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Jesco, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 480, AFL–CIO

Jesco, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 474, AFL–CIO. Cases 26–CA–17283 (Formerly Case 15–CA–13703), 26–CA–17529, and 26–CA–17322

August 18, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND KIRSANOW

On August 21, 1997, Administrative Law Judge Howard I. Grossman issued the attached Decision. The Respondent filed exceptions and a supporting brief. On June 9, 2000, the Board remanded this proceeding for further consideration in light of *FES*, 331 NLRB 9 (2000), affd. 301 F.3d 83 (3d Cir. 2002). Thereafter, on February 6, 2001, Judge Grossman issued a Supplemental Decision, also attached. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions as modified below, and to adopt his recommended Order as modified and set forth in full below.

We agree with the judge's findings that the Respondent violated Section 8(a)(1) by interrogating employee Tommy Dearing about his union affiliation and that of other employees,[3] and that it violated Section 8(a)(3) by discharging Dearing and employees John Smith, Jay Greenwell, and Kenneth Wahlgren for refusing to remove union stickers from the hardhats they wore. We also agree with the judge, as explained below, that the Respondent manipulated and disregarded its hiring policies at three construction sites in order to avoid hiring union members, in violation of Section 8(a)(3) and (1). Specifically, we agree with the judge that the Respondent unlawfully discriminated against the named union applicants at its Jackson and Holly Springs sites and that they all are entitled to instatement and backpay. Additionally, we agree with the judge that the Respondent discriminated against union applicants at the Yazoo City site.[4] However, we disagree with his finding that the Respondent's use of restrictive language on application forms at the Yazoo City site was unlawful, and consequently, with his findings regarding the number of union applicants who are entitled to offers of instatement and backpay at that jobsite.

[1] The Respondent has excepted to the judge's denial of its motion to reconsider his prehearing ruling that the Union was not required to produce certain subpoenaed documents because they were irrelevant and that other subpoenaed documents need not be produced prior to witnesses testifying at the hearing. We affirm the judge's finding that the W-2 forms, other payroll information, and membership information requested are irrelevant to whether an alleged discriminatee is a bona fide applicant for employment. *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995). We also find that transcripts of tapes made by the Union and other documents were appropriately made available to the Respondent after witnesses testified and that the Respondent has not shown any prejudice by the judge's failure to order their production before the hearing.

The Respondent also contends that the judge's rulings at the hearing and conduct away from the hearing demonstrate bias in favor of the General Counsel and the Union. Specifically, the Respondent cites the judge's rulings discussed above, and the fact that on the second day of the hearing the judge apparently rode to the hearing site in a vehicle with counsel for the General Counsel and the Union's representative and sat with them in the wrong hearing room awaiting the court reporter and the Respondent's counsel, who were waiting in the correct room.

We reject the Respondent's bias contention for two reasons. First, it is untimely. The Respondent alleged bias for the first time in its brief in support of exceptions to the judge's decision. However, under Sec. 102.37 of the Board's Rules and Regulations, the Respondent was required first to raise its bias contention to the judge and move that he disqualify himself and withdraw from the proceeding. See *Pioneer Natural Gas Co*., 253 NLRB 17 fn. 2 (1980). Having failed to do so, the Respondent is precluded from raising the issue now in its exceptions brief. Second, even assuming that the Respondent may initially raise the issue of bias in its exceptions brief, we find no merit in its contention. Careful review of the record shows no statements or other evidence indicating bias or prejudice against the Respondent by the judge.

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

[3] In finding that the Respondent, through Russell Brock, unlawfully interrogated Dearing, we note that the Respondent has not excepted to the judge's findings that Brock exercised independent judgment in responsibly directing Dearing's work and was therefore a supervisor within the meaning of Sec. 2(11) of the Act.

[4] In addition to finding that the Respondent unlawfully failed and refused to hire union applicants, the judge found that the Respondent violated Sec. 8(a)(3) by hiring certain nonunion applicants instead. Because any violation in this regard is subsumed by the refusal-to-hire violations found and is remedied by the remedial provisions set forth herein, we find it unnecessary to pass on the judge's finding of this separate 8(a)(3) violation.

Background

In 1994 and 1995, the Respondent began performing electrical work at three construction sites in Mississippi: the Methodist Hospital in Jackson, a state prison facility in Holly Springs, and a federal prison facility in Yazoo City. Work at each site continued into 1996. Many union members applied for employment at each site, but few open union adherents were hired. There is some question whether the Respondent maintained a written hiring policy at the time of these events. However, the Respondent's superintendents at the respective sites testified similarly that it was their policy to bring in current employees from other jobs, then to hire former employees, next to hire individuals who were recommended by foremen and competent employees of the Respondent, and finally, to hire by word of mouth and sign posting.[5]

Jackson

The Respondent began work at the Methodist Hospital construction site in Jackson in early- to mid-September 1995. Its superintendent at the site was Deral Knight. Knight testified that his practice was first to ask "core" employees who worked with him to transfer and then to transfer in current employees of the Respondent from other sites. Next, Knight said that he hired former employees with good work records and asked for recommendations from foremen and competent employees. Last, he "put the word out on the street" and posted hiring signs at the jobsite. Knight's testimony also indicates that he contacted individuals he had worked with prior to his employment with the Respondent before he hired off the street.

At the beginning of the project, Knight placed a "not hiring" sign at the jobsite, which remained posted until December 15, 1995. During the period that the "not hiring" sign was posted, Knight hired nonpriority, nonunion employees and contracted with a local employment agency, Workforce, to supply electricians and other craft employees. Knight replaced the "not hiring" sign with an "accepting applications" sign on December 15 because he assertedly learned at a contractors meeting on December 13 or 14 that the Respondent was behind schedule. The "accepting applications" sign remained posted until January 3, 1996. Knight did not explain why he removed the sign on January 3, but he continued hiring even after that date.

IBEW Local 480 Assistant Business Manager Wayne Devine went to the jobsite with union members on three occasions.[6] On each visit, the would-be applicants wore 3-inch "Union Organizer" buttons, and each time Knight refused to give them applications, saying he was not hiring at that time. Specifically, Devine and three Local 480 members went to the jobsite on September 29, 1995, to request applications. Knight replied that he was not accepting applications. Responding to a newspaper ad placed by Workforce, on October 27 Devine went to Workforce and spoke with a person named Harold. Naming Jesco, Harold told Devine that he needed as many electricians as he could get. Devine said he could supply this need, and Harold said he would get back with Devine as soon as possible. Not hearing from Harold, Devine returned to Workforce a few days later. Harold's attitude had changed, and he told Devine that he would not be providing electricians for Jesco any more.

On November 3, the same day that Knight hired a nonunion employee, Devine returned to the jobsite with three more union members to request applications. Knight said that he had opened the applications period up for 1 day but did not need any more employees. On November 27, Devine returned to the hospital jobsite, this time with seven union members. Knight refused to give applications to them and told them he would not need any more electricians to finish the job.

In early January, during the "open window" period when Knight had posted the hiring sign and accepted applications from the general public, he hired an overt union adherent, John Smith, who had previously attempted, along with Wayne Devine, to apply for a job. During this period, Knight also hired Tommy Dearing, who kept his union affiliation secret. As stated above, the two union employees subsequently were unlawfully terminated on January 12 for wearing union stickers on their hardhats.

The record establishes that Knight hired a total of 21 employees at the jobsite between September 25, 1995, and May 1, 1996. From September 29, 1995, the date that the 11 named discriminatees first attempted to apply, through the date of the last hire in April 1996, Knight hired 15 nonunion applicants to work at the site. Of

[5] The Respondent's Manager of Administration and Human Resources, Bob Baughn, explained why transferred employees were given preferential treatment in hiring decisions. He testified that the company transferred employees whose work records showed them to be competent and dependable.

[6] The Respondent does not dispute that the Union applicants had the work experience or training necessary to meet the requirements for the positions. *FES*, supra, 331 NLRB at 12. Rather, its challenge to their status as qualified applicants is based on their status as "union salts." In *NLRB v. Town & Country Electric, Inc.*, supra, however, the Supreme Court held that "a worker may be a company's 'employee,' within the terms of the National Labor Relations Act, even if, at the same time, a union pays that worker to help the union organize the company." 516 U.S. at 87.

those 15 hires, 6 did not meet criteria for preferential hiring under the stated hiring policy.[7]

Based on the foregoing facts, the judge found that the Respondent refused to hire the named discriminatees or consider them for hire because of their union affiliation in violation of the Act. He also concluded that all of the discriminatees are entitled to instatement and backpay.

In a refusal to hire case, the General Counsel must establish that (1) the Respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) the applicants had experience and 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) antiunion animus contributed to the decision not to hire the applicants. *FES*, supra, 331 NLRB at 12. Once the General Counsel has met this burden, the employer must show that it would have made the same hiring decisions even absent the applicants' union affiliation.

We find, as the judge did, that the General Counsel met his burden under *FES* of demonstrating that the Respondent unlawfully refused to hire union members at the Jackson site. It is clear from the Respondent's contracting with Workforce that Knight had concrete plans to hire at the Jackson site, and in fact he did hire employees throughout the course of the project. There is no dispute that the union members who attempted to apply and were turned away possessed the skills and experience relevant to the positions for which Knight hired nonunion employees and applicants. And, as explained herein, the Respondent demonstrated animus toward the would-be union applicants. Knight kept a "not hiring" sign posted at the site and refused to allow 11 union members to apply on 3 occasions. During the same period, however, Knight contracted with Workforce, which in turn advertised for electricians to work at the site and told Devine that Respondent needed as many electricians as it could get. Clearly then, at a minimum, the Respondent had an intention to hire, and it did hire nonunion employees after the union members were refused the opportunity to apply. This subterfuge demonstrates antiunion animus. Moreover, from the date when the union members first attempted to apply through the date when the Respondent hired the last employee at the site, at least 40 percent of the nonunion applicants that Knight hired (6 of 15) did not meet criteria for priority hiring under the policy he articulated. So substantial a disregard of the stated policy, coupled with the manipulation of the hiring process by refusing to allow union members even to file applications, strongly implies animus.[8]

The General Counsel having established the elements of a refusal to hire case, the burden now shifts to the Respondent to show that it would have made the same hiring decisions irrespective of the union members' affiliation with the Union. The Respondent asserts that it did not hire the would-be applicants because they did not apply at times when the Respondent was hiring, and that it hired according to its policy. We reject these defenses. Contrary to the Respondent's assertion, the union applicants did seek to apply for work at the time when the Respondent was hiring, but the Respondent denied the applicants that opportunity. See *Commercial Erectors, Inc*., 342 NLRB 940, 942–944 (2004). As for its priority hiring defense, in light of our finding above that the Respondent's substantial disregard of this hiring policy constituted evidence of union animus, it necessarily fails as a defense to the Section 8(a)(3) allegation.

[7] The hires that did not merit preferential treatment under the policy are Johnny Franklin, Jacob Evans, Bobby Hamilton, Gary Hamilton, Don Pratt, and Roy Parker. Phillip Cook is another questionable hire, as is Rodney Fuller. Cook was employed through Workforce as a laborer at the site and converted to the Respondent's payroll, apparently as an electrician. Fuller listed the Respondent as a former employer on his application and would have been entitled to a priority under the hiring policy so long as he had a good work record. However, there is no evidence that Knight checked his record to determine whether he had performed competently and been dependable.

[8] In this connection, we find that this case is distinguishable in material respects from *Zurn/N.E.P.C.O.*, 345 NLRB No. 1 (2005). There, the Board found that, under the circumstances, the respondent employer's deviations from a hiring policy did not "yield an inference that the entire hiring process was unlawfully motivated." Id., slip op. at 8. The Board found that employer violated Sec. 8(a)(3) in instances where it deviated from its hiring policy, but found no violation where nonunion applicants were hired in apparent conformity with the policy. *Zurn* differs from this case in important respects. The hiring policy deviations there were comparatively few (23 of 169 nonunion hires, or 13.6 percent). Id. There was no evidence, in turn, that the employer excluded union applicants from the hiring process (id. at 10), much less that the employer advised the employment agency with which it contracted not to hire or refer union members (as we infer the Respondent did, based on "Harold's" abrupt turnaround from saying to Devine he needed as many electricians for Jesco as he could get to telling Devine, only a few days later, that he would not be providing electricians for Jesco any more).

Both with respect to the failures to hire and the unlawful discharges found herein, Chairman Battista and Member Kirsanow do not rely on the judge's finding that, in addition to the evidence of union animus discussed above, the Respondent displayed union animus by distributing to employees a hiring package in which the Respondent stated its belief in a "union-free environment" and by Knight's testimony that the Respondent wished to remain an open-shop contractor. In Chairman Battista's and Member Kirsanow's view, statements like these are protected by Sec. 8(c) of the Act. See *MEMC Electronic Materials, Inc.*, 342 NLRB 1172, 1178 (2004) (Chairman Battista, dissenting in part). Member Liebman agrees with the Chairman and Member Kirsanow to the extent that they find that union animus is established even without reliance on the hiring package.

As it is clear that the Respondent discriminatorily refused to hire 11 qualified union members at the Jackson site, we find that it violated Section 8(a)(3) of the Act. Because the Respondent hired more individuals with no union affiliation than union members who attempted to apply, we find that it must offer instatement and backpay to all 11 named discriminatees.

Holly Springs

The Respondent began work at the Holly Springs site in early August 1995. Russell "Rusty" Hendrix was the Respondent's electrical superintendent there. Hendrix hired several employees in August and September, but laid off many of them during the concrete pour stage of construction. He began recalling employees in November.

In late December 1995 or early January 1996, the Respondent entered into a settlement agreement with the Union over charges that it had refused to hire union members in the fall. As part of the agreement, the Respondent agreed to offer jobs to nine union members selected by the Union and to consider others for hire.[9] The Respondent hired eight of the nine union members,[10] and notified the Union on January 9, 1996, that it would accept applications from union members on January 15 and 16.

On January 16, 1996, 16 qualified union members wearing union insignia went to the site and were permitted to complete applications. The Respondent hired 19 employees at the Holly Springs site after January 16, but none of those hires included the union members who applied on January 16.[11]

Hendrix testified that he did not hire the union applicants because he believed they would leave the job (i.e., strike or quit) as other union members had done. Rather, he hired nonunion individuals who were recommended by employees working at other sites and employees who transferred from other sites, including a crew of seven individuals who had worked a week or less for the Respondent at its Beach Mold project in Virginia. During this phase of hiring, in February 1996, Hendrix also terminated union members Greenwell and Wahlgren for wearing union stickers on their hardhats, in violation of Section 8(a)(3).

We find, as the judge did, that the General Counsel has met his initial burden under *FES* of demonstrating that the Respondent discriminatorily refused to hire union members at Holly Springs. Specifically, the record establishes that the Respondent was hiring when the union members applied for work and thereafter, and that, despite meeting the experience and training requirements of the positions,[12] none of the union applicants was hired. The General Counsel also demonstrated that antiunion animus contributed to the Respondent's decision not to hire the union applicants. Thus, Hendrix testified that he did not hire the union applicants because he believed they would strike or leave for some other reason.[13]

The General Counsel having established that the Respondent refused to hire the named discriminatees because of their membership in the Union, the burden shifts to the Respondent to show that it would not have hired the discriminatees even absent their union affiliation. We find that the Respondent failed to meet this burden. *FES*, 331 NLRB at 12.

The only reason Hendrix gave for refusing to hire the discriminatees was an unlawful one: he was afraid that they would engage in protected activity by going on strike. Thus, the individual responsible for hiring at Holly Springs failed to posit even one lawful reason for his actions.

The Respondent, however, argues that its failure to hire the union members was justified by its facially neutral hiring policy. It is well established that an employer may defend its failure to hire union applicants by showing that it acted pursuant to a facially nondiscriminatory hiring policy, provided that the employer consistently

[9] The settled charges are not at issue in this proceeding.

[10] The ninth alleged discriminatee in that case declined the Respondent's offer of employment.

[11] The 19 hires did not include the eight union members who were previously hired as a result of the settlement agreement.

The Respondent contends that because the complaint alleges discrimination at the Holly Springs site on March 1, 1996, and continuing thereafter, the union members who sought work there before that date are not appropriately alleged to be discriminatees. We reject these contentions. The second amended consolidated complaint states, "About March 1, 1996, and continuing thereafter,"—wording that arguably includes the period prior to March 1. Moreover, counsel for the General Counsel explained, on the record, that, although the Respondent's hire list showed ostensibly valid transfers to the Holly Springs site up to March 1, he had not received supporting records from the Respondent and reserved the right to challenge the validity of the hires. The Respondent did not supply the records until the last day of the hearing, and the General Counsel nevertheless challenged the hire of these transfers. The parties subsequently briefed related arguments to the judge. Thus, contrary to the Respondent's assertions, the legitimacy of hires prior to March 1, 1996, clearly was litigated.

[12] Again, the Respondent's only challenge to the union applicants' status as qualified applicants is based on their status as "union salts." We reject its argument that the Union members were not bona fide applicants. See, *NLRB v. Town & Country Electric, Inc.*, and fn. 4, supra.

[13] In this regard, there was no evidence establishing that the Respondent had a policy against hiring short-term employees. See *American Residential Services of Indiana, Inc.*, 345 NLRB No. 72, slip op. at 4 (2005) (finding refusal-to-hire violation where employer failed to establish that it had a policy against hiring short-term employees).

We find that the Respondent also exhibited animus when it unlawfully discharged Greenwell and Wahlgren for wearing union stickers on their hardhats.

adhered to the policy. See, e.g., *Brandt Construction Co.*, 336 NLRB 733 (2001), review denied sub nom. *International Union of Operating Engineers, Local 150 v. NLRB*, 325 F.3d 818 (7th Cir. 2003). Where an employer departs from such a policy in a sufficient number of instances, however, it cannot carry its rebuttal burden by relying on the policy. See, e.g., *Fluor Daniel v. NLRB*, 332 F.3d 961, 971 (6th Cir. 2003), enfg. 333 NLRB 427 (2001); cf. *Zurn/N.E.P.C.O.*, supra, 345 NLRB No. 1, slip op. at 8 (distinguishing *Fluor Daniel*, observing that the respondent in *Zurn* deviated from hiring policy only 13.6 percent of the time).

The Respondent's asserted justification fails. As stated above, the Respondent did not in fact rely on the policy when it rejected the discriminatees; rather, it refused to hire them for the *sole* reason that Hendrix believed that they would strike. See *Limestone Apparel*, 255 NLRB 722 (1981) (employer's stated reasons for its actions held pretextual where they either did not exist or were not actually relied on), enfd. 705 F.2d 799 (6th Cir. 1982). The Respondent cannot rebut the General Counsel's initial showing of discriminatory motivation with a pretextual explanation. Id. at 722; see also *Concrete Form Walls, Inc*., 346 NLRB No. 80, slip op. at 4 (2006).

Although the Respondent now argues that it relied on the policy, the facts show that it did not do so. Although the policy as described by Hendrix afforded preference to certain present and former employees of the Respondent and to individuals recommended by its supervisors and other employees, many of the nonunion employees hired at Holly Springs did not qualify for such preferential treatment. Apart from its hire of eight union members pursuant to a settlement agreement, the Respondent hired 19 employees at Holly Springs after the discriminatees applied. All of those hires were nonunion. A commitment had been made on January 12 to employ 3 of the 19 individuals—Tom and Jeanie Everitt and Loren Albritton. Of the remaining 16 individuals hired, at least 5 were nonunion employees who did not merit preferential treatment under the hiring policy that Hendrix described. They are employees who were transferred to Holly Springs after having been hired at the Respondent's Beach Mold jobsite in Virginia only days earlier.[14] Significantly, Human Resources Manager Baughn testified that the company transferred employees whose work records showed them to be competent and dependable. Having worked only days at Beach Mold, these five hires had not yet shown that they met the transfer criteria. Nor did they meet any other criterion for preferential treatment. The five Beach Mold transfers represent nearly one-third of the hires made after the union members applied. One-third is too many for the Respondent to argue persuasively that it would have rejected the union members simply because they, too, lacked priority under the policy. See *Fluor Daniel v. NLRB*, supra.

Because the Respondent filled as many positions after the union members applied as the number of union applicants, we find that all of the discriminatees are entitled to instatement and backpay.

Yazoo City

In late February 1995, union member Al Lungrin saw a sign at the Yazoo City site indicating that electricians were among the craftsmen being sought to work on the project. Lungrin introduced himself to the Respondent's project superintendent, Tommy Miller, as a union member and requested an employment application. Miller responded that he had no openings. Lungrin reported his conversation to Local 480 Assistant Business Manager Wayne Devine, who telephoned Miller a short time later. Devine did not identify himself as a union member when he spoke with Miller, and Miller told him that the Respondent needed electricians.

On March 14, Devine went to the site with union members Lungrin, Tommy Dearing, Alfred Mathews, Larry Nipper, Larry Watts, and Sammy Yelverton. They wore union insignia and verbally identified themselves as union members. The union members had from 7 years to more than 20 years experience working as electricians. Miller permitted them to fill out applications, but did not hire any of them to work at the project. Between March 14 and the completion of the project in late 1996, the Respondent hired 11 individuals to work at the site. All of the hires were nonunion employees.

Miller testified that he hired electricians for the project using a priority system that gave first preference to current employees of the Respondent with good work records, then to applicants who had previously been employed by the Respondent, then to applicants recommended by current employees, and finally general applicants.

Applying *FES*, supra, we find that the Respondent unlawfully discriminated against union applicants at the Yazoo City site. The record establishes that the Respondent was hiring at the time the union members applied, that the union applicants met the experience and training requirements for electrician positions, and that the Respondent harbored animus against the Union, which affected its hiring decisions. In addition to the evidence of animus previously established in this case, Miller falsely

[14] There were seven transfers from Beach Mold to Holly Springs, but one of them, Richard Enlow, is the brother of current employee Bill Enlow, and another, Roderick Enlow, may also be related. Even assuming that Bill Enlow recommended his relatives, the other Beach Mold transfers have not been shown to meet the hiring criteria.

told Lungrin, who openly displayed his union membership, that he was not hiring when in fact he was; and he told Devine, who omitted mention of his union membership in their telephone conversation, that he needed electricians. The judge also found that the Respondent falsified the application dates of two nonunion applicants, neither of whom met the Respondent's hiring policy criteria, to make it appear that they had applied the day before the union members applied, when in fact they had applied later.

We also agree with the judge that the Respondent failed to demonstrate that, under Miller's hiring policy, it would not have hired any of the union applicants even absent their union affiliation. Contrary to the Respondent, we agree with the judge that three of the employees hired after union members applied do not meet any of Miller's stated hiring criteria because they were not transfers, referrals, or former employees, and their applications did not predate those of the union members. Accordingly, we find that the Respondent discriminatorily refused to hire union members in violation of Section 8(a)(3) and (1).[15]

We also find, however, that only three union applicants at Yazoo City are entitled to instatement and make-whole relief. As explained below, this is because only three individuals were hired during the time the union members' applications were valid.

The application forms given to prospective employees at Yazoo City, unlike those at Jackson and Holly Springs, were stamped with the language, "This Application Valid for 30 Days Only" and "This Application Valid for Yazoo Prison Project Only." The General Counsel alleged, and the judge found, that the stamped language was used discriminatorily to limit the viability of union members' applications and restrict their employment, if they were hired at all. The judge noted that the applications used at Holly Springs did not bear the stamped legends.

Contrary to the judge, we do not find that the Respondent violated the Act by placing the stamped legends on the Yazoo City application forms. To begin with, both statements are facially nondiscriminatory. They apply equally to union and nonunion applicants. Further, there is no evidence that the language was used in a disparate manner against union applicants.

Moreover, the Respondent's witnesses persuasively testified that there was a valid business justification for these limitations. Thus, Miller explained that the stamps were used to reduce paperwork because the Yazoo City project was a long-term one. Human Resources Manager Bob Baughn elaborated, testifying that, because the project was a federal one, the Respondent was required to develop and maintain affirmative action records about applicants and the employees it hired for review by the U.S. Office of Federal Contract Compliance Programs (OFCCP). Baughn said the project-only stamp helped distinguish this site from nonfederal sites, and that the 30-day viability of applications reduced the amount of paperwork and reporting to be done at the site.

Of the three construction sites in issue in this proceeding, the prison at Yazoo City was the only federal jobsite. Thus, it was entirely reasonable that the employment applications at Yazoo City were stamped with language tailoring them to that site, and that the applications made available at Holly Springs did not bear these stamps.[16] In these circumstances, the Respondent's use of the restrictive language on the application forms at the Yazoo City jobsite was not unlawful.

This being so, the applications of the seven union members who applied on March 14 were valid for only 30 days, i.e., through April 13. Between March 14 and April 13, the Respondent hired three nonunion employees who applied after the union members did. The Respondent failed to credibly establish that the three nonunion employees were entitled to preference under its stated hiring policy. Absent the Respondent's discriminatory departure from the stated hiring policy, we find that three union member applicants would have been hired during the 30-day period. Accordingly, we shall modify the judge's recommended Order to direct that the Respondent offer to instate and make whole three of the union members who applied at the Yazoo City jobsite.[17]

ORDER

The National Labor Relations Board orders that the Respondent, Jesco, Inc., Tupelo, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union or other concerted protected activities.

(b) Discouraging membership in the International Brotherhood of Electrical Workers, Locals 474 or 480, AFL–CIO, or any other labor organization: by discharging employees because of their union affiliation or other protected concerted activities; by refusing to issue employment applications to, or to employ applicants for the

[15] In so finding, we disavow the judge's implication that the asserted hiring policy is itself unlawful because it inherently excludes union members.

[16] The record does not include applications from the Jackson site. Union members were not permitted to fill out applications there.

[17] We leave to the compliance stage of this proceeding the identification of the three applicants to whom instatement and make-whole relief are owed. *FES*, supra, 331 NLRB at 14. The remaining four applicants will be entitled to a refusal-to-consider remedy. Id.

reasons listed above; and by manipulating its hiring policies so as to bar union members and sympathizers from employment.

(c) In any like or related manner interfering with, restraining, or coercing employees or applicants for employment in the exercise of their rights guaranteed 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 John Smith, Jr. Tommy Dearing, Jay Greenwell, and Kenneth Wahlgren full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

(b) Make John Smith, Jr., Tommy Dearing, Jay Greenwell, and Kenneth Wahlgren whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, 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 discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Within 14 days from the date of this Order, offer those employee-applicants named in paragraph 2(e) below employment in the positions for which they applied or, if those positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against by the Respondent.

(e) Make the employee-applicants named below who applied at the Jackson and Holly Springs jobsites whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

Wayne Devine	John Smith, Jr.
Mike Pickett	Robert Conn
Sammy Yelverton	Al Lungrin
Jim Horne	Hewitt Barton, Sr.
Hewitt Barton II	William Payne Barton
R. B. Penton, Jr.	Andy Cole
Roy Summit	Robin Lunsford
Davis Newsom	Cliff Emory
Gary Summit	David Erwin
Jack Gatlin	Glen Greenwell
Kevin Shipp	Charlie Garrison
John Clenny	Danny Hawkins
Craig Goodson	Mike Young
Bruce Gaston	

Where an employee-applicant has been discriminated against more than once, the period for computation of backpay shall begin with the date of the first incident of discrimination against him.

(f) Offer to three of the employee-applicants named below, who are identified in the compliance stage of this proceeding as the three individuals who should have been hired at the Yazoo City jobsite, employment in positions for which they applied or, if those positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against by the Respondent.

Al Lungrin	Sammy Yelverton
Wayne Devine	Larry Nipper
Larry Watts	Alfred F. Mathews
Tommy Dearing	

(g) Make each of the three employee-applicants identified in compliance proceedings whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(h) Consider the remaining four employee-applicants named in paragraph 2(f) above for future job openings in accord with nondiscriminatory criteria, and notify them, the Charging Party Unions, and the Regional Director for Region 26 of future openings in positions for which the four individuals applied or substantially equivalent positions. If it is shown at the compliance stage of this proceeding that, but for the failure to consider these four individuals, the Respondent would have selected any of them for any job openings arising after the beginning of the hearing on February 3, 1997, or for any job openings arising before the hearing that the General Counsel neither knew nor should have known had arisen, the Respondent shall hire them for any such positions and make them whole for any losses, in the manner set forth in the remedy section of the judge's decision, as modified.

(i) Notify the employee-applicants referred to in paragraph 2(h) in writing that any future job applications will be considered in a nondiscriminatory way.

(j) Within 14 days from the date of this Order, remove from its files any references to the unlawful refusals to hire and to consider for hire the employee-applicants named above, and within 3 days thereafter, notify the discriminatees in writing that this had been done and that the refusals to hire and to consider for hire will not be used against them in any way.

(k) 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 desig-

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

(l) Within 14 days of the date of this Order, mail a copy of the attached notice marked "Appendix"[18] to the last known address of the employee-applicants named above and to all persons employed by the Respondent on or after September 29, 1995 at its Jackson jobsite, all persons employed on or after February 26, 1996 at its Holly Springs jobsite, and all persons employed on or after March 18, 1996 at its Yazoo City, Mississippi jobsite. Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be mailed by the Respondent immediately upon receipt thereof.

(m) Sign and return to the Regional Director for Region 26 sufficient copies of the notice for posting by the Unions, if they are willing, at their offices and meeting halls, including all places where notices are customarily posted.

(n) Within 14 days after service by the Region, post at its Jackson, Holly Springs, and Yazoo City, Mississippi jobsites copies of the notice. Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities 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 October 2, 1995.

(o) 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. August 18, 2006

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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 coercively interrogate employees concerning their union or other concerted protected activities.

WE WILL NOT discourage membership in the International Brotherhood of Electrical Workers, Local 474 or 480, AFL–CIO or any other labor organization by discharging, refusing to issue employment applications to, or refusing to hire union members or sympathizers, or by manipulating our hiring policies to avoid hiring them because of their union or other protected activities.

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

WE WILL, within 14 days from the date of the Board's Order, offer John Smith, Jr., Tommy Dearing, Jay Greenwell, and Kenneth Wahlgren full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

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

WE WILL make whole John Smith, Jr., Tommy Dearing, Jay Greenwell, and Kenneth Wahlgren for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of John Smith, Jr., Tommy Dearing, Jay Greenwell, and Kenneth Wahlgren, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer the employee-applicants named below employment in the positions they applied for or, if those jobs no longer exist, in 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.

Wayne Devine	John Smith, Jr.
Mike Pickett	Robert Conn
Sammy Yelverton	Al Lungrin
Jim Horne	Hewitt Barton, Sr.
Hewitt Barton II	William Payne Barton
R. B. Penton, Jr.	Andy Cole
Roy Summit	Robin Lunsford
Davis Newsom	Cliff Emory
Gary Summit	David Erwin
Jack Gatlin	Glen Greenwell
Kevin Shipp	Charlie Garrison
John Clenny	Danny Hawkins
Craig Goodson	Mike Young
Bruce Gaston	

WE WILL make the employee-applicants named above whole for any loss of earnings and other benefits resulting from our unlawful refusal to hire them upon application, less any net interim earnings, plus interest.

WE WILL offer three of the employee-applicants named below, the individuals to be identified in a Board compliance proceeding, employment in the positions they applied for or, if those jobs no longer exist, in 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.

Al Lungrin	Sammy Yelverton
Wayne Devine	Larry Nipper
Larry Watts	Alfred F. Mathews
Tommy Dearing	

WE WILL make the three employee-applicants identified in compliance whole for any loss of earnings and other benefits resulting from our unlawful refusal to hire them, less any net interim earnings, plus interest.

WE WILL consider the remaining four employee-applicants named above for future job openings in accord with nondiscriminatory criteria, and notify them, the Charging Party Unions, and the Regional Director for Region 26 of future openings in positions for which the four individuals applied or substantially equivalent positions. If it is shown at a compliance stage of this proceeding that, but for the failure to consider them, they would have been selected for any other openings, we shall hire them for any such positions and make them whole, with interest, for any loss of earnings and benefits.

WE WILL notify the four employee-applicants just referred to, in writing, that any future job applications will be considered in a nondiscriminatory way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusals to hire or to consider the above-named employee-applicants for employment, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the refusals will not be used against them in any way.

JESCO, INC.

Jack L. Berger, Esq., for the General Counsel.
William I. Gault, Esq., and *David M. Thomas, III, Esq., (Phelps Dunbar)*, of Jackson, Mississippi, for the Respondent.
Mr. Wayne Devine, Assistant Business Manager Local No. 480, of Jackson, Mississippi, for Local No. 480.
Mr. Benny Goolsby, Assistant Business Manager Local No. 474, of Memphis, Tennessee for Local No. 474.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charge in Case 26–CA–17283 was filed on February 12, 1996, by International Brotherhood of Electrical Workers, Local No. 480, AFL–CIO (Local 480), and an amended charge on April 10, 1996. Local 480 filed the charge in Case No. 26–CA–17529 on June 20, 1996. The International Brotherhood of Electrical Workers, Local Union No. 474, AFL–CIO (Local 474) filed the charge in Case No. 26–CA–17322 on February 29, 1996.

After issuance of a consolidated complaint, a second amended consolidated complaint issued on August 28, 1996, and an amendment thereto on January 24, 1997. It alleges that Jesco, Inc., (Respondent or Jesco) committed unfair labor practices at three different jobsites, Jackson, Mississippi, (herein the Jackson jobsite); Holly Springs, Mississippi, (herein the Holly Springs jobsite); and Yazoo City, Mississippi, (herein the Yazoo City jobsite).

At the Jackson jobsite, the complaint as further amended at the hearing alleges that Respondent posted a "not hiring" sign in about September, 1995, for the purpose of discouraging Union members and supporters from applying for employment. The complaint also alleges that, on three separate occasions in September and November, 1995, Respondent refused to give applications for employment to applicants because of their union activities. On January 10, 1996, the Jackson complaint alleges, Respondent unlawfully interrogated an employee about his union membership and the union activities and membership of other employees. The complaint alleges that, between September 29 and November 27, 1995, Respondent failed to hire or consider for hiring various individuals[1] into at least 10 job openings, because of their protected, concerted activities and to discourage employees from engaging in such activities and filled said positions with employees who were not "legitimate core employees" from Respondent's other jobsites. The complaint alleges that Respondent discharged John Smith, Jr., and Tommy Dearing because of their protected activities.

At the Holly Springs jobsite, the complaint alleges, Respondent refused to hire various individual into at least four job openings,[2] because of their protected, concerted activities, and to discourage other employees from engaging in such activities and filled these openings with employees who were not "legitimate core employees transfers from other jobsites of Respondent." In addition, the complaint alleges that Respondent discharged employees Jay Greenwell and Kenneth Wahlgren because of their protected concerted activities.

At the Yazoo City jobsite, the complaint avers, Respondent refused to hire various individuals[3] into at least two job openings, because of their protected, concerted activities, and filled the job openings with employees who were not legitimate core employee transfers from other jobsites. The complaint also alleges that Respondent maintained a policy that employment was temporary in nature and only for the duration of the project, in order to prevent employees from transferring to other jobsites and to preclude them from becoming core employees.

A hearing was held before me on these matters on February 3 through February 7, 1997, in Jackson, Mississippi. Thereafter, the General Counsel, Respondent, and Local 474 filed briefs. On the basis of the entire record, including my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business in Tupelo, Mississippi, and jobsites in Jackson, Mississippi; Holly Springs, Mississippi; and Yazoo City, Mississippi where it has been engaged as an electrical contractor in the building and construction industry. During the 12-month period ending June 30, 1996, Respondent, in conducting its business operations in the above-cited jobsites, purchased and received at its Tupelo, Mississippi, location, goods valued in excess of $50,000 directly from points located outside the State of Mississippi. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

The evidence adduced at the hearing establishes that Locals 480 and 474 are labor organizations within the meaning of Section 2(5) of the Act, and I so find.

II. THE ALLEGED UNFAIR LABOR PRACTICES AT THE JACKSON JOBSITE

A. Summary of the Evidence

1. The alleged unlawful refusal to hire

The complaint alleges that Respondent unlawfully refused to hire or consider for hire 11 applicants beginning September 29, 1995 and ending November 17, 1995. Respondent's records show that it hired 21 electricians at the jobsite, 16 of them after September 29, 1995, the date of the first union attempt to file applications (R. Exh. 19).

Darel Knight, an admitted supervisor, was the project superintendent at the Jackson jobsite, and was in charge of hiring employees. He gave to each employee a hiring package containing a Company statement on "Unions" as follows:

> Jesco has achieved its enviable position in the market place without a labor union. Jesco operates its facilities in a union-free environment and strongly believes it to be in the best interest of employees. Unions do not provide products, create jobs, or operate in the best interest of employees. Collective bargaining eliminates individual freedom.[4]

Asked whether it was true that Respondent did not want unions, Knight replied that the Company was an open shop contractor and wanted to stay that way.

Knight testified that he hired according to certain policies. There is no documentary evidence of these policies, and Knight testified twice on the subject. Although his testimony is not entirely clear, his second attempt to elucidate these policies appears to state that he first tried to obtain transfers of "good employees" from other Jesco jobs. Next, he reviewed the job histories of previous employees. His third approach was to ask for recommendations from foremen and "competent employees." The last recourse was to "put the word on the street" and put up application signs for "anybody who came around."[5]

The Jackson job consisted of electrical work on a Methodist hospital. Work on this project began in mid-September 1995.

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[1] Wayne Devine, John Smith, Jr., Mike Pickett, Robert Conn, Sammy Yelverton, Al Lungrin, Jim Horne, Hewitt Barton, Sr., Hewitt Barton, II William Payne Barton, and R. B. Penton, Jr. (the complaint erroneously lists an "Arby" Penton).

[2] Andy Cole, Roy Summit, Robin Lunsford, Davis Newsom, Cliff Emory, Gary Summit, David Erwin, Jack Gatlin, Glen Greenwell, Kevin Shipp, Charlie Garrison, John Clemney, Danny Hawkins, Craig Goodson, Mike Young, and Bruce Gaston.

[3] Al Lungrin, Sammy Yelverton, Wayne Devine, Larry Nipper, Larry Watts, Alfred F. Mathews, and Tommy Dearing.

[4] G.C. Exh. 6. Although it was not offered in evidence, Knight affirmed its content.

[5] Rufus Palmer, vice president of operations, stated that Jesco had four hiring categories: (1) current employees from other jobsites that are overstaffed or who can be transferred to another site; (2) former employees in good standing; (3) referrals from current employees or colleagues; and (4) applications from the general public.

A summary of Respondent's records prepared under Knight's supervision purports to show that he hired 21 employees at the jobsite from September 25, 1995, until May 1, 1996.[6] At the beginning of this period, Knight placed a "Not Accepting Applications" sign at the jobsite, but took it down on December 15, 1995. He put it up again on January 3, 1996. Knight called the period when the sign was down the "applications period."

Respondent's summary shows that Respondent hired three employees before September 29, when the union applicants first applied. One of these was Dan Cowart, who was transferred from another job, the Pasquotank prison project, to the Jackson jobsite. The second was Robert Bramlett, who had been a foreman on another job. The third was Troy Bell. Knight testified that Bell had been working for Knight's brother-in-law, and that he hired Bell based on the brother-in-law's recommendation.

On September 29, Wayne Devine, Local 480's assistant business manager, went to the Jackson jobsite with John Smith, Mike Pickett, and Robert Conn. All were qualified electricians, and wore 3-inch buttons stating that they were organizers for Local 480. They told Knight that they were there to put in applications. Knight replied that there was a sign up, and that he was not accepting applications.[7]

Prior to December 15, Knight hired six more employees. Three were assertedly transfers from the Pasquotank project,[8] while three had worked with Knight on other projects.[9]

On October 26, business agent Devine saw an ad in a local newspaper placed by Workforce, an employment agency. The ad stated that electricians and helpers were needed.[10] The next day, October 27, Devine went to Workforce and spoke with an individual named Harold. The latter named Jesco, and Devine referred to "the hospital up there." Harold said that he needed as many electricians as he could get. Devine replied that he could supply this need, and gave his pager number to Harold. The latter promised to get back with Devine as soon as possible.[11]

Devine did not hear further from "Harold," and went back to Workforce a few days later. The latter's "attitude had changed," and he told Devine that he would not be providing electricians for Jesco any more.[12]

On the same day that Cory Williams applied November 3, Devine went back to the jobsite with Al Lungrin, Sammy Yelverton, and Jim Horne. All wore union organizer buttons and were qualified electricians. Knight acknowledged to the union applications that he had hired two employees through Workforce. He had "opened up the applications" for one day, but told Workforce that he would not be needing any more employees.[13]

On November 27, Devine returned to the jobsite with Sammy Yelverton, Mike Pickett, John Smith, R. B. Penton, Hewitt Barton, Jr., Hewitt Barton, Sr., and William Barton.[14] All were qualified electricians, and wore their union organizer buttons. According to the consistent testimony of these applicants, they asked to submit employment applications, and Knight refused, saying that he would not need any more electricians to finish the job.[15]

After the opening of the "applications period," on December 15, Knight hired four employees simply because they were qualified electricians.[16] He hired one because he had been recommended by his father.[17] Knight also hired Tommy Dearing, an alleged discriminatee in this proceeding. Dearing was a certified electrician. He went to the jobsite on December 27 but did not reveal his union affiliation. He was interviewed by Knight and given a drug test. Dearing reported for work on January 3, pursuant to a call from Knight. As indicated hereinafter, he was discharged a short time later.

On December 20, Knight sent Devine a fax stating that he would receive his application.[18] Devine went to the jobsite the next day with John Smith, and submitted an application. He received a message on his recording machine on January 2, 1996, advising him to report for work the next morning. Devine's wife was then in the hospital in childbirth involving a premature breech birth. Devine called Knight and said that he could not be at the job on January 3, but would arrive the following day. Knight said there would be "No problem." That night Devine's wife was again in difficulty and Devine stayed with her until 4:30 a.m. He called Knight at 9 a.m., and was told that he had been replaced. Knight contended that Devine did not call in for 4 days, and that Knight told him that the offer of employment had been withdrawn.

Respondent's records show that it hired Don Pratt on January 8, 1996.[19] Although Respondent's summary and Knight's testimony clearly establish that the "applications period" ended on January 3, Knight insisted at the hearing that Pratt was hired

[6] R. Exh. 19.

[7] Devine taped this conversation, and a transcript is in evidence as G.C. Exh. 9. Respondent's counsel was given an opportunity to listen to the tape.

[8] Dale Parker, Russell Brock, and Thomas Struchen.

[9] Clay Speed, Cory Williams, and Cliff Daniel.

[10] G.C. Exh. 10.

[11] Devine taped this conversation, and a transcript is in evidence as well as the tape. G.C. Exh. 11. Respondent's counsel was given an opportunity to review the tape. Respondent objected on the ground of hearsay, and that Workforce's status as an agent of Respondent had not been established. I credit Devine's testimony as to this conversation, as supplemented by the tape of the conversation. In addition, the parties stipulated that Workforce supplied one employee to Respondent, albeit a prior employee. The Board has concluded that an employment service was an agent of an employer when providing temporary employees to the employer. *Storall Mfg. Co.*, 275 NLRB 220, fn. 3 (1985). I reach the same conclusion herein.

[12] Devine recorded this conversation, and a transcript is in evidence as G.C. Exh. 12. Respondent's counsel was given an opportunity to review the tape.

[13] This conversation was also recorded. G.C. Exh. 13.

[14] All were members of Local 480 except for Penton and the Barton's, who were members of Local 903 in Gulfport, Mississippi.

[15] This conversation was recorded, G.C. Exh. 14.

[16] Johnny Franklin, Jacob Evans, Rodney Fuller, and Bobby Hamilton.

[17] Gary Hamilton.

[18] G.C. Exh. 5.

[19] R. Exh. 19.

during the "applications period." Accordingly, he did not have to meet any of the first three hiring criteria.

Roy Parker was also hired after the close of the "applications period." Knight stated that he had worked with Parker on a job back in 1979 or 1980, that Parker called him, was "down in the dumps," needed work, and Knight gave him a job out of the goodness of his heart. He also transferred Glen Silverman from the Yazoo City project.

Knight asserted that William Mitchell was a former employee, although Knight did not specify the job location. Mitchell was having "personal problems" and wanted to get back "to home and momma." Accordingly, Knight gave him a job. Knight testified that Philip Cook had worked for him as a temporary employee from Workforce, and that he transferred Cook to Jesco's payroll on January 4. Although Knight contended that Cook was a former Jesco employee, he appeared to base this testimony on assertions made to him by Workforce.

John Smith went to the jobsite on September 29 and November 27 with other union applicants, and wore an organizer button on those occasions. He went to the jobsite again with Wayne Devine on December 21 in response to a call from Devine. The record is silent as to whether he wore union insignia on that day. Smith filled out an application, was sent for drug screening, and reported for work on January 3, in response to a call from the Company. He was discharged a short time later.

2. The Alleged Unlawful Interrogation

The General Counsel amended the complaint at hearing so as to name a different supervisor as the individual who engaged in the interrogation. The General Counsel stated that his last name was unknown, but that his first name was "Russell." Accordingly, the complaint was amended to name "Russell Blank" as the supervisor.

Two documents list all the employees hired at the Jackson jobsite. Only one employee has the first name "Russell." The last name is "Brock," who is listed as an "electrician/foreman."[20] He has formerly been identified herein as an employee hired by Knight prior to December 15.

As indicated, Tommy Dearing reported for work on January 3, 1996. He testified that project superintendent Knight introduced him to an individual named "Russell," and said that the latter would be Dearing's foreman. Dearing described Russell as an individual in his late twenties, with short brown hair. He testified that Russell gave Dearing his orders, and told him what to do. Dearing considered Russell to be his supervisor.

Dearing testified that, on January 10, Russell asked him whether he knew John Smith, and whether the latter was a union member. Dearing replied that he did know Smith, and that he was a union member. Russell then asked Dearing whether he was a union member, and Dearing answered affirmatively. Russell next asked how many union members were on the job. Dearing replied that he was not at liberty to disclose this information. Dearing's testimony is uncontradicted.

3. The alleged unlawful discharges

On the next day, January 11, Tommy Dearing and John Smith put union organizer buttons on their clothing and union stickers on their hard hats. Dearing testified that a foreman named "Dan" asked him what he was doing with the button and union stickers. Dearing replied that he was representing the IBEW. Dan said that Dearing was a fool, and that Jesco was not going to put up with it.[21] This testimony is uncontradicted.

Dearing and Smith testified that other employees wore various stickers on their hardhats. According to Dearing, everybody on the job wore stickers. Smith testified that employees Gary Hamilton, Don Pratt, John Cook, Cliff Daniel, Bob Hamilton, and "Russell" wore stickers. He described the stickers as "Moses Electric" and "Edward's Electric" stickers, flags, "smiley faces," frogs, and stickers out of cereal boxes. There was no enforcement of any rule against non-Company stickers on hardhats.

On January 12, Dearing and Smith were called to project superintendent Knight's office. Russell was present. Knight told the employees to remove the stickers from their hard hats. Dearing replied that they could not do so as long as other employees were permitted to wear such stickers. Knight said that he would have to terminate the employees if they refused to remove the stickers, and Dearing told him to do what he had to do. Both Dearing and Smith testified that, as Knight was preparing the termination papers, he told Russell to see that stickers were removed from all hard hats on the job.

Project superintendent Knight denied that Dearing and Smith asserted that other employees were wearing stickers on their hardhats. He denied that the two employees said they could not remove the stickers as long as other employees were wearing them. Knight denied that, in the presence of the employees, he told Russell to make sure that other employees were not wearing stickers on their hardhats.

Knight asserted that he had a standing rule against any decals on hardhats except those authorized by Jesco. He pointed to a rule which states such a prohibition,[22] and asserted that copies of the rules were distributed to employees. Knight also contended that the rule was enforced, and referred to warnings issued to Dan Cowart on December 29, 1995,[23] and to Charles Shaw on January 11, 1996.[24] Knight said that his reasons for the rule were to prevent sexual harassment, derogatory comments, and racial slurs. These could give the wrong impression to women and minorities. "My hardhats are mine, and I should have control over them," Knight stated.

[20] G.C. Exh. 2; R. Exh. 19.

[21] The only individual with the first name "Dan" on the two rosters in evidence lists a "Dan Cowart" as an electrician/foreman. G.C. 2, R. Exh. 19. Cowart has previously been identified as an employee hired before September 29.

[22] G.C. Exh. 3, rule 6.

[23] R. Exh. 21. Cowart is listed as a foreman on Respondent's roster for the Methodist Hospital job, R. Exh. 19.

[24] R. Exh. 22. Knight speculated that the 1995 date may have been a clerical error. The hospital job was not in existence at that time. The location of the offense is listed on the warning as "Methodist." Shaw is not listed as a Methodist Hospital employees on Jesco's roster. R. Exh. 19.

B. Factual and Legal Conclusions

1. The alleged unlawful interrogation

From the fact that two of the Respondent's documents list a "Russell Brock" as the only employee with that first name, I conclude that the "Russell" about whom Tommy Dearing testified was Russell Brock. I also credit Dearing's uncontradicted testimony that Brock gave him orders and told him what to do, and that Dearing considered Brock to be his supervisor.

I credit Dearing's uncontradicted testimony that Brock, on January 10, 1996, when Dearing was employed, asked Dearing whether John Smith (then employed) was a union member, whether Dearing was a union member, and the number of union members on the job.

The first issue is the question of Brock's supervisory status. Section 2(11) of the Act defines a supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Court of Appeals for the Fifth Circuit has stated: "The functions of a supervisor listed in the statute are disjunctive; the Board need not show that an employee performed all or several of the functions to support a finding of supervisory status." *NLRB v. Dadco Fashions*, 632 F.2d 493, 106 LRRM 2022, 2024 (5th Cir. 1980), enfg. 243 NLRB 1193 (1979).

I conclude that the work Dearing was required to perform, electrical work on a construction site, involved specialized expertise. I also conclude that the direction of such work required independent judgment. The Board has held on similar facts that this responsibility establishes supervisory status. *Lab Glass Corp.*, 296 NLRB 348 (1989); *F. Mullins Construction*, 273 NLRB 1016 (1984). At least two circuit courts of appeal have sustained the Board's finding of supervisory status where responsible direction of work constituted a key factor in the Board's conclusions. *NLRB v. Dadco Fashions*, supra; *Justak Brothers and Company v. NLRB*, 664 F.2d 1074 (7th Cir. 1981) enfg. 253 NLRB 1054 (1981). I conclude on this authority that Russell Brock was a supervisor.

The next issue is whether Brock's questions to Dearing constituted unlawful interrogation.

In an early statement of the principles to be applied in such cases, the Board stated:

> In our view, the test is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act. The fact that employees gave false answers when questioned, although relevant, is not controlling. The Respondent communicated its purpose in questioning the employees-a purpose which was legitimate in nature-to the employees and assured them that no reprisal would take place. Moreover, the questioning occurred in a background free of employer hostility to union organization. These circumstances convince us that the Respondent's interrogation did not reasonably lead the employees to believe that economic reprisal might be visited upon them by Respondent. [*Blue Flash Express*, 109 NLRB 591, 593 (1954).]

The Board distinguished its decision in *Blue Flash* from a contrary holding, in which the interrogation took place a week before a Board election, and the employer failed to give the employees any legitimate reason for the interrogation or assurances against reprisal (id.).

The Board reiterated this standard in *Rossmore House*, 269 NLRB 1176 (1984), where it rejected a per se approach to interrogation of open union adherents and concluded that the test was whether, under all of the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce, employees in the exercise of rights guaranteed by the Act (id., 269 at 1177). The Board stated some of the factors to be considered:

> Some factors which may be considered in analyzing interrogations are: (1) the background; (2) the nature of the information sought; (3) the identity of the questioner, and (4) the place and method of interrogation. See *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). These other relevant factors are not to be mechanically applied in each case. Rather, they represent some areas of inquiry that may be applied in applying the *Blue Flash* test of whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. [Id., 269 NLRB at 1178 fn. 20.]

The Board has concluded that interrogation of a known union adherent's union sympathies was coercive. *Baptist Medical System*, 288 NLRB 882 (1988). In *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), the Board applied the same test to interrogation of employees who were not open union adherents. The Court of Appeals for the Fifth Circuit recently affirmed a Board finding of coercive interrogation because of the employer's promulgation of an illegal rule, and a history of attempting to engage in the same practice in the past. *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359 (5th Cir. 1990), enfd. in part 294 NLRB 462 (1989).[25]

The Board has recently considered a case with similarities to the case at bar. In *Stoody Co.*, 320 NLRB 18 (1995), there was no apparent purpose for the questions, nor were any assurances given that the employee did not have to answer or that his job was not endangered. The violations in *Stoody* consisted only of transgressions of Section 8(a)(1), whereas here the Respondent discharged Dearing.

[25] Citing *Bourne*, supra the court listed eight factors to be considered in determining whether interrogation has been coercive: (1) the history of the employer's attitude toward its employees: (2) the nature of the information sought or related; (3) the rank of the questioner in the employer's hierarchy; (4) the place and manner of the conversation: (5) the truthfulness of the employee's response: (6) whether the employer had a valid purpose in obtaining the information sought: (7) whether a valid purpose, if existent, was communicated to the employee that no reprisals would be forthcoming. Although some of these factors were not satisfied, the court in *NLRB v. Brookshire Grocery*, supra, agreed with the Board that the interrogation had been coercive.

I conclude that the circumstances in this case were at least as coercive as they were in *Stoody*, and that Respondent, by Brock's questions, violated Section 8(a)(1).

2. The alleged unlawful discharges

(a) Factual resolutions

The first factual issue is whether other employees wore stickers not approved by Jesco on their hardhats. Dearing and Smith affirmed that they did. They described the types of decals in detail, and Dearing identified at least five employees by name who did so. Respondent referred to evidence of a Company rule prohibiting such decals and two warnings which assertedly demonstrated Jesco's enforcement of the rule. However, one of the warnings was against an individual whose name does not appear on Jesco's roster for the Methodist Hospital job (Charles Shaw), and I therefore do not consider this to be probative evidence of Company enforcement of the rule at that job. The other evidence pertained to an individual listed on Respondent's roster as a foreman (Dan Cowart).

The Company did not call any of the employees named by Dearing to contradict his testimony that they wore hardhat decals not approved by Jesco. Dearing was a truthful witness, and I credit his testimony. I do not consider evidence that one employee, a foreman, was warned for wearing a hardhat sticker to be a contradiction of Dearing's testimony regarding other employees. I therefore conclude that Respondent's hardhat rule was not uniformly enforced and that other employees wore such decals.

The next factual issue is whether Dearing and Smith, during the exit interview on January 12, told project superintendent Knight that other employees were wearing hardhat decals not approved by Jesco. The employees affirmed that they did so, and Knight denied it. The employees were truthful in demeanor, and it is highly unlikely that they would fail to present a defense which was factually true. I credit their testimony that they did so, and said that they would not remove the decals from their own hardhats as long as the Company permitted others to wear them. I do not credit Knight's denial that they said this.

The last factual issue is whether Knight, when preparing the employees' termination papers, told supervisor Russell Brock to make sure that employees were not wearing stickers on their hardhats. Respondent did not call Brock to deny the employees' testimony that Knight said this to him. I credit that testimony, and reject Knight's denial that he made this statement to Brock.

(b) Legal conclusions

In *Malta Construction Co.*, 276 NLRB 1494 (1985), enfd. 806 F.2d 1009 (11th Cir. 1986), the alleged discriminatee refused to remove a union sticker from his hardhat. The Board concluded that his discharge for this reason violated the Act. The Board relied upon the Supreme Court's statement in *Republic Aviation Corp.* that "the right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity. . . ."[26]

[26] 324 U.S. 793, 802 fn. 7 (1945).

The Board in *Malta* referred to its statement in a prior case[27] that a rule which curtails an employee's right to wear union insignia is "presumptively invalid unless special circumstances exist which make the rule necessary to maintain production or discipline, or to ensure safety."

The Board considered the employer's reasons in *Malta* for the rule—the decals would obscure the distinctive color of the hardhats which enabled the employer to identify the employee's craft and the fact that some of the decals had "obscene pictures" on them which would offend the public when the employees were directing traffic. The Board concluded that neither of these reasons was established by the evidence.

This decision was enforced by a panel majority of the Court of Appeals for the 11th Circuit. The dissenting opinion voiced reasons for opposing the majority view with arguments which anticipated the views of the 6th Circuit in a later case.[28] Thus, the dissenting opinion in *Malta* pointed out that the employee was not restricted from applying union insignia to his own clothing, and opined that the Board had not properly balanced the interest of the employees in organizing against the employer's property interest.

The 11th Circuit majority in *Malta*, however, stated that the Board's conclusion that the employer's reasons for the discharge were not the real reasons was supported by substantial evidence and, accordingly, enforced the Board's order.

In *Windemuller Electric*, supra, the Board concluded that the discharges of the employees assertedly because they refused to remove stickers from their hardhats was unlawful. The Board adopted the administrative law judge's conclusion that the reasons advanced by the employer for the removal order were pretextual. The Court of Appeals for the Sixth Circuit declined to enforce this part of the Board's Order. The Court stated that the fact that the employer permitted the employees to place union insignia on their own clothing demonstrated that the employees had means of communicating their views to other employees without using hardhat decals. The Court held that the use of Company property in the form of the hardhats "to let organizational rights trump property rights" was not justifiable when there was no need to do so (34 F.3d 395). In *Reno Hilton*, 319 NLRB 1154, fn. 4 (1995), the Board stated that it "respectfully disagreed with the court's decision. . . ".

I am bound by the Board's view of the law whether or not it is enforced by the U.S. Court of Appeals. *Iowa Beef Packers*, 144 NLRB 615 (1963). The Board's view of the principles governing the case at bar appears to have been adopted by the 11th Circuit in *Malta* after consideration of the dissenting view. Thus there was a violation because the employer's reasons for the discharge were pretextual.

This raises in this case the issues of whether the General Counsel has presented a prima facie case that protected activities were a factor in the Respondent's decision to discharge Dearing and Smith, and if so, whether Respondent has rebutted

[27] *Kendall Co.*, 267 NLRB 963 (1983).

[28] *NLRB v. Windemuller Electric*, 34 F.3d 384 (6th Cir.1994), enfg. in part, revg. in part and remanding 306 NLRB 664 (1992).

the prima facie case by showing that they would have been discharged in any event.[29]

Respondent elicited evidence to establish that it was without antiunion animus. Thus, Bob Baughn, Respondent's manager for administration and human resources, testified that Respondent signed a union agreement for a job characterized as the "Savannah River" project, and hired union members for that job. However, Rufus Palmer, the project manager for the Savannah River project, testified that Jesco never signed a union contract for that project, but used union members because Davis-Bacon wage rates applied, and the Company "could use the Union applicants."

Administrative manager Baughn testified that the Company did not exclude union applicants, and that it had employed union members. He knew this because employees "talk" to the project superintendents, and "occasionally" list union affiliation on their applications. Baughn did not have any records of employees who were union members, but said that he knew "one" that "popped" in to his mind.

At the Jackson jobsite, Respondent's animus against unions is established by its distribution to employees of a hiring package stating that it was in their best interest to work in a "union-free environment," by project superintendent Knight's testimony that Respondent wanted to remain an open-shop contractor, and by supervisor Brock's unlawful interrogation of Dearing as to whether he or John Smith was a union member, and the number of union members in the plant.

Respondent points to its hiring of two union members, Dearing and Smith, and its job offer to business agent Devine, as evidence of the lack of animus. However, Dearing did not reveal his union affiliation when he applied, and the record is silent as to whether Smith did so when he applied on December 21. In any event, both Dearing and Smith were promptly discharged for an unjustifiable reason as soon as they revealed their union affiliation. Although Knight sent Devine an offer, he failed to honor his promise to Devine that the latter's concern with his wife's medical condition would cause "no problem." Instead, he withdrew the offer, simultaneously hired another individual outside the "applications period" (Don Pratt), and thereafter hired additional employees. The job offer to Devine was a mere token served up by Respondent because Devine had made one of his applications during the "applications period."

I have found that Respondent did not uniformly enforce its rule against hardhat stickers, and that other employees in fact wore them without penalty. This disparate treatment constitutes evidence of discriminatory motivation. Knight's order to Brock to make sure that all such decals were removed, while he was terminating Dearing and Smith, shows that the sticker issue was a mere device to get rid of recently hired employees discovered to be union organizers. Knight's purported reasons for the hardhat rule—the prevention of sexual harassment, derogatory comments, and racial slurs—were not sustained by any evidence whatever that any of this occurred. The Board reached the same conclusion in *Malta* with respect to the employer's allegation of obscene pictures on hardhats. The fact that Respondent failed to enforce its rule against other employees shows that its application in the case of Dearing and Smith was pretextual. Accordingly, I find that Respondent has not rebutted the General Counsel's prima facie case, and that it discharged John Smith and Tommy Dearing on January 12, 1996, because of their concerted, protected activities in violation of Section 8(a)(3) and (1) of the Act.

3. The alleged unlawful refusals to hire

In order to establish an unlawful refusal to hire, the General Counsel must establish that the employer refused to hire the applicants because of their union affiliation. *Starcon, Inc.*, 323 NLRB 977, 982 (1997). "This is true even when the applicants are union members (salts) intent on organizing other employees (authority cited). Likewise an employer who establishes application and hiring procedures designed to impede or screen out union applicants violates Section 8(a)(3) (authority cited)" (id.). See also *TIC-The Industrial Co.*, 322 NLRB 605 (1996).

The evidence supports a conclusion that the alleged discriminatees applied for jobs at times when Respondent was hiring. Between September 29, 1995, when union applicants first applied, and December 15, 1995, when Knight opened his "applications period," Respondent hired 6 employees, and through its agent, Workforce, caused an ad to be placed in a newspaper seeking applicants. Workforce told business agent Devine that it needed as many employee applicants as Devine could get.

Devine and other union members applied in September and twice in November. On one of these occasions, November 3, Respondent had hired a nonunion applicant, and Knight told the union applicants that he "opened the applications period for one day, but would not be needing any more employees." Nonetheless, he continued to hire employees.

On December 15, Knight opened his alleged "applications period," and thereafter hired four applicants based upon their applications only, plus discriminatees Dearing and Smith. After Knight's closing of the "applications period" on January 3—for which no credible reason has been advanced—he continued to hire or transfer other employees from other jobs.

The evidence shows that Respondent knew that the applicants were affiliated with the Union, and that Respondent had antiunion animus.

Respondent argues that it hired according to its hiring policies. The record does not support this argument. Thus, Troy Bell was hired based on a brother-in-law's recommendation. This does not meet any of the hiring policies. Neither was the hiring of Gary Hamilton, who was hired on the recommendation of his father, who had just been hired. Knight hired Roy Parker and William Mitchell for personal reasons which, however commendable, do not fall within Respondent's stated hiring policies.

On November 27, 1995, Knight falsely told Devine and other applicants that he did not need any more electricians to complete the job. Thereafter, he hired more electricians. The only logical reason for Knight's opening of the "applications period"

[29] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Manno Electric Inc.*, 321 NLRB 278, 280 fn. 12 (1996).

on December 15 (aside from his prior "one day" opening) was that his first three hiring methods were not working, and that he needed more employees. He closed the "applications period" on January 3, 1996, for an inexplicable reason, since he still needed employees.

Respondent argues that the union applicants were not hired because they did not apply when the jobs were available, i.e., when the "applications period" was open. Knight's actual hiring policies showed that he manipulated the system to make sure that union applicants were excluded. His "one day opening" of the "applications period" is unexplained, as well as his later closing of it on January 3. His other violations of his own stated practices remove all credibility from his asserted policies.[30]

Respondent argues that the alleged discriminatees were not bona fide applicants because of their organizational objectives. This argument has been laid to rest by the Supreme Court in *NLRB v. Town & Country Electric, Inc.*, 133 L. Ed. 2d 371 (1995), and by the Board which, in *Sunland Construction*, 309 NLRB 1244, 1230 (1992) stated:

> The statute's premise is at war with the idea that loyalty to a union is incompatible with an employee's duty to the employer. The fact that paid union organizers intend to organize the employer's workforce if hired establishes neither their unwillingness nor their inability to perform quality services for the employer. Indeed, because the organizers seek access to the jobsite for organizational purposes, engaging in conduct warranting discharge would be antithetical to their objective.

In summary, Respondent hired more employees subsequent to the attempts of the union members attempts to apply than the number of union members. I conclude that Respondent refused to hire or consider for hiring the applicants listed in footnote 1 above because of their union affiliation, on the dates indicated above, in violation of Section 8(a)(3) and (1) of the Act.

The complaint further alleges that Respondent posted a "not hiring" sign in September 1995, for the purpose of discouraging union members and supporters from applying. In light of Knight's actions described above, it is an inescapable conclusion that this allegation is correct, and I so find. The allegation that Respondent filled positions with employees from other jobsites who were not "legitimate core employees" of Respondent presents some problems. Respondent transferred some employees from other jobsites, but there is no evidence that they were not "legitimate core employees." Other employees, however, were hired as part of Respondent's manipulation of its hiring procedures. I shall recommend that the "legitimate core" allegation be dismissed.

[30] Local 474 argues that undersigned's Decision in *D.S.E. Concrete Forms, Inc.*, 303 NLRB 890 (1991), is a "mirror image" of this case. It follows logically, or tautologically, that reliance upon an applicant pool which does not include union members automatically excludes such members.

III. THE ALLEGED UNFAIR LABOR PRACTICES AT THE HOLLY SPRINGS JOBSITE

A. Summary of the Evidence

1. The alleged refusal to hire

Jesco was doing the electrical work for a Wackenhut Correctional Center project in Holly Springs, also known as the Marshall County Correctional Center. The project superintendent was Rusty Hendrix, an admitted supervisor. He started hiring in August 1995, hired about four or five electricians, and then laid them off in October 1995.

Local 474 filed a charge against Jesco in September 1995, in Case 26–CA–17030, alleging Jesco's failure to accept applications from 18 individuals because of their union affiliation. The case was settled on January 23, 1996, with Jesco's agreement that it would hire 5 of the 18 individuals immediately, and 4 more for its next available electrician positions. Respondent further agreed to accept and consider applications on a nondiscriminatory basis.[31] The General Counsel states that Local 474 concedes that 5 members were hired immediately, and 4 more when additional openings occurred, but that Jesco failed to abide by its agreement to consider applications from the remaining 9, and others.

On January 9, 1996, the Holly Springs project manager, Bobby Stewart, sent Local 474 assistant business manager Benny Goolsby a letter with a copy of the charge in Case 26–CA–17030 attached to it. The letter stated that Respondent would be accepting applications for the Holly Springs job on January 15 and 16, and that any of the individuals named in the charge who desired employment should report to project superintendent Rusty Hendrix on those days.[32]

On January 16, 1996, Local 474 financial secretary Jack Gatlin assembled all of the individuals named above in footnote 2, and drove them in two vans to the Holly Springs jobsite. The individuals wore IBEW logo caps, buttons, and shirts, and the vans had large banners labeled "IBEW Local 474 Organizing Committee, Memphis, TN."

Jack Gatlin and Michael Young testified that all of these individuals filled out applications on January 16, 1996, and that all were journeymen electricians and members of Local 474. The General Counsel subpoenaed Respondent's employment records, and the applications of all the individuals named above in footnote 2 were obtained, except for Michael Young and Kevin Shipp. Each of the submitted applications shows the applicant's union affiliation in a variety of ways—listing the Union's phone number as an emergency number, and a union official as the person to call, stating that he heard about the job from a union organizer, or had completed an IBEW apprenticeship school course.[33]

Michael Young testified that he was the last individual to submit an application. He affirmed that he filled out the application correctly, and stated thereon that he was a qualified IBEW journeyman electrician. Gatlin caused a photograph to

[31] G.C. Exh. 26.
[32] R. Exh. 13.
[33] G.C. Exhs. 20(a)–20(n).

be taken showing the union applicants standing alongside the two vans. Young testified that he was the last individual on the right in this photograph.[34]

Assistant business manager Goolsby examined the photograph of the applicants standing in front of the vans. He identified the 6th individual from the left, wearing blue jeans, a T-shirt, and an IBEW logo as Kevin Shipp.[35]

In summary, the General Counsel presented evidence that 16 union applicants filed applications on January 16, 1996. Financial secretary Jack Gatlin testified that none of the union applicants was hired. Respondent's records show that it hired 27 employees at the Holly Springs jobsite after January 16, 1996. Eight of these were pursuant to Jesco's settlement agreement with the Union (R. Exh. 24).

Project superintendent Hendrix stated that, at the time of the hearing, Respondent's policy was to transfer employees from other jobs, rather than lay them off, and rely upon referrals from existing employees. However, he did not know whether this policy was in effect at the time of the Holly Springs hirings.[36] He "guessed" that the policy first became effective in November or December 1996.

Hendrix testified that he hired four or five employees beginning in August 1995, then had to "gear down," and started hiring again in early 1996. His testimony on the identities and date of employees who were hired was confusing and contradictory. Respondent's records show that on February 26, it hired at least five employees who were said to have been "transferred from the Beach Mold and Tool Project."[37] The employment applications for these individuals show that they were hired at the Beach Mold project on February 19, a week before their "transfer" to Holly Springs on February 26.[38] Respondent's Holly Springs records also show a Neal Myrick transferred from the Beach Mold project on February 26, and Hendrix so testified. Respondent's records show nine more hirings in March 1996, some assertedly "transfers" from the Beach Mold and Interstate projects, some based on "referrals."[39]

2. The alleged unlawful discharges

Alleged discriminatees Jay Greenwell and Kenneth Wahlgren were employed covertly at the Holly Springs job in August 1995. They engaged in several strikes for reasons which are not relevant to the issues in this case, and later returned to work. Greenwell testified that Wayne Patterson, a foreman, was wearing a sticker on his hardhat. Greenwell and Wahlgren put IBEW stickers on their hats, and project superintendent Hendrix ordered them to remove the stickers. Greenwell protested that other employees were wearing stickers, and Hendrix denied it. Greenwell and Wahlgren decided not to make an issue of the matter and removed their stickers.

Greenwell and Wahlgren were employed again in February 1996. They testified that foreman Wayne Patterson was wearing two stickers on his hardhat, an American flag and a Confederate or Mississippi State flag. Foreman Lee Everett had a red and white sticker on his hardhat. Greenwell and Wahlgren put the IBEW stickers back on their hardhats. Hendrix told them to remove the stickers or he would fire them. He repeated this in a second conversation. The employees again protested that other individuals were wearing stickers and, according to Greenwell, Hendrix acknowledged that this was true. He again told the employees to remove the stickers, or go and get their tools. They decided to take the latter option, and returned later to the construction trailer with their tools. Foreman Lee Everett was trying to put "white-out" over the sticker on his hardhat, without success.

Greenwell testified that Hendrix did not say anything to them about stickers on hardhats when they were first employed. They were given a copy of the Company's rules which prohibit decals not approved by the Company.[40]

Hendrix corroborated the employees' testimony. Although Patterson worked in the trailer with Hendrix, he did not notice that Patterson wore a sticker on his hardhat. Two other employees had placed stickers on their hardhats, and Hendrix ordered them removed. He stated his objections to stickers: "/T/he younger crowd likes to put the FU words on or profanity, or cross-bones, and it's just very unprofessional."

B. Factual and legal conclusions

The evidence clearly establishes that the alleged discriminatees filed applications for work on January 16, 1996, one of the dates designated by Respondent for such filing. Although Respondent did not supply the employment applications of Michael Young and Kevin Shipp pursuant to the General Counsel's subpoena, I conclude that the evidence set forth above is sufficient to establish that they made such applications.

The applications show each applicant's union affiliation. The affiliation of Young and Shipp is established by Young's testimony that he stated this affiliation on his application, and by Shipp's wearing a union logo on his T-shirt when he applied, together with his presence in a group of obvious union sympathizers.

Respondent's own records show that it hired more employees at the Holly Springs jobsite after January 16, 1996 than the number of union applicants (with the settlement hirings excluded). Respondent's argument that it did so pursuant to its hiring policies has no merit. In the first place, the very existence of such policies is suspect, in light of the testimony of project superintendent Hendrix that they may not have come into existence until November or December of 1996. Respondent's assertion that some of the hired employees were transfers from other Jesco jobs is a patent subterfuge. Respondent's records show that they applied at the other job (Beach Mold) only a week before their "transfer" to the Holly Springs job.

[34] G.C. Exh. 25.

[35] Ibid.

[36] See footnote 5, supra.

[37] R. Exh. 24. Greg Sizemore, Michael Landrum, Randy Brock, Roderick Enlow, and Richard Enlow.

[38] G.C. Exhs. 34(b), 34(c), 34(e), and 34(f). Roderick Enlow was hired on February 22. G.C. Exh. 34(d).

[39] R. Exh. 24. One of the hirings based on referral was Donnie Bowman who was hired on February 22. Hendrix stated that he applied at about the same time that the union applicants submitted their applications. Respondent's records also show that it hired five employees pursuant to the settlement agreement.

[40] G.C. Exh. 3, rule 6.

Respondent could not have been following its asserted objective of protecting the jobs of long-standing and competent employees. This fact establishes the validity of the complaint allegation that Respondent filled the job openings with employees who were not "legitimate core employee transfers." This manipulation of its own policies to exclude union members, and the unlawful discharges of Greenwell and Wahlgren, intra, establish Respondent's antiunion animus.

Accordingly, I find that Respondent failed to hire the applicants listed in footnote 2 above, because of their Union and protected concerted, activities, in violation of Section 8(a)(3) and (1) of the Act.

The facts in the discharges of Jay Greenwell and Kenneth Wahlgren are identical to those in the case of John Smith, Jr. and Tommy Dearing. For the reasons set forth in those cases, I conclude that Respondent discharged Jay Greenwell and Kenneth Wahlgren on February 22, 1996, because of their protected, concerted activities, in violation of Section 8(a)(3) and (1) of the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES AT THE YAZOO CITY JOBSITE

A. Summary of the Evidence

The Yazoo City jobsite involved the construction of a federal prison. Tommy Miller, an admitted supervisor, was the electrical superintendent at this jobsite. He testified to hiring procedures similar to those outlined above at the other projects. Miller asserted that he was a member of the IBEW.

Seven union members attempted to apply at the Yazoo City jobsite, one on February 23, 1996, and all 7 on March 14. Respondent's records show that it hired 11 employees after March 14, 1996.[41]

On February 23, Al Lungrin went to the jobsite and saw a sign stating that Respondent was taking applications for electricians. Lungrin spoke to electrical superintendent Miller, identified himself as a union member, and said that he needed a job. Miller replied that he was "full up," and did not need any electricians. Lungrin reported this to business agent Devine. The latter then called Miller, used a fictitious name, and asked whether Miller needed electricians. Miller replied affirmatively, and asked Devine to come and see him.[42] Union member Sammy Yelverton visited the jobsite and observed that the "receiving applications" sign was still in place.

On March 14, 1996, Devine went to the jobsite with several union members.[43] Devine told project superintendent James Martin, an admitted supervisor, that they were all members of the IBEW, and Martin said that he knew it.[44]

The applicants spoke with electrical superintendent Tommy Miller. He asked whether they all wanted to work, and all answered affirmatively. Miller responded that he was "hired up," and had some people coming in the following Monday. Miller asserted that two of these individuals had previously worked for Jesco.[45] Respondent's records show that 3 individuals—Emilio Garza, Kenneth Bond, and Troy Watson—were hired shortly after the visit of the union applicants on March 14. Garza filed an application on March 18. In the application, Garza states that he had never prevously worked for Jesco. The date of the application, March 18, 1963, appears after Garza's signature. On the first page of the application the date is stated to be "March 13, 1996." This date is imprinted with a different pen and in handwriting different from the date opposite Garza's signature.[46] Respondent's records show that Garza started working on March 20[47] Miller asserted that he hired Garza because he would be useful in communicating with Respondent's Spanish-speaking employees. Miller contended that he learned about Garza from a report given to an asserted Jesco foreman by a mason employed by another subcontractor. Neither the foreman nor the mason testified.

Kenneth Bond filed an application, but did not indicate any date opposite his signature. On the first page of the application is the date "March 13, 1997" in handwriting different from Bond's, made with a different pen.[48] Bond testified that he did not make this entry. He affirmed that he took a drug screening test a day or two after he filed his application, and identified the drug screening report, which indicates that the screening was done on March 19, 1996.[49] In his application, Bond indicates that he had not previously worked for Jesco.[50]

Miller claimed that he had promised employment to Bond based on the recommendation of a current employee, Bryan Saxon. However, no such name appears on Respondent's record of Yazoo City employees.[51] Nonetheless, Miller asserted that Saxon told him that Bond was previously from Yazoo City, was moving back, and that Miller told Saxon to tell Bond that Miller would hire Bond. Bond contended that Saxon was an employee on the Yazoo City jobsite, and told him in January 1996 to tell Bond to report for work on March 18, 1996.

Respondent's records show that Troy Watson started work on March 18, and assert that this was based on the fact that he was a former employee. Miller testified to the same effect. However, Watson left the jobsite 4 days later, on March 22.[52] The records further show that, subsequent to the foregoing hirings, Respondent hired three employees in May, four in June, and one in July.[53]

The applications submitted by the union applicants were stamped at the top with two legends: "This Application Valid for Yazoo Prison Project Only," and "This application Valid for 30 days Only," with the date noted. Underneath these stamped notices, as part of the regular application form, was the statement that the application would remain active for 90 days.[54] Eight applications filed at the Holly Springs job did not contain

[41] R. Exh. 26.
[42] This conversation was taped. G.C. Exh. 17.
[43] Sammy Yelverton, Tommy Dearing, Al Lungrin, Larry Watts, Larry Nipper, and Alfred Mathews.
[44] G.C. Exh. 18, a tape of this conversation.
[45] Ibid.
[46] G.C. Exh. 29.
[47] R. Exh. 26.
[48] G.C. Exh. 27.
[49] G.C. Exh. 28.
[50] G.C. Exh. 27.
[51] R. Exh. 26.
[52] R. Exh. 26.
[53] R. Exh. 26.
[54] G.C. Exh. 8; testimony of business agent Devine.

either of the stamped legends.[55] Miller asserted that the reason for the different legends on the Yazoo City job was the fact that the project was going to last a long time, and Respondent wanted to cut down on paperwork.

B. Factual and Legal Conclusions

Respondent hired more employees at the jobsite after the union applicants attempted to apply them the total number of union applicants. Miller's statement to Lungrin on February 23 that Respondent was "full up" was false. My conclusion is based on Miller's invitation to Devine when the latter applied by phone using a fictitious name, the continued maintenance of the "receiving applications" sign, and Respondent's subsequent hiring of electricians.

Miller's statement to Devine and the other union members on March 14—that he had just "hired up," had some people coming in the following Monday, and that two of them were former Jesco employees—was also false. I conclude that Garza did not apply until March 18, the date opposite his signature, and that the "March 13, 1996" entry on the first page is erroneous. Since the application was under the control of Respondent, I further conclude that the March 13 entry was made by a Jesco employee. The only possible reason for this predating of the application was to make it appear that it was filed prior to March 14, the date of the union attempts to apply.

Jesco's listing of Bond's application date of March 13 is also false. Bond denied that he made this entry. The record of his drug screening on March 19 and his testimony that he applied a day or two prior to this event show that he applied on March 17 or 18—subsequent to the union applications on March 14.

I also conclude that Respondent did not follow its own professed hiring criteria in the cases of Garza and Bond. Neither was a former employee. Neither was a transfer from another Jesco job. It is obvious in the case of Garza that he was not recommended by a current Jesco employee. The dubious status of "Bryan Saxon," whose name does not appear on the jobsite list of employees, precludes a finding that a current employee recommended Bond, and that Miller had made a prior offer to Bond through Saxon. As for Troy Watson, his unexplained tenure of only 4 days at the Yazoo City jobsite suggests that his hiring there was not related to work requirements. In any event, he started work at the jobsite 4 days after the union applications. In summary, Garza's, Bond's, and Watson's hirings do not support Miller's statement to the union applicants on March 14.

I do not accept Miller's explanation of the legends at the top of the Yazoo City applications. The legend stating that the application was valid only for the Yazoo City project could have had no effect except to provide Respondent with an argument that the employee could not transfer to other projects, contrary to Respondent's stated transfer policy. The legend limiting the application to 30 days would not eliminate paper work. In fact, its natural tendency would be to cause additional applications every 30 days instead of every 90 days.

Respondent's animus against the union applicants is established by its record at the other projects, and by its false responses to the applicants at Yazoo City.

Respondent points to the fact that electrical superintendent Miller was himself an IBEW member. However, it was Miller who gave the union applicants the false reasons for denying their attempts to apply, and thus played an integral part in Respondent's refusal to hire them. In these circumstances, Miller's union membership does not provide a defense to Respondent. *Western Exterminator Co.*, 223 NLRB 1270 (1976).

I conclude that the General Counsel has established a prima facie case that Respondent refused to hire the applicants listed above in footnote 3 above because of their union membership, and that Respondent has not rebutted that case.[56]

The complaint also alleges that Respondent filled jobs with employees who were not legitimate core employees from other jobsites. This is accurate in the cases of Garza and Bond, who did not meet any hiring criteria.

The complaint also alleges that Respondent maintained a policy that employment was temporary in nature and only for the duration of the project. This was the obvious intention of the legend limiting the application of the Yazoo City project only, and, as such, was contrary to Respondent's stated transfer policy. Applications at other jobsites did not contain this legend. The only possible reason for the legends at Yazoo City was the fact that union applicants had applied, and that Respondent wanted to prevent their transfer to another jobsite in the event that they were required to be hired by Board action.

I conclude that the two policies listed above were discriminatorily motivated and violated Section 8(a)(3).

In accordance with my findings above, I make the following:

CONCLUSIONS OF LAW

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

2. International Brotherhood of Electrical Workers, Local Unions 480 and 474 are labor organizations within the meaning of Section 2(5) of the Act.

3. At the Jackson jobsite, Respondent violated the Act by:

(a) Coercively interrogating an employee about his union membership and the union membership of other employees, thus violating Section 8(a)(1);

(b) Discharging John Smith, Jr. and Tommy Dearing on January 12, 1996, because of their union and other protected concerted activities, in violation of Section 8(a)(3) and (1);

(c) Refusing to give employment applications to individuals attempting to apply, because of their union membership, on September 29, 1995, November 3, 1995, and November 27, 1995, in violation of Section 8(a)(3) and (1); and

(d) Refusing to hire the individuals listed in footnote 1 above because of their union and other concerted protected activities, in violation of Section 8(a)(3) and (1).[57]

[55] Applications of Donald Bowman, Jeanie Everett, Tom Everett, Herbert Younker, Jr., Larry Phillips, Francis Poorman, Jr., and Loren Albritton. G.C. Exhs. 31, 32.

[56] Supra, fn. 29.

[57] The refusals to hire took place on the following dates; (a) September 29, 1995—Wayne Devine, John Smith, Jr., Mike Pickett, and Robert Conn; November 3, 1995—Wayne Devine, Sammy Yelverton, and Jim Horne; November 27, 1995—Wayne Devine, John Smith, Jr.,

4. At the Holly Springs jobsite, Respondent violated the Act by:

(a) Refusing to hire the applicants listed in footnote 2 above, on January 16, 1996, because of their union and other concerted, protected activities, in violation of Section 8(a)(3) and (1);

(b) Filling job openings with individuals who were not legitimate core employees in order to bar the applications of union applicants, because of their union membership, thus violating Section 8(a)(3) and (1); and

(c) Discharging Jay Greenwell and Kenneth Wahlgren on February 22, 1966 because of their protected, concerted activities, in violation of Section 8(a)(3) and (1).

5. At the Yazoo City jobsite, Respondent violated Section 8(a)(3) and (1) by:

(a) Refusing to hire the individuals listed in footnote 3 above on March 14, 1996, and thereafter, because of their union and other concerted, protected activities;

(b) Hiring individuals into job openings who were not legitimate core employees and contrary to its own hiring policies, in order to bar the hiring of union applicants; and

(c) Limiting the validity of an application to the Yazoo City jobsite and to 30 days in duration, in order to prevent the transfer of any union employees to other jobsites.

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

THE REMEDY

It having been found that Respondent engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent unlawfully discharged John Smith, Jr., and Tommy Dearing on January 12, 1996 and Jay Greenwell and Kenneth Wahlgren on February 22, 1996, it will be recommended that Respondent be ordered to reinstate them to their former positions, or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges to which they would have been entitled. They shall be made whole for any loss of earnings they may have suffered by reason of Respondent's unlawful action, by Respondent's paying them a sum of money equal to their loss of earnings, less net interim earnings, from the date of their discharges to their reinstatement, or, absent reinstatement, to the date when the job ended from which they were discharged. At the compliance stage of this proceeding, it will be determined whether they would have been transferred to another job if the current job ended, and if, so, whether the backpay period should be extended. Backpay will be computed on a quarterly basis as in the Board's order in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall also recommend that Respondent be required to expunge from its files all references to its discharges of John Smith, Jr., Tommy Dearing, Jay Greenwell and Kenneth Wahlgren, and inform each of them in writing that this has been done, and that his discharge will not be used as the basis of any future discipline of him.

I have concluded that Respondent's refusal to give employment applications to the union applicants at the Jackson jobsite was unlawful. I further conclude that had such applications been given to them and submitted by them, jobs for all of them would have been available. Accordingly, I shall recommend that Respondent be ordered to offer them employment and make them whole in the same manner as that set forth above for the discharged employees. I shall also recommend that Respondent be require to expunge from its records all references to its refusal to hire them.

At the Holly Springs jobsite, Respondent hired more employees than the number of union members who applied. I note Respondent's disregard of its own asserted hiring policies, and, indeed, the issue of whether they even existed. Accordingly, I shall recommend that Respondent be required to offer employment to the individuals named in footnote 2 above, and make them whole in the same manner as that set forth above for the discharged employees. I shall also recommend an expunction order.

At the Yazoo City jobsite, Respondent hired more employee than the total number of union members who attempted to apply for employment. Accordingly, I shall recommend that Respondent be required to offer employment to the individuals listed in footnote 3 above, and make them whole in the same manner as that set forth above for the discharged employees. I shall further recommend the same expunction order as that described above.

On the basis of my findings of fact, and conclusions of law, I issue the following recommended[58]:

ORDER

Jesco, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union or other concerted protected activities;

(b) Discouraging membership in the International Brotherhood of Electrical Workers, Locals 474 or 480, AFL–CIO, or any other labor organization by discharging employees because of their union affiliation or other protected concerted activities, by refusing to issue employment applications to or to employ applicants for the reasons listed above, by manipulating its hiring policies so as to bar union members and sympathizers from employment, or by discriminating against employees or applicants for employment in any other manner with respect to their wages, hours, or tenure employment, or any other term or condition of employment.

(c) In any like or similar manner, interfering with, restraining, or coercing employees or applicants for employment in the exercise of their rights guaranteed by Section 7 of the Act.

Mike Pickett, Sammy Yelverton, Hewitt Barton, Sr., Hewit Barton, II, William Payne Barton, and R.B. Penton, Jr.

[58] If no exceptions are filed as provided by §102.48 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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 John Smith, Jr., Tommy Dearing, Jay Greenwell, and Kenneth Wahlgren reinstatement to their former positions, or, if any such position no longer exists, to a substantially equivalent position, dismissing if necessary any employee hired to fill said position.

(b) Make John Smith, Jr., Tommy Dearing, Jay Greenwell, and Kenneth Wahlgren whole for any loss of earnings any of them may have suffered because of Respondent's unlawful discharge of him, in the manner set forth in the remedy section of this Decision.

(c) Within 14 days from the date of this Order, expunge from its records all references to its unlawful discharges of John Smith, Jr., Tommy Dearing, Jay Greenwell, and Kenneth Wahlgren and inform each of them in writing that this has been done and that the discharge will not be used as the basis of any future discipline of him.

(d) Within 14 days from the date of this Order, offer those employee-applicants named below, who would currently be employed but for Respondent's refusal to hire them, employment in 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 they had not been discriminated against by Respondent.[59]

(e) Make the employee-applicants named below whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this Decision.

Wayne Devine	Cliff Emory
John Smith, Jr.	Gary Summit
Mike Pickett	David Erwin
Robert Conn	Jack Gatlin
Sammy Yelverton	Glen Greenwell
Al Lungrin	Kevin Shipp
Jim Horne	Charlie Garrison
Hewit Barton, Sr.	John Clemney
Hewit Barton, Jr.	Danny Hawkins
William Payne Barton	Craig Goodson
R. B. Penton, Jr.	Michael Young
Andy Cole	Larry Nipper
Roy Summitt	Larry Watts
Robin Lunsford	Alfred Mathews
Davis Newsom	Tommy Dearing

Where an employee-applicant has been discriminated against more than once, the period for computation of backpay shall begin at the date of the first discrimination.

(f) Within 14 days from the date of this Order, remove from its files any references to the unlawful refusal to hire the employee-applicants named above and within 3 days thereafter notify the discriminatees in writing that this had been done and that it will not be used against them in any way.[60]

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

(h) Mail a copy of the attached notice marked "Appendix.[61]" to the last known address of the employee-applicants named above and to all persons employed by Respondent at its Jackson, Holly Springs, and Yazoo City, Mississippi jobsites. Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be mailed by Respondent immediately upon receipt thereof.

(i) Sign and return to the Regional Director for Region 26 sufficient copies of the notice for posting by the Unions, if they are willing, at their offices and meeting halls including all placed where notices are customarily posted.

(j) Within 14 days after service by the Region, post at its Jackson, Holly Springs, and Yazoo City, Mississippi jobsites copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by Respondent 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 February 12, 1996.

(e) 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. August 21, 1997

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

[59] *TIC-The Industrial Co.*, supra.

[60] Ibid.

[61] 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."

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 coercively interrogate employees concerning their union or other concerted protected activities.

WE WILL NOT discourage membership in the International Brotherhood of Electrical Workers, Locals 474 or 480, AFL–CIO, or any other labor organization, by discharging or refusing to hire union members or sympathizers, by manipulating our hiring policies so as to exclude union members, or by discriminating against them in any other manner.

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

WE WILL offer John Smith, Jr., Tommy Dearing, Jay Greenwell, and Kenneth Wahlgren reinstatement to their former positions, and make them whole, with interest for any loss of earnings they may have suffered by reason of our unlawful discharges of them.

WE WILL offer employment to the following individuals, and make them whole, with interest, for any loss of earnings they may have suffered by reason of our unlawful refusal to hire them upon application.

Wayne Devine	Cliff Emory
John Smith, Jr.	Gary Summit
Mike Pickett	David Erwin
Robert Conn	Jack Gatlin
Sammy Yelverton	Glen Greenwell
Al Lungrin	Kevin Shipp
Jim Horne	Charlie Garrison
Hewit Barton, Sr.	John Clemney
Hewit Barton, Jr.	Danny Hawkins
William Payne Barton	Craig Goodson
R. B. Penton, Jr.	Michael Young
Andy Cole	Larry Nipper
Roy Summitt	Larry Watts
Robin Lunsford	Alfred Mathews
Davis Newsom	Tommy Dearing

WE WILL expunge from our files any references to our unlawful refusal to hire the above individuals.

Jack L. Berger, Esq., for the General Counsel.
William I. Gault, Esq. and *David M. Thomas, III, Esq., (Phelps Dunbar)* of Jackson, Mississippi, for the Respondent.
Mr. Wayne Devine, Assistant Business Manager Local No. 480, of Jackson, Mississippi, for Local No. 480.
Mr. Benny Goolsby, Assistant Business Manager Local No. 474, of Memphis, Tennessee for Local No. 474.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. This is a Supplemental Decision in the above-captioned proceeding. On May 11, 2000, the Board issued its Decision in *FES*, 331 NLRB 9. Thereafter, the Board issued an Order Remanding the above-captioned proceeding to me for consideration in light of its decision in *FES*. The parties submitted briefs and responses to an Order to Show Cause which I have carefully considered together with the record in this proceeding.

I. THE ELEMENTS OF AN UNLAWFUL REFUSAL TO HIRE

The General Counsel must establish that the employer was hiring or had concrete plans to hire at the time of the alleged unlawful conduct.

The General Counsel can establish a discriminatory refusal to hire even when no hiring takes place. If the employer had plans to hire and then did not do so in order to avoid hiring union applicants, there is a discriminatory refusal to hire.[1]

The General Counsel must also show that the applicants had experience or training relevant to the announcement or generally known requirements for the positions being filled or that the requirements were themselves pretextual.

The General Counsel must also show that antiunion animus contributed to the decision not to hire the applicants.

Once this is established the burden shifts to the Respondent to show that it would not have hired the applicants even in the absence of their union activity. Should the Respondent assert that the applicants were not qualified for the position it was filling, it is the burden of the Respondent to show at the hearing on the merits that they did not possess the qualifications that the position required, or that others who were hired had superior qualifications and that it would not have hired them for that reason in the absence of their union membership or affiliation. If the General Counsel meets his burden and the respondent fails to show that it would have made the same hiring decisions even in the absence of union membership or affiliation then a violation of Section 8(a)(3) has been established.

The remedy for such a violation is a cease and desist order and an offer of immediate instatement to the positions for which they applied or if no such positions exist to substantially equivalent positions.[2]

II. THE ALLEGED REFUSAL TO HIRE AT THE JACKSON, MISSISSIPPI JOBSITE

The record shows that between September 29, 1995 when union members made applications for employment and January 22, 1996, that Respondent hired 16 electricians. It also advertised for electricians and instructed its hiring agent to hire them. During this period of time fewer than 16 union members or sympathizers applied for employment. These applicants were electricians. Two of the employees hired by Respondent during this period of time were union members, Tommy Dearing and John Smith. However, there is no evidence that Respondent knew that Tommy Dearing was a member of the Union or a sympathizer. Further, both Dearing and Smith were discharged unlawfully within a few days as indicated in my initial Decision.

Respondent also claimed that it made a job offer to the union business agent Wayne Devine, but that he failed to come to

[1] FES, supra, P 4, and fn. 7.
[2] Ibid.

work. Devine testified that his wife was in a difficult medical condition and that he called the employer and said that he would not be able to report on the day specified but would need another day. When he did attempt to go to work at that time he was told that he had been replaced. Respondent's supervisor Darryl Knight asserted that Devine did not call until 4 days later. I credit Devine's testimony. Respondent's statement that Devine had been "replaced" is not credible. Respondent continued to have vacancies and continued to hire. Divine could have been employed.

Respondent claimed that it hired according to a hiring system of categories of employees. The system is described in my initial Decision. However the record shows that Respondent did not uniformly adhere to its own rules.[3] Respondent has provided no explanation for its telling union members that it did not need any more employees when in fact it did need them and later hired them, nor has it explained its "1 day" opening of its application period, and its later closing of its application period when union members could apply for jobs, when in fact Respondent needed and later hired additional electricians.

The complaint alleges that Respondent's unlawful refusal to hire took place between September 29, 1995 and November 17, 1995. Respondent argues that it did not during this period of time hire enough employees to provide evidence of vacancies in sufficient numbers to meet the applications of the union members. However, under *FES*, Respondent need not have been hiring during this period in order to supply evidence of a violation. It is sufficient if it had concrete plans to engage in such hiring and I conclude on all the evidence of this case that in fact it did have such concrete plans. I further conclude Respondent closed its applications period on January 3, 1996, in order to deter any other applications from union members such as those of John Smith and Tommy Dearing, whom it hired and then almost immediately discharged. In summary Respondent has not rebutted the General Counsel's evidence which meets the requirement that there must have been sufficient vacancies to hire all of the applicants. Respondent has not rebutted the General Counsel's evidence of the availability of vacancies. The only evidence of the hiring of a known union sympathizer was that of John Smith. This evidence is insufficient to rebut the evidence of Respondent's antiunion animus in this case including the fact that Smith himself was unlawfully discharged.

III. THE ALLEGED UNLAWFUL REFUSAL TO HIRE AT HOLLY SPRINGS, MISSISSIPPI

On January 16, 1996, pursuant to Respondent's letter to the Union that it would accept their applications, 16 union members or sympathizers applied for work at the Holly Springs jobsite. Their union affiliation was known to Respondent, and all of them had the qualifications required for the job for which they were applying. These qualifications included positions as journeyman electricians, or other positions of similar or greater stature. Respondent did not hire any of these applicants. Beginning the next day, January 17, 1996 and continuing thereafter Respondent hired 19 nonunion electricians.[4]

The remaining two elements in the General Counsel's case, i.e., the qualifications of the applicants and Respondent's antiunion animus have already been established.

Respondent argued that in hiring the individuals whom it did employ, it was merely following its established hiring practices. However, Supervisor Hendricks, admitted he believed that these policies did not go into effect until later in 1996. One of these policies, Respondent asserted, was that it transferred long standing, dependable employees from jobsites where they were not needed to others where there was a greater need for their services. As the evidence shows however, Respondent transferred at least five employees from one jobsite to a Holly Springs jobsite, employees who had been hired only a short time before their supposed transfer. Respondent thus, did not adhere uniformly to its own asserted policies, the existence of which at the time of the events being litigated was in doubt. I conclude that Respondent has not rebutted the General Counsel's prima facie case.

Supervisor Hendricks stated that his first reason for not hiring the applicants was that he did not believe they would work, but instead would participate in a strike then in progress. The Board has held that a refusal to hire because the employer believed that the applicant would picket the jobsite constituted a violation of Section 8(a)(3). *Godsell Contracting*, 320 NLRB 871, 874 (1996). For the same reason, Respondent's refusal in the case at bar to hire employees because it believed they would engage in a strike was unlawful.

I conclude that Respondent has not rebutted the General Counsel's prima facie case of a violation at the Holly Springs jobsite.

IV. THE ALLEGED REFUSAL TO HIRE AT YAZOO CITY, MISSISSIPPI

Seven union members attempted to apply for jobs as electricians at the Yazoo City jobsite on March 14, 1996. All were announced to be members of the Union. One of them had previously applied and one of them had previously attempted to apply for a job. All were refused. During this period of time Respondent posted a sign at the jobsite stating that applications by electricians were being received. Union business agent Devine called the jobsite and asked whether they were receiving applications from electricians. Devine did not reveal his union affiliation. He was told that Respondent was hiring electricians and it was suggested that he come over and apply. When applicants known to be union members asked for applications project supervisor Miller replied that he was all "hired up." Respondent continued to display the sign stating that applications from electricians were being received.

Subsequent to March 14, 1996, Respondent hired 11 nonunion electricians.[5]

I conclude that the General Counsel has established a prima facie case that Respondent was hiring or had concrete plans to

[3] Page 13 of my initial Decision.

[4] R. Exh. 24.

[5] R. Exh. 26. The figure given above includes three individuals whom Respondent claims that it hired prior to March 14, 1996, but who in fact were hired thereafter as explained in subsections A and B and section 4 of my original decision.

hire at the time of the union applications. The applicants were all journeyman electricians or electricians with similar stature and their qualifications were not challenged by Respondent. The Company's antiunion animus has been previously established.

Respondent asserts that it followed a specific hiring policy. First, it transferred employees from other jobsites, next it hires former Jesco employees, and then employees recommended by a Jesco employee. Finally, it hires from general applicants. However, Respondent did not uniformly follow this policy.[6] The most glaring example of Respondent's unlawful conduct is its rejection of the applications of the known union applicants, while at the same time it told business agent Devine who concealed his identity that it was ready to hire and that he should come to the jobsite. Further, Respondent was a nonunion company, and it is unlikely that there were any union members or sympathizers in the first three categories of its hiring plan. The practical effect of his hiring policy was to screen out union members and sympathizers and was unlawful. *D.S.E. Concrete Forms*, 303 NLRB 890, 897–898 (1991); *TIC-The Industrial Co. Southeast*, 322 NLRB 605 (1996); *M.J. Mechanical Services*, 325 NLRB 1098 (1998).

Accordingly, I affirm my prior conclusions of law and the recommended order of this proceeding.

Dated, Washington, D.C. February 6, 2001.

[6] See pages 19–20 of my original Decision.