

**Abell Engineering & Manufacturing, Inc. and Sheet Metal Workers' International Association, Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL-CIO.** Cases 25-CA-25966 and 25-CA-26263

October 18, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On September 13, 1999, Administrative Law Judge C. Richard Miserendino issued the attached decision. The General Counsel and the Respondent each filed exceptions, supporting briefs, and answering briefs. The Respondent also filed a reply to the General Counsel's answering brief. On June 22, 2000, the Board invited the parties to file supplemental briefs addressing the framework for analysis of refusal-to-consider and refusal-to-hire allegations set forth by the Board in *FES*, 331 NLRB 9 (2000). The Respondent and the General Counsel subsequently filed supplemental briefs.

The National Labor Relations 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, and conclusions only to the extent consistent with this Decision and Order.

The consolidated complaint alleged, *inter alia*, that the Respondent's October 1998 discharge of employee Richard Gist violated Section 8(a)(3) and (1) of the Act. Gist was terminated for attempting to persuade fellow employee David Bautista to quit the Respondent for a position with another employer, at which membership in Local 20 of the Sheet Metal Workers (the Union) was contractually required. The judge found that Gist's solicitation of Bautista to take another job was protected activity and that the solicitation did not constitute "disloyalty" to the Respondent that deprived Gist of the Act's protection, on the grounds that Gist's objective was to "increase membership in the Union" and there was no evidence that he would personally have benefited from Bautista's taking the union job. The judge consequently found the discharge unlawful. Based on that finding, he also found that the Regional Director's revocation of a settlement agreement resolving allegations of earlier violations of Section 8(a)(1) and (3) (including an earlier discharge of Gist) was permissible, and that the Respondent had committed a number of the presettlement violations alleged.

The Respondent excepts to all of these findings, arguing that Gist's attempt to persuade Bautista to quit the Respondent's employ was disloyal conduct that deprived him of protection, whether or not his other activities were protected. Accordingly, the Respondent contends the settlement agreement resolving the other allegations in the complaint was not properly revoked and should be reinstated. The General Counsel argues to the contrary and contends that the allegations of earlier misconduct addressed by the revoked settlement agreement are established in the record.

On the credited record, we reverse the judge and find that, under the circumstances, Gist engaged in disloyal conduct that deprived him of whatever statutory protection he may otherwise have had.

Although Gist had attempted to organize the Respondent's three-man welder/fabricator unit, the record establishes that he gave up that attempt when neither of the other two employees, including Bautista, was willing to sign a union authorization card. Gist informed Union Organizer Michael Van Gordon of his inability to recruit a unit majority. At Van Gordon's instruction, Gist then informed Bautista—who had expressed some interest in union benefits and pension—that a higher paying job located closer to his home was available with another employer who had a union-shop contract, and urged him to take that job. Bautista replied that he was not interested, but Gist raised the subject again a few minutes later, emphasizing that the job at higher pay was available for Bautista and urging him to contact Van Gordon if he had any questions. Bautista then asked why Gist did not take the job himself, and Gist replied that he already had something else "set up." Bautista informed the Respondent's owner of what Gist had said to him about the other job, and Gist was discharged later that day, which was a Friday. The following Monday, Gist started work with another employer, confirming that he had indeed "set up" another job for himself.

It is clear from these facts that Gist's organizing activity had ceased when he attempted to recruit Bautista to work for another employer, and that he pursued Bautista with the full knowledge that if Bautista took that job the Respondent would lose one of only three employees in its welder/fabricator unit. Accordingly, Gist's attempts to induce Bautista to quit and take another job were unrelated to organizing the Respondent's employees or improving their conditions of employment with the Respondent. Moreover, his actions would have been deeply injurious to the Respondent, leaving it with only one employee.<sup>1</sup> Whatever the impact of this conduct on a larger employer, better able to absorb the loss of one or two employees simultaneously, here the impact—as Gist was fully aware—would have been at least temporarily crippling, and possibly fatal, to the Respondent.

Under this set of facts, we find that Gist's conduct exceeded the protections of the Act.<sup>2</sup> The facts presented here are most analogous to those in *Clinton Corn Processing*, 194 NLRB 184 (1971) (former employee who became

<sup>1</sup> When Gist sought to induce Bautista to quit, he had already arranged to take a job with another employer himself.

<sup>2</sup> We need not decide what, if any, protection a union organizer would have to induce an employee to quit for other employment in some other factual context.

Members Cowen and Bartlett have strong doubts that there are any factual circumstances where the Act would protect a union organizer who induces an employee to quit for other employment. However, they need not decide whether there are any such circumstances inasmuch as they find that, in the circumstances here, Gist's conduct was unprotected.

agent for competitor was not protected when he solicited respondent's employees to work for competitor), and distinguishable from those in cases where the Board found that the protection of the Act was not lost.<sup>3</sup>

Because Gist's actions exceeded the Act's protection, the Respondent committed no violation of the Act in discharging him for urging Bautista to take a job with another employer.<sup>4</sup> We therefore find that the discharge did not constitute a valid basis for the Regional Director's revocation of the settlement agreement concerning the allegations of earlier violations of the Act. We will accordingly reinstate the settlement agreement and dismiss the consolidated complaint in its entirety.<sup>5</sup>

#### ORDER

The consolidated complaint is dismissed and the settlement agreement in Case 25-CA-25966 is reinstated.

*Raifael Williams, Esq.*, for the General Counsel.

*James H. Hanson, Esq.*, of Indianapolis, Indiana, for the Respondent.

<sup>3</sup> See, e.g., *Arlington Electric*, 332 NLRB 845 (2000) (employee who distributed union flyer advertising union-scale employment elsewhere did not lose protection because he was not trying to induce employees to quit but rather to demand higher pay from respondent); *Technicolor Services*, 276 NLRB 383 (1985) (distribution of employment applications for competitor was not disloyal because there was a real possibility of layoff, and distribution was intended to ensure continued employment, not to injure respondent); *Special Machine & Engineering, Inc.*, 247 NLRB 884 (1980) (employee who posted another employer's wage rates was not disloyal because he did not urge employees to leave respondent and posting, at most, merely invited comparison of wages); *QIC Corp.*, 212 NLRB 63 (1974) (group of employees did not lose protection for attempting, on their own initiative, to seek employment with competitor during pay dispute with respondent); and *Boeing Airplane Co.*, 110 NLRB 147 (1954), enf. denied 238 F.2d 188 (9th Cir. 1956) (organizing a "manpower availability conference" to match engineers with prospective employers was not disloyal conduct; conference was intended to leverage respondent's bargaining position on wages and also to counter employers' "gentlemen's agreement" not to hire each other's employees).

Member Cowen and Member Bartlett agree that the foregoing decisions may be distinguished from *Clinton Corn Processing*, and that doing so helps illustrate the unprotected nature of Gist's conduct in the instant case. However, they express no view regarding the merits of those decisions.

<sup>4</sup> Although the judge found that the Respondent acted with unlawful animus with respect to the earlier alleged violations, he implicitly credited the Respondent's contention that the discharge was motivated solely by Gist's attempt to persuade Bautista to work elsewhere and not—as contended by the General Counsel—by his protected activity of trying to organize the Respondent's employees.

<sup>5</sup> We therefore express no view as to the judge's findings on the merits of the complaint allegations of earlier misconduct. Our reinstatement of the settlement agreement also makes it unnecessary for us to consider the General Counsel's limited exceptions to the judge's dismissal of two refusal-to-consider allegations involving employee William Gary Rogers.

#### DECISION

##### STATEMENT OF THE CASE

C. RICHARDS MISERENDINO, Administrative Law Judge. This case was tried in Indianapolis, Indiana, on June 7–8, 1999. The charge in Case 25-CA-25966 was filed by Sheet Metal Workers' International Association, Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL-CIO (Union) on April 2, 1998,<sup>1</sup> alleging that Abell Engineering & Manufacturing, Inc. (Respondent) violated Section 8(a)(1) and (3) of the Act by refusing to hire or consider for hire union applicants William Rogers, Dennis Wheeler, Charles Parsley,<sup>2</sup> and Mark Moran and by discharging on February 17, 1998, Union Organizer Richard Gist because of their union activity. The charge was amended on June 22, 1998, to allege that the Respondent violated Section 8(a)(1) of the Act by threatening to close the business if the employees chose to be represented by a union.

On July 31, 1998, the Union and Respondent entered into a settlement agreement, which was approved by the Regional Director, whereby the Respondent agreed to offer reinstatement to Richard Gist, pay a specified amount of backpay to Mark Moran, notify William Rogers that he, along with other applicants, would be considered for employment on a non-discriminatory basis, and post a notice. Gist was reinstated on August 28, 1998, Moran was paid the gross amount of \$2520, Rogers was notified that he would be considered for employment if he applied, and a notice was posted from August 7 to October 8, 1998. The Respondent filed a notice of compliance on October 14, 1998.

In the meantime, however, on October 2, 1998, the Respondent discharged Gist again and the Union filed the charge in Case 25-CA-26263 alleging that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Richard Gist because he engaged in union activities.

On November 20, 1998, the Regional Director set aside the settlement agreement and issued a consolidated complaint essentially alleging the violations asserted in the charge, as amended, in Case 25-CA-25966 and the charge in Case 25-CA-26263.<sup>3</sup> The Respondent's timely answer denied the material allegations of the complaint. The parties have been afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file posthearing briefs.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent,<sup>4</sup> I make the following

<sup>1</sup> All dates are in 1998, unless otherwise indicated.

<sup>2</sup> Charles Parsley is not named as an alleged discriminatee in this case.

<sup>3</sup> In addition, the consolidated complaint alleges that the Respondent offered to re-employ Gist on February 17, if he resigned his membership in the Union. (Complaint par. 5(b).)

<sup>4</sup> On July 15, 1999, counsel for the General Counsel filed a motion to strike Respondent's posthearing brief on the grounds that it was untimely filed. Respondent's counsel responded on July 16, 1999. Having duly considered the arguments raised therein and the trial transcript at p. 271, the motion to strike is denied.

## FINDINGS OF FACT

## I. JURISDICTION

The Respondent, an Indiana corporation, is a small engineering and manufacturing company engaged in sheet metal fabricating, stamping, shearing, and welding, located in Indianapolis, Indiana, where during the 12-month period ending March 31, 1998, it purchased and received, sold, and shipped goods valued in excess of \$50,000 directly from and to points outside the State of Indiana. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

## II. ALLEGED UNFAIR LABOR PRACTICES

A. *Issues*

1. Whether the Respondent discharged Richard Gist on October 2, 1998, because of union activities in violation of Section 8(a)(3) of the Act?

2. Whether the circumstances warrant revoking the settlement agreement approved by the Regional Director on or about July 31, 1998, and if so,

3. Whether the Respondent unlawfully:

(a) Told union applicants William Rogers and Dennis Wheeler that it would close its business if the employees unionized in violation of Section 8(a)(1) of the Act.

(b) Offered Richard Gist re-employment on February 17, 1998, if he relinquished his union membership in violation of Section 8(a)(1) of the Act.

(c) Refused to consider for hire William Gary Rogers since October 28, 1997, in violation of Section 8(a)(1) and (3) of the Act.

(d) refused to consider for hire and refused to hire Mark Moran on February 11, 1998, in violation of Section 8(a)(1) and (3) of the Act.

(e) Discharged Gist on February 17, 1998, in violation of Section 8(a)(1) and (3) of the Act.

B. *Presettlement Conduct*

The Respondent, a small company which designs and manufactures mall kiosks and decorative metal pieces, is operated by husband and wife George and Cheryl Abell. George Abell (Abell), the president and owner, supervises the sheet metal shop and is primarily responsible for interviewing and hiring employees. Cheryl Abell (Cheryl), the secretary-treasurer, oversees the office and bookkeeping duties, occasionally assists in the shop, and occasionally assists with interviewing and hiring.

In late October 1997, the Respondent employed about three or four employees in its sheet metal shop. One of them, William Graves, a welder, was discharged by Abell for taking the afternoon off without permission. Seeking to replace him, Abell advertised for a replacement in the *Indianapolis Star-News* on October 26–29.<sup>5</sup> (GC Exhs. 3, 6, and 10.)

<sup>5</sup> The ad, which appeared on October 26 and 27, sought a welder, the ad which appeared on October 28 sought an operator, and separate ads

## 1. The October 1997 hirings

On the morning of October 28, union members William Gary Rogers (Rogers) and Dennis Wheeler (Wheeler) responded in person to the advertisements. (Tr. 102; GC Exhs. 3 and 6.) Neither attempted to conceal their union affiliation. Both wore union hats. Rogers submitted a completed application, along with a resume, for a welder/fabricator position. His application indicated that he was an organizer for the Union and that he had 4 years of relevant welding experience (i.e., MIG, TIG, and heliarc). He also had experience using a plasma cutter, hydraulic punch, shears and other sheet metal tools. Wheeler submitted a completed application for a fabricator position.<sup>6</sup> His application likewise indicated that he was an organizer for the Union.

George Abell interviewed Rogers and Wheeler together. They told Abell that they were currently employed by the union as organizers. They also told him that as organizers they applied for work at nonunion shops to try to organize the employees. Rogers and Wheeler testified that Abell told them that he was not a union shop, that he previously had a bad experience with a union, that he did not have many people working for him, and that he did not need a union. According to Rogers and Wheeler, Abell also said that if his employees decided to go union, he would close the doors. (Tr. 105.) Abell denied making the latter statement. (Tr. 241.)

Rogers and Wheeler were credible witnesses. Their respective testimonies were also corroborated by contemporaneous writings, i.e., union interview logs, that were completed soon after their interview ended. Both logs reflect that Abell said he would close the business.

Respondent's counsel unpersuasively argues that the interview logs actually discredit their testimonies because they differ as to the order in which the conversation flowed. Rogers' log noted that Abell said he would close the business early in their conversation and Wheeler's log noted that the statement was made later. I do not attribute great significance to this discrepancy because as a practical matter not everyone remembers the same events in exactly the same way. What is important is that both interview logs reflect that the statement was made and that the event was recorded minutes after the interview ended. That the logs differ to a degree enhances the integrity of the documents as independent recollections because otherwise it would seem as if Rogers and Wheeler copied from each other.

Adding credence to their testimonies is the fact that the statement attributed to Abell fits with the other undisputed remarks that he made at the same time which show that he opposed unions. That is, Abell stated that he previously had a bad experience with a union and that he did not need a union. (Tr. 153–154.)

The Respondent nevertheless asserts it is unlikely that Abell made that remark because he gave Rogers a welding test and told him that he was required to consider him for the job, even though he was a union organizer. The Respondent essentially

appeared on October 29 for a welder and operator. (GC Exhs. 3, 6, and 10.)

<sup>6</sup> There is no evidence that a fabricator position was available at that time.

argues that the statement about closing the business that is attributed to Abell is inconsistent with his actions and therefore his denial should be credited. I do not agree. The welding test was a part of the regular interview process. To deny Rogers the opportunity to take the test would truly have set the stage for a failure to consider violation. More importantly, the fact that Abell followed the interview process does not make it any more or less likely that he told these union applicants that if the employees ever unionized he would close the business.

Finally, having observed Abell's demeanor, I find that his denial was unconvincing. Thus, for demeanor, and other reasons, I therefore credit the testimony of Rogers and Wheeler that Abell stated that he would close the business if the employees decided to unionize.

After completing the welding test,<sup>7</sup> Abell told Rogers and Wheeler that he would be in touch, but they were never contacted by Respondent.

On October 28, Paul Parker, a nonunion applicant, also applied for the welder's job. He had previously worked with Abell for several years at Gammon Sheet Metal and had 7 years relevant experience as a welder. Abell considered him to be an excellent welder and therefore hired him on the spot. According to Abell's un rebutted testimony, Parker was one of the first applicants he interviewed on October 28, and that he interviewed before Rogers and Wheeler.<sup>8</sup>

## 2. The February 1998 hirings

On January 13, 1998, Parker voluntarily quit. On February 8, Abell placed an ad in the local newspaper for a welder and another ad on February 9 and 11 for a welder/fabricator.<sup>9</sup> (GC Exhs. 11, 12, and 17.) Several individuals who responded to the ad were scheduled for interviews.

On February 10, at approximately 9 a.m., Abell interviewed Jeff Evans, a nonunion applicant. He had 4 years of relevant welding experience. Evans took a welding test, which he passed, and was hired. At approximately 10 a.m., Abell interviewed David L. Bautista, who had 9 years of relevant welding experience. Although Abell was impressed with Bautista's qualifications and his welding skills, he did not offer him a job because he was still living in California and was not immediately available for work.

A few hours later, at approximately 1 p.m., Richard Gist applied as a covert union applicant. He did not reveal that he was a union member or wear any clothing that would suggest the same. His application reflected that he worked for Zue Corporation as a welder at a pay rate of \$9.50 hour. Abell and Foreman Neat gave Gist a welding test and were impressed. They went to Abell's office to discuss work experience and

salary expectations. Abell testified that he offered Gist a job at \$10 an hour. Gist testified that when he asked for \$11–12 per hour, Abell told him that he would phone him the following day after he conducted a few more interviews. That night, Abell discussed the situation with his wife, Cheryl, and decided to offer Gist \$10.50 an hour. He called Gist on February 11, offered him a welder job at \$10.50 an hour with a pay raise in 6 months, which Gist accepted.

In the meantime, and after Gist left, union applicant Mark Moran, overtly applied for the welder/fabricator position on February 10. Moran submitted a completed application to Abell showing that he was employed by the Union as an organizer and attached a resume disclosing his union experience. Moran listed Apex Industries as a former employer. Abell asked Moran if Apex was a union contractor and Moran responded affirmatively. He also told Abell that he was employed by the Union as an organizer. Although Moran had 8 years of relevant welding experience, as well as experience as a fabricator, Abell would not give him a welding test because he was a union organizer and he wanted to hire a nonunion employee. (Tr. 51–52.) Abell admitted that he told Moran that he “did not feel that it was in the best interest of the company to hire someone who stated on his resume that he worked for the Sheet Metal Workers and wanted to organize [the] company.” (Tr. 51.) Abell nevertheless told Moran that he would be in touch with him.

Finally, on February 11, Rogers and another union organizer, Charles Parsley responded to the welder/fabricator ad. They were wearing work clothes and union hats. Rogers told an employee of the Respondent that he wanted to check the status of his application and Parsley said that he wanted to submit an application. Neither were afforded the opportunity to do so.

## 3. Gist is discharged on February 17, 1998

On February 17, 3 days after he began working for Respondent, Gist gave Abell a letter from union organizer Michael E. Van Gordon advising Abell that Gist was a member and employee of the Union, who had been assigned by the Union to organize the Respondent's employees. Abell testified that when he asked Gist why he did not disclose his union affiliation on his application, Gist responded, “Well, I guess I falsified my application. And you wouldn't have hired me if I would have put that on my application. So I guess that's grounds for you to dismiss me.” In contrast, Gist testified that when Abell looked at the letter, Abell commented that Gist had lied to him and that lying was possibly grounds for termination. In any event, Abell did not discharge Gist at that point.

After lunch, Gist told Abell that he was taking the rest of the afternoon off because he had a headache and sore neck from wearing a welder's helmet. Gist testified that Abell told him that he was still thinking about firing him because he had lied on his application. He also questioned whether Gist had ever worked for Zue Corp. as stated in his application. Gist insisted that he had worked there. Abell then told Gist that there was a great deal of work to be done, and if he was not going to work, he should get his “stuff and get out.” (Tr.172, 211.) According to Gist, as he clocked-out, Abell told him that if he was to get

<sup>7</sup> Wheeler decided not to take the welding test because he was not familiar with TIG welding. (Tr. 147.)

<sup>8</sup> William C. Winesmann, another nonunion applicant, applied for a job on October 29. He was referred by Shop Foreman Ed Neat, and was hired for the operator position on that date. There is no evidence, or argument, that either Rogers or Wheeler applied for that position.

<sup>9</sup> As Abell explained, a fabricator has to shear, punch, and press together intricate metal pieces to form a subassembly. A welder fastens the subassemblies together using different types of welding techniques. A welder/fabricator can do both jobs. (Tr. 25–29.)

out of the Union, he would still have a job and he would be paid what the Union was paying him.

Abell flatly denied that he told Gist that if he resigned from the Union he could keep his job and would be paid at the union pay rate. (Tr. 251.) However, a telephone conversation with Gist that took place shortly after he was discharged undercuts Abell's credibility.

After leaving the Respondent's premises, Gist went to the union hall where he phoned Abell ostensibly to inquire about his last paycheck. Unbeknown to Abell, Gist tape recorded their conversation. (R. Exh. 18.) Gist told Abell that his boss, Union Organizer Van Gordon, was upset with him because he had taken off a half day. He asked Abell, "Were you serious about what you said? If I was to quit here and go there, you would pay me . . . What I was making?" Abell hesitated, and then responded, "uh, uh, I would have to think about that because I don't like to be deceived, ya know." After some prodding by Gist, Abell remarked that Gist was making \$16 an hour, and that he could not pay him that much money because he did not even make that much himself.<sup>10</sup>

At that point, the transcript of the tape recorded conversation shows that Abell undisputedly told Gist that he would have to resign from the Union before he would take him back.

GIST: Yeah, so if I did jump out of here and went back to you, if you, ya know, still wanted me, I would have a position?

ABELL: Well, you would have to, uh, resign from the Sheet Metal Workers Union.

GIST: Right, I realize that.

ABELL: I'd have to see that in writing.

GIST: Right.

ABELL: Well, I don't know, because I don't know if you would ever truly resign from them anyway. You would probably still try to organize a union here. [R. Exh. 18.]

This evidence corroborates Gist's testimony about his conversation at the timeclock with Abell and leaves little doubt that resignation from the Union was a precondition for reemployment. For these, and demeanor reasons, I credit Gist's testimony that while he was clocking out on February 17, Abell told him he could keep his job if he would resign from the Union and that the Respondent would pay him the union pay rate.

#### 4. Bautista is hired

In March 1998, Abell phoned Bautista, who was still living in California, and offered him a welder's job. He accepted and began working for Respondent on March 31, 1998. He was later promoted to foreman.

#### C. The Settlement Agreement

On or about July 29, 1998, the Union and Respondent entered into an informal settlement agreement of the charge in Case 25-CA-25966, which was approved by the Regional Di-

<sup>10</sup> At no time during the telephone conversation did Abell ever deny that he told Gist earlier that he would pay him the union rate if he stayed, although he had ample opportunity to do so. This omission lends credence to Gist's version of their earlier conversation.

rector. It required, among other things, the Respondent to provide backpay to Mark Moran (without reinstatement); consider William Rogers and any other applicant for employment on a nondiscriminatory basis; offer Richard Gist full reinstatement to his welder position (without backpay) (R. Exh. 12) and post a notice stating that it would not tell applicants that it would close the business if the employees decided to unionize and offer or promise to rehire employees if they resigned their membership in the Union. The notice also stated that the Respondent would not discharge employees because of union activity and would not refuse to hire or refuse to consider for hire union applicants.

Gist accepted an offer of reemployment and returned to his welder's position on August 28, 1998. Moran was paid backpay and Rogers was notified that he would be considered for employment on a nondiscriminatory basis. The notice was posted from August 7 to October 8, 1998.

#### D. The Postsettlement Discharge of Gist

Soon after Gist returned to work, he began talking to the employees about joining the Union. On September 16, he discussed the pros and cons of unionizing with Evans and Bautista in the breakroom and asked them if they wanted more information. Evans immediately said no and left the breakroom. Bautista asked for more information about benefits and pensions. The following day, Gist gave Bautista the information and an authorization card. Thus, out of the three nonsupervisory shop employees (Evans, Bautista, and Gist), only Bautista showed any interest in learning more about the Union. However, Bautista would not sign an authorization card.

By October 1, Gist had garnered little, if any, support for the Union. He and Union Organizer Van Gordon therefore conceived a plan to persuade Bautista to take a job with a union contractor.

Shortly after arriving for work on October 2, Gist told Bautista about a job paying \$15 an hour with Nu-Jac, a union contractor, on the west side of town, which was closer to where Bautista lived. Bautista told Gist that he was not interested. About 5 minutes later, Gist returned to tell Bautista that it was a good job, and if he had any questions, he should talk to Van Gordon. When Bautista asked Gist why he did not take the job, if it was so "good," Gist told him that he already had something else set up.<sup>11</sup>

October 2 was also Bautista's birthday. At lunchtime, Cheryl Abell bought pizza for all of the employees and an office worker gave Bautista a birthday cake. During the celebration, Gist left the building and met Van Gordon in the parking lot. Van Gordon gave Gist a birthday cake to give to Bautista, which read "Happy Birthday from Local 20 Sheet Metal Workers." Gist went back inside and in the presence of everyone at lunch presented Bautista with the cake telling him happy birthday from the Union.

As the pizza party concluded, Bautista told Abell that Gist had told him about a job with a union contractor paying \$15 an

<sup>11</sup> The evidence shows that Gist was discharged by Respondent later that day, Friday, October 2, and started work at Apex Industries on Monday, October 5.

hour. (Tr. 268.) Abell then met with Cheryl. He told her that right after lunch, Gist came to him saying that the Union wanted the Respondent “to join their ranks.” (Tr. 230.) He also told her that Gist apparently had approached Bautista about the Union because Bautista had confided to him that Gist had offered him a job with a union contractor making \$15 an hour. (Tr. 230.) Cheryl wondered aloud whether they had “to put up with this.” However, because they had rehired Gist under the terms of the settlement agreement, they were unsure of their legal rights. Abell left for a meeting, so Cheryl phoned their attorney.

After speaking with their lawyer, Cheryl went out to the production area, where Bautista and Gist were working. In the presence of Gist, Cheryl asked Bautista if Gist had offered him a job making \$15 an hour, and Bautista responded, “Yes.” Cheryl then told Gist to get his tools and get out.

#### E. Analysis and Findings

##### 1. The unlawful discharge of Richard Gist on October 2, 1998

The primary issue here is whether Gist was engaged in protected union activity at the time he was discharged. If so, the Respondent must show that it would have discharged him even in the absence of protected union activity. If not, then no violation occurred.

Section 7 of the Act, in pertinent part, states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted. [Emphasis added.]

The undisputed evidence shows that Gist sought to assist the Union in two ways. First, he unsuccessfully tried to organize the sheet metal shop employees. He spoke to them about the benefits of joining the Union, passed out information, and tried to get Bautista to sign an authorization card. In addition, and at the direction of Union Organizer Van Gordon, he attempted to persuade Bautista to take a job with a union contractor, which would have required Bautista to join the Union. The evidence discloses that when Gist told Bautista about a job on the west side of town with a union contractor that paid \$15 an hour, he also told him that he would have to join the Union in order to get the job. (Tr. 188.) Thus, the evidence supports a reasonable inference that Gist (and Van Gordon) sought to assist the Union by attempting to do indirectly, what they could not do directly, that is, obtain another member for the Union. I therefore find that Gist’s conduct falls within the broad protective ambit of Section 7 of the Act.

The Respondent does not argue that Gist was not engaged in protected activity. Rather, it asserts as a *Wright Line*<sup>12</sup> defense that it discharged Gist for cause because he breached a duty of loyalty owed to the Respondent under Indiana and Board law.<sup>13</sup>

<sup>12</sup> 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

<sup>13</sup> The evidence shows, and the Respondent on brief effectively concedes, that the General Counsel has satisfied his initial evidentiary burden under *Wright Line*. The Respondent therefore elected to focus on its *Wright Line* defense.

It cites *Potts v. Review Board of the Indiana Employment Security Division*, 475 N.E.2d 708, 711 (Ind. Ct. App. 1985), and *Davis v. Eagle Products*, 501 N.E.2d 1099 (Ind. Ct. App. 1986), for the proposition that “an employee must refrain from actively or directly competing with his employer for customers and employees and must continue to exert his best efforts on behalf of the employer.” (R. Br. at 18.)

Those cases are inapposite for two reasons. First, neither case involves union or concerted activity and therefore the spectrum of Section 7 of the Act was not invoked. Second, in both cases, the employees engaged in a course of conduct which sought to inure a benefit for themselves. In *Potts*, an unemployment insurance case, the employee was discharged after his employer found out that he had invested money in a competing taxicab company. The State Court found that the employee had breached his duty of loyalty because his own interests were potentially antagonistic to those of his employer. In *Davis*, two employees who planned to leave their employer to form a rival company solicited fellow employees to come work for them. They breached a duty of loyalty because while still employed by placing their own self-interests above those of their employer. In the present case, there is no evidence that Gist sought to derive a benefit for himself or the union contractor. Thus, neither of these cases address the factual issue presented here.

The Respondent also argues that Board law supports its defense citing *Crystal Linen & Uniform Service*, 274 NLRB 946 (1985). In that case, striking route driver salesmen were permanently replaced. They went to work for a competing company and individually solicited their former customers to switch their business from their employer to its competitor. After they received a formal written warning from their employer directing them to cease such conduct or face further discipline, including discharge, the striking drivers filed an 8(a)(1) charge which was pursued to trial. The administrative law judge, as affirmed by the Board, determined that there was no violation of the Act. Significantly, he found that, in soliciting their former customers, the employees were not engaged in concerted activity. “It could not be reasonably argued that solicitation of former customers contributed to the advancement of strike goals or to union solidarity. The purpose of activity was to advance individual goals and objectives, rather than any group benefit.” *Id.* at 948. This was a fatal defect in the case, which warranted dismissal of the complaint.<sup>14</sup>

*Crystal Linen* is readily distinguishable by virtue of the fact that Gist was engaged in protected union activity. Indeed, the object of his conduct was not to advance any individual goal, rather it was increase membership in the Union by persuading Bautista to go work for a union contractor. There is no evidence that Gist stood to personally benefit if Bautista took the job at Nu-Jac and there is no evidence that Nu-Jac was the Respondent’s competitor. Thus, I find that Gist did not breach a duty

<sup>14</sup> The administrative law judge alternatively noted that “employees who compete with their employer and who solicit the employer’s customers to switch to the competitor are disloyal and may properly be disciplined or threatened with discipline.” *Id.* at 949.

of loyalty to the Respondent under Indiana or Board law and that his conduct was protected under Section 7 of the Act.

The Respondent has not asserted any other reason for the discharge. There is no evidence that Gist engaged in other unrelated and indefensible conduct which would demonstrate that the same action would have taken place even in the absence of the protected conduct. To the contrary, the Respondent's defense is based on the same evidence showing that Gist's conduct was protected under Section 7 of the Act. Thus, I find that the Respondent has failed to prove that Gist would have been discharged in the absence of the protected union activity. *Time-keeping Systems, Inc.*, 323 NLRB 244 (1997).

Accordingly, I find that the Respondent unlawfully discharged Gist on October 2, 1998, in violation of Section 8(a)(3) of the Act.

#### 1. Revocation of the settlement agreement was justified

A settlement agreement can be set aside and unfair labor practices can be found based on presettlement conduct, if post-settlement unfair labor practices have been committed. *Outboard Marine Corp.*, 307 NLRB 1333 (1992). Gist returned to work as part of the settlement agreement in response to the allegation that he was unlawfully discharged on February 17 for engaging in protected union activity. The evidence shows that during the notice posting period, he was unlawfully discharged. I therefore find that revocation of the settlement agreement was justified. Accordingly, I now consider the alleged presettlement violations.

#### 2. The presettlement 8(a)(1) violations

Paragraph 5(a) of the consolidated complaint alleges that Abell told union applicants Rogers and Wheeler that he would close his business if the employees selected a union as their collective-bargaining representative. I already have credited their testimonies concerning this allegation and in light of that determination I find that Abell's assertion tends to interfere with rights of employees under Section 7 of the Act. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act.

Paragraph 5(b) of the consolidated complaint alleges that Abell telephonically offered Gist reemployment if he relinquished his membership in the Union. The credible evidence shows that after being discharged on February 17 Gist phoned Abell from the union hall. The conversation, tape recorded by Gist, in pertinent part, discloses the following.

GIST: Yeah, so if I did jump out of here and went back to you, if you, ya know, still wanted me, I would have a position?

ABELL: Well, you would have to, uh, resign from the Sheet Metal Workers Union.

GIST: Right, I realize that.

ABELL: I'd have to see that in writing.

GIST: Right.

ABELL: Well, I don't know, because I don't know if you would ever truly resign from them anyway. You would probably still try to organize union here. [R. Exh. 18.]

Thus, the evidence shows that Abell introduced the idea of resigning during the conversation and preconditioned Gist's reemployment on resigning from the Union. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act.

#### 4. The presettlement 8(a)(3) allegations

Paragraph 6(a) of the consolidated complaint alleges that since on or about October 27, 1997, the Respondent has refused to consider for hire William Rogers because of his union affiliation. *Wright Line*, supra, establishes the analytical framework for deciding refusal-to-consider/hire discrimination cases turning on employer motivation. The General Counsel must persuasively establish that the evidence supports an inference that protected conduct was a motivating factor in the employer's decision.<sup>15</sup> Specifically, the General Counsel must establish that the alleged discriminatee submitted an employment application, was a union member or supporter, known suspected to be a union supporter by the employer, who harbored antinunion animus, and who refused to consider and/or hire the alleged discriminatee because of that animus. *Big E's Foodland*, 242 NLRB 963, 968 (1979). Inferences of animus and unlawful motive may be inferred from the total circumstances proved and in some circumstances may be inferred in the absence of direct evidence. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). Once accomplished, the burden shifts to the employer to persuasively establish by a preponderance of the evidence that it would have made the same decision even in the absence of protected activity. *T&J Trucking Co.*, 316 NLRB 771 (1995).

##### a. *The alleged refusal to consider Rogers for hire on October 28, 1997*

There is no dispute that Rogers submitted a completed application and resume for employment on October 28 and that he did not conceal the fact that he was an organizer employed by the Union. The credible evidence also shows that Abell told Rogers that he was opposed to unionizing and why, as well as what would happen if his employees did chose a union to represent them.<sup>16</sup> Abell nevertheless took the application, interviewed Rogers (and Wheeler), and gave Rogers a welding test,<sup>17</sup> all of which are part of the hiring process. Thus, the evidence shows that Rogers was "considered" for hire.

That Rogers was not hired on October 28 does not change this conclusion. The Respondent persuasively argues that by the time Abell interviewed Rogers on October 28, he had already hired former coworker Paul Parker who had more welding experience than Rogers. Counsel for the General Counsel does not argue, and there is no credible evidence, that Parker was not hired before Rogers. Thus, the evidence fails to show that the

<sup>15</sup> *Manno Electric*, 321 NLRB 278 fn. 12 (1996).

<sup>16</sup> Other evidence of animus is Abell's statement to Moran on February 10, 1998, that "he did not feel that it was in the best interest of the Company to hire someone who stated on his resume that he worked for the Sheet Metal Workers and wanted to organize [the] Company" (Tr. 51), and his statement to Gist that he would reemploy him if he resigned from the Union.

<sup>17</sup> Wheeler declined to take the test because he did not have the required welding skills.

Respondent refused to consider William Rogers for hire on October 28, 1997.

*b. The refusal to consider Rogers for hire on February 11, 1998*

The undisputed evidence shows that on February 10, 1998, Abell interviewed and hired Jeffrey Evans for the welder/fabricator position. The credible evidence also shows that on the same day, Abell interviewed Gist after Evans. Even though Abell had not planned to hire two employees, he was so impressed with Gist's experience and welding skills, that he made him an offer at \$10 an hour, which Gist turned down. Unsure what pay rate Gist might accept, Abell continued with the interviews. After discussing the matter that evening with his wife, Cheryl, Abell called Gist the next day February 11, and offered him a job at \$10.50 an hour, which Gist accepted.

Sometime on February 11, Rogers and fellow union applicant, Charles Parsley, went to the Respondent's office. Rogers wanted to check the status of his earlier application and Parsley wanted to submit an application. Both were wearing union hats. Rogers was not given the opportunity to review his file and Parsley was not given an application. The Respondent did not explain why, except to argue on brief that the position was filled when Abell offered the job to Gist. However, the General Counsel has not shown that a job was available at the time they applied. There is no evidence that Rogers applied before Gist accepted the job nor is there any evidence that as part of its normal hiring process the Respondent considers applications kept on file. There is no evidence that the Respondent interviewed any job applicants after Gist accepted the job offer on February 11 or after Rogers and Parsley left the Respondent's offices.

As a part of his initial evidentiary burden, the General Counsel must establish that a job was available when Rogers applied on February 11. He has failed to do so. Thus, no violation can be found. Accordingly, I shall recommend that the allegations of paragraph 6(a) be dismissed.

*c. The unlawful refusal to consider and refusal to hire Mark Moran on February 10, 1998*

Paragraph 6(b) of the consolidated complaint alleges that the Respondent refused to consider for employment and refused to hire Mark Moran because of his union affiliation. The evidence shows, and the Respondent does not dispute, that the General Counsel has satisfied his initial evidentiary burden under *Wright Line*. Rather, the Respondent argues on brief that it did not violate the Act because Abell had already hired Evans and offered Gist a job at the time Moran applied for employment. The Respondent asserts that if either individual had turned down the offers or not shown up for work as expected, then a position would have been available. The evidence, however, does not support the argument.

It is undisputed that Evans was the first interviewed and first hired on February 10. It is also undisputed that Abell decided to hire another welder after interviewing Gist. The evidence stops short, however, of establishing that there was a job offer outstanding to Gist when Moran sought to apply for the job later that day. Rather, it shows that Abell was impressed with Gist's

experience and skills and offered him \$10 an hour, but Gist wanted \$11–12 an hour. (Tr. 245, 170.) In other words, he rejected the \$10-an-hour job offer. At that point, the un rebutted testimony of Gist is that Abell told him he would contact him the next day after interviewing some other people. (Tr.170.)

One of those applicants was Moran, who submitted an application showing that he was an organizer for the Union and who told Abell the same. Although Moran had 8 years of relevant welding experience, as well as experience as a fabricator, Abell did not give him a welding test, which was part of the interview process, because Moran was employed as an organizer for the Union. Abell admitted that he told Moran that he "did not feel that it was in the best interest of the Company to hire someone who stated on his resume that he worked for the Sheet Metal Workers and wanted to organize [the] Company." (Tr. 51.) Thus, the evidence establishes that at the time Moran applied for the employment, the welding position was available and there was no job offer outstanding to Gist. I therefore find that the Respondent failed to consider Moran for hire because of his union affiliation.

The undisputed evidence shows that Moran was not hired by the Respondent. In order to prove that it would not have hired Moran even in the absence of his union affiliation, the Respondent must show that Gist was more qualified than Moran for the job. The Respondent does not argue and has submitted no evidence showing that Gist was the better candidate of the two. I therefore find that the Respondent has not satisfied its evidentiary burden.

Accordingly, I find that on February 11, 1998, the Respondent failed to consider and failed to hire Mark Moran for the welding/fabricator position in violation of Section 8(a)(3) of the Act.

*d. The unlawful discharge of Richard Gist on February 17, 1998*

Paragraph 6(c) of the consolidated complaint alleges that Gist was unlawfully discharged on February 17 because of his union activity. The Respondent's *Wright Line* defense is that Gist would have been discharged in any event because he was insubordinate and because the Respondent has treated similarly situated employees in the same manner. Abell testified that Gist gave him an ultimatum when he told him he was leaving because he had a sore neck and headache from welding. He also testified that a few months earlier he terminated a nonunion employee, William Graves, who similarly told him that he was taking the afternoon off.

Gist credibly testified, however, that when he told Abell that he was leaving, Abell said that he was thinking about firing him anyway for falsifying his application (i.e., failing to write down that he was an organizer for the Union). (Tr. 172.) While Abell denied that Gist was discharged for being a union organizer, he did not deny making that statement. This evidence therefore calls into question whether Abell would have perceived Gist's statement as an "ultimatum" had it not been for the fact that earlier that day, Gist gave him a letter from the Union stating that he was an organizer. In other words, the evidence supports a reasonable inference that he was already contemplating firing Gist because he did not tell him that he was a union organizer.

Also, the credible evidence shows that Abell was willing to treat Gist differently than Graves if he resigned from the Union. Gist credibly testified that as he clocked out on February 17, Abell told him that if he got out of the Union, he could keep his job and get paid the union pay rate. A few hours later, Abell repeated again that resigning from the Union was a precondition of reemployment. Thus, despite the so-called ultimatum defense, the evidence shows that Abell was willing to retain and/or reemploy Gist if he resigned from the Union. The evidence therefore supports a reasonable inference that Abell would not have terminated Gist in the first place, but for his union activity. Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act by discharging Richard Gist on February 17, 1998.

#### CONCLUSIONS OF LAW

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

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

3. The Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct.

(a) Telling applicants for employment that it would close the business if the employees selected a union to represent them for collective-bargaining purposes.

(b) Telephonically offering a former employee re-employment if he relinquished his membership in the Union.

4. The Respondent violated Section 8(a)(3) of the Act by engaging in the following conduct.

(a) Refusing to consider for hire and refusing to hire Mark Moran on February 10, 1998.

(b) Discharging Richard Gist on February 17, 1998.

(c) Discharging Richard Gist on October 2, 1998.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not otherwise engaged in any other unfair labor practice alleged in the complaint in violation of the Act.

#### REMEDY

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

Having found that the Respondent refused to consider for hire and refused to hire Mark Moran in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that the Respondent be ordered to immediately offer him employment at the rate paid welders/fabricators hired by the Respondent with commensurate experience; if necessary, terminating the services of employees hired in his stead, and to make him whole for wage and benefit losses that he may have suffered by virtue of the discrimination practiced against him computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), less any interim earnings, with the amounts due and interest thereon computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent unlawfully discharged Richard Gist in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that the Respondent reinstate him to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed; if necessary, terminating the services of employees hired in his stead, and to make him whole for wage and benefit losses that he may have suffered by virtue of the discrimination practiced against him for the period February 17 through August 28, 1998 (the date of the first discharge to the date of reinstatement), and from October 2, 1998, to the date the Respondent offers reinstatement, computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, supra, less any interim earnings, with the amounts due and interest thereon computed in accordance with *New Horizons for the Retarded*, supra.

[Recommended Order is omitted from publication.]