

**J & L Enterprises, Inc. d/b/a AJS Electric and International Brotherhood of Electrical Workers, Local 441, AFL-CIO. Case 21-CA-27298**

January 14, 1993

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On April 24, 1991, Administrative Law Judge George Christensen issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs and answering briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> only to the extent consistent with this decision, and to modify the recommended Order.

The judge found that the General Counsel failed to establish a prima facie case that the Respondent's failure to hire Joseph Sulak was unlawful. The judge found that Sulak's application did not reveal his union membership and that there was no evidence that the Respondent was otherwise aware of Sulak's union membership when it reviewed his application. We disagree. Sulak's application listed his "Trade or Bus. School" as "IBEW App. Training, New York, N.Y.," the "Position Applying For" as "Journeyman Electrician," and the "Salary Desired" as \$23.55, which was union scale. The judge found that Sulak applied for work with the Respondent at office headquarters in a group of four that included Paul Rich. Two of the

four wore jackets with IBEW Local 441 union insignia. The receptionist inquired whether the four were from the union hiring hall and whether they knew that the Respondent was nonunion. Following an affirmative response, the receptionist told them to complete applications and tests. On receiving these documents from the four applicants, the receptionist advised them that the Respondent would contact them if the Respondent wished to employ them. The Respondent hired neither Paul Rich nor Joseph Sulak.

The judge found that the General Counsel had presented a prima facie case as to the failure to hire Rich and rejected the Respondent's rebuttal that the Respondent could not have refused to offer Rich employment because of his suspected union membership because the Respondent was unaware of it. The judge noted that Rich's application listed the "Position Applying For" as "Electrician," the "Salary Desired" as \$23.55, and "Former Employers" as "1960-1989 IBEW." This information constituted clear notice to any reviewer of the application that Rich had secured work through the union hiring hall for the preceding 29 years and might be a member of IBEW Local 441. Contrary to the judge, we find that Sulak similarly revealed his IBEW affiliation by listing on his application his participation in the IBEW apprenticeship training program and by requesting the union wage scale. Moreover, Sulak, like Rich, made his application with the Respondent in a group of four whose affiliation with IBEW Local 441 was openly acknowledged. In these circumstances, we find that the Respondent was aware of Sulak's union affiliation and denied Sulak employment because of his suspected union membership in violation of Section 8(a)(3) of the Act. Accordingly, he is entitled to the same remedies the judge provided for the other discriminatees.

ORDER

The National Labor Relations Board orders that the Respondent, J & L Enterprises, Inc. d/b/a AJS Electric, Anaheim, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a) and (b).

"(a) Offer immediate employment to Cedric Huntington, Harry Naylor, Daniel Strahle, Earl Wright, Paul Rich, and Joseph Sulak at rates paid electricians hired by AJS with commensurate experience; if necessary terminating the service of employees hired in their stead.

"(b) Make whole Cedric Huntington, Harry Naylor, Daniel Strahle, Earl Wright, Paul Rich, and Joseph Sulak for wage and benefit losses they may have suffered by virtue of the discrimination practiced against

<sup>1</sup> 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.

<sup>2</sup> We agree with the judge that Cedric Huntington, Harry Naylor, Daniel Strahle, Earl Wright, Paul Rich, and Joseph Sulak (Huntington et al.) are not paid union organizers and are employees protected under the Act. There is no evidence that Huntington et al. were paid organizers for the Union or that the Union reimbursed them for their expenses in making applications with the Respondent. Moreover, the employee status of Huntington et al. was not compromised by their signing IBEW Local 441's Salting Resolution, which committed unemployed union members to "organize the unorganized" at the behest of the Union's business manager. By voluntarily obligating themselves to organize on the Union's behalf, Huntington et al. did not forfeit their status as employees. In addition, the judge found that the Respondent's rejection of the applicants was not motivated by a policy against hiring short-term applicants. Also, see generally *Sunland Construction Co.*, 309 NLRB 1224 (1992), reexamining the status of paid union organizers and finding that they are "employees" within the meaning of the Act and are protected by Sec. 8(a)(1) and (3).

them in the manner prescribed in the remedy section of this decision.”

2. Substitute the attached notice for that of the administrative law judge.

#### APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT tell employees or job applicants that our owner would go out of business before he would go union.

WE WILL NOT fail or refuse to hire job applicants because of their known or suspected membership in and/or support of International Brotherhood of Electrical Workers Local 441, AFL-CIO or any other labor organization.

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

WE WILL offer immediate employment to Cedric Huntington, Harry Naylor, Paul Rich, Daniel Strahle, Earl Wright, and Joseph Sulak.

WE WILL make Cedric Huntington, Harry Naylor, Paul Rich, Daniel Strahle, Earl Wright, and Joseph Sulak whole for any wage or benefit losses they may have suffered by virtue of our unlawful failure or refusal to hire them because of their known or suspected membership in or support of Local 441, plus interest.

J & L ENTERPRISES, INC., D/B/A AJS  
ELECTRIC

*Yvette H. Holliday-Curtis and Jean Libby*, for the General Counsel.

*Mark A. McLean (Kindel & Anderson)*, of Los Angeles, California, for AJS.

*Ray Van Der Nat*, of Los Angeles, California, for Local 441.

#### DECISION

##### STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge. On October 17 and 18 and November 13, 1990, I conducted a hearing at Los Angeles, California, to try issues raised by a complaint issued on August 1, 1990, based on a charge filed by International Brotherhood of Electrical Workers, Local No. 441, AFL-CIO (Union) on January 5, 1990, and amended on July 19, 1990.

The complaint alleged and J & L Enterprises, Inc., d/b/a AJS Electric (AJS) denied AJS violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act) by failing or refusing to hire six job applicants because of their membership in and/or support of the Union and by threatening some of those job applicants with AJS' ceasing operations in the event its employees secured union representation.

The complaint also alleged and AJS denied its president, Jack Sweeney, and its field superintendent, Steven R. Lawson, were agents of AJS acting on its behalf at times pertinent and that John Davis at times pertinent was its superintendent/job interviewer, supervisor, and agent acting on its behalf.

AJS affirmatively alleged the six job applicants were neither "employees" nor bona fide applicants entitled to protection under the Act; paid organizers for the Union; that by offering employment to the six, AJS would violate the Act, inasmuch as by hiring the six AJS would be subsidizing the Union, i.e., lending the Union financial support; and that AJS had legitimate business reasons for not hiring the six.

The issues created by the foregoing are:

1. Whether at times pertinent Sweeney and Lawson were agents of AJS acting on its behalf within the meaning of Section 2 of the Act and John Davis at times pertinent was an AJS superintendent/job interviewer, supervisor and agent acting on AJS' behalf within the meaning of Section 2 of the Act.

2. Whether Lawson and/or John Davis threatened some of the six job applicants with AJS' ceasing operations in the event its employees secured Union representation.

3. Whether the General Counsel established a prima facie case AJS failed or refused to hire the six job applicants named in the complaint because of their known or suspected membership in the Union and/or activities on behalf of or in support of the Union.

4. Whether AJS had valid business reasons for not hiring any of the job applicants.

5. Whether the six are not entitled to protection under the Act because they were not bona fide job applicants but rather paid Union organizers and by hiring them AJS would be violating the Act.

The General Counsel, the Union and AJS appeared by counsel and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue, and file briefs. The General Counsel and counsel for AJS filed briefs.

Based on my review of the entire record, observation of the witnesses, perusal of the briefs and research, I enter the following

FINDINGS OF FACT<sup>1</sup>

## I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleged, the answer thereto admitted, and I find at pertinent times AJS was an employer engaged in commerce in a business affecting commerce and the Union was a labor organization within the meaning of Section 2 of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

At all pertinent times<sup>2</sup> AJS was a nonunion electrical contractor doing business in southern California under the overall direction and control of its president and general manager Jack Sweeney, assisted by three project managers, five field superintendents, approximately 20 job foremen, approximately 50 electricians, and 30 helpers. During the August-November 1989 period, AJS had approximately 100 projects in various stages of completion.

The five field superintendents ordered materials and coordinated the flow of materials and labor on the projects assigned to them, hired, fired, laid off, transferred, assigned, and directed the work of the foremen, electricians and helpers on their crews and were responsible for the timely and efficient completion of the work at the projects to which they were assigned. Sweeney exercised general control over all of AJS' operations, including the direction and control of the managerial and nonmanagerial employees previously listed.<sup>3</sup>

Due to the constant turnover in AJS' work force and a steady expansion of its activities, AJS regularly ran help wanted advertisements in various newspapers in southern California, interviewed some of the applicants who responded to advertisements soliciting job applicants to apply for jobs at its general offices, hired some of those interviewed, interviewed all the applicants who responded to advertisements soliciting job applicants to apply for jobs at various hotels in southern California where mass interviews were conducted, and hired some of those applicants.

When applicants appeared at its general offices in response to its advertisements, AJS' receptionist gave each applicant a job application and test to complete, collected the completed applications and tests, graded the tests, placed the documents in a basket for review by Sweeney and any field su-

perintendents who needed additional help, and told applicants they would be contacted if AJS was interested in hiring them. During the 4-month period of August through November 1989,<sup>4</sup> AJS received approximately 225 applications at its general offices, interviewed 35 of the 225 applicants and hired 25 of them.

During the same time period, AJS received applications from and interviewed approximately 260 job applicants at mass hotel interviews and hired 40 of them.

Thus during that time period, AJS received a total of 485 applications, conducted 295 interviews, and hired 65 applicants as either foremen, electricians, or helpers.<sup>5</sup>

About 75 hotel interviews were conducted on August 9, 50-60 interviews were conducted on September 19, and 10 applicants were hired at each of those interviewing sessions.

AJS placed advertisements in the Orange County Register stating it was accepting applications for the positions of foremen, journeyman electrician, and helpers on August 4 through 9 at Anaheim Stadium Travel Lodge.

Earl Wright, a journeyman electrician with over 30 years of experience as a journeyman electrician, foreman and general foreman in all types of electrical work, and a member of the Union, appeared at the Union's hiring hall on August 9 to see if any work was available to which he might be dispatched. After he learned there was no dispatch available to him that day, Union Organizer Steve Nelson, who was present in the hall, showed Wright the AJS advertisement and suggested he might aid the Union's campaign to organize AJS' employees by seeking and securing employment with AJS.<sup>6</sup>

Wright accepted the suggestion, went to the Travel Lodge in Anaheim, secured an employment application and a test in one of the rooms AJS rented, completed the two documents, and was escorted into an adjacent room, where Lawson reviewed his application and test score. In his application, Wright stated he was seeking work as an electrician, desired a wage rate of \$25 per hour, and, under the heading "former employers," wrote "37 years union book" and listed previous employments by four employers who were signatory to contracts with the Union as either an electrician or a job foreman at rates ranging from \$23.40 per hour (journeyman) to \$26.90 per hour (foreman).

On completing his review of Wright's application, Lawson asked Wright how long he had been a union member, to which Wright replied, 37 years. Lawson then asked Wright why he wanted to work nonunion and Wright responded he

<sup>1</sup> While every apparent or nonapparent conflict in the evidence has not been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying and my evaluation of the reliability of their testimony; therefore any testimony in the record which is inconsistent with my findings is hereby discredited.

<sup>2</sup> During the 4-month period of August through November 1989.

<sup>3</sup> In its answer to the complaint, AJS admitted at times pertinent Sweeney was its president and its supervisor within the meaning of Sec. 2 of the Act, admitted Steven Lawson was one of its field superintendents and its supervisor within the meaning of that section, but denied either Sweeney or Lawson were AJS' agents within the meaning of that section and denied an individual identified as John in the complaint was its interviewer/field superintendent, supervisor and agent within the meaning of that section. In the course of the hearing, John Davis was identified as an interviewer and field superintendent of AJS, and that he conducted the interviews of two of the alleged discriminatees.

<sup>4</sup> Read 1989 after further date references omitting the year.

<sup>5</sup> Of the 65, 19 were still employed by AJS in October 1990.

<sup>6</sup> While the Union's constitution or bylaws expose to intraunion discipline any member who secures employment in a nonunion establishment, the Union adopted a resolution waiving the application of those sections of its constitution or bylaws as to any member who, with the knowledge of the Union, secured employment with a nonunion employer and agreed to aid the Union in its campaign to secure sufficient support among that employer's employees to seek and secure union representation. That resolution (the Salter Resolution) was reduced to writing and both Wright and the business manager of the Union signed a document wherein the Union waived the provisions in question vis-a-vis Wright's seeking and securing employment with a nonunion employer and Wright agreed to assist the Union in organizing the employees of any nonunion employer who hired him and to leave such employment in the event the Union requested he do so.

wanted to show AJS what good work union members performed and to aid the Union in securing union representation of AJS' employees, to which Lawson replied that was not likely.

Lawson pointed out an incorrect answer Wright entered on his test and the two discussed it. Wright asked what rate of pay AJS was paying and Lawson gave him the requested information.<sup>7</sup>

Lawson asked how Wright might be contacted. Wright designated his telephone number. Lawson informed Wright AJS would contact him if it decided to offer him employment.

Lawson wrote "No" on Wright's application, noting under "Remarks" Wright was "37 years Union" and wanted to work for AJS in order to organize AJS' employees for Local 441, IBEW. He testified he rejected Wright's application because Wright requested too high a wage on his application (though conceding he did not ask Wright if he would accept a lower wage rate) and because he formed the impression Wright was not interested in working for AJS (though Wright told him he was interested in securing a job with AJS to show that good work he as a union member could do).

Needless to say (in view of the "No" Lawson placed on Wright's application), Wright never was contacted by AJS and offered employment.

Cedric Huntington, an electrician with over 20 years of experience as a journeyman electrician, job foreman and general foreman in the electrical industry and a 20-year member of the Union, also went to the Anaheim Travel Lodge on August 9 to apply for employment by AJS at Nelson's suggestion after failing to receive a job dispatch at the Union's hiring hall.<sup>8</sup>

Huntington previously (in 1960) had been employed by the Union as a business representative, had been laid off from that position for 3 to 4 months in 1984, and recalled, and was laid off again from that position in July.

Huntington secured an application and a test form in one of the rooms rented by AJS at the Lodge and completed the two forms. On the front page of his application he stated he was applying for a journeyman electrician job, desired a rate of \$23.55, and under the heading "Former Employers," listed the Union as his last previous employer (between 1980 and 1989) and employment as a foreman for Kirkwood Electric in 1979 and 1980.

On completing the two documents, Huntington gave them to an AJS representative seated in the room. That representative escorted Huntington into an adjacent room where Lawson was seated, placed the two documents on a desk at which Lawson was seated, and pointed to an entry on the front page of Huntington's application.<sup>9</sup> Lawson looked at the entry, arose, and asked Huntington to accompany him outside.<sup>10</sup>

Huntington complied with the request and, when the two arrived outside the Lodge, Lawson asked Huntington if the Union sent him to apply for employment. Huntington replied

<sup>7</sup>For journeymen \$8 to \$13 per hour and \$13 to \$15.50 for foremen.

<sup>8</sup>Huntington and the Union's business manager previously executed the "Salter Resolution" previously discussed.

<sup>9</sup>Probably his listing of his previous employment as a business agent for the Union.

<sup>10</sup>There were two other persons in the room at the time.

in the negative, stating while Union Organizer Steve Nelson advised him AJS was hiring, it was his decision to apply for a job with AJS. Lawson stated quite a few union people had been applying recently for jobs with AJS and Huntington conceded he also was connected with the Union, i.e., that he had been a union business representative the preceding 9 years.

Lawson commented Nelson previously contacted him and solicited his joining the Union; Huntington renewed Lawson's invitation to join and stated if he was employed by AJS, he intended to try to organize AJS' employees; Lawson responded if the Union succeeded in organizing AJS' employees and AJS had to pay union scale wages, it would be noncompetitive, it would lose its contracts in the nonunion market where it was engaged and it would have to cease operations; the two then engaged in a general conversation concerning conditions in the electrical industry and parted. Lawson neither referred to nor discussed Huntington's job qualifications, the wage rate AJS was prepared to offer, or Huntington's test score during the conversation.

Lawson wrote "No" on Huntington's application, testified he did not consider Huntington a serious applicant for employment.

Again, needless to say, Huntington never was contacted by AJS and offered employment.

Between September 15-19, AJS ran advertisements in the Orange County Register, the San Clemente Sun Post, the Riverside Press Enterprises, the San Bernardino Sun Telegram, and the Pomona/Ontario Progress Bulletin for journeymen electricians, helpers, and foremen, again requesting any job applicants appear at the Anaheim Travel Lodge to apply and be interviewed.

Harry Naylor, an electrician with over 16 years of experience as a journeyman electrician, foreman, and general foreman and a member of the Union during that 16-year period, was "rained out" at his job (Causey Electric) on September 19, and went to the union hall. Nelson suggested he apply for work with AJS at the Travel Lodge.<sup>11</sup>

Naylor went to the Travel Lodge and completed an employment application and test in one of the rooms at the Lodge and gave it to an AJS representative. In his application Naylor stated he was applying for a journeyman electrician job and the wage he desired was "open."

Naylor was interviewed by Field Superintendent John Davis. Davis reviewed Naylor's test and the two discussed the four questions where Naylor's answers were graded as incorrect. Davis asked Naylor what wage rate he desired and Naylor stated he was open for an offer. Reviewing Naylor's statement under the heading "Former Employers" he was currently employed by Causey Electric and noting Causey and Naylor's three previous employers were all employers with contractual relations with the Union, Davis stated AJS was nonunion, AJS' wage scale was much lower than union-scale wages, and asked Naylor why he would be interested in leaving a well-paying job to work for AJS. Naylor responded AJS' lower wage scale was no problem, he would

<sup>11</sup>Naylor and the Union's business manager previously executed a copy of the "Salter Resolution."

take whatever AJS paid because he wanted to cease working for his current employer.<sup>12</sup>

In the course of the interview Davis asked Naylor if he was a union member and whether he knew other applicants that day were also union members; Naylor confirmed he was a member and stated he didn't know anything about other union member/applicants. Davis picked up the telephone and told whoever he called there was another union applicant applying for work and, on completing the call, told Naylor that AJS would telephone him if it decided to offer him employment.

Davis testified he did not hire Naylor because he did not like his attitude—stating Naylor announced at the outset of his interview he was well qualified, he was loud and cocky, and, on leaving the interview room, told Davis he better hire him because he was well qualified—and because he did not think Naylor would get along well with and as part of his crews. He also said he did not hire applicants who were currently employed.<sup>13</sup>

Naylor subsequently telephoned AJS' general office and inquired about his possible employment; he was advised if AJS was interested in employing him, AJS would telephone him.

Naylor never was offered employment by AJS.

Dan Strahle, an electrician with over 15 years of experience as a journeyman electrician and a member of the Union over those 15 years, went to the Union's hiring hall on September 19 to check his status on the out-of-work list and possibly secure a job referral. No referral was available. While he was in the hall, Nelson spoke to Strahle and three to four other union members in the hall seeking work, and suggested they apply to AJS for employment at the Anaheim Travel Lodge. Nelson told the group if enough union members could secure jobs with AJS, the Union could represent them and negotiate a contract with AJS. Strahle accepted the suggestion and proceeded to the Lodge.<sup>14</sup>

Strahle went to the Travel Lodge, completed a job application and test, and handed the two documents to an AJS representative in one of the rooms AJS rented at the Lodge. Strahle listed the job for which he was applying as "journeyman electrician" and that he desired a rate of \$23.55 per hour. He listed his last employment as at Berg Electric at a rate of \$23.55 per hour. Berg Electric and the three previous employers he listed on his application all were signatory to agreements with the Union and paid union scale wages and benefits.

Strahle was interviewed by Field Superintendent John Davis.<sup>15</sup>

<sup>12</sup> While Naylor did not tell Davis why he wanted to leave his current employer, he testified he anticipated trouble with another electrician at Causey and wanted to leave Causey before it occurred.

<sup>13</sup> The record established, however, Davis interviewed and hired seven applicants who were employed at other jobs at the time they applied for jobs with AJS.

<sup>14</sup> Strahle and the Union's business manager previously executed a copy of the "Salter Resolution."

<sup>15</sup> While it was established Davis interviewed Strahle (Davis identified the note "Lake Elsinore" on the application as in his handwriting and Strahle testified his interviewer was named "John"), Davis had no recollection of what transpired during the interview. He claimed, however, he never told any job applicant AJS would cease doing business if its employees secured union representation.

After reviewing his application and noting Strahle listed an address in Murietta, California, Davis learned it was near Lake Elsinore and noted "Lake Elsinore" on the application. He told Strahle that AJS had a job going at Ontario and asked Strahle if he would be willing to work there. Strahle replied affirmatively. On reviewing Strahle's previous employers, Davis asked Strahle if he was a member of the Union. Strahle again replied in the affirmative. Davis then said Strahle would not want to work for AJS, AJS did not pay in excess of \$16.50 per hour. Strahle responded he was out of work, needed some income, and was willing to work for that wage. Davis asked Strahle if he realized the Union would "blackball" him if he worked for a nonunion contractor. Strahle replied that was not true, since the Union was trying to organize AJS' employees. Davis stated AJS' owner would go out of business before he would go Union. Strahle asked why. Davis responded if AJS went union, all of AJS' current employees would be replaced by union members. Strahle replied that wasn't true, the Union did not take away jobs, the Union would offer union membership to AJS' current employees. Davis then said the interview is over, and Strahle departed.

AJS never offered employment to Strahle.

Between November 16 and December 8, AJS ran advertisements in the Orange County Register for experienced electricians, listing AJS' general office as the place to apply. When union members Paul Rich and Joseph Sulak, plus two other members, appeared at the union hall on November 27 and were unsuccessful in securing job dispatches, either Union Organizer Nelson or Union Organizer Saunders showed the four the advertisement and suggested they apply to AJS for jobs.<sup>16</sup>

The four accepted the suggestion and proceeded to AJS' offices in separate cars. They walked into the offices together and told AJS' receptionist they wished to apply for employment in response to the advertisement. Two of the four were wearing jackets containing the Union's emblem or insignia. The receptionist asked the four if they were from the Union and whether they knew AJS was nonunion. They affirmed they were union members and knew AJS was nonunion. She advised them they would have to fill out the applications and complete a test. Each was furnished an application and a test and each completed the two documents and gave them to the receptionist. The receptionist advised them they would be contacted by an AJS field superintendent if AJS wished to employ them.

In his application, Rich indicated he was applying for employment as an electrician and desired the rate of \$23.55 per hour. As his current employer, Rich listed "1960-1989, IBEW"<sup>17</sup> and his last job as an electrician at Muzak at \$23.55 per hour.

Sulak also stated in his application he was applying for employment as an electrician and desired the rate of \$23.55 per hour. He listed his most recent employment as July to November 1989 at Cochran Electric as a foreman at \$26.21 per hour and September to December 1988 at AKS Electric as an electrician at \$23.55 per hour.

<sup>16</sup> Both Rich and Sulak were signatories to the Salter Resolution.

<sup>17</sup> Rich had been a member of the Union and a journeyman electrician during that period and secured all his jobs through the union hiring hall.

Neither was ever contacted by AJS, though their applications and test results were examined by two of AJS' field superintendents (signified by the fact the two initialed the applications, as was the practice).

These findings are based on the mutually corroboratory testimony of Rich and Sulak. Their two companions were neither identified nor summoned to testify. AJS would have me draw the inference their testimony would be contradicted by their two unidentified companions on the ground the General Counsel failed to produce the two companions as witnesses. I reject that contention; counsel for AJS had ample opportunity to learn the identity of the two companions during cross-examination and summon them if on contact he learned they would contradict Rich and Sulak, and the General Counsel has no duty to summon additional witnesses to supply testimony which is simply cumulative.

### B. Analysis and Conclusions

#### 1. The supervisor-agency issue

I have entered findings at all pertinent times Sweeney was the president and general manager of AJS and directed AJS' operations. I have also entered findings at all pertinent times Lawson and Davis were field superintendents employed by AJS who were empowered to and exercised authority to hire and fire AJS employees, assign and transfer AJS employees, coordinate all aspects of those portions of AJS' field operations to which they were assigned with respect both to materials and employees, and to achieve satisfactory and timely completion of the projects assigned to them.

On the basis of those findings, I conclude at all pertinent times Sweeney, Lawson, and Davis were supervisors and agents of AJS acting on its behalf within the meaning of Section 2 of the Act.

#### 2. The alleged threats

I have entered findings on August 9 Lawson told Huntington if the Union succeeded in organizing AJS' employees and AJS had to pay union scale wages, AJS would be non-competitive in its market (competing with other nonunion electrical contractors for business), it would lose its contracts (to its nonunion competitors) and it would have to cease doing business; on the same date Lawson told Wright it was unlikely the Union could or would succeed in organizing AJS' employees; and on September 19 Davis told Strahle AJS' owner would go out of business before he would go Union.

Neither of the August 9 Lawson statements, however, constitutes a threat. The former statement was Lawson's opinion or prediction what would happen if AJS was organized and the latter was Lawson's opinion of the likelihood of union success in organizing AJS' employees.

I therefore shall recommend dismissal of those portions of the complaint alleging by Lawson's remarks to Huntington and Wright AJS violated the Act.

Davis' September 19 statement, however, constitutes a threat; Davis' statements was unequivocal and unaccompanied by any explanation or qualification.

I therefore conclude by Davis' September 19 statement to Strahle, AJS violated Section 8(a)(1) of the Act.

#### 3. The alleged prima facie case

With the possible exception of Huntington,<sup>18</sup> it is undisputed the six applicants were currently experienced electricians in all aspects of the trade and scored well in their tests.

Four of the six applicants (Huntington, Naylor, Strahle, and Wright) informed their interviewers they were union members when asked; Rich's application clearly demonstrated he was a union member when he applied for a job; AJS' interviewers (Lawson and Davis) indicated their awareness a number of union members were seeking employment by AJS and AJS was opposed to union representation of its employees; Huntington, Strahle, and Wright expressed to their interviewers their belief they, if hired, and the balance of AJS' employees would benefit by union representation and they intended to try to secure such representation for themselves and the balance of AJS' employees if hired; and during the 4-month span in which the six applied for AJS employment, AJS failed or refused to knowingly hire any applicant AJS knew or believed to be a union member, supporter, or activist.<sup>19</sup>

The General Counsel maintains the facts recited above establish a prima facie case during the period in question AJS was failing or refusing to hire job applicants it knew or suspected were union members, supporters, and activists, regardless of their job qualifications, in order to deny such applicants an opportunity to seek union representation for themselves and the balance of AJS' employees, thereby violating the Act.

I find and conclude the recited facts establish a prima facie case AJS failed or refused to hire Huntington, Naylor, Rich, Strahle, and Wright for the reasons cited by the General Counsel, but that those facts do not establish a prima facie case AJS failed or refused to hire Sulak for those reasons (since Sulak's application does not on its face indicate Sulak was a union member when he applied nor that the two superintendents who reviewed Sulak's application were aware he was a union member when they reviewed his application).

<sup>18</sup> In Huntington's case, most of the 9 years preceding his application were spent performing duties as a union business representative. The question of whether his preceding 20 years at the trade were sufficient qualification is academic, however, since Lawson never reviewed his prior employments, never questioned his qualifications and in fact never conducted a job interview of Huntington, but rather escorted Huntington outside the Lodge, verified he was a former union business representative and heard Huntington, as Wright, state if hired he intended to seek union representation for himself and the other AJS employees, conducted a conversation on other subjects with Huntington and, on ending the conversation, marked "No" on Huntington's application.

<sup>19</sup> In the single incident cited by AJS as evidence it hired a union member (Gilbert Reyes) during the 4-month period, there is no evidence Reyes was a union member when he applied and was hired, no evidence his interviewer and hiring superintendent knew Reyes' last employer was signatory to a collective-bargaining agreement with the Union, no evidence his interviewer and hiring superintendent knew Reyes was a union member; Reyes did not list his rate of pay while employed by Berg or previous employers in his application; and Reyes in his application sought a rate of \$15 per hour (he was hired as a job foreman at \$14 per hour). I therefore reject the Reyes' hiring as evidence AJS knowingly hired a union member during the 4-month period.

#### 4. The AJS rebuttal

Citing *Wright Line*,<sup>20</sup> AJS contends it effectively rebutted the General Counsel's prima facie case and established AJS would not have hired Huntington, Naylor, Rich, Strahle, and Wright irregardless of their union affiliation, support, and activity.

In support of that position, AJS contends:

1. AJS followed the policy of never hiring applicants who requested a wage rate substantially above its wage scale because it sought long-time employees who would be happy to continue working at those wage scales in steady employment, being moved from each job to which they were assigned to other jobs as each was completed and four of the applicants (Huntington, Rich, Strahle, and Wright) requested hire as journeyman electricians at rates substantially higher than AJS-current wage scales;

2. Huntington failed to complete portions of his application;

3. Huntington was not a "serious" applicant;

4. Naylor was currently employed when he applied;

5. Naylor was loud, cocky, chewing gum, demanded he be hired, and was observed picking up a blank application and test before departing from the motel;

6. The superintendents who reviewed Rich's application were unaware he was a union member;

7. Strahle's home was a considerable distance from AJS' projects or jobs;

8. Wright applied for a supervisory position and therefore was not protected by the Act;

9. Wright applied for a supervisory position and AJS was not hiring supervisors;

10. Wright was quiet and undemonstrative during his interview and AJS' interviewer expected applicants to be "eager" and "enthusiastic" about going to work for AJS.

Each of these contentions shall be discussed below.

##### (a) *The alleged policy*

The testimony of Brennan, Lawson, and Davis to application of the alleged policy in rejecting the applications of Huntington, Rich, Strahle, and Wright is not entitled to credence; AJS hired Michael Bass on August 21 at a rate of \$15 per hour as a job foreman despite his listing a \$26 per hour desired rate in his application and listing rates of \$21, \$24, \$31, and \$24 as rates he received in his four previous employments; only a small number of the applicants hired during the 4-month period were still employed by AJS at the time of the hearing; a goodly number of those no longer employed were listed as "laid off"; and Lawson and Davis testified there was approximately an 80-percent turnover rate per annum among AJS' electricians (as is typical in the industry).

Additionally, with regard to Huntington, since Lawson escorted Huntington out of the motel, engaged Huntington in nonjob related conversation for a short period after verifying his previous employment as a union business representative, and upon parting from Huntington rejected his application, it is readily apparent Huntington's requested rate never was considered.

<sup>20</sup> *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved *NLRB v. Transportation Management Corp.*, 462 U.S. 1302 (1984).

Similarly with respect to Strahle, when Davis informed Strahle of the lower wage scales at AJS than his requested rate, Strahle replied he needed a job and was willing to accept a lower rate of pay.

As to Wright, Lawson never questioned Wright's willingness to accept a lower rate of pay if offered employment.

In the absence of any testimony by the AJS superintendents who reviewed Rich's job application, I find AJS failed to establish his requested wage rate caused their rejection of his application.

##### (b) *The incomplete application*

Huntington failed to list any personal references in his application and listed his previous 9 years as a union business representative and one other employment as an electrician as previous employment.

Lawson, however, never reviewed these factors in rejecting Huntington's application, since he never reviewed them before denying Huntington a job interview, escorting Huntington from the motel, verifying his last employment as a union business agent and rejecting his application.

Huntington scored well on the test and his testimony he was highly skilled at the electrician's trade and maintained his skills and familiarity with developments in the field is undisputed and is credited.

As far as Huntington's failure to list four rather than two previous employments and any personal references, three employees hired by AJS during the 4-month period (Bundang, Miller, and Sepeda) failed to list personal references, another employee hired during the period listed two previous employers (Wimer), and six hires partially completed the previous employer section of their applications (Brooks, Buccat, Dobrick, Fonteno, Miller, and Reyes).

##### (c) *Huntington, not a "serious" applicant*

Huntington's testimony he had been laid off by the Union from his business representative position, was seeking employment as an electrician following that layoff, failed to secure any job referral at the Union's hiring hall the day he applied for employment by AJS, and was willing to accept employment by AJS at AJS' current wage scales if offered, is undisputed and is credited.

It appears Lawson never was "serious" in considering Huntington as a potential employee after noting and verifying he was a former business representative and not that Huntington was not a "serious" applicant.

##### (d) *Naylor's current employment*

AJS contends one of the reasons Davis rejected Naylor's application was his statement he was currently employed.

That contention is incredible, inasmuch as 15 employees hired by AJS between August and October stated they were currently employed in their applications (Bass, Buccat, Bundang, Fonteno, Welborn, Carr, Corey, Hutchinson, Jenkins, Richea, Adler, Elias/Garcia, Anguiano, Sepeda, and Yank).

##### (e) *Naylor's conduct during the interview*

Davis also claimed he rejected Naylor's job application because during the interview Naylor was loud, cocky, chew-

ing gum, demanded he be hired, and took a blank job application and test before leaving the motel.

All these factors are alleged subjective reactions on Davis' part which I can only review by examining Davis' credibility on the stand and Naylor's demeanor while testifying.

Davis certainly weakened his credibility by his claim he followed an alleged general AJS policy not to hire any applicant who requested a rate substantially higher than AJS' current wage scales (which he could not claim in Naylor's case, since Naylor listed "open" as his desired wage and stated to Davis he was willing to accept whatever wage AJS was currently offering), a policy which I have determined was nonexistent; his claim he followed an alleged general AJS policy of seeking long-term employees, which again I have found to be nonexistent; and his claim AJS did not hire applicants who were currently employed, which is a false claim.

As far as Naylor's demeanor is concerned, he was self-confident, articulate, and obviously well educated; his voice was modulated, and he impressed me as a person who would be an intelligent and motivated employee for any employer; he scored highly on the AJS test, had an excellent work background showing experience in all phases of electrical work. He was not "loud"; he was not "cocky"; and certainly the indication of a strong desire for an AJS job, chewing gum and the taking of the blank documents do not give much support for a refusal to hire a strongly motivated, experienced, and desirable employee.

On these grounds, I do not credit Davis' testimony and find, to the contrary, he concocted these subjective reactions to justify his refusal to offer employment to Naylor.

(f) *Unawareness of Rich's union membership*

AJS argues the two superintendents who reviewed Rich's application could not have failed or refused to offer him employment because of his union membership on the ground they were unaware of his union membership when they conducted their reviews.

Under the heading "Former Employers," Rich stated: "1960-1989 IBEW"; under Salary, "\$23.55"; under Position, "Electrician" and under Reason for Leaving, "Lay-off."

This constituted clear notice to any reviewer Rich had been a union member securing his jobs through the Union's hiring hall over the preceding 29 years.

(g) *Strahle's residence*

Davis claimed to have no recollection of the Strahle interview, so it is difficult to find support for AJS' contention Davis rejected Strahle's job application because he lived too far from any of AJS' projects, particularly in view of Strahle's undisputed and credited testimony Davis told Strahle that AJS had a project in progress at Ontario in Riverside County, California, asked Strahle if he was willing to travel to Ontario if hired and Strahle replied he was willing to work either in Riverside or Orange County, California (where most of AJS' projects were located).

(h) and (i) Wright's alleged application for a nonexistent supervisory position

In his application Wright indicated he was seeking employment as an electrician at a desired rate of \$25 per hour, and stated under the heading "Former Employers" as follows: "37 years Union Book"; listed two immediately previous employments as a journeyman electrician at rates of \$23.40 per hour, and two previous employments as a job foreman at \$26.90 per hour.

While in the course of his interview by Lawson, Wright expressed interest in employment as a job foreman (since it paid a higher rate than journeyman electrician), this did not negate his interest in employment by AJS as a journeyman electrician if there were no vacancies in the job foreman classification. In addition, in the absence of evidence the functions of an AJS job foreman warranted classifying that position as supervisory, there is no basis for a finding Wright's interest in employment as an AJS job foreman removed his protection under the Act.

Insofar as the contention there were no job vacancies in the job foreman position, during the period of July through October, AJS employed four applicants as job foremen (Bass, Buccat, Reyes, and Sepeda).

(j) *Wright's demeanor while interviewed*

Lawson claimed he did not offer employment to Wright because Wright was quiet and undemonstrative during his interview and did not demonstrate the degree of eagerness and enthusiasm for employment by AJS he expected of job applicants.

As in the case of Naylor, such factors are alleged subjective reactions on the part of Lawson reviewable only by determining Lawson's credibility and Wright's demeanor while testifying before me.

Lawson's credibility is suspect, in view of his testimony to nonexistent AJS policies discussed above, his discredited testimony regarding his encounter with Huntington, and his noting "37 years Union" and that Wright wanted to work for AJS in order to organize AJS' employees when marking "No" on Wright's application.

With respect to Lawson's claim he rejected Wright's application because he was not "eager" or "enthusiastic" for AJS' employment during his interview, surely Lawson as an experienced interviewer was aware differing personalities respond in different ways during an interview and a quiet and undemonstrative demeanor is no evidence of job competence. Certainly while testifying in this proceeding, Wright was a quiet, undemonstrative, and convincing witness.

On the above grounds, I do not credit Lawson's claim Wright's demeanor was the cause for his rejection of Wright's application.

On the basis of my foregoing analysis and discussion, I find and conclude AJS failed to rebut the General Counsel's prima facie case AJS failed or refused to offer employment to Huntington, Rich, Naylor, Strahle, and Wright because of their known or suspected union membership, support and activity and to deny them an opportunity if employed to seek union representation for themselves and the balance of AJS' employees, thereby violating Section 8(a)(1) and (3) of the Act.

#### 5. The paid organizer and bona fide defenses

AJS contended the six alleged discriminatees are not entitled to the protection of the Act because they were paid by the Union to seek employment with AJS to organize AJS' employees and therefore were not bona fide job applicants.

AJS failed to develop any evidence the Union paid any of the six job applicants or reimbursed their expenses for traveling to AJS' hiring sites and applying for employment.

It is undisputed Huntington was laid off by the Union from his position as a business representative prior to applying for employment by AJS and received no compensation for applying or for his expenses in applying.

AJS failed to establish Rich received any compensation as a union vice president or that he received any compensation or expense reimbursement from the Union for applying to AJS for employment.

I therefore find and conclude AJS failed to establish any of the six applicants were "paid organizers" for the Union.

AJS contends, however, as parties to the "Salter Resolution," the six applicants were subject to Union discipline if they failed to assist the Union in its efforts to organize AJS' employees by applying to AJS for jobs, by seeking to persuade other AJS employees to join in an effort to secure union representation if hired, and by failing to leave AJS' employment if hired at the command of the Union, and therefore were not "bona fide" applicants entitled to the protection of the Act, arguing if it hired any of the applicants, they would be devoting working time paid by AJS to organizing AJS' employees on behalf of the Union rather than performing the work they were hired to perform.

This argument is completely speculative and devoid of evidentiary support. There is just as much likelihood the applicants would perform excellent work, given their backgrounds, and seek to proselytize their fellow employees on lunch and other breaks, which is permissible conduct in any employment. As far as their leaving AJS' employment if hired when so commanded by the Union, Strahle speculated this might occur if the Union lost an election conducted by the Board, again a complete speculation and again permissible conduct by any employee.

I therefore find and conclude AJS failed to establish the alleged discriminatees are not entitled to the protection of the Act as "paid organizers" and "bona fide" employee applicants.

#### CONCLUSIONS OF LAW

1. At all pertinent times AJS was an employer engaged in commerce in a business affecting commerce and the Union was a labor organization within the meaning of Section 2 of the Act.

2. At all pertinent times Brennan, Lawson, and Davis were supervisors and agents of AJS acting on its behalf within the meaning of Section 2 of the Act.

3. AJS violated Section 8(a)(1) of the Act by Davis' September 19 statement to Strahle that AJS' owner would go out of business before he would go union.

4. AJS violated Section 8(a)(1) and (3) of the Act by failing or refusing to hire Huntington, Naylor, Rich, Strahle, and Wright because of their known or suspected union membership, support, and activities and to deny them an opportunity

if employed to seek union representation for themselves and the balance of AJS' employees.

5. AJS did not otherwise violate the Act.

6. The unfair labor practices enumerated above affected and affect commerce as defined in the Act.

#### THE REMEDY

Having found AJS engaged in unfair labor practices, I recommend AJS be directed to cease and desist therefrom and to take affirmative action designed to effectuate the policies of the Act.

Having found AJS discriminatorily failed or refused to hire Cedric Huntington, Harry Naylor, Paul Rich, Daniel Strahle, and Earl Wright, I recommend AJS be ordered to immediately offer Huntington, Naylor, Rich, Strahle, and Wright employment at rates paid to electricians it hired with commensurate skill and experience, if necessary terminating employees AJS hired in their stead, and to make all five whole for wage and benefit losses they may have suffered by virtue of AJS' discrimination against them, less any interim earnings, with the amounts due and interest thereon computed in accordance with the formulae of *New Horizons for the Retarded*, 293 NLRB 1173 (1987), *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record in this case, I recommend the issuance of the following<sup>21</sup>

#### ORDER

The Respondent, J & L Enterprises, Inc., d/b/a AJS Electric, Anaheim, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees and job applicants AJS' owner would go out of business before he would go union.

(b) Failing or refusing to hire job applicants because of their known or suspected membership in and/or support of International Brotherhood of Electrical Workers Local 441, AFL-CIO or any other labor organization.

(c) 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) Offer immediate employment to Cedric Huntington, Harry Naylor, Paul Rich, Daniel Strahle, and Earl Wright at rates paid electricians hired by AJS with commensurate experience, if necessary terminating the service of employees hired in their stead.

(b) Make whole Cedric Huntington, Harry Naylor, Paul Rich, Daniel Strahle, and Earl Wright for wage and benefit losses they may have suffered by virtue of the discrimination practiced against them in the manner prescribed in the remedy section of this decision.

<sup>21</sup> 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.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze and determine the amount or amounts of money due under the terms of this Order.

(d) Post at its facility in Anaheim, California, and any other locations where notices to employees are customarily posted copies of the attached notice marked "Appendix."<sup>22</sup>

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<sup>22</sup>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

Copies of the notice, on forms provided by the Regional Director for Region 21, upon receipt shall be immediately signed and posted by a authorized representative and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken to ensure the notices are not altered, defaced, or covered by other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps have been taken to comply.

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Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."