

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

JOSEPH S. LOMBARDO d/b/a
MODERN GRAPHICS AND DESIGN

and

Case 3-CA-25292

INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES, DISTRICT COUNCIL NO. 4

Aaron Sukert, Esq.,
Of Buffalo, New York
For the General Counsel

Richard D. Furlong, Esq.,
Of Buffalo, New York
For the Charging Party Union

Christopher Flynn, Esq.,
Of Cheektowaga, New York
For the Respondent Employer

DECISION

Statement of the Case

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Buffalo, New York on December 6 and 7, 2006. International Union of Painters and Allied Trades, District Council No. 4 (hereinafter Union) filed a charge in this case on February 28, 2005 and filed an amended charge on April 26, 2005. Region Three issued a Complaint and Notice of Hearing on May 31, 2006. The Complaint alleges that Joseph S. Lombardo d/b/a Modern Graphics and Design (hereinafter Respondent or Employer) engaged in conduct in violation of Section 8(a)(1) and (3) of the Act. Respondent filed an Answer in which it, inter alia, admitted the jurisdictional allegations of the Complaint, the supervisory and agency status of Respondent's owner, Joseph S. Lombardo. It admitted that Christine Johnt held the position of Respondents office manager, but denied she had been an agent within the meaning of Section 2(13) of the Act.¹ At the hearing, Respondent made motion to dismiss based on a ministerial error in the Complaint. I ruled against Respondent and denied the motion for the reasons set forth in General Counsel's written response to the motion to dismiss.²

¹ At hearing, General Counsel amended the Complaint to allege the agency status of Respondent's foremen Kean Carmell, Randy Klumpf, and Mike Wagner. Respondent denied at hearing that these foremen were agents within the meaning of the Act.

² This case had been set for hearing in August 2006, but was postponed as the Union and Employer had entered into a non-Board settlement and the Union had filed a conditional withdrawal of its charges. Based upon a showing of non-compliance by Respondent the Region

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, I make the following³

5 Findings of Fact

I. Jurisdiction

10 The Respondent, a sole proprietorship with an office and place of business in Tonawanda, New York, has at all material times engaged in business as a commercial painting contractor. As noted Respondent admitted the jurisdictional allegations and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

15 II. Alleged Unfair Labor Practices

20 As noted, Respondent is a sole proprietorship located in Tonawanda, New York, engaging in business as a commercial painting contractor. The Complaint alleges that since on or about September 21, 2004, Respondent has refused to consider for hire and has refused to hire Mark Stevens. The Complaint further alleges that Respondent engaged in this conduct because Stevens joined and assisted the Union and engaged in protected activities and to discourage employees from engaging in these activities, in violation of Section 8(a)(1) and (3) of the Act.

25 A. Facts Relating to the Alleged Unfair Labor Practices

1. Respondent's Operations and Policies

30 Joseph S. Lombardo is the owner of Respondent and oversees all of its operations. The Company normally paints commercial buildings both inside and outside. He regularly employs about ten painters who he considers his core employees. This workforce is supplemented by temporary employees as needed. He is solely in charge of hiring for Respondent. According to Lombardo, Respondent employs painters/laborers and foremen. Employees with lesser painting skills perform more laborers' tasks and skilled painters perform more painting and less laborer's tasks. This testimony was contradicted by other, more credible witnesses and I believe the best evidence is that the only positions Respondent maintains with respect to its painting function are painters and foremen.⁴

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 entered an Order revoking the conditional withdrawal of charges and dismissal of the Complaint. The Order also reinstated the Complaint and reset the case for hearing.

45 ³ At the close of hearing, a brief date of January 8, 2007 was set. General Counsel timely filed a brief. Respondent filed a request for an extension of time on January 9, 2007. The request was denied by Division of Judges because the request was not made within the time allowed by the rules, did not state a reason for the request and was not served on the other parties to the case.

50 ⁴ GC Ex. 26 is the Respondent's payroll submitted to the Department of Labor and shows Respondent's job classifications as all being that of "painter." Lombardo testified that all of his hourly employees are under that classification regardless of what they do on prevailing wage jobs.

Foremen are in control of the jobs they are assigned and direct the work of other employees on these jobs. They also actively paint on the jobs they are assigned. Respondent's foremen make independent judgments about which employee performs specific tasks on a job. They do not hire or fire, though they make independent decisions about how the job is done.

5 They report to Lombardo about employee performance and can make recommendations about discipline, but do not have authority to impose discipline independently. They can become involved in training new or inexperienced employees, but it is not a major part of their job. Foremen also convey company policies, including safety policies, to men working under them.

10 Kean Carmell is currently employed by Respondent as a foreman. He has worked for the Company since 1997. As a foreman, Carmell makes an independent judgment as to which men perform tasks on a job and in what order. In assigning tasks, he takes into consideration the skill level of the employees under him. He also passes on policies, including safety policies, to the men under his direction. The men assigned to work with him, the job to be done, the materials
15 for a job and the daily work goals were all given him by Lombardo. He has no authority to hire, fire or discipline employees.

Respondent's office manager, Christine Johnt pays the bills, sends out invoices, orders supplies, records daily progress reports on jobs, accepts time sheets and passes them on to the Respondent's payroll administrator, and compiles the Company's books. She does not administer discipline. She conveys company policy to employees. She conducts preliminary hiring interviews. Testimony from other witnesses indicates that Johnt on occasion admonishes employees for failing to file required paperwork or filing incorrect paperwork. These admonitions do not amount to formal discipline, however.

25 There are no written hiring policies, only an application form that is filled out by prospective employees. There are no written work policies.

Since 1978, the Respondent has solicited job applicants through advertisements. It also
30 has hired on the recommendation of current employees. The Respondent also uses a temporary personnel agency, Active Work Force, to supply temporary employees. If the Company desires to do so, it can hire persons supplied by this agency on a permanent basis. Active Work Force recruits its employees through advertisements. When that agency supplies an employee to Respondent, Lombardo does not conduct an interview with the employee. If a
35 job applicant comes in off the street because of advertisement for new employees or otherwise, that applicant fills out an application form, takes a test supplied to Respondent by the trade association Painting and Decorating Contractors of America (PDCA), and is interviewed by either Christine Johnt or Lombardo or by both individuals. There is normally a preliminary interview and sometimes a follow-up interview. Johnt usually performs the first interview and
40 Lombardo the follow-up interview. Lombardo is not present for the first interview by Johnt. The first interview is to obtain information called for by a written questionnaire used by Respondent. The second interview could take place within a day or two of the first interview, or as long as a week after the first interview. Job applications are kept only seven days then discarded. This seven day practice was started in 2005. Prior to that year, applications were kept sixty days or
45 longer.

Lombardo uses the PDCA test as a barometer of an applicant's painting knowledge, generally looking at a couple of questions to determine if the applicant is fudging on his level of experience in painting. He testified that he would not hire anyone that already has a job, either
50 full-time or part-time. He added that to his knowledge he had never hired anyone who had a job at that time they applied unless the individual had lied and said that he was not currently employed. This alleged policy is belied by the record evidence. During the fall of 2004,

Lombardo hired an individual who had a part-time job based on the representation of the applicant on his application form.

5 Lombardo, in the hiring decision, considers whether an applicant is knowledgeable about current painting techniques and equipment, has formal training, and works well with other employees. Though the application form asks whether a job applicant has been convicted of a felony within the last seven years, Lombardo testified that a positive answer to that question would not preclude the individual from being hired as "everybody needs a chance." Indeed, Lombardo hired a convicted felon during the time frame covered by this proceeding. Though the form asks whether an applicant has a valid driver's license, this is a factor Lombardo considers only "slightly."

15 When an employee is hired, he is given a list of equipment that he must possess. The equipment listed consists of the basic tools that a painter must have to do his job. If the new hire does not have the equipment, he can buy it in a store or from Respondent at price shown on the list, roughly a little over \$110 for everything on the list.

20 Normally, Respondent's employees work Monday through Friday. In the summer months they also work Saturdays, and the work days are nine hours. He would prefer that an employee not work for someone else on Sundays and knows of no employee of his that has done this. Lombardo testified that he sometimes checks job applicants' references if he wants to hire them.

25 The Union filed a petition to represent Respondent's employees on February 19, 2003. This resulted in a Board election on March 21, 2003, in which the Union was rejected by the employees. During the period between February 19 and March 21, Lombardo met with employees to give his views on unionization of the Company. He testified that he read a script given him by his counsel at that time. He made clear to the employees that he did not want a union.

30 GC Ex. 4 is a listing of all advertisements placed by Respondent in the Buffalo News during the period January through September, 2004. It reflects ads were placed on January 7, April 16, May 17 and 28, July 1 and 16, and September 16, 2004. The advertisement which ran in the paper on September 19, 2004, sought: PAINTERS/Foreman M/F, Exp'd, driver's license, top pay/benefits and the phone number to call.

40 Respondent is also listed as a potential employer by the New York state unemployment division called the New York State Workforce. This entity refers unemployed persons to potential employers including Respondent.

45 Lombardo testified that fall is the Respondent's busiest season. He testified that the advertisement for job applicants placed in September 2004 was placed in anticipation of getting two large jobs. One of these jobs was a Hampton Inn and the other a church chapel. He submitted bids on these jobs in August or September 2004. After the bidding process and after he placed his September advertisement, he learned he was underbid on one of them and he decided he did not want to do the work on the other one. Regardless of why he placed the advertisement, and notwithstanding the loss of the two jobs noted, Lombardo hired several applicants who responded to the advertisement, though not Mark Stevens.

50 2. Evidence Related to Mark Stevens' Attempt to Obtain Employment

Mark Stevens is employed by the Union as an organizer/representative. He has been

employed by the Union since 2001 and been a member of it since 1991. As an organizer, he speaks with painters on the phone, at jobsites or other places, explaining union benefits. He testified that his hours are flexible and that he meets with people at night, on weekends and sometimes during the day. As he comes from a family of painters, he has been involved with painting all his life. He has experience in both residential and commercial painting, with extensive experience in the commercial side of the industry. He also has seven years experience as a painting foreman. He also attends journeyman upgrade classes made available through the Union to keep his skills current.

The Union became interested in organizing Respondent and sent a letter in February 2003 stating its intention to organize Respondent's workers and filed a representation petition. Prior to this, Stevens had never met Lombardo. He began stopping by Respondent's jobsites at the request of Respondent's employees who had called the Union expressing interest. This began at the end of 2002 and carried over into 2003 and thereafter. Stevens remembered some specific jobs he visited, the DeSiderio's building, the Benderson project, the LCO building, a model home in Clarence, and a building at Sheridan Meadows. In the summer of 2003, he visited the Kenmore High School project on more than one occasion. On one of these visits, he tried to talk to Lombardo but Lombardo avoided him. Stevens described his own demeanor on this occasion as calm and courteous. Lombardo testified that Respondent has no written policy or oral policy about employees talking with one another while working, on a break, or the subject matter that they could talk about. This assertion was disputed by other witnesses whose credited testimony establishes that at least around the time of the Union's 2003 organizing campaign, Lombardo promulgated an oral rule banning employees from talking to Union organizers or about the Union between themselves.

Stevens applied for work at Respondent on two occasions. The first was on January 14, 2004. He read an ad in the Buffalo newspaper offering job opportunities for experienced painters. He called the listed number and made an appointment to file an application. He went to Respondent's office with four other Union officials. They were given applications and they filled them out. According to Stevens they gave their applications to Lombardo who asked if they all wanted work. They said they did and he said he would get back to them. Stevens asked how long they kept job applications and Lombardo said he kept them on file. He gave Stevens no period of time for which they were kept. They never heard from him again about their applications. Stevens called Respondent about his application with no results.

On September 21, 2004, Stevens again applied for work at Modern Graphics. He responded to an ad he had seen in the Buffalo newspaper on September 19. He called the number listed and made an appointment to file an application. The person answering the phone, an estimator named for Respondent, said that Respondent was hiring. He went to the office the next day wearing his Union jacket. He asked if the application he filed in January was still on file. Johnt replied that it was no longer valid, so he filled out another one. During his interview with Johnt he asked if Respondent was hiring and Johnt, at this point knowing Stevens' identity, said that was up to Lombardo. Johnt asked him about his employer and he told her it was the Union. She asked if that would pose a time problem and he said no. He told her that his first priority would be working for the company, but that on his own time he would try to organize the employees. Johnt then stated that organizing would not be on her (company) time. Johnt brought up the subject of another Union organizer, Dan Booty, Jr. and a phone conversation he had had with Lombardo. Johnt then went over several company policies with Stevens. She also remarked that the individual references he had given, all Union personnel, were out of the same cookie jar. She also made the point with Stevens that the Respondent was not going anywhere. What that meant is not known as Respondent did not call Johnt to testify. The interview lasted about half an hour. There was no discussion of the position Stevens was seeking or the wage

rate Respondent was paying. In the period of time after he filed the application, Stevens called back to see if he would be hired and got no answer. He was told by Johnt on October 6, 2004 in one of these calls that Respondent had not hired anyone, though the truth was that a new employee had reported for work that same day. That new employee had filed an application eight days after Stevens filed his application. At no time during the application process, did anyone from Respondent tell him that having more than one job would preclude his hiring.

Stevens' application form filed in September 2004 reflects that, pursuant to an ad in the Buffalo newspaper, he applied for a painter's position seeking \$12 to \$15 per hour and wanted to start work on September 22. It reflects that he had applied for employment the previous year, but had not been hired. It also shows that he has a drivers license, was willing to work overtime; was willing to work weekends; was willing to work second shift; was willing to work third shift; was able to travel; that he could blockfill; could use spray equipment; could apply finish paints and could hang wallcoverings. It also shows that Stevens had been a lead foreman for seven years, was OSHA safety trained and had good communication and leadership skills . It then named two previous employers as references. It states that Stevens has never been convicted of a felony, has no physical limitations and has no limitation on getting to and from a job. It reflects Union job training to the journeyman level and his status as a third generation painter. It concludes with a handwritten statement by Steven's that reads as follows: "I have a strong work ethic, with ability to get job done effectively & efficiently. I have great communication skills to work with other trades and on my own time, I can explain how the Union is beneficial to your men. And hope Modern Graphics becomes a Union signatory."

The application lists as persons not related to him and whom he has known for a year three other Union employees. The application also reflects that Stevens has a degree from the University of Charleston.

Stevens took the Respondent's pre-employment examination as part of the application process. Lombardo testified that he never graded this exam. Following this interview, Lombardo contacted one of the listed references. That reference said that Stevens was a good worker and had a good attendance record and a good attitude. Steven had worked for the referenced company four or five years prior to 2004.

The interview form filled out by Johnt tracks the information put on the application form by Stevens. It also notes that Stevens is a Union journeyman painter, is a Union organizer, and is not leaving that job, but is looking for supplemental income. Upon asking Stevens why Stevens believed Respondent should hire him, Johnt wrote that Stevens replied "he'd like to organize us better." She also, apparently for the only time in Respondent's recent hiring history, filled out a post interview form.

Lombardo testified that he did not hire Stevens because he was not suitable for the position, explaining that he meant that he prefers to hire people who need jobs and do not currently have jobs. He testified that Stevens had a full time job that he indicated he was not giving up. Lombardo was aware that Stevens was employed by the Union as an organizer. He did not have any actual knowledge of Stevens work schedule or whether there would be a conflict between his Union job and the one for which he was applying. He added that he had lost one bid during this period and he backed out of one he had obtained so he did not need Stevens. As will be shown below, this assertion is not backed up by the objective facts. Lombardo did continue to hire new employees throughout the remainder of 2004 and thereafter. Lombardo' affidavit given during the investigation of this case does not mention this loss of potential business either as a fact or a reason for not hiring Stevens.

In his affidavit, Lombardo stated: "I also needed someone who is physically capable of doing painting for eight or more hours per day. My concern [was] that Stevens, who apparently had not worked in the field for four to five years might not be capable of doing our workload." At the hearing, Lombardo backed away from this reason for not hiring Stevens. Lombardo also stated in the affidavit that Stevens work experience was not recent as he had not worked as a painter for four or five years. In his testimony at hearing however, Lombardo stated that he had no reason to doubt Steven's knowledge of the painting industry or painting techniques. At one point, Lombardo testified that if Stevens had not had an existing job, he would have hired him.

Lombardo admitted that Stevens, based on his application, resume and the results of his call to one of Stevens' references was a perfect fit for the person sought in the newspaper ad to which Stevens responded. He had no qualms about his qualifications. No one told Stevens that he was not qualified to be hired because he had a job at the time of filing the application, and Lombardo did not just toss the application for this reason. He actually called one of Stevens' references. No one told Stevens that he had to quit his current employment in order to qualify for a position with Modern Graphics.

3. Respondent's Hiring History After Stevens is Not Hired

a. Anthony Cogdill Is Hired

Anthony Cogdill applied for work with Respondent on September 29, 2004 and began working there the next week. For the 12-15 years preceding the year 2001, Cogdill had lived in Florida. He had been employed in security and maintenance for a resort hotel, gaining painting experience there from repainting hotel rooms. He also worked for a Florida apartment complex where he painted and repaired damage to apartments when tenants moved out. He had received formal training as a plumber, but not as a painter. His only experience as a painter was in his Florida employment. Cogdill moved to New York in 2001 and found employment with a community hospital in Harrison, New York where he worked in maintenance and as a Certified Nursing Aide. He left that job in 2003 and worked as a cashier for a local grocery store. His last job before applying with Respondent was as a cashier/cook at a McDonald's restaurant in Harrison, New York.

When he applied for work at Respondent, five years had gone by since he had last painted. Like other applicants, Cogdill filled out an application form and took the pre-employment test. He was on unemployment compensation and learned about Respondent on the website of the State of New York Workforce. According to Cogdill, the reference to Modern Graphics noted that it wanted painters with ten years experience. He called and said he was seeking employment as a painter. His application form reflects that he admitted that he could not blockfill, use spray equipment or apply finish paints. These are all things that Stevens could do. At his initial interview with Johnt, he was given a list of ten items of painting equipment that he should possess before coming to work for Respondent. If a new hire does not have these tools, Respondent supplies them to him at a cost of a little over \$100. When the interview ended, Johnt said she would call him back for a second interview. At no time during this interview did he indicate that he was applying for a position as a laborer or helper, and Johnt made no mention of those positions.

As he left the office he met Lombardo and they talked. He told Lombardo he was applying for a painter's job and noted that his wife was expecting a baby and he needed a job badly. They did not discuss his painting experience. Lombardo asked when he could start to work and Cogdill replied that he would have to wait for his next unemployment check to purchase the required painting equipment. Lombardo asked when that would be and Cogdill

said it would come on Friday of that week. Lombardo told him to report to work on Monday. Based on this conversation, Cogdill believed he had been hired as a painter. Lombardo had not mention anything about a helper's or laborer's position. Neither Johnt nor Lombardo discussed his experience as a painter.

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He reported to work on Monday at 7:00 am and was assigned to a work crew of about six painters and sent to a job at Hamburg Dodge to paint the showroom and the shop automotive bay. On that job he cut, taped off, rolled and painted. These were the same tasks performed by the other employees in the crew. This job lasted about three days and he was paid \$10 per hour. He then spent part of a day doing touch up work at a local hospital. He then was assigned to work at Galaxy Golf in Buffalo with a six man crew for about three days. On this job he rolled and painted as did all the other men assigned to work there. When this job ended, he was laid off. He got a letter with his paycheck which read: "Due to work scheduling, there is a temporary layoff. Feel free to file for unemployment if you are eligible. Please contact us on a regular basis to see when work will resume." The letter is dated October 13, 2004.

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Cogdill then began trying to find other employment as he did not want to go back on unemployment. About a week later, he returned to Modern Graphic to pick up a paycheck he was owed. He met Lombardo who told him to ignore the layoff letter and return to work the next day. When he reported to work he was assigned to work with a four man crew on a project in Buffalo. On that job, he rolled and painted, as did the other men in the crew. His work was the same as the others. This job lasted two days, then he was assigned to work at a private residence. This job lasted two days. The first day involved a four man crew, the next day only two returned. Cogdill cut and painted as did the other men. He also sanded which the other men did not do. However, he was paid the same for sanding as he was for painting. The following day he was assigned to paint another residence. These jobs are listed as the Snyder house and the Dixon house. When he finished the last house, he was told by another employee that he was again laid off for lack of work.

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Cogdill testified that Paul Kawaloeski was employed by Modern Graphics about a week after he was employed. They worked together on the Golf Galaxy job and another project in Buffalo. Both of them painted on these jobs and both had about the same skill level, according to Cogdill. Cogdill received no written work policies when he was hired and was not told of any restrictions on topics that employees could discuss. He was never referred to as a laborer while working for Respondent.

b. Respondent Continues Hiring

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After Stevens applied, and after Respondent hired Cogdill, Respondent hired numerous individuals directly. On September 28, Kawaleoski, who had responded to the same ad as Stevens, applied for a foreman position on his application form. Nonetheless, Respondent, after interviewing him on September 28, hired Kawaleoski as a painter on October 26, 2004. Kawaleoski had no formal training, just on-the-job training, and ran his own business in Brazil. Eventually, Kawaleoski severed his employment with Respondent because of his inability to get along with other employees.

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On December 7, 2004, Timothy Wigdorski applied as a painter, according to his application and his interview form. Respondent hired him on December 17, 2004 and , according to Lombardo, he worked on the Color Technology project. He also worked on other projects. Respondent's documentation classifies Wigdorski as a laborer. According to Lombardo, Respondent hired him on the recommendation of Roger McMIndes, a foreman; but during his testimony, Lombardo did not know if McMIndes had any actual knowledge about

Wigdorski's skill level.

The record establishes that Respondent performed work on numerous painting projects from the period of September through December 31, 2004.⁵ In addition, the record establishes Respondent utilized employees from a temporary employment service, Active Work Force, at numerous job sites, from January 1, 2005 through the present, on an ad hoc basis. Starting in 2005, Respondent admittedly had various jobs, such as Keller, where it supplemented its crew with employees hired through Active Work Force. Respondent never informed applicants whom it did not hire that they could apply through the temporary company.

The record reflects that Active Work Force sends employees to Respondent without Respondent having an opportunity to observe their work performance, interviewing them, or without them taking a pre-employment examination. Respondent does not provide any hiring criteria to Active Work Force or any other employment agency.

On January 25, 2005, Respondent hired Donald Kerr as a laborer. Kerr put on his application form that he was seeking a position as a painter, cleaner, or any open position. Lombardo testified that he knew Kerr's father. On February 14, 2005, Respondent hired Donald LaChance, Jr. the owner of Quaker Painting, as a painter, even though he applied for a painting foreman's position on his application. LaChance worked only a few days. Respondent continued its hiring thereafter: Rawle L. Charles (February 2, 2005 – Laborer); Michael F. Crowell (April 18, 2005 – Laborer); Matthew Pattison (April 18, 2005 – Laborer); Scott M. Harvey, a former Active Work Force employee who had worked on Respondent's projects (May 14, 2005 – Painter); John J. Nole (June 15, 2005 – Painter/Laborer); Corey Winchell (June 22, 2005- Painter); Joseph Neri, a former Active Work Force employee (July 22, 2005 – Painter/Laborer); Michael McMIndes (foreman Robert McMIndes' brother (July 28, 2005); Christopher J. Wise (August 5, 2005 – Laborer); Michael Smith (November 2, 2005 – Painter/Laborer); Warrant Croft (January 1, 2006 – Painter); David Orton (April 28, 2006 – Painter); Randy Klumpf (June 7, 2006 – Painter); Kenneth Huber (June 19, 2006 – Painter).

⁵ The jobs, from GC Ex. 6, on which Anthony Cogdill (hired on October 6, 2004), Paul Kawaleoski (hired on October 26, 2004), and Timothy Wigdorski (hired on December 17, 2004) worked, are highlighted, with their initials in brackets. Thus, the highlighted projects began after Mark Stevens applied. The projects on which Matthew Torrelli (who separated his employment on September 13, 2004) work are italicized and are thus jobs prior to when Mark Stevens applied. The projects are as follows as they appear, alphabetically in GC Ex. 6: 1. John Bellamy; 2. Benderson (Joanne Fabrics); 3. B.J.'s Tonawanda (PK); 4. Buffalo Office Interior (Tim Horton's); 5. Calspan; 6. City-View (Larkin Exchange) (AC, PK); 7. Coastal Construction (Tim Horton's – Young) (PK); 8. Coastal Construction (Tim Horton's – Lakewood); 9. Colton RV; 10. Tom Dixon's Residence (AC); 11. DR Cham (Culligan Pontiac); 12. *DR Cham (Culligan Toyota) (M. Torrelli)*; 13. DR Cham (FSNB Pittsford-Savannah); 14. DR Cham (Vandermark)(PK); 15. Grandview (Phoenix EX)(PK); 16. Grimm (Dr. Polwalski); 17. Ingersoll Painting; 18. JEG (T&M Courtyard)(TW); 19. Keller (T&M Courtyard)(TW); 20. Kucharchi, Annette (PK); 21. Lemperelli (Mercy Hopital Surgery Waiting Room (AC); 22. Landmark; 23. Levine; 24. Modern Electrical Construction – Brogan Building; 25. Modern Electrical Construction (Upper Offices) (TW); 26. Modern Graphics (TW); 27. Mulvey (NOCO); 28. Orville's Applicances; 29. Patrick Development (Golf Galaxy)(AC,PK); 30. Patrick Development (Aunt Pat's); 31. Project Developers (NF Imaging)(TW); 32. Sherwood; 33. Simon, Bill (Snyder House)-(AC); 34. Sotek EX; 35. *Todd-WVFC (MT)*; 36. Towne Automotive Hamburg (AC, PK); 37. Towne Automotive – Towne Dodge; 38. Tri-River (Pier One – McKindley); 39. Value Home Center (Clarence); 40. Value Home Center (Harbor Creek); 41. Value Home Center (Lakewood).

The foregoing shows that Respondent's that new hires, Harvey and Neri, started out with Active Work Force performing work for Respondent and then Respondent hired them directly. Lombardo testified that he did not contact Crowell's references, and that he hired Harvey even though he was a convicted felon. Many of these employees were hired, even though they put limitations on their availability to work certain times for Respondent (Pattiso, Harvey, and John Hole indicated on their applications that they could not work second or third shift). Stevens scored higher on the pre-employment test than any of the job applicants Respondent hired. Stevens missed two questions. Hired applicant Cogdill answered fourteen of the twenty five questions incorrectly. Kawaleoski missed five questions and Wigdorski missed twelve.

On Cogdill's application, there is no indication that any references were called, and Lombardo did not have an independent recollection of calling his references. Cogdill had not had painting experience for about five years before being hired by Respondent. Kawaloeski sought the position of foreman but was hired as a painter though the he did not have formal training in painting. Lombardo testified that he was impressed that Kawaloeski had been self employed for the past two years. Wigdorski was hired even though he had a current part-time job at the time of filing his application.

Despite the loss of one anticipated project and his decision not to take on the other, Lombardo maintained about the same number of painter employees throughout the fall of 2004. He had seven such employees in September, seven employees for half of October and eight employees for the remainder of October, and began November with nine employees and that number rose to ten during the month. For the period September 2004 through January 2005, Lombardo did not utilize Active Work Force employees. He had used them before September 2004 and he again utilized them after January 2005.

4. Evidence Adduced from Witnesses Establishing Respondent's Animus

a. Mark Mixon

Mark Mixon worked for Respondent as a painter for seven months in 2002. He left Respondent to take a position with a Union contractor. He stayed in the Union position for three months, then was laid off and went back to work for Respondent at the end of 2002. When he came back, Lombardo asked what had happened with the Union position. Mixon told him it was not what he expected, that he expected to work full time. Lombardo noted that things are not always what they seem to be.

Mixon testified that during his employment with Respondent, the Company did not refer to any of its employees as laborers. During his employment with Modern Graphics, there was an organizing campaign and an election was held. Mixon testified that before the election, Respondent held two mandatory employee meetings and one non-mandatory meeting. At these meetings, Lombardo indicated that he disliked the Union stating that it was too powerful. Around December 2002, Mixon asked whether there was going to be work available during the upcoming winter. According to Mixon, Lombardo stated that if the employees voted in the Union, there would be no work as he would close the business. Lombardo added that the available work depended on the vote. On several occasions while Mixon was employed by Respondent, Lombardo expressed his displeasure with Stevens for visiting Respondent's employees on jobsites and talking to them on Company time. Lombardo also indicated that he did not like Stevens talking to his employees at any time. Mixon heard Lombardo be asked whether he would ever hire Stevens. Lombardo answered that he would never hire him because he was with the Union. He also heard Lombardo state to a group of employees before the election that

if they voted 'yes', they might as well not show up for work the next day. Lombardo also told employees in the presence of Mixon that if anyone left to join the Union, he would never rehire them. During this same pre-election time frame, he heard Lombardo in a neighborhood bar state that he disliked the Union, and that "they can all go f... themselves." Lombardo also said he would fold the business before he was forced to [deal] with the Union. Mixon testified that he quit Respondent after the election because he had voted 'yes' for the Union and believed Lombardo that there would not be continuing employment for anyone voting that way.

In early 2005, Mixon again spoke with Lombardo about the possibilities of returning to work at Modern Graphics. Lombardo said there were some things that would have to be worked out and asked him about the Union. Lombardo reiterated his earlier statement to the effect that things are not always what they seem and told Mixon to call him the next day. Mixon made the call and was told to call back a few days later. He did not hear back from Lombardo. Following this inquiry about returning to work for Respondent, Mixon had a conversation with one of Respondent's foremen, Mike Wagner. Wagner said that Lombardo had told him that he would not rehire Mixon because he was still involved with the Union. In 2006, Mixon had another conversation with Wagner and Wagner stated that Lombardo had said that he would never hire anyone who was in the Union.

b. Kean Carmell

Foreman Kean Carmell testified that he attended some Employer-held meetings during the Union organizing campaign of 2002 – 2003. He has problems with his memory, but was sure that Lombardo was against the employees being represented by the Union. He also testified that Stevens visited Respondent's jobsites and that Lombardo preferred that Stevens did not take men away from their work. He testified that employees were under orders from Lombardo to report any incidences of Stevens coming on to jobsites.

c. Anthony Romano

Anthony Romano worked as a painter for Respondent in the year 2002. He sought employment with Respondent after seeing a help wanted sign in front of Respondent's office. He completed an application form and was given a test. The test was administered by Johnt or a Company estimator, Mark Hellerer. At the time Romano applied, he had four years experience as a painter. At no time during his employment with Modern Graphics did Lombardo refer to employees as laborers. He testified that during his employment with Respondent, he went to the Union on a few occasions seeking work. In response to his inquiries, Stevens came to a job on which he was working while employed by Lombardo. Stevens briefly explained Union wages and benefits, then another employee told him he should not be talking to Stevens on Company time. Stevens then left. One of the other employees working at the site reported Stevens visit to Lombardo. Upon Romano's return to the office that day, in the company of four or five other employees, Lombardo indicated his displeasure about Romano talking with Stevens on the job. Romano testified that Lombardo made clear that it was not in his best interest if he wanted to continue to work at Modern Graphics to speak with anyone from the Union or about the Union, especially on Company time. Lombardo then said to the group of employees that if he caught any of them talking to the Union or about the Union on his time, he would fire them. He instructed them to call him immediately if anyone from the Union came onto a job site where they were working. And Lombardo again made clear that he did not want employees talking to anyone from the Union or talking about the Union on work time. Romano added that Lombardo stated that if they ever tried to organize the shop, he would close the doors forever.

Romano also testified that as time went by, Lombardo became angrier about the Union's

organizing efforts. On several occasions, Lombardo stated that all the Union wanted was their money and that once it got their money, they would be out of work. He also called Stevens a liar and an asshole. Romano also remembered an incident when Stevens came on a job when Lombardo was present. Stevens approached Lombardo and attempted to talk to him about
5 organizing. Lombardo pointed out that he did not belong there and told him to leave. Stevens continued to talk to Lombardo and finally Lombardo left. A few days after this incident, Romano decided to join the Union. When he received his paycheck, he told Lombardo he was quitting and why. Lombardo expressed disbelief and as Romano walked away, angrily said that he would be back.

10 Following this event, during 2003, Romano was in a bar near Modern Graphics with a friend. He saw Lombardo sitting a few feet away. Romano testified that Lombardo taunted him, saying "What's the matter Tony? Where's your big Union job? What's the matter? No work?" Romano replied that he was just off a couple of days, but that he made so much more money
15 that it did not matter. To keep the situation pleasant, Romano ordered a beer for Lombardo and Lombardo said thank you. Then Romano asked Lombardo if he knew he was drinking a union made beer. According to Romano, Lombardo angrily slammed the beer down and walked into the back room of the bar. Romano then left the bar.

20 d. William Meyer

William Meyer worked as a painter and foreman for Modern Graphics from August 2000 until March 2003. He sought employment there after seeing an ad in the Buffalo newspaper. He filled out an application and took a pre-employment examination. He gave Johnt his resume and
25 some letters of reference. A few days later, Johnt called and reported that he was hired. He worked as a painter for most of his employment with Modern Graphics, becoming a foreman the last year of his employment. Meyers testified that all employees were referred to as painters and that no one was called a laborer. He also filled out reports, ordered material and performed maintenance on Company equipment. Meyer testified that periodically employees were
30 evaluated. Foremen were asked for their input on employees' performance. As a foreman, he independently assessed employees' skills and assigned them to tasks according to his judgment. While he worked for Respondent, the other foremen were Mike Anderson, Kean Carmell, Nick Vannote, Charley Schmidt and Mike Wagner.

35 Meyer testified that Johnt orders materials, receives and processes time sheets and time off requests and occasionally reprimanded employees for failing to file required reports or filing them improperly.

40 Meyer joined the Union a few months after leaving his employment with Respondent. He had learned about the Union from Stevens and other organizers who visited Respondent's job sites. During the last year of his employment with Respondent, Lombardo would occasionally state his dislike of the Union and his opinion that the Union would steal members' retirement. He would also say that all the dues went for salaries at the Union hall and that there was no future
45 with the Union. These statements were made both before and after the filing of the representation petition. Meyer testified that in late 2002, at the shop, Lombardo told employees that if he found out that any employee was talking with Union organizers on the job, that there would be consequences.

50 Prior to the election in 2003, Lombardo held mandatory employee meetings. These were held weekly, usually between 4:00 pm and 5:00 pm on Fridays. About 12 to 15 employees attended these meetings. According to Meyer, Lombardo would stress that he could provide work all year and that everyone was included in the Company's retirement plan. He also

informed the employees of the salaries of the Union's paid officials stating they were not worth the money they were being paid.

5 Meyer testified that on a number of occasions in the months leading to the election, Lombardo would tell employees that he would close the doors and shut down the shop rather than go Union. A couple of weeks prior to the election, Lombardo changed all the locks at the shop and told Meyer that he did not trust the employees anymore because they had been talking to the Union officials behind his back. Meyer testified that about the same time, Lombardo complained to a group of employees that he was being asked by employees for more
10 money and that they were just not worth it.

About a week before the election, Lombardo had Meyer put all the painting equipment in a locked storage room. Lombardo then told Meyer that he was putting the equipment away to scare the employees into thinking he was closing the shop in hopes of thwarting the Union's
15 attempt to organize them.

On the day of the election, Meyer resigned, telling Lombardo he was pursuing a career as a Union painter. Lombardo told him that he did not have to vote. Meyer said he was going to
20 vote.

In the summer of 2005, Meyer ran into Lombardo at a bar/restaurant very near Respondent's office. Lombardo asked him if he was working and Meyer did not respond. According to Meyer, Lombardo then said that Stevens and fellow organizer John Adams, were bullshitters and motherf.....s. Lombardo said they were liars, that he did not like them and that they would steal Meyer's retirement. He told Meyer that there was no future with the Union and that he would discuss Meyer returning to work for him.
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e. Mark Hellerer

30 Mark Hellerer worked at Modern Graphics from late 2002 until he left in 2004. He was employed as a project manager and estimator. In his job he usually worked in the office in a space between Johnt's office and Lombardo's office. When his employment ended, he and Lombardo agreed that it was time to part ways. With respect to the matters under consideration here, he testified that in early 2004, four or five Union officials came to the Respondent's office.
35 The only one he recognized was Mark Stevens. The Union men asked to apply for jobs and were given application forms. They filled them out, took the test, and Johnt said they would be called. The men left and according to Hellerer, Lombardo said he would not hire any of them and that none of them was qualified to be a painter. He added they just wanted to unionize his shop and he did not want that. One of the Union applicants was from Rochester. Lombardo
40 commented that if he hired any of them it would be that one as he had the longest drive to get to work.

At about the time the representation petition was filed, Lombardo expressed to Hellerer his disgust that the Union would try to organize the company he had built over twenty five years.
45 He wondered aloud why the Union would want his company. He also expressed this view to employees in Hellerer's presence. At some point in his employment with Respondent, Lombardo issued an oral directive that employees were not to talk with anyone from the Union on Company time or at a jobsite. Hellerer testified that Lombardo was very angry that the Union would come on a jobsite and try to talk to his employees while they were working. Following the
50 issuance of this directive, some employees apprehensively asked him about the consequences of failing to heed Lombardo's directive and he dodged their questions.

Just prior to the election, Lombardo told Hellerer that if the employees voted the Union in, he would not sign a contract; rather, he would close the doors. There were employees nearby when this conversation took place, but Hellerer did not name them. Hellerer testified that he was approached by some employees concerned about whether Lombardo would really close the business.

Hellerer testified about the duties of foremen at Modern Graphics. He testified that foremen are to run the jobs, make sure the employees are working, make sure they fill out all required paperwork including time cards, daily sheets, vehicle logs, etc. They also passed on policies to the employees, including safety policies. He testified that Johnt took care of all paperwork and ran the office. She occasionally suggested discipline to Lombardo. Whether he followed her suggestions is not known.

5. Respondent's Evidentiary Presentation

Eric Larsen is part of the management of Color Coatings, Inc., a painting contractor. Stevens also applied for a job with that company and it did not hire him. The Union filed a charge over this refusal to hire and it was settled between the parties. The company paid \$5000 to Stevens and offered him a job, but he did not show up to work. Pursuant to an agreement between the parties' lawyers, another Union organizer did show up and was hired. He worked one day and then effectively quit.

Lombardo denied the conversations alleged by the other witnesses by saying that he denied the accuracy of their testimony and that his statements might have been misconstrued. Respondent presented vague evidence that it employed an individual named Darryl Moore. Moore was a painter employed by Respondent in or about 1997, but left that employment within less than a year to become an independent contractor. Within the last year, after Stevens' application, Respondent hired Moore as a subcontractor. Without showing any basis for his knowledge, Lombardo testified that within the last year Moore became a Union member. Moore was not hired as an employee and was not shown to be a Union organizer. There was no showing as to whether he worked with a crew of Respondent's employees, alone, or with painters he employed as a contractor. Respondent hired Michael McMIndes, foreman George McMIndes brother, in July 2005, even though he was member of Sheetmetal Workers Local 71, which does not represent painters. Such an employee poses no threat of organizing Respondent's employees. Respondent hired David Orton in April 2006, but Orton worked as a subcontractor for two years prior to working for Respondent, and prior to that, had worked for the Union. There is no showing that he was a member of the Union when Respondent hired him or what his feelings about the Union might be, good or bad.

I do not accept Lombardo's vague denial of the testimony of Mark Mixon, Anthony Romano, William Meyer, Mark Hellerer and Kean Carmell. I credit these witnesses' testimony over that of Lombardo to the extent there is a conflict between their testimony and Lombardo's testimony and denial. Each of the General Counsel witnesses gave fairly factually detailed testimony establishing Respondent's antiunion animus. Their testimony tended to be mutually corroborating and consistent. None of these witnesses was shown to harbor any ill will toward Lombardo nor was any reason advanced why they would not be telling the truth. By way of contrast, Lombardo's shifting defenses as to why Stevens was not hired are a serious blow to his credibility.

6. Are Respondent's Office Manager and Foremen Agents within the Meaning of the Act?

In determining agency, the specific acts performed to not have to be actually authorized or subsequently ratified. *Dentech Corp.*, 294 NLRB 924, 925 (1989). Agency can be ascribed when “under all the circumstances the employees would reasonably believe that the employee was reflecting company policy and acting on behalf of management.” *Kosher Plaza Supermarket*, 313 NLRB 74 (1993); *Dentech, supra*, at 925. An employee was found to be an agent when she was often the only person in the office, distributed and collected job applications, and discussed hiring needs with applicants. *GM Electrics*, 323 NLRB 125, 126 (1997); see also *Diehl Equipment Co.*, 297 NLRB 504, n.2 (1989)(employee handling applications who had apparent authority to provide information found to be an agent). *Southern Bag Corp*, 315 NLRB 725 (1994)(applicants could reasonably believe that employee’s discussion of application procedures reflected company policy).

The record established that Respondent’s office manager Christine Johnt conducted interviews and explained company policy during the course of those interviews. Johnt provided and collected applications. Johnt provided information about hiring to Stevens, including the length of time Respondent maintained applications, the hiring process and whether Respondent was hiring. Johnt provided the mandatory equipment list to hired employees. Johnt’s interview sheets reflect that she conveyed company policy, and Lombardo testified that Johnt followed his directives regarding interviewing. During the course of Johnt’s interview of Stevens, she conveyed company policy on a number of issues and discussed terms and conditions of employment with him. In addition, Johnt had informed Meyer that he had been hired. Johnt at one point collected weekly pay sheets. Accordingly, the record establishes that an applicant would reasonably believe that Johnt was reflecting company policy and acting on behalf of management in her dealings with applicants, such as Stevens, and with employees. *Kosher Plaza, supra; Dentech, supra*. I find Johnt to be an agent of Respondent within the meaning of the Act.

Likewise, General Counsel urges that Respondent’s foremen are agents of Respondent, in particular Mike Wagner, for purposes of allowing his statements to Mixon into evidence. The record, based upon Lombardo’s testimony, foreman Carmell’s testimony and the testimony of those witnesses who served as foremen or worked in the office, reflects that Respondent’s foremen organize the job, run jobs, ensure that materials are present at the job, direct employees to perform particular job functions, and independently make decisions as to which employees perform particular tasks. Lombardo, Carmell and other witnesses testified that foremen convey policy directives, including safety directives, from management to employees. At times, foremen would recommend to Lombardo for hiring certain individuals, or would provide information to Lombardo which he would use in disciplining employees. According to Hellerer and Carmell, Lombardo instructed foremen about directives, such as whether to prohibit employees from speaking with Union representatives. I find that applicants or employees would reasonably believe that foremen were reflecting company policy and I find Wagner to be an agent within the meaning of the Act when he spoke with Mixon in or about 2005-2006.

B. Discussion and Conclusions

Under *FES (A Division of Thermo Power)*, 331 NLRB 9, 15 (2000), the General Counsel establishes a prima facie case of discriminatory refusal to consider for employment by showing that: 1) Respondent excluded applicants from the hiring process; and 2) Respondent’s anti-union animus contributed to this decision. The Board outlined the prima facie case for a refusal to hire allegation in *FES, supra*, at 12. In order to establish a discriminatory refusal to hire violation, the General Counsel must establish the following elements:

- (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.

After the General Counsel meets its initial burden, the burden shifts to the Respondent to show that it would have not considered for hire, or hired, the applicant even in the absence of the applicant's union activity or affiliation. *FES, supra*, at 12; *Wayne Erecting, Inc.*, 333 NLRB 1212 (2001).

The status of paid union organizers as bona fide applicants is well-settled under case law. In *Ferguson Electric Co.*, 330 NLRB 514, 515 (2000) enfd. 242 F.3d 426 (2nd Cir. 2001), the Board citing *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), held that an individual's status as a paid full-time union organizer does not deprive him of protection of the Act, and that "employment applicants are 'employees' within the meaning of Section 2(3) of the Act, even if they are paid by a union to organize their prospective employer." The Supreme Court has held that Union organizing, "when done for pay, but during nonwork hours, would seem equivalent to simple moonlighting, a practice wholly consistent with a company's control over its workers as to their assigned duties." *NLRB v. Town & Country Electric, supra* at 95. In *Sunland Construction*, 309 NLRB 1224, 1230 (1992), the Board held, "the fact that paid organizers intend to organize the employer's workforce if hired establishes neither their unwillingness nor their inability to perform quality services for the employer."

General Counsel, through the credited evidence, has overwhelmingly established a prima facie case in support of a finding of discrimination based on antiunion animus and Respondent has wholly failed to carry its burden of showing it would have not hired Stevens even in the absence of Steven's union activity or affiliation. According, based on the credited evidence, and my analysis of the evidence set out below, I find that Respondent refused to consider Stevens for employment and refused to hire him because of Stevens protected Union activities and affiliation, in violation of Section 8(a)(1) and (3) of the Act.

At various times during the history of this case, Respondent has offered various reasons for not hiring Stevens. During the hearing, Lombardo backed away from almost all of these reasons and the evidence and law establish the remaining reasons are false, pretextual or simply unavailing as a matter of law. Respondent's shifting rationales as to why it did not hire Stevens support a finding that they are pretextual, and that animus instead motivated the decision not to hire Stevens. *Doug Wilson Enterprises, Inc.*, 334 NLRB 394, 397 (2001)(employer's shifting and pretextual reasons warrants an inference that employer's real reasons for its conduct is something other than as stated). In addition, Respondents hiring of other individuals less qualified than Stevens indicates that its true rationales were unlawful. Respondent's willingness to utilize Active Work Force employees on its jobs, and to observe their work performance, without affording Stevens a similar chance, indicates antiunion animus as well.

By its advertisement in the Buffalo News, Respondent sought to hire painters/foreman. Stevens is clearly qualified to fill either position. He has years of experience in both residential and commercial painting, and has taken courses to keep up with any changes in techniques, equipment or supplies used in the painting process. Even Lombardo admitted in his testimony that he had no reason to doubt that Stevens was qualified to be a painter. The lone reference which Lombardo checked praised Stevens as a good and qualified painter with a good

attendance record. The four or five year period preceding Steven's application when he did not actively paint cannot be an excuse for not hiring him, as the person Lombardo did hire almost immediately after Stevens applied, Cogdill, similarly had not painted for four or five years. Moreover, the painting that Cogdill had done in the past was not nearly as extensive or as skilled as the painting done by Stevens. In his affidavit, Lombardo also stated that he

5 questioned Steven's physical capability to be a painter, a position he backed away from in his testimony.

An argument that Stevens was overqualified for the position sought has no credence. Respondent hired for a short time Donald LaChance, the owner of another painting company. Clearly he was as qualified as Stevens, yet his over qualifications were not a hindrance to being hired. An argument that Respondent was only hiring helpers or laborers is also unavailing. The first person hired after Stevens applied was Cogdill, who applied for a painter position and after being hired, was given painting tasks, not laborer's tasks. He did the same work as did the other

10 painters on the crews to which he was assigned. Moreover the credible evidence shows that Respondent never referred to any employees as laborers until this hearing. Certainly, the employees that Lombardo did hire after Steven's was refused believed they were hired for and worked in the position of painter. Again, I believe Respondent's position in this regard is pretextual. An argument that Stevens applied for the position of foreman and Respondent was

15 not hiring foreman is similarly pretextual. Not only did all the evidence adduced show that Steven's applied for a painter' position, but it also shows that Kawaloeski, hired shortly after Stevens applied, did seek a foreman's position, but was hired as a painter notwithstanding his preference to be a foreman.

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An argument that the two jobs Respondent did not get in September 2004 because of being under bid or out of its own choice made it unnecessary to hire is patently false. Regardless of the loss or decision not to do these jobs, Lombardo continued to hire. Stevens' unrebutted testimony established that on September 19, 2004, an estimator for Respondent informed him that Respondent was hiring. Respondent hired Cogdill on the spot on September

25 29; Kawaloeski, who responded to the same advertisement as Stevens, was hired on October 26, 2004; and Wigdorski was hired on December 17, 2004. Respondent was still engaged in numerous other work projects in the fall of 2004, which is generally the busiest season for Respondent. Thereafter, Respondent's hiring continued unabated through 2006 (with its latest hiring, that of Kenneth Huber on June 19, 2006). Respondent also continued to employ Active

30 Work Force employees on its projects, and hired directly some of that company's employees.

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Respondent not only maintained the same employee complement during the period when the two projects fell through, but actually increased its employee complement during some months, even after losing an employee, Matt Torrelli, on September 13, 2004. As noted earlier,

40 Respondent maintained a seven employee complement in September, which rose to nine later in the fall.

An argument that Lombardo would not hire an applicant who had another job I believe to not only be pretextual, but unavailing as a matter of law. If the Supreme Court has held that a

45 full-time union organizer cannot be refused a position because of his status as an organizer, this reason for refusing Stevens must be unlawful and/or unavailing. It is well-established that Union organizers loyalty and ability to work for an employer should not be questioned by virtue of their status as organizers. *Sunland Construction, supra*, at 1230. In *Sunland*, the Board stated that the statute "is founded on the belief that an employee may legitimately give allegiance to both a

50 union and an employer. To the extent that may appear to give rise to a conflict, it is a conflict that was resolved" in "favor of the right of employees to organize." *Id.*, at 1230. In addition, the Board has found that company policies prohibiting employees from engaging in "moonlighting"

have been found to be unlawful. *Tualatin Electric, Inc.*, 319 NLRB 1237 (1995).

In *Tualatin, supra*, the employer contended its policy was necessary to provide needed time off to employees and to avoid employee conflict of interest serving two different masters. The Board found that there was abundant evidence that the policy was adopted primarily as a result of the employer's antiunion animus. The Board examined the evidence of Respondent's ongoing battles with the Union and virulent antiunion sentiment, including the belief that the Union was out to destroy the company. The Board held that the employer implemented the rule with the purpose of restricting and preventing employees from engaging in protected activity.

Here, as in *Tualatin*, the employer ostensibly asserts that it follows such a hiring criteria because of concern for the health and safety of employees. Although the record is not clear as to when the criteria was adopted, (Respondent has no written version of it), or whether it has in fact been a criteria prior to this proceeding, the antiunion animus of Respondent proven in this record strongly supports my finding that the criteria is actually a pretext to restrict or prevent the hiring of union organizers like Stevens.⁶

There remains no good reason why Respondent did not hire Stevens except for the obvious one, that is, Lombardo harbored animus toward the Union and toward Stevens specifically for his attempts to organize Respondent's workforce on behalf of the Union. The record clearly establishes instances where Respondent uttered unlawful statements, which, notwithstanding they occurred outside the Section 10(b) period, still reveal animus by Respondent toward the Union generally and particularly toward Stevens as a Union organizer. Conduct occurring prior to the 10(b) period may be used to shed light on Respondent's motivation. *Monongahela Power Co.*, 324 NLRB 214 (1997). The Board has held that a discriminatory motive may be inferred from the record as a whole. *Tublar Corp. of America*, 337 NLRB 99 (2001). Although employers are protected by Section 8(c) of the Act, expressions of antiunion comments, such as that an employer does not particularly like unions or that an employer is against unions because they do not benefit employees and interfere with employees' direct interaction with employees, while not themselves violative of the Act, nevertheless establish animus. *Lampi LLC.*, 327 NLRB 222 (1998); *Stoody Co.*, 312 NLRB 197 (1993)(animus can be based on unalleged conduct, and on conduct that is not necessarily violative of the Act); *Gencorp.*, 294 NLRB 717, n. 1 (1989).

Respondent threatened employees with losing their jobs if they supported the Union. For example, Mixon testified that Respondent threatened that if anyone supported the Union, they might as well not show up for work, and if anyone left to go to work for the Union, they would not be hired back. Romano testified that Respondent threatened he would terminate any employees who talked to the Union or even discussed the Union in his shop. Meyer testified that Respondent threatened that there would be "consequences" if Lombardo discovered that

⁶ There is nothing in Respondent's help wanted advertisements, nor in its job application forms that would indicate that it will not hire a person simply because that person has a job at the time of applying for work with Respondent. At no stage in the application process or thereafter until this case was instituted, did anyone from Respondent inform Stevens he was precluded from being hired because he presently had a job. Indeed, if such a policy existed, why did Lombardo call the references listed on Stevens' application form? Lombardo was unable to recall any other job applicants, beside Stevens, who were qualified and skilled, but were denied employment because of working a second job. Moreover the record reflects that Respondent did hire an applicant after Stevens applied who had a part-time job. There is no showing in this record whether that person kept his part-time job or quit it.

employees had spoken with Mark Stevens or John Adams. See *In re Swardson*, 340 NLRB 179, 185 (2003)(finding that an employer unlawfully threatened to discharge employees for talking to the Union). Statements that have a reasonable tendency to coerce employees in the exercise of their Section 7 rights are violative of the Act. *KSM Industries*, 336 NLRB 133 (2001).

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Moreover, Lombardo threatened employees with closing the facility if they supported the Union. Mixon testified that Lombardo stated he “would close the shop before he was forced into a Union,” and on numerous occasions threatened to close the shop because of the Union. Romano testified that Lombardo threatened to close the doors forever if employees ever organized the shop, and that everyone would be out of a job. Meyer testified that Lombardo stated that he would rather close his doors before he signed a contract, and that if employees voted in favor of the Union he would not sign a contract. An employer’s threats to close a shop for supporting a union are hallmark violations of the Act and clear evidence of antiunion animus. *Highland Yarn Mills*, 313 NLRB 193, 206-207 (1994); *In re Swardson*, *supra*, at 179.

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In addition, Meyer recounted that Lombardo stated that he did not trust anyone anymore because employees were talking with the Union, and changed the locks on the doors. Mixon even resigned believing that Respondent was going to fire him for supporting the Union, in furtherance of Lombardo’s disseminated threats. The record reflects that employees approached Hellerer out of apprehension that Lombardo was going to carry out his threats to terminate employees. Respondent attempted to dissuade employees from supporting the Union through coercion, such as the removal of equipment to make it appear as if it was closing down the shop. Furthermore, in the past, Lombardo had stated, in the presence of employees, that he would never hire Stevens because he was with the Union, directly connecting his past union animus with his present refusal to hire Stevens.

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Lombardo repeatedly expressed his dislike of Mark Stevens, and articulated his antipathy toward the Union. Mixon testified that Lombardo called Stevens derogatory names and stated his dislike of Stevens. Romano testified about Lombardo’s derogatory references to Stevens and that Lombardo was upset that employees spoke to him at all, and Lombardo’s actions to avoid speaking with Stevens at a jobsite. Meyer testified about Lombardo’s derogatory comments about Stevens and fellow organizer John Adams. Lombardo also articulated his dislike for the Union in general. Meyer testified that Lombardo stated he disliked the Union, that it was not good for anyone, that the Union would steal the employees’ retirement, that employees paid Union salaries, and that there is absolutely no future in the Union. Hellerer testified about Lombardo’s remarks at meetings about the Union taking jobs and not providing what it promised, and recounted Lombardo’s anger toward the Union, and stating there was no money for raises because of legal fees paid to defeat the Union organizing efforts. Hellerer also recounted that Lombard stated that he would not hire (union organizer job applicants) because he did not want to have a union in the shop, and that if he did hire one, it would be the applicant from Rochester so that he would have a long distance to travel for work.

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Though most of the recounted expresses of antiunion animus by Lombardo took place around the time of the 2003 election, they continued on into the following years. Mixon testified that in 2005 and 2006, he learned from one of Respondent’s foremen that Lombardo had stated he would not hire Mixon back because he was with the Union. The foreman also informed Mixon that Lombardo had said that he would never hire a Union member again.

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I believe that further evidence of Respondent’s animus can be found in John’s interview of Stevens. During the interview, when Stevens noted that his employer was the Union and that he intended to try to organize Respondent’s employees on his own time, she blurted out, “Well, not on my (Company) time. She also wrote on her interview sheet on the part where she put the

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reason the applicant believed that he or she should be hired, the statement, "He'd like to organize us better." Following the filing of his application, Stevens called back in on October 6, 2006, to ask if anyone had been hired. He spoke with Johnt and asked her that question. Though Cogdill had been hired on September 29, 2004 and started work on October 6, 2004, Johnt answered that no one had been hired. An employer's false statements that it is not hiring are indicative that antiunion animus contributed to a decision not to consider applicants. *C&K Insulation*, 347 NLRB No. 71, slip op. at 2 (2006); *Superior Micro Film Systems, Inc.*, 201 NLRB 555 (1973).

Again, for the reasons set forth above, I find that Respondent violated Section 8(a)(1) and (3) of the Act by refusing to consider for hire and refusing to hire Mark Stevens.

Conclusions of Law

1. Respondent, Joseph S. Lombardo, d/b/a Modern Graphics and Design is an employer within the meaning of Section 2(2), (6) and (7) of the Act.
2. International Union of Painters and Allied Trades, District Council No. 4, the Union herein, is a labor organization within the meaning of Section 2(5) of the Act.
3. By refusing to consider for hire, or hire Mark Stevens because of his protected Union activities and/or because of his affiliation with the Union, Respondent violated Section 8(a)(1) and (3) of the Act.
4. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

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

The Respondent having discriminatorily refused to consider for hire or hire Mike Stevens, it must offer him the position for which he applied and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent is also ordered to inform Mike Stevens in writing that any future job application will be considered in a nondiscriminatory manner and that any record of its unlawful refusal to hire Stevens will be expunged and will not be used against him in any manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

⁷ 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.

ORDER

5 The Respondent, Joseph S. Lombardo d/b/a Modern Graphics and Design, Tonawanda, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

- 10 a. Failing and refusing to consider for employment, and refusing to employ Mark Stevens.
- b. In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

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

- 20 a. Within 14 days of the Board's Order, offer Mark Stevens employment in the position for which he applied, or attempted to apply, and if such position no longer exist, to a substantially equivalent position, and make him whole for any loss of earnings and other benefits that he may have suffered as a result of the discrimination against him, as set forth in the remedy section of this decision
- 25 b. Within 14 days of the date of the Board's Order, remove from its files any reference to the unlawful refusal to consider for employment and its failure to employ Mark Stevens and notify him in writing that this has been done and will not be used against him and further, that any future application will be considered in a non-discriminatory manner.
- 30 c. 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.
- 35 d. Within 14 days after service by the Region, post at its facility in Tonawanda, New York, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 3, 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
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50 ⁸ 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."

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 28, 2005.

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- 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.

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Dated, Washington, D.C., April 25, 2007

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Wallace H. Nations
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT fail and refuse to consider for employment or fail and refuse to employ job applicants because they engage in protected concerted activities, union activities, or because of the union affiliation.

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

WE WILL offer Mark Stevens employment in the position for which he applied, and if such position no longer exists, to a substantially equivalent position and make him whole for any loss of earnings and other benefits that he may have suffered because of our unlawful discrimination against him.

WE WILL remove from our files any reference to our unlawful refusal to consider Mark Stevens for employment and our refusal to employ him, and notify him in writing that this has been done and will not be used against him and further, that any future applications will be considered in a non-discriminatory manner.

JOSEPH S. LOMBARDO d/b/a MODERN
GRAPHICS AND DESIGN

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

111 West Huron Street, Federal Building, Room 901

Buffalo, New York 14202-2387

Hours: 8:30 a.m. to 5 p.m.

716-551-4931.

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THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 716-551-4946.

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