**Americlean Restoration and Maintenance Corp., d/b/a Americlean *and* Local 466, International Brotherhood of Painters and Allied Trades, AFL–CIO.** Case 3–CA–21350

August 27, 2001

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On March 27, 2001, Administrative Law Judge Joel P. Biblowitz issued the attached decision and supplemental decision.[1] 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 matter 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,[2] and conclusions and to adopt the recommended Order, as modified below.[3]

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to hire seven applicants for employment. Applying the standard set forth in *FES*, 331 NLRB 9 (2000), the judge found that the General Counsel sustained his burden of showing that the Respondent was hiring and had job openings for the seven applicants, that the applicants had the experience and qualifications to perform these jobs, and that the Respondent's antiunion animus contributed to the decision not to hire the applicants. The judge further found that the Respondent had not sustained its burden of establishing that it would not have hired the applicants even absent their union activities. We agree with the judge's findings.

Our dissenting colleague contends that the Respondent did not unlawfully refuse to hire two of the applicants, Philip Tucker and Nancy Devine. According to our colleague, the General Counsel failed to meet his burden under *FES* of showing that Tucker and Devine possessed the necessary experience to qualify for employment with the Respondent as painters. Although Tucker and Devine credibly testified to having 20 and 21 years experience respectively, our colleague finds this evidence insufficient to meet the General Counsel's burden under *FES* because it does not show that the Respondent knew that Tucker and Devine had the requisite experience. Relying on the fact that the Respondent's newspaper advertisements stated that the Respondent was seeking painters with a minimum of 5 years experience, and virtually dismissing the fact that the Respondent's application asked only for the applicant's last four employers, our colleague concludes that the General Counsel failed to sustain his burden because the applications do not show that Tucker and Devine had 5 years of painting experience. We find no merit to our colleague's contention.

Although the record establishes that the Respondent's advertisements sought applicants with five years experience, the Respondent's application clearly did not ask the applicant for information showing 5 years experience; it only asked the applicant to list the last four employers and the dates of their employment. Indeed, the portion of the application asking for the last four employers is very small, and there is no additional space on the application upon which to list additional work experience. It is thus clear that this application did not seek to inquire whether the applicant had 5 years experience.[4] Accordingly, the

[1] On April 22, 1999, the Administrative Law Judge issued his decision in the above captioned case, finding that the Respondent had violated Sec. 8(a)(3) and (1) of the Act by its failure to hire and failure to consider to hire Philip Tucker, Austin Devine, James Chmielewsky, Nancy Devine, John McLean, William O'Leary and Carl Winchell because of their membership in, and support for the Union. Thereafter, on June 7, 2000, the Board remanded this case for further consideration in light of its decision in *FES*, 331 NLRB 9 (2000).

[2] 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 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.

In adopting the judge's finding that the Respondent unlawfully refused to hire James Chmielewsky, we note that Chmielewsky's employment application indicated that he had attended a painting apprenticeship program for 3 years and then worked as a painter for more than 4 years.

[3] We will modify the notice to include language conforming with that set forth in the judge's recommended Order. In addition, we will modify the recommended Order in accordance with *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Ferguson Electric Co.,* 335 NLRB No. 15 (2001).

[4] Thus, there is no support for our colleague's contention that Tucker and Devine withheld such information from the Respondent. Indeed, their applications included all of the relevant information concerning their last four employers. Furthermore, the evidence shows that the Respondent did not screen out applicants who failed to list prior employers with whom the applicant had a total of 5 years painting experience. The Respondent's newspaper advertisements appeared 14 times during the period from late January 1998 to later May 1998, uniformly requiring 5 years experience for painters. During the period spanned by these advertisements, Charles Olden and Chris Walsh filed applications for employment as painters, were interviewed and were hired. Their applications did not indicate 5 years experience as painters. During this same period, six other persons applied for painter positions and were interviewed, although their applications did not list the prerequisite 5 years' experience. These applicants, who were interviewed—although not hired, included Michael Randall, Kirk Flandsberg, Jeffrey Miller, Mark Davis, Patrick Moorehouse and Chad Ovitt. Our dissenting colleague speculates that the Respondent may have been hiring for "entry level" painters, or that these applicants could have communicated addi-

absence of such evidence on the applications of Tucker and Devine cannot be fatal to the General Counsel's case.

We also find our colleague's analysis is flawed because it attaches no significance to the fact that both Tucker and Devine credibly testified to having substantially more than 5 years' painting experience, and instead faults the General Counsel for not establishing that the Respondent had knowledge of this experience. The Board stated in *FES* that in order to meet his initial burden, the General Counsel must show, inter alia, "that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire. . . ." *FES*, supra at 12. The Board further explained that

> The General Counsel's burden in this regard is limited to showing that the applicants met the employer's publicly announced or generally known requirements of the position, to the extent that these facial requirements are based on nondiscriminatory, objective, and quantifiable employment criteria. *FES*, supra at 13.

This requirement is met here by the testimony of Tucker and Devine, which establishes that they had 20 and 21 years experience respectively. There is nothing in the language of *FES* that requires the General Counsel, as part of his initial burden, to additionally show in these circumstances that the Respondent knew the applicants had the requisite experience. Indeed, to the extent that some ambiguity existed because of the advertisement's reference to 5 years experience and the application's request for information only about the last four employers, *FES* specifically states that in such circumstances the burden is on the employer to show that the applicant failed to meet the qualifications.[5] Our colleague's contention that the General Counsel must initially establish an added element of employer knowledge of these qualifications is in clear conflict with the *FES* framework.

Finally, we disagree with our colleague's contention that our application of *FES* makes "employers responsible for the inaccuracy of the information submitted by job applicants," and "forc[es] employers to play a guessing game." This contention rests upon the erroneous assumption that the applicants were asked to provide information demonstrating 5 years' experience. The simple fact is that the Respondent never asked Tucker and Devine to provide this information and that it hired other applicants who "withheld" this information on their applications. The record clearly establishes that the Respondent chose to make these hiring decisions without inquiring as to their experience. Indeed, there is no evidence even remotely suggesting that the Respondent was "forced" to make a hiring decision without having complete information.

We also reject the Respondent's contention that the discriminatees were not hired on account of their high wage histories, which ranged from $16 to $21.40. The Respondent contends that because it had previously hired five applicants with wage histories ranging from $14 to $19 only to have them leave shortly after being hired, it created a policy whereby it would consider an applicant with a wage history of $12, but would not grant an interview to an applicant with a wage history of $16.

The record shows, however, that the Respondent regularly departed from this purported policy. Indeed, within 2 months after the discriminatees applied for jobs with the Respondent, the Respondent interviewed four applicants with wage histories of more than $16, hiring one with a wage history of $21.05. In addition, about 7 months after the discriminatees applied for jobs with the Respondent, the Respondent interviewed and offered a position to another applicant who had a wage history of $16. Further, as noted in the judge's original decision, the Respondent called Carl Winchell, whose application indicated a salary history of $16, to offer him an interview, but upon learning from Winchell that he was a member of the Union terminated the telephone conversation and never called him back. We find that the above conduct demonstrates that the Respondent's wage history assertions are pretextual.

Accordingly, we adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire the seven applicants for employment.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, and orders that the Respondent, American Restoration and Maintenance Corp., d/b/a Americlean, Glenn Falls, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

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tional years of experience at the time they submitted their applications. However, given the number of applications for painting positions that did not show on their face the required 5 years' of experience, we infer that there was no initial requirement to show this information as a prerequisite for an applicant to obtain an interview enabling the applicant to reveal the required level of experience at that time. The discriminatees' inability to be interviewed precluded them from obtaining this opportunity.

[5] See *FES*, supra at 13 ("Similarly, if there is any ambiguity in the employer's statement of requirements for the position or any suggestion that the requirements are not rigid (e.g., 'two years preferred'), the burden is on the employer to show that the applicant failed to meet these imprecise qualifications.").

(a) Within 14 days from the date of the Board's Order, offer employment to Philip Tucker, Austin Devine, James Chmielewski, Nancy Devine, John McLean, William O'Leary and Carl Winchell for jobs which they applied or, if such job no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had been hired.

(b) Make Philip Tucker, Austin Devine, James Chmielewski, Nancy Devine, John McLean, William O'Leary and Carl Winchell whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any interim earning, plus interest.

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

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

CHAIRMAN HURTGEN, dissenting in part.

I find that the Respondent did not violate Section 8(a)(3) and (1) of the Act by refusing to hire applicants Philip Tucker and Nancy Devine.[1] As explained below, I disagree with the interpretation of the Board's decision in *FES*[2] that has lead my colleagues to the opposite conclusion.

In *FES*, the Board established a new standard for determining the lawfulness of an employer's refusal to hire applicants for employment. To establish a discriminatory failure to hire, the General Counsel has the initial burden to show, at a minimum, that (1) the employer was hiring or had concrete plans to hire; (2) the applicants had experience or training relevant to the announced (or actually applied) nondiscriminatory, objective, and quantifiable qualifications for the position; and (3) antiunion animus contributed to the decision not to hire the applicants.

Here, as the judge found, the first element of the *FES* test is satisfied by record evidence that the Respondent: (1) placed a newspaper advertisement seeking painters; (2) received applications and interviewed applicants; and (3) and hired at least 10 painters during the period relevant to these proceedings. The third element of the test, antiunion animus, is shown by: (1) the Respondent's questioning self-identified union member applicants about their union activities and denying them interviews, in contrast to its treatment of applicant Winchell, who did not disclose his union membership when he filled out an employment application; and (2) the fact that the Respondent annotated the applications of several of the applicants, who were not interviewed, with the word "Union" and other union-related notations.

There remains for analysis the second of the *FES* objective criteria, that is, the applicants' experience and training relevant to the Respondent's advertised painting jobs. Contrary to the judge, I find that the General Counsel has not satisfied the burden to show that Tucker and Devine possessed the necessary experience to qualify for employment by the Respondent as painters. Accordingly, as to Tucker and Devine, the General Counsel has not established a prima facie case of a discriminatory refusal to hire.

The relevant facts are these. On January 28 and February 3, 1998, respectively, Tucker and Devine went to the Respondent's facility and filled out applications in response to the Respondent's newspaper advertisement seeking "quality painters with own tools, transportation, clean driver's license & minimum 5 years experience." (Emphasis added.) The application form requests that applicants describe their education and special training, list their last four employers and dates of employment, and give the names of references.

On the application form, Tucker listed, as his last four employers, painting jobs starting in May 1997 and lasting through September 1997, and employment as an organizer for the Union beginning in September 1997. He listed, as a reference, one person in the painting business whom he had "known" for 10 years. Devine listed, as her last four employers, painting jobs beginning about February 1997 and ending in January 1998. She also listed special training as a "Wallpaper-vinyl expert."

Thus, despite the Respondent's advertised requirement of 5 years painting experience, neither Tucker's nor Devine's application indicated that the applicant satisfied that requirement. That was the information available to the Respondent when it decided not to interview or hire Tucker and Devine.

As noted, the newspaper advertisement clearly set forth the 5-year requirement. The applicants can hardly say that they were unaware of the requirement, for they were responding to that advertisement. Notwithstanding this, they set forth, on their application forms, a work history that showed less than 5 years experience. Thus, so far as Respondent was aware, they did not have the requisite experience.

[1] All references herein to Devine refer to Nancy Devine.

[2] *FES* 331 NLRB 9 (2000).

Contrary to my colleagues, I find nothing ambiguous in the Respondent's clearly stated requirement of 5 years painting experience. This unambiguous requirement is not rendered unclear by the Respondent's use of a preprinted, standard application form. Concededly, the form calls only for the listing of four prior employers and the dates of each. To the extent that the four prior employments do not together yield 5 years experience, there were many ways (e.g., oral statements) in which applicants could have communicated other prior employment which satisfied the 5-year requirement.

My colleagues suggest that the Respondent's knowledge, or lack thereof, is irrelevant. But, clearly, the Respondent was the person who was doing the hiring, and it would thus seem apparent that its knowledge (concerning whether applicants meet the stated requirements) would be not only relevant but critical.

I recognize that 1 year later, at the instant unfair labor practice hearing in February 1999, Tucker and Devine testified that they had more than 5 years painting experience—20 years experience for Tucker, and 21 for Devine. Their reasons for withholding this information from the Respondent, at the time they applied for jobs, were not satisfactorily explained.[3]

My colleagues contend that the General Counsel's eliciting of this tardy evidence of Tucker's and Devine's employment history at the hearing is sufficient to satisfy the *FES* burden of demonstrating that the two possessed the required experience to qualify for employment by the Respondent. I disagree. The Respondent having clearly communicated an unambiguous experience requirement in its newspaper advertisement, the applicants were responsible for demonstrating that they possessed the necessary experience. Instead, they demonstrated the opposite. Other applicants who responded to the newspaper advertisement recognized their responsibility and entered information regarding their entire painting work history on the application forms.

My colleagues point out that the Respondent ran newspaper advertisements for painters with 5 years experience 14 times between January and late May 1998. By examining bare, unexplained employment applications and hiring data, my colleagues observe that, within that same approximate time frame, the Respondent interviewed and hired two employees (Olden and Walsh) whose applications did not indicate 5 years experience, and interviewed but did not hire six other applicants (Randall, Flandsberg, Miller, Davis, Moorehouse, and Ovitt) whose applications similarly did not indicate 5 years experience. From these bare, unexplained records, my colleagues infer that the Respondent did not have an "initial requirement to show [5 years experience] as a prerequisite for an applicant to obtain an interview."

I do not find such an inference reasonable based on the record, which is devoid of context to support this inference. None of these applicants testified at the hearing. No witness testified as to the circumstances under which the applications were filed and the applicants were interviewed. There is no showing of a nexus between these applications and the ad. There is no evidence showing whether these applicants applied for the advertised painting positions that required 5 years experience and, if so, whether the applicants conveyed in some other manner additional information to satisfy the experience requirement. In any case, the application forms submitted by several applicants contain notations made by company officials, apparently made during interviews, that suggest that the Respondent may have been interviewing for entry-level painting positions, different from the advertised positions at issue here.

In my view, these bare, unexplained application forms have little probative value. The absence of evidence regarding these applications is not surprising, however, given that the Respondent has not asserted as a defense that it never hired painters with less than 5 years experience and thus, always screened out applications that did not show sufficient experience. Rather, the instant case is about a failure to hire in response to a particular advertisement that called for 5 years experience. It was the General Counsel's burden to show that the alleged discriminatees met the requirement, and conveyed that to Respondent. Other applications in the past, not in response to the instant advertisement, are irrelevant.

In fact, my colleagues' argument begs the critical issue, which is whether the General Counsel met his initial burden, under *FES*, to demonstrate that the applicants for the advertised positions possessed the necessary experience to qualify for employment. As shown, the General Counsel did not satisfy his burden to show that, at the time when Tucker and Devine applied for employment, they possessed the necessary 5 years experience. Thus, as to Tucker and Devine, the General Counsel failed to establish a critical part of his prima facie case.

*FES* does not support the position of my colleagues. Common sense and the plain language of the *FES* standard require that the determination whether applicants meet the necessary experience requirements must be

[3] My colleagues are mistaken in contending that I "attach[] no significance" to Tucker's and Devine's testimony at the hearing establishing that, at the time of their application for employment with the Respondent, each has more than 5 years' painting experience. As I explain infra, the testimony concerning the 5 years of experience is relevant, but so is the fact that Respondent was not aware that they had that experience.

made based on information available to employers at the time that hiring decisions are made, not months or years later, when the information is no longer useful. Otherwise, the effect of *FES* would be to establish a one-sided guessing game in which applicants are free to provide information which indicates that they fail to satisfy an employment requirement, and then (much later) testify that they do meet the requirements. I would not join my colleagues in making employers responsible for the inaccuracy of the information submitted by job applicants, and forcing employers to play a guessing game.

In sum, Tucker and Devine applied for positions that unambiguously required, inter alia, a minimum 5 years of painting experience.[4] Tucker's application reflected only 5 months of past employment as a painter. Devine's application showed, at most, 1 year of painting experience. Thus, neither applicant demonstrated to the Respondent that they had the necessary experience to qualify for employment. Concededly, the Respondent's application form only asked applicants to identify their last four employers. It did not expressly ask for total years of experience. However, the applicants were responding to an advertisement that plainly and unambiguously stated a 5-year experience requirement. It was the responsibility of the applicants to demonstrate to the Respondent that they possessed the necessary experience at the time they applied. Several of the discriminatees understood this responsibility and included their total years of painting experience on the application forms. Tucker and Devine did not do so. Thus, the Respondent acted lawfully in deciding not to interview and not to hire the two apparently unqualified applicants.

Accordingly, I would reverse the judge's unfair labor practice findings with regard to the Respondent's decision not to hire Phillip Tucker and Nancy Devine.

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 refuse to hire applicants for employment because of their support of Local 466, International Brotherhood of Painters and Allied Trades, AFL-CIO (the Union) or any other labor organization or their engagement in union activities or because of their status as paid union representatives.

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

WE WILL , within 14 days from the date of the Board's Order, offer employment to Philip Tucker, Austin Devine, James Chmielewski, Nancy Devine, John McLean, William O'Leary and Carl Winchell for jobs which they applied or, if such job no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had been hired.

WE WILL make Philip Tucker, Austin Devine, James Chmielewski, Nancy Devine, John McLean, William O'Leary and Carl Winchell whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any interim earning, plus interest.

AMERICAN RESTORATION AND MAINTENANCE CORP., D/B/A AMERICLEAN

SUPPLEMENTAL DECISION

JOEL P. BIBLOWITZ, Administrative Law Judge. By decision dated April 22, 1999, I found that the Respondent violated Section 8(a)(1) and (3) of the Act by refusing to hire, or consider for hire, Phillip Tucker, Austin Devine, James Chmielewsky, Nancy Devine, John McLean, William O'Leary, and Carl Winchell because of their membership in, and support for, Local 466, International Brotherhood of Painters and Allied Trades, AFL–CIO (the Union). By Order Remanding Proceeding to administrative law judge dated June 7, 2000, the Board remanded the proceeding to me for further consideration in light of its decision in *FES*, 331 NLRB 9, which issued on May 11, 2000. By Joint Motion to Reopen Record for Receipt of Stipulation, together with Joint Stipulation with attachments, dated between February 8 and February 12, 2001, the parties agreed that there was no need to reopen the record to present additional testimony and exhibits. In addition, I gave the parties an opportunity to file briefs herein.

[4] No party has argued that this experience requirement was not legitimate, or that the Respondent did not uniformly adhere to this requirement when making hiring decisions.

Facts and Analysis

Austin Devine, Tucker, McClean and Chmielewsky went to the Respondent's premises on January 28, 1998;[1] Winchell went on either January 28 or 29, but not with any of the above-named individuals. O'Leary and Nancy Devine went to the premises on February 3. All of them, with the exception of Winchell, were wearing union shirts and hats and went in response to an ad that the Respondent had placed in a Glens Falls, New York newspaper on January 25 requesting ". . . quality painters with own tools, transportation, clean driver's license & minimum 5 years experience. Steady work, non seasonal . . . ." I found that none of these applicants were hired, or considered for hire, by the Respondent for discriminatory reasons, in violation of Section 8(a)(1) and (3) of the Act.

In *FES,* supra, the Board set forth the three elements of a prima facie case of an employer's discriminatory refusal to hire:

> (1) that the Respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

The first requirement is satisfied by the newspaper ad which stated that the Respondent was looking for painters, together with the fact that it was interviewing applicants, and took applications from the seven discriminatees herein. In addition, Attachment A of the parties' Joint Stipulation establishes that the Respondent hired employees for the following periods between January 1998, and November 1, 1999: from February 5 until April 17; from April 6 to May 18; from May 21 to November 25; from July 17 to December 3; September 21 through November 5, 1999, and from April 27, 1999, through April 8, 2000. Employees who were subsequently hired by the Respondent worked for the following periods: March 28, 2000, to November 2, 2000; May 11, 2000, until October 14, 2000; April 11, 2000, to July 31, 2000; June 26, 2000, and still employed by the Respondent; August 10, 2000, to October 10, 2000; and October 23, 2000, and still employed by the Respondent.

The second requirement calls for a more thorough examination of the record herein. In *FES,* supra, the Board determined that the General Counsel has the burden of establishing that the applicants met the employer's publicly announced or objective requirements for the job, while the employer bears the burden of establishing that the applicant did not meet the "imprecise" or subjective, qualifications (in *FES*, the example used was "outstanding skills in wiring"). The requirements specified in the ad were quality painters, own tools and transportation, clean driver's license, and 5 years of painting experience. The Respondent's application for employment requests the applicants' education, special training, if any, last four employers and three references with the number of years known. There is no specific place on the application for number of years experience as a painter.

Austin Devine lists 1978 to 1981 for "Became a Union Painter" and union painting jobs from 1981 through 1997. Tucker lists his last four employers as painting jobs commencing May 1997 through September 1997, all of which he states he left due to lack of work, and District Council 9 of the Painters' Union as his employer from September 1997 to the present as an organizer; he also lists, at least, one person in the painting business whom he has known for 10 years. Chmielewsky's application lists his four most recent jobs as commencing in May 1993 and concluding in January, and a 3-year painting apprenticeship program. McClean's application states that he has painted for 22 years, served a 4-year apprenticeship, and lists painting employment from 1978 to 1998. Winchell's application lists 8 years employment as a painter and O'Leary's application lists painting employment for the prior 6 years. Nancy Devine's application lists her last four employers as commencing February 1997 and concluding in January and her special training as "Wallpaper-vinyl expert." All of these applicants had driver's licenses; there is no evidence one way or the other whether they had their own tools. The evidence therefore establishes that all of the applicants, with a few possible exceptions, satisfied all the objective requirements of the Respondent's ad. Although Tucker's four past painting employers only covered 5 months, he lists an individual in the painting business whom he has known for 10 years as a reference. Chmielewsky's application lists his four most recent jobs as commencing in May 1993, which would be 4 months short of 5 years, but he also lists 3 years of a painting apprenticeship program. The other possible exception is Nancy Devine, who lists her four former employers as commencing March 1997 and concluding in January; and lists the reason for leaving each of these jobs as "lack of work." Obviously, these four jobs lasted less than the 5years of experience in the painting industry specified in the Respondent's ad. However, that may be due to the fact that the application only requests the applicant's past four employers and does not ask for the number of years spent in the industry. Further, the Respondent never objected to the lack of painting experience of Nancy Devine, or of any of the other applicants. I therefore find that the counsel for the General Counsel has satisfied its burden under *FES* that the applicants met the Respondent's objective criteria set forth in the ad, while the Respondent did not meet its burden of establishing that the applicants were not "quality painters." The second requirement of *FES* has therefore been met.

Finally, *FES* requires that antiunion animus contributed to the decision not to hire the applicant. In my decision I found that the union membership of the applicants was the reason that they were not hired. Central to this finding was that of these applicants, only Winchell received a call from the Respondent to come for an interview, and he was the only applicant who did not make his union membership obvious when filling out the application at the employer's premises. However, when he responded to the offer of an interview by saying that he belonged to the Union, the conversation ended and a job offer

[1] Unless indicated otherwise, all dates referred to herein relate to the year 1998.

never materialized. In addition, three of the applicant's applications had the word "Union" written on them by the Respondent.

Having found that counsel for the General Counsel has sustained his burden under *FES*, I find that the Respondent has not sustained its burden of establishing that it would not have hired the applicants even absent their union activities. As stated in my decision, I reject the Respondent's defenses herein, principally its salary history defense.

In addition to establishing the three elements as set forth above, *FES* requires that the counsel for the General Counsel must establish the number of openings that the Respondent had available if, as is true here, counsel for the General Counsel seeks an affirmative backpay and instatement order.[2] Attachment A of the Parties' stipulations sets forth the painters hired by the Respondent from January 1998 to October 2000. This attachment establishes that the Respondent had job openings for the following periods:

1. February 5 through November 25.[3]
2. July 17 through December 3.
3. September 21, 1998 through November 5, 1999.
4. April 27, 1999 through April 8, 2000.
5. March 28, 2000 through November 2, 2000.
6. April 11, 2000 through July 31, 2000.
7. May 11, 2000 through October 14, 2000.
8. August 10, 2000 through October 10, 2000.
9. Two positions, one commencing June 26, 2000, and the other, October 23, 2000.

## CONCLUSIONS OF LAW

1. The Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent had the following job openings available after January 28:

(a) February 5 through November 25.
(b) July 17 through December 3.
(c) September 21, 1998 through November 5, 1999.
(d) April 27, 1999 through April 8, 2000.
(e) March 28, 2000 through November 2, 2000.
(f) April 11, 2000 through July 31, 2000.
(g) May 11, 2000 through October 14, 2000.
(h) August 10, 2000 through October 10, 2000.
(i) June 26, 2000 and October 23, 2000 to the present time.

4. The discriminatees herein had the experience and qualifications to perform these jobs.

5. The Respondent's antiunion animus contributed to the Respondent's failure to employ any of the discriminatees herein.

6. By failing to hire Austin Devine, Tucker, Chmielewski, McLean, Winchell, O'Leary, and Nancy Devine, the Respondent violated Section 8(a)(1) and (3) of the Act.

## THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Pursuant to the Board's Remand and *FES*, I have found that the Respondent had eight specified job openings between February 5, 1998, and October 10, 2000, as well as two open-ended job openings, that the discriminatees were qualified to fill these positions, but that the Respondent did not hire them because of its union animus, in violation of Section 8(a)(1) and (3) of the Act. I shall therefore recommend that the Respondent offer them instatement and make them whole for any loss of earnings or other benefits they may have suffered as a result of the discrimination practiced against them from the date that they would have commenced working for the Respondent to the date that the employment would have ended. The amounts due to the discriminatees, if anything, shall be determined at a compliance hearing using, inter alia, the job opening dates found above as well as the other stipulations received herein[4]. The amount of backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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

## ORDER[5]

The Respondent, American Restoration and Maintenance Corp., d/b/a Americlean, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire applicants for employment because of their support of the Union, their engagement in union activities, or their status as paid union organizers.

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

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

(a) Within 14 days of this Order, and pursuant to my findings as discussed above, offer employment to Phillip Tucker, Austin Devine, James Chmielewski, John McLean Carl Winchell, William O'Leary, and Nancy Devine in jobs for which they

[2] *FES*, supra at 14.

[3] There was an 11-day period, April 6 through April 17, when both Christopher Walsh and Charles Olden were employed by the Respondent, but this could be explained by either a training period for the latter or a severance period for the former, so this period will not be included as a "two employee period."

[4] Some of the attachments that were part of the Stipulation herein relate to instatement offers that the Respondent made to the discriminatees herein that were either not responded to or were refused. I will leave the determination of the effect of these letters and the amount of backpay, if any, due to the discriminatees herein to the Compliance proceeding herein.

[5] 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.

applied or, if such jobs no longer exist, to 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, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(b) 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.

(c) Within 14 days after service by the Region, post at its facility in Glens Falls, New York copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 28, 1998. Further, the Respondent shall mail a copy of this notice to each of the named discriminatees herein, at their last known address or at the address listed on their employment application.

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

Dated, Washington, D.C. March 27, 2001

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 discriminate against applicants for employment by refusing to hire them because of their support of Local 466, International Brotherhood of Painters and Allied Trades, AFL–CIO or any other labor organization or engagement in union activities or because of their status as paid union representatives.

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

WE WILL, within 14 days from the date of the Board's Order, offer to the employees named below employment in jobs for which they applied or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had been hired and WE WILL make them whole for any loss of earnings and other benefits resulting from the discrimination against them, less any interim earnings, plus interest:

Phillip Tucker, Austin Devine, James Chmielewski, Nancy Devine, John McLean, William O'Leary and Carl Winchell.

AMERICAN RESTORATION AND MAINTENANCE CORP., D/B/A AMERICLEAN

*Alfred M. Norek, Esq.,* for the General Counsel.
*Gary C. Hobbs, Esq., Bartlett, Pontiff, Stewart & Rhodes, P.C.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge: This case was heard by me on February 22, 1999 in Albany, New York. The complaint, which issued on August 11, 1998[1] and was based upon an unfair labor practice charge that was filed on May 29 by Local 466, International Brotherhood of Painters and Allied Trades, AFL–CIO (the Union), alleges that American Restoration and Maintenance Corp., d/b/a Americlean, herein called the Respondent, interrogated an applicant for employment regarding his union membership, and refused to hire and/or consider for hire employee-applicants Phillip Tucker, Austin Devine, James Chmielewsky, Nancy Devine, John McLean, William O'Leary, and Carl Winchell because of their support for, or membership in the Union, in violation of Section 8(a)(1) and (3) of the Act.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] Unless indicated otherwise, all dates referred to herein relate to the year 1998.

## FINDINGS OF FACT

### I. JURISDICTION

The Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. LABOR ORGANIZATION STATUS

The Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

### III. THE FACTS

#### *A. January 28 Salts*

This is a salting case involving individuals who appeared at the Respondent's office on January 28, and February 2, and 3 and filled out employment applications, but were not hired by the Respondent. Devine, Tucker, McClean, and Chmielewsky went to the Respondent's facility on January 28, 1998 at about 2 p.m. in response to an ad that the Respondent had placed in a local newspaper in Glens Falls, New York. The ad, which appeared on January 25 stated:

> AMERICLEAN, a drug-free company, seeks quality painters with own tools, transportation, clean driver's license & minimum 5 years experience. Steady work, non seasonal. A great place to work! Call for an appointment between 3 & 5pm

Devine, who is an Organizer for District Council 9 of the International Brotherhood of Painters, which is made up of local unions from Long Island to Plattsburgh, New York, was the principal spokesperson for the group. He testified that earlier that day he called the telephone number listed in the ad and said that several painters were interested in applying for the jobs. He was told to come to the office between 3 and 5 p.m.; the applicants arrived as a group at the Respondent's facility at about 2 p.m. They were all wearing union hats and shirts. The hats were white with the union name in blue lettering, and the shirts were white with the International Union's name in blue lettering. When they arrived, the Respondent's receptionist/clerical employee, Michele Bardon gave them employment applications to complete and showed them into a conference room, where they filled out the applications. When they returned to her desk with the completed applications, Bardon asked, "You guys aren't union are you?" Devine responded that they were, and Bardon did not say anything. The other employee of the Respondent present at the time, Luke Graves, the bookkeeper, said that he wouldn't tell if they didn't tell. He also said that the Respondent was not a union company and did not pay union wages. Devine said that was okay, because they were not asking for union wages, the wages that they were requesting were flexible or negotiable. Devine also said that on his own time, before and after work and on his lunch hour, he would be attempting to organize the Respondent's employees to sign with his union; Graves burst out laughing and said: "Good luck." Devine also said that he would be a hard worker and would accept whatever pay the Respondent was paying its employees. Bardon then asked for their driver's licenses, made copies of them, and returned them. She also asked them if they had industrial experience (they all answered that they did) and how many years' experience they had and they left. When Devine had not heard from the Respondent he called and spoke to "Ann"; at about the end of March, after seeing an identical ad in the newspaper, he called Graves and asked him if anything was wrong with their applications, if they had to reapply, and why they had not been called. Graves told him that they did not have to reapply, that the applications are maintained indefinitely. During their visit on January 28, he and the other applicants were each courteous, did not raise their voice, and did not place union bumper stickers on cars in the Respondent's parking lot. If he had been offered employment by the Respondent, he would have accepted the offer.

Tucker, a Business Representative for District Council 9 of the Painters' Union, testified that after he saw the ad in the newspaper on January 25, he called the telephone number listed and was told to come to the office on January 28 between 3:00 and 5:00; he and the three other applicants arrived at the office at about 2:00 wearing union hats and shirts. He testified that they went at 2 p.m. because McLean told them that he had an appointment to be there at 2 p.m., and the others went with him. The receptionist, Bardon, gave them employment applications to fill out, which they did and they returned them to Bardon at her desk. She then asked for their driver's licenses, and made copies of them. At that time, she asked them, "Are you all union painters?" and they said that they were. Devine then said that if he was hired, in his off hours, before and after work and during lunch, he would attempt to organize the Respondent's employees. After he said this Graves, who was sitting at a computer laughed. During this visit, Devine was speaking in a normal conversational tone and was not acting in any confrontational manner. About a week later, Tucker called the Respondent's office and asked if their applications were still on file, if they were being considered, and how long they were kept on file, and he was told that they were kept on file indefinitely. If he were offered employment by the Respondent, he would have accepted the offer at the Respondent's wage scale.

McLean testified that on January 27 he called the Respondent's office and said that he had seen the ad in the paper and would like to fill out an employment application; he was told to come the following day between 2 and 2:30 p.m. He arrived on January 28 shortly after 2 p.m. with Tucker, Devine and Chmielewsky; they were each wearing a union hat and shirt. They were given employment applications by the receptionist, filled them out and returned them to her. They were then asked for, and turned over, their driver's licenses which she made copies of. At about that time, she asked if they "were all Union", and they said that they were. Graves said, "Well, I won't tell anyone if you won't tell anyone." Devine said that they were going to attempt to organize the shop before and after work and during the lunchbreak, and that he would be a good conscientious worker. Graves laughed, and said good luck in organizing the shop. During this meeting Devine was speaking in a normal tone of voice. At that time, McLean had been unemployed for a few weeks, and if he had been offered a job by the Respondent, he would have accepted the job.

Graves who, at the time of the hearing herein was no longer employed by the Respondent, testified that he had no responsi-

bilities involving interviewing, hiring or firing employees; rather, he performed normal bookkeeping responsibilities for the Respondent. He was in his office when the four applicants arrived on January 28. They asked for employment applications, and Bardon gave them the applications and took them to the conference room where they filled them out.[2] He was typing at Bardon's desk when the applicants gave Bardon their completed applications and she asked for, and received, their driver's licenses, which she photocopied. Bardon then told them that she would give the applications to Jamie Morello, the Respondent's painting manager and Devine said that he was a union organizer and he intended to organize the Respondent's employees. "He was shouting at the top of his voice when he did this." At this point Graves got up and stood next to Bardon because of the volume of Devine's voice. Devine had some papers rolled up in his hand and he was hitting them against the counter and pointing at him and Bardon. He was very frightened and concerned by Devine's manner. At no time did Bardon ask them if they were union members and he never laughed or said anything to the four applicants. After the applicants left, Graves told Morello that the four individuals were very rude, loud and intimidating.

Bardon, who left Respondent's employ in March, testified that while employed by the Respondent she was the only clerical employee and was the recipient of telephone calls from job applicants. On those occasions, she usually gave the applicant a specific time to be at the office, for example 2 p.m. She testified: "it was usually a little test we would give to see if someone could be punctual." She was sitting at her desk when Devine and the three other applicants came to the office on January 28. She gave each of them an application and took them to the conference room to fill them out. When they gave her the completed applications, she asked for and received their driver's licenses, which she photocopied. At about that point Devine's voice became very loud; he was yelling toward Graves, not Bardon, about how he was part of the Union and he was going to organize the Respondent's employees at lunch and after work and asked Bardon what her name was. This lasted for a couple of minutes during which time Bardon felt very uncomfortable. She never asked them about their status with the Union. Later that day she told Morello that they were rude and made her feel uncomfortable.

Morello, who had been employed by the Respondent as the painting division manager until August, testified that he interviews painters applying to work for the Respondent. On about January 28, Graves and Bardon told him about the January 28 incident with the applicants: "The unprofessionalism and the loudness, threatening attitude that they brought into the office." He testified why he never interviewed any of these individuals: "Number one reason was their unprofessional attitude and their threatening and making Michele and Luke feel uncomfortable. That was number one reason." The reason that bothered him was, "it's kind of obvious. You don't need to have those types of individuals around."

Mark Miller, the Respondent's president, testified that when applicants call for an appointment to pick up an employment application they are given a firm time to come in. "It's the first test to see if they can hold an appointment and follow directions." If the applicant did not arrive at the set time, they normally would not consider the individual for employment. In addition, someone who is rude, loud and obnoxious, would not be considered for employment.

Winchell and Randall also applied for work at the Respondent's facility on either January 28 or January 29. Winchell testified that after seeing the ad in the newspaper, he called the telephone number listed and spoke with a lady. He asked her if they were still taking applications, she said that they were, and set up an appointment for him for the following day. On direct examination he testified that the appointment was set for 2:45; on cross examination he testified that it was set for between 2:45 and 3:15 p.m., and that he arrived at about 3 p.m.. He and Randall appeared together at that time; the receptionist (presumably Bardon) gave them applications to complete and took them to a room where they could fill them out. When they completed the applications and returned them to the receptionist she asked them for identification and they gave her their drivers' licenses, which she photocopied and returned to them. Winchell testified that on the following day, he received a telephone call from a lady who asked him if he would come to the Respondent's office for an interview, and "she gave me the time, 2:45 or 3:15, between that hours," to come. He said that he would, and then said, "By the way, I belonged to the Union. She hesitated for a minute. She said, well, I will call you back. She never called back. I didn't hear nothing from them since then." He has a telephone and an answering machine at home, and there were never any subsequent messages from the Respondent; he never called them as well. At the time, he had been unemployed for about a month, and if he had been offered a job by the Respondent, he would have accepted it. Winchell's employment application has certain entries under "Remarks" saying: "not currently working, no problem with varied shifts, has transportation, has tools, used to working 40 plus hours." Winchell testified that this information is correct, but he does not remember giving this information to the receptionist at the Respondent's office. Bardon testified that Winchell told her this when he handed in the employment application on January 28. In addition, she wrote "Union" on the top of the front page of the application because "he had to have volunteered it. I would not have asked." Morello testified that he makes the decisions on who will be interviewed, and he never asked anybody to call Winchell for an interview because under "Salary Desired" on the employment application he listed $16 an hour, and the Respondent was only paying about half of that. Additionally, he testified that because he was out of the office about 80 percent of the time, he almost always arranged for interviews at 7 or 8 a.m.

### *B. February 2 Salt*

Kirk Flansburgh, who was not a union member and is not alleged as a discriminatee herein, testified that Devine informed

[2] The affidavit that Graves gave to the Board states that he gave the employment applications to the four individuals and brought them to the conference room to fill them out, and he testified: "It's possible" that he did so.

him that the Respondent advertised for painters, and asked him if he would like him to apply for a job there. He told Flansburg that he would like him to help in organizing the shop. Flansburg went to the Respondent's office on the morning of February 2 and was given an employment application by the receptionist, filled it out and returned it to her. That was the extent of his actions at the office that morning. When he returned home that afternoon there was a message from a male at the Respondent saying that he should call the Respondent's office for an interview. Later that day he called the office and arranged to be interviewed at the Respondent's office the following day. He was interviewed on February 3 by two men whom he could not identify; he was asked about his skills and past history, but he does not recall whether there was any discussion of wages. They said that they would like to hire him and, at that time, offered him a job that was located two hours north of Glens Falls; he lives in the Albany, New York area, about an hour South of Glens Falls. He testified: "I terminated the interview once I said the job was too far." Miller and Walter Bohlman, who at the time was Morello's assistant, testified that at that time the Respondent did not have a job 2 hours north of Glens Falls. Morello testified that his procedure was to conduct two interviews, including a "hands on test" and a drug test prior to hiring any individual and he never offered employment to anyone after only one interview and that Flansburg's testimony was "incorrect." After the initial interview, Flansburg called the office, but as Morello was out, he left a message. Later that day, when Morello returned, he called Flansburg to arrange for a second interview and left a message on his answering machine. Flansburg never returned this call, so Morello did not pursue him further.

*C. February 3 Salts*

O'Leary, who had seen the Respondent's newspaper ad, went to the Respondent's office on February 3 with Nancy Devine, Austin Devine's wife. They testified that they arrived at about 10:30 a.m. wearing union shirts and hats identical to those warn on January 28. They asked for and received employment applications from, presumably, Bardon, filled them out and returned them to her. O'Leary asked if there was a problem with them being union, and was told that there was not. Bardon asked O'Leary and Nancy Devine if they were familiar with industrial settings, and they said that they were. She also asked them for their driver's licenses, which they gave her. In addition, O'Leary gave her his business card, which lists Local 201 of the Painters' Union, and lists his title as J.A.T.C. Coordinator. Bardon made a copy of that card, together with his driver's license, and attached it to his employment application. Both O'Leary and Nancy Devine's application has written under "Remarks", not by them, but presumably by Bardon: "Is union, but doesn't care that we are not, has license, doesn't mind the travel, has experience in industrial settings." O'Leary's application also states: "not pushy about union status." Bardon testified that she wrote this on the applications because O'Leary and Nancy Devine told her that. "I would not have asked." O'Leary and Nancy Devine each testified that if the Respondent had offered them employment, they would have accepted the offer.

The Respondent has a number of defenses herein in addition to its defense that Devine's loud and disruptive manner on January 28 contributed to its decision not to offer employment to Devine, Tucker, McLean and Chmielewsky. Initially it defends that it has no union animus and, in fact, employs union people. In addition, it defends that most or all of these individuals were not hired or even seriously considered for hire because the Salary History in their applications states that they were previously employed at about $16 an hour or more. The Respondent's policy and history is not to hire applicants such as that because they were paying only about $8 or $9 an hour and their experience was that such employees remain for a very short time, until they get a better offer.

As to the former defense, Morello testified that he knows of two employees of the Respondent, Bob Tyler and Mike Rich, who are union members. Tyler was employed by the Respondent prior to Morello's employment with the Respondent, but Morello hired Rich, whose employment application lists Quality Painting, a known unionized employer in Amsterdam, New York and an hourly rate of $15.50 an hour, and two other employers at $14.75 and $12 an hour. The salary desired in his employment application was $9.00 an hour. Charles Olden filed an employment application on March 24. His most recent employer (from June to July 1997) was Quality Painters, where he earned $14.65 an hour. Other wage rates for the period May 1996 to July 1997 range up to $21.05 an hour. Morello testified that he hired Olden knowing that he had recently been employed by Quality. Tyler has been employed by the Respondent since about October 1995. His resume lists the Union from 1986 to 1995 under Work Experience and salary desired as $9, but does not contain a salary history for the prior 13 years. Tucker, who has been a union member for 15 years and had been union treasurer, testified that Rich and Tyler have not been union members since about 1994 or 1995. The Respondent interviewed applicant Jeffrey Miller in about February. The Salary History on his employment application lists $8 and $10 in 1994, 1995 and 1996, and $21 from December 1997.

As to this latter defense, there are two relevant areas in the Respondent's employment application, Salary Desired, and Salary History. Morello testified that during the time in question, the Respondent was paying painters between $8 and $9 an hour. If someone listed $16 as the Salary Desired, Morello would not consider that applicant for an interview. If an applicant listed $12, he would "consider that." As to an applicant's Salary History, he testified: "we have hired, from time to time, men who have made $18, $19, $21 an hour, and as soon as another $18, $19, $21 an hour job comes along, they leave . . . really upsets what we are trying to do as a company." He did not offer to interview Devine, Tucker, McLean, and Chmielewsky "number one" because of their "unprofessional" and "threatening attitude" toward Bardon and Graves. An additional reason was the salary history in their employment applications. Tucker listed four jobs in 1997, each at $16 an hour. Devine's two most recent jobs were at $21 an hour. Chmielewsky's two most recent jobs were at $18.75 an hour, and the job before those was at $11, and McLean's most recent employment was at $16 and $17 an hour. All four wrote "negotiable" for the salary desired in the employment application.

Morello interviewed Flansburg, who listed $12 as the salary desired, and salaries from $10 to $18 (self employed) under salary history. Michael Randall, who completed his employment application on January 28, listed three jobs between 1995 and 1997 of $10 and $12 an hour, and a salary desired as "flexible." Morello interviewed him because those rates were "within our working range." He did not attempt to interview Winchell because the one employer listed paid him $16 an hour, and the salary desired was also $16. Francis Santoro, whose employment application is dated January 28 and whose salary history was between $15 and $16 an hour and who listed $16 for salary desired also was not offered an interview by the Respondent. Anthony Vecchio filed an employment application with the Respondent on April 3, 1997. His salary history ranged from $16.50 to $18.50 an hour, and the salary desired was $10 an hour. Morello testified that Vecchio told him that he was willing to start at $9; he was hired, showed up for a company meeting, and never appeared again. Four other named individuals who were employed by the Respondent in 1994 and 1995 and had salary histories of about $10 to $15 or $15 to $19, were hired and trained by the Respondent, and stayed for between two weeks to a few months. Miller testified that in the past, the Respondent had hired individuals with a high salary history and "they would work until the better paying job came along, and they would be gone. And they usually didn't last more than two weeks." Afterward, the Respondent's policy was: "To take a closer look at people's pay history, and not consider someone that is…making over $15, $16 an hour as a good candidate, as a long-term employee."

## III. ANALYSIS

Initially, it is alleged that the Respondent, on about January 29, by Morello, interrogated an applicant for employment regarding his union membership in violation of Section 8(a)(1) of the Act. As there is no evidence that this occurred, I recommend that this allegation be dismissed. As regards the remaining allegation herein, in *Wright Line*, 251 NLRB 1083 (1980), the Board spelled out the burdens to be applied in 8(a)(3) cases, including salting cases such as the instant matter. The General Counsel has the initial burden of establishing a prima facie case sufficient to support the inference that the individual's protected conduct was a "motivating factor" in the employer's decision (in this case) not to hire the applicants. If the General Counsel has satisfied this requirement, the burden shifts to the employer to establish that the employees would not have been hired "even in the absence of the protected conduct."

There are a number of credibility determinations that need to be made prior to determining whether the General Counsel has sustained its initial burden herein. I found Devine, Tucker, and (especially) McLean to be credible witnesses who appeared to be testifying in an honest and truthful manner, and credit their testimony that Devine did not raise his voice or act in a loud or threatening manner at the Respondent's facility on January 28. That is not to say that Bardon and Graves were totally incredible witnesses. Although they are no longer employed by the Respondent and had nothing to gain from their testimony in support of the Respondent's position, I found the testimony of Devine, Tucker and McLean more credible. Further, I find it more reasonable that the applicants who were applying for the jobs in order to be able to organize the Respondent's employees on their free time would be respectful, as Tucker and McLean admittedly were, in order to get the job. I therefore credit the testimony of Devine, Tucker and McLean over that of Bardon and Graves concerning the incident of January 28, and reject the Respondent's defense that Devine's alleged unprofessional and threatening attitude was the "number one reason" that these four applicants were not hired. The remaining defenses are that the Respondent lacked any union animus and did not hire the applicants herein because it had a practice of not hiring applicants with a salary history substantially in excess of what Respondent was paying ($8 or $9 an hour at the time). While this defense has some reasonable appeal, it must be carefully examined in order to determine whether it is a convenient pretext for refusing to hire union members.

The instant matter is a perfect illustration of the dangers inherent in this defense. The union members herein, while employed in union or prevailing rate jobs recently, were paid hourly wages ranging from about $15 to $21 an hour. Any employer, fearful of salting campaigns in general or union employees in particular, could simply invoke this "salary history defense" in order to defend its refusal to hire union members. This defense, even if supported by some bad situations that the Respondent had experienced in the past, such as its employment of Vecchio in 1997 and four other individuals with high salary histories who were hired by the Respondent in 1994 and 1995 and only remained for from a few weeks to a few months, cannot be used mechanically to defeat rights established by the Act.

I find that the Respondent has not adequately established its salary history as a defense to the allegations herein. Although there is credible evidence that the Respondent had been burnt in the past by hiring high salaried individuals, there is also evidence that they continued to interview applicants, such as Olden and Miller, with high salary histories. *Donald A. Posey, Inc.*, 327 NLRB 140 (1998), distinguishable from the instant matter. In that case, the applicant-discriminatee assured the employer that, if hired, he would remain in their employ for at least a year. The applicants herein gave no such assurances. In addition to the above, I found Winchell to be a credible and believable witness, although it is reasonable to believe Bardon's testimony that Winchell gave her the prior employment information listed on the application. Winchell was a credible witness, but not one with a perfect memory. I credit his testimony that on the day following his interview, he was called to come to the Respondent's office for an interview; when he responded that he belonged to the Union, the conversation and his contact with the Respondent ended. Winchell's employment application, under salary history, lists only one job for 8 years and an hourly salary of $16. All of this convinces me that while the Respondent's salary history defense herein has some obvious appeal, the evidence establishes that at the time in question it was enforced in a selective manner.

I also reject the Respondent's defense that it lacked union animus. Although there is some disputed evidence that it employed some union members, there is some credible and some undisputed evidence establishing animus. As stated above, I

credit Winchell's testimony that after he informed Bardon that he was a Union member, he was never again offered the interview. In addition, Bardon noted on Winchell, O'Leary, and Nancy Devine's employment application that they were union members. Although Bardon testified that they volunteered this information, neither she nor any of the Respondent's witnesses testified as to why this information was relevant to the Respondent in determining which applicants to hire. It should have nothing to do with their qualifications, and it was not a factor that Morello would have to know in determining whether they should be interviewed. Since I have discounted the Respondent's defenses herein, I find that the General Counsel has sustained his initial burden herein and that the Respondent has not sustained its burden of establishing that these applicants would have been hired even in the absence of their union membership.

## CONCLUSIONS OF LAW

1. The Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1)(3) of the Act on about January 28 and February 3 by refusing to hire, or consider for hire, job applicants Devine, Tucker, Chmielewsky, McLean, Winchell, O'Leary, and Nancy Devine because of their union membership and support.

## THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent unlawfully refused to hire, or consider for hire, Devine, Tucker, McLean, Chmielewski, Winchell, O'Leary, and Nancy Devine, the Respondent must offer them employment to the same or substantially equivalent position for which they applied, without prejudice to any seniority or other rights or privileges to which they would have been entitled in the absence of the discrimination. Respondent must also make them whole for any loss of earning or other benefits they may have suffered as a result of the discrimination practiced against them from the date that they would have commenced working for the Respondent to the date that the Respondent makes them a valid offer of employment. Such amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

## ORDER

The Respondent American Restoration and Maintenance Corp., d/b/a Americlean, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Refusing to hire, or consider for hire, job applicants who were members of Local 466, International Brotherhood of Painters and Allied Trades, AFL–CIO, or any other union.

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

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

(a) Within 14 days from the date of this Order, offer Phillip Tucker, Austin Devine, James Chmielewski, John McLean, Carl Winchell, William O'Leary and Nancy Devine employment to the same or substantially equivalent positions for which they applied, without prejudice to any seniority or any other rights or privileges to which they would have been entitled in the absence of the Respondent's hiring discrimination.

(b) Make the above named employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(c) 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.

(d) Within 14 days after service by the Region, post at its facility in South Glens Falls, New York copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition, the Respondent, at its own expense, shall duplicate and mail a copy of the notice herein to the seven applicants found to have been unlawfully discriminated against in this Decision.

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

Dated, Washington, D.C. April 22, 1999

[3] 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

[4] If this Order is enforced by a Judgment of the 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 refuse to hire job applicants because they are members of Local 466, International Brotherhood of Painters and Allied Trades, AFL–CIO or any other labor organization.

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

WE WILLwithin 14 days from the date of the Board's Order, offer Phillip Tucker, Austin Devine, Nancy Devine, James Chmielewski, John McLean, William O'Leary, and Carl Winchell employment to the same or substantially equivalent positions for which they applied, without prejudice to their seniority or any other rights or privileges to which they would have been entitled in the absence of our hiring discrimination.

WE WILL make Tucker, Devine, Devine, Chmielewski, McLean, O'Leary, and Winchell whole for any loss of earnings and other benefits resulting from our discrimination against them, less any net interim earnings, plus interest.

AMERICAN RESTORATION AND MAINTENANCE CORP., D/B/A AMERICLEAN