**Watkins Engineers & Constructors, Inc. *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO.** Case 12–CA–18146

April 4, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND WALSH

On November 6, 1998, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party filed cross-exceptions and a supporting brief, and the Respondent, the Charging Party, and the General Counsel filed answering briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The issues presented on exceptions in this case are whether the judge correctly found that the Respondent did not violate Section 8(a)(3) and (1) of the Act by refusing to hire, but did violate the Act by refusing to consider for hire, 24 union-affiliated applicants. Based on our recent decision in *FES,* 331 NLRB 9 (2000), we agree with the judge's finding of a refusal-to-consider violation, but we have decided to remand the refusal-to-hire portion of the case. The remand may include, if necessary, reopening the record to obtain evidence required to decide the case under the *FES* framework.

1. The facts

The Respondent (Watkins), a nonunionized construction and maintenance corporation in Jacksonville, Florida, had a contract with the Jacksonville Electric Authority (JEA) to provide ongoing maintenance at the St. John's River Power Park, one of JEA's steam generating stations. In early January 1996,[2] Watkins successfully bid on a contract with JEA to perform additional work during an upcoming outage[3] at St. John's. Watkins' project manager, Bob Webber, knew that additional employees would be needed to perform the outage work, but he did not know exactly when the outage would occur.

Watkins' hiring policy is to accept employment applications only when job openings are anticipated. In January, Webber began keeping a call-in list of qualified individuals who called to inquire about upcoming job openings. According to the judge, the record showed that any person with boilermaker skills who called to inquire about work after Webber began the call-in list should have been placed on the list. As of March, the call-in list contained approximately 580 names. The Respondent, however, did not place on the call-in list the names of 23[4] union members who were qualified and had called Watkins about employment.[5] All of these union applicants had, about the same time, submitted resumes that showed their union status.

In March, Watkins began calling applicants on the call-in list for the outage project. The call-in list was Watkins' primary source for hiring outage workers. The outage work started on March 17 and lasted for 21 days. Approximately 130 individuals were hired to perform the outage work.

The judge found that the Respondent violated Section 8(a)(3) of the Act by refusing to consider for hire 24[6] union applicants because of their affiliation with the Union. The judge found, however, that the Respondent was not hiring in January and early February. Therefore, he dismissed the refusal-to-hire allegation.

2. The refusal-to-consider allegation

The judge applied the *Wright Line*[7] test and found that the Respondent unlawfully refused to consider for employment the 24 union applicants. We agree with the judge's unfair labor practice finding for the reasons set forth by him and the additional reasons set forth below.

In *FES*, the Board clarified the elements of a discriminatory refusal-to-consider violation:

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

[2] All dates hereinafter are in 1996 unless otherwise specified.

[3] An outage refers to a period of time where the powerhouse or boiler is shut down for maintenance and repair.

[4] The one union applicant on the call-in list was Juan Pichardo. Pichardo called Watkins on January 25, did not reveal his union affiliation, and was told to submit a resume. Presumably at this point, Pichardo was placed on the call-in list. Subsequently, the Respondent learned of Pichardo's union affiliation. Pichardo was not contacted by the Respondent.

[5] The Union learned in January that Watkins had been awarded the outage contract. Union President James Estes told union members at a January 19 union meeting to call Watkins about employment.

[6] We agree with the judge that there is no basis for finding a violation with respect to union members who failed to comply with the Respondent's hiring procedures. In adopting this dismissal, we need not rely on any suggestion he may have made that some union applicants were not considered because they failed to follow their Union's instruction to call the Respondent about their applications.

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

> To establish a discriminatory refusal to consider, pursuant to *Wright Line*, supra, the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.
>
> If the respondent fails to meet its burden, then a violation of Section 8(a)(3) is established.

*FES*, supra at 15.

The judge's findings comport with this test. First, the Respondent excluded union applicants from its hiring process. The Respondent's call-in list was Watkins' primary source for hiring outage workers and, thus, a key component of its hiring process. The Respondent placed on the list any person with the skills of a boilermaker who called to inquire about work after mid-January and before the March outage—approximately 580 names. The over 100 applicants the Respondent hired for outage work were on the call-in list. By failing to put the union applicants on the call-in list, Watkins clearly excluded them from the hiring process.

Second, antiunion animus contributed to the decision not to place the names of known union-affiliated applicants on the call-in list. We agree with the judge's finding that "blatantly disparate treatment" supports an inference of unlawful motivation. The Respondent's omission of the union-affiliated applicants is a classic example of such disparate treatment. We further rely on the testimony of Edward Aaron, Watkins' senior vice president of operations, who explained why Watkins returned the union members' resumes. According to Aaron, "[I]f I get twenty resumes from the [union] hall, I usually believe something is up" and that a batch of resumes from one fax number "throws a suspicion" on those resumes.

Finally, the Respondent did not show that it would not have considered these 24 applicants for employment absent their support for the Union.

Based on the foregoing, we find that an unlawful refusal to consider violation has been established under the *FES* framework.

3. The refusal-to-hire allegation

In *FES*, the Board held that the General Counsel must establish the following elements to meet his burden of proof in a discriminatory refusal-to-hire case:

> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

*FES*, supra at 12.

We find that the above elements have been established in this case. First, the Respondent had concrete plans to hire. The call-in list Webber started in January was specifically created for the outage work. Webber testified that he established the list "to supply the names of people that we may be interested in hiring for the outage in March." In other words, the call-in list was a pool of applicants from which Watkins would be hiring when he knew more details about the outage project. These facts demonstrate that in late January and early February, when the union applicants attempted to apply for outage positions, the Respondent had "concrete plans to hire" within the meaning of *FES*.

Second, the record establishes that the applicants had experience and training relevant to the positions for hire. The Respondent stipulated that all of the union applicants are skilled boilermakers and qualified to do a majority of the work performed during an outage.

Finally, the record supplies evidence of antiunion animus. As described above, the Respondent unlawfully refused to consider the 24 applicants because of their union affiliation.

Based on the foregoing, we find that the General Counsel has met his burden of establishing the necessary elements of an unlawful refusal to hire under the *FES* framework.

Once the General Counsel has established his case, the burden shifts to the Respondent to demonstrate that it would not have hired the applicants even in the absence of their union activity or affiliation. In *FES*, the Board held that the issue of whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits.[8] There was record evidence that the Respondent hired boilermakers during the outage between March 17 and early April, but the judge made no findings with regard to whether the Respondent met its burden of establishing that the union applicants would not have been hired even in the absence of their Union or affiliation. Instead, the judge left this issue for compliance proceedings. How-

[8] *FES*, supra at 12.

ever, as the Board stated in *FES*, "matters which can be litigated at the unfair labor practice stage, must be litigated at that stage and cannot be deferred to compliance." *FES*, supra at 17.

Accordingly, we shall remand the refusal-to-hire allegation to the judge for further consideration of whether, under *FES*, the Respondent has demonstrated that it would not have hired the union applicants for job openings after mid-March, even in the absence of their union activity or affiliation. This remand shall include, if necessary, reopening the record to obtain evidence required to decide the case under the *FES* framework. Although we are adopting the judge's finding of a refusal-to-consider violation, we are not issuing a final order as to that violation because the remedy we would order for that violation would be subsumed within the remedy for a refusal-to-hire violation.

## ORDER

IT IS ORDERED that the issue of whether the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire union-affiliated applicants is remanded to the judge for appropriate action as set forth above. The judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

*Michael R. Maiman, Esq.,* for the General Counsel.
*Charles F. Henley Jr.* and *John D. Cole, Esqs.,* for the Respondent.
*Michael J. Stapp, Esq*., for the Charging Party.

## DECISION

## STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Jacksonville, Florida, on August 10, 11, 12, and 13, 1998. The charge was filed on June 19, 1996,[1] and the complaint issued on October 30, 1997. The complaint alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act by failing to consider for hire, or to hire, 45 named individuals because of their affiliation with the Charging Party.[2] Respondent's answer denies any violation of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

[1] All dates are in 1996 unless otherwise indicated.

[2] Two posthearing exhibits, CP Exh. 3 and R. Exh. 9, are, without opposition, received and admitted into evidence.

## FINDINGS OF FACT

### I. JURISDICTION

The Respondent, Watkins Engineers & Constructors, Inc., a corporation, is engaged in the business of providing construction and maintenance services to customers at various locations in the United States, including the St. John's River Power Park located at Jacksonville, Florida, at which it annually purchased and received goods and materials valued in excess of $50,000 directly from points located outside the State of Florida. The Respondent admits, and I conclude and find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I conclude and find, that International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### *A. Background*

The Jacksonville Electric Authority produces electrical power at steam generating stations located near Jacksonville in the St. John's River Power Park. During the period relevant to this proceeding, Watkins had a contract with the Electric Authority pursuant to which it provided ongoing maintenance at the Power Park utilizing approximately 20 employees. The Electric Authority typically shuts down its generating stations for several weeks each year so that major maintenance can be performed upon the boilers, generators, and other components of the station. These periods of intense maintenance activity are referred to as shutdowns or outages. The Electric Authority solicits bids for the performance of maintenance services during shutdowns. Although Watkins provided ongoing maintenance, it had to bid against other contractors in order to obtain the additional shutdown work. During a shutdown, the contractor performing the work requires a large number of employees who possess the skills of boilermakers, millwrights, pipefitters, and iron workers. Watkins is not signatory to a contract with the Union.

The local union of the International Brotherhood of Boilermakers in the Jacksonville area is Local 199. At a building trades meeting in January, Local 199 President James Estes learned that Watkins had been awarded the contract for an upcoming shutdown at the Power Park. During the Union's monthly meeting, held on January 19, International Representative Mike Peterson informed the members that Watkins, rather than a union contractor, had been awarded the contract for the upcoming shutdown. Notwithstanding that Watkins was not a union contractor, he suggested that any members who wanted to seek shutdown work with Watkins were free to do so. He prepared a handwritten notice advising members of the upcoming shutdown and providing the Watkins telephone number. The notice states that the members should document the date and time of their telephone call, and it advises the caller to "have witness if possible."

Watkins' hiring policy provides that applications for employment are accepted only when job openings are anticipated. Watkins' project manager, Bob Webber, knew that additional

employees would be needed to perform the shutdown work, but he did not know exactly when the shutdown would occur. Therefore, rather than accept applications, Webber decided to create and maintain a call-in list. Beginning in January, when a person called and inquired about upcoming work or working during the shutdown, Project Manager Webber directed Office Manager Sean Landrum, who was stipulated to be an agent, and secretary Rhonda Thrift, the two individuals who handled the majority of these calls, to obtain the person's name, telephone number, and craft. Thereafter, Thrift entered the names onto a computer. Webber noted that, although it was "possible" that an individual's name could have been misplaced, "we tried not to let that happen." The call-in list, as of March, contained approximately 580 names. Watkins did not accept résumés as part of its hiring process; however, the Electric Authority requested résumés for employees who would potentially be assigned to work in two areas. To comply with this request, Watkins, in January, asked boilermakers or millwrights who inquired about working during the shutdown to send in a résumé that Watkins then forwarded to the Electric Authority. Watkins did not accept unsolicited résumés. The General Counsel placed into evidence several résumés produced by Watkins pursuant to subpoena, but he presented no evidence regarding the circumstances surrounding the submission to Watkins of these résumés. Although the names on five of these résumés do not correspond to names on the call-in list, none of the five individuals was employed on the shutdown. Thus the record does not establish that they were submitted in connection with the shutdown, nor does it establish that they were unsolicited.

Watkins gives priority in hiring to former employees, and there is no evidence that any person who had not previously worked for Watkins was hired prior to March. Twelve employees who had previously worked for Watkins were hired in late February including five welders, one pipefitter, and one boilermaker, positions that utilized boilermaker skills. The vast majority of hires were in mid-March, which is consistent with the testimony of Project Manager Webber. Webber also explained that Respondent does not internally refer persons to other jobs. Rather, if no work was available when a person called, the caller would be told of any other known work. This is confirmed by Cecil Estes and Jerry Rhoden who, when they called Respondent, were advised of work in Perry, Florida, and at the Jacksonville shipyard, respectively.

### *B. Facts*

During the week following Peterson's announcement at the union meeting, his handwritten note containing Watkins' telephone number was posted on the bulletin board at the union hall. Three members took the initiative to contact Respondent. On January 25, Juan Pichardo called the number given by Peterson and spoke with Project Manager Webber. He did not reveal his union affiliation. Webber asked if Pichardo was a certified welder, and Pichardo replied that he was. Webber requested that he send a résumé and a document reflecting his certification. On January 26, Cecil Estes, son of Local 199 President James Estes, called the number provided by Peterson. Although Estes recalled that he spoke with a woman named Robin, I find that he spoke with Rhonda Thrift. Estes, who did not reveal his union affiliation, asked about work at the Power Park, and Thrift told him that she did not believe that Respondent would need anybody else. Nevertheless, she requested that he send a résumé and advised Estes that she understood there was work at Perry, Florida. Matthew Jonjock also called Respondent. The woman with whom he spoke told him that he needed to "talk to Sean [Landrum]" and to send in a résumé.

Peterson, upon learning that boilermakers were being told to send in résumés, "surmised that that was going to be their hiring policy for this particular shutdown and proceeded in that direction." He developed a form and directed Julie Jacques, the secretary at Local 199, to prepare résumés for any members willing to apply to Watkins. The member's name, address, and telephone number appear at the top of each résumé. The first two paragraphs of each résumé state the following:

> I am a field construction Boilermaker with skills in welding, fitting of pipe and plate and rigging. All the skills you will need to successfully complete current and future jobs.
>
> I have __ years experience in field construction and boiler making and am member in good standing with Boilermakers Local #199 in Jacksonville FL.

The résumés then set out the member's welding certifications, past employers, and freedom from drugs, information Jacques obtained from union records.

The Union began asking members to sign résumés on Monday, January 29. On January 29, the Union sent 11 résumés by facsimile transmission (fax), to the Respondent. None of these members had called Respondent previously, and none had been requested to send résumés. Project Manager Webber, upon receipt of the résumés, observed their similarity and contacted his superiors. Although Webber claimed that he did not read these résumés, that "the first one was identified to be with the Union, and that's where I stopped," I do not credit this testimony. He obviously had to identify each résumé to determine whether it was similar. On January 30, having received nine additional résumés, Webber called Local 199 President Estes and had a letter dated January 30 hand-delivered to him. The letter states that Respondent accepts applications only when it is hiring, but goes on to advise that Respondent "will accept telephone calls from anyone that is seeking employment and tell them the status of available work, if any." The letter concludes by noting that Respondent is returning the 20 unsolicited résumés that were sent by fax. Webber admits counting these. The name of the employee-applicant appears at the top of each page. The letter does not advise that Respondent was creating a call-in list for the upcoming shutdown.

Despite this letter, the Union continued to fax résumés to Respondent. On February 1, Webber again wrote Estes. This letter states that the résumés faxed to Respondent on January 31 had been discarded. It notes that Webber had advised Estes of Respondent's hiring policy both in the telephone conversation and letter of January 30, and it advises that any résumés submitted in the future would also be destroyed.

On February 9, the Union sent to the Respondent, by certified mail, the signed résumés of 44 members, including the résumés of Pichardo and Jonjock, which had been separately

mailed previously. Because of security at the Power Park, the public, including the Postal Service, is not permitted access to any facility other than the Jacksonville Electric Authority administration building. Certified mail is signed for by an employee of the Electric Authority. The Union's package was signed for on February 9 by Patricia Kramer. The package was then placed with other contractor mail and carried to the mail bin located in the building containing the offices of the contractors, from which it should have been picked up by a representative of Watkins. Respondent, in its position statements submitted during the investigation of the charge, denied receipt of this package.

The Union, during this same time period, prepared and duplicated a typed document that secretary Jacques "was giving out to the guys as they came in." That document relates to seeking employment with Respondent Watkins and another company, North American Power Services. It directs employees to telephone these employers, stating as follows: "Call once a week if possible every other week at least, ask about your status on their list and about any jobs they might have going or coming up." The document then sets out the respective telephone numbers. It concludes in underlined capital letters: "*KEEP A RECORD OF YOUR CALL, GOOD COMPLETE NOTES!, AND YOUR PHONE BILL.*"

Notwithstanding these clear instructions, only 26 of the members whose signed résumés were mailed to Respondent made a telephone call. The majority of the members who called did so from the union hall on the day they signed their résumés. Few made a second call; however, multiple calls would have been unnecessary since one call should have resulted in placement on Respondent's call-in list.

Estes, who had called on January 26, did not submit a résumé. His name appears on Respondent's call-in list.

Pichardo, who had called on January 25, signed his résumé on January 31 and personally mailed it to Respondent. It was not faxed from the union hall. He did not call Respondent after sending his résumé. His name appears on Respondent's call-in list. Pichardo, whose telephone has an answering machine, was not contacted by Respondent.

Jonjock signed his résumé on February 1 and had secretary Jacques mail it for him. It was not faxed. Jonjock, who had been told that he needed to talk to Sean Landrum, called Respondent about a week-and-a-half after he sent in his résumé. Landrum asked about a résumé, and Jonjock told him that he had sent in a résumé. Landrum left the telephone and, when he returned, told Jonjock that Respondent had his résumé, that they had "been receiving quite a few of these from boilermakers." He concluded the conversation by advising that Respondent would call him. Jonjock's name does not appear on Respondent's call-in list.

Harold Adams, whose résumé had been faxed on January 29, called Respondent in late February or early March to inquire about work. He was informed that Respondent had his résumé, but that there was no work at the time. His name does not appear on the call-in list.

Hollis Burch's résumé dated January 30 was mailed to Respondent on February 9. There is no evidence that this résumé was faxed to Respondent. Burch telephoned Respondent, asked if Respondent had received his résumé, and was told that it had. The male that he was speaking with asked him to verify his name, address, and telephone number. Since Respondent had this résumé, it must have been received by mail since it was not faxed to Respondent. Although Burch testified that he called some 3 to 5 days after signing the résumé, I find his call was made after February 9. His name does not appear on the call-in list.

Kevin Murphy, whose résumé was signed and faxed to Respondent on February 1, called Respondent on that same day. He asked that his name be put on the list. About 2 weeks later he called again, stated that he was checking on the job, and wanted to be sure he was on the list. The woman who had answered the telephone told him that he was. His name does not appear on the call-in list.

No other members testified to any conversation confirming either that their résumé had been received or that their name was on Respondent's call-in list. The call-in list, in addition to the names of Estes and Pichardo, includes the names of Kenneth Connell and Lee Kemp. Kenneth Q. Connell's résumé identifies him as K. Q. Connell, although he did sign it using his full name. Connell called Respondent from the union hall. His résumé was faxed on January 29, the date he signed it, but the record does not reflect the date of his call. The call-in list contains the name Kenneth Connell, without the middle initial Q., and the same telephone number as that shown on K. Q. Connell's résumé. Cranford L. Kemp's résumé was faxed to Respondent on January 29. At some point, the record does not establish when, Kemp telephoned Respondent. The name Lee Kemp, with the same telephone number as that on Cranford L. Kemp's résumé, appears on Respondent's call-in list.[3]

Michael McVay did not call Respondent on the basis of information furnished by the Union; however, his telephone bill confirms that he placed a 2-minute call to Respondent on January 22. McVay did not reveal his union affiliation. He was told that Respondent had work coming up but was not hiring at the time. He was not requested to send in a résumé. McVay's résumé was faxed on February 1 and was included in the February 9 package. McVay made no effort to contact Respondent after this. His name does not appear on the call-in list.

Eighteen other union members whose résumés were sent to the Respondent called Respondent pursuant to the Union's posted instructions. None of their names appears on the call-in list. Peterson witnessed more than half of these calls, including calls by the following eight members:

James Batten called on January 29, the day his résumé was faxed.

Marvin Gossage called on February 1, after his résumé had been faxed on January 29.

[3] Kemp testified to making a number of telephone calls where he either reached voice mail or a person named Yvonne. On February 1, when Kemp thought he was calling Respondent, his log reflects that he talked to Yvonne who told him that an individual named J. R. would be doing the hiring for the March shutdown. Project Manager Webber identified Yvonne and J. R. as employees of Power Plant Maintenance, another contractor at the site. Thus, on that occasion, it appears that Kemp reached Power Plant Maintenance instead of Respondent.

Robert Hatten called on January 31, the day his résumé was faxed.

Raymond Hicks called on January 31, the day his résumé was faxed.

Michael Kubeck called on January 31, the day his résumé was faxed.

Kenneth Reynolds called on January 31, the day his résumé was faxed.

George Spicer called on February 1, after his résumé had been faxed on January 29.

Thomas Sykes called on February 1. His résumé was not faxed.[4]

Peterson also witnessed the calls made from the union hall by the following 4 members who testified regarding their calls:

Terry Austin called on January 31, the day his résumé was faxed.[5]

Rickey Hurst called on January 31, the day his résumé was faxed.

Jerry Rhoden called on February 1, after his résumé had been faxed on January 29.[6] Rhoden was told there might be work at the shipyard.

Dale Ferguson called on January 29, the day his résumé was faxed.[7]

The following 6 employees credibly testified to calling Respondent:

Isham Carter's résumé was faxed to Respondent on January 30, the date he signed it. He called Respondent from the union hall, although the specific date of the call is not established.[8]

Bobby Crews, whose résumé dated January 30 was mailed to Respondent on February 9, called Respondent from his home. Crews' initial failure to recall signing a résumé is immaterial since the document confirms that he did so. Although Crews did not remember when he called, the person he spoke with confirmed that Watkins had work coming up and would need welders. Insofar as Crews was out of work when he called, and his records reflect that he was out of work from February 9 until March 5, I find that he called during that period.

William Ducati, whose résumé dated January 30 was mailed to Respondent on February 9, called Respondent after having conversations about upcoming work at the Power Park with a former union member who had worked with Watkins. When he called, "They said they'd be in touch."[9]

Carlton Ferguson's résumé was signed and faxed to Respondent on January 30. Sometime after this, Ferguson called Tim Mewbourn, who oversaw the work of boilermakers on the job. Webber testified that Mewbourn could effectively recommend applicants for employment. Mewbourn took Ferguson's name and number, but Ferguson was never called.

Clarence Moody, whose résumé dated January 30 was not faxed to Respondent, called Respondent sometime after January, but he did not place a date on the conversation. The record does not establish from where he made the call. He told the woman who answered the telephone that he was following up on an application he had filled out. The woman did not acknowledge receipt of Moody's résumé, but she did state she was going through "them," and would call him back. He received no call and made no further attempt to contact Respondent.

Larry Williams' résumé was signed and faxed to Respondent on January 29. Three or four days after this, Williams, who had previously worked for Respondent, called. The woman he spoke with obtained his name and advised that he could call back and that someone might be in touch with him.

Dennis Conway's résumé is dated January 29. Conway testified to having called a company that he believed to be Respondent prior to signing his résumé, but he did not testify to the number he called. In that telephone conversation, Conway was requested to come in and fill out an application or bring a résumé. He acknowledged that he had been calling various ads that he found in the paper. In a second conversation, a few days after signing the résumé and, therefore, in early February, Conway called and stated that he had filled out an application. He was told that "all we're needing is laborers right now, but we might be hiring some boilermakers later on." There is no evidence that Respondent was accepting applications or that it was hiring laborers or anyone else in early February. Conway was mistaken regarding the identity of the company that he reached; he did not call the Respondent.

In March, Respondent began calling the individuals on its call-in list, many of whom were already working or could not be reached. Webber testified that persons identified as having previously worked for Watkins were called first and that an attempt was made to contact every person in the relevant crafts on the call-in list. This conclusory testimony was not corroborated. Much of the calling was performed by Landrum and Thrift; neither of whom testified. Superintendent Ed Chase, who also utilized the call-in list, did not claim that he attempted to contact everyone on the list. Thus, although an attempt

[4] Although Sykes remembered filling out a document at the union hall, he could not remember signing his résumé or speaking with anyone at Watkins. I credit Peterson who made a contemporaneous note on the back of Sykes' résumé reflecting that Sykes called at 9:15 a.m.

[5] Austin's résumé is dated January 29.

[6] I credit Peterson's contemporaneous notes over Rhoden's fuzzy recollection regarding the date of this call.

[7] Dale Ferguson testified that sometime after this, it could have been as late as June, Respondent called him and offered him a job out of town which he refused. Since his name does not appear on the call-in list, it would appear that this job offer resulted from a subsequent application in which the Union was not involved. Ferguson, at some point, filled out an application in person at Watkins' office in the area of Eastport Road and Main Street.

[8] Carter took no notes. I find that Carter was mistaken in attributing to Respondent a statement that he would not be hired after he stated that "we were trying to organize them."

[9] Ducati's testimony regarding a woman asking if he would like to fill out an application obviously related to some other job inquiry since Respondent was not accepting applications.

should have been made to contact every person, there is no probative evidence that this actually occurred. Pichardo, who had an answering machine, received no call. Thereafter, Respondent began seeking the names of qualified employees from its current employees. A current employee gave Peterson's name to Tim Mewbourn, who hired him. Peterson recommended Camilio Juncao a member of a different local of the Union, who lived in Tampa, Florida. Mewbourn called Juncao and hired him. Neither Peterson nor Juncao revealed their union affiliation.

### *C. Credibility and Conclusions Regarding Knowledge of Union Affiliation*

The relevant conversations in this case occurred in January and February 1996, more than 2-1/2 years before the hearing. During that same 2-1/2-year period, these employees would have had conversations regarding potential employment with many other employers. Despite the Union's direction that the members take notes when contacting Respondent by telephone, almost none of the members followed that instruction. In view of the foregoing, I am able to place little reliance upon the recollection of these employees regarding any statements relating to the availability of work or hiring. Although I am satisfied that they sought to testify truthfully, review of the testimony reveals constant lack of clear recollection. Of far greater significance is the testimony regarding representations that the employee was on the call-in list or that Respondent had received the employee's résumé, issues that were specific to contact with this Respondent. This is particularly critical in view of Respondent's contention that it did not have knowledge of the union affiliation of the alleged discriminatees.

Although Respondent, in its position statements, denied receipt of the résumés sent by mail, Respondent did not question Webber concerning this. Counsel for the Charging Party did raise this matter with Webber, who responded: "I didn't receive the union résumés in the mail." This testimony does not establish that the résumés were not received by some other method, such as by delivery from another contractor on the site or by delivery to Sean Landrum or Rhonda Thrift who worked in the same offices as Webber. The record does not reflect whether Sean Landrum is still employed by Respondent. Rhonda Thrift left Respondent's employment in 1996 and assumed a position with another contractor at the Power Park. The record does not reflect whether she is still employed by that contractor. The General Counsel and the Charging Party argue that an adverse inference should be drawn from the absence of testimony by Landrum and Thrift; however, it is inappropriate to make an adverse inference of the basis of absence of testimony by a person no longer employed by a Respondent. *Lancaster-Fairfield Community Hospital*, 303 NLRB 238 fn. 1 (1991). In this case, no adverse inference is necessary. Webber's testimony that he did not receive the résumés in the mail does not categorically deny receipt of the résumés, nor does it rebut the presumption of delivery to some other agent of Respondent. There is a presumption of delivery of mail deposited with the United States Postal Service. *U.S. Service Industries*, 315 NLRB 285, 292 (1994). When Harold Adams called Respondent in late February or early March, he was informed that Respondent had his résumé. Since Respondent contends that it returned or destroyed all résumés received from the Union by fax, the possession of Adams' résumé establishes receipt of the mailed résumés. When Hollis Burch, whose résumé was not faxed to Respondent, called Respondent after February 9, he was asked to verify his name, address, and telephone number as they appeared on the résumé, further confirming receipt of the 44 résumés sent by certified mail. There is no evidence contradicting the credible testimony of Adams and Burch. That testimony, coupled with the inference of delivery of mail, establishes Respondent's receipt of the package sent by certified mail on February 9.

The résumés received by Respondent establish its knowledge of the union affiliation of those individuals. I do not credit Webber's claim that he did not read the names on the résumés that were faxed to the office. There is simply no way that Webber could have confirmed that the 20 résumés returned to the Union on January 30 were all from the Union without looking at them. Even if I were to credit that testimony, it does not establish lack of knowledge by Respondent's agent Landrum or Thrift, who was authorized to receive calls from persons inquiring about employment and who was responsible for maintaining the call-in list. Employee-applicants, including Pichardo and Jonjock, had been asked to send résumés. Thus, Webber, Landrum, or Thrift should have checked each résumé against the call-in list to confirm whether the individual had been requested to send in a résumé regardless of union affiliation. Confirmation of Respondent's knowledge is established by credible and uncontradicted testimony. Jonjock spoke with Landrum who left the telephone, located Jonjock's résumé, and commented that Respondent had "been receiving quite a few of these from boilermakers." Adams and Burch were each told that Respondent had received their résumés. Respondent was fully aware of the union affiliation of the 44 members whose résumés were sent to Respondent, and I so find.

Alleged discriminatee Kenneth Messer testified that he signed a résumé; however, the record does not contain a copy of it. There is no evidence that it was faxed to Respondent or included in the Union's mailing of February 9. Thus, insofar as there is no evidence that Respondent was aware of Messer's union affiliation, I shall recommend that the complaint as to Messer be dismissed. I draw no inference from the absence of Messer's name from the call-in list since, although he testified to calling on an unspecified date, he could not even remember the month.

### *D. Analysis and Concluding Findings*

The foregoing facts establish that the issue in this case is not refusal to hire but whether Respondent unlawfully refused to consider the alleged discriminatees for hire. Consequently, I agree with Respondent that there is no basis for a finding of refusal to hire. Respondent was not hiring in late January and early February. A Respondent's refusal to accept applications when it is not hiring does not violate the Act. *Delta Mechanical, Inc.*, 323 NLRB 76 (1997).

The General Counsel and Respondent argue that Respondent unlawfully refused to consider for hire or to hire all members who submitted résumés and that its refusal to accept the résumés establishes this violation. There is no evidence that

Respondent accepted unsolicited résumés and there is no probative evidence that any résumé submitted prior to January 29 had not been solicited. The résumés prepared by the Union, except for those of Pichardo and Jonjock, had not been solicited. Respondent advised the Union that it was not accepting résumés, consequently neither the Union nor its members had any expectation that names would be placed upon the call-in list as a result of the résumés. The Union posted written instructions to its members that directed them to call Respondent, and Peterson made it a point to witness those calls. Any member who was seeking to make a bona fide attempt to obtain shutdown work with Respondent would, pursuant to the Union's instructions, have called Respondent. In view of this, I can find no basis for finding that Respondent refused to consider for hire any member who did not follow his own Union's instructions to call Respondent. Thus, I shall recommend dismissal of the complaint as to any member who did not call Respondent.

In assessing the evidence under the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), I find that the employee-applicants who sent résumés to Respondent were engaged in union activity. Although Respondent did not violate the Act by failing to place the names of those individuals on its call-in list, I have found Respondent was aware of the names and union affiliation those individuals. When any of those individuals called Respondent, they should, pursuant to Respondent's procedure, have been placed on the call-in list. Of the 27 members who called Respondent, only Estes, Pichardo, Connell, and Kemp are on Respondent's call-in list. Estes did not submit a résumé, thus there is no evidence that Respondent identified him as a union member. He is not alleged as a discriminatee. The call-in list contains the names of Kenneth Connell, who is named on his résumé as K. Q. Connell, and Lee Kemp, who is named on his résumé as Cranford L. Kemp. I find that Respondent did not identify these individuals as union members since the names Respondent recorded on the call-in list are different from the names shown on their résumés. Insofar as Respondent had no knowledge of their union affiliation due to their identification in a manner other than that shown on their résumés, I shall recommend dismissal of the complaint as to them. Thus, there are 24 employee-applicants who called Respondent and who Respondent identified as union members from the résumés prepared by the Union.

Having established knowledge of the employee-applicants' union affiliation, General Counsel must establish that animus towards employee union activity was a "motivating factor" in Respondent's actions. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). Although the complaint contains no independent 8(a)(1) allegation establishing animus, an inference of unlawful motivation may be "drawn from evidence of blatantly disparate treatment." *New Otani Hotel & Garden*, 325 NLRB 928 fn. 2 (1998). Of the 24 employee-applicants who called Respondent and who were identified by their names on the résumés as members of the Union, only one, Pichardo, appears on the call-in list. Pichardo called on January 25 and thereafter, on February 1, sent the résumé revealing his union affiliation. Despite the presence of Pichardo's name on the list, Respondent did not contact him. Pichardo had an answering machine, thus any attempt to contact him would have been received. The record establishes that any person with the skills of a boilermaker who called Respondent and inquired about work in and after January, but prior to the shutdown, should have been placed on the call-in list. Although it was possible that the name of a caller could be misplaced, Respondent "tried not to let that happen." Murphy was told that he was on the call-in list. Adams and Burch called Respondent and confirmed Respondent's receipt of their résumés, as did Jonjock who had been requested to send a résumé. McVay had also contacted Respondent prior to sending a résumé identifying himself as a union member. None of the foregoing employees appears on the call-in list. Indeed, none of the 22 union members who sent résumés and, either contemporaneously with the submission of their résumés or thereafter, called Respondent appear on the call-in list. (Pichardo and McVay did not call after sending their résumés.) I find that the absence from the call-in list of the names of Jonjock, McVay, and the 21 members of the Union who signed résumés and who called the Respondent at or after the time their résumés were either faxed to Respondent or received by Respondent on February 9 cannot be attributed to mere coincidence. The absence of these names supports an inference of discriminatory omission.

In *D.S.E. Concrete Forms,* 303 NLRB 890, 897 (1991), the Board found an unlawful refusal to consider for hire where the respondent took various actions to avoid considering union affiliated applicants, including using a signup roster which union affiliated applicants were not asked to sign. Id. at 894, 895. In the instant case, the employee-applicants did not have access to the call-in list which was maintained chiefly by Landrum and Thrift. Those employee-applicants who called Respondent should have been placed on the list. Calls were made to Respondent by the 8 members whose calls were established by Peterson and by the 19 other members who testified concerning their calls. The absence from the call-in list of 23 of these 27 individuals precluded them from consideration for employment. Respondent's brief, although noting that the names of Pichardo, Connell, and Kemp appear on the list, does not address the absence from the list of the names of the 23 other union members who called Respondent. The presence of the names of Connell and Kemp is explained by Respondent's failure to identify them as union members. Connell is identified as Kenneth, instead of K. Q., and Kemp is identified as Lee, instead of Cranford L. Although Pichardo's name is on the list, there is no evidence that Respondent attempted to contact him. In the absence of any explanation for the absence of the names of these 23 union members, I find that General Counsel has established a prima facia case and that the record supports an inference that the names of these individuals were not placed on the call-in list because of their known affiliation with the Union. *New Otani Hotel & Garden*, supra; *Fluor Daniel*, supra.

Respondent argues that its hiring of known or suspected union members reveals an absence of animus; however, it appears all of the individuals that Respondent knew or suspected to be union members at the time it hired them had worked for Respondent in the past and had not attempted to engage in any organizational activity at a Watkins jobsite. Respondent adduced no evidence accounting for or explaining the absence

from its call-in list of Jonjock, McVay, and the 21 employee-applicants whom it identified as union members from the résumés that the Union prepared. Although these employee-applicants did not make application for employment since Respondent was not accepting applications, each took the action of making the telephone call that should have resulted in their names appearing on Respondent's call-in list. Their unexplained absence from the call-in list, which contains approximately 580 names, reveals blatant disparity and establishes Respondent's animus towards union affiliated applicants. *Fluor Daniel, Inc.*, supra at 971.

The foregoing evidence compels the conclusion that Respondent failed to record on the call-in list the names of those individuals who it identified as members of the Union and struck the names of Jonjock and McVay, who had called in January, from its list after receiving their résumés. By failing to contact Pichardo, by striking the names of Jonjock and McVay, and by failing to place on the call-in list the names of the remaining 21 employee-applicants whom it identified as union members from the résumés that the Union prepared, "the Respondent effectively denied 'the applicants . . . even the possibility of being hired.'" *Casey Electric*, 313 NLRB 774, 775 (1994). In so doing, Respondent failed to consider these employee-applicants for hire because of their union affiliation and violated Section 8(a)(3) of the Act. *The 3E Co.*, 322 NLRB 1058 (1997).

## CONCLUSION OF LAW

By failing to consider for hire at St. John's River Power Park, Jacksonville, Florida, the 24 employee-applicants named in subparagraph 2(a) of the recommended Order, because of their affiliation with the Union, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

## REMEDY

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

The Respondent having unlawfully refused to consider for hire these 24 applicants, it must consider them for hire and provide backpay to those whom it would have hired but for its unlawful conduct. If, at the compliance state of this proceeding, it is determined that the Respondent would have hired any of these employee-applicants, the inquiry as to the amount of backpay due these individuals will include any amount they would have received on other jobs to which the Respondent would later have assigned them. Although Charging Party's Exhibit 3 appears to reflect that all new hires were terminated at the conclusion of the shutdown, this issue was not fully litigated, and I shall, consistent with the Board's decision in *Dean General Contractors*, 285 NLRB 573 (1987), not presume that employment would have ended at the conclusion of the shutdown. In this regard, I note that Larry Williams had prior work experience with the Respondent.

Any backpay liability on the part of Respondent may be minimal. Testimony of those alleged discriminatees who appeared at the hearing revealed that almost all of them had been referred to jobs and were working during some portion of the shutdown at the Power Park and, therefore, had interim earnings.[10] This is confirmed by the fact that Peterson, when asked to recommend a welder, named Juncal, who is not a member of Local 199 and who had to travel from Tampa. Insofar as the Union herein was dealing in good faith with its members, I am satisfied that, if Peterson were aware of a member of Local 199 who desired to work for Respondent and who was not working, he would have named that member rather than Juncal.

Insofar as the shutdown work was completed in 1996, Respondent must mail a copy of the notice to all employees who were employed at the St. John's River Power Park during and after the shutdown. *Jo-Del, Inc.*, 326 NLRB 296 (1998).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

## ORDER

The Respondent, Watkins Engineers & Constructors, Inc., Jacksonville, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to consider for hire applicants because they are members of International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO, or any other labor organization.

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

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

(a) Within 14 days from the date of this Order, offer those of the employee-applicants named below who would currently be employed, but for the Respondent's unlawful refusal to consider them for hire, employment in the positions for which they applied or, if those jobs 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 the Respondent.

| | |
|---|---|
| Harold Adams | Terry Austin |
| James Batten | Hollis Burch |
| Isham Carter | Bobby Crews |
| William Ducati | Carlton Ferguson |
| Dale Ferguson | Robert Hatten |
| Marvin Gossage | Rickey Hurst |
| Raymond Hicks | Matthew Jonjock |
| Michael Kubeck | Michael McVay |
| Clarence Moody | Kevin Murphy |

[10] Although Jonjock and Austin testified that they would not have quit employment with a union contractor in order to accept employment with Watkins, the record does not establish their employment status on the dates that Respondent was calling names on the call-in list.

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

| | |
|---|---|
| Juan Pichardo | Kenneth Reynolds |
| Jerry Rhoden | George Spicer |
| Thomas Sykes | Larry Williams |

(b) Make whole those of the employee-applicants named above who would have been employed, but for the Respondent's unlawful refusal to consider them for hire, 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 decision.

(c) 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.

(d) Mail to all former employees employed by the Respondent at the St. John's River Power Park at any time since January 29, 1996, and post at its office and jobsites in and around Jacksonville, Florida, copies of the attached notice marked "Appendix."[12] Such notice shall be mailed to the last known address of each former employee. Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be mailed within 14 days after service by the Region and shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

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

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

Section 7 of the Act gives employees these rights:

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

WE WILL NOT fail or refuse to consider for hire applicants because they are members of International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO, or any other labor organization.

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

WE WILL, within 14 days from the date of this Order, offer those of the employee-applicants named below who would currently be employed, but for our unlawful refusal to consider them for hire, employment in the positions for which they applied or, if those jobs 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.

| | |
|---|---|
| Harold Adams | Terry Austin |
| James Batten | Hollis Burch |
| Isham Carter | Bobby Crews |
| William Ducati | Carlton Ferguson |
| Dale Ferguson | Robert Hatten |
| Marvin Gossage | Rickey Hurst |
| Raymond Hicks | Matthew Jonjock |
| Michael Kubeck | Michael McVay |
| Clarence Moody | Kevin Murphy |
| Juan Pichardo | Kenneth Reynolds |
| Jerry Rhoden | George Spicer |
| Thomas Sykes | Larry Williams |

WE WILL make whole those of the employee-applicants named above who would have been employed, but for our unlawful refusal to consider them for hire, 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 decision.

WATKINS ENGINEERS & CONSTRUCTORS, INC.

[12] 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 Judgement of a United States Court of Appeals Enforcing an Order of the National Labor Relations Board."