Respondent also provided uncontradicted evidence that the wage rate under such union contractors is in the \$20 per hour range, far in excess of the \$13 to \$15 per hour that the Respondent was offering. Based on this showing, the burden shifted to the General Counsel to show that the Respondent either had no such wage-rate policy, or that such policy was disparately enforced. Contrary to my colleagues, I find that the General Counsel did not make that showing.

Rather, the applications of more than 50 individuals hired by the Respondent during the period of January 1995 to August 1998 show, with minimal exception (discussed below), that the Respondent did not hire individuals who were paid significantly more than the Respondent was offering. My colleagues' attempts to establish the contrary are unpersuasive. Thus, to the extent they rely on evidence that six employees employed in the 1995–1998 period had previously earned salaries in the \$16–\$17 range, they fail to acknowledge several relevant facts: (1) one of the six had not been paid this higher rate in his most recent employment (Edward Keiser); (2) two additional applicants were employed as "crew leaders," presumably with a higher rate reflecting that particular position (Damon Muncie, Matthew Shue); and (3) as to all six, the wage differential between their previous employment and the \$13–\$15 range offered by the Respondent is substantially less than the difference between the alleged discriminatees' most recent \$21–\$24 wage history and the wages offered by the Respondent.⁶ And, as

⁵ These alleged discriminatees are Christine Britton, William Fortwengler, Geoffrey Paluzzi, William Rogers, James Salmon, Denny Smith, and Stacey Stockton.

⁶ In this regard, while a \$17 wage rate is 13 percent higher than a \$15 rate, applicants who previously earned \$21 to \$24 per hour were accustomed to salaries 40 to 60 percent higher than the top rate being

to the 2 hires out of more than 50 who the majority claims had wage histories comparable to the seven alleged discriminatees, one received that higher rate on an earlier job (i.e., not his most recent job). Thus, boiled down to its essence, my colleagues point to one instance where an individual was hired, in a three and one-half year period, as establishing that either the Respondent did not have a wage history policy or that it disparately enforced it. I disagree. This singular aberration—which, interestingly, resulted in the hire of an applicant with a recent history of working on union jobs, is insufficient to undercut the Respondent’s defense.

3. Final assault on Respondent’s defense

My colleagues’ final assault on the Respondent’s defense that it lawfully did not hire the 20 alleged discriminatees because their applications were stale and/or because of their high wage history is to claim that there must be a violation because the Respondent failed to present evidence that it rejected nonunion applicants on these bases. I reject this argument. Once the General Counsel meets his initial burden under *FES* in a refusal-to-hire case, the burden shifts to the respondent to show that it would have made the same hiring decisions even in the absence of the alleged discriminatees’ union activities. Here I find that the Respondent clearly met its rebuttal burden. It established that it had the above-described hiring criteria, that the 20 alleged discriminatees did not satisfy it, and that those it hired *did* meet the criteria.

My colleagues state the Respondent failed to show that it did not hire any nonunion applicant for any reason. However, Respondent cannot be faulted for failing to prove a negative. Respondent affirmatively showed that those whom it *did* hire did meet the criteria, and that the 20 alleged discriminatees did not.

Accordingly, I find that the allegations of refusal to consider and hire violations have not been established as to these seven alleged discriminatees.

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 National Labor Relations Act gives employees these rights.

offered by the Respondent. Contrary to my colleagues, I view this differential as substantial and significant.

- 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 refuse to hire and consider for hire applicants on the basis of their union affiliation.

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 from the date of this Order, offer William Rogers, Christine Britton, Geoff Paluzzi, Rodney Boyle, Mark Darnell, Charles Atkinson, Jeryl Cooke, Edward Meinzen, Merlin Rice, Charles Gates, Joseph Beatson, James Poulson, Roger Hodson, Bruce Morehouse, Duane Harty, Michael Bowen, Denny Smith, William Fortwengler, James Salmon, and Stacey Stockton, employment 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 to which they would have been entitled if we had not discriminated against them.

WE WILL make whole the applicants listed above, with interest, for any loss of pay and benefits they may have suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of the Board’s Order, remove from our files any reference to the unlawful refusal to hire and consider for hire the applicants listed above, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

WE WILL also notify the applicants listed above in writing that any future job application filed by any of them will be considered in a nondiscriminatory way.

MASIONGALE ELECTRICAL-MECHANICAL INC.

Steve Robles, Esq., for the General Counsel.
S. Douglas Trolson, Esq. and *Malcom M. Metzler, Esq.*, for the Respondent-Employer.
Anthony W. Bane, Jeffrey E. Jehl, and Jack Neal Jr., for the Charging Party.

SUPPLEMENTAL DECISION AND ORDER

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me in Muncie, Indiana, on August 24, 25, and 26, 1998, pursuant to a consolidated complaint and notice

of hearing (the complaint) issued by the Regional Director for Region 25 of the National Labor Relations Board (the Board) on January 30, 1998. The complaint, based upon a charge filed on December 23, 1996 in Case 25-CA-25119, and a charge filed on March 17, 1997¹ in Case 25-CA-25246, by the Indiana State Pipe Trades Association and United Association Local 172, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (Local 172 or Union), and an original charge filed on June 18, in Case 25-CA-25446 and amended on January 28, 1998, by the Indiana State Pipe Trades Association and United Association Local 661 a/w United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (Local 661 or Union), and a charge in Case 25-CA-25731 filed on November 7, by Local 661, alleges that Maisongale Electrical-Mechanical Inc. (Respondent or Employer) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent, in its answer to the complaint, denied that it violated the Act as alleged. On January 15, 1999, I issued a decision finding that Respondent discriminatorily discharged two employees, refused to hire or consider for hire 20 applicants for employment, refused to reinstate an employee to his former position of employment, and engaged in numerous independent violations of Section 8(a)(1) of the Act. On June 30, 2000, the Board affirmed my decision insofar as it concerned the discharge of the two employees, the refusal to reinstate an employee to his former position and the independent violations of Section 8(a)(1) of the Act. See, *Maisongale Electrical-Mechanical, Inc.*, 331 NLRB 534 (2000). As it concerns the allegation that the Respondent violated Section 8(a)(1) and (3) of the Act by refusing to employ or consider for hire 20 union plumber applicants, the Board decided to remand this issue for further consideration in light of its May 11, 2000 decision in *FES*, 331 NLRB 9 (2000), setting forth the framework for analysis of refusal-to-hire and refusal-to-consider violations. On July 7, 2000, I issued an Order to Show Cause to the parties for the purpose of determining whether the record is sufficient to decide the issues presented in light of the Board's remand. By supplemental brief dated August 3, 2000, the General Counsel stated that the record is more than sufficient to support a violation with regard to the 20 union applicants and there is no need, for further submission of evidence or a reconvened hearing. In a reply dated August 3, 2000, the Respondent asserted that the General Counsel has not met its burden of proof as to the applicants who would have been hired by Respondent. The Respondent, however, did not indicate that the state of the record was insufficient in any way to issue a supplemental decision nor did it argue that it was necessary to reopen the record to obtain additional evidence to decide the case under the *FES* framework.

Under these circumstances, I have determined that the current state of the record is sufficient to issue a supplemental decision in this matter.

¹ All dates are in 1997, unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation that performs electrical, HVAC,² and plumbing services in the construction industry, with an office and place of business in Muncie, Indiana, where it annually purchased and received goods and materials at its facility in excess of \$50,000 directly from points outside the State of Indiana. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 172 and 661 are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The Respondent is a nonunion electrical and plumbing contractor, which has operated in the Greater Muncie area for approximately 13 years. It is principally owned and run by Ken Maisongale, the Respondent's president. The office staff is comprised of four clericals including Karen Nottingham, who is responsible for job applications and scheduling interviews for employment. Superintendent John Blevins coordinates work responsibilities from the office while Ron Curd and Michael Woods serve as job 'superintendents in the field. Mike Maisongale, the owner's son, also serves as a supervisor for the Employer. Commencing in December 1996 and continuing on a regular basis through September 1997, the Respondent placed advertisements in a number of local newspapers seeking to hire journeymen plumbers and/or licensed apprentices to man its jobsites including the Springlake Apartment project in Mishawaka, Indiana, and the Bayshore jobsite in Greenwood, Indiana (GC Exhs. 2(a)-2(1)). Most of the ads required an applicant to apply in person but some listed a toll-free telephone number for inquiries.

1. The overt union member applicants

The above ads prompted a great deal of interest and the business agents for Locals 172 and 661, suggested that unemployed union plumbers submit applications to Respondent. A number of union members individually contacted the Respondent and obtained blank job applications. These applications were given to the respective business agents and were reproduced for distribution to interested members. In conjunction with the first three union members who applied and did not conceal their union affiliation, the Union engaged in informational picketing at the Springlake Apartment project around December 16, 1996. The picket signs apprised the public that the Respondent did not pay prevailing or area standard wages. Christine Britton wore a union jacket when she applied at the Springlake Apartment project in mid-December 1996. She showed her plumber's license to the job superintendent and they discussed prior job experience. Britton submitted her job application to the superintendent, who she later learned was named "Ron,"

² HVAC work is the installation of heating and air-conditioning systems, including furnaces, air conditioning compressors, and the related ductwork.

with the statement "Voluntary Union Organizer" across the top. Geoff Paluzzi obtained a copy of Respondent's job application from the business agent of Local 172 and went to the Springlake Apartment project on December 16, 1996, to submit it. He introduced himself to the job superintendent, who reviewed his application and commented that he had a good amount of experience in the plumbing trade and his prior work showed stability. Paluzzi apprised the superintendent that he previously was a foreman, a steward and a voluntary union organizer. Indeed, like Britton, Paluzzi included the phrase "Voluntary Union Organizer" on the top of his application. The superintendent told Paluzzi that he would hear something in a couple of days. William Rogers filled out a job application at the union hall and included the phrase "Voluntary Union Organizer" across the top. He took the completed application to the Springlake Apartment project on December 16, 1996, and observed a number of pickets patrolling in front of the complex. He introduced himself to the job superintendent while wearing a union jacket with insignia. The superintendent briefly looked over the application, said that the Respondent needed plumbers and after Rogers showed him his plumber's license, informed Rogers he would get back to him.

None of these individuals were ever contacted by the Springlake Apartment superintendent or any one else at the Respondent.

Since February 26, 13 unemployed union members with valid plumbing licenses submitted job applications to Respondent.³ Each of the applications included the phrase "Voluntary Union Organizer" across the top. Although the Bayshore jobsite was operational from January 1997 to July 1998, the Respondent did not hire any of the 13 union members that applied for plumber positions.

On August 22, union organizer Anthony Bane met with unemployed plumbers Denny Smith, William Fortwengler, James Salmon, and Stacey Stockton⁴ at the Pizza Hut restaurant to brief them on how to apply to nonunion employers. Bane distributed union T-shirts and hats to the employees and suggested that they insert on the top of any application submitted "Voluntary Union Organizer." The group proceeded to the Respondent's facility and requested job applications from the receptionist. Each of the employees wore a union T-shirt and inserted the phrase "Voluntary Union Organizer" on the top of their applications. While the employees were filling out their job applications, Bane asked the receptionist for a list of the Respondent's plumbers and their license numbers. The receptionist left the office area and returned with Superintendent Blevins who apprised Bane that he did not need to show him such a list. Bane replied that there is a law to this effect. While this conversation was taking place, Office Manager Karen Nottingham came in the front door and asked Bane why he was at the office. Bane said, "that the employees were filling out job

applications." He also asked Nottingham for a list of Respondent's plumber license numbers. Nottingham said, "Oh, I know you" and said she was unaware of any law requiring that a list be provided. The employees submitted their applications to the receptionist and each received a Xerox copy for their records. None of these employees was ever called or hired by Respondent for a plumber position.

2. The hiring of covert union members Gary Gravit and Jeffrey Jehl

In December 1996, Gary Gravit became aware of job opportunities at the Respondent's Springlake Apartment project, and went to the jobsite to apply for a plumber position. He introduced himself to Superintendent Ron Curd and discussed his qualifications. Curd gave Gravit a job application that he took to the union hall and made copies. Curd telephoned Gravit to offer him a position and inquired if he knew any additional plumbers. It was agreed that Gravit would start work on December 16, 1996, at the Springlake Apartment project.

Gravit met union organizer Jeffrey Jehl on December 16, 1996, around 6 a.m. at a local gas station, and Jehl apprised Gravit about the duties of a voluntary union organizer. He stressed that Gravit should do excellent work but that he should try and talk to employees about the Union before and after work and while on break.

Gravit and Jehl crossed the union informational picket line when they reported to the jobsite the morning of December 16, 1996. Gravit introduced Jehl to Curd and informed him that Jehl did not have a plumber's license but that he was an experienced plumber and could do a good job. Curd said, "if you know how to do plumbing work, it will be fine." Gravit handed his job application to Curd while Jehl filled out his application. Neither employee revealed their union affiliation or put anything in the job application to identify them as union members. Curd asked Jehl about his previous wage history and stated he could pay \$13 per hour. Jehl accepted the offer and was hired on the spot.

3. The events that occurred before Gravit and Jehl revealed their union affiliation

Gravit was assigned to do journeyman plumbing work while Jehl worked as a plumber's helper backfilling excavation where piping had already been installed. Around 9:30 a.m., Gravit and Jehl observed two individuals with union insignia hand papers to Curd while they briefly conversed. A short time later, Curd approached Gravit and Jehl, and asked whether either of them knew the union men who were just here. Gravit said, "he knew one of the employees." Curd briefly walked away but then returned and said, "have either of you been a member of the union before?" Gravit said, "he worked permit a couple of times in the past few years." Jehl said, "he was never a member of Local 172." Both employees finished work that day without further incident.

4. The events that occurred after Gravit and Jehl revealed their union affiliation

The next day Gravit and Jehl arrived at work around 6:40 a.m., and immediately began distributing union literature and meeting with employees about the Union. Jehl wore a white

³ The employees are Rodney Boyle, Mark Darnell, Charles Atkinson, Jeryl Cooke, Edward Meinzen, Merlin Rice, Charles Gates, Joseph Beatson, James Poulson, Roger Hodson, Bruce Morehouse, Duane Harty, and Michael Bowen.

⁴ Stockton filed an earlier application with Respondent on May 23, and noted this on his August 22 job application.

union organizer jacket while Gravit wore a Local 172, baseball cap. Curd arrived about 10 minutes later, and Jehl apprised him that he was a union organizer. Curd replied, "that he figured yesterday that they were union members since he only gave an application to Gravit that was allowed off site and the two union guys had job applications." He also said, "If Masiongale has to pay union wages they might as well pull off the job, they would go broke and might as well close up."

5. The hiring of covert union members Jack Neal Jr. and Anthony Bane

Local 661 Business Agent Jack Neal Jr., saw one of Respondent's newspaper advertisements in early January 1997. He went to Respondent's office, spoke with Nottingham and picked up a job application. He took the job application back to the union hall and made a number of copies that he distributed to unemployed union members. Indeed, he personally observed a number of union members' sign their job applications (GC Exhs. 14-21). Shortly thereafter, Neal saw another of Respondent's ads in the Muncie newspaper and telephoned the facility. He spoke with Ken Masiongale who inquired whether he had a plumber's license and encouraged him to get a job application. Neal went to the facility on January 26, and picked up another job application that he took with him.

On March 28, Neal personally delivered his employment application to Respondent's receptionist along with a number of job applications that had been completed by unemployed union members (GC Exhs. 7-21 and R. Exh. 2). On April 15, Neal telephoned Respondent's office regarding his job application and spoke with Nottingham, who informed him that he would have to speak with Masiongale. Neal left his name and telephone number. On the evening of April 15, Superintendent Michael Woods left a message on Neal's answering machine. Neal telephoned Respondent's office the next day and was given Wood's cellular telephone number at the Bayshore jobsite. On April 17, Neal reached Woods at the jobsite and informed him he had a plumber's license and prior experience working on apartment projects. Woods offered Neal \$14 an hour and told him he would see him the following Monday at the Bayshore jobsite to commence work. Later that evening, Neal called Woods to let him know that he had a friend named Anthony Bane who also had a plumber's license and was interested in working. Woods requested Neal to have Bane telephone him at the jobsite. Woods also requested Neal's driver's license number to do a background check and said he would see Neal on the jobsite next Monday unless he heard from him before that time.

On April 17, Bane telephoned Woods and informed him he possessed a plumber's license and had prior residential and piping experience. Woods requested Bane's driver's license number and during the conversation it was agreed that Bane, like Neal, would be hired at \$14 an hour. Woods told Bane to show up at the jobsite the following Monday unless he heard from him to the contrary. Neither Bane nor Neal made any reference to their union affiliation during the initial hiring discussions with Woods.

On April 21, Neal and Bane met for breakfast before proceeding to the Bayshore jobsite. Woods requested that both

employees fill out job applications along with other paperwork (GC Exhs. 23 and 24). During initial discussions while filling out the job applications, Woods informed Neal and Bane that he needed plumbers as the job was expected to last 18 months. Woods made a telephone call to the office to inform them that the two new plumbers were filling out their paperwork and then would be assigned to Foreman Mike Dalton to commence work. Although Bane included the fact that he attended the union apprenticeship program on his application, Woods did not review the applications before instructing Neal and Bane to report to Dalton.

6. The events that occurred after Neal and Bane revealed their union affiliation

Before Neal and Bane left the trailer to report to Dalton, Bane informed Woods that they were union organizers. Bane testified that Wood's demeanor changed dramatically after he apprised him that they were union organizers. In fact, Woods slammed both hands down and started out the door. He said, "I want you to sit in your truck until Mike Masiongale comes to the jobsite." Neal and Bane left the trailer but were able to see Woods make a telephone call. Shortly thereafter, Woods came out to the truck and told Neal and Bane that the Respondent had a standard hiring procedure that involved a private detective before people were hired. Bane said, you previously told me that everything was fine and if I did not hear from you by Friday, to report to work. Neal said, you did mention a driver license check but never mentioned anything else. Woods replied, "Well, that is just part of it." As they were leaving the jobsite, Bane told Wood's that they were there to do a good job. Woods said, "no you didn't, you are here to screw up my operation."

Bane, upon returning home on April 21, retrieved a message from his answering machine and telephoned Nottingham at Respondent's facility. Nottingham told Bane that he needed to fill out a release for the private detective background check. It was agreed that the forms would be faxed to Bane who completed and signed the release and faxed it back to Nottingham. A meeting with the private detective was scheduled which Bane was forced to cancel because of a prior commitment. A second appointment was scheduled but Nottingham cancelled it and Bane never heard anything else regarding the background check or a date to resume work at Respondent.

Neal also received a message from Nottingham to sign a release for a background check. He went the next day to Respondent's office and signed the release. Shortly thereafter, Neal met with private detective Bing Crosby for approximately thirty minutes. During the meeting, Crosby asked Neal about his union background and affiliation. Neal did not hear anything for about 3 weeks so he telephoned Respondent's office on May 21, and spoke with Nottingham. Neal inquired about the status of his application and Nottingham said, "I thought you did not want a job." Neal replied that he wanted a job and Nottingham said that if you were still interested, Superintendent John Blevins would be contacting you. On May 22, Neal spoke with Blevins who requested that he come to the office on May 27. Neal reported to Respondent's facility on May 27, and wore a union T-shirt. Blevins requested Neal to fill out additional paperwork and offered him \$13 an hour. Neal apprised

Blevins that Woods had previously hired him at \$14 an hour. Neal was directed to watch a safety film and then was introduced to Masiongale who told him he did not like his union shirt. Blevins told Neal he would not be returning to the Bay-shore jobsite but would be working out of the shop putting together shower faucet heads. Neal was directed to the storage garage and was told he would be working in this area. Blevins had one of his men come to the garage with a tow motor to clear out a space for Neal to work in. Since there was no work-station or benches in the garage, Neal obtained several saw-horses and some plywood to make a suitable workbench to perform his assignment. Neal was unable to locate any shower faucets and apprised Blevins of this fact. Blevins promised to order some but instructed Neal to cut copper pipe. Neal asked Blevins the proper dimensions for the copper pipe and Blevins promised to get back to him. After Blevins provided the required dimensions, Neal began to cut the copper pipe as instructed. Shortly thereafter, Masiongale and Blevins approached Neal in the garage. Masiongale told Neal, "that he did not want him talking about the union to his employees, handing out literature, and did not want him to talk to his employees about the union on the job, in his office or on his property." He also said, "that he did not want the Union, they messed with me before." After Masiongale left the garage, Neal told Blevins that Masiongale did not have the right to talk to him like that. Therefore, he was going on strike. He picked up his tools and left the facility. Neal returned to the facility the next day and as the door was open observed that the garage was again being used as a storage facility. Neal also observed that no one was working in the garage. Thereafter, Neal attempted to telephone Blevins and Woods but Respondent never returned any of his calls.

A. Analysis and Findings

1. The refusal to hire the employees listed in paragraphs 6(a), (f), and (j) of the complaint⁵

In *Wright Line*, 251 NLRB 1083 (1990), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding discrimination cases turning on employer motivation. The General Counsel must persuasively establish that the evidence supports an inference that protected conduct was a motivating factor in the employer's decision.⁶ In *FES*, the Board held that in order to establish a discriminatory refusal to hire violation, the General Counsel must show (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicant 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 require-

⁵ The employees are William Rogers, Christine Brittan, Geoff Paluzzi, Rodney Boyle, Mark Darnell, Charles Atkinson, Jeryl Cooke, Edward Meinzen, Merlin Rice, Charles Gates, Joseph Beatson, James Poulson, Roger Hodson, Bruce Morehouse, Duane Harty, Michael Bowen, Denny Smith, William Fortwengler, James Salmon, and Stacey Stockton.

⁶ *Manno Electric*, 321 NLRB 278 fn. 12 (1996).

ments 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. In a refusal to consider case, the Board in *FES* held that the General Counsel must establish (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once the General Counsel has established these two elements, the burden shifts to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

2. Respondent's knowledge of the applicants' union affiliation and its related union animus

The Respondent does not deny that it received the employment applications listed in paragraphs 6 (a), (f), and (j), with the exception of Rogers and Paluzzi's applications. Likewise, there is no challenge to the fact that all were union members, and that none were hired. In regard to the Rogers and Paluzzi's applications, both employees credibly testified that they went to the Springlake Apartment project on December 16, 1996, and personally submitted their application to the superintendent in charge. Each employee wrote "Voluntary Union Organizer" on the top of the application and described the physical characteristics of the superintendent they spoke with which corresponds with other witnesses description of Ron Curd. Moreover, Gravit credibly testified that he saw Paluzzi on that date in the late afternoon talking to Curd, and both Gravit and Jehl testified that they observed two individuals with union insignia talk to Curd on that date and hand him papers. Curd did not testify during the course of the hearing. Accordingly, I credit the un-rebutted testimony of Rogers and Paluzzi that they submitted their job applications to Curd. Likewise, this was about the same time that Christine Britton submitted her application to Superintendent Curd, which the Respondent acknowledges receiving. Based on the credible evidence presented, I conclude that Rogers and Paluzzi filed applications with Curd and hold the Respondent accountable for their receipt.

The evidence establishes that the entries on all of the respective application forms sufficiently notified the Respondent that the applicants belonged to the Union. In this regard, all of the employees listed former union employers and each wrote across the top of the application the phrase "Voluntary Union Organizer." In addition, a number of the employees wore union insignia when making their applications, which served to alert the Respondent that they were union members. Likewise, with respect to the applicants that filed applications at Respondent's facility on August 22, Masiongale testified that he knew the applicants previously worked for union employers as he recognized the contractors listed in the applications.

Credible evidence also exists of antiunion animus. As previously found, Respondent representatives Curd, Woods, Blevins, and Masiongale engaged in numerous acts of independent Section 8(a)(1) conduct during the period between December 16, 1996, and May 27. Likewise, Respondent rejected all of the overt applications that were submitted and did not grant interviews to these individuals. On the other hand, Respondent considered the covert applications of employees Gravit, Jehl,

Neal, and Bane, granted interviews to each and hired all of them. It is also noted that Gravitt and Jehl were hired even though they did not possess plumbing licenses unlike Britton, Paluzzi, and Rogers who were much more experienced and possessed valid plumbing licenses.

Accordingly, I find that the General Counsel has satisfied its initial burden of persuasively establishing that the alleged discriminatees were not hired because of their union membership. The Respondent must now establish that its hiring decisions would have been the same in the absence of union membership.

3. The Respondent's defenses

The Respondent asserts that its hiring decisions were based on lawful criteria including, among other things, skill, experience, employment history, appearance and earning history. Applying these criteria, the Respondent contends that it hired the best people available. In this regard, Masiongale acknowledges that he received and reviewed the applications of the union applicants that were brought to the office on March 28 (GC Exhs. 7-21), but rejected all of them because they were not considered current. Since the applications were all signed and dated in January 1997, and the body of the application states that they would be current for only 30 days, all the applications were placed in the noncurrent file and were not considered.

Concerning the job applications that were filed in the office on August 22 (GC Exhs. 3-6), Masiongale testified that they were not considered because the earning history was in the range of \$20 an hour and he only considered applicants in the \$13-15 an hour range.

Respondent introduced in evidence 54 job applications for individuals that were hired from January 1, 1995, to August 1998 (R. Exhs. 5(a)-5(bbb)). The documents reveal that none of these individuals indicated on their job applications that they possessed valid plumber's licenses or were certified as licensed apprentices. In comparing the qualifications of the 20 overt union applicants to those of the individuals that were hired, it is readily apparent that the union applicants possessed superior qualifications.⁷ Additionally, it is obvious that the Respondent did not adhere uniformly to the requirements sought in its advertisements as none of its hires possessed valid plumber's licenses or were certified apprentices.⁸

The Respondent's arguments are unpersuasive for several reasons. First, I previously found that Respondent engaged in numerous independent violations of the Act and note that Masiongale told Neal that he did not want the union. Thus, it is apparent that the Respondent was dead set against hiring any individual who it knew openly supported the Union. Thus, I reject Masiongale's testimony that the March 28 applications were not considered because they were stale. I find this to be a belated defense and note that it was never mentioned to the employees when they filed their applications on that date or at anytime thereafter. Second, the Respondent did not present any evidence as to why the applicants it hired were better qualified than the overt union applicants. In fact, the evidence in the

record conclusively establishes that the 20 union applicants possessed superior qualifications when compared with Respondent's hires. Third, it is apparent that the Respondent needed qualified plumbers to man its jobsites based on statements to this effect by Curd and Woods and the fact that it hired covert union applicants Gravitt, Jehl, Neal, and Bane. Fourth, contrary to his direct examination, Masiongale admitted on cross examination that even though the August 22 job applications did not mention the wages earned by the applicants, he did not hire them because the employer's listed were union contractors and he knew that their wages exceeded \$13 an hour.

Accordingly, I find that the Respondent's reasons for not hiring any of the 20 overt union applicants are pretextual. Had it not been for their union affiliation, these individuals likewise would have been considered for hire. I, therefore, find that the Respondent violated Section 8(a)(1) and (3) of the Act by refusing to hire or consider for hire the overt union applicants. Indeed, all of the elements required by the Board in *FES* to find a refusal to employ or consider for hire violation have been met in this case.

CONCLUSIONS OF LAW

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

2. Local 172 and Local 661 are labor organizations within the meaning of Section 2(5) of the Act.

3. By refusing to employ or consider for hire William Rogers, Christine Britton, Geoff Paluzzi, Rodney Boyle, Mark Darnell, Charles Atkinson, Jeryl Cooke, Edward Meizen, Merlin Rice, Charles Gates, Joseph Beatson, James Poulson, Roger Hodson, Bruce Morehouse, Duane Harty, Michael Bowen, Denny Smith, William Fortwengler, James Salmon, and Stacey Stockton because they were union members, the Respondent violated Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

Having found that the Respondent unlawfully refused to employ or consider for hire the above noted employees in paragraph 3 of the conclusions of law, I shall order the Respondent to offer them reinstatement and make them whole for any losses of earnings and benefits they may have suffered as a result of the Respondent's unlawful conduct, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In accord with *FES* and *Dean General Contractors*, 285 NLRB 573 (1987), the Respondent shall have the opportunity, in compliance proceedings, to show that it would not have transferred the applicants listed in paragraph 3 of the conclusions of law to other worksites upon the completion of the project at which the unlawful conduct occurred.

[Recommended Order omitted from publication.]

⁷ Each of the 20 union applicants possessed a valid plumber's license.

⁸ It is also noted that Respondent hired several covert applicants that did not hold valid plumbing licenses while at the same time rejecting overt union applicants that possessed certified plumber licenses.