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**Smucker Company and International Brotherhood of Electrical Workers, Local Union No. 98.** Case 4–CA–28672

January 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND SCHAUMBER

On January 17, 2001, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs, and answering briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions, and to adopt the recommended Order.<sup>2</sup>

I. ALLEGED VIOLATIONS

The judge found that the Respondent, a drywall contractor on a job at Villanova University, violated Section 8(a)(3) and (1) of the Act by failing to hire and consider for hire union representatives Timothy Browne, Fred Cosenza, and Wayne Miller because of their union affiliation. In so finding, the judge rejected the Respondent's contention that Browne, Cosenza, and Miller were not "bona fide" applicants. The Respondent has accepted to this conclusion. We agree with the judge.

As discussed in the judge's decision, in order to establish a refusal-to-hire violation, the General Counsel had to show, among other things, that Browne, Cosenza, and Miller had the relevant experience or training for the helper and laborer positions for which they applied. *FES*, 331 NLRB 9, 12 (2000). The judge found that the General Counsel made this showing and otherwise satisfied his threshold burden, as required by *FES*.

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

<sup>2</sup> We shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

The burden then shifted to the Respondent to prove that it would not have hired the applicants even in the absence of their union support or activity. *Id.*<sup>3</sup>

Here, the judge specifically credited the testimony of Browne, Cosenza, and Miller that they would have accepted jobs with the Respondent. He specifically found that they "truly wanted to work for the Respondent, albeit with the ulterior motive of trying to organize it from the inside." His finding is supported by the fact that Browne, for example, sought employment with other contractors on the Villanova project and actually worked for several of those contractors. See *Lin R. Rogers Electrical Contractors*, 328 NLRB 1165, 1166 fn. 8 (1999). In these circumstances, we see no sound reason to upset the judge's finding that Browne, Cosenza, and Miller were bona fide applicants.

We also find unpersuasive the Respondent's argument that Browne, Cosenza, and Miller intended only to "trump up" unfair labor practice charges against it. The Respondent points out that they were alleged discriminatees in a number of other charges filed with the Board during the same time period. To begin, the Respondent's argument ignores the judge's specific credibility findings discussed above. In any event, that Browne, Cosenza, and Miller were named as discriminatees in charges filed against other employers does not establish that they were only seeking to provoke violations by the Respondent, or otherwise undercut their status as bona fide applicants. See *Sommer Awning Co.*, supra at 1327 ("enforcement of one's statutory rights does not necessarily translate into a less than bona fide attempt to obtain employment"). Accord *M. J. Mechanical Services*, 324 NLRB 812, 813–814 (1997), enfd. 172 F.3d 920 (D.C. Cir. 1998) (unpublished table decision).

Accordingly, we affirm the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire and consider for hire Browne, Cosenza, and Miller because of their union affiliation.

II. REMEDIAL ISSUES

Although finding a violation, the judge denied Browne, Cosenza, and Miller reinstatement and full back-pay because it became clear by the second day of the hearing that they had cheated on the Respondent's pre-

<sup>3</sup> We need not revisit the thorny issue of which party bears the burden of proof concerning whether Browne, Cosenza, and Miller were bona fide applicants. See *Exterior Systems, Inc.*, 338 NLRB No. 82 (2002); cf. *Merit Electric Co.*, 328 NLRB 212, 213 fn. 6 (1999); see also *HVAC Mechanical Services*, 333 NLRB 206 (2001); *Sommer Awning Co.*, 332 NLRB 1318, 1326–1327 (2000). We find that, regardless of who bears the burden on this issue, the judge properly found based on the record evidence that the applicants in this case were bona fide.

employment skills test. Acknowledging the General Counsel's claim that backpay could be cut off only when the employer has an established past practice of terminating an employee for that misconduct, the judge found that no past practice was necessary here because: (1) there was no evidence that any applicant had previously engaged in such misconduct; and (2) the misconduct was "malum in se." Accordingly, the judge ruled that backpay would continue only until November 16, 2000, the second day of hearing, when the Respondent's human resources manager, Todd Montgomery, testified about the tests. The General Counsel excepts. We affirm the judge's ruling for the reasons that follow.

The Board's usual remedies for refusal-to-hire violations are reinstatement and backpay. See generally *FES*, supra (establishing elements of refusal-to-hire and refusal-to-consider violations). It is well established that, if an employer claims a discriminatee is not entitled to reinstatement and full backpay, it is the employer's burden to prove that the discriminatee engaged in misconduct for which the employer would have disqualified any employee from continued or future employment. See *Marshall Durbin Poultry Co.*, 310 NLRB 68, 69–70 (1993), enfd. in pertinent part, 39 F.3d 1312 (5th Cir. 1994). The employer must "establish that the discriminatee's conduct would have provided grounds for termination based on a preexisting lawfully applied company policy and any ambiguities will be resolved against the employer." *John Cuneo, Inc.*, 298 NLRB 856, 857 fn. 7 (1990). The Board will not infer or assume that an employer would have disqualified an individual based on the nature of his misconduct. *John Cuneo*, supra at 857 fn. 7.<sup>4</sup>

There is no evidence that the Respondent had an express policy or past practice for dealing with cheating on a preemployment exam. Nor does the record show that it had previously confronted a similar situation. While Montgomery testified that he personally had not dealt with a similar situation in the past, he also testified that he would have deemed the three applications invalid had he been aware of the cheating at the time. We find that the judge credited, albeit implicitly, Montgomery's testimony as evidenced by the judge's concluding reference to that testimony in cutting off backpay as of the second day of the hearing.

In turn, the Respondent's established practice of requiring applicants to complete a preemployment exam provides an objective basis for Montgomery's testimony. Inherent in giving such an exam is a policy to disqualify

applicants who cheat.<sup>5</sup> In other words, for the exam to achieve its objective—to give the Respondent a fair measure of an applicant's actual jobs skills—applicants must complete the exam honestly. Otherwise, the purpose of requiring the exam would be frustrated. This is exactly what happened when Browne, Cosenza, and Miller cheated on their preemployment exams.

For these reasons, we conclude that the Respondent did "establish that the discriminatee's conduct would have provided grounds for termination based on a preexisting lawfully applied company policy," in the words of *John Cuneo*, supra. Accordingly, we affirm the judge's conclusion that the discriminatees are not entitled to reinstatement or to claim backpay beyond the second day of the hearing.<sup>6</sup>

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Smucker Company, its officers, agents, successors, and assigns, and/or representatives, shall take the action set forth in the Order.

Dated, Washington, D.C. January 30, 2004

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Robert J. Battista,	Chairman
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Wilma B. Liebman,	Member
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Peter C. Schaumber,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>5</sup> Cf. *Hoffman Plastic Compounds, Inc.*, 326 NLRB 1060, 1062 (1998), enfd. 237 F.3d 639 (D.C. Cir. 2001) (en banc), reversed on other grounds 535 U.S. 137 (2002) (employer's policy of not hiring illegal aliens was evidenced by employment application, which asked whether applicant was prevented from lawfully becoming employed due to immigration status).

<sup>6</sup> With respect to the respective burdens of proof regarding back pay until that time, Chairman Battista and Member Schaumber are inclined to agree with then-Member Hurtgen's dissenting views expressed in *Ferguson Electric Co.*, 330 NLRB 514 (2000), enfd. 242 F.3d 426 (2d Cir. 2001). However, they note that the Respondent does not seek to overrule *Ferguson Electric*. In these circumstances, they agree to apply the principles of *Ferguson Electric* rather than those set forth in the *Ferguson* dissent.

<sup>4</sup> Accordingly, we disavow the judge's repeated comments evidencing his own disapproval of the applicants' conduct.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail to consider for hire or refuse to hire job applicants because of their union affiliation.

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

WE WILL make Timothy Browne, Fred Cosenza, and Wayne Miller whole for any loss of pay and benefits they may have suffered, with interest, as a result of our violations of Federal labor law, from the date of our refusal to hire them until November 16, 2000.

SMUCKER COMPANY

*Randy M. Girer, Esq. and Michael C. Duff, Esq.*, for the General Counsel.

*Thomas R. Davies, Esq. (Harmon & Davies, P.C.)*, of Lancaster, Pennsylvania, for the Respondent.

*Richard C. McNeil Jr. and Jennifer B. Liebman, Esqs. (Sagot, Jennings & Sigmond)*, of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. This is a salting case involving three union representatives, Timothy Browne, Fred Cosenza, and Wayne Miller, who, the complaint alleges, were not hired or considered for hire by Respondent Smucker Company in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. Respondent denies that it violated the Act in any manner.<sup>1</sup>

<sup>1</sup> The relevant docket entries are as follows: The hearing was held in Philadelphia, Pennsylvania, on November 15 and 16, 2000. The charge was filed by International Brotherhood of Electrical Workers, Local Union No. 98 on October 15, 1999, and the complaint was issued on December 21, 1999.

Respondent, a Pennsylvania corporation with an office and place of business in Smoketown, Pennsylvania, has been engaged as an interior finishing contractor in the construction industry, with an emphasis on drywall, drywall finishing, and metal framing. During the year ending December 21, 1999, Respondent purchased and received goods valued in excess of \$50,000 from points outside Pennsylvania. I conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude, as Respondent admits, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The testimony of Browne, an organizer—business agent of International Brotherhood of Electrical Workers, Local Union 98, Cosenza, a business representative—organizer for the Philadelphia Building Trades Council, and Miller, a business agent—organizer and president of Sprinkler Fitters Local Union 692, differed from that of Respondent's sole witness, its human resources manager, Todd Montgomery. According to Browne and Cosenza, they learned that Respondent, a nonunion firm, would be engaged in a project at Villanova University;<sup>2</sup> and they and Gene Pender, an organizer for the Laborers Union, Local 413, went to Respondent's office on Monday, April 19, 1999,<sup>3</sup> to apply for jobs. Browne had previously done some salting, and so he told the others, less experienced than he, that he was to do all the talking. When they went to Respondent's office, they entered into a small room, where there was a window to their left, behind which was a receptionist. Browne asked for an application for each of the three and then asked for an additional copy to make duplicates of and to give to friends who were unable to come to Respondent's office. All his requests were granted, to the delight of Browne, who thought it most important that he was given permission to make copies of the application forms, which (also of great importance) were not numbered. He also was given permission to fill in the applications away from Respondent's office, making it easier for the forms to be prepared. Thus, he could make as many copies as he wanted and attempt to have employed numerous union sympathizers, making it that much easier to organize Respondent. Another important fact noticed by Cosenza and Browne was that Respondent had posted no notice that the applications expired in a certain number of days.

So off they went from Respondent's office, returning to their respective union offices to make plans for their next visit. That occurred the following Monday, April 26, when Cosenza and Browne, armed with a stack of other completed applications that they obtained from the Carpenters Union and Electrical Workers, were joined by Miller. When they got in the car to travel from Philadelphia to Smoketown, they had not filled out their own applications, so Miller and Browne filled theirs out in the car which Cosenza was driving. Cosenza filled his out in the car when they arrived at Respondent's office, and once again all agreed that Browne was to do all the talking. They entered the office, all wearing union shirts and insignia, and

<sup>2</sup> The job, which started on August 12, 1999, or a week before, involved construction of interior walls and ceilings, metal stud framing, drywall, and acoustical ceilings at some dormitories.

<sup>3</sup> All dates refer to the year 1999, unless otherwise stated.

Browne went to the same window, where he delivered the other applications and the three of theirs, in which each indicated that they were currently union business agents. The receptionist looked them over and asked whether theirs were in the stack. Browne said that they were. To Browne's surprise, the receptionist asked them to wait for a minute, and they waited for five, at which point Montgomery came through the door and asked if they would mind taking a test. Browne said no, and the three were given four-page tests, each page dealing with a different skill, attached to clipboards, and they proceeded to fill them out. Once finished, they returned them to the receptionist, who again told them to wait. Shortly, Montgomery returned. Browne asked how they did, and Montgomery said that they did "real good, everything looks good." Browne asked how long the applications were good for, and Montgomery said that they were good forever. Browne asked whether there were jobs available, and Montgomery replied that Respondent was not hiring at that time, but expected to do so soon. The three left.

According to Montgomery,

The receptionist brought a packet of applications to me and I looked at them. I went out to meet the gentlemen. I told them—I asked them if their applications were among this group and they said yes. So then I told them that they needed to fill out an assessment questions to determine their expertise.

So they received the assessment questions on a clipboard. I told them to notify the receptionist when they were completed and I went back to do what I was doing. I was told that they were done so I went out, took the assessment questions from them, looked over them briefly. At that point Mr. Browne was doing the talking and he asked me how our work outlook was and I said it looks okay that they had done pretty well and he asked me then about the Villanova project and I said what about Villanova and he said to me that we're working for Shoemaker down there and we don't want to do that.

At that point I was just kind of not sure what was going on and so at that point he said—he came over a little closer to me and we were about a foot to a foot and a half apart and he asked what's the next procedure. I said we'll [sic] we're not currently hiring. If we need you we will give you a call. So I told him that if we needed him that we would give him a call.

So at that point I believe the other two fellows who were standing there moving towards the door and Mr. Browne came over and he put his arm around me and he said you're messing with the union now and I said what's that supposed to mean. As he was walking out the door he said you're a smart guy you figure it out and that was the end of the conversation.

Montgomery denied that he had ever been asked how long the applications were good for and that he gave any answer. Respondent's position papers submitted to the Region during the investigation of the unfair labor practice charge contended that, before the events in this case, Respondent had rules posted in its office that provided, in part, that applications would expire after 30 days. For example, in a letter dated September 2,

Respondent's counsel admitted to the Region that the three union representatives had filed applications on April 26 and stated: "A copy of the Company's hiring policy is posted in the reception area and a key element of this policy is that applications would be considered active for thirty days." In a letter dated September 20, counsel enclosed "a copy of the Application Procedure which have [sic] been posted at the Company's facilities since mid-April." In a letter dated November 23, counsel wrote:

With respect to your questions regarding the Company's hiring policies, as I previously indicated, these were posted sometime in April 1999. I believe I had indicated to you before that there was some inconsistency in the application of the policies at the very beginning, but the policies have been continuously applied for the last several months. During our conversation, you advised me that there were claims that individuals had visited the Company's offices during the summer and that the policy was not posted. The Company tells me, and based upon my occasional visits to their facility it appears to be true, that since the policy was posted in April 1999 it has been continuously posted in the office.

Because of the representations of Respondent's counsel, the counsel for the General Counsel took pains to prove on her direct case that there were no rules posted in the office and that none of these rules had been complied with up to the date of the union representatives' second visit. On Respondent's direct case, its position that there were rules on the wall on April 26 was abandoned. Montgomery testified that he had attended a seminar in March, from which the rules stemmed, but he had not had a chance to post them. He finally posted them on April 27, the day following the applications of Cosenza, Browne, and Miller, and they have remained up since, a fact disputed by two carpenters, who testified that they applied for jobs in July and that there were no rules posted. In addition, the 30-day rule had been in effect even prior to the seminar, when he first became the human resources manager in August 1998, and that all applications over 30 days old had been put in a separate file and retained for another 11 months, because it was his understanding that that was required by law. In any event, he never told the three representatives that their applications were going to expire in 30 days.

The facts stated by Respondent's counsel in the position papers were not made up. Someone told him what the facts were and misled him; and nobody corrected them, even up to the time of the hearing, when Montgomery admitted that there was no posting on April 26. Against this, there is the problem of the credibility of the three union representatives, who denied that they had cheated in filling out the employment tests they took on April 26 or had helped one another, when it is so clear that at least Browne and Miller not only helped one another but also may have written the same pages for the other. The answers, even the blanks, are the same. The bad spelling is identical.<sup>4</sup>

<sup>4</sup> I have considered other problems in the testimony of all the witnesses, such as the omission from Browne's precomplaint investigatory affidavit of the word "forever" and Cosenza's inconsistent testimony about whether anything had been said about the Villanova job. None

Despite my rejection of this testimony of the three representatives, in determining whom to believe on the issue of the 30-day rule, I do not credit Montgomery. If Respondent had a longstanding rule that threw out applications that were more than 30 days old, the position statements would have said exactly that, instead of relying on posted rules that were not posted. Those rules required the numbering of applications, required each application to bear a stamp to show its originality, and required each applicant to show proper identification and to be present to fill out the applications. The rules prohibited the copying of applications and prohibited group applications. None of these rules were complied with on April 26. There were no numbers on the applications; Browne was given an application form from which to make copies; Respondent accepted the applications of people who were not present in the office. Montgomery conceded that on April 26, none of the rules were in effect. It follows that the 30-day policy, which was part of the rules, was also not in effect. It became effective the day after, not as Montgomery testified that it was a longstanding policy since 1998, but that it became Respondent's policy with the adoption of the rules, because if it were the policy before, the position statements would have made mention of that.

All this is not to say that Montgomery's testimony, quoted above, was wholly false. When the application process went so well for the union representatives, Browne was overly pleased. (He testified, "we were so excited, that we had the applications, we had permission to make copies of them"); the applications were delivered, including the batch that was copied and filled out away from Respondent's premises; there was no numbering on the applications; and he had the commitment by Montgomery that the applications, like the visibility on a clear day, were "forever." He had control, and he let Montgomery know that he was caught in the vise that "the union" had pressured him into. When Browne and the others left, Montgomery must have continued to consider what Browne meant by his statement that he was messing with the Union, and his thoughts went back to the seminar that he attended in March. What was it that I was to do to avoid salting, Montgomery thought, and suddenly he remembered the rules that he was to post. And that was the genesis of the rules and the false notification to Respondent's counsel that the rules had been posted. In finding that Montgomery made the "forever" commitment, I also find that Browne and Miller were aware of salting techniques and would have ensured that their applications had been renewed at the end of the 30 days, if that were really necessary. I am convinced that Montgomery assured them that it was not necessary.<sup>5</sup> For this reason, Respondent's may not rely on *Eckert*

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theless, "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950).

<sup>5</sup> Respondent's reliance on its rule was unsupported by any document, but just on the basis of Montgomery's statement. He had tenable excuses when confronted with applications that had been retained for more than 30 days, explaining that they had been hired within the time period to start more than 30 days after they submitted applications. His

*Fire Protection, Inc.*, 332 NLRB 198 (2000), in which it was found that the employer had imposed a valid policy that it would not consider applications that were over 30 days old.

In *FES*, 331 NLRB 9, 12 (2000), the Board required the General Counsel to prove in a refusal-to-hire case, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982):

(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.]

Regarding item (1), Respondent was not hiring at the precise time that the applications were filed on April 26, was not advertising, and was not using subcontractors to perform work normally done by employees. However, it was still looking for skilled mechanics with 3 years' experience, as shown by the fact that it continued to offer its employees bonuses to find them, as much as \$500 at one time, but from early March \$100, soon to be increased to \$300 in June. The General Counsel relies on a statement by Respondent on April 7, regarding an application for unemployment compensation of Chad Herr, an employee who left, that "continuing work [was] available." However, the same documents also show that Herr was laid off because of lack of work. In addition, the General Counsel contends that there were ample jobs pending, but whether Respondent had a need to hire additional employees on April 26, even with the loss of two employees who left shortly before the three filed their applications, was not proved.

While it is true that Respondent hired no one in all of May, which included the 30 days after the three union representatives filed their applications, the failure to do so may have been merely a ruse. After all, Respondent had hired employees in every month through April, including the day after the three applied; and Respondent hired seven employees in June, starting on the 1st, including two trainees on June 8, a laborer on June 21, and a trainee on June 22. In addition, Respondent hired another 11 new employees, including one trainee, in July.<sup>6</sup> So, these are some support for the General Counsel's contention that Respondent held off hiring in that 1 month of May solely to make its case that it had no opening for employment for 30 days, the representatives' applications therefore lapsed, and it was free to hire employees, who at that time had no union connections. On the other hand, there was no proof of concrete plans to hire in May.<sup>7</sup>

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lack of explanation of the application on which he wrote "keeper," however, was less than satisfactory.

<sup>6</sup> In describing the jobs, I have omitted summer hires.

<sup>7</sup> "The General Counsel may establish a discriminatory refusal to hire even when no hiring takes place if he can show that the employer had concrete plans to hire and then decide not to hire because applicants for the job were known union members or supporters. *FES*, *supra*

Once the 30 days expired, Respondent thought it was free of any obligations to hire the union business agents. It hired a substantial number of persons in June and July and extensively used personnel and employment services such as Manpower and Labor Ready for the purpose of getting skilled mechanics whom it found that it could not hire as employees, even with giving bonuses. Respondent advertised in newspapers in six communities on June 2, 10, 17, 18, 20, and 21, for experienced drywall hangers, finishers, and metal framers with 2 years' experience and for trainees, with 2 years' experience preferred "but will train." Respondent did not hire the three union representatives. It did not consider any of them for employment. It did not contact any of them or ask to interview them. I thus find that, with the applications continuing in effect into June and July, Respondent had concrete plans to hire, as shown by the fact that if it did hire employees, thus meeting the first of the three requirements of *FES*.

The second requirement is also present here. Although the three union representatives testified that they had construction trade experience, they exaggerated, raising home repairs to a degree of skill and experience far beyond their worth. But they certainly had enough skills to perform laborers' or helpers' work, for which they had applied and which required no skills at all. That is shown by the hire of individuals who were no better qualified than the three union representatives to fill the positions which Respondent filled, after Respondent refused to hire or consider the three. Otherwise, there is not enough shown in the applications of the business agents or in their credible testimony to prove that they were capable of performing the work of a journeyman. Respondent additionally contends that the three were not bona fide applicants. I disagree. They truly wanted to work for Respondent, albeit with the ulterior motive of trying to organize it from the inside. The rationale quoted by Respondent was language in decisions<sup>8</sup> by administrative law judges that was specifically not relied on by the Board.

Finally, the General Counsel has also proved the third requirement regarding antiunion animus, even though there is no direct evidence of Respondent's discriminatory intent. The only defense that Respondent made during the investigation of the underlying unfair labor practice charge was that it had a posted rule that all applications expired after 30 days. That was patently false. Respondent then seemingly shifted, after the General Counsel's case had been presented, to a claim that there had always been an unwritten 30-day rule, a claim that Respondent had never made before and which I have found not credible. "The Board has long expressed the view that when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted." *Black Entertainment Television*, 324 NLRB 1161 (1997), quoting *Sound One*

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at 12 fn. 7. I reject the counsel for the General Counsel's reliance on the hearsay statement of Respondent's receptionist, made in a telephone call, that Respondent was "always looking for good drywall mechanics." The complaint did not name her as an agent or supervisor or representative of management.

<sup>8</sup> *Bay Control Services*, 315 NLRB 30, 35 (1994); *Eckert Fire Protection, Inc.*, supra at 208–209.

*Corp.*, 317 NLRB 854, 858 (1995). Where a defense is shifting and inconsistent, this is strong support for a finding that no legitimate reason existed for a refusal to hire. *Frances House, Inc.*, 322 NLRB 516, 523 (1996). It is well settled that, when the asserted reason for an action fails to withstand scrutiny, the Board may infer that there is another reason—an unlawful one which the employer seeks to conceal—for the discipline. *Shattuck Denn Mining Corp.*, 362 F.2d 466, 470 (9th Cir. 1966); *Painting Co.*, 330 NLRB 1000, 1001 fn. 8 (2000). I make that inference, noting that Montgomery's posting of the new rules on April 27 was a direct and immediate reaction caused by the appearance of and applications by the union representatives the day before, all to prevent them from being hired.

Accordingly, I conclude that the General Counsel has presented a prima facie case of a violation of Section 8(a)(3) and (1) of the Act by Respondent's refusal to hire the three union representatives. Under *Wright Line*, as explained in *FES*, supra at 12, the burden then shifts to Respondent

to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity.

There is nothing to indicate that Montgomery considered the applications of Cosenza, Browne, and Miller when he hired employees in June and July. The applications were stale, according to Respondent's theory, and the three were rejected for no reason other than the fact that the applications were no longer valid, a reason that was pretextual and false. Respondent did not show that the three had less qualifications than the helpers and laborers whom it hired. The qualifications of the three union representatives were never an issue; their character was never an issue; their veracity was never an issue. Montgomery may have looked at the applications on April 26, but never saw the "glaring similarities" about which Respondent's counsel complains in his brief. Nor was there any threat by Browne's comment that Montgomery was now messing with the Union, other than the threat of union organization. The facts in *Heiliger Electric Corp.*, 325 NLRB 966 (1998), cited by Respondent, are completely dissimilar.

Accordingly, Respondent has failed to meet its burden. It has not shown that it would have taken the same action even in the absence of their union activities. I conclude that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Cosenza, Browne, and Miller. *Germinsky Electrical Co.*, 331 NLRB 1365 (2000), relied on by Respondent, is distinguishable on various grounds, including the fact that the administrative law judge specifically found, supra at 1371, that none of the reasons proffered by the employer for refusing to hire the applicants were "demonstrably false or pretextual in nature."

The complaint also alleged that Respondent refused to consider these union representatives for employment, In *FES*, su-

pra at 15, the Board set forth a somewhat different test for analyzing refusal-to-consider allegations:

[T]he General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that anti-union animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

Montgomery admitted that only applicants who have been interviewed are considered for hire and that he did not interview the applicants. He further admitted that he refused to consider Cosenza, Browne, and Miller for any position that was available and thus excluded them from the hiring process. Respondent made no showing that it would have considered them had they not been union representatives. It follows that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider them.

#### REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist. I will not, however, grant the full remedy that is normally granted in these salting cases. First, I reject the General Counsel's request for reinstatement. The three union representatives cheated on the employment test given to them by Respondent. The answers of Browne and Miller were almost identical, including the blanks that they left in answer to questions. That was not coincidental. For example, the question on the "Drywall Hanger" test asked: "Describe why, when hanging drywall on light gauge studs, you need to screw the soft side or open side first." The answers were the same: "To be shoure the stud don't bend on next piece." Not only is the language identical; so is the misspelling of the word "sure." The "k" in both representatives' answers to question 9 on the "Drywall Hanger" test is distinctively the same. What Miller identified as being his handwriting, so different from the writing on the rest of the page, was fine and small by comparison. Compare, for example, the writing of most of the answers on the "Metal Framer" test, "clock wise" in answer to question 5 on the "Drywall Hanger" test, and the answer to question 3 on the "ACT Mechanic" test and more particularly, the different answer written under the bolder writing in answer to question 2 on the same test.

Browne either gave the answers to Miller or he wrote the answers for both himself and Miller, whose formal experience in construction work was limited to fitting sprinkler systems and who, although he may have been able to do some drywall work at home and help out friends and family, was unfamiliar with the terms used in the trade and thus needed help on the test. It may be that Cosenza did less cheating than the others, but Respondent's reception area was a small room in which Cosenza could easily see and hear what was going on; and he, as well as the others, lied at the trial when answering that they did not cheat. From that response, I infer that he contributed answers to the others in an attempt to deceive Respondent and make this

case stronger. (He also wrote on his application that he had graduated from high school, but he did not.) That conduct is not to be rewarded by their reinstatement. The General Counsel's contention that they cheated together—concertedly—thus deserving protection under Section 7 of the Act, is too absurd to require comment. In sum, their flagrant conduct demonstrates that they are unfit to be Respondent's employees. *Marshall Durbin Poultry Co.*, 310 NLRB 68 (1993), *enfd.* in relevant part 39 F.3d 1312 (5th Cir. 1994); *John Cuneo, Inc.*, 298 NLRB 856, 857 (1990).

The award of backpay raises different concerns. One of them relates to the fact that these same union representatives have been traveling from nonunion employer to nonunion employer, seeking to salt. There are a number of unfair labor practice charges pending involving them. But, *Ferguson Electric Co.*, 330 NLRB 514 (2000), requires them to mitigate their damages, should an unfair labor practice be found in this proceeding and an award of backpay granted. Under that rationale, the only thing that the Board must ensure is that there are not too many salting cases that are lost track of, lest a union business agent be awarded double and treble and quadruple backpay awards, with little to guide which employer should be responsible for what backpay.

In addition, I must admit my reluctance to award backpay to people who so brazenly cheated on Respondent's employment test to find out their qualifications, especially because these are not out-of-work journeymen or ordinary employees, but persons employed by labor unions who are paid their salaries, no matter whether they successfully "salt" or not. But *Ferguson* teaches that union representatives are entitled to receive this backpay, and *John Cuneo, Inc.*, 298 NLRB 856, 857 (1990), teaches that after-acquired evidence of employee misconduct may cut off backpay upon discovery, but does not extinguish an employee's right to it. The General Counsel contends that backpay liability may be cut off only when the employer has an established past practice of terminating an employee for that reason. In a situation where the employer's actions in refusing to employ are so predictable and so warranted, I find that no past practice is necessary, especially because there is no inkling that any prior applicant had the gall and the lack of honesty that these applicants had and because the conduct of Cosenza, Browne, and Miller was *malum in se*.

Accordingly, I will recommend that backpay be awarded, as if they were hired to fill the first three openings for laborers and trainees. The backpay is to continue until November 16, 2000, the second day of this hearing, when Montgomery testified about the tests. Backpay shall otherwise be computed as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law, on the briefs submitted by the General Counsel and Respondent and

on the entire record,<sup>9</sup> including my observation of the witnesses as they testified, I issue the following recommended<sup>10</sup>

#### ORDER

The Respondent Smucker Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to consider for hire and refusing to hire job applicants because of their union affiliation.

(b) 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 National Labor Relations Act.

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

(a) Make Fred Cosenza, Timothy Browne, and Wayne Miller whole for any loss of pay and benefits they may have suffered, in the manner set forth in the remedy section of this decision.

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

(c) Within 14 days after service by the Region, post at its facility in Smoketown, Pennsylvania, copies of the attached notice marked "Appendix."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed

<sup>9</sup> The General Counsel's and Respondent's motion to correct the Official Transcript are granted.

<sup>10</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>11</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by Respondent's authorized representative, shall be posted by 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 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, Respondent has gone out of business or closed the facility involved in these proceedings, 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 June 8, 1999.

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

Dated, Washington, D.C. January 17, 2001

#### 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.

WE WILL NOT fail to consider for hire and refuse to hire job applicants because of their union affiliation.

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

WE WILL make Fred Cosenza, Timothy Browne, and Wayne Miller whole for any loss of pay and benefits they may have suffered, with interest.

SMUCKER COMPANY