Wise Alloys, LLC *and* International Brotherhood of Electrical Workers, Local 558. Case 10–CA–34319

October 29, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On July 23, 2004, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an exception and a supporting brief, and the Respondent filed an answering brief.

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

The Board has considered the decision[1] and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Wise Alloys, LLC, Sheffield, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing its practice of exclusively using the union hiring hall to select bargaining unit employees in the positions of electrical technician and crane operator.

(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) Restore its past practice of exclusively using the Union hiring hall to select employees for electrical technician and crane operator positions within the following appropriate unit:

> Employees performing maintenance and/or operations work in the plant of the Company, coming under the jurisdiction of the Unions signatory hereto.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of electrical technicians or crane operators, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of electrical technicians and crane operators in the bargaining unit set forth above.

(c) Offer immediate and full employment to those applicants who would have been referred to the Respondent by the Union for employment were it not for the Respondent's unlawful conduct,[4] and make them whole for any loss of earnings and other benefits suffered as a result of the Respondent's failure to hire them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

[1] We wish to correct two inadvertent errors in the judge's decision. First, the correct spelling of the name of the Respondent's vice president of human resources from April 1999 to June 2000 is John Wilham, not John Wilhelm. Second, in the section of the judge's decision headed "Credibility Findings as to the written agreements," the judge stated that Wilham "testified it was never Respondent's intent to exclusively use the Union hiring hall." It was not Wilham who so testified regarding the written agreements, but rather John Cameron, Respondent's president and CEO.

[2] The Respondent has excepted to some of the judge's credibility findings. The Respondent contends that the Board must review all the evidence de novo because the judge conceded in fn. 8 of his decision that, with just one exception, his credibility findings were not based on his observations of the witnesses while testifying. 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). Assuming arguendo that the Respondent's contention has merit, we have independently examined the record in this case and find no basis for reversing the judge's findings.

[3] We find merit in the Respondent's contention that par. 2(a) of the judge's recommended Order is overbroad. We shall narrow the recommended Order to limit the Respondent's obligation to hire exclusively from the Union's hiring hall to the electrical technician and crane operator positions under the Union's jurisdiction. We also find merit in the General Counsel's contention that the judge inadvertently omitted an instatement and backpay remedy for those applicants who would have been referred to the Respondent by the Union for employment were it not for the Respondent's unlawful conduct. See *J. E. Brown Electric*, 315 NLRB 620, 622–623 (1994). We shall modify the recommended Order accordingly. Instatement and backpay issues will be resolved by a factual inquiry at the compliance stage of the proceeding. See id. at 623. (In this regard, Member Schaumber finds it unnecessary now to decide issues concerning the validity of *J. E. Brown Electric*. See concurring opinions in *Brown*, and in *Coulter's Carpet*, 338 NLRB 732 (2002); see also dissenting opinions in *M. J. Wood & Associates, Inc.*, 325 NLRB 1065, 1068 fn. 9 (1998); *Baker Electric*, 317 NLRB 335, 336 fn. 4 (1995).) In addition, we shall modify the recommended Order to require the Respondent to notify and, on request, bargain with the Union before implementing any changes in wages, hours, or other terms and conditions of employment. See *Mimbres Memorial Hospital*, 337 NLRB 998 fn. 2 (2002). Finally, we shall substitute a new notice in conformity with these modifications.

[4] We leave to the compliance stage the determination of which employees, if any, fall into this category.

(e) Within 14 days after service by the Region, post at its facility in Sheffield, Alabama, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 2003.

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

APPENDIX

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

The National Labor Relations Board has found that we violated 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 unilaterally change our practice of exclusively using the hiring hall operated by International Brotherhood of Electrical Workers, Local 558, to select bargaining unit employees in the positions of electrical technician and crane operator.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL restore our past practice of exclusively using the union hiring hall to select employees for electrical technician and crane operator positions within the following appropriate unit:

> Employees performing maintenance and/or operations work in the plant of the Company, coming under the jurisdiction of the Unions signatory hereto.

WE WILL, before implementing any changes to the wages, hours, or other terms and conditions of employment of our electrical technicians or crane operators, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of electrical technicians and crane operators in the bargaining unit set forth above.

WE WILL offer immediate and full employment to those applicants who would have been referred to us by the Union for employment were it not for our unlawful conduct, and WE WILL make them whole, with interest, for any loss of earnings and other benefits suffered as a result of our failure to hire them.

WISE ALLOYS, LLC

Katherine Chahrouri, Esq., for the General Counsel.
William G. Miossi, Esq. and *Gina M. Petro, Esq.,* for the Respondent.
Lance Blackstock, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

PARGEN ROBERTSON, Administrative Law Judge. A hearing was held in Sheffield and Huntsville, Alabama, on January 26 and 27 and June 14, 2004. I have considered the entire record and briefs including supplemental briefs,[1] filed by Respondent and the General Counsel in reaching this decision.

I. JURISDICTION

At material times Respondent has been a Delaware corporation with an office and place of business in Sheffield, Alabama, where it has been engaged in the manufacture of sheet aluminum for processing into aluminum cans. During the past 12-month period Respondent, in conducting those business operations, sold and shipped goods valued in excess of $50,000 directly to customers outside Alabama. Respondent has been an employer engaged in commerce within the meaning of the National Labor Relations Act (the Act), at all material times.

[5] 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."

[1] In her brief, counsel for the General Counsel pointed out that the record did not include GC Exhs. 12, 13, and 14 and she moved for their receipt. I agree with counsel for the General Counsel that those exhibits were received during the hearing, should be included in the record, and they are received.

II. LABOR ORGANIZATION

At material times the Charging Party has been a labor organization within the meaning of the Act.

Bargaining Unit

The following employees at Respondent's Sheffield, Alabama facility constitute a unit appropriate for the purposes of collective bargaining:

> Employees performing maintenance and/or operations work in the plant of the Company, coming under the jurisdiction of the Unions signatory hereto.[2]

At all material times the Union has been the exclusive collective-bargaining representative of the unit employees. The most recent bargaining agreement is effective from December 6, 2002, through November 1, 2007.

III. THE ALLEGED UNFAIR LABOR PRACTICE EVIDENCE

This controversy involves allegations that Respondent unilaterally changed its hiring practices in February 2003. Instead of using the Union's hiring hall as its exclusive source for bargaining unit employees, Respondent started also using other sources including the Alabama employment office.

The Collective-Bargaining Agreements

The Union had a bargaining relationship with Respondent's predecessor employer, Reynolds Aluminum, from the 1940s. In 1999, Respondent purchased Reynolds' assets and Respondent recognized the Union as representative of unit employees. Respondent started operations on April 1, 1999.

Union Business Manager Lance Blackstock testified that Reynolds Aluminum owned the relevant manufacturing facility at Muscle Shoals,[3] Alabama, until April 1999. From the 1940s the Union represented Reynolds' bargaining unit employees. Blackstock testified that Reynolds' practice during that time from the 1940s until the end of March 1999 was to fill bargaining unit positions through exclusive use of the Union's hiring hall. Larry Hester corroborated that testimony. Hester worked for both Reynolds and Respondent[4] as personnel officer. Hester's testimony and the full record including documents received in evidence showed that Hester was the official that actually handled hiring of bargaining unit employees before February 2003.

For a time here was no written agreement regarding Reynolds and Respondent's use of the union hiring hall.[5] Instead the Employers, both Reynolds and Respondent, exclusively used the union hiring hall pursuant to verbal agreements. On November 1, 2002, Respondent and the Union set their agreement in writing: "All hiring practice remains as is (as established prior to 4/1/99) Electrical Tech & Crane Operators." (GC Exh. 6; Jt .Exh. 2, pp. 61–62.)

The Practice from 1999: The Earlier Unfair Labor Practice Charge

Lance Blackstock testified that Respondent initially changed it hiring practices in July 1999. The Union filed an unfair labor practice charge against Respondent on September 8, 1999, alleging that Respondent had informed the Union it would no longer utilize the hiring hall exclusively when hiring new employees (Jt. Exh. 3). However, according to Blackstock, Respondent agreed to restore its former hiring hall practice. That alleged agreement occurred during a meeting at the NLRB resident office on December 16, 1999. Respondent contended that it did not agree during that meeting to use the Union's hiring hall as its exclusive source for unit employees.

Evidence Regarding Respondent's Practice Before 2003

Larry Hester testified that he would contact the Union by phone whenever Reynolds Aluminum needed unit employees. When Respondent started operations on April 1, 1999, Hester was responsible for filling unit positions and he used the union hiring hall as the exclusive source for those employees.

Hester's testimony under both direct and cross-examination, showed that Respondent initially used the union hiring hall as its exclusive source to fill bargaining unit jobs from April 1 until mid to late summer 1999. After recalling all "IBEW members" on the recall list[6] in the late summer "Buzz" Wilhelm[7] instructed Hester to "go for outside source for candidates." From that point until around Christmas 1999, Hester used the IBEW, the State employment service, and advertising in the newspaper, in consideration of filling bargaining unit jobs. Hester testified that Wilhelm told him around Christmas, "in settlement of various Board charges that he had with IBEW that I was instructed to go back to using our system that we had used with Reynolds." From that time until he was discharged at the end of January 2003, Hester used the union hiring hall as his exclusive source for bargaining unit employees.

Sandra Scarborough has been Respondent's human resources manager since January 2003. Scarborough testified that her practice regarding placement of unit employees since she was hired, has been to notify the union hiring hall and the Alabama employment security system of openings (see R. Exhs. 10–20). As to records such as job applications and referrals dated before she became Respondent's resources manager, Scarborough testified that she did not know whether those records were in regard to placement in bargaining unit positions or in positions

[2] Union Business Manager Lance Blackstock testified without dispute that the bargaining unit includes electrical technicians and crane operators.

[3] As shown herein, the relevant Respondent facility is sometimes referred to as the Muscle Shoals or the Sheffield or the Lister Hill facility.

[4] Hester worked for Respondent from April 1999 through January 31, 2003.

[5] Lance Blackstock testified there were no written contract provisions in the Reynolds collective-bargaining agreements and the 1999 Wise Alloy collective-bargaining agreement regarding the hiring hall.

[6] The Union's collective-bargaining agreement with Reynolds included a clause in which Reynolds agreed to require any successor employer to, among other things, (1) extend offers of employment to Reynolds bargaining unit employees; and (2) maintain a preferential hiring list of Reynolds bargaining unit employees until the successor employer completed its hiring during the first 3 months after startup (GC Exh. 3). In March 1999 before starting its operation of the Muscle Shoal facility Respondent signed a similar agreement with the Union (GC Exh. 5). Respondent started operations at Sheffield on April 1, 1999, and the initial 3-month period extended through June 1999.

[7] Buzz Wilhelm was identified in the record as John Wilhelm.

in one of Respondent's locations away from Muscle Shoals. Larry Hester testified on rebuttal that Respondent had other facilities including one it opened in late 1999 to restart the Southern Reclamation Plant. Those other facilities represented jobs covered by the personnel records referred to by Scarborough but the employees of those other facilities were not part of the bargaining unit.

Findings

Credibility

The disputed material issue concerns the question of what was Respondent's practice regarding filling bargaining unit jobs.

As to what was Respondent's hiring practice before the alleged unfair labor practices, two questions are pertinent:

1. Did the parties have an agreement regarding use of the Union's hiring hall?

Lance Blackstock[8] testified that first Reynolds then Respondent verbally agreed with the Union to use the union hiring hall as its exclusive source of bargaining unit employees. As shown more fully below, I credit Blackstock's testimony.

There was no written agreement regarding exclusive use of the union hiring hall until November 1, 2002. The parties agreed to the following on that date: "(15) All hiring practice remain as is (as established prior to 4/1/99) Electrical Tech & Crane Operators."

Credibility Findings as to the Written Agreement

Robert Marion admitted that during 2002 negotiations the Union suggested that the above-cited proposed contract clause meant Respondent was to use the union hiring hall exclusively. Marion, as well as John Wilhelm, testified it was never Respondent's intent to exclusively use the union hiring hall. Nevertheless, Respondent agreed to the above clause and it said nothing to the Union about not agreeing to the Union's interpretation of that clause. As shown below, I find that Marion and Wilhelm's testimony is not credible in view of the demeanor of Marion and Wilhelm and numerous conflicts between that testimony and the credited evidence.

I find the language of the agreement is clear and the evidence shows that Respondent knew of its meaning from the time of its agreement. Respondent admittedly knew the Union wanted the clause in the contract to order to ensure exclusive use of the union hiring hall and John Wilhelm testified that he understood that Reynolds had exclusively used the union hiring hall for unit jobs. Against that background Respondent agreed to the contract provision as proposed by the Union. Therefore, I credit the evidence showing the parties had a written agreement from November 1, 2002, that Respondent would exclusively use the union hiring hall to fill bargaining unit positions.

2. What was Respondent's hiring practice before the alleged unfair labor practices?

Credibility Findings as to the Practice

Only one witness with direct knowledge of Respondent's actual pre-February 2003 hiring hall practices testified. Larry Hester was the person that directly operated Respondent's unit hiring practices until January 31, 2003.

Other witnesses were less competent to testify on the overall issue. Sandra Scarborough directly operated Respondent's hiring after January 2003. However she had no first hand knowledge of the practice before that time. Union employees Lance Blackstock and Wesley Thompson testified but only Blackstock testified regarding Respondent's past practice. Blackstock demonstrated that he was competent to testify in regard to referrals that Respondent actually hired. Blackstock was not competent to testify as to possible referrals that were considered but not hired.

Blackstock competently testified that all of Respondent's August 15, 2003 unit employees (Jt. Exhs. 5 and 6) were referred by the union hiring hall with the exception of five crane operators. Respondent's business records show those five crane operators were hired on and after April 8, 2003. The five crane operators were hired through sources other than the union hiring hall.

Even though he was not competent to testify as to which sources Respondent's used in considering applicants for unit positions, Blackstock's testimony as well as the information contained in Joint Exhibits 5 and 6, regarding Respondent's August 15, 2003 unit employees, does lend support to the testimony of Larry Hester. Blackstock's testimony regarding Respondent's actual hires shows that Respondent did not hire any bargaining unit employee from a source outside the union hiring hall except the five crane operators. That supports Hester's testimony that not only did Respondent not hire anyone from a source other than the union hiring hall, but also during Hester's tenure from 2000 until January 31, 2003, Respondent did not consider hiring anyone in the bargaining unit that was not referred by the union hiring hall.

Robert Marion, John Wilhelm, William Miossi, and John Cameron were all associated with Respondent at some material time, but none of those witnesses were competent to testify as to Respondent's actual practices. Robert Marion testified that he was the chief negotiator and the supervisor of the human resources manager. He testified about negotiations and his knowledge of Respondent's use of sources for bargaining unit employees. However, it is evident from the record that Marion did not engage in the actual work of contacting sources for bargaining unit workers. In consideration of their demeanor and the full record, I credit the testimony of Larry Hester and do not credit the testimony of Robert Marion especially to the extent the two are in conflict.

[8] None of the witnesses, with the exception of one, demonstrated overt showings which reflected on my credibility findings. That one was John Wilhelm. Wilhelm appeared reluctant to give a straightforward answer to questions and I was not impressed with his overall demeanor. All the other witnesses for the General Counsel, Charging Party, and Respondent were well composed and gave no outward showing of either truthfulness or untruthfulness. Even though demeanor played a part in my findings it was not based on anything so obvious as nervousness or other outward signs.

A similar situation was presented through the testimony of John Wilhelm.[9] For the time he was employed Wilhelm supervised the work of Larry Hester. He testified that he did not recall that the parties settled the prior unfair labor practice case in the December 16, 1999 meeting at the NLRB resident office and he did not recall telling Larry Hester to return to a practice of exclusively using the union hiring hall for unit employees. Wilhelm's testimony conflicted with other evidence including the testimony of Larry Hester and the rebuttal testimony of Lance Blackstock. Wilhelm denied telling Blackstock that he did not recall anything of the December 16 meeting at the resident office. Blackstock testified in rebuttal that Wilhelm did tell him that he did not recall anything of the December 16 meeting. I do not credit Wilhelm to the extent his testimony conflicted with credited evidence and I credit the testimony of Blackstock, which illustrated that Wilhelm's testimony conflicted with earlier comments he made to Blackstock.

William Miossi was Respondent's attorney. His testimony was limited to the December 16, 1999 meeting in the NLRB Regional Office and did not involve Respondent's sources for hiring unit employees. In view of the full record, I do not credit Miossi to the extent his testimony conflicted with credited evidence.[10]

John Cameron is Respondent's president and chief executive officer. His testimony included Respondent's hiring practices, but Cameron admitted that he was not testifying from direct knowledge. I find that his testimony was not competent on the issue of what Respondent's past practice regarding exclusive use of the union hiring hall was. In consideration of their demeanor and the full record, I credit the testimony of Larry Hester and do not credit the testimony of John Cameron especially to the extent the two are in conflict.

The record revealed that only Hester and Scarborough gave competent testimony regarding whether Respondent exclusively used the union hiring hall regarding both considerations for hire and actual hire. Scarborough's testimony included an explanation of the records in Respondent's Exhibit 23. Initially, it appeared she was testifying that the employees shown in that exhibit were referred to unit positions by sources in addition to the union hiring hall. However, she subsequently admitted that those referrals were not necessarily to bargaining unit positions and may have been to jobs in other Respondent plants that did not include unit employees.[11]

Larry Hester also testified that Respondent's Exhibit 23 included referrals for jobs at several other facilities in addition to Respondent's Sheffield, Alabama facility.[12] That testimony by Hester was not rebutted and I credit Hester's testimony and, to the extent there are conflicts I do not credit Scarborough.

In deciding to credit Hester I was also influenced by record documents. Larry Hester testified that he used the Union's hiring hall as the exclusive source for bargaining unit employees with the exception of a period from the summer to Christmas in 1999. As shown above during that late 1999 period Hester used more than the one source for unit employees. In late 1999 or early 2000 Hester resumed use of the union hiring hall as the exclusive source of unit employees.

The record includes various documents regarding sources used by Respondent to consider unit employees for hire.[13]

In view of my determinations noted above and the full credited record, I find that none of Respondent's records, show that Respondent failed to exclusively use the union hiring hall during the January 2000 to February 2003 period of time.

Respondent's Argument

In its brief, Respondent argued, among other things, that it has hired a total of 142 personnel to fill union bargaining unit positions and that, of that number, only a total of 24 were hired through the union hiring hall. In support of that argument Respondent cited Respondent's Exhibits 10–20; Joint Exhibits 5 and 6; and General Counsel's Exhibit 4. From my examination of those records, there was no showing that Respondent hired 142 bargaining unit employees at material times.[14]

Joint Exhibits 5 and 6 list the bargaining unit employees as of August 15, 2003. Those two exhibits show that Respondent employed 107 bargaining unit employees on August 15. Of that 107, 45 were crane operators and 62 were electricians. Respondent recognized the Union as bargaining representative of unit employees and agreed with the Union to a collective-

[9] After initially failing to appear ,Wilhelm testified on June 14, 2004. Wilhelm was employed by Respondent as vice president of human resources from April 1999 until June 2000.

[10] There was a great deal of disputed testimony regarding a December 16, 1999 meeting with the parties and the NLRB resident officer. The disputed evidence involved whether the parties agreed during that meeting to settle a prior unfair labor practice case alleging that Respondent had unilaterally changed from the exclusive use of the union hiring hall to use of other sources in addition to the union hiring hall. As shown above in my credibility determinations, I credit those witnesses that testified the parties did agree that Respondent would thereafter use the union hiring hall as the exclusive source in filling unit jobs. However, that issue is not determinative of the overall questions relevant to these proceedings. The actual material issues involve Respondent's contractual obligations and what was Respondent's practice regarding filling unit jobs before February 2003. I am convinced the overwhelming credited record shows that Respondent had a contractual obligation and it was Respondent's practice before February to use the union hiring hall as its exclusive source for filling bargaining unit positions regardless of whether the parties agreed on December 16 to settle the outstanding unfair labor practice charge.

[11] For example, R. Exh. 23 included applicants James C. Turner, and that application was faxed to Respondent on January 14, 2000; Thomas C. Campbell, which application was faxed to Respondent on January 18, 2000; and Danny L. Avery, which application was faxed to Respondent on February 4, 2000. None of those three applicants were employed in a bargaining unit position at any material time.

[12] Those jobs at facilities other than Sheffield did not include bargaining unit jobs.

[13] Jt. Exh. 5 shows all the crane operators in the bargaining unit and Jt. Exh. 6 shows all the electricians in the bargaining unit, on August 15, 2003. R. Exh. 15 includes applications Respondent received from the union hiring hall. R. Exh. 17 includes applications Respondent received from the union hiring hall in 2000. R. Exh. 20 includes applications Respondent received from the union hiring hall in March 2003 before March 25. R. Exh. 21 includes applications Respondent received from the union hiring hall after March 25, 2003.

[14] R. Exhs. 10–20 show applications Respondent allegedly received from several sources. GC Exh. 4 shows craft seniority list for unit employees on April 1, 1999.

bargaining agreement in March 1999. Subsequently, a substantial number of the unit employees that worked for Reynolds Aluminum in March 1999 started work for Respondent when its operations began on April 1, 1999. Of the employees listed on Joint Exhibits 5 and 6, 62 of those employees worked for Reynolds Aluminum in March, started working for Respondent in April 1999, and were still working for Respondent on August 15, 2003.

Lance Blackstock testified without rebuttal that the remaining unit employees shown on Joint Exhibits 5 and 6 were all referred by the union hiring hall except for five crane operators hired on and after April 8, 2003. Respondent's records support Blackstock's testimony. Sandra Scarborough was able to identify union hall referrals by referral slips that remained attached to some employee applications. There were 24 employees that Scarborough identified through that manner. Therefore at least 86 of the August 15 employees were either employee in the Reynolds bargaining unit that moved over to Respondent on or after April 1, 1999, or employees that Respondent identified as being referred to bargaining unit jobs by the union hiring hall. Additionally, as shown above, there is no dispute but that Respondent hired five crane operators on and after April 8, 2003, that were not referred by the union hiring hall. Therefore, 91 of the 107 August 15 employees were identified through matters not in dispute.

Of the remaining 16 unit employees, there were no documents introduced by Respondent showing those employees were not referred to it by the union hiring hall. As shown herein, Respondent introduced several documents showing employees that were allegedly considered for employment. However, Sandra Scarborough admitted that those documents might have shown applicants considered by Respondent for hire in facilities other than where unit employees worked. Larry Hester then testified that those particular documents were indeed for consideration in filling jobs at several of Respondent's facilities.

Therefore, I find the record does not support Respondent's argument.

Did Respondent Change its Past Practice?

There is no dispute regarding Respondent's practice after the end of January 2003. As shown above, Sandra Scarborough has been Respondent's human resources manager since January 2003. Scarborough testified that her practice regarding placement of unit employees since she was hired, has been to notify the union hiring hall and the Alabama State Employment Security System of openings (see R. Exhs. 10–20).

Lance Blackstock testified from Respondent's roster of bargaining unit employees (Jt. Exh. 5) that all those employees were referred to Respondent through the union hiring hall except for crane operators Grigsby, Box, Bolden, Short, and Smith. Those five crane operators were not referred to Respondent through the union hiring hall. Grigsby, Box, Bolden, Short, and Smith were all hired on or after April 8, 2003. Even though Blackstock could not competently testify as to whether Respondent considered sources other than the union hiring hall after January, he could and did competently testify that Respondent hired unit employees that had not been referred by the union hiring hall beginning on April 8, 2003.

When taken together the undisputed evidence shows that Respondent used the Alabama employment security system as a source after January and that Respondent actually hired unit employees from a source other than the union hiring hall beginning on April 8.[15]

Conclusions

When reduced to their basic form, the questions here are simple. Did Respondent unilaterally change its hiring practice? In dealing with that question there are two areas of inquiry. One is did the parties have a contractual agreement which Respondent breached by using sources other than the union hiring hall. The second area of inquiry is did Respondent change its established practice by going to additional hiring sources without bargaining.

As shown above, the answer to the first inquiry is that Respondent and the Union had agreed to use the union hiring hall as Respondent's exclusive source for bargaining unit employees. Initially, Respondent and the Union, like Reynolds and the Union before April 1, 1999, had an oral agreement that the Employer would use the union hiring hall exclusively for the selection of unit employees. On November 1, 2002, Respondent and the Union reduced that agreement to writing. In view of that evidence, I find that at all material times Respondent and the Union had a collective-bargaining agreement requiring Respondent to use the union hiring hall as its exclusive source in filling unit jobs.

In regard to what was Respondent's practice before 2003, the full record shows that from April 1, 1999, Respondent's practice was to use the union hiring hall as its exclusive source for filling unit jobs. Respondent departed from that practice from the summer until around Christmas 1999. After that short period Respondent returned to the exclusive use of the union hiring hall until after Larry Hester was discharged at the end of January 2003

A final inquiry is, did Respondent continue to use the union hiring hall as its exclusive source for unit employees after January 2003. The undisputed testimony of Sandra Scarborough shows that from the time she took over from Larry Hester Respondent considered applicants from several sources and from April 8, 2003, Respondent actually hired applicants received from sources other than the union hiring hall.

Therefore, I find that Respondent's collective-bargaining agreement with the Union and its practice before February 2003 was to consider only referrals from the union hiring hall in filling bargaining unit positions and that Respondent changed that practice in early 2003. Respondent did not offer to bargain over that change. I find that Respondent unilaterally changed its practice of exclusively using the union hiring hall in violation of Section 8(a)(1) and (5).

[15] Respondent told the Union it had legal advice that it could not lawfully rely exclusively on the union hiring hall to fill unit positions. However, there was no evidence that such a legal opinion was valid under the law. There was nothing to show that the union hiring hall failed to conduct its referrals under applicable laws.

CONCLUSION OF LAW

By unilaterally changing its practice of exclusively using the union hiring hall to obtain employees in the below described collective-bargaining unit, the Respondent, Wise Alloys LLC, has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

Employees performing maintenance and/or operations work in the plant of the Company, coming under the jurisdiction of the Union's signatory hereto.

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.

[Recommended Order omitted from publication.]