Shisler Electrical Contractors, Inc. *and* International Brotherhood of Electrical Workers, AFL–CIO, Local 241. Case 3–CA–22768

April 27, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On January 7, 2002, Administrative Law Judge Paul Buxbaum issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the General Counsel 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 and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(3) and (1) by refusing to consider and hire applicants Gary Kirton and Gary Fulcher because of their union activities. For the reasons stated below, we adopt the judge's finding that the Respondent unlawfully refused to consider and hire Kirton, but reverse his findings as to Fulcher. We also defer the General Counsel's request for a tax reimbursement remedy to the compliance stage of this proceeding.

Background

The Respondent, a small, informally operated electrical contractor located in Ithaca, New York, employed approximately seven to nine employees during the relevant period. Lloyd Shisler Sr., the Respondent's president and sole owner, made all of the hiring decisions and, as the judge found, "hired employees on an ad hoc basis, hiring whomever he wished whenever he wished to do so." There is no evidence that the Respondent had any written hiring policies or procedures. The judge found that the Respondent had no "customary method of hiring at all."

Journeyman electrician Gary Kirton is an organizer for the International Brotherhood of Electrical Workers, AFL–CIO, Local 241. Kirton repeatedly, since 1996, sought to persuade Shisler to enter into a collective-bargaining relationship with the Union. On May 17, 2000, Kirton met with Shisler, who said he was not interested in going union because he did not like the way he had been treated by union members at the supply house, and because he had tried to join the Union years earlier and he had been denied entry. At the end of the meeting, Kirton gave Shisler a resume and told him he would do "just about anything."

On July 24, 2000, journeyman electrician Gary Fulcher, at Kirton's suggestion, applied for a position with the Respondent. The next day, Shisler met with Fulcher to discuss Fulcher's experience and qualifications. Shisler testified that he told Fulcher that he "might have some other things in the fire or something." Shisler then asked Fulcher about the reference to "Local 25, IBEW" on his resume, and Fulcher explained that it referred to the Union. Shisler said Fulcher would be hearing from him, but Fulcher was not contacted about a job.

On August 23, 2000, Kirton gave Shisler another copy of his resume. Shisler stated that "if he gave [Kirton] a job, the only thing [Kirton] would do would be to organize his people." Kirton was not hired.

The next day, applicant Mark Snyder telephoned Shisler and asked if he had any work. Shisler arranged for an interview, which was held on August 26, 2000. On August 29, Shisler hired Snyder as an electrician.[2]

In May 2001, Kirton made another unsuccessful attempt to obtain employment. No other electricians were hired until sometime between late June and mid-July 2001, when the Respondent hired Jim Duncan. In addition, on July 26, 2001, during a hiatus in the hearing in this case, the Respondent sent a letter to Fulcher offering him an electrician position. Fulcher never responded to the offer.

Analysis

Refusal to Consider Gary Kirton

To establish a refusal to consider violation, the General Counsel must show that the employer excluded applicants from the hiring process, and that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden shifts to the respondent to show that it would not have considered the applicants even in the absence of their union activity. *FES*, 331 NLRB 9, 15 (2000), supple-

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

[2] The judge rejected the Respondent's contention that Snyder was hired as a laborer/helper and not as an electrician.

mental decision 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002).

We find that the General Counsel met his burden of proof with respect to the refusal to consider Kirton. Kirton was excluded from the hiring process because, although Shisler accepted Kirton's resume, he did not review the resume, interview Kirton, or otherwise consider Kirton's qualifications for employment. Rather, he stated merely that "if he gave [Kirton] a job, the only thing [Kirton] would do would be to organize his people." Although "[a]n employer's acceptance of applications generally supports a finding that the employer considered the applications,"[3] a refusal-to-consider violation can be established where an employer accepts a union adherent's application but also makes comments showing it was excluding him from the hiring process because of his union affiliation. See *Wayne Erecting, Inc*., 333 NLRB 1212 (2001) (comment that respondent would not hire applicant because applicant would "tell us all to join the union" shows that applicant was excluded from the hiring process because of his union activity and affiliation). Shisler's comment to Kirton similarly shows that Kirton was not considered for employment because of his organizing activities and establishes that antiunion animus contributed to Shisler's decision not to consider Kirton for employment.[4]

The Respondent has offered no evidence to show that it would not have considered Kirton even in the absence of his organizing activity. Shisler's comment to Kirton indicates that the Respondent's unwillingness to consider Kirton was based solely on his organizer status. Therefore, we find that on August 23, 2000, the Respondent unlawfully refused to consider Kirton in violation of Section 8(a)(3) and (1).[5] See *Brown & Root USA, Inc*., 319 NLRB 1009 (1995) (unlawful refusal to consider applicants because of union organizer status).

Refusal to Hire Gary Kirton

The judge found, and we agree, that the General Counsel has shown a discriminatory refusal to hire Kirton under *FES*. In order to establish a refusal-to-hire violation, the General Counsel must show that the Respondent was hiring or had concrete plans to hire, that the applicants had experience or training relevant to the generally known requirements or announced requirements for the position, and that antiunion animus contributed to the decision not to hire. Once these elements are established, the burden shifts to the Respondent to show that it would not have hired the applicants even in the absence of their union activity. *FES*, supra at 12.

For the following reasons, we find that the Respondent violated Section 8(a)(3) and (1) by refusing to hire Kirton. First, the General Counsel has shown that the Respondent was hiring or had concrete plans to hire at the time Kirton applied for employment. Kirton submitted his resume on August 23, 2000. The next day, applicant Snyder telephoned Shisler and asked if he had any work. Shisler interviewed Snyder on August 26. On August 29, Shisler hired Snyder to fill an electrician position. Thus, Kirton's application was just days old at the time Snyder was interviewed and hired.

[3] *C&K Insulation, Inc*., 347 NLRB No. 71 (2006).

[4] The judge also found animus based on two statements Shisler made concerning his past experiences with the Union. In explaining to Kirton why he did not want to enter into a relationship with the Union, Shisler stated that he did not like the way he had been treated by union members when he met them at the supply house, and that he had tried to join the Union years earlier and had been denied entry. We do not rely on these statements as evidence of animus.

The judge also inferred animus from a finding that the Respondent's contention that Snyder was hired as a laborer, and not an electrician, was pretextual. We do not rely on that inference. Although we agree with the judge's conclusion that Snyder was hired as an electrician, the Respondent's position that Snyder was a laborer was not frivolous (Snyder's pay was at the lowest rate for company electricians, and his independent work assignments involved "unsophisticated" tasks). Under these circumstances, we find it inappropriate to infer animus from the Respondent's defense that Snyder was not hired as an electrician.

Contrary to his colleagues, Member Schaumber finds that the General Counsel failed to establish a prima facie case of discriminatory refusal to consider and hire paid union organizer Gary Kirton. The majority's animus finding is based solely on Shisler's statement to Kirton that, if Shisler gave Kirton a job, the only thing Kirton would do would be to organize Shisler's employees. While this statement on its face suggests animus, the context in which the statement was made gives a decidedly different gloss. For approximately 5 years, Kirton, a full-time union organizer, aggressively and persistently pressured Shisler to recognize the Union and enter into a collective-bargaining agreement. Shisler never refused discussion with the Union, and, in March 2000, told Kirton he wanted more time to consider the Union's recent contract proposal. In May 2000, Shisler declined another overture from Kirton to enter into a relationship with the Union. When asked why, Shisler provided explanations that were purely personal and did not reflect opposition to unionization in general or collective bargaining. In response, Kirton gave Shisler his resume, telling Shisler he would take *any* job just to be hired. Kirton, however, never filled out an employment application and there is no record evidence that Kirton had ever expressed any prior interest in working for Shisler during his years of interacting with him. Under these circumstances, Shisler's statement a few months later, rather than reflecting antiunion animus, could fairly be interpreted as a benign remark reasonably questioning the seriousness of Kirton's interest in employment. In fact, the judge acknowledged as much by conceding that the breadth of Kirton's offer cast doubt on his seriousness as a job applicant. Thus, Member Schaumber discerns in all this insufficient evidence of animus and would dismiss the allegations relating to Kirton.

[5] The judge also found that the Respondent unlawfully refused to consider Kirton for the positions offered to Duncan in June/July 2001 and Fulcher in July 2001. We do not pass on those additional refusals to consider because they are cumulative and would not affect the remedy.

Second, the General Counsel has shown that Kirton "had experience or training relevant to the announced or generally known requirements of the positions for hire." *FES*, 331 NLRB at 12. Here, the Respondent did not state any specific requirements for the electrician position, and the only generally known requirement was that the applicant be an electrician. Kirton testified that he was an experienced electrician, and the General Counsel submitted a copy of Kirton's resume which shows that he had been working as a journeyman electrician for the "last couple of years."

Third, as discussed above, the General Counsel has shown that the Respondent harbored animus toward Kirton's union activities. Shisler feared that "if he gave [Kirton] a job, the only thing [Kirton] would do would be to organize his people." See *Sommer Awning Co.,* 332 NLRB 1318, 1318–1319 (2000) (animus established by employer stipulation that it refused to hire applicants because of their participation in union's organizing program).

Contrary to our colleague, we find that Shisler's statement adequately establishes that antiunion animus was a motivating factor in the Respondent's refusal to consider or hire Kirton. The statement, on its face, expresses the notion that, if Shisler hired Kirton, Kirton would unionize the Respondent's work force. The statement itself therefore clearly indicates that this was the reason why he would not give Kirton a job, and therefore demonstrates antiunion animus.

We agree that the context of a remark is relevant. But here the context only adds to the antiunion animus of the remark. Kirton had sought for a long time to obtain recognition for the Union, and the Respondent had consistently refused. In the instant case, the Respondent perceived that Kirton's efforts would continue, this time from the "inside" as an employee. The Respondent made it plain that it would have none of that. Thus, the antiunion animus of the remark is made even clearer in context.

Our colleague also suggests that Kirton was not really seeking a job at all. The facts are to the contrary. Kirton expressly said that he would take any job, just to be hired. Indeed, as discussed above, becoming an employee was to be a part of his organizational effort.[6]

Because the General Counsel has established all the elements of a refusal to hire violation as to Kirton, the burden then shifts to the Respondent to show that it would not have hired Kirton even in the absence of his union activity. The Respondent has not met its burden of showing that it would not have hired Kirton even in the absence of his organizing activities. Shisler's comment to Kirton indicates that Kirton's organizing activity was the reason he was not hired. Accordingly, we find that on August 29, 2000, the Respondent violated Section 8(a)(3) and (1) when it refused to hire Kirton for the position offered to Snyder.[7]

Refusal to Consider Gary Fulcher[8]

We find that the General Counsel has not satisfied the first prong of the *FES* refusal-to-consider test as to Fulcher because the record does not show that the Respondent excluded Fulcher from the hiring process.[9] To the contrary, Shisler accepted Fulcher's employment application and resume, interviewed him at the Respondent's

[6] It is beyond dispute that one can be an employee *and* engage in organizational efforts. See *NLRB v. Town & Country Electric, Inc.,* 516 U.S. 85 (1995).

[7] The judge also found that the Respondent unlawfully refused to hire Kirton in June/July 2001 (when Duncan was hired), and again on July 26, 2001 (when Fulcher was offered employment). We find it unnecessary to pass on these allegations because finding additional refusals to hire Kirton would be cumulative and would not affect the remedy.

As a remedial matter, the judge ordered instatement and backpay for Kirton, consistent with *Dean General Contractors*, 285 NLRB 573 (1987). Chairman Battista recognizes that *Dean General* represents current Board law, but he has concerns as to whether that case was correctly decided. Accordingly, he would leave to compliance the issue of how long Kirton, if he had not been discriminated against, would have remained an employee of the Respondent, and the related issue of which party bears the burden of proof on this matter. See *Construction Products*, 346 NLRB No. 60 fn. 2 (2006); *Quantum Electric, Inc.*, 341 NLRB 1270 fn. 2 (2004).

In his sole exception, the General Counsel requested that the Board order the Respondent to reimburse the discriminatees "for any extra federal and/or state income taxes they may incur as a result of the lump sum payment of a backpay award." Such an order would involve a change in Board law. See, e.g., *Hendrickson Bros.*, 272 NLRB 438, 440 (1985), enfd. 762 F.2d 990 (2d Cir. 1985). We observe that subsequent to the filing of the exceptions in this case, the General Counsel withdrew a request for a similar tax reimbursement remedy in *Hotel & Restaurant Employees Local 26*, 344 NLRB No. 70 (2005), enfd. 446 F.3d 200 (1st Cir. 2006). We have decided not to rule on the General Counsel's exception at this time, but instead we shall defer this issue to the compliance stage of this proceeding. If the General Counsel chooses to continue to pursue this remedy with respect to Kirton, he must raise the issue again in compliance.

Because Member Schaumber would find no discriminatory refusals to consider and hire here, he finds it unnecessary to reach the judge's recommended instatement with backpay remedy and the General Counsel's exception regarding tax reimbursement.

[8] Member Walsh does not join in this section of the decision. He finds it unnecessary to pass on the allegation that the Respondent unlawfully refused to consider Fulcher because the remedy for such a violation would be subsumed by the remedy for a refusal-to-hire violation which, contrary to his colleagues, he would find as set forth below.

[9] Because we find that the first prong of the *FES* refusal to consider test has not been met, we find it unnecessary to pass on whether the animus prong has been satisfied as to Fulcher. However, in finding that the General Counsel has not made a prima facie case of discriminatory refusal to consider and hire Gary Fulcher, Member Schaumber reiterates that he finds no animus in Shisler's statement to Kirton, as discussed at footnote 4, infra.

offices, and discussed Fulcher's experience and qualifications. As set forth above, "[a]n employer's acceptance of applications generally supports a finding that the employer considered the applications." *C&K Insulation, Inc*., supra. Unlike with Kirton, there were no comments made to Fulcher indicating that his application was not being considered because of his organizing activities or union affiliation. Therefore, we find that on July 25, 2000, the Respondent did not unlawfully refuse to consider Fulcher in violation of Section 8(a)(3) and (1) of the Act.[10]

Refusal to Hire Gary Fulcher

Contrary to the judge, we find that the General Counsel has not established all the elements of a discriminatory refusal to hire Gary Fulcher. Specifically, we find that the General Counsel failed to satisfy his burden of showing that the Respondent was hiring or had concrete plans to hire at a time when Fulcher's application was active.[11]

Fulcher's application was submitted on July 24, 2000. There is no evidence that there were any job openings for electricians as of that date. Shisler merely indicated to Fulcher that there "might" be "some other things in the fire or something." Further, as the judge found, Shisler "hired employees on an ad hoc basis, hiring "whomever he wished whenever he wished to do so." Therefore, the record does not support a finding that the Respondent had a "concrete" plan to hire electricians at the time that Fulcher submitted his July application.

The General Counsel did, however, show that the Respondent was hiring 5 weeks later on August 29, when the Respondent hired Snyder. But in order to establish a discriminatory refusal to hire Fulcher for that August 29 position, the General Counsel would have to show that Fulcher's application was still active as of that date. That would entail proving that the Respondent had an application retention policy under which applications remain viable for at least 5 weeks, the period of time between Fulcher's application and Snyder's hiring.[12] For the following reasons, we find that the General Counsel did not show that the Respondent had such an application retention policy.

Shisler testified that he generally kept applications for 1–2 weeks, but the judge found that "in keeping with its informal hiring processes, there was no evidence that the Company had any specified time limits for continuing to consider applications to be current."[13] However, the burden is on the General Counsel to show a retention policy. The judge inferred an indefinite application retention policy from the Respondent's July 26, 2001 job offer to Fulcher, made during the course of this litigation and 1 year after Fulcher's application. ALJD fn. 21.[14] Contrary to the judge, we do not believe that it is appropriate to infer a general indefinite application retention policy from a single employment offer to an alleged discriminatee during the course of litigation. An offer can be made for many reasons (e.g., effort to toll backpay or as part of litigation strategy). Such an offer is not necessarily probative of the Respondent's normal business practices. Moreover, the judge's inference that the Respondent routinely kept applications active indefinitely is inconsistent with his finding that the Respondent had no "customary method of hiring at all." Shisler's hiring process was informal, unconstrained by any written policies or procedures, and an inference that applications were generally retained for as long as a year (or even 5 weeks) is not warranted. For these reasons, we find that the General Counsel has not shown an application retention policy that would establish that Fulcher's application was still active 5 weeks after it was filed. Because the General Counsel has not shown that there was an active application on file at the time hiring took place (either in 2000 when Snyder was hired or in 2001 when Duncan was hired), or that there was a concrete plan to hire when Fulcher's application was still fresh, we find that the General Counsel has not established a prima facie case as to Fulcher.

Our dissenting colleague acknowledges the principle that the General Counsel must show that an application "would" still be regarded as active when a subsequent

[10] Nor has the General Counsel shown a refusal to consider Fulcher in late June and mid-July 2001, when the Respondent hired Jim Duncan as an electrician. The General Counsel has not shown that Fulcher's application, submitted 1 year before Duncan was hired, was still active at the time of Duncan's hiring. See the discussion in the Fulcher refusal-to-hire section below.

[11] We therefore find it unnecessary to pass on whether the other prongs of the *FES* refusal to hire test have been met as to Fulcher.

[12] Our placement of this burden on the General Counsel is consistent with *FES*, supra, 331 NLRB at 15 fn. 18 (burden on the General Counsel to "prove that the discriminatees actually would have been selected for the opening in question, and that entails, at a minimum, showing that applications filed at the time the discriminatees applied would still be regarded as active when the opening occurred, had the respondent's normal nondiscriminatory practices been followed"). Contrary to our dissenting colleague, it is not enough for the General Counsel to show that an employer *could* have considered an application if it had wished to do so. Rather, the General Counsel must show that the employer *would* have regarded the application as active at the time a vacancy was filled. We find that the General Counsel has not met that burden in this case.

[13] ALJD fn. 21. In so finding, the judge implicitly discredited Shisler's testimony that he kept applications for 1–2 weeks.

[14] The judge found, at fn. 21 of his decision, that the Respondent's job offer to Fulcher, made during the course of this litigation and 1 year after Fulcher's application and interview, "belies any contention that the Company has a policy of declining to consider applications after the passage of any specific period of time."

opening occurred. However, our colleague then goes on to find that the application was active here because there was no reason why the Respondent "could" not have considered it at the time of the subsequent opening. We believe that our colleague was correct at the outset.

Accordingly, we shall dismiss the allegation that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Fulcher either in 2000 or in 2001.[15]

ORDER

The National Labor Relations Board orders that the Respondent, Shisler Electrical Contractors, Inc., Ithaca, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to consider for employment or refusing to hire job applicants because of their membership in or activities on behalf of the International Brotherhood of Electrical Workers, AFL–CIO, Local 241, or any other labor organization.

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

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

(a) Within 14 days from the date of this Order, offer Gary Kirton instatement to the position for which he applied or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges to which he would have been entitled absent the discrimination against him.

(b) Make Gary Kirton whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to consider and hire Gary Kirton, and within 3 days thereafter, notify him in writing that this has been done and that the discriminatory action will not be used against him in any way.

(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.

(e) Within 14 days after service by the Region, post at its facility in Ithaca, New York, copies of the attached notice marked "Appendix."[16] 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 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 August 23, 2000.

(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.

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

[15] Contrary to his colleagues, Member Walsh would find that the Respondent violated Sec. 8(a)(3) and (1) of the Act by refusing to hire Fulcher. Member Walsh recognizes the existence of language in fn. 18 of *FES*, relied on by his colleagues, that places on the General Counsel the burden of showing that an application "would still be regarded as active when [an] opening occurred." However, Member Walsh would find that an application would "still be regarded as active" if the employer could have chosen to consider it and there is nothing that would have precluded the employer from doing so. Contrary to his colleagues' implication, Member Walsh's position is not internally inconsistent. Rather, it reflects a view of the active applicant pool that is more realistic than that of his colleagues, i.e., it encompasses those who could have been considered had the employer chosen to do so. Here, Shisler "hired employees on an ad hoc basis, hiring whomever he wished whenever he wished to do so" and the Respondent had no "customary method of hiring at all." Thus, there is no reason that Shisler could not have considered Fulcher's application at the same time that he was deciding whether to hire Snyder. Although the Respondent attempted to prove that it had a 1–2 week application retention policy, the judge implicitly discredited Shisler's testimony to that effect when he found that "in keeping with its informal hiring processes, there was no evidence that the Company had any specified time limits for continuing to consider applications to be current." (ALJD fn. 21.) Thus, Fulcher's application was still in the pool of available applications at the time Shisler decided to fill an opening. Therefore, Member Walsh disagrees with his colleagues' finding that the General Counsel failed to show that Fulcher's application was still active at the time Snyder was hired. Accordingly, Member Walsh would find that the Respondent violated Sec. 8(a)(3) and (1) by refusing to hire Fulcher in August 2000.

[16] 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."

Dated, Washington, D.C. April 27, 2007

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to consider for employment or refuse to hire job applicants because of their membership in or activities on behalf of the International Brotherhood of Electrical Workers, AFL–CIO, Local 241, or any other labor organization.

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

WE WILL, within 14 days from the date of the Board's Order, offer Gary Kirton instatement to the position for which he applied or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges to which he would have been entitled absent the discrimination against him.

WE WILL make Gary Kirton whole for any loss of earnings and other benefits he may have suffered by reason of the discrimination against him.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to consider and hire Gary Kirton, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the unlawful action will not be used against him in any way.

SHISLER ELECTRICAL CONTRACTORS, INC.

Nicole Roberts, Esq. and *Ron Scott, Esq.,* for the General Counsel.

Joseph J. Steflik Jr., Esq., of Binghampton, New York, for the Respondent.

Gary Kirton, of Ithaca, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BUXBAUM, Administrative Law Judge. The original charge in this matter was filed October 26, 2000, with first and second amended charges filed December 27, 2000, and January 9, 2001, respectively. The complaint was issued January 16, 2001. The case was tried in Ithaca, New York, on June 12 and 13, and September 27, 2001.[1]

The complaint alleges that since July 25, 2000, the Company has refused to consider for employment and, since August 26, 2000, has refused to hire Gary Fulcher. It also alleges that since August 23, 2000, the Company has refused to consider for employment and, since August 26, 2000, has refused to hire Gary Kirton. It is further alleged that the Company's refusals to consider for employment and hire the named employee-applicants occurred because these individuals were union members and engaged in protected concerted activities. The Respondent's conduct is alleged to be in violation of Section 8(a)(1) and (3) of the Act. Respondent's answer denies the material allegations of the complaint and raises affirmative defenses.[2]

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

FINDINGS OF FACT

I. JURISDICTION

Shisler Electrical Contractors, Inc., a corporation, maintains an office in Ithaca, New York, and has been engaged in business as an electrical contractor in New York State. The Company admits and I find that during the 12-month period preceding December 27, 2000, it provided services valued in excess of $50,000 for the Southern Cayuga Central School District and the Elmira Housing Authority, each of which are within New York State and are entities directly engaged in interstate commerce. The Company admits and I find that it is an employer

[1] The trial was interrupted in order to permit the General Counsel to obtain enforcement of a subpoena.

[2] The affirmative defenses raised in the answer appear to be pro forma. They consisted of assertions that the Union lacked standing and that the complaint was untimely. No arguments in support of either affirmative defense were made in the Company's brief. I find no basis for the proposition that the Union lacked standing to advance a charge that the Company unlawfully discriminated against its members on the basis of their membership and union activities. I also find that the complaint was filed within the applicable 6-month period following the Company's alleged refusals to hire and consider the applicants.

engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

In December 1990, Lloyd Shisler Sr., formed Shisler Electrical Contractors, Incorporated. He is the president and sole owner of the corporation. During the year 2000, the Company employed a total of nine persons at varying times, including Shisler and his son, Lloyd Shisler Jr. Catherine Allen, a salaried employee, served as the office manager and bookkeeper. The remaining employees were paid at different hourly wage rates. Harold Russell was paid $15 per hour. James Bovard received $14 per hour, while Gabriel Goodman's hourly rate of pay was $13. Randy Smith and Mark Snyder received $12 per hour. Finally, James Traphagen's compensation was $8 an hour.

For approximately 6 years, representatives of Local 241 of the International Brotherhood of Electrical Workers have held numerous meetings with Shisler in an effort to persuade him to enter into a collective-bargaining relationship with Local 241. Gary Kirton, Local 241's union organizer, conducted many of these efforts.[3]

Almost 5 years ago, Kirton introduced himself to Shisler and began a series of numerous contacts designed to persuade Shisler to enter into a collective-bargaining relationship with Local 241. One such meeting was held in January 2000. At that time Shisler agreed to a further meeting with Kirton and Dave Carr, the Union's business manager. Kirton had several subsequent casual contacts with Shisler and provided him with a proposed contract. The meeting with Carr was held on March 17, 2000. Shisler said that he wanted time to think about the Union's proposal. In May, Kirton approached Shisler informally and was told that he remained unsure about accepting the Union's offer.

On May 17, 2000, Kirton and Shisler met again. Shisler declined to enter into a relationship with the Union. Kirton asked for an explanation and Shisler stated that he did not like the way he was treated by union members when he met them at the supply house. He also stated that he had tried to join the Union years earlier and had been denied entry.

In addition to the efforts to obtain a collective-bargaining agreement with Shisler, the Union also tried to organize Shisler's employees. Discussions were held with Bovard and Traphagen.[4] Kirton also made some effort to obtain employment with the Company.[5] The nature and extent of this effort is the source of considerable dispute between Kirton and Shisler. Kirton testified that at the May 17 meeting during which Shisler rejected the Union's proposal, he gave Shisler a copy of his resume. Kirton contends that he told Shisler that he would do "just about anything that he wanted done, drive a truck, bookkeeping, collections, electrical work, didn't matter." (Tr. 94.)

The record contains a resume prepared by Kirton. It does not list any past employers except his own electrical contracting company. It does report past work as a journeyman electrician and experience in "estimating, payroll, collections, running jobs, hiring, safety meetings, purchasing and driving truck[s]." (GC Exh. 2.) When asked if this resume was identical to the one given to Shisler, Kirton stated that he "believe[d]" it was. (Tr. 94.) Kirton did not testify that he sought a Shisler job application form and such a form was not completed.

Kirton met with Shisler alone on August 23, 2000. He gave Shisler another copy of the resume he had provided in May. Kirton testified that Shisler told him that if he gave Kirton employment, the only thing Kirton would do "would be to organize [Shisler's] people." (Tr. 103.) Shisler denied that he made any such statement. Kirton also testified that he made another effort to obtain employment from Shisler in May 2001.

Shisler and Kirton agree that Kirton gave Shisler at least one resume. Shisler testified that Kirton never submitted a job application form. Kirton's testimony on this question is difficult to quantify as he persistently confused his submission of resumes with the issue of whether he completed a company application form.[6]

Aside from making an effort to obtain employment from Shisler, Kirton also recommended that Gary Fulcher seek employment with the Company. Fulcher is a journeyman electrician with 19 years' experience. He is a member of Local 25 of the International Brotherhood of Electrical Workers. This Local serves the Long Island area. In July 2000, Fulcher left his employment in the New York City area and returned to Ithaca where he had been residing since 1997. Upon his return to Ithaca, he contacted Kirton to seek local employment. Kirton

[3] Kirton, himself, was formerly a nonunion electrical contractor who employed 30 workers and operated a company with annual sales of $1.5 to $2 million. He owned this company for 25 years until 1993. In 1994, he joined the Union as a journeyman electrician and remained in this status until September 1996, when he became Local 241's organizer. Among his primary duties as organizer are the recruitment of electrical workers and nonunion electrical contractors. In this connection, he has applied for employment with a variety of nonunion electrical contractors.

[4] The evidence (including Kirton's testimony) is that when Shisler hired Traphagen, he knew that Traphagen wished to join the Union and enter its apprenticeship program. Counsel for the Company highlights this fact in his brief as evidence of a lack of antiunion animus. (R. Br. at pps. 3 & 7.) Upon close examination, I do not find this to be highly persuasive. The fact remains that Traphagen was not a union member when Shisler hired him. Employing a nonunion individual who harbors a long-term career goal involving union membership is not particularly probative.

[5] This is a practice known as "salting." For an interesting and detailed discussion of the strategy and tactics of salting employed by other locals of the International Brotherhood of Electrical Workers, see the administrative law judge's decision in *Aztech Electric Co.*, 335 NLRB 260 (2001).

[6] I find that Kirton submitted a resume to Shisler but never obtained and submitted a company application form. In light of my ultimate conclusions in this matter, Kirton's failure to complete an application form is not fatal. As another administrative law judge has noted, "decisions by the Board make clear than an individual is not required to file an application in order to perfect a hiring claim if such filing would be a 'futile act.'" *Norman King Electric*, 334 NLRB 154, 160 (2001), and the cases cited therein.

informed him that Local 241 did not have anything available. Kirton suggested that Shisler was "possibly hiring." (Tr. 51.)

On July 24, 2000, Fulcher went to the office of Shisler Electrical Contractors and spoke with Catherine Allen. She gave him a company application form that he completed and returned to her. She also asked if he had a resume and he stated that he could provide one on the following day. Fulcher testified that on the next day he returned with a resume. Allen was not present, but Shisler accepted the resume. Shisler and Fulcher spoke for approximately 10 minutes, during which Shisler scanned Fulcher's application and resume. They discussed Fulcher's experience and qualifications as well as Shisler's inability to pay wages at rates comparable to Fulcher's past employment. Fulcher testified that Shisler stated that he was just awarded a job commencing on the following Wednesday and asked if Fulcher could begin work at that time. Fulcher indicated that he was available. Fulcher further testified that Shisler then asked what the abbreviation "Local #25, IBEW" meant on Fulcher's application and resume.[7] Shisler then concluded the meeting and stated that Fulcher would be hearing from him. Shisler disputed this version of events, testifying that he had a brief conversation with Fulcher but did not obtain a resume or application and did not tell Fulcher about a specific job, but merely that, "I might have some other things in the fire or something." (Tr. 276.)

In the days following the July 25 meeting, Shisler did not contact Fulcher. Fulcher did not make any further inquiries with Shisler. Two weeks after their meeting, Fulcher obtained employment with another employer.

On July 26, 2001, Shisler wrote to Fulcher, making him an "unconditional offer of employment" as an electrician commencing August 1, 2001. The offer did not specify a precise wage rate but referred to "the same wages . . . as enjoyed by other employees." (R. Exh. 15.) Fulcher did not respond to this letter.

The General Counsel alleges a refusal to consider Fulcher for employment since July 25, 2000, and a similar refusal to consider Kirton since August 23, 2000. The evidence reveals that on August 29, 2000, the Company hired one new employee, Mark Snyder. The parties are in sharp disagreement as to whether Snyder was hired as a laborer/helper or as an electrician. They point to evidence regarding both Snyder's background and the work that he actually performed for the Company.

Snyder testified regarding his work history prior to his employment by the Company. When asked what sort of work he performed, he responded that he did "[p]lumbing, electrical, equipment operator, truck driver." (Tr. 197.) He reported that he has been doing electrical work for the past 20 years, but has not had any formal training in this field. He has performed a variety of electrical work, including pulling wire and installing light fixtures.

Snyder also submitted a resume. (GC Exh. 30.) This resume sheds no light on what transpired between Snyder and Shisler at the time that Snyder was hired since the resume was clearly prepared after Snyder's hiring. This is demonstrated by the fact that the resume references Snyder's work for Sonia Thayler, a job he performed while employed by Shisler.

Although Shisler could not have considered the resume in the hiring process, the document does illuminate Snyder's subjective view of his experience and qualifications. Snyder characterizes his past occupations as laborer, hoist operator, maintenance worker, and supervisor. He does not describe any of his past work history as having been as an electrician. While he notes past employment with New York State Electric & Gas, he lists his position as a "laborer." He does, however, list specific tasks in the electrical field that he has performed, including installation of panel and junction boxes, rewiring an entire house, installing fixtures, and troubleshooting.

While the record does not include the particular resume that Snyder testified he provided to Shisler, it does contain the Company's job application form as completed by Snyder. (R. Exh. 3.) Snyder did not respond to the portion of the application that asks the applicant to list the type of position being sought. When asked to describe any areas of special study or job-related skills, he only listed his possession of a commercial driver's license. When asked to list his last four employers, he chose to list only his most recent employment and he characterized this occupation as "laborer."

Snyder testified regarding the manner in which he came to be employed by the Company. He found the Company by looking in the yellow pages and telephoned to ask about work. Shisler then interviewed him in person. Discussion centered on Snyder's work experience and prospective wage. As to the wage issue, Snyder testified that "I was trying to get $15 and he was trying to get $12."[8] (Tr. 215.) Snyder also testified that he and Shisler did not discuss a precise job title or classification for his employment with the Company.

In addition to this evidence regarding Snyder's past work experience and qualifications, both Kirton and Shisler expressed opinions regarding this issue. Shisler testified that Snyder was hired for the position of "[h]elper." (Tr. 263.) Kirton testified that he was acquainted with Snyder because Snyder came to his office after leaving Shisler's employ. Kirton opined that Snyder was not a journeyman electrician, but did electrical service repair work on his own.

There is also evidence regarding the type of work that Snyder actually performed during his period of employment for the Company. This evidence is limited by the fact that Snyder was only employed from August 29 to September 26, 2000. The most probative evidence in this regard consists of the Company's own records for each job. The General Counsel admitted 10 of these documents. (GC Exhs. 16 through 25.) The

[7] Fulcher originally testified that Shisler asked what "JATC IBEW" meant. After viewing his prior affidavit, he agreed that Shisler's question was about "Local 25, IBEW." It is noted that the revised testimony is consistent with the contents of Fulcher's resume which notes work experience from 1982 to the present for "Local 25, IBEW" and does not mention JATC. (GC Exh. 8.)

[8] Evidently Shisler prevailed as the evidence shows that Snyder was paid at the hourly rate of $12.

Company admitted 11.[9] (R. Exhs. 4 through 14.) Taken together, these documents describe the vast majority of the jobs performed by Snyder during his brief tenure with the Company. In addition, testimony was received that further explained some of the jobs described in the reports.

The evidence includes a total of 21 jobs performed by Snyder while employed by the Company. He performed nine of those jobs alongside other company employees. Shisler testified that the other employees were the lead workers on those jobs. Snyder's testimony tended to minimize the extent that the companion workers supervised his work and to emphasize the complexity of the tasks he performed on the jobs. These work assignments included installing and disconnecting wiring and replacing a meter. Snyder's remaining 12 jobs were performed alone with job instructions being provided by Shisler. These jobs consisted of installing light fixtures, doorbells, and a bathroom fan, changing ballasts and light bulbs, and replacing outlets. The overall impression presented by evidence is that Snyder was assigned routine service tasks on his own.[10] He was only assigned more complex electrical work when the job assignments involved more than one employee.

Snyder testified that he quit his employment with Shisler in September 2000 due to his belief that Shisler had failed to keep certain promises made at the time of his hiring. Specifically, Shisler failed to give him a raise and reimburse him for transportation expenses. He also expressed dissatisfaction with his next proposed job assignment as it was some distance away in Elmira.

After Snyder left his employ, Shisler did not hire another employee until the summer of 2001. At that time he hired Jim Duncan as an electrician. Duncan worked for the Company for "a few weeks intermittent." (Tr. 283.) The only other evidence of the Company's actual hiring efforts was the job offer extended to Fulcher on July 26, 2001.

The General Counsel also introduced evidence in an effort to establish that the Company intended to hire other workers but did not implement such plans out of a desire to avoid hiring Fulcher and Kirton. This evidence was of two basic types.[11] First, there was testimony offered to prove that the Company's workload was so large that it mandated additional hiring. The primary witness in this regard was Bovard. Bovard testified that the Company's employees frequently urged Shisler to hire more employees due to workload pressures. Upon cross-examination, Bovard conceded that the workload pressure was seasonal as employees were required to work on school projects at night so as to avoid disrupting the educational process during daytime hours. Thus, Bovard agreed that by July 2000, "we were pretty much back to eight hour days." (Tr. 38.) Bovard's testimony was unclear as to why workload pressure compelled a management decision to engage in new hiring. Upon direct examination he asserted that the employees were working 16-hour days and "we were getting worked really hard." (Tr. 34.) Yet, on cross-examination, he agreed that there were not large amounts of overtime, but he complained that the employees "were getting moved around quite a bit and not being able to finish things." (Tr. 42.) On redirect examination, he reverted to the claim that he was working 14- to 16-hour shifts as often as 3 days out of every 5. (Tr. 44.) However, on recross-examination he again conceded that "[w]e didn't work overtime year round." (Tr. 46.) In fact, the Company bookkeeper's testimony, derived from the corporate payroll records, showed very modest amounts of overtime. For example, the amount of overtime paid during the quarter ending in June 2000 was $1082.25, and during the quarter ending in September 2000 was a mere $78.

The second type of evidence regarding the Company's intent to engage in additional hiring is testimony from Victor Powers, an employee of the New York State Department of Labor. Powers testified and provided written documentation to show that on December 4, 2000, Shisler placed a job order with the Department of Labor. The order was for an "experienced journeyman electrician—able to work alone, reading blueprints." (GC Exh. 9.) The order was for a full-time position with a salary range of $8.50 to $12 per hour. Powers testified that no referrals were made to the Company and the job order lapsed. Shisler testified that his purpose in placing the job order was to conduct a survey to determine worker availability for a prospective project with Kasonic Builders that would involve construction of as many as 50 or 60 houses. He reported that the project never materialized. He further testified that he framed the inquiry as a job order rather than a survey so that he could use the free services of the Department of Labor for this purpose. Powers testified that such use of the department to conduct a sub-rosa labor survey was known to him, although he noted that employers would never admit to this practice when contacting the department.

B. Analysis

The General Counsel alleges that the Company engaged in discriminatory refusals to consider for employment and to hire Kirton and Fulcher. The Board established the analytical framework for assessment of such allegations in *FES,* 331 NLRB 9 (2000). In order to establish a discriminatory refusal to consider for employment, the General Counsel bears the burden of showing that the Company excluded the applicants from consideration for employment and that antiunion animus contributed to the decision to exclude the applicants from such consideration. If this is established, the burden shifts to the

[9] Unsurprisingly, each side admitted those records that they believed would advance their respective positions.

[10] As Shisler explained, "since he had previous experience as a maintenance man doing some of this pitter patter work" there was no reason he could not be sent out alone on such jobs. (Tr. 175.)

[11] The General Counsel also attempted to offer dodge reports that had been compiled by Kirton. These reports show that the Company was bidding on a variety of prospective jobs during the period under consideration. (GC Exhs. 3 through 6.) I admitted these reports for the limited purpose of demonstrating Kirton's background knowledge and subjective belief that the Company was going to be hiring. Even if these reports were considered for the broader purpose suggested by the General Counsel, they cannot establish that the Company planned to hire additional employees. No evidence was introduced to show that the Company was actually awarded any of the contracts referenced in the dodge reports. Without more, the documentation merely shows that the Company was seeking projects. This is neither remarkable nor probative.

Company to demonstrate that it would not have considered the applicants even without their union membership or activities.

The holding in *FES* also sets forth the steps required to establish a discriminatory refusal to hire. The General Counsel bears the burden of showing that the Company was hiring or had concrete plans to hire, that the applicants had relevant training or experience needed to meet the announced or generally known requirements of the positions (or that the announced requirements were not adhered to uniformly or were created as a pretext for discrimination), and that antiunion animus contributed to the refusal to hire the applicants. If these elements are established, the burden shifts to the Company to show that it would not have hired the applicants even in the absence of their union membership or activities.

Analysis of the alleged refusals to hire Fulcher and Kirton begins with the question of whether the Company was hiring or had concrete plans to hire. The period under consideration commences "on or about August 26, 2000" and extends to "all times thereafter."[12] It is undisputed that during the period from August 26, 2000, through the concluding date of the hearing on September 27, 2001, the Company extended job offers on three occasions. On August 29, 2000, Mark Snyder was hired. The next job offer made by the Company was to Jim Duncan. Shisler could not provide the precise date of Duncan's hiring, but testified that it was sometime between late June and the middle of July 2001. Although the Company hired no other employees during the period under consideration, a job offer was extended to Fulcher on July 26, 2001.

It is also undisputed that Duncan was hired as an electrician and Fulcher was offered employment as an electrician. There is considerable disagreement as to the type of position for which Snyder was hired. The General Counsel contends that Snyder was hired as an electrician and performed work for the Company in this occupation. The Company contends that he was hired as a laborer/helper and only worked in this capacity. I note that this issue is only relevant to Fulcher's claim of discriminatory refusal to hire. While Fulcher applied for work as an electrician, Kirton's offer to work for the Company was broader.[13] As to Fulcher's application for employment, it is necessary to address the Company's contention that the job opening filled by Snyder was for a laborer/helper, not for a journeyman electrician.

The Company is a small business, owned and operated by one individual. There is no evidence that the Company had any written hiring policies or procedures. In fact, there is no evidence that the Company had any customary method of hiring at all. Shisler made all hiring decisions on an ad hoc basis. Snyder testified that he was looking for work in the yellow pages and called the Company to ask about prospective employment. He did not respond to a job advertisement or notice, so there is no written documentation regarding the type of work that was available. Snyder testified that during his interview with Shisler there was no discussion of a precise job classification and during his period of employment he was never provided with a designated job title. Given these informalities, other evidence must be considered in deciding whether the job filled by Snyder was for a laborer/helper or an electrician.

There is evidence that supports the Company's position that Snyder was hired as a laborer. For example, he did not have any formal training as an electrician. While his past work history included electrical work, it also included plumbing, equipment operation, and truckdriving. Snyder characterized his most recent job for New York State Electric & Gas as a laborer. After his hiring, he performed 9 of his 21 jobs for the Company alongside a lead worker. Many of his work assignments were unsophisticated, involving such tasks as changing light bulbs and replacing ballasts and outlets.

Considerable evidence was introduced to cast Snyder's position in a more professional light. Snyder testified that he had 20 years of experience in performing electrical work. His prior work history included tasks that were indicative of a residential electrician's level of skill, such as wiring an entire house and installing electrical panels, junction boxes, and light fixtures. More than half of his work assignments for the Company were performed by himself, although performed in accordance with instructions from Shisler. Some of these solitary jobs went beyond simple tasks and included installation of fixtures and electrical appliances such as fans and doorbells.

Resolution of the nature of the job for which Snyder was hired poses some difficulty based on this evidence. However, there is a clear item of objective evidence that strongly supports a conclusion that Snyder was hired as an electrician. Snyder testified that he sought a pay rate of $15 per hour but settled on Shisler's proposed pay rate of $12 per hour with a promise of a future increase to $13 per hour. Comparison of Snyder's pay rate with that of the other employees of the Company is striking. The Company's electricians (Russell, Bovard, Goodman, and Smith) were paid from $12 to $15 per hour. The Company's laborer (Traphagen) was paid at the rate of $8 per hour. It is readily apparent that Snyder was compensated at a rate comparable to the lowest rate for company electricians and 33 percent higher than the rate paid to the laborer. I find this rate of pay at the lowest level of electrician's compensation to be entirely consistent with the overall evidence regarding his past work experience and the types of job tasks he was assigned while with the Company. There was no evidence of any special circumstance affecting Snyder's rate of pay. It will be recalled that he located the Company in the yellow pages and certainly did not appear to have any insider connections that could ac-

[12] Complaint and notice of hearing, par. V, (c).

[13] Indeed, the breadth of Kirton's offer to work for the Company is problematic in that it may been seen as proving too much. His offer to do "just about anything," including electrical work, supervisory work, truckdriving, bookkeeping or collections is so broad as to call into question his seriousness as a job applicant. By way of analogy, one can imagine that a person seeking employment with a law firm who indicates a willingness to accept a position as managing partner, partner, associate, law librarian, secretary, receptionist, or custodian would receive little serious consideration for any of those positions. Having said this, despite Kirton's questionable tactics in seeking employment, his resume clearly showed recent work experience as a journeyman electrician. Therefore, if the Company were hiring for such positions (and, as discussed later, I conclude that it was), it was under a duty to refrain from a discriminatory refusal to hire Kirton. Having also concluded that the Company was not filling any positions for laborers, it is not necessary to address Kirton's qualifications for such jobs.

count for his rate of pay.[14] I find this objective evidence to be highly probative in resolving the issue and conclude that Snyder was hired as an electrician. It follows that the Company had a job opening for an electrician at the time of Snyder's hiring.

In addition to the three job openings for electricians established in the record, the General Counsel presented circumstantial evidence to suggest that the Company had intentions of hiring additional employees. As stated by the Board in *FES*, if it is found that the Company had "concrete" plans to hire and delayed or cancelled such plans in order to avoid making job offers to union applicants, this conduct would constitute discriminatory failure to hire.[15] The use of the modifier "concrete" indicates that the evidence must establish more than a vague, speculative, or contingent plan to hire.[16]

The General Counsel contends that the Company "had intentions of hiring" on July 25, 2000 when Shisler interviewed Fulcher.[17] In support, the General Counsel alleges that Shisler told Fulcher that he had a job commencing on the following Wednesday. While recognizing that the Company did not hire anyone at that time, General Counsel urges that it be inferred that the decision not to hire was made in order to avoid hiring union applicants. I cannot agree with this view of the evidence. The primary difficulty with this version of events is that it ignores the manner in which Fulcher came to be interviewed. Fulcher sought Kirton's assistance in locating work in the Ithaca area. Kirton told him that the Union did not have any work available but suggested that he seek work from the Company. Fulcher initiated the employment application process and was not responding to any advertised opening. Also, I accord greater weight to Shisler's version of the conversation with Fulcher. It is noteworthy that after their meeting Fulcher never made any further effort to contact Shisler about his job status. This is consistent with Shisler's statement that he merely indicated to Fulcher that he "might have some other things in the fire or something." (Tr. 276.) Such vague prospects of future employment would not be likely to prompt a quick follow-up contact with the prospective employer. By contrast, if Shisler had told Fulcher that he had a definite job opening commencing in the next week, it would be reasonable to expect that Fulcher would have made a follow-up call or visit regarding this imminent job prospect.

For these reasons, I conclude that the evidence fails to establish that the Company had any "concrete" plans to hire at the time of Fulcher's interview. In so doing, I note that when the Board established the requirement in *FES* that the General Counsel show "concrete" plans to hire, it cited *V.R.D. Decorating*, 322 NLRB 546 (1996), as the illustrative example of this concept. In *V.R.D. Decorating*, the evidence showed that the six union job applicants responded to a company advertisement published on the same day on which they contacted the company to seek work. The company deferred hiring despite having only a minimal work force available during its busiest season and later hired applicants "with minimum or absolute lack of experience or skills" despite the availability of highly qualified union applicants.[18] By contrast, Shisler was not advertising for new employees and the one employee hired during the following month contacted the Company through the yellow pages to seek employment. The record does not support an inference that the Company had concrete plans to hire at the time Fulcher contacted it to seek work.

The General Counsel presented testimony from Bovard for purposes of advancing a theory that the Company used the device of requiring excessive overtime from existing employees in order to avoid hiring union workers. However, I found this testimony to be particularly unpersuasive. Bovard was unclear about the time period during which he contended that excessive overtime was being worked. On direct examination, he reported that it was in the first half of 2000. On cross-examination, he indicated that it might have been in the autumn of 1999. Either account establishes that it was prior to the dates on which the General Counsel alleges the failure to consider and failure to hire Fulcher and Kirton. Additionally, the evidence shows that overtime was assigned on school projects while school was in session, as the work had to be performed outside of school hours. This was a temporary condition that ceased prior to the period alleged in the complaint. Bovard testified that, by July 2000, the employees had returned to working 8-hour days. Most importantly, the testimony and documentary evidence show that the actual amounts of overtime earned by the existing employees were quite small. There is simply insufficient evidence to allow any inference that overtime was employed as a stratagem to avoid hiring union applicants.

Finally, the General Counsel presented evidence showing that the Company placed a job announcement with the New York State Department of Labor, Job Service Division, on December 4, 2000. Shisler testified that he placed the announcement as a preparatory step in anticipation of obtaining a very large contract from Kasonic Builders. He further testified that the job fell through. It is clear that no employees were interviewed or hired as a result of this announcement. Shisler's testimony that the prospective contract never materialized is uncontradicted.[19] Victor Powers, the witness from the Department of Labor, testified that employers sometimes use their free job announcement services to conduct a labor survey rather than to advertise actual existing openings. On this record, I do not find that the Company's job announcement on December 4, 2000, represented a "concrete" plan to hire.

[14] Such connections, if present, could account for higher pay. For example, Shisler's son was paid at the rate of $16 per hour, a rate higher than any other electrician. There was absolutely no evidence that Snyder benefited from such connections or possessed any other special qualification to receive compensation as a laborer far beyond that provided to Traphagen.

[15] *FES*, supra at 4 fn. 7.

[16] Webster's defines the applicable meaning of "concrete" as relating to "an actual, specific thing or instance." *Webster's II New Riverside University Dictionary*, p. 294.

[17] GC Br. at 9.

[18] *V.R.D. Decorating*, supra at 552.

[19] This is particularly significant since one would expect that it would be a relatively simple matter to show the existence of such a large additional contract through inspection of company records or interviews with company employees. No such evidence was presented.

In rejecting any attempt to show that the Company had concrete plans to hire and deferred such hiring as a means to avoid hiring union applicants, I have not only considered events in isolation, but have conducted an overview of the Company's conduct regarding hiring throughout the period at issue. Viewed in this manner, I conclude that Shisler did not engage in any sophisticated scheme to avoid hiring union adherents. Rather, he hired employees on an ad hoc basis, hiring whomever he wished whenever he wished to do so. The evidence is insufficient to conclude that he altered his hiring plans and decisions by deferring any planned hiring. This small, informally operated Company's hiring during the period at issue demonstrates that the actual and concrete hiring plans consisted only of the three job offers made to Snyder, Duncan, and Fulcher.[20] The analysis must now proceed to consider whether the General Counsel met its burden regarding discriminatory refusal to hire Kirton and Fulcher for these vacancies.

Having found that the Company had job openings for electricians, it is necessary to determine whether Kirton and Fulcher were qualified to perform these jobs.[21] In keeping with the informal nature of the Company's hiring process, there is no evidence that the Company set forth any specific prerequisites for these positions. The only issue then is whether the applicants possessed experience and training relevant to the generally known requirements for electricians.[22] The evidence shows that Fulcher served in an apprenticeship program from 1982 to 1986, and has had extensive work experience as an electrician since that time. There is absolutely no evidence to suggest that he was not a qualified applicant and, by the act of extending him an offer of employment as an electrician on July 26, 2001, the Company essentially has conceded the point.

The evidence regarding Kirton's job qualifications is a bit more complex. For the past 4 years, Kirton has been employed as a union organizer.[23] For 25 years, Kirton was the owner-operator of an electrical contracting company. As such, he performed a wide variety of tasks necessarily related to the type of work under consideration. Nevertheless, there is no need to determine whether such work experience alone would render him qualified for employment as an electrician since the record shows that after he ceased working as an electrical contractor, he was employed as a journeyman electrician for several years during the mid-1990s. Based on this work experience, he possesses relatively recent and significant experience directly related to the positions for which the Company was hiring. I find that he was a qualified applicant for the three job openings at issue.

Having found that three job openings existed and that Kirton and Fulcher were qualified to perform the work and were not hired, it is now necessary to determine whether the General Counsel met its burden of showing that antiunion animus contributed to the decision not to hire the applicants. The evidence clearly shows that Shisler was aware of Kirton's union membership and activities. Indeed, Kirton and Shisler had been involved in extensive negotiations regarding a possible collective-bargaining relationship. It is also established that Shisler became aware of Fulcher's union membership during his job interview. Fulcher's membership status was plainly set forth on his resume as "Local #25, I.B.E.W." (GC Exh. 8.) While there was some testimony indicating that Shisler appeared to ask what this meant, I find that he knew this referred to union membership. It will be recalled that Shisler himself had sought membership in the same union earlier in his career and had been involved in multiple negotiations with Kirton in his capacity as an IBEW organizer.[24]

The record reveals three indicia of antiunion animus on the part of Shisler. Kirton testified that when he asked Shisler why he would not enter into a collective-bargaining relationship with the Union, Shisler stated that he did not like the way in which union members treated him at the supply house and that he had been denied entry into the Union earlier in his life. Although Shisler testified at trial and disputed several of Kirton's assertions, I note that he did not dispute these statements attributed to him by Kirton.

Kirton testified that Shisler told him that he would not hire Kirton because the only thing Kirton would do "would be to organize his people." (Tr. 103.) Shisler disputed this. Upon review of the entire record, I credit Kirton. When the Company's counsel asked Shisler whether he would have considered hiring Kirton if he had a job opening, Shisler's initial response was a tepid, "[m]aybe." (Tr. 275.) When his counsel pressed him further, he hesitated for a noticeable period before finally responding in the affirmative. Given Shisler's obvious understanding of the importance of his attorney's questions on this crucial issue, I find that Shisler's verbal and nonverbal

[20] By the same token, I do not find that Snyder's departure in September 2000 resulted in a concrete job vacancy. If Shisler had concluded that he needed a replacement for Snyder, I find that he would have hired one. This would have been consistent with his overall practice of hiring employees as needed, rather than deferring hiring to avoid consideration of union applicants.

[21] As to whether it was appropriate for the Company to consider Kirton and Fulcher as available for these subsequent openings, I note that, in keeping with its informal hiring processes, there was no evidence that the Company had any specified time limits for continuing to consider applications to be current. Furthermore, the Company's action in making a job offer to Fulcher fully 1 year after his application and interview belies any contention that the Company has a policy of declining to consider applications after the passage of any specific period of time.

[22] *FES*, supra at 4.

[23] Kirton's position as a union organizer does not affect his status as an applicant for employment since paid union organizers seeking employment have been recognized as "employees" within the meaning of the Act. *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001), citing *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995).

[24] On the issue of Shisler's knowledge of Fulcher's union membership, the General Counsel also contends that Shisler's remark that he could not afford to pay Fulcher as much as he earned on previous jobs might have resulted from a conclusion that Fulcher's prior jobs were for union contractors. (GC Br. at 8, fn. 7.) I do not agree. Shisler knew that Fulcher had been working in the New York City metropolitan area. I think it more likely that Shisler's comment about lower wages reflected the common knowledge that the metropolitan area's wages were higher than those earned in a small community such as Ithaca. In any event, I find that Shisler did not need to engage in speculation as Fulcher's resume clearly established that he had worked on union jobs.

responses provide telling corroboration of Kirton's testimony that Shisler was unwilling to hire him due to his organizational activity.

In addition to the direct evidence of antiunion animus, there is probative circumstantial evidence. The Company has taken the position that it did not consider Kirton or Fulcher for employment in the position offered to Snyder since this was a helper/laborer position. For reasons discussed earlier, I have rejected this claim. In particular, I have found the evidence regarding Snyder's rate of pay to be highly probative in establishing that the position that was filled was for an electrician. In reaching this conclusion, I further find that the Company's assertion that Snyder was a mere helper/laborer is simply a pretext advanced to justify the refusal to consider the union applicants for the position offered to Snyder.

In concluding that evidence of pretext is appropriately considered in addressing the issue of antiunion animus in this matter, I have applied the doctrine set forth in *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). This doctrine permits the trier of fact to draw an inference of unlawful motivation where the stated motivation is found to be pretextual, at least where "the surrounding facts tend to reinforce that inference." 362 F.2d 466, 470. The Board has endorsed this principle and has gone so far as to cite such evidence as being the most significant evidence of illegal motivation in a particular factual situation. *Active Transportation*, 296 NLRB 431 (1989), enf. mem. 924 F.2d 1057 (6th Cir. 1991). The Second Circuit, in *Holo-Krome Co. v. NLRB*, 954 F.2d 108, 113 (2d Cir. 1992), has essentially approved the Board's "consistent rule in practice," noting that the Board's practice was "understood" by the Supreme Court during that Court's consideration of the *Wright Line* doctrine[25] in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). This portion of *Holo-Krome* has also been cited with approval by the D.C. Circuit in *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995). Applying this analysis to the circumstances of this case, I find that the evidence of pretext, considered in combination with the other evidence of antiunion animus discussed earlier, establishes that Shisler's antiunion animus contributed to his decision to refuse to consider or hire Kirton and Fulcher.

The General Counsel has met its burden of showing that the Company had concrete hiring plans, that Kirton and Fulcher were qualified applicants, and that antiunion animus contributed to the decision not to hire them. The burden now shifts to the Company to show that it would not have hired these applicants even in the absence of their union affiliation or activities. *FES*, supra at 4. Review of counsel for Respondent's brief shows that the Company's defense centered on its contention that the General Counsel did not meet its initial burden. I have rejected this contention. The only assertions made with respect to the final stage of the analysis are that the Snyder job opening was for a laborer and that Kirton's resume "establishes only management skills" and the Company "did not require such skills." (R. Br., p. 4.) I have already determined that Snyder was hired as an electrician, albeit at the lowest skill level for such a position within the Company's pay structure. Thus, the job opening filled by Snyder was for an electrician, not a laborer. The Company's assertion to the contrary is merely a pretext. With regard to Kirton's qualifications, I reject the claim that his resume reflects only management skills. Aside from the fact that his ownership of Kirton Electric would indicate knowledge of electrical contracting work, Kirton's resume clearly states that for "[t]he last couple of years I have been working as a journeyman electrician in the IBEW Local 241 in Ithaca, N.Y." (GC Exh. 2.) I reject any contention that Kirton's resume failed to establish his qualifications for the Company's job openings. As a result, I find that the Company has failed to show that the applicants would not have been hired even in the absence of their union affiliation and activities.

In sum, the evidence reveals that during the period under consideration, the Company had three concrete job openings. It failed to hire or consider Kirton for any of these openings. It failed to consider or hire Fulcher for two of these openings. The failure to consider or hire these applicants was not due to any lack of qualifications and was motivated by antiunion animus. There is no evidence showing that the Company would have refused to hire the applicants for any reason apart from such animus. As a result, the General Counsel has established discriminatory refusals to consider and hire the applicants within the analytical framework established by the Board in *FES*.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By refusing to hire, and consider for hire, employment applicants Gary D. Fulcher and Gary S. Kirton, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

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

The Board has held that the appropriate remedy for unfair labor practices such as the refusals to hire Fulcher and Kirton is an order to offer them immediate instatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions, and to make them whole for losses sustained by reason of the discrimination against them. *Casino Ready Mix, Inc.*, 335 NLRB 463, 466 (2001), citing *FES*. I recommend imposition of this remedy with backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[25] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, Shisler Electrical Contractors, Inc. of Ithaca, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from refusing to hire or consider for hire Gary D. Fulcher and Gary S. Kirton, or any other employee applicant, because of their union membership or activities.

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

(a) Within 14 days from the date of this Order, offer Gary D. Fulcher and Gary S. Kirton immediate instatement to the positions for which they applied, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

(b) Make Gary D. Fulcher and Gary S. Kirton whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, computed on a quarterly basis, less any interim net earnings, as further prescribed in the remedy section of this Decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to its unlawful refusal to hire Gary D. Fulcher and Gary S. Kirton, and, within 3 days thereafter, notify these employee applicants in writing that this has been done and that they will be hired in a nondiscriminatory manner.

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

(e) Within 14 days after service by the Region, post at its facility in Ithaca, New York, copies of the attached notice marked "Appendix."[27] 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 gone out of business or closed its 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 July 25, 2000.

(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.

Dated, Washington, D.C. January 7, 2002

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 refuse to hire or consider for hiring Gary D. Fulcher and Gary S. Kirton, or any other employee applicant, because of their union membership or activities on behalf of the International Brotherhood of Electrical Workers, or any other labor organization.

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

WE WILL, within 14 days from the date of the Board's Order, offer Gary D. Fulcher and Gary S. Kirton full instatement to the positions for which they applied, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

WE WILL make Gary D. Fulcher and Gary S. Kirton whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire Gary D. Fulcher and Gary S. Kirton, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that they will be hired in a nondiscriminatory manner.

SHISLER ELECTRICAL CONTRACTORS, INC.

[26] 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.

[27] 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."