3D Enterprises Contracting Corporation *and* North Central West Virginia Building and Construction Trades Council, AFL–CIO. Case 6–CA–29051

May 23, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On October 16, 1998, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief, 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 and to adopt the recommended Order as modified.[2]

The Respondent excepts to the judge's finding that it violated Section 8(a)(3) and (1) of the Act by refusing to consider for hire union laborer applicants Ted Mick and Jerry Elder. The judge analyzed the refusal-to-consider allegations under *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Subsequently, the Board issued its decision in *FES,* 331 NLRB 9 (2000), setting forth the framework for analysis of refusal-to-consider and refusal-to-hire violations. Nevertheless, we conclude that it is appropriate to affirm the judge's finding because, in applying *Wright Line*, the judge necessarily made the requisite findings to support a refusal-to-consider violation under *FES*. The judge found that Mick and Elder applied for work; that the Respondent, through manipulation of its "Not Taking Applications" sign, excluded them from the hiring process; that the Respondent acted out of union animus; and that the Respondent failed to prove that it would not have considered Mick and Elder for hire even in the absence of their union membership. See *FES*, supra.

The complaint also alleged that the Respondent unlawfully refused to hire Mick and Elder. The judge did not address the merits of this allegation. Instead, as part of his remedy for the refusal-to-consider violation, the judge left to the compliance stage the issue of whether the Respondent would have hired Mick and Elder but for their union membership. However, under *FES*, supra, slip op. at 6, if the General Counsel is seeking a remedy of reinstatement and backpay based on openings that have arisen prior to the commencement of the hearing on the merits, he must prove the existence of those openings at the unfair labor practice hearing, and the judge must decide any hiring issues in the unfair labor practice proceeding. Accordingly, consistent with *FES*, we shall remand this proceeding to the judge for the purposes of reopening the record, if necessary, and resolving the issue of whether the Respondent unlawfully refused to hire Mick and Elder for any openings that occurred prior to the unfair labor practice hearing in this case. Further, if hiring occurred between the opening of the initial hearing and the reopening of the hearing on remand, the General Counsel must also litigate the question of whether the discriminatees would have been hired for any such subsequent openings in the absence of the discriminatory refusal to consider them. See *FES*, supra at 18.[3]

[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.

The General Counsel has excepted to several of the judge's comments concerning testimony offered by the General Counsel. We do not interpret the judge's comments to imply that the General Counsel knowingly presented or knowingly relied on false testimony.

We also correct several inadvertent errors made by the judge, which do not affect our decision. In finding that the Respondent harbored union animus, the judge noted that "Hoke testified without contradiction that during the third time that Zakrzewski called and asked him to come to work at the Weston project, Zakrzewski mentioned that 'some union men had come by and tried to fill out an application.'" At another point, the judge inadvertently attributed Hoke's testimony to McFall. The judge also inadvertently stated at one point that the Respondent was claiming that it permanently replaced "four of the six" June 3 strikers. In fact, there were eight June 3 strikers and the Respondent claimed that it permanently replaced six of them. In any event, the judge dealt with all six of the alleged permanent replacements. Finally, the judge erroneously stated that Montoney and Wainscott testified that the Respondent's "Not Taking Applications" sign was displayed on the morning of May 13, when they were hired. In fact, Montoney and Wainscott testified that the sign was posted on the evening of May 12, when Zakrzewski told them to report to the jobsite on the morning of May 13. Nevertheless, we agree with the General Counsel that the record fairly indicates that the sign was displayed on May 13 and, in any event, we are satisfied that this minor discrepancy does not undermine the judge's finding that the Respondent used the sign as a device to avoid accepting applications from known union adherents.

[2] Our dissenting colleague contends that we should require the General Counsel to establish at compliance how long union "salts" Steven Montoney and Donald Huff would have worked for the Respondent at its Weston jobsite, or at other sites, had the Respondent not unlawfully denied them reinstatement on June 5, 1997. We disagree for the reasons fully set forth in *Ferguson Electric Co.,* 330 NLRB 514 (2000), enfd. 242 F.3d 426 (2d Cir. 2001). As the wrongdoer here, it is the Respondent's burden to prove that Montoney and/or Huff would have ceased working for the Respondent at some point during or at the conclusion of the Weston project, or at some later date.

[3] We recognize that no party has excepted to the judge's failure to decide the merits of the Respondent's alleged unlawful refusal to hire

Moreover, although we have affirmed the judge's finding that the Respondent unlawfully refused to consider Mick and Elder for hire, we find it necessary also to remand the refusal-to-consider issue to the judge for the limited task of formulating an appropriate remedy for this violation in light of *FES* and his findings on the refusal-to-hire issues.

Finally, the Respondent excepts to the judge's conclusion that it violated the Act in other respects. None of the remaining issues implicates our decision in *FES* and there is no reason to delay the resolution of those issues pending the outcome of the limited remand we are ordering. Accordingly, having considered the Respondent's remaining exceptions and found them without merit, we have decided to issue a final Order with respect to the remaining violations found by the judge. See *Masiongale Electrical-Mechanical, Inc.,* 331 NLRB 534 (2000).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, 3D Enterprises Contracting Corporation, Weston, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 2(d) and reletter the remaining paragraphs accordingly.

IT IS FURTHER ORDERED that the issue of whether the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire applicants Mick and Elder, and the issue of an appropriate remedy for the Respondent's unlawful refusal to consider applicants Mick and Elder, are severed from the rest of this proceeding and remanded to the administrative law judge for appropriate action as set out above.

IT IS FURTHER ORDERED that the administrative law judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Mick and Elder. However, as stated above, the General Counsel prevailed on the merits of the refusal-to-consider allegations, and the judge reserved the refusal-to-hire issues for the compliance stage. In these circumstances, Sec. 102.46(b)(2) of the Board's Rules and Regulations, providing that any exception not urged shall be deemed to have been waived, does not preclude consideration of the refusal-to-hire issues. See *FES*, supra at 9 fn. 3. Accord: *HVAC Mechanical Services,* 333 NLRB No. 24, slip op. at 2 (2001).

CHAIRMAN HURTGEN, dissenting in part.

I agree with my colleagues in all respects except one. For the reasons set out in my dissent in *Ferguson Electric Co.,*[1] I would require the Union, and the General Counsel acting on its behalf, to establish at compliance how long Steven Montoney, a paid representative of the Union, and Donald Huff, a paid union organizer, would have worked for the Respondent at its Weston, West Virginia, jobsite had they not been unlawfully denied reinstatement on June 5, 1997.[2]

As explained by the judge, Steven Montoney sought employment with the Respondent with the object of organizing the Weston job. The Respondent hired Montoney on May 27. Immediately thereafter, Montoney told Huff that he wanted Huff to come to work with him on June 2 so that Huff could help Montoney lead a strike on June 3. Huff agreed. The Respondent hired Huff on June 2. On June 3, as planned, Montoney and Huff led six of the Respondent's employees out on strike. On June 5, they offered to return, and the Respondent unlawfully refused to reinstate, inter alia, Montoney and Huff.

In fashioning a remedy for this violation, the judge noted that the Weston project would soon close and that Montoney and Huff might well be eligible for transfer to another of the Respondent's projects after the Weston job ended. The judge ordered the Respondent to reinstate Montoney and Huff to substantially equivalent positions at the Respondent's jobsite nearest Weston and to make them whole from June 5 until the date of a proper offer of reinstatement. Finally, as required under *Dean General Contractors*, 285 NLRB 573 (1987), the judge afforded the Respondent the opportunity at the compliance stage to show that it would not have transferred Montoney and Huff to another jobsite after Weston and that its backpay and reinstatement obligations ended at that point.

There are two problems with this remedy. First, it creates a presumption that, absent the Sec. 8(a)(3) violation, Montoney and Huff would have worked for Respondent for an indefinite period. The remedial order places on the Respondent the burden of presenting evidence that they would have terminated their employment earlier. The presumption is unwarranted, and the placing of the burden of proof is unfair. My colleagues presume that, because Montoney and Huff were hired by the Respondent, they would continue to be employed indefinitely but for the Respondent's refusal to reinstate them at the end of the economic strike. However, as explained above, Montoney applied for a job with the Respondent

[1] 330 NLRB 514 (2000), enfd. 242 F.3d 426 (2d Cir. 2001).

[2] All dates refer to 1997 unless otherwise stated.

with the object of organizing the Weston jobsite, and Huff went to work for the Respondent with the object of leading a strike. They were sent by the Union to accomplish these objectives. In those circumstances, it is the Union that effectively controls the duration of employment, and such duration is tied to the accomplishment (or lack thereof) of these objectives. Thus, the Union should bear the burden of going forward with the evidence as to how long Montoney and Huff would have worked for the Respondent if had taken them back.[3] *Ferguson Electric Co.*, 330 NLRB No. 75, slip op. at 319.

Further, even if Montoney and Huff would have continued to work at the Weston site at which they were hired, it is even more problematical to presume that they would have sought and obtained transfers to future sites after the Weston job was finished.[4] The issue of whether Montoney and/or Huff would have been transferred to another of the Respondent's jobsites is ultimately dependent on whether the Union wanted to organize the new site. These are again matters peculiarly within the Union's knowledge, and therefore it should bear the burden of producing the evidence relevant to these issues at the compliance stage of this proceeding. For these reasons, I would not apply the *Dean General* presumption to salts.[5]

Gerald McKinney, Esq., for the General Counsel.
John T. Lovett and *David L. Hoskins, Esqs.,* of Louisville, Kentucky, for the Respondent.
Lafe C. Chafin, Esq., of Huntington, West Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This trial of case under the National Labor Relations Act (the Act) was conducted before me in Clarksburg, West Virginia, on April 28 through May 1, 1998. On June 3, 1997,[1] North Central West Virginia Building and Construction Trades Council, AFL–CIO (the Union) filed the charge in Case 6–CA–29051, alleging that 3D Enterprises Contracting Corporation (the Respondent) had committed unfair labor practices as defined by the Act. Based on that charge, as amended, the General Counsel of the National Labor Relations Board (the Board) issued a complaint and an amended complaint alleging that at its Weston, West Virginia jobsite (the Weston project), Respondent had violated Section 8(a)(1) and (3) of the Act. Respondent admits that this matter is properly before the Board, but it denies the commission of any unfair labor practices.

On the testimony and exhibits entered at trial,[2] and on my observations of the demeanor of the witnesses,[3] and after consideration of the briefs that have been filed, I make the following findings of fact and conclusions of law.

I. JURISDICTION

As it admits, Respondent is a corporation with an office and place of business in Weston, West Virginia, where it has been engaged in business as an industrial construction contractor. During the 12-month period ending May 31, Respondent, in conducting the business operations purchased and received goods valued in excess of $50,000 from suppliers located at points outside West Virginia. Therefore, at all relevant times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties stipulated that the Union and the following organizations are labor organizations within the meaning of Section 2(5) of the Act: United Brotherhood of Carpenters and Joiners of America, Carpenters' District Council of North Central West Virginia, Local Union Nos. 476 and 604; International Union of Operating Engineers, Local No. 132, AFL-CIO; and Laborers' International Union of North America, Laborers' Local No. 984, AFL-CIO.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Overview of the case

Respondent is an engineering and construction business that builds water, sewer, and power plants in the eastern United States. Its headquarters is in Lexington, Kentucky. Its Weston project involves the construction of a water treatment plant for the West Virginia American Water Treatment Company (the West Virginia Water Company). According to the testimony of Luke Zakrzewski, Respondent's project superintendent at the Weston project, Respondent's contract with the West Virginia Water Company "deals with the concrete and pipe work over four inches, instrumentation, process equipment, and door frames." Respondent is not a general contractor at the Weston project; electrical and other contractors have separate contracts with the West Virginia Water Company. Respondent began the construction of the Weston project on March 10. Completion of Respondent's portion of the Weston job is scheduled for the end of 1998. Other projects that Respondent had under construction at the time of the events in question were at Bluestone, West Virginia; Mt. Sterling, Kentucky; and Murfreesboro, Tennessee; and Franklin, Tennessee.

Respondent does not recognize any labor organization as the collective-bargaining representative of any of its employees at

[3] It should be noted that I speak here of the burden of going forward with the evidence. Thus, my view is not contrary to the principle that the burden of persuasion in these cases is on the wrongdoer respondent.

[4] The presumption is based on *Dean General Contractors,* 285 NLRB 573 (1987).

[5] I do not pass on the application of *Dean General* to nonsalting situations.

[1] All dates mentioned are in 1997 unless otherwise indicated.

[2] Certain passages of the transcript have been electronically reproduced. Some corrections to punctuation have been entered. Where I quote a witness who restarts an answer, and that restarting is meaningless, I sometimes eliminate some of the redundant words, e.g., "Doe said he mentioned that" becomes "Doe mentioned that."

[3] Credibility resolutions are based on the demeanor of witnesses and any other factors that I may mention.

any of its projects. The term "salting" applies to efforts by a labor organization to have a nonunion employer hire employees who, as well as working during working times, will attempt to secure support for the labor organization among other employees with an ultimate objective of having the employer recognize and bargain with, and sign a collective-bargaining agreement with, the labor organization. In this case there is involved a salting (or attempted salting) of the Weston project by members of various labor organizations which, in turn, are represented by the Union. This salting effort at the Weston project, and Respondent's alleged responses to it, gave rise to the following facts, alleged facts and contentions:

(1) From March 10 through June 2, Respondent hired several employees who had no allegiance to any union and who engaged in no union activities while working for Respondent.

(2) From May 8 through June 2, Respondent unwittingly hired two paid union organizers as employees, and it hired six other employees who had never before been union members but who signed union authorization cards after they were hired.

(3) From March 31 through June 2, Respondent allegedly refused to hire or consider for employment 27 applicants because of their known or suspected union memberships or sympathies.

(4) The General Counsel contends that about May 27, Zakrzewski twice threatened an employee in violation of Section 8(a)(1).

(5) On June 3, the two employees who were paid union organizers, and the six employees who had signed union authorization cards, began a strike; the General Counsel alleges that the June 3 strike was an unfair labor practice strike because it was caused by Respondent's refusals to hire union members. (The General Counsel does not contend, however, that Zakrzewski's alleged May 27 threats caused the strike.) Respondent contends, however, that the strike was an economic strike because it had only a recognitional objective.

(6) On June 3 and 4, Respondent hired six employees as permanent replacements for six of the eight June 3 strikers.

(7) On June 5, the Union made an offer to return to work on behalf of the eight June 3 strikers; the General Counsel contends that this offer was unconditional, but Respondent contends that it was not.

(8) Also on June 5, Respondent offered reinstatement to two of the eight June 3 strikers, but it refused to reinstate the six other strikers on the stated ground that they had been permanently replaced. The General Counsel contends that the six putative replacements could not have been lawful permanent replacements because the June 3 strike was an unfair labor practice strike; alternatively, the General Counsel contends that, even if the June 3 strike is held to be economic, the six replacements were only temporary replacements whose hirings would not affect the strikers' rights to reinstatement on the Union's June 5 unconditional offer to return to work.

(9) Also on June 5, the two employees who had been offered reinstatement on that date began a second strike; the General Counsel contends that the June 5 strike was a second unfair labor practice strike, but Respondent contends that it was a second economic strike.

(10) On June 6, Respondent hired an employee as a permanent replacement for one of the two June 5 strikers. (Respondent does not contend that it hired a permanent replacement for the other June 5 striker.)

(11) On July 3 Respondent allegedly refused to hire or consider two more applicants because of their known or suspected union memberships or sympathies.

(12) On November 7, the Union made a second offer to return to work on behalf of all eight employees who had theretofore engaged in a strike. The General Counsel contends that this offer was a repetition of the offer to return to work by the six employees who were refused reinstatement after the June 5 offer to return to work, and the General Counsel contends that this was a new offer to return to work by the two employees who had received offers of reinstatement on June 5 but who began the strike of that date instead of accepting those offers. Respondent concedes on brief that the November 7 offer to return to work was unconditional.

(13) After November 7, Respondent made offers of reinstatement to five of the eight employees who had engaged in the two strikes. As well as contending that Respondent owes backpay and reinstatement obligations to the three employees who have never been offered reinstatement, the General Counsel contends that the offers of reinstatement to the other former strikers were unlawfully delayed and that Respondent therefore owes them backpay obligations.

Ultimately, I find and conclude that: (1) On May 27 Zakrzewski made the alleged unlawful threats. (2) Before June 3 Respondent did not unlawfully refuse to hire or consider any union members. (3) After June 3 Respondent did not unlawfully refuse to hire any union members. (4) After June 3 Respondent unlawfully refused to consider two union members for employment. (5) The June 3 strike had solely a recognitional objective and was therefore economic. (6) The June 5 offer to return to work was unconditional. (7) By June 5 Respondent had hired only temporary replacements for the June 3 strikers. (8) Respondent has unlawfully refused to reinstate three of the June 3 strikers to date. (9) Respondent unlawfully delayed offering reinstatement to three other June 3 strikers. (10) The June 5 strike by the two employees who had been offered reinstatement on that date was an unfair labor practice strike. (11) Respondent unlawfully delayed offering reinstatement to the two June 5 strikers.

2. Background—initial hiring at the Weston project

Zakrzewski has been the only supervisor at the Weston project and he has been Respondent's sole agent for hiring employees at that site. Zakrzewski testified that Respondent's "hiring priorities" are as follows: First Respondent attempts to transfer "current employees" to any of its projects where they are needed. (Zakrzewski testified: "By current, I mean within

the company, within 3D, available for transfer.") If no employees at other Respondent's projects are available for transfer, Respondent seeks out former employees. If no former employees are available, Respondent seeks employees who are recommended by supervisors; then it seeks employees who are recommended by other employees. If none of these sources are availing, Respondent then looks to "unknown applicants," or those who have filed applications but who have not been recommended by supervisors or employees.

Zakrzewski testified that he was assigned to be the job superintendent at the Weston project in December 1996. At the time, he forecasted that he would need, at the most, 16 to 20 employees at the project. The first employees employed at the project were Steve Foster and Harold Wireman, both of whom began working there on March 10. Both Foster and Wireman are equipment operators (cranes, bulldozers), and Wireman is also a driller (for dynamiting). Foster and Wireman were transferred to the Weston project from Respondent's Bluestone and Murfreesboro projects, respectively. Phillip Wireman, son of Harold, was hired as a laborer on March 17 on the recommendation of his father. Zakrzewski testified that Harold Wireman and Foster were still employed at the Weston project at time of the trial. Zakrzewski was not asked if Phillip Wireman was still employed at the Weston project; Respondent's payroll records that were placed in evidence (by the General Counsel) extend only through October 24, and those records show that Phillip Wireman worked at the Weston project until at least that date. Foster and the two Wiremans were the only employees employed at the project when the salting effort began on March 24, and none of these three employees joined either the June 3 or June 5 strikes.

3. Evidence presented by the General Counsel

March 24—First visit to the jobsite by Montoney and Wainscott. Steven Montoney is a journeyman bricklayer and concrete mason, a member of Bricklayers' Local Union 15, and a paid representative of Affiliated Construction Trades Foundation, an organization that reports to labor organizations in West Virginia about jobs that are, and that are not, being operated under labor contracts. Greg Wainscott is a concrete mason, a member of Bricklayers' Local Union 15, and Montoney's personal friend. On March 24, Montoney and Wainscott went to the Weston project seeking employment with Respondent. Montoney and Wainscott had the object of organizing the job, but they did not disclose that object, or their union affiliations, when they spoke with Zakrzewski. Wainscott testified that he told Zakrzewski that he had been doing cement finishing all his working life; Montoney told Zakrzewski that he had experience in carpentry as well as cement finishing. Montoney testified that Zakrzewski told them that he then had no application forms, but Zakrzewski "said that he would be putting some people on through the next few weeks, he would need about 25 to 30 employees, half would be from 3D themselves, and they would be hiring about half off the street." Montoney and Wainscott then left the premises.

March 31—Second visit by Montoney and Wainscott. Montoney and Wainscott testified that they returned to the Weston project on March 31. They went to a trailer which Respondent maintains on the site and which Zakrzewski uses as an office. Montoney and Wainscott again asked Zakrzewski for work. Zakrzewski gave Montoney and Wainscott application forms, which they completed. Montoney testified that while he was in Zakrzewski's office Zakrzewski mentioned that he had 20 other application forms and that he would be hiring more employees soon.

Richard L. Williams is the executive director of the Union. LeRoy G. Stanley is the director of organizing for the North Central West Virginia Regional Council of Carpenters, AFL-CIO. After leaving the worksite on March 31, Montoney called Williams and Stanley and told them that Zakrzewski had 20 application forms and that they should send workers to apply for work as he and Wainscott had done.

March 31—Stanley presents eight applicants. Stanley testified that on March 31, after Montoney's call, he met Carpenters' union members Robert Waugh Jr., Bruce Morrison, Howard Wayne Johns, Michael Jenkins, Roger McCauley, Deborah Johnson, Michael Collins, and David Gainer at the gate of the Weston project. He wrote the eight carpenters' names, addresses, and telephone numbers on a sheet of paper and escorted them to, and into, Respondent's trailer. Stanley introduced himself to Zakrzewski and he introduced the eight carpenters as journeymen who were seeking work. Zakrzewski gave each of the carpenters an application. According to Stanley, as the carpenters were completing the applications, Johnson approached him and Zakrzewski. Johnson stated to Stanley and Zakrzewski that she had noted that on the back of the application form is a statement that it is "only good for 15 days."[4] Zakrzewski responded that that was true. Further, according to Stanley:

> I said, "Well, I have this list of all of those that has made application here. Would you accept this list as to hire from after the 15 days, or would they have to come back and make application again?"
>
> And he said, "Yeah, we will use the list."

Stanley gave the above-quoted answer after the General Counsel, in a nonleading fashion, had asked him to describe the events of March 31. Three times thereafter, however, the General Counsel asked Stanley, in leading fashions, to repeat Zakrzewski's response to Stanley. That leading produced predictable embellishments of the above-quoted first answer by Stanley. The General Counsel also called applicants Johnson, Morrison, and McCauley who corroborated Stanley's quoted testimony, but who also offered different versions of Stanley's prompted embellishments. As discussed below, Zakrzewski denies agreeing to use Stanley's list of carpenters for any purpose. Finally, Stanley testified that after the carpenters had completed their applications,[5] he introduced each individually to Zakrzewski, stating that they were "excellent carpenters, with a lot of form work experience." (The "form work" to

[4] More particularly, above a space for the applicant's signature is: "This application is current for only 15 days. At the conclusion of this time, if I have not heard from the employer and still wish to be considered for employment, it will be necessary to fill out a new application."

[5] Neither party placed in evidence any of the applications that the eight carpenters completed.

which Stanley referred is the building of wooden forms into which concrete is poured; Respondent's job required a great number of these forms.) Gainer had died by the time of trial; the other seven carpenter applicants, however, testified consistently with Stanley about their coming to Zakrzewski's trailer to apply for work on March 31.

March 31—Williams presents 11 applicants. Also on March 31, after Stanley and the carpenter-applicants had left the Weston project, Union Representative Williams, met 11 employees of different crafts at the gate. Williams escorted them to Respondent's trailer, and to Zakrzewski, to apply for work. Before going into the trailer, Williams collected two lists that contained the applicants' names, addresses, and telephone numbers, and the names and local numbers of their unions. Four of the employees whom Williams escorted to the trailer were members of Local 132 of the International Union of Operating Engineers; these were: Clem Hood, Donovan Burt, Ronald Clevenger, and Danny Haggerty. Two of the applicants whom Williams escorted were members of Sheet Metal Workers' Local 33; these were Kenny Perdue and Randy Gombos. Finally, five of the employees whom Williams escorted were members of Bricklayer's Local Union 15; these were Michael Handley, Arthur Lawson, Gary Meloy, Greg Rhoades, and LeRoy Hunter Sr. The information for the engineers and sheet metal workers was on one of the lists that Williams collected; the information for the bricklayers was on the other. On the list of the bricklayers was written: "These are qualified union craftsmen as well as union organizer[s] on their own time." The 11 applicants followed Williams to the trailer where he introduced himself to Zakrzewski and stated that the men with him were "union people . . . that would like to apply for work." Zakrzewski told Williams that he only had one application left; Zakrzewski gave the application to Gombos who completed it.[6]

Williams further testified that he gave his two lists to Zakrzewski and asked him to "refer to" them when Zakrzewski later needed employees. Zakrzewski replied, "O.K." (Nothing was said about the 15-day limitation that was mentioned when the carpenters had been in the trailer.) Williams and the applicants then left. Perdue did not testify, but Gombos corroborated Williams' testimony that Perdue was in the group of applicants that Williams escorted to the job to apply for work on March 31. Gombos, Handley, Lawson, Rhodes, Hunter Sr., Hood, Burt, Clevenger, and Haggerty testified consistently with Williams about their coming to Zakrzewski's trailer to apply for work on March 31.

Respondent did not hire any of the 19 applicants who were escorted to the jobsite by Stanley and Williams on March 31. The complaint alleges that Respondent's failure to hire 18 of those applicants violated Section 8(a)(3). (At the hearing, for reasons that were not disclosed, the General Counsel moved to delete Melov's name from the complaint.)

March 31—Application by Shearer. Michael Shearer has a college degree in accounting, he has no construction-work experience, and he has never been a member of a union. Shearer testified that on March 31 he went to Respondent's jobsite to apply for work. He told Zakrzewski that he had no construction experience, and the only reason that he could give Zakrzewski for hiring him was that he would always be on time for work because he lived almost directly across the public road from the Weston project. Zakrzewski gave Shearer an application to complete. As Shearer was doing so, the group of carpenters mentioned above came to Zakrzewski's office to apply for work. When he heard that they were all journeyman carpenters, Shearer approached Zakrzewski and asked if it were not a waste of time for him to submit an application because all of the other applicants in the room had more construction experience than he. Zakrzewski told him to go ahead and complete the application.

April 5—Hiring of Shearer. Shearer testified that on April 5 Zakrzewski called him and asked him to meet him for another interview that day. At the interview, Shearer reasserted that he had no construction experience. Zakrzewski told Shearer that he was hired, that he should come to work the next day, and that he should bring a tape measurer, a crowbar, and a hammer with him. Shearer did so. As a laborer, Shearer was paid $6 per hour wage; Shearer testified that this wage was $1 per hour less than Respondent had been advertising for laborers in the local newspaper.[7] Ultimately, Shearer signed a union authorization card, he became one of the eight June 3 strikers, and he became one of the two June 5 strikers.

April 7—Hiring of Sandlin. As will be discussed in the narration of Respondent's case, Donald Sandlin began working as a machine operator at the Weston project on April 7. The General Counsel contends that Sandlin was one of the employees who was unlawfully preferred to the March 31 union member-applicants who are alleged discriminatees; but I ultimately conclude that arrangements for his employment at the Weston project were made well before March 31. Sandlin did not join the June 3 or 5 strikes.

April 14—Third visit by Montoney and Wainscott, and the hiring of King. Montoney and Wainscott returned to the jobsite on April 14. Montoney testified that as they approached the gate they saw: "a small white sign erected, which on one side said, '3D is taking applications,' the other side said, '3D is not taking applications.'" The latter side faced the road. Montoney and Wainscott met Zakrzewski who told them that they "did not need to check back for four to six weeks, or until the sign was taken down." Montoney and Wainscott then left. As discussed in the narration of Respondent's case, also on April 14 Respondent transferred carpenter Ralph King to the Weston project from another of Respondent's projects. King did not join the June 3 or 5 strikes.

April 21—Hiring of Hoke. Timothy Hoke, a carpenter who has never been a member of a union, testified that he had worked for Respondent at its Bluestone project from April 1995 until mid-1996 when he quit to work elsewhere. During his tenure at Bluestone, Zakrzewski was his foreman. In early 1997 Zakrzewski called him about three times, asking him to come to work at the Weston project. Hoke refused until Zakrzewski met his asking price, $16 per hour wage, plus $3

[6] Neither party placed Gombos' application in evidence.

[7] The General Counsel did not offer into evidence any such newspaper advertisements for laborers (or for carpenters or for any other classifications, if such existed).

per hour travel allowance. Hoke testified, without contradiction, that during his last telephone conversation with Zakrzewski, "He had mentioned that there is, some union men had come by and tried to fill out an application." (On cross-examination Hoke acknowledged that Zakrzewski did not tell him that he wanted Hoke to come to work because he did not want to hire applicants who were union members.) According to Respondent's payroll records, Hoke began working at the Weston project on April 21. Ultimately, Hoke signed a union authorization card, and he became one of the eight June 3 strikers.

April 22—Hiring of Garrison. Charles Garrison is a house carpenter by trade, and he has never been a member of any labor organization. Garrison came to the jobsite and completed an application for employment on March 25, and he was hired on April 22. Although the General Counsel contends that Garrison is an employee who should not have been hired in preference to union member-applicants who are alleged discriminatees, and although the General Counsel called Garrison as his witness, the General Counsel did not ask Garrison anything about the circumstances of his being hired at the Weston project. On cross-examination, Garrison admitted that one Greg Van Pelt at the West Virginia Water Company (again, the owner of the Weston project) gave him a referral of some sort, but Garrison was not asked when that referral may have come. (Garrison did not list Van Pelt as a reference on his application, and he did not list West Virginia Water Company as a prior employer.) Ultimately, Garrison signed a union authorization card and he became one of the eight June 3 strikers.

May 8—Fourth visit by Montoney and Wainscott. Montoney and Wainscott returned to the jobsite again on May 8. At the time, according to Montoney, the "Not Taking Applications" side of the sign was still facing the road. Montoney and Wainscott met with Zakrzewski and, according to Montoney:

> Luke said that he was glad that we had come by, he would be putting some men on in the next week or so; he asked us if we had any referrals, and we said, no, that we didn't know anybody on the job.
>
> Luke said, "It's a lot easier when you have a referral."
>
> Luke said the labor laws have him in a "fucking bind" about hiring people who aren't referrals, because he would have to open it up to everybody then.
>
> He told us to call back early Monday morning, and so that he could figure out how that he could hire us on. He said he didn't have any applications with him at that time.

Zakrzewski did not deny any of this testimony by Montoney. Further on cross-examination, Montoney admitted that on May 8, Zakrzewski told him that when Respondent is hiring employees, "They call back former employees, then they use referrals, and then open it up to hiring off the street."

May 12—Visit by Leroy Hunter Jr. Leroy Hunter Jr., like his father who is mentioned above, is a journeyman bricklayer and a member of the Bricklayers' Union. Hunter Jr. testified that on May 12 he drove to the Weston project and noticed that the "Not Taking Applications" sign was facing the road. He went to Respondent's trailer anyway, and he asked Zakrzewski if he needed any cement finishers. Zakrzewski replied that he did not then need cement finishers, but he would later. Hunter told Zakrzewski that he was a "union concrete finisher" and was looking for work. Zakrzewski told Hunter that he would turn the sign around the next time that he needed to hire any more employees. (The complaint alleges that Hunter Jr., was the nineteenth applicant whom Respondent unlawfully refused to hire.)

May 12—Wainscott calls Zakrzewski. On May 12 Wainscott called Zakrzewski. According to Wainscott:

> When I talked to Mr. Zakrzewski on the phone, he asked if I could be there before starting time the following morning, and I said yes, I could.
>
> He asked me if I could be there in the morning, where he would not have to take the sign down for hiring, and that he couldn't get into trouble that way for new hires.

Zakrzewski did not deny this testimony by Wainscott.

May 13—Montoney and Wainscott are hired. On May 13, somewhat before the usual starting time of 7 a.m., Montoney and Wainscott returned to the jobsite. Montoney and Wainscott testified that the "Not Taking Applications" sign was facing toward the road. (Zakrzewski denied this, but I credit Montoney and Wainscott.) When they went into Respondent's office trailer, Zakrzewski presented them with blank application forms and stated that the one that they had previously submitted had "expired." Wainscott asked what he should put down as a "Referral Source"; Zakrzewski told him to put "Previous application/referral." Montoney and Wainscott did so and then went to work, Montoney building the wood forms that were to be used in pouring concrete, and Wainscott doing other concrete work. Montoney testified that employees on the job were "multi-tasking" or doing work that required different skills; for example, one worker would do carpentry, cement finishing, and pipefitting, as the job required. Ultimately, Montoney became one of the eight June 3 strikers; Wainscott, however, quit on May 19.

May 13—Stanley and Williams present five applicants. Carpenters' union representative, Stanley, testified that also on May 13 he escorted carpenter Bob Kisner to the Weston project. When they arrived, the "Not Taking Applications" sign was facing the road. Stanley told Zakrzewski that he had another journeyman carpenter who wished to apply for work. According to Stanley, "Luke said he was not taking applications at that time, to watch the sign out front, and when the sign was down, that they would be taking applications again." Stanley further testified that he asked Zakrzewski if he still had the list of carpenters that he had given to Zakrzewski on March 31, and Zakrzewski replied that he had sent it to Respondent's office in Lexington. Stanley and Kisner left the jobsite. Kisner corroborated this testimony by Stanley.

Union Representative Williams testified that also on May 13 (but apparently after Stanley and Kisner had left the jobsite) he escorted cement finishers Bob Ghuste and Anthony Farber and carpenters Bruce Morrison and Howard Johns to the jobsite to apply for work (or reapply in the cases of Johns and Morrison, both of whom had applied on March 31 when they were then escorted to the jobsite by Stanley). According to Williams:

> I just told him [Zakrzewski] that I had four more good union applicants, and he told me that they weren't taking applications that day; that we should watch the sign out front; when the sign is turned around, it says they are taking applications today, then we should stop by and put applications in.

Further according to Williams, Zakrzewski added that if the sign was showing its other side, "just drive on by, because they won't be taking applications that day." Ghuste and Farber testified consistently with Williams' testimony about the events of May 13. (The complaint alleges that Ghuste, Farber, and Kisner were the 20th through 22nd applicants whom Respondent unlawfully refused to hire.)

May 19—Hiring of John Graham. As discussed in the narration of Respondent's presentation, on May 19, laborer John Graham was transferred from Respondent's Murfreesboro project to the Weston project. Graham did not join either the June 3 or 5 strikes.

May 27—Alleged threats by Zakrzewski. On May 21, Montoney met with several of the employees at a local motel. At the meeting Hoke and Garrison signed union authorization cards. Montoney testified that on May 22, when he saw Zakrzewski at work:

> Luke [Zakrzewski] told me he wanted to put on another carpenter crew, he had three-men carpenter crews, he wanted me to get a list of four local workers so that he did not have to open up the applications to hiring off the street. . . . He said he wanted to make sure that they were local so he didn't have to pay travel or motel expenses or anything like that, and to make sure that I could refer them so that they could have a reference when they came on the job.

On May 27, at the start of working time, Montoney brought Zakrzewski a list of four names: Donald Huff, Boyd Pennington, Michael Brouffey,[8] and Rodney Harper. Harper and Pennington were not then the members of any union; Brouffey was a member of a union; and Huff was a paid union organizer. Montoney's list did not indicate the union allegiance of any of the four employees. At the end of the workday, Montoney met again with Zakrzewski in the office trailer; this time Montoney was accompanied by Hoke. At that time, Zakrzewski told Montoney to bring Pennington with him when he came to work the next day. Montoney further testified that he agreed to do so, and he then left; Hoke remained in the trailer with Zakrzewski. (On cross-examination, Montoney admitted that Zakrzewski asked him about the job skills of the employees whom he recommended, but not their union affiliations.)

According to Hoke, after Montoney had left the trailer on May 27:

> That's when Luke said that he would know then if Steve was a spy for the union or not.
>
> And I asked him, "Well, what do you mean?"
>
> He says, "Well, if he shows up tomorrow with 30 union carpenters, then I will know."
>
> And I asked him, "What would that hurt?"
>
> Well, he said that 3D would not hire union employees because they would talk to the men about the higher wages, and they would not put up with that.
>
> I said, you know, "What would happen if they did get on the job, you know, and we start"—
>
> And he said, "They would shut the job down."
>
> So, you know, I just told him, "Well, it don't really matter to me because I am not in the union, [and] I don't know anything about it."
>
> And that's about all.

Based on this testimony by Hoke, paragraph 7 of the complaint alleges that, in violation of Section 8(a)(1), Respondent, by Zakrzewski "informed its employees that the Employer would not hire union carpenters because they would start talking to everyone about getting more money." At its paragraph 8, the complaint further alleges that by Zakrzewski's remarks to Hoke, Respondent also "threatened its employees that the Employer would shut the job down if union carpenters got on the job." Zakrzewski denied making either of the alleged remarks.

May 28—Hiring of Pennington. On May 28, Montoney brought Pennington with him when he came to work. When they arrived, according to Montoney, the "Not Taking Applications" sign was facing the road. The General Counsel did not ask what was said between Pennington and Zakrzewski, but a memorandum that Zakrzewski created recites that Pennington was hired on that date to begin working on June 2. Ultimately, Pennington signed a union authorization card, and became one of the eight June 3 strikers.

May 29—Rittenhouse presents two applicants. Michael Rittenhouse is a field representative for Laborers' Local Union 984. Rittenhouse testified that on May 29 he escorted members Ted Mick and Jerry Elder to the Weston project where they met with Zakrzewski. After introducing himself as a union representative, and introducing Mick and Elder, Rittenhouse asked Zakrzewski if Mick and Elder could fill out applications. Zakrzewski replied that he was not then taking applications and he would not be taking applications again until the "Not Taking Applications" sign was removed from the gate. Rittenhouse, Mick, and Elder then left. Mick and Elder testified consistently with Rittenhouse. (The complaint alleges that Mick and Elder were the twenty-third and twenty-fourth applicants whom Respondent unlawfully refused to hire.)

May 29—Hiring of Hyre. Although the General Counsel contends that Richard Hyre is one of the employees who should not have been hired in preference to the union member-applicants who are alleged discriminatees, and although the General Counsel called Hyre as his witness, the General Counsel did not ask Hvre about the circumstances of his being hired by Zakrzewski. As will be seen in the narration of Respondent's case, however, Hyre first applied for work on March 24, and he was hired as a carpenter on May 29. On cross-examination, Hyre acknowledged that he knew that, at some point, he had received a recommendation from a previously hired employee, Harold Wireman (who, again, had worked at the Weston project from the start). Ultimately, Hyre signed a

[8] The General Counsel's unopposed motion to correct the complaint's spelling of Brouffey's name is granted.

union authorization card and became one of the eight June 3 strikers, and he became one of the two June 5 strikers.

June 2—Hirings of Huff and McFall, and plans for the June 3 strike. On Friday, May 30, Zakrzewski told Montoney to bring Huff with him to work on Monday, June 2. Montoney testified that during the weekend of May 31 and June 1 he talked to Huff by telephone and in person. Montoney told Huff that Hoke had told him of Zakrzewski's threats and that Respondent was refusing to hire union members. Montoney told Huff that he wanted Huff to come to work on June 2 and help him lead a strike on June 3 because of the threats and the refusals to hire union members. Huff agreed. (Again, the complaint does not allege that Zakrzewski's threats, even in part, caused the strike.)

It is undisputed that on June 2, without knowing that Huff was a union member (much less a paid union representative), Zakrzewski hired Huff as a carpenter. On cross-examination, Huff testified that when he came to the jobsite, he told Zakrzewski that he was a good carpenter, laborer, and equipment operator: The next day, Huff became one of the eight June 3 strikers.

As I discuss in the narrative of Respondent's case, infra, Michael McFall, a carpenter, was also hired by Zakrzewski on June 2. Ultimately, McFall signed a union authorization card, and he also became one of the eight June 3 strikers.

(By the end of the workday of June 2, Respondent employed 14 employees at the Weston project. Those employees may be categorized as follows: (1–8) still working were 8 of the 11 nonunion employees who were hired before Montoney and Wainscott were hired on May 8, to wit: Foster, Harold, and Phillip Wireman, King, Sandlin, Shearer, Hoke, and Garrison; (9–10) paid union organizers Montoney and Huff; (11–14) four nonunion employees who were hired after Montoney and Wainscott were hired, to wit: John Graham, Hyre, Pennington, and McFall.)

Montoney testified that during the evening of June 2, he and Huff conducted a meeting of "about five" employees. Montoney testified that Shearer and Hyre were not invited because: "We did not know if they would tell 3D who we were; I did not know these employees, I did not feel I could trust them at this time. . . . They had been recommended by some other people on the job." At the meeting Pennington and McFall signed union authorization cards. Montoney was not asked about what may have been discussed at the June 2 meeting, but he did testify that after the meeting he and Huff agreed that because Respondent was refusing to hire union members, they would lead the employees on a strike the next day. Huff corroborated this testimony by Montoney, and he also was not asked what may have been discussed at the June 2 meeting of employees.

Montoney further testified that also during the evening of June 2, he called Carpenters' union representative, Stanley, "and I asked him to prepare some unfair labor practice signs for the strike that we were going to have Tuesday morning." Stanley also testified that on June 2 Montoney asked him to prepare some picket signs for a strike that would begin the next morning; Stanley further testified that Montoney told him that the unfair labor practice strike would be over Respondent's refusals to hire union members.

Montoney testified that he also contacted Union Representative Williams during the evening of June 2. According to Montoney: "And about 9:15 I called Richard Williams and I told Rick that we had a lot of support from the 3D employees, and I asked him if he would represent them, if they wanted to come out on strike." Williams said that he would. Montoney further testified that he asked Williams to compose a letter addressed to Zakrzewski demanding recognition of the Union as the collective-bargaining representative of Respondent's employees. Williams told Montoney that he would. Williams also testified that Montoney called him on the evening of June 2. According to Williams:

> He called and we talked about what was going on down at 3D, and he asked me if I could help support a strike the next day, and I told him I would try to do that, but normally I don't talk with the local union members directly; I do that with the business managers.
>
> He also asked me if I would represent the employees who had signed authorization cards in a possible negotiation, and I told him I would do that. And he also asked that I make up a letter demanding recognition, and I did that.

Neither Williams nor Montoney testified that during this telephone call of June 2 Montoney mentioned Respondent's hiring practices in any way.

June 3—The first strike begins. Early on the morning of June 3, Williams came to the jobsite and met with Montoney and Huff. Williams brought with him a letter that he previously had typed. The letter is addressed to Zakrzewski; it states:

> Please be advised that I am a representative of [the Union], a labor organization that is assisting a group of your employees who wish to organize their work site.
>
> At least 51% of your employees have chosen [the Union] as their collective-bargaining agent. We hereby request recognition by 3D Enterprises Contracting Corporation.
>
> The employees listed below are asking for representation in collective bargaining.

After that there were 11 blanks that were to be used for insertion of employees' names. Williams gave the letter to Montoney. Thereafter, Montoney entered into eight blanks the names of himself, Huff, Pennington, Garrison, Hoke, McFall, Hyre, and Shearer. Beside his and Huffs names, Montoney printed "volunteer union organizer." (Shearer and Hyre had signed union authorization cards at some point during that morning.)

While Williams, Pennington, Garrison, Hoke, McFall, Hyre, and Shearer waited at the gate, Montoney and Huff went to the office and met with Zakrzewski. Montoney testified that he presented the demand letter to Zakrzewski and Huff stated that the Union was requesting recognition. As Montoney testified:

> Donny [Huff] told Luke [Zakrzewski] that we had a letter to give him. Donny told Luke that Stephen Montoney and himself were volunteer union organizers, and that we represented a majority of the employees on that job, and that we wanted

Luke to start negotiating with Richard Williams, who was waiting outside.

Zakrzewski replied that he could not respond to the letter until he contacted Respondent's office in Lexington, and he asked that all the employees go to work immediately. Montoney testified that: "We told Luke that we would go wait outside by the gate, which comes into the jobsite, until he started negotiating with Rick [Williams], or would tell us what he wanted us to do." Montoney and Huff then left the trailer and returned to the gate where they rejoined the other six striking employees (and Williams).

After the eight employees had waited about 2 hours, further according to Montoney, Zakrzewski came to the gate area and read aloud the following statement (a copy of which was received in evidence):

1. 3D does not have a contract with any labor unions.
2. The National Labor Relations Board has not certified any union as representing any 3D employees.
3. If any of you wish to go on strike, you have the legal right to do so, but 3D must continue to build this project, so we plan to permanently replace anyone who does not go to work.

Further, according to Montoney and Huff, Huff responded that the employees were then on an unfair labor practice strike, but Zakrzewski replied that he did not want to hear any more, and Zakrzewski returned to the trailer.

As previously noted, the General Counsel contends that the June 3 strike was caused solely by Respondent's unfair labor practices of refusing to hire union members, but Respondent contends that the June 3 strike was only recognitional, and therefore only an economic strike. When the General Counsel asked Montoney for his subjective reason for striking, Montoney testified that: "We went on strike because Luke refused to hire union workers." Huff was not asked by the General Counsel for his reason for joining the strike, but the six other June 3 strikers also testified in their direct examinations that they had struck because of Respondent's unfair labor practices of refusing to hire union members. None testified on direct examination that the strike was joined, even in part, for a recognitional objective. The General Counsel, however, offered no evidence of what any of the strikers, other than Montoney and Huff (again, the paid organizers), did or said before the strike to indicate that they were striking because of Respondent's hiring practices. Moreover, Montoney admitted on cross-examination that when on June 3 Zakrzewski asked that the employees return to work he replied that, "We want an answer first." Montoney was then asked and he testified:

Q. And that was an answer as to whether you were going to begin negotiations or not, right?
A. Yes. Whether he would talk with Rick Williams.
Q. And specifically whether he would recognize the union?
A. No.
Q. Well, what were you waiting for an answer about?
A. Whether he would start negotiations with Rick Williams, because if he would, that would have resolved the issues that we had with 3D.

Also, Hoke was asked on cross-examination and he testified:

Q. Do you know that Steve Montoney presented a letter demanding union recognition to Luke on June 3; did you know about that?
A. I know he presented him with a letter.
Q. Did you all discuss what you would do if Luke had said, "Okay. I will talk to your union representative"? What were you all going to do?
A. We were going to go to work.

Hoke was not asked when this agreement was reached among the employees, but it was obviously before Montoney and Huff went to Zakrzewski to demand recognition.

Montoney, Huff Pennington, Garrison, Hoke, McFall, Hyre, and Shearer did not attempt to return to work during the remainder of June 3 or at any time on June 4. Beginning on June 4 the eight strikers began picketing with four picket signs. The legends of three of the signs indicated that the employees were engaging in an unfair labor practice strike (without indicating what type of unfair labor practice the strikers may have had in mind); the fourth sign bore only the union's logo. Stanley testified that the picketing continued until some time in early October.

June 3—Stanley presents four applicants. Stanley testified that, also during the morning of June 3 he brought four carpenters to Zakrzewski's office to apply for employment. Respondent denies that this occurred. As discussed below, I find that it did, but I also must first note that Stanley's testimony about that morning is revealing about the true intent of the June 3 strikers. The General Counsel's examination of Stanley about his coming to the jobsite on June 3 was cryptic; it did not disclose whether Stanley and the four carpenters came to the gate area before or after Montoney and Huff presented Williams' demand letter to Zakrzewski, and it did not include any questions about may have been said between Stanley and Montoney whenever Stanley did come to the gate during that morning. When Stanley was on cross-examination, however, he was asked and he testified:

Q. Was anything going on, anything unusual happening when you arrived at the jobsite yourself?
A. Yes. . . . I saw Steve Montoney and some other guys huddled around one another there, near the job trailer. . . . Between the job trailer and the entranceway.
Q. Did you speak to them?
A. Yes.
Q. Anything particular that you said to them?
A. Just, "What's going on?"
Q. Did they say anything back to you?
A. Yes.
Q. What did they say to you?
A. Well, they just said that they was thinking about going out on an unfair labor practice strike; that 3D had not—had not quit discriminating against union people.
Q. Oh, really?

A. That's correct.

Q. And then you marched these people up to put in applications?

A. Yes.

Of course, Montoney and Stanley had also testified that just the evening before Montoney had called Stanley and told him that on June 3 the employees would begin an unfair labor practice strike to protest Respondent's refusals to hire union members, and both Montoney and Stanley testified that Montoney then asked for Stanley's help in preparing signs to be used by the strikers. When given an opportunity to explain the conflict, Stanley, obviously flustered, could only offer:

> He [Montoney] had already told me that on the night of the 2nd, and I just didn't know what was going on, I had to ask what was going on, and I took those guys up there and asked Luke if he would like to—"These guys want to make an application."

That is, when confronted with the obvious inconsistency, Stanley changed the subject. (There was no followup question to this cross-examination, and the General Counsel did not address the issue on redirect examination.)

Stanley testified that the carpenters whom he escorted to the jobsite on June 3 were Paul Sypolt, Tim Radford, Michael Brouffey,[9] and Rob Waugh Jr. Stanley testified that he led the four carpenters to the door of the trailer where they were met by Zakrzewski. Stanley told Zakrzewski that he had "some union carpenters" who wished to apply for a job. Further, according to Stanley, Zakrzewski replied that he was not taking applications that day and that he should "[w]atch the sign out front." The five men left. Brouffey, Radford, Sypoh, and Waugh also testified that it was on June 3 that they went with Stanley to apply for work at the Weston project, and they testified consistently with Stanley about Stanley's exchange with Zakrzewski. The complaint alleges that Sypalt, Radford, and Brouffey were the 25th through 27th applicants whom Respondent unlawfully refused to hire. (As noted above, Waugh had also been in the group of applicants that Stanley had escorted to the jobsite to apply for work on March 31, and Waugh is included in the allegations of that date.)

June 5—End of the June 3 strike, and the beginning of the second strike. At 7 a.m. on June 5, Montoney and Huff approached Zakrzewski and gave him a letter from Williams stating that, "The following employees are offering to unconditionally return to their former employment." They follow the names of the eight employees who had participated in the strike on June 3 and 4. Zakrzewski again replied that he would need to contact Respondent's headquarters before he could reply. Montoney and Huff returned to the gate area to wait with the other six strikers. Zakrzewski then appeared and read the following statement: "John [Michael] Shearer and Richard Hyre go to work. This is all we need today. The rest of you have been permanently replaced. We will call you if and when we need you." Zakrzewski then turned and started walking back to the trailer.

(As discussed below, Respondent contends that it had, in fact, permanently replaced all strikers but Shearer and Hyre by the time it received the Union's offer to return to work on June 5. The General Counsel first contends that the strikers were unfair labor practice strikers and could not lawfully be replaced; alternatively, the General Counsel contends, and par. 19(a) of the complaint alleges, that even if the strike was economic Respondent violated Sec. 8(a)(3) "by falsely informing [Montoney, Huff, Pennington, Garrison, Hoke, and McFall] that they had been permanently replaced at a time when vacancies still existed in their job classification; by falsely informing them that they had been permanently replaced at a time when either the claimed replacement employees were not hired into job classifications that matched those of the striking employees, or the claimed replacement employees had never been hired by Respondent at all, or the claimed replacement employees were not hired until after the striking employees had been notified they had been permanently replaced." Respondent's efforts at securing replacements will be discussed in the narrative of the defense, infra.)

Hyre testified that he responded to Zakrzewski: "[W]e all went out together [and] that we should all go back together. Shearer testified that he told Zakrzewski: "I told him that I had to decline the offer, that if he wasn't going to hire everybody back, that I couldn't go back myself, without everybody else going." Shearer and Hyre returned to the gate and the picket line was then reestablished. (As discussed infra, Respondent contends that when Shearer and Hyre conditioned their return to work on the reinstatement of the other six June 3 strikers the Union's prior offer to return to work was rendered conditional itself.)

Shearer and Hyre remained on strike until November 7 when the Union made an unconditional offer to return to work on their behalf; as discussed below. The strike by Shearer and Hyre is referred to as the June 5 strike. The complaint alleges that the June 5 strike by Shearer and Hyre was caused by Respondent's unfair labor practices of refusing to reinstate Montoney, Huff, Pennington, Garrison, Hoke, and McFall. (As discussed below, Respondent contends that, after Shearer and Hyre declined reinstatement on June 5, it permanently replaced Shearer, but it does not contend that it permanently replaced Hyre.)

July 3—Seders and Kyle appear at the jobsite. Rick Seders and Roger Kyle are millwrights, and they are members of a union that represents that trade. Seders and Kyle testified that they went to the Weston project on July 3 to apply for jobs. Both were wearing caps that indicated that they were members of a millwrights' union, and Seders was wearing a union T-shirt. As they approached Respondent's trailer, someone whom they could not identify came out of a trailer that was owned by an electrical contractor. That unidentified person told Seders and Kyle to leave the premises because they were not wearing hard hats. Seders and Kyle then left. (The complaint alleges that Seders and Kyle were the 28th and 29th union members whom Respondent unlawfully refused to hire.)

[9] Again, Brouffey is one of the four employees whom Montoney had recommended to Zakrzewski for hiring on May 27. There is no allegation that Respondent unlawfully refused to hire Brouffey at that time, but he is included in the June 3 refusal-to-hire allegations of the complaint.

November 7—Second offer to return to work. On November 7 Williams sent Zakrzewski a letter on behalf of Montoney, Huff, Pennington, Garrison, Hoke, McFall, Hyre, and Shearer stating: "The following employees are once again offering to unconditionally return to work in their former employment at the Weston Water Treatment plant site." The General Counsel contends that, for Montoney, Huff, Pennington, Garrison, Hoke. and McFall, this was simply a repetition of their June 5 offer to return to work from the June 3 strike; for Shearer and Hvre it was an offer to return to work from the June 5 strike.

To date, Respondent has made no offers of reinstatement to Montoney, Huff, or Hoke; Respondent has, however, made unconditional offers of reinstatement to Pennington, Garrison, McFall, Shearer, and Hyre."[10] Garrison received an offer of reinstatement on December 4, Pennington on January 13, and Shearer and Hyre on January 22. The date of the offer of reinstatement that was made to McFall is not disclosed in the record, but on brief the General Counsel concedes that it was made, "during this same approximate period of time." All five of these employees declined Respondent's offers. The General Counsel contends that Respondent still owes Montoney, Huff, and Hoke obligations of both backpay and reinstatement because it refused their June 5 offers to return to work. The General Counsel further contends that Respondent unlawfully delayed in offering reinstatement to Pennington, Garrison, and McFall after the June 5 offer to return to work and that Respondent owes backpay obligations to those three employees from that date. The General Counsel further contends that Respondent unlawfully delayed in offering reinstatement to Shearer and Hyre after the November 7 offer to return to work and that Respondent owes backpay obligations to those two employees from that date.

Employees hired after the replacements. After the June 5 offer to return to work, and before September 15 (the last date for which the General Counsel introduced records), Respondent transferred to, or hired, or rehired for, the Weston project 10 employees in addition to seven whom it considers to have been permanent replacements for the eight strikers; to wit: (1) On June 9 Respondent transferred from its Murfreesboro project one Mark Buttry to work as an equipment operator. (As discussed in more detail in the narration of Respondent's case, Respondent initially contended that Buttry was a replacement for striking carpenter Hyre, but it abandons that contention on brief.) (2–5), Respondent transferred to the Weston project four employees to work as laborers: (a) Malcomb Luttrell, on June 9, from Respondent's warehouse near Lexington, (b) Michael Hatton, on June 30, from the Murfreesboro project, (c) Kevin Eversole, on July 2, from the Murfreesboro project, and (d) James Graham, on September 15, from the Bluestone project. (6) On June 16, carpenter Bradley Mercer was transferred to the Weston project from an unnamed project of Respondent.[11] (7–8) On June 23, carpenter Wesley Bryant and laborer Burton Godsey were rehired after having previously worked for Respondent in the Lexington area.[12] (9-10) Finally, Respondent hired at the Weston project two laborers who had never worked for Respondent before: Jimmy Campbell on June 30, and Bryan Williams on September 5.

4. Evidence presented by the Respondent

Employees hired before the June 3 strike, and Zakrzewski's alleged threats. Respondent's Exhibit 8 is a list of employees, some of whom came to work at the Weston project. Zakrzewski identified the list as one that he created between March 10, when the job started, and March 17, when laborer Kenneth Wireman was hired. The purpose of the list, Zakrzewski testified, was to show his superiors in Lexington who, among Respondent's then-current or past employees, he wished to hire at the project and dates that he wanted them to report there. Those listed employees who actually did come to work at the Weston project after March 17,[13] and the dates that Zakrzewski had listed for the anticipated need of each, are as follows: Ralph King, April 14; Donald Sandlin, March 31 or April 7;[14] Willard Johnson, March 31; Les Wade, date not indicated; Tim Hoke, March 31; Mike McFall, date obliterated; Lewis Richmond and Gary Bragg, March 31; and Kenneth Wireman, John Graham, and James Graham, "May" (with no day of the month indicated).

Zakrzewski testified that individuals seeking work began coming to the Weston project on the first day of work, March 10, and they continued coming thereafter. Zakrzewski told the first inquirers that he would have some applications on March 24, which he did. By a point that was still early in the morning of March 24, he distributed 15 applications which was all that he then had. Montoney and Wainscott visited the job after those applications had been distributed. Zakrzewski further testified that on March 24 he was looking to hire only one laborer; he did not then need another carpenter because he had already made arrangements with carpenter Willard Johnson to begin work there on March 31. A "Project Memo," or daily record that Zakrzewski regularly maintained, as well as his list of desired personnel, supports Zakrzewski's testimony that he had made such arrangements with Johnson. Johnson did, in fact, start working at the job on March 31. (Johnson, however, quit on April 28.)

On March 31, according to Zakrzewski, six or eight applicants came to the site early in the morning and he gave each of them an application. As I find, these applicants would have included Montoney and Wainscott, even though Zakrzewski denied recalling that Montoney and Wainscott completed any applications other than the ones that they completed on May 13.

[10] On Br. p. 36, the General Counsel concedes the validity of the five offers of reinstatement.

[11] This is according to a memorandum that was created by Zakrzewski that the General Counsel placed in evidence, even though it did not name the specific project from which Mercer was transferred.

[12] GC Exh. 2, which lists Bryant as a transferee, is in error, see GC Exh. 5(b)(30).

[13] Again, Harold, Phillip Wireman, and Steve Foster were the only employees who were working at the project through March 17.

[14] On Zakrzewski's list, the date of March 31 had first been printed by Sandlin's name, but that date was scratched out; as seen infra, Sandlin was paid for working at the Weston project from March 24, but he did not actually begin working there until April 7, another date that appears by Sandlin's name.

Zakrzewski admitted that when Union Representative Stanley and the eight carpenters arrived at the trailer later in the morning of March 31 he accepted from Stanley a list of the carpenters' names and addresses, but he denied telling Stanley that he would use the list when seeking employees in the future, and he denied telling Stanley (or anyone else) that the carpenters who were with Stanley need not file further applications to be considered for employment, even after 15 days had elapsed. Zakrzewski did not dispute any part of Union Representative Williams' testimony about what happened when Williams escorted bricklayers, sheet metal workers, and operating engineers to the jobsite still later on March 31; Zakrzewski testified, however, that Respondent's contract called for neither brick work nor sheet metal work, and Zakrzewski testified that Respondent needed no tradesmen of those skills.

Zakrzewski further testified that he created the "Not Taking Applications" sign on March 31 because he did not need any additional labor by that date and the process of receiving applications was consuming too much of his time. (Zakrzewski had no help in the office trailer.)

Zakrzewski did not contradict any of the testimony of laborer Shearer about his being hired on April 7. Zakrzewski testified that he hired the "unknown" applicant Shearer because Respondent then needed only someone to do unskilled labor, Shearer seemed willing to work, he lived across the street from the Weston project and would be likely to be at work on time each day, and he was willing to accept $6 per hour to start. Zakrzewski further testified that he did not consider any of the carpenters who completed applications on March 31 for the laborer's position because his experience was that employees who have been accustomed to receiving craftsmen's wages soon became "disgruntled," and left, if they hired in at rates that are usually paid to unskilled employees. (Stanley testified that the prevailing rate for carpenters in the area was $18.98 per hour, plus $7 per hour in fringe benefits.)

Also on April 7, Donald Sandlin, a machine operator, transferred to the Weston project from the Murfreesboro project. Zakrzewski testified that Sandlin was "predetermined to be out at Weston," as Respondent's Exhibit 8 indicates. Also, although Sandlin did not begin working at the Weston project until April 7, he was carried on (and was apparently paid from) the Weston project's payroll beginning on March 24. Sandlin continued to work at the Weston project through the time of trial.

On April 14 Respondent transferred Ralph King from the Murfreesboro project to the Weston project to work as a carpenter and pipefitter. King continued to work at the Weston project through time of trial (and King testified for Respondent). Also on April 14, according to his project memo of that date, Zakrzewski arranged with Hoke to come to work on April 21 as a carpenter. Zakrzewski did not dispute Hoke's account of how he was contacted by Zakrzewski.

As well as Hoke, Respondent hired two other carpenters on April 21, Gary Bragg and Lewis Richmond. Both Bragg and Richmond were former employees of Respondent, both having worked with Zakrzewski at the Bluestone project. (Richmond and Bragg ceased working at the Weston project on May 19 and May 30, respectively.)

On April 22 Zakrzewski hired Garrison as a laborer for $6 per hour; Zakrzewski testified that he did so on the recommendation of one Greg Van Pelt of West Virginia Water Company, the owner of the project.[15] Zakrzewski acknowledged that on April 28 carpenter Willard Johnson quit. Zakrzewski testified that he had no recollection of a May 12 visit to the jobsite by Leroy Hunter Jr. (who, again, testified that he had gone alone to the Weston project asking for work as a cement finisher).

Zakrzewski did not dispute the testimonies of Montoney and Wainscott about how they came to be hired on May 13 or what was said before they were hired. Zakrzewski testified that he hired Montoney and Wainscott based on their persistence (they had visited the jobsite four times seeking employment before May 13) as well as their representations of their skills at form carpentry work and cement finishing. Zakrzewski agreed that both Montoney and Wainscott did good work before Wainscott quit on May 19 and before Montoney went on strike on June 3.

Zakrzewski did not dispute the testimony of Union Representatives Stanley and Williams, that on May 13 they escorted five employees to the site seeking employment and that Zakrzewski told them that Respondent would not be taking any more applications until the "Not Taking Applications" sign was turned around.

Zakrzewski testified, and records show, that on May 19 John Graham was transferred from the Murfreesboro project to the Weston project to work as a laborer at $8 per hour wage, plus $3 per hour for traveling expenses. Graham continued to work at the site at the time of the trial.

Zakrzewski denied Hoke's testimony that on May 27 Zakrzewski stated to him that Respondent would not hire union employees and that Respondent would shut the Weston project down if a union "did get on the job." Zakrzewski acknowledged only one exchange with Hoke that involved a statement about unions. Zakrzewski testified that once before June 3, at a time that Hoke, Foster, and King were acting as lead carpenters, the four men met at the end of the day to discuss the plans for the next work day. According to Zakrzewski:

> Tim Hoke asked me in the office trailer, at the end of the day, "What would 3D do if a union came to this job?"
> I told Tim Hoke I didn't know, because I didn't.

Respondent also called King who testified consistently with Zakrzewski. (Neither party called Foster to testify.) Zakrzewski further denied telling Hoke that he suspected that Montoney may have been a "spy" for the Union. Zakrzewski testified that before Montoney presented Williams' recognitional demand letter on June 3, he had no knowledge or suspicion of any prounion sympathies that Montoney may have possessed. (On the General Counsel's rebuttal, Hoke testified that King was not present when he was threatened by Zakrzewski.)

Zakrzewski did not dispute the testimonies of Montoney and Pennington about how Pennington came to the jobsite to apply on May 28. Nor did Zakrzewski dispute Pennington's testi-

[15] Zakrzewski was not asked how this recommendation came about or how Garrison came to be hired on April 22 after having applied on March 25, a date that is much more than the 15 days that Respondent contends is the maximum effectiveness of its applications.

mony that the "Not Taking Applications" sign was displayed when he came to apply and was hired.

Although Hyre was not hired as a carpenter until May 29, Zakrzewski testified that Hyre had come to the jobsite and completed an application on March 24. Hyre also came to the jobsite somewhat later inquiring about the possibility of employment, and Zakrzewski then told him that he could not be lured, but he should come back and try again later. Zakrzewski further testified that previously hired machine operator Harold Wireman had seen Hyre on one of his visits to the jobsite, and Wireman had told Zakrzewski that Wireman's wife was a good friend of Hyre's wife, and Zakrzewski further testified that Wireman told him that "he knew that Richard had worked construction before as a carpenter." Zakrzewski testified that the next time that he needed a carpenter, he told Wireman to contact Hyre and tell him to come back to the jobsite and reapply. Hyre did come and complete a second application on May 29, and he listed Wireman as his "Referral Source."

Zakrzewski did not dispute the testimonies of Union Representative Rittenhouse and laborers Mick and Elder that, also on May 29, Rittenhouse escorted Mick and Elder to the jobsite, identified himself as a union representative and asked for employment for the two laborers. Zakrzewski did not admit that this testimony was true; rather, he testified that he could recall no union representatives coming to the jobsite except Stanley and Williams.

Zakrzewski testified that McFall was hired on June 2 as a carpenter because McFall was a former employee with whom he had worked at the Bluestone project. Zakrzewski did not deny that, when he contacted McFall, he told McFall that "union men" had been coming to the Weston project to apply for work.

Zakrzewski agreed that he hired Huff as a carpenter on June 2; Zakrzewski testified that he did so as a result of the recommendation by Montoney. Zakrzewski testified that he could not remember a visit to the jobsite by Stanley on June 3 (with or without carpenter applicants Sypolt, Radford, Brouffey, and Waugh). Zakrzewski ventured that he would have remembered such a visit, if it had actually occurred, because June 3 was such an "eventful" day.

Zakrzewski did not dispute the testimonies of Montoney and Huff that on June 3 they presented the recognitional demand letter from Williams, that he told Montoney and Huff that he would need to confer with his offce in Lexington, that the employees returned to the gate area to await his response rather than go to work, and that he went to the gate area about an hour later and read the above-quoted message (that Respondent would continue to operate and that strikers would be replaced). Zakrzewski testified at one point that he heard Huff say something to him after he had read the quoted message and he had turned and had begun walking away, but he could not remember what it was (that the employees were going on an unfair labor practice strike or anything else). At another point, Zakrzewski testified that he did not hear what it was that Hoke said to him as he was walking away.

Respondent's June 3 and 4 efforts to secure strike replacements. When Zakrzewski got back to the trailer after reading the above-quoted notice to the strikers on June 3, he telephoned David Klein, Respondent's vice president for business development. Zakrzewski informed Klein that the strikers did not return to work. Klein then spoke to Donald Myers, Respondent's vice president of operations. Myers testified that he contacted all employees whom Respondent contends were permanent replacements for the June 3 strikers.

According to Meyers. after he was contacted by Klein he called the Murfreesboro project and:

> I talked to both Ken Wireman and Kendall Hoover, explained the situation that had occurred in Weston, asked them if they would be willing to transfer to Weston, and they both indicated that they would, and then they subsequently did.

Meyers did not testify to what may have been said by himself, Wireman, or Hoover regarding the possible duration of their tenure at the Weston project. Neither Wireman nor Hoover testified. Zakrzewski testified that he employed Wireman as a replacement for carpenter McFall, and he employed Hoover as a replacement for laborer Pennington.[16] Za1 Qzewski testified that Wireman was still employed at the Weston project at time of trial. Hoover, however, continued working only through June 11. Zakrzewski testified about Hoover's departure from the Weston project: "He has got a father that's pretty old and not real healthy, and they were doing some farm work, and I think it was with tobacco, I am not sure, and he asked that he go and tend to his farm and his father." According to Myers, Hoover was again working at the Murfreesboro project at time the of the trial.

Meyers further testified that on June 3 he went to Respondent's Mt. Sterling project and spoke to employees Leslie Wade and Clifford Lainhart, who ultimately became strike replacements. Myers did not, however, testify about anything that was said between him and Wade and Lainhart (in terms of prospective duration of employment at the Weston project or anything else). Lainhart did not testify; Wade, however, was called by the General Counsel. Wade testified that Myers approached him and Lainhart at the Mt. Sterling project and told them that eight employees had walked off the Weston project that day and that he wanted them to go there and work. Wade told Meyers that he could go the next day, and Lainhart said that he could go the next week. Wade testified that Meyers did not tell him or Lainhart how long their employment at the Weston project might last, and they did not ask. Wade testified that Meyers only told him that: "I would be keeping the job going." Wade did arrive at the jobsite on June 4. Zakrzewski testified that he employed Wade as a replacement for carpenter Montoney. Wade was still employed at the Weston project at the time that he testified. Lainhart arrived at the jobsite on June 9. Zakrzewski testified that he employed Lainhart as a replacement for carpenter Hoke. According to Respondent's payroll records, Lainhart continued working at the Weston project until August 1. Myers testified, "Clifford Lainhart, as I recall, was transferred to help build the chemical facility in—I believe sometime in mid to late August, that facility was completed, and he was transferred to a project in Lexington." Zakrzewski

[16] The General Counsel does not question the qualifications of any of those who were hired as replacements.

did not testify that he had hired Hoke, for whom Lainhart was the replacement, only to help build the chemical facility about which Meyers testified.

Invoking the ambiguous passive voice, Meyers testified that on June 4, "it was agreed" that Lowell Burke, a laborer at the Murfreesboro project, "could be transferred to Weston." Myers testified that he spoke to Burke, but he did not testify to what was then said (about the prospective duration of Burke's employment at the Weston project or anything else). Burke began working at the Weston project on June 9; Zakrzewski testified that he employed Burke as a replacement for laborer Garrison. According to Respondent's payroll records, Burke continued working at the Weston project until June 27. Myers testified that the Murfreesboro project had gotten behind because of weather-related problems and that Burke was transferred back there, "to help get that project out of trouble."

Also on June 4, Dennis Treadway appeared at the Weston project. Until June 4, Treadway had been the project superintendent, and ultimate supervisor, of the Bluestone project. (Zakrzewski had been the assistant project superintendent to Treadway at the Bluestone project before Zakrzewski became the project superintendent at the Weston project.) Treadway did not testify. Meyers testified that he spoke to Treadway, but he did not testify what he may have said to Treadway about the prospective duration of his employment at the Weston project or what Treadway may have said to him in return. Respondent's counsel, however, stated at the hearing that, although Treadway had been a supervisor within Section 2(11) of the Act for years at Bluestone and other of its projects, and although Treadway continued to be salaried and receive other executive benefits while working at the Weston project, he was not employed at the Weston project as a statutory supervisor. Respondent acknowledges that Treadway was employed on a "temporary" basis when he worked at the Weston project, but not "temporary" in the sense that he was employed there only for the duration of the strike. Respondent contends that Treadway was assigned to work at the Weston project only until Respondent was ready to start another project where Treadway would become superintendent; only in that sense, Respondent contends, was Treadway a "temporary" replacement. Zakrzewski testified that he used Treadway at the Weston project as a replacement for carpenter Huff. Treadway left the Weston project on June 13 when, according to Meyers, he became the manager at another of Respondent's projects that was then starting.

(Counting Treadway, Respondent contends that before the offer to return to work of June 5 it had effectively secured permanent replacements for four of the six employees who had gone on strike on June 3; the two exceptions being laborer Shearer and carpenter Hyre. Respondent further contends that the refusals of Shearer and Hyre to return to work unless all strikers were reinstated effectively made the Union's June 5 written "unconditional" offer to return to work conditional. For this reason, Respondent argues that none of the June 3 strikers had replacement rights after June 5. As well, Respondent contends that, after June 5, it permanently replaced Shearer, but, again, it does not contend that it permanently replaced Hyre.)

Respondent's transfers of Malone and Buttry. The replacement that Respondent secured for laborer Shearer was Banford Malone. Meyers testified, "Banford Malone was another one of the individuals that was working in Mt. Sterling, and it was also agreed, since Mt. Sterling was closing down, that Banford could transfer to the Weston project and subsequently did, also." Meyers did not testify about what he may have said to Malone, or what Malone may have said to him, about how long Malone's assignment to the Weston project might last. Myers also did not testify to the date that "it was agreed" that Malone would come to the Weston project; however, a project memo of Zakrzewski's indicates that it was June 6, and I shall accept that date. According to Respondent's payroll records, Malone worked at the Weston project only until August 1. Malone's home is in Kentucky. Meyers testified Malone left the Weston project after saying: "[T]his is not going to work out for me, and this is causing me too much personal hardship, to be in Weston every week, for 4 or 5 days a week, and I need to try to get transferred back closer to home, where I can save my marriage and my family." Meyers testified that Malone was then transferred to a facility of Respondent's that is nearer to his home in Kentucky.

At the time that the strike began, Mark Buttry was a heavy equipment operator at the Murfreesboro project. On June 9, Buttry was transferred to the Weston project. On June 11, Zakrzewski created a project memo which states: "Mark was transferred to replace [carpenter] Richard Hyre." Zakrzewski testified, "Mark has done some crane operator work, some general labor work, and he was made available, as a permanent replacement." As his invocation of the passive voice clearly implies, it was not Zakrzewski who contacted Buttry before his transfer to the Weston project. It may have been Meyers who contacted Buttry; but Meyers (also in the ambiguous passive voice, again) only testified that "it was agreed" that Buttry would be transferred from the Murfreesboro project to the Weston project. Meyers testified that he did speak to Buttry, but he did not testify about what may have been said between Buttry and himself about the prospective duration of Buttry's employment at the Weston project (or anything else). Buttry did not testify. Buttry operated a crane and a bulldozer at the Weston project for 1 week, from June 9–13 when, according to both Zakrzewski and Meyers, he was transferred back to the Murfreesboro project where Respondent had an unexpected need for a crane operator. Although Zakrzewski testified that Buttry "was made available as a permanent replacement," and although Zakrzewski created a project memo that Buttry replaced Hyre, Zakrzewski did not testify that heavy equipment operator Buttry replaced carpenter Hyre, permanently or otherwise. Moreover, on brief, Respondent does not contend that Buttry was a permanent replacement for Hyre. (On brief,p. 45, Respondent states only that "Mr. Buttry was assigned to fill the absence of Mr. Hyre.")

B. Credibility Resolutions and Conclusions

1. The applicants

The complaint alleges that on July 3 Respondent rejected two of the 29 union members-applicants who applied for employment at the Weston project on that date, Seders and Kyle.

By their own accounts, however, Seders and Kyle came to the jobsite without speaking to any agent of Respondent. I credit their testimonies, but the General Counsel suggests no way in which Respondent might have known that they had come there to apply for employment. The General Counsel has therefore not made a prima facie case showing that Respondent rejected Seders and Kyle for employment, lawfully or otherwise, and I shall recommend that the allegations of the complaint in respect to them be dismissed.

I further credit the testimonies of the other applicants, and the testimonies of the union representatives who accompanied them, that the union members did, in fact, come to the jobsite and apply on the dates cited above. The only serious dispute that is raised on this issue is one that Respondent premises on the testimony of Zakrzewski that he did not remember the visit to the jobsite by Stanley on June 3 and that he (Zakrzewski) believed that he would have remembered such, had it actually happened, because June 3 was such an eventful day. June 3 was an eventful day, but by that point Zakrzewski was accustomed to routinely rejecting applicants who were accompanied by union representatives, and one more instance of that phenomenon would not have been committed to Zakrzewski's memory. This is especially true where the rejection came about the same time as an event of enormous implications, the first strike. I believe that, in Zakrzewski's memory, Stanley's presentation of the four carpenters on June 3 was eclipsed by the strike of that date. Finally, I do not believe that the four carpenters, as well as Stanley, were lying about their applications of June 3. Accordingly, I find that Stanley did present four carpenters for application on June 3, as Stanley and those carpenters testified.

2. Stanley's list of carpenters

Despite Zakrzewski's denial, I find that on March 31, when Stanley came to the jobsite and was in the process of presenting eight carpenters for employment, and Stanley asked Zakrzewski if he would use his list of eight carpenters after 15 days, Zakrzewski replied that he would. Simply stated, I do not believe that Zakrzewski, who had no office help, wanted any more mass applications, and that is why he agreed to keep the list and promised to refer to it later.

I would not, however, attach the importance to Zakrzewski's response that the General Counsel does. The only applications to which Zakrzewski's reply to Stanley could have had relevance are those of Johnson, Morrison, and McCauley; they are the only applicants who testified that they heard Zakrzewski's response to Stanley, and no other applicant testified that he or she ever heard of it. Also, no applicant testified that he or she failed to return to the jobsite and reapply because of Zakrzewski's statement to Stanley. Also, Zakrzewski did not testify that he refused to employ any of the eight carpenters (or any other alleged discriminatee-applicant) because they did not return after 15 days. Finally on this point, although Zakrzewski told Stanley that he would use the list of carpenters after 15 days, he did not tell Stanley that he would abjure Respondent's established hiring priorities and give the carpenters priority over current or past employees, or employees who came recommended by them.

3. Zakrzewski's threats

I fully credit Hoke's testimony that on May 27 Zakrzewski told him that he thought that Montoney was a union spy, that Respondent would not hire prounion employees because they might foment employee discussions about higher wages, and that Respondent would shut the Weston project down if the employees selected the Union as its collective-bargaining representative. Respondent argues that Hoke is an alleged discriminatee and was testifying only out of self-interest. Hoke's testimony about Zakrzewski's threats, however, adds nothing to his own case. The claims asserted on behalf of Hoke are those of a striker who had not been permanently replaced. Under the authorities cited infra, the animus that is revealed by Hoke's testimony is not even relevant to such claims. More importantly, Hoke had a far more credible demeanor than either Zakrzewski or King, and his testimony had the ring of truth. I further believe that King was not present at the time that Zakrzewski made these statements to Hoke. I therefore find, and conclude that Respondent, by Zakrzewski, in violation of Section 8(a)(1), threatened its employees by telling them that it would not hire union members and that it would shutdown the Weston project if its employees selected the Union as their collective-bargaining representative.

4. Pre-June 3 hiring allegations

The complaint alleges that Respondent unlawfully refused to hire or consider a total of 29 applicants because of their union memberships. I have previously disposed of the allegations that Respondent unlawfully refused to employ Seders and Kyle when they applied for work on July 3. The remaining 27 applicants (the 27 alleged discriminatees) applied for work from March 31 through June 3. The General Counsel contends that Respondent unlawfully refused to hire the 27 alleged discriminatees following June 3, but the General Counsel first contends that Respondent also unlawfully refused to hire them on and before June 3.

(The General Counsel further contends that Respondent's pre-June 3 refusals to hire union members was the sole cause of the strike of that date. For this reason I shall first dispose of the allegations that Respondent unlawfully refused-to-hire union members on or before June 3, and then I shall address the issue of possible causation of the June 3 strike. After that, I shall address the issues raised by the Union's June 5 offer to return to work, Respondent's response to that offer, the June 5 strike, the Union's November 7 offer to return to work, and Respondent's responses to that offer. After all of that, I shall address the General Counsel's contention that Respondent unlawfully continued to refuse to hire or consider union members following June 3.)

In *Wright Line*,[17] the Board sets forth the test to be employed in cases where the General Counsel alleges 8(a)(l) and (3) violations that turn on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support an inference that protected conduct was a motivating factor in

[17] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).

the employer's action. Specifically in cases where unlawful refusals to hire employees are alleged, the required elements of a prima facie showing are as follows: (1) an application by each alleged discriminatee; (2) refusals to hire each alleged discriminatee; (3) a showing that each alleged discriminatee was a union member or sympathizer; (4) a showing that the employer knew of or suspected such membership or sympathy; and (5) proof of a degree of animus against such membership or sympathy suffcient to support an inference that protected conduct was a motivating factor in the employer's action in refusing to hire each alleged discriminatee.[18] As in any case that turns on employer motivation, if the General Counsel does establish a prima facie case the burden then shifts to the employer to demonstrate that it would have taken the same action notwithstanding the known protected conduct of the alleged discriminatees.

It is uncontested that each of the 27 alleged discriminatees was a member of a union, and I have found that each of them applied for work with Respondent from March 31 through June 3. Of these 27, 26 were accompanied by union representatives who identified themselves as such. The 27th, Leroy Hunter Jr., was credible in his testimony that on May 12 he appeared at the jobsite, identified himself to Zakrzewski as a "union concrete finisher" and told Zakrzewski that he was seeking work as a concrete finisher. The accompaniment by union representatives in the former cases, and the express statement of Hunter in the latter, provide the required element of knowledge of the 27 alleged discriminatees' union memberships.[19] It being undisputed that Respondent did refuse to hire all of the 27 alleged discriminatees, the only element of the General Counsel's prima facie case that remains to be demonstrated here is that of animus.

There are many factors that cause me to conclude that Respondent did possess a degree of animus which would be sufficient to support an inference of unlawful discrimination. (1) I would find that Zakrzewski's threats to Hoke, alone, constitute evidence of animus sufficient to conclude that the General Counsel has presented a prima facie case of unlawful discrimination against all 27 of the alleged discriminatees.[20] Zakrzewski told Hoke that Respondent would not hire union members because they would talk to other employees about securing higher wages. Whatever the rationalization, Zakrzewski thereby told Hoke that he would not (knowingly) hire union members simply because they were union members. A better illustration of animus sufficient to support an inference that Respondent would refuse to hire union members for proscribed reasons can hardly be imagined. Moreover, Zakrzewski additionally threatened Hoke that Respondent would shutdown the Weston project if the employees selected a union as their collective-bargaining representative; as the Supreme Court has held, such a threat is the most severe that an employer can make against employees' exercises of their rights under the Act.[21] (2) It is also clear enough that Zakrzewski was using the "Not Taking Applications" sign as a method of hindering, if not excluding altogether, prounion applicants. Zakrzewski testified that he created the "Not Taking Applications" sign because taking applications took too much of his time. This testimony was undoubtedly false. As Zakrzewski demonstrated so many times when union-member applicants approached him even though the "Not Taking Applications" sign was displayed, all he had to say to any undesired applicants was that he was "not taking applications," and they would go away. The real reason for Zakrzewski's manipulation of the sign is plainly disclosed in Wainscott's undenied testimony that, when he called Zakrzewski on May 12, and Zakrzewski indicated that he wished to hire Wainscott the next day, Zakrzewski additionally asked Wainscott if he could come early in the morning, "where he would not have to take the sign down for hiring, and that he couldn't get into trouble that way for new hires." It would take little imagination to divine what sort of "trouble" it was that Zakrzewski feared if someone saw Montoney and Wainscott coming to the jobsite and getting hired while the "Not Taking Applications" sign was being displayed. No exercise of imagination, however, is required. On May 8, according to the undenied testimony of Montoney, he and Wainscott went to the jobsite when the "Not Taking Applications" side of Zakrzewski's sign was displayed to the road. Instead of telling Montoney and Wamscott to come back only when the "Not Taking Applications" side of the sign was not displayed, as he had told those whom he had known to be union members, Zakrzewski told Montoney and Wainscott that he wished that they had some sort of referral because, "the labor laws have him in a 'fucking bind' about hiring people who aren't referrals, because he would have to open it up to everybody then." Quite apparently, "everybody" was anybody who was prounion; there is no other logical reason for Zakrzewski's reference to the "labor laws." (3) As is further undisputed, when on May 27 Zakrzewski told Montoney that he wanted to add a carpenter-crew, he told Montoney to recommend four carpenters to him, "so that he did not have to open up the applications to hiring off the street." According to this record, the only carpenters who had come "off the street" were those who had been brought to the jobsite by Union Representative Stanley. (4) Another element requiring a conclusion that a prima facie case has been presented lies in a contrast of the number of known union members hired against the number of nonknown union members hired. From the first overt union application on March 31 through the end of June 2, 15 employees began working at the Weston project; to wit: Sandlin, Willard Johnson, Shearer, King, Bragg, Richmond, Hoke, Garrison, Montoney, Wainscott, John Graham, Hyre, Pennington, Huff, and McFall. Not one of these employees, however, was known to Zakrzewski to be a union member.[22] Even given that Respondent had made prior arrangements with Sandlin and Johnson, a

[18] See *Hoboken Shipyards,* 275 NLRB 1507, 1514 (1985), citing *Big E's Foodland,* 242 NLRB 963, 968 (1979).

[19] *Refrigeration Systems Co.,* 321 NLRB 1085, 1093 (1996).

[20] See *GM Electrics,* 323 NLRB 125 (1997), where sufficient evidence of animus was found in an agent's otherwise unexplained comment which reasonably would have caused applicants to believe "that union status may not be favorably linked to [the employer's] hiring decisions."

[21] See *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969).

[22] Zakrzewski was unaware at the times that he hired them that Montoney and Huff were paid union organizers and that Wainscott was a union member.

ratio of "only" 13-to-0 is indicative of a mind-set that was disposed to cause that which ensued, no known union members on the job.[23] (5) Finally, Hoke testified without contradiction that during the third time that Zakrzewski called and asked him to come to work at the Weston project, Zakrzewski mentioned that "some union men had come by and tried to fill out an application." Zakrzewski would have had no reason to make such reference if he did not want to convey the impression that Hoke's employment at the Weston project could help him avoid hiring "Union men."

The elements of a prima facie case having been established, under *Wright Line* the burden shifts to Respondent to show that it would have refused to hire the 27 union-member applicants even absent their known-union memberships. Therefore, Respondent's defenses must be examined.[24]

The Board will conclude that Respondent has successfully defended the pre-June 3 refusal-to-hire allegations if it has shown that, even absent its animus toward the known-union memberships of the 27 alleged discriminatees, it would have hired other employees during that period instead of the alleged discriminatees.[25] Again, there were 15 of those other employees, and Respondent has successfully defended the pre-June 3 refusal-to-hire and refusal-to-consider allegations if it has shown that it would have hired those other employees, instead of the alleged discriminatee-applicants, for legitimate reasons.

(1–2) Although they did not report to the Weston project until April, Respondent has established that Sandlin and Willard Johnson were hired for the Weston project well before March 31, the date when the first alleged discriminatees applied Zakrzewski's testimony about his antecedent agreement with Johnson, which testimony was corroborated by Zakrzewski's project memo; was credible. Also, Sandlin was even being carried on the project's payroll by March 24. Therefore, I would conclude that Respondent's hirings of Sandlin and Johnson were for legitimate reasons.

(3–5) I further find that Respondent's pre-June 3 hirings of Montoney, Wainscott, and Huff were for legitimate reasons. Zakrzewski testified that he hired Montoney and Wainscott as carpenters and cement finishers because, although they had no previous experience with Respondent, and they had no one to recommend them, they were persistent in their efforts to obtain employment, having come to the jobsite four times before being hired. Indeed, Montoney and Wainscott applied, and reapplied, even when the "Not Taking Applications" sign was displayed. None of the alleged discriminatees showed such persistence. The Board has held in at least one case that persistence is a valid consideration for employers to apply,[26] and the General Counsel makes no argument that such persistence was not a valid consideration in the cases of Montoney and Wainscott.[27] Also, the Board has held that recommendations by current employees are a valid consideration,[28] and the General Counsel does not challenge Zakrzewski's testimony that he hired Huff on the recommendation of Montoney who had been a good employee himself.

(6–10) Also I find that Respondent's pre-June 3 hirings of carpenters McFall, King, and Hoke and cement finishers Bragg and Richmond were for legitimate reasons. The Board has recognized the validity of an employer's preferring to hire employees with whom it has had experience.[29] King was a current employee whom Respondent transferred from another project; Hoke, Bragg, and Richmond were former employees with whom Zakrzewski had worked. Even Montoney admitted that when he and Wainscott applied for work on March 24 and May 8, Zakrzewski told him that Respondent preferred to employ current and former employees before hiring "strangers." Moreover, as stated before, even though Zakrzewski told Union Representative Stanley that he would use Stanley's list of carpenters for hiring purposes, and even though Zakrzewski accepted a list of bricklayers from Williams, there is no reason to believe, in either case, that Zakrzewski was thereby promising to use unknown applicants before he could find current or former employees to transfer to the jobsite.

(11–14) Also I find that Respondent's pre-June 3 hirings of laborers Shearer, Garrison, John Graham, and Pennington were for legitimate reasons, Shearer lived across the road, he was willing to work for $6 per hour, and Respondent had no other applicants for a laborer's position at the time that Shearer was hired. Garrison had the recommendation of Respondent's client (West Virginia Water Company). Graham was apparently available for transfer from another project. Pennington, like Huff was recommended by current employee Montoney. I would additionally point out that Shearer, Garrison, Graham, and Pennington all were hired by May 28. The only alleged discriminatees who applied for laborers' positions were Mick and Elder, but they did not apply until May 29. All of the union members who applied before then were carpenters or other skilled tradesmen who were introduced to Zakrzewski as such by their representatives, and there is no testimony that they or their union representatives told Zakrzewski that they would accept laborers' positions. Even if they had done so, Zakrzewski credibly testified that he would not hire skilled tradesmen to work as laborers because they quickly became disgruntled and left.

[23] The import of such a ratio (15 to 0) is discussed by the Board in *Continental Radiator Corp.,* 283 NLRB 234 (1987), and *San Angelo Packing Co.,* 163 NLRB 842 (1967).

[24] This examination must be done without any assistance from the General Counsel. Although counsel's brief contains a thorough exposition of the prima facie case, it does not address Respondent's defenses, and it makes no attempt to distinguish the cases that may support those defenses. Instead, the brief merely states (at p. 27): "Respondent has failed to meet its *Wright Line* burden." Then the General Counsel goes on to other topics.

[25] See, for example, *Fluor Daniel, Inc.,* 304 NLRB 970 (1991), where the Board questioned only the employer's filling of 13 of 81 vacancies. This was because the employer had demonstrated that it filled the other 68 vacancies according to the valid consideration of having prior employment experience with the employer.

[26] *Irwin Industries,* 325 NLRB 796 (1998).

[27] Again, the General Counsel makes no arguments why any of Respondent's defenses should be rejected; the General Counsel only states that they should be.

[28] See *Belfance Electric*, 319 NLRB 945 (1995).

[29] See Fluor *Daniel, Inc*., supra.

(15) Finally, Zakrzewski testified that he hired Hyre based, in part, on the recommendation of operator Harold Wireman. This reason is not without its suspicions; Wireman had not known Hyre and could not have known whether Hyre was a good worker or bad; the only basis for Hyre's recommendation was that Wireman's wife knew Hyre's wife and from that source Wireman had learned that Hyre was a carpenter. Nevertheless, even Montoney admitted that Zakrzewski told him well before June 3 that Respondent preferred employees who had references from anyone on the job; indeed, Montoney testified that he did not invite Shearer and Hyre to the June 2 union meeting because he did not know who "on the job" (Montoney's words, but Respondent's professed hiring priority) had recommended them to Zakrzewski. Moreover, the Board has found validity even in such attenuated sources of recommendations,[30] and my suspicions are not enough to find in the hiring of carpenter Hyre evidence of discrimination against any of the alleged discriminatees before June 3.

That is, Respondent has shown that before June 3 it would have hired Sandlin, Johnson, Shearer, King, Bragg, Richmond, Hoke, Garrison, Montoney, Wainscott, Graham, Hyre, Pennington, Huff, and McFall, rather than any of the 27 alleged discriminatees, even absent the animus that it possessed.[31] I therefore find and conclude that Respondent has not violated Section 8(a)(3) by refusing to hire, or consider, the 27 union members-applicants on or before June 3.[32]

5. Causation of the June 3 strike

Because the General Counsel argues that the sole cause for the June 3 strike was Respondent's refusals to hire union members before that date,[33] and because I have rejected the General Counsel's contention that such unfair labor practices occurred, it must be concluded that the June 3 strike was not caused by Respondent's unfair labor practices. For possible purposes of review, however, I am constrained to note that, even if Respondent had unlawfully refused to hire or consider union members before June 3, I would not find that such unfair labor practices, in any way, caused the June 3 strike.

Counsel for the General Counsel carefully steered the testimonies of Montoney and Huff around the June 2 union meeting to ask only what happened before and after it. Also, the General Counsel did not ask any of the "about five employees" (Montoney's words) who were at the meeting what had happened there. Yet, if the employees ever had a meeting where they decided to strike on June 3, the June 2 meeting was most probably it. If Respondent's refusals to hire union members had been discussed at that meeting, as a reason for striking or anything else, the General Counsel assuredly would have offered evidence to that effect. Also, if the employees met at some other point and agreed to strike because Respondent was refusing to hire union members, the General Counsel assuredly would have offered evidence to that effect. Such is exactly the kind of evidence that the Board looks to when deciding the intent of strikers; conversely, the Board has firmly stated that it will not rely on the type of testimony that the General Counsel did offer. As stated in *F. L. Thorpe & Co.*, 315 NLRB 147, 150 fn. 8 (1994):

> For the foregoing reasons, we would admit testimony of an employee's subjective reasons for striking, as *expressed by the employee at the time of the relevant events.* Further, it is suffcient that the employee expressed the thought that he/she struck because of a given action by the employer. It is not necessary that the employee express the view that the action was unlawful. Finally, we would not admit testimony of an employee's subjective reasons for striking, as asserted for the first time at the hearing in the unfair labor practice case. (Emphasis original.)

The requirement that the General Counsel introduce evidence of employees' expressions "at the time of the relevant events" is a minimal one, especially since employer representatives are seldom present when such expressions are made. Except for the testimonies of Montoney and Huff about what happened *before and after* the June 2 union meeting, however, the General Counsel offered only the type of evidence that the Board rejected in Thorpe—the employees' "subjective reasons for striking, as asserted for the first time at the hearing."[34] As far as the testimonies of Montoney and Huff is concerned, I must note that, as stated by the Board in *C-Line Express,* 292 NLRB 638 (1989), as it quotes *Soule Glass Co. v. NLRB*, 652 F.2d 1055 at 1080 (1st Cir. 1980):

> Applying objective criteria, the Board and reviewing court may properly consider the probable impact of the type of unfair labor practice in question on reasonable strikers in the relevant context. Applying subjective criteria, the Board and court may give substantial weight to the strikers' own characterization of their motive for continuing to strike after the unfair labor practice . . . . However, in examining the union's characterization of the purpose of the strike, the Board and the court must be wary of self-serving rhetoric of sophisticated

[30] See *Beljance Electric,* supra, where one employee was hired because the employer only knew him to have been a contractor and he was a member of the employer's church.

[31] In addition to the evidence that I have mentioned in the immediately preceding paragraphs, I also note that, according to R. Exh. 8 and Zakrzewski's credible testimony, of the 15 employees whom the General Counsel contends were unlawfully preferred to the 27 alleged discriminatees, Zakrzewski proposed the following eight for hire at the Weston project well before the alleged discriminatees began applying for work on March 31: John Graham, McFall, King, Hoke, Bragg, Richmond, Sandlin, and Willard Johnson.

[32] Cf. *M & M Electric Co.,* 323 NLRB 361 (1997), where a violation was found because, as well as giving hiring preferences to past employees, the employer accepted recommendations only from other non-union contractors. Employers' exchanging such recommendations among themselves is, of course, akin to a blacklisting.

[33] Again, the General Counsel does not contend that Zakrzewski's May 27 threats to Hoke were a factor in causing the June 3 strike. (Also, I found incredible the offered employee testimony that the threats were a factor in causing them to strike.)

[34] I credit the testimonies of Montoney and Huff that on June 3 Huff told Zakrzewski that the employees were on an unfair labor practice strike. Huff, however, did not tell Zakrzewski what the unfair labor practice was. As I discuss infra, it is most probable that Montoney and Huff were then claiming a violation of Sec. 8(a)(5), not Sec. 8(a)(3).

union officials and members inconsistent with the true factual context.

Although *C-Line Express* was a strike-conversion situation, the principle is the same, and paid union officials Montoney and Huff (especially Montoney) appeared to me to be exactly the type of union officials that the Board had in mind.

That is, the General Counsel presented no probative evidence that the June 3 strike was caused, in whole or in part, by Respondent's hiring practices (lawful or otherwise). Indeed, as Respondent contends, the June 3 strike objective was purely recognitional, as was made clear by the evidence that was probative.

Montoney had collected five union authorization cards by June 2. Then he called on Williams to compose a letter demanding recognition (and nothing else, like lawful hiring practices). Then he got McFall, Shearer, and Hyre to sign more authorization cards on June 3. Then possessing an apparent card-majority of the 14 employees that Respondent then employed at the Weston project, Montoney went into the trailer with Huff and requested recognition. Montoney and Huff then said nothing to Zakrzewski of Respondent's alleged unfair labor practices, but they did say that Williams was waiting to accept recognition and begin negotiations. According to Montoney's testimony on direct examination, when Zakrzewski asked Montoney if the employees would go to work, Montoney replied that the employees would wait at the gate "until he started negotiating with Rick Williams." On cross-examination, Montoney rearmed this testimony by testifying that he told Zakrzewski that he would not ask the employees to return to work until Respondent gave them an answer to the question that he had raised with Zakrzewski; and that question was, further according to Montoney: "Whether he would start negotiations with Rick Williams, because if he would, that would have resolved the issues that we had with 3D." In no way, however, did Montoney testify that he told Zakrzewski that the employees would go back to work if Respondent agreed to hire union members. That is, Montoney premised the end of the strike *solely* on Respondent's grant of recognition, not a cessation of Respondent's alleged unlawful refusals to hire union members.

I further do not believe the testimonies of Montoney and Stanley that on the evening of June 2 Montoney called Stanley and asked him to prepare picket signs for the employees because they were going to begin a strike the next day over Respondent's refusals to hire union members. I do not believe that Montoney and Stanley even had a June 2 conversation in which a potential June 3 strike was mentioned. The strikers did not have any picket signs until June 4. If Stanley had accepted responsibility for making some picket signs on June 2, he assuredly would have brought at least one sign with him when he arrived at the jobsite on June 3 (or he would have been asked on direct examination why he had not done so). Not only did Stanley not bring any picket signs with him on June 3 when he did arrive at the jobsite on that date and saw that the employees were not working, he had to ask Montoney what was "going on." Obviously, if Stanley had possessed any idea that the employees were going to begin some type of strike on June 3, he would not have asked this question. Again, the picket signs did not arrive at the jobsite until June 4, and it is perfectly clear to me that, if it was Montoney who asked Stanley to prepare the signs, he did so at some point on June 3 or 4, not June 2.[35]

In rejecting the General Counsel's contention that the June 3 strike was caused, in some way, by Respondent's refusals to hire union members before that date, I must further point out that Montoney called Williams on the evening of June 2, but he did not report to Williams that the employees had any intention of going on strike because of Respondent's hiring practices; both Williams and Montoney testified that Montoney told Williams that the employees were planning to go on strike for recognition. If there had been any objective other than recognition, Montoney assuredly would have told Williams who, after all was the chief executive of the Union.

Huff was not asked at trial for his subjective reasons for striking on June 3, but Montoney and the other strikers were. Each of the employees except Montoney displayed an incredible demeanor when testifying that they had struck because Respondent had given jobs to them instead of the union members. That is, even though I know that the Board will not accept as probative evidence the bare, subjective, *after the fact,* trial testimonies of the strikers' intent,[36] I am constrained to point out that I consider the strikers' testimonies on this point to be nothing short of a compendium of scripted lies.[37]

I feel the same way about the testimonies of Montoney and Stanley that the General Counsel offered to prove that the employees struck because of Respondent's hiring practices. Montoney and Stanley testified that they made plans for the June 3 strike during the evening of June 2. When Stanley arrived at the jobsite on June 3, however, he asked Montoney, "What's going on?" When given the opportunity to explain why, if he had just the night before planned the strike with Montoney, he had asked this question, Stanley foundered and changed the subject. Moreover, that Stanley was lying about his knowledge of the circumstances of the June 3 strike became pellucid when he testified that, in response to his question to Montoney: "Well, they just said that they was thinking about going out on an unfair labor practice strike; that 3D had not—had not quit discriminating against union people." What equanimity Stanley had appeared to possess before that point degenerated as he gave this answer. Even if Stanley had remained as smooth as Montoney, however, his pause and awk-

[35] Although Montoney was able to testify on his own that the critical telephone conversation with Stanley occurred on June 2, the General Counsel apparently felt constrained to lead Stanley directly to that false date:

Q. I would like to direct your attention now to June 2nd of 1997. Did you have a telephone conversation with Steve Montoney during the evening of June 2, 1997?

A. Yes, I did.

Moreover, before doing this, the General Counsel abandoned chronology in his presentation to first ask Stanley (in leading fashion) if he had not brought the last carpenter-applicants to the jobsite on the false date of June 4. Obviously, counsel for the General Counsel did not want Stanley being asked about July 3.

[36] See *F. L. Thorpe,* supra.

[37] My conclusion is fortified by Hoke's answer on cross-examination that, had Zakrzewski agreed just to talk to Williams, "We were going to go to work."

ward retrenching to invoke the double negative form "had not quit discriminating against" was a clear demonstration that Montoney had told Stanley on June 3 that the employees were striking because Respondent "had not" done something else; to wit: granted recognition.

Finally, Hoke testified that on June 5, when he went to the jobsite office to collect his pay check, Zakrzewski asked him why he had gone on strike. Hoke testified that he replied to Zakrzewski that it was because Respondent would not hire union members. On brief, for the first time, the General Counsel moves for a finding and conclusion that Zakrzewski's question constitutes an interrogation in violation of Section 8(a)(1), and the General Counsel further contends that Hoke's answer to Zakrzewski constitutes objective evidence of the reason for the strike. Very possibly because the allegation was not included in the complaint or even suggested at trial, Zakrzewski was not asked for his version of the incident, and the matter was therefore not litigated. Moreover, even if the General Counsel could effectively raise the allegation now, there is no evidence of possible coercive impact in Zakrzewski's question, especially since it is not clear whether the question occurred before or after the June 5 offer to return to work. Also, Hoke's alleged response to Zakrzewski hardly proves that the June 3 strike's objective was something other than recognitional. Hoke most probably came to Zakrzewski's office after the June 5 offer to return to work. Hoke's testimony, therefore, was nothing but another *after the fact,* completely self-serving, statement of motivation which hardly overcomes all the probative evidence that the June 3 strike was purely for a recognitional objective.

6. Replacements for the economic strikers

A recognitional strike is, of course, an economic strike. In *NLRB v. Mackay Radio & Telegraph Co*., 304 U.S. 333 (1938), the Supreme Court held that an employer has no duty to reinstate economic strikers whom it has permanently replaced, even if those strikers have made an unconditional offer to return to work. Conversely, the Court in *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375 (1967), held that, unless it has permanently replaced them, an employer violates Section 8(a)(3) if he fails to offer reinstatement to economic strikers who have made an unconditional offer to return to work.

Respondent first contends that although the Union's written June 5 offer was facially unconditional it became conditional when Shearer and Hyre conditioned their returns on Respondent's offering reinstatement to the other strikers. Respondent cites *H. & F. Binch Co v. NLRB,* 456 F.2d 357 (2d Cir. 1972), as authority for the proposition that an individual striker's response can qualify a union's preceding unconditional offer to return to work that has been made on behalf of all strikers. In *Birch,* however, the union's written offer to return to work bore an express condition on its face; it proposed to the employer an end of a strike: "provided you agree to take everyone back."[38] Moreover, the condition that all strikers be offered reinstatement was placed by, and for, Shearer and Hyre only. Those two individuals had no authority to speak for the other strikers, and they did not purport to do so. Even if Shearer and Hyre had possessed authority to speak for Montoney, Huff, Pennington, Garrison, Hoke, and McFall, the Board has held that the reasons that strikers may decline valid reinstatement offers may be examined only after valid offers are made to them.[39] Again, in response to the Union's June 5 offer to return to work, Respondent made no offer of reinstatement (valid or otherwise) to Montoney, Huff Pennington, Garrison, Hoke, or McFall. That is, neither the Union nor the employees conditioned the June 5 offer to return to work to the extent that it had been made on behalf of Montoney, Huff, Pennington, Garrison, Hoke, and McFall. Respondent accordingly had a duty to offer reinstatement to those six employees unless it had permanently replaced them. Therefore, the next issue to be addressed is whether the replacements for these six employees may be considered to have been "permanent" under the law.

The General Counsel is not required to prove that the replacements which Respondent secured for the June 3 strikers were temporary. The law is that all replacements for economic strikers are presumptively temporary employees, and the burden is on the employer to "show a mutual understanding between itself and the replacements that they are permanent.[40] Respondent contends that Montoney, Huff, Pennington, Garrison, Hoke, and McFall were permanently replaced by, respectively, Wade, Treadway, Hoover, Burke, Lainhart, and Kenneth Wireman. Respondent further contends that it has overcome the presumption that the replacements were hired on a temporary basis. In so doing, Respondent relies solely on the testimonies of Zakrzewski and Myers.

Meyers testified that he secured permanent replacements for Montoney, Huff, Pennington, Garrison, Hoke, and Fall by transferring Wade, Treadway, Hoover, Burke, Lainhart, and Kenneth Wireman to the Weston project from other of its projects. It is clear enough that transferred employees may serve as permanent replacements just as newly hired employees may so serve. Indeed, in *Mackay, Radio* the Supreme Court treated transferred employees as "hired" employees and found that they did effectively serve as permanent replacements. In so doing, however, the Court noted, at 346, that the employer had given the transferred employees assurances that, ". . . if they so desired their places might be permanent . . .''. Meyers testified that he intended that the replacements would be permanent

[38] I am disappointed by Respondent's statement on Br. p. 57, that in *Binch* "The only evidence as to the striker's (sic) intent was the testimony of one striker who testified that." In *Binch,* however, the testimony of the striker referred to by the court (one Joan Shippe) was not the "only evidence" of the strikers' intent. The court made this clear by quoting in its first footnote, in capital letters, the *documentary* evidence that was the union's conditional offer. I am further constrained to note that to achieve its misrepresentation Respondent purposely wrenches the language of the court (456 F.2d at 364) that: "The only *testimony* bearing on the strikers' intention, that of Joan Shippe on examination by the General Counsel, was that."

[39] *Consolidated Freightways,* 290 NLRB 771 (1988), enfd. 892 F.2d 1052 (D.C. Cir. 1989).

[40] *Hansen Bros. Enterprises,* 279 NLRB 741 (1986), enfd. mem. 812 F.2d 1443 (D.C. Cir. 1987), cert. denied 484 U.S. 845 (1987). See also *Associated Grocers*, 253 NLRB 31 (1980), affd. mem. sub nom. *Transport & Delivery Drivers Local 104 v. NLRB,* 672 F.2d 897 (D.C. Cir 1981), cert. denied 459 U.S. 825 (1982).

employees at the Weston project, but that bare intention is irrelevant.[41] The issue in this case is whether Meyers actually gave, and the replacements actually accepted, such assurances, or equivalent assurances at the time of hire,[42] or at least at some point before the strikers unconditionally offered to return to work.[43] Therefore, the Board must examine Respondent's evidence of what assurances it tendered to the six replacements and which of those assurances were accepted by the replacements.

a. Treadway

According to abundant authority,[44] the burden of proving that an individual is a supervisor within Section 2(11) of the Act rest on the party advancing the proposition. The General Counsel contends that Treadway was a supervisor at the Weston project, but he offered no evidence that Treadway possessed any supervisory authority while he worked there. Therefore, even though Treadway received executive benefits while he worked at the Weston project, and even though he was a supervisor before and after he worked there, I necessarily find and conclude that Treadway was not a supervisor at the Weston project. The issue remains, however, whether as an employee Treadway was a permanent replacement.

Myers testified that on June 4 Treadway was hired[45] as a replacement for carpenter Huff. It is undisputed that Meyers did not tell Treadway that he could stay at the Weston project as long as he so desired; Myers apparently told Treadway that he could stay at the Weston project only until Respondent began a project that needed him more as a superintendent.[46] It is further apparent that Treadway agreed to that condition because he left as soon as another project was available for him to superintend (which turned out to be only 10 days later). Respondent contends that it has overcome the presumption that Treadway's employment at the Weston project was temporary because the term "temporary" can only mean that the employer and the replacement have agreed that the employee will leave the job as soon as the strike is over. The cases that are cited by Respondent as support for this proposition, however, hold no such thing. The Board in *Solar Turbines,* 302 NLRB 14 (1991), noted that the replacements there in issue were subject to a drug test and a probationary period, but it specifically noted that: "When hired they were assured that they would retain their jobs not for a period of limited duration but indefinitely, provided only they proved themselves qualified." In *Target Rock Corp*., 324 NLRB 373 (1997), the Board held that "there is a substantial showing that the replacements did not understand that they were hired as permanent employees and that the Respondent did not intend for them to be so." The concurring opinion in *Target Rock,* on which Respondent specifically relies, agreed that "Respondent has not established that the replacements involved here were 'permanent replacements' for the strikers." Neither the Board in *Solar Turbines,* nor the concurring opinion in *Target Rock,* concluded that the only strike-replacement hiring agreement that can be held to be temporary is one that requires that employment of the replacement will end at the termination of a strike.

It seems only logical to conclude, as I do, that an agreement that employment is temporary on *any* basis is not an agreement that the employment is "permanent" within the meaning of *Mackay Radio* or any of its progeny. At any rate, unlike the circumstances in *Mackay,* Respondent and Treadway did not agree that Treadway could continue working as a carpenter as long as he "so desired." (Again, at most they agreed that Treadway would work at the Weston project until Respondent needed him more elsewhere.) Absent evidence of such agreement, it must be held that Treadway was hired at the Weston project only as a temporary employee. Respondent's having failed to rebut the presumption that Treadway's employment at the Weston project was temporary, I necessarily find and conclude that it violated Section 8(a)(3) by refusing to reinstate Huff on the Union's June 5 unconditional offer to return to work.

b. Lainhart

Myers testified that on June 4 Lainhart was hired as a replacement for Hoke. Myers' testimony reveals that he did not tell Lainhart that he could stay at the Weston project as long as he so desired; Myers, it is apparent, told Lainhart that he could stay at the Weston project until a certain "chemical facility" was completed, because that is what happened. That is, when the chemical facility was completed, Lainhart was removed from the Weston project. In these circumstances it must be concluded that Lainhart was transferred to the Weston project as only a temporary replacement. Respondent's having failed to rebut the presumption that Lainhart's employment at the Weston project was temporary, I necessarily find and conclude that it violated Section 8(a)(3) by refusing to reinstate Hoke on the Union's June 5 unconditional offer to return to work.

c. Burke

Myers testified that on June 4 Burke was hired as a replacement for Garrison. Myers did not testify to what he said to Burke about duration of his prospective tenure at the Weston project, and Burke did not testify at all. Burke stayed at the Weston project for only 2 weeks when, according to Myers, he was transferred back to the Murfreesboro project "to help get that project out of trouble." If Myers' testimony about how Burke happened to leave the Weston project (after only 2 weeks) had been credible, I would conclude that Burke, like Treadway, was transferred to the Weston project for only as long as Respondent did not need him more elsewhere. On that basis, alone, I would find that Burke was only a temporary

[41] See *Associated Grocers,* supra at 32, where the Board held that an employer's burden under *Mackay is* not satisfied merely by proof of what was "in the mind" of the individual who contacted strike replacements on behalf of the employer.

[42] See, e.g., W. C. *McQuaide, Inc.,* 270 NLRB 1197 (1984).

[43] See, e.g., *Gibson Greetings, Inc.,* 53 F.3d 385, 390 (D.C. Cir. 1995).

[44] See, *e.g., Soil Engineering Co.,* 269 NLRB 55 (1984).

[45] As did the Supreme Court in *Mackay, I* hereby use the term "hired" to denote a transfer between Respondent's operations.

[46] I must use the term "apparently" because, although Meyers testified that he spoke to all of the replacements about transferring to the Weston project, he did not testify what he, or they, said when he did so. The closest that Meyers came was to invoke the passive voice to say such as "it was agreed that he would be transferred."

replacement. I do not, however, credit Myers' testimony in regard to the circumstances under which Burke left the Weston project. Burke was not usually employed as a superintendent (like Treadway), or even a low-level supervisor; Burke was an unskilled laborer. I simply do not believe that he was transferred back to the Murfreesboro project to get it "out of trouble." This reason being false, it is reasonable to conclude, as I do, that the true reason was an unlawful one that Respondent wished to conceal.[47] I conclude that Burke came to the Weston project, and stayed there for only 2 weeks, because he had come there as a temporary replacement in the first place. Respondent's having failed to rebut the presumption that Burke's employment at the Weston project was temporary, I necessarily find and conclude that it violated Section 8(a)(3) by refusing to reinstate Garrison on the Union's June 5 unconditional offer to return to work.

d. Hoover

Myers testified that he hired Hoover as a permanent replacement, and Zakrzewski testified that he used Hoover as a replacement for Pennington. Myers did not testify what offer he may have made to Hoover. One could speculate that, before he was transferred to the Weston project, Hoover was told that he could stay there as long as he pleased because, according to Zakrzewski, Hoover left to help his father on his farm, a purely personal reason. That may have been the way things turned out, but it does not prove the original understanding between Myers and Hoover. Again, it was Respondent's burden to prove the point, and I find that it failed to do so. I find that Hoover was hired as a temporary replacement. Respondent's having failed to rebut the presumption that Hoover's employment at the Weston project was temporary, I necessarily find and conclude that it violated Section 8(a)(3) by refusing to reinstate Pennington on the Union's June 5 unconditional offer to return to work.

e. Wade

Myers testified that he hired Wade as a permanent replacement, and Zakrzewski testified that he employed Wade as a replacement for Montoney. Myers did not testify what terms that he and Wade reached in regard to duration of Wade's prospective employment at the Weston project. Wade, however, flatly denied that Myers told him that his employment at the Weston project was "permanent." Indeed, Wade testified that Myers only told him that he would be "keeping the job going," a plain inference that Wade was to stay only as long as he was needed to replace others who were not "keeping the job going." I find and conclude that, even though he continued to work at the Weston project at the time of the trial, Wade was hired as a temporary replacement. Respondent's having failed to rebut the presumption that Wade's employment at the Weston project was temporary, I necessarily find and conclude that it violated Section 8(a)(3) by refusing to reinstate Montoney on the Union's June 5 unconditional offer to return to work.

f. Wireman

Myers testified that he hired Kenneth Wireman as a permanent replacement, and Zakrzewski testified that he employed Wireman as a replacement for McFall. Again, although it was part of its burden of proof, Respondent offered no evidence of the terms under which Wireman agreed to come to the Weston project. Therefore, it must be concluded that Wireman came to the Weston project only as a temporary replacement; even though he stayed through time of trial. Respondent's having failed to rebut the presumption that Wireman's employment at the Weston project was temporary, I necessarily find and conclude that it violated Section 8(a)(3) by refusing to reinstate McFall on the Union's June 5 unconditional offer to return to work.

In summary, under *Mackay Radio* (on which Respondent heavily relies) permanent replacements are at least those who are told that they could stay at a struck worksite "if they so desired." Respondent, however, offered no evidence of what assurances that Myers gave to the replacements, and Respondent offered no evidence of what the employees may have said in return that would indicate that there was a "mutual understanding between the Respondent and the replacements that the nature of their employment was permanent," as required in *Hansen Bros. Enterprises,* supra. That is, none of the six strikers who were told on June 5 that they had been permanently replaced actually were. I therefore conclude that Respondent's refusal to reinstate those strikers on the Union's unconditional offer to return to work, in effect discharging them for striking, violated Section 8(a)(3).[48]

7. The June 5 unfair labor practice strike

The Union's June 5 unconditional offer to return to work ended the economic strike that Montoney, Huff, Pennington, Garrison, Hoke, McFall, Hyre, and Shearer began on June 3. On June 5 Zakrzewski unlawfully refused to reinstate Montoney, Huff, Pennington, Garrison, Hoke, and McFall on that offer. The sole purpose of that strike was Respondent's previously found unfair labor practice of refusing to reinstate Montoney, Huff, Pennington, Garrison, Hoke, and McFall, and it was incontestably an unfair labor practice strike.

8. Respondent's offers of reinstatement to some of the strikers

By letter of November 7 the Union sent to Respondent a written unconditional offer to return to work on behalf of Montoney, Huff, Pennington, Garrison, Hoke, McFall, Hyre, and Shearer. For Montoney, Huff, Pennington, Garrison, Hoke, and McFall, this was nothing but a restatement of their June 5 offer to return to work (which offer, as I have found above, Respondent unlawfully rejected). For Shearer and Hyre, it was an offer to return to work from the unfair labor practice strike that they had begun on June 5. As unfair labor practice strikers, Shearer and Hyre were owed immediate reinstatement following the Union's November 7 unconditional application to return

[47] *Shattuck Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966).

[48] The complaint also alleges that Respondent's telling the employees that they were replaced violated Sec. 8(a)(3). Falsely telling employees who are on strike that they have been replaced may be a violation, but the six employees involved here were not on strike when Zakrzewski told them that they had been replaced; they had ended the June 3 strike with the June 5 offer to return to work. I shall therefore recommend dismissal of this allegation of the complaint.

to work.[49] Respondent's failure to afford Shearer and Hyre immediate reinstatement accordingly violated Section 8(a)(3), and Respondent owes them backpay from November 7 until it did unconditionally offer them reinstatement on January 22, 1998.

Even if Shearer and Hyre had been economic strikers, Respondent's obligations to them would have run through January 22. Respondent makes no contention that Hyre was ever replaced permanently, but Respondent does contend that Malone permanently replaced Shearer on June 6. On the authorities cited above, however, I would find and conclude that even if Shearer had been an economic striker as of November 7 he would then have been entitled to immediate reinstatement because he had not been replaced permanently; Respondent offered no evidence of how Malone and any agent of Respondent could have reached a mutuality of understanding that Malone was a permanent replacement (at the time that he was hired, or thereafter).

Respondent offered reinstatement to Garrison and Pennington on December 4, 1997, and January 13, 1998, respectively. The record does not disclose the date of the unconditional offer of reinstatement to McFall; for the purposes of determining a remedy, as detailed infra, it is appropriate to resolve the ambiguity against the wrongdoer and deem the date of the offer to McFall to be the same as Respondent's last known offer to the other discriminatees, January 22, 1998. (Respondent may, however, demonstrate at the compliance stage of this proceeding that the date should be fixed earlier.) Garrison, Pennington, and McFall refused their offers of reinstatement, and Respondent's backpay obligations to them ended as of the dates of the offers to them.

Respondent has never offered reinstatement to Huff, Hoke, or Montoney and, because they had not been permanently replaced when the Union made an unconditional offer to return to work on their behalf on June 5, Respondent's obligations of backpay and reinstatement to them continue.

Assuming, however, that Respondent did meet its burden of proving that it permanently replaced Montoney, Huff, Pennington, Garrison, Hoke, and McFall, it thereafter ignored the rights of Huff, Pennington, Garrison, and Hoke to reinstatement on the departures of their permanent replacements.[50] The replacements for Montoney and McFall (Wade and Kenneth Wireman, respectively) continued to work at the Weston project through the date of the hearing. The replacements for Huff, Pennington, Garrison, and Hoke, however, departed the job by August 1. More particularly, Treadway, who replaced Huff, departed on June 13; Hoover, who replaced Pennington, departed on June 11; Burke, who replaced Garrison, departed on June 27; and Lainhart, who replaced Hoke, departed on August 1. Therefore, assuming that Respondent had proved that it had secured permanent replacements for Huff, Pennington, Garrison, and Hoke before June 5, Respondent would owe those four former strikers backpay and reinstatement obligations from the dates that their replacements departed the Weston project.

[49] *Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270, 278 (1956).

[50] See *Laidlaw Corp.,* 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

9. Refusals to hire or consider applicants after June 3

After June 3, Respondent hired 10 employees other than the seven that it contends were replacements for seven of the eight June 3 and 5 strikers. Eight of these 10 employees were either current employees who were transferred from Respondent's other projects or were employees who had been employed by Respondent previously at other projects: to wit*:* heavy equipment operator Buttry; laborers Luttrell, Hatton, Eversole, James Graham, and Godsey; and carpenters Mercer and Bryant. For the reasons that I rejected the General Counsel's contentions that Respondent should have hired the alleged discriminatees instead of current and former employees before June 3, I reject the General Counsel's contentions that, after June 3, Respondent should have hired alleged discriminatees who had applied for work as carpenters, machine operators, or laborers instead of utilizing these eight current and former employees.

The General Counsel also showed, however, that Respondent hired laborer Jimmy Campbell on June 30, and it hired laborer Bryan Williams on September 5. Notwithstanding this demonstration, Respondent offers not the slightest reason for hiring these laborers without considering for employment alleged discriminatees Mick and Elder who had applied for laborers' work on May 29.[51] That is, Respondent has not met its *Wright Line* burden of showing that, even absent their known-union memberships, it would not have considered Mick and Elder for employment. I therefore find and conclude that by refusing to consider Mick and Elder for employment Respondent violated Section 8(a)(3).

10. Summary of all refusal-to-hire and refusal-to-consider allegation

Respondent having successfully defended all of the refusal-to-hire allegations, I shall recommend that they be dismissed. I shall also recommend dismissal of the refusal-to-consider allegations, other than those advanced on behalf of Mick and Elder.

CONCLUSIONS OF LAW

1. By the following acts and conduct Respondent has violated Section 8(a)(1) of the Act.

(a) Threatening employees that it would refuse-to-hire applicants who have become or remained members of the Union, or any of its constituent labor organizations, or given assistance or support to such labor organizations.

(b) Threatening employees with closure of its Weston project if the employees selected the Union, or of any of its constituent labor organizations, as their collective-bargaining representative.

[51] Zakrzewski did not testify that he refused to consider Mick or Elder because of the purported 15-day time limitation on Respondent's application forms. If he had, however, I would point out that: (1) Even if only to get rid of him, Zakrzewski indicated to Stanley that the limitation was not rigid; (2) Garrison was hired on the basis of an application that was over 30 days old; (3) Although Hyre's application had long "expired," Zakrzewski simply sent Harold Wireman after Hyre to get Hyre to come back and complete another one; and (4) Montoney and Wainscott were afforded the opportunities to complete as many as three applications each.

2. By the following acts and conduct Respondent has violated Section 8(a)(3) of the Act.

(a) From June 5 to date, refusing to reinstate on their unconditional offers to return to work from an economic strike employees Steven Montoney, Donald Huff, and Timothy Hoke.

(b) From June 5 until the dates set opposite their respective names, delaying reinstatement of the following-named employees after their unconditional offers to return to work from an economic strike:

Charles Garrison	December 4, 1997
Boyd Pennington	January 13, 1998
Michael McFall	January 22, 1998

(c) From November 7, 1997, through January 22, 1998, delaying reinstatement of employees Michael Shearer and Richard Hyre after their unconditional offers to return to work from an unfair labor practice strike.

(d) From on or about June 30, 1997, and continuing to date, refusing to consider for employment applicants Ted Mick and Jerry Elder.

3. Respondent has not otherwise violated the Act as alleged here.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act. Matters of remedy in this case are somewhat complicated by the fact that the Weston project was scheduled to be completed by the end of this year, 1998. If Respondent would immediately comply with my order, the usual remedies would suffice because the project would still be ongoing. I believe, however, that immediate compliance with my order is unlikely. I shall therefore premise my specification of the necessary remedies on the assumption that the Weston project has been completed at the time that Respondent first seeks to come into compliance.

As its defense in this action makes clear, Respondent prefers previously employed employees when hiring for its projects. Absent discrimination, Huff, Hoke, and Montoney may well have been afforded such preference when Respondent staffed its projects that followed the Weston project. Subject to certain limitations set forth below, therefore, I shall order Respondent to offer immediately to former strikers Huff, Hoke, and Montoney reinstatement to substantially equivalent positions of employment at its project that is nearest to Weston, West Virginia, without prejudice to their seniority rights or other rights and privileges, discharging, if necessary, any and all employees hired at the project instead of them. If, after such dismissals, there are insufficient positions available for Huff, Hoke, and Montoney, those positions which are available shall be distributed among them without discrimination because of their union membership or activities or participation in the strike in accordance with seniority or other nondiscriminatory practices utilized by Respondent. If no employment is immediately available for Huff, Hoke, or Montoney, they shall be placed on a preferential hiring list in accordance with their seniority or in accordance with other nondiscriminatory practices utilized by Respondent, and they shall be reinstated before any other persons are hired at any of Respondent's projects. I shall further order Respondent to make Huff, Hoke, and Montoney whole, with interest, for any losses of earnings or other benefits that they may have incurred as a result of the discrimination against them from the date that Respondent unlawfully refused to reinstate them, June 5, 1997, to the dates of proper offers of reinstatement to them. Additionally, I shall recommend that Respondent be required to expunge its files of any reference to its refusals to reinstate Huff, Hoke, and Montoney, and Respondent shall be required to inform those employees that this has been done.

To remedy the Respondent's unlawful refusal to consider Mick and Elder for hire, I shall order it to consider them for hire and to provide backpay for them if at the compliance stage of this proceeding it is determined that they would have been hired but for Respondent's unlawful conduct. In addition, if at the compliance stage of this proceeding it is determined that the Respondent would have hired Mick or Elder the inquiry as to the amount of backpay due to them will include any amounts they would have received on other jobs to which the Respondent would later have assigned them.[52] Finally, if at the compliance stage it is established that the Respondent would have assigned Mick or Elder to current jobs, Respondent shall be required to hire them and place them in positions substantially equivalent to those for which they applied at the Weston project.[53] In this connection, Respondent, during the compliance proceedings, will be permitted to introduce evidence that Mick and Elder would not, in any event, have been hired after their applications of May 29.[54] The Respondent shall, however, bear the burden of proving that the laborers hired after the application dates of Mick and Elder actually had superior qualifications to those discriminatees.[55]

I shall further order Respondent to make whole, with interest, former strikers Shearer, Hyre, Pennington, Garrison, and McFall, whose offers of reinstatement Respondent unlawfully delayed, for any losses of wages or other benefits that they may have suffered by reason of Respondent's delays.

Backpay shall be computed in the manner prescribed in *F. W. Woolworth* Co., 90 NLRB 289 (1950), plus interest as set forth in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). Again, because the Weston project is scheduled for completion by the end of 1998, I shall order that the notice to employees shall be mailed to all employees employed at the Weston project from June 5, 1997, the date of the first unfair labor practice found here, until the completion of that project.

The above remedies of backpay and reinstatement are subject to the considerations of *Dean General Contractors*, 285 NLRB 573 (1987); therefore, Respondent will have the oppor-

[52] According to the testimony and many documents that are in evidence, Respondent pays travel premiums to employees whose employment is distant from their domiciles. Any monetary remedy to Mick, Elder, Montoney, Huff, or Hoke shall include such premiums in addition to wages and other benefits.

[53] See *Ultrasystems Western Constructors,* 316 NLRB 1243 (1995).

[54] See M. J. *Mechanical Services,* 325 NLRB 1098 (1998), and cases cited therein.

[55] See *D. S. E. Concrete Forms,* 303 NLRB 890, 898–899 (1991).

tunity at the compliance proceeding to show that, under its customary procedures, Mick, Elder, Huff, Hoke, and Montoney would not have been transferred to another jobsite after the Weston project was completed, and that therefore, no backpay and reinstatement obligations to those employees exist beyond that point.[56]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[57]

ORDER

The Respondent, 3D Enterprises Contracting Corporation, Lexington, Kentucky, and Weston, West Virginia, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that it would refuse to hire applicants who have become or remained members of the Union or any of the Union's constituent labor organizations or who have given assistance or support to such labor organizations.

(b) Threatening employees that Respondent would close a business operation if the employees selected the Union or any of its constituent labor organizations as their collective-bargaining representative.

(c) Discriminating against employees because of their union memberships or other protected activities or sympathies by refusing to reinstate them after they have unconditionally offered to return from a statutorily protected strike.

(d) Discriminating against employees because of their union memberships or other protected activities or sympathies by delaying their reinstatement after they have unconditionally offered to return from a statutorily protected strike.

(e) Discriminating against employee-applicants because of their union memberships or other protected activities or sympathies by refusing to consider them for hire.

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

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

(a) Within 14 days from the date of this Order, offer to Steven Montoney, Timothy Hoke, and Donald Huff immediate reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any persons hired as strike replacements after June 5, and make Huff, Hoke, and Montoney whole with interest, for any loss of earnings or other benefits that they may have suffered by reason of Respondent's unlawful refusal to reinstate them, as set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to reinstate Steven Montoney, Timothy Hoke, and Donald Huff, and within 3 days thereafter notify those employees in writing that this has been done and that Respondent's refusal to reinstate them will not be used against them in any way.

(c) Within 14 days from the date of this Order, make Boyd Pennington, Charles Garrison, Michael McFall, Richard Hyre, and Michael Shearer whole, with interest, for any loss of earnings or other benefits that they may have suffered by reason of Respondent's unlawful delays in offering them reinstatement after their unconditional offers to return to work from either an economic strike or an unfair labor practice strike.

(d) Make whole Ted Mick and Jerry Elder for any losses they may have suffered by reason of Respondent's discriminatory refusal to consider them for hire as determined in the compliance stage of this proceeding. If it is shown at the compliance stage that Mick or Elder would currently be employed but for the Respondent's unlawful refusal to consider them for hire, Respondent shall offer them employment in positions for which they applied. If those positions no longer exist, Respondent must offer Mick and Elder substantially equivalent positions without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against by Respondent.

(e) Within 14 days of this Order, notify in writing Ted Mick and Jerry Elder that any future job applications by them will be considered in a nondiscriminatory manner.

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

(g) Within 14 days after service by the Region, mail a copy of the attached notice marked "Appendix"[58] to each employee who was employed by the Respondent at its Weston, West Virginia jobsite at any time from the onset of the unfair labor practices found in this case, June 5, 1997, until the completion of these employees' work at that jobsite. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

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

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

[56] See *WestPac Electric,* 321 NLRB 1322 (1996).

[57] 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.

[58] 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."

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 threaten you that we would refuse to hire applicants who have become or remained members of North Central West Virginia Building and Construction Trades Council, AFL–CIO or any of its constituent labor organizations, or who have given assistance or support to such labor organizations.

WE WILL NOT threaten you that we would close a business operation if you select North Central West Virginia Building and Construction Trades Council, AFL–CIO or any of its constituent labor organizations, as your collective-bargaining representative.

WE WILL NOT discriminate against employees because of their union memberships or other protected activities or sympathies by refusing to reinstate them after they have unconditionally offered to return from a statutorily protected strike.

WE WILL NOT discriminate against employees because of their union memberships or other protected activities or sympathies by delaying their reinstatement after they have unconditionally offered to return from a statutorily protected strike.

WE WILL NOT discriminate against employee-applicants because of their union memberships or other protected activities or sympathies by refusing to consider them for hire.

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, within 14 days from the date of the Board's Order, offer to Steven Montoney, Timothy Hoke, and Donald Huff immediate reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any persons hired as strike replacements after June 5, 1997, and WE WILL make Huff, Hoke, and Montoney whole, with interest, for any loss of earnings or other benefits that they may have suffered by reason of our unlawful refusal to reinstate them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusals to reinstate Steven Montoney, Timothy Hoke, and Donald Huff and WE WILL, within 3 day, thereafter notify those employees in writing that this has been done and that our refusal to reinstate them will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, make Boyd Pennington, Charles Garrison, Michael McFall, Richard Hyre, and Michael Shearer whole, with interest, for any loss of earnings or other benefits that they may have suffered by reason of our unlawful delays in offering them reinstatement after their unconditional offers to return to work from either an economic strike or an unfair labor practice strike.

WE WILL make whole, with interest, Ted Mick and Jerry Elder if, as determined in an NLRB compliance proceeding, they are found to have suffered economic losses as a result of our failure and refusal to consider them for hire.

WE WILL offer to Ted Mick and Jerry Elder employment in positions for which they applied, if it is shown in an NLRB compliance proceeding that they would be currently employed by us but for our unlawful refusal to consider them for employment.

WE WILL, within 14 days of the Board's Order, notify in writing Ted Mick and Jerry Elder that any future job applications by them will be considered in a nondiscriminatory manner.

3D ENTERPRISES CONTRACTING CORPORATION