

Allied Mechanical Services, Inc. and Plumbers and Pipefitters Local 357, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO. Cases 7-CA-40907 and 7-CA-41390

May 28, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND MEISBURG

On February 8, 2000, Administrative Law Judge David L. Evans issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Charging Party filed cross-exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified and to adopt the recommended Order as modified² and set forth in full below.

The essential facts giving rise to the unfair labor practice complaint in this case are as follows. In 1991, pursuant to a settlement agreement, the Respondent agreed to recognize and bargain with Plumbers and Pipefitters Local 337, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO. The parties engaged in contract negotiations but never reached an agreement. On March 1, 1998,³ the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, merged Plumbers and Pipefitters Local 337 with Plumbers and Pipefitters Local 513 to create a new local, Plumbers and Pipefitters Local 357, the Charging Party herein. On March 2, the Charging Party made an unconditional offer to return to work on behalf of 10

strikers, 2 of whom had begun striking in December 1996 (Jon Kinney and Tobin Rees), while the remaining 8 had begun striking in July 1997 (Jim Bronkhorst, Ken Falk, Ted Fuller, Grant Maichele, Marty Preston, Max Roggow, Brian Rowden, and Steve Titus). The Respondent refused to reinstate the 10 strikers. Thereafter, on July 22, the Respondent withdrew recognition from the Charging Party and announced that it would not bargain with it.⁴ In the meantime, between March 31 and August 5, 21 union members applied for work with the Respondent.⁵ None was hired.

1. We agree with the judge's dismissal of complaint allegations that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from Local 357 on July 22, and thereafter making unilateral changes and refusing to furnish Local 357 with information. In adopting the judge's finding that the Respondent's withdrawal of recognition was lawful, we rely solely on his finding that Local 357 did not succeed to the bargaining rights of Local 337.

Following an incumbent union's merger or affiliation, an employer's duty to recognize and bargain with the union continues unless the union's members did not have an adequate opportunity to participate in a vote on the merger, the vote was conducted without adequate due process safeguards, or the merger caused changes so significant that substantial continuity was lost between the pre- and post-affiliation union. *NLRB v. Financial Institution Employees (Seattle-First National Bank)*, 475 U.S. 192, 199 (1986); *Minn-Dak Farmers Cooperative*, 311 NLRB 942, 945 (1993), *enfd.* 32 F.3d 390 (8th Cir. 1994). The judge properly found, as the General Counsel concedes, that the merger of Locals 337 and 513, which resulted in the creation of Local 357, did not satisfy the Board's standard, because Local 337's members were not given an opportunity to vote on the merger. Therefore, the Respondent had no duty to bargain with Local 357.

Thus, we find it unnecessary to pass on the judge's alternative finding that the withdrawal of recognition was lawful on the basis that the Respondent and Local 337

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

² We shall modify the judge's recommended Order in accordance with our decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

³ All dates are in 1998, unless otherwise indicated.

⁴ Although the Respondent's letter withdrawing recognition was addressed to Local 337, the letter acknowledged that the Respondent had been notified in March that Local 337 had been merged with Local 513 to create Local 357, the Charging Party. Additionally, the Respondent's letter was addressed to Robert Williams, the Charging Party's business manager and financial secretary, who had served in the same capacities for Local 337 prior to the merger.

⁵ The 21 union job applicants were Elton Bennett, Scott Calhoun, Terri Jo Conroy, Mike Curran, Eric Englehart, Ken Falk, Ted Fuller, Marty Hampton, Harold Hill, Jeff Kiss, Dave Knapp, Grant Maichele, Rod Newcomb, Tom Patterson, Marty Preston, Tobin Rees, Max Roggow, Brian Rowden, Jeff Warren, Todd West, and Randy Wood.

had a bargaining relationship under Section 8(f), rather than Section 9(a), of the Act. We also do not rely on the judge's apparent finding that the withdrawal of recognition was lawful because the Respondent had bargained for a reasonable period of time with Local 337.

2. The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate 10 strikers (Jim Bronkhorst, Ken Falk, Ted Fuller, Jon Kinney, Grant Maichele, Marty Preston, Tobin Rees, Max Roggow, Brian Rowden, and Steve Titus) who made unconditional offers to return to work on March 2.⁶ The judge found that the 10 strikers were not unfair labor practice strikers, as alleged, but, rather, were economic strikers. The judge, nevertheless, found the Respondent's refusal to reinstate the strikers violated Section 8(a)(3) and (1), because the Respondent had not permanently replaced them. The result is the same regardless of whether the employees were economic strikers or unfair labor practice strikers, because employees who engage in either type of strike have the same right to reinstatement if they have not been permanently replaced. *Anaheim Plastics, Inc.*, 299 NLRB 79 fn. 3 (1990). In adopting the judge's finding that the Respondent's refusal to reinstate the strikers violated the Act, we find it unnecessary to pass on his finding that the strikers were not unfair labor practice strikers.⁷

3. The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider for employment and to hire 10 union members (Scott Calhoun, Terri Jo Conroy, Eric Englehart, Marty Hampton, Harold Hill, Jeff Kiss, Rod Newcomb, Tobin Rees, Brian

Rowden, and Todd West)⁸ who applied for jobs on various dates in 1998.⁹ We agree with the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire four of the applicants—Calhoun, Conroy, Hill, and Kiss—because of their union membership.¹⁰ Although the judge decided this case before the Board issued its decision in *FES*, 331 NLRB 9 (2000), supplemented by 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002), and applied slightly different standards in assessing the General Counsel's case, we nevertheless find that, with regard to these four applicants, the General Counsel has met his burden of proof under the *FES* standards.

In *FES*, supra, the Board set forth the framework for analysis of refusal-to-hire and refusal-to-consider cases. To meet his burden of proof in a discriminatory refusal-to-hire case, the General Counsel must show:

- (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.¹¹

We find that, with respect to applicants Calhoun, Conroy, Hill, and Kiss, the General Counsel has successfully established each element of the *FES* standards for a refusal-to-hire violation. With respect to element (1), the judge found that Calhoun, Conroy, Hill, and Kiss applied with the Respondent for plumbing and pipefitting jobs

⁶ In *Allied Mechanical Services*, Case 7-CA-44304, et al., a later case that involves the same parties as the present case, the General Counsel has alleged that, in 2001, the Respondent unlawfully discharged Steve Titus after reinstatement and made an invalid offer to reinstate Marty Preston. The administrative law judge's decision in that case is currently before the Board. The effect, if any, that the Board's ultimate disposition in that case may have on our reinstatement and make-whole remedies here regarding Titus and Preston may be resolved at the compliance stage in this case.

⁷ Some or all of the strikers struck, in part, over the Respondent's earlier refusal to reinstate the "summer-of-1996" strikers, who had made an unconditional offer to return to work in September 1996. Judge Evans noted that, in an earlier case, Administrative Law Judge Beddow had found that the Respondent's refusal to reinstate the "summer-of-1996" strikers violated Sec. 8(a)(3) and (1). Judge Evans declined to rely on that finding, however, because Judge Beddow's decision was under review by the Board at the time that Judge Evans was preparing his decision in the present case. Although not passing on Judge Evans' finding that the 10 strikers who made unconditional offers to return to work on March 2, were not unfair labor practice strikers, we nevertheless note that the Board subsequently affirmed Judge Beddow's finding that the Respondent's termination of and refusal to reinstate the "summer-of-1996" strikers violated Sec. 8(a)(3) and (1). *Allied Mechanical Services*, 332 NLRB 1600 (2001).

⁸ In the conclusions of law and remedy sections of his decision, the judge inadvertently referred to Todd West as "Randy West." We correct this error.

⁹ The judge dismissed allegations that the Respondent unlawfully refused to consider and to hire 11 other job applicants (Elton Bennett, Mike Curran, Ken Falk, Ted Fuller, Dave Knapp, Grant Maichele, Tom Patterson, Marty Preston, Max Roggow, Jeff Warren, and Randy Wood). There were no exceptions as to the judge's dismissals regarding Bennett, Curran, Falk, Fuller, Knapp, Preston, or Roggow.

¹⁰ We find it unnecessary to pass on the alleged unlawful refusals to hire Rees and Rowden. As Rees and Rowden were among the 10 strikers whom the Respondent unlawfully refused to reinstate on March 2, they are already entitled to a reinstatement and make-whole remedy. Accordingly, an additional reinstatement and make-whole remedy awarded them on the basis of the Respondent's subsequent refusal to hire them in August would be superfluous. The remaining four employees are discussed in sec. 4, infra.

The judge's findings that the Respondent unlawfully refused to hire applicants Englehart, Hampton, Newcomb, and West are addressed below.

¹¹ 331 NLRB at 12 (fns. omitted).

between July 28 and 30.¹² The judge further found, and the record shows, that between August 5 and 31, the Respondent hired five employees in plumbing and pipefitting jobs and made an additional job offer to a plumbing and pipefitting employee. The Respondent hired 16 more plumbing and pipefitting employees during the rest of 1998 and early 1999.¹³

With respect to element (2), the judge found that the Respondent did not contend that any of the applicants against whom it allegedly discriminated were not qualified for the plumbing and pipefitting jobs that the Respondent filled in 1998. Moreover, record evidence, including the applicants' resumes, amply demonstrates that all of them had "experience or training relevant to the announced or generally known requirements of the positions for hire." Indeed, applicants Calhoun, Hill, and Kiss, had previously worked for the Respondent in plumbing and pipefitting positions.

With respect to element (3), the judge found that the Respondent's animus toward union applicants was shown by a number of factors, including its labor relations history,¹⁴ its discriminatory refusal to reinstate the 10 strikers, President Huizinga's instructions to Human Resources Director DeJong not to interview union members, and the Respondent's disparate treatment of union applicants. Thus, we are satisfied that the parties litigated, and the General Counsel established, each element of the prima facie case for discriminatory refusal to hire under *FES*.

Under *FES*, once the General Counsel meets his initial burden of proof, the burden shifts to the Respondent to show that it would not have hired the alleged discriminatees even in the absence of their union activities or affiliation. *FES*, 331 NLRB 9, 12 (2000). We agree with the judge that the Respondent failed to meet this burden. Although the Respondent argues that it did not hire Hill because he was a journeyman and did not hire Calhoun, Conroy, and Kiss because they were advanced apprentices, the judge rejected these arguments for lack of proof. Thus, although DeJong testified that the Respondent was primarily seeking apprentices, neither he nor any other witness testified that the Respondent did not

hire or would not have hired Calhoun, Conroy, Hill, or Kiss because they were too experienced. Moreover, Calhoun, Conroy, and Kiss were, in fact, apprentices.

The Respondent also contends that it did not hire or even consider the applications of Calhoun, Conroy, Hill, or Kiss because, at the time it received their applications, between July 28 and 30, it already had enough applicants and was "into the process" of scheduling interviews with them and checking their references. The Respondent's explanation of its conduct in processing these applications, however, is in conflict with its own standard hiring procedures.

Under the Respondent's written policy, the Respondent, when hiring, considers all current applications, which, under the Respondent's definition, are applications received within the last 30 days. (An application's "current" status can be extended beyond 30 days if, during the 30-day period, the applicant contacts the Respondent to update his application or the Respondent contacts the applicant.) The Respondent's written hiring policy, which it supplied to job applicants, stated that "[w]hen AMS is preparing to hire, we will go over *all current resumes*." (Emphasis in original.) This language appeared in the Respondent's hiring policy that was in effect before August 1, and was reaffirmed in the Respondent's revised policy issued August 1. Human Resources Director DeJong further confirmed in his testimony that, when new employees were needed, the Respondent looked at "every" active application.

As noted above, the Respondent received the applications of Calhoun, Conroy, Hill, and Kiss between July 28 and 30, and it did not make even its first hire until August 5. Thus, in order to ignore these timely applications, the Respondent deviated from its own standard policy of reviewing all current applications when preparing to hire. The Respondent's handling of the applications in a nonstandard way—that is, ignoring them even though they were timely—does little to show that the Respondent would not have hired them even in the absence of their union activities or affiliation. Rather, it tends to demonstrate the opposite.

Further, the Respondent's contention that it did not consider the applications of Calhoun, Conroy, Hill, and Kiss because it already had enough applications is not supported by the facts. By July 28, the Respondent possessed only six other current applications, those of non-union applicants Andrews, Campbell, Holler, Kilgore, Meeuwse, and Sloan. Beginning August 5, the Respondent hired five new employees in August and made a job offer to a sixth, which was tentatively accepted. It hired 10 more employees between September and December. Thus, as the Respondent in late July was preparing to

¹² The Respondent received Kiss' application on July 28, Calhoun's application on July 29, and Conroy's and Hill's applications on July 30.

¹³ The five applicants whom the Respondent hired between August 5 and August 31, were Scott Andrews, Robert Holler, Daniel Kilgore, James Meeuwse, and Mark Sloan. The Respondent made an additional job offer to applicant Verden Campbell in early August. Campbell accepted but arranged to defer his start date to October 14. Ultimately, he declined the job prior to October 14. Thus, as of August, the Respondent believed it had hired six new employees.

¹⁴ The aspects of the Respondent's labor relations history on which the judge relied all involve violations of the Act.

hire a significant number of employees, the six current applications that it possessed on July 28, clearly were not such an abundant supply as to plausibly cause the Respondent to depart from its established policy and dispense with considering any additional applications. In light of the meager number of current applications that it possessed, the Respondent's contention that it did not consider the subsequent timely applications of Calhoun, Conroy, Hill, and Kiss because it already had enough rings hollow.

We find that the Respondent has failed to show that it would not have hired Calhoun, Conroy, Hill, or Kiss even in the absence of their union activities or affiliation. Accordingly, we conclude, in agreement with the judge, that the Respondent violated Section 8(a)(3) and (1) by refusing to hire Scott Calhoun, Terri Jo Conroy, Harold Hill, and Jeff Kiss.

4. Contrary to the judge, we find that the Respondent did not violate Section 8(a)(3) and (1) by refusing to consider and to hire applicants Eric Englehart, Marty Hampton, Rod Newcomb, and Todd West. Assuming arguendo that the General Counsel met his burden of proof under *FES* regarding Englehart, Hampton, Newcomb, and West, we find that the Respondent succeeded in showing that it would not have considered or hired these alleged discriminatees even in the absence of their union activities or affiliation.

West's job application was filed with the Respondent on April 23, and Englehart's, Hampton's, and Newcomb's applications were filed on May 1. The Respondent hired no new employees from January 1 through August 2. It began interviewing job applicants during the first week of July.

As noted above, when the Respondent was hiring, it would consider only current applications, and it deemed an application "current" if it had been filed within 30 days or, if during the 30-day period, either the applicant contacted the Respondent to update his application or the Respondent contacted the applicant. Englehart's, Hampton's, Newcomb's, and West's applications were filed with the Respondent more than 30 days before the first week of July, when the Respondent began considering hiring. Neither Englehart, Hampton, Newcomb, or West thereafter updated their applications, and the Respondent, which was not hiring at the time that it received their applications, did not contact them. Consequently, the applications of Englehart, Hampton, Newcomb, and West were not current at the time that the Respondent began hiring.

The judge found that the Respondent's policy of requiring applications to be filed within 30 days in order to be considered current was facially nondiscriminatory.

He found, however, that the Respondent applied this policy in a discriminatory fashion because, in his view, the Respondent had relaxed the rule to consider expired applications of two nonunion applicants, Stevenson and Andrews. The judge found that Stevenson's August 31 application had expired when the Respondent called him to its office to file a new application and be hired on October 9. The judge further found that the Respondent's preferential treatment of Stevenson was not an isolated case, because the Respondent called Andrews to come in for an interview and be hired the day *before* his July 9 application would have expired.

We do not agree with the judge's analysis. The Respondent called Andrews to come in for an interview and be hired *before* his application would have expired—i.e., while his application was still current. Thus, the Respondent's treatment of Andrews was *not* an instance of the Respondent's failure to apply its 30-day rule to a nonunion applicant. Therefore, we are left with the Respondent's treatment of Stevenson as the only instance of the Respondent's failure to apply its 30-day rule to a nonunion applicant. The Respondent interviewed 25 job applicants in 1998. In these circumstances, contrary to the judge, we find the Respondent's failure to apply its 30-day rule to 1 job applicant out of 25 to be an isolated event and, as such, an insufficient basis for finding that the Respondent applied its 30-day rule in a discriminatory fashion.¹⁵

Consequently, contrary to the judge, we find that the record supports the Respondent's defense that it would not have considered or hired Englehart, Hampton, Newcomb, and West even in the absence of their union activities or affiliation, as their applications were no longer current under the Respondent's 30-day rule at the time that the Respondent began considering hiring. Accordingly, we dismiss the complaint allegations that the Respondent violated the Act by refusing to consider and to hire Englehart, Hampton, Newcomb, and West.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, Allied Mechanical Services, Inc., Kalamazoo, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in United Association of Journeymen and Apprentices of the Plumbing and Pipe-

¹⁵ See, e.g., *Avondale Industries*, 329 NLRB 1064, 1231 (1999) (single instance . . . does not prove disparate treatment); *Albertsons, Inc.*, 289 NLRB 177, 178 fn. 5 (1988) (disparate application of rule not shown by isolated instances); *Kendall Co.*, 267 NLRB 963, 965 (1983) (disparate enforcement of policy not shown by isolated deviations).

fitting Industry of the United States and Canada, AFL–CIO, or any other labor organization, by unlawfully failing and refusing to reinstate or otherwise discriminating against its employees because they have engaged in a protected strike or other concerted activity for their mutual aid or protection.

(b) Refusing to consider job applicants for employment, or hire, because of their union memberships, activities, or desires.

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

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

(a) Within 14 days from the date of this Order, offer Jim Bronkhorst, Ken Falk, Ted Fuller, Jon Kinney, Grant Maichele, Marty Preston, Tobin Rees, Max Roggow, Brian Rowden, and Steve Titus full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

(b) Within 14 days from the date of this Order, offer employment to Scott Calhoun, Terri Jo Conroy, Harold Hill, and Jeff Kiss.

(c) Make Jim Bronkhorst, Ken Falk, Ted Fuller, Jon Kinney, Grant Maichele, Marty Preston, Tobin Rees, Max Roggow, Brian Rowden, Steve Titus, Scott Calhoun, Terri Jo Conroy, Harold Hill, and Jeff Kiss 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 judge's decision.

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

(e) Within 14 days after service by the Region, post at its Kalamazoo, Michigan facility copies of the attached notice marked "Appendix."¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places,

including all places where notices to employees are customarily posted. The Respondent shall take reasonable steps 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 March 2, 1998.

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

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to reinstate strikers to their former or substantially equivalent positions because they have engaged in a strike or other protected activities on behalf of United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, or any other labor organization, or because they have engaged in other protected concerted activities.

WE WILL NOT fail and refuse to consider for employment employee-applicants, or refuse to hire employee-applicants, because of their union memberships, activities, or desires.

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

¹⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL offer to Jim Bronkhorst, Ken Falk, Ted Fuller, Jon Kinney, Grant Maichele, Marty Preston, Tobin Rees, Max Roggow, Brian Rowden, and Steve Titus immediate reinstatement to the jobs that they held when they went on strike, or if those jobs no longer exist, substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of earnings or other benefits that they may have suffered because of the discrimination practiced against them.

WE WILL offer employment to Scott Calhoun, Terri Jo Conroy, Harold Hill, and Jeff Kiss, and WE WILL make them whole for any losses of earnings or the other benefits that they may have suffered because of the discrimination practiced against them.

ALLIED MECHANICAL SERVICES, INC.

Bradley Howell, Esq., for the General Counsel.
David M. Buday, Craig Miller, and Nathan D. Plantinga, Esqs.,
of Kalamazoo, Michigan, for the Respondent.
Tina Marie Pappas, Esq., of Ann Arbor, Michigan, for the
Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Kalamazoo, Michigan, on eight dates from June 30 through July 16, 1999. Plumbers and Pipefitters Local 357, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (the Charging Party or Local 357), filed the charge in Case GR-7-CA-40907 on April 27, 1998, and it filed the charge in Case GR-7-CA-41390 on September 25, 1998, both against Allied Mechanical Services, Inc. (the Respondent). Based on those charges, the General Counsel issued a complaint on June 16, 1999, alleging that the Respondent had violated Section 8(a)(3), (5), and (1) of the Act by various acts and conduct toward its employees. The Respondent duly filed an answer admitting that this matter is properly before the National Labor Relations Board (the Board) but denying the commission of any unfair labor practices.

Upon the testimony and exhibits entered at trial,¹ and upon my observations of the demeanor of the witnesses,² and after

¹ Certain passages of the transcript have been electronically reproduced. Some corrections to punctuation have been entered. In my quotations of the exhibits, I sometimes simply correct meaningless grammatical errors rather than use "[sic]."

² Credibility resolutions are based on the demeanor of the witnesses and any other factors that I may mention.

consideration of the briefs that have been filed,³ I make the following findings of fact and conclusions of law.

I. JURISDICTION

As it admits, the Respondent is a corporation with an office and place of business in Kalamazoo, Michigan (the Kalamazoo facility), where it is engaged in the construction industry in the business of fabrication and installation of heating, plumbing, and air conditioning systems. During the calendar year ending December 31, 1998, the Respondent, in conducting said business operations, purchased and received at its Kalamazoo place of business goods valued in excess of \$50,000 directly from suppliers located at points outside Michigan. Therefore, at all material times Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

There are three areas of alleged unfair labor practices to be considered in this case. The first area is that of alleged unlawful refusals to bargain; the bargaining issues arise from complaint allegations that the Respondent has violated Section 8(a)(5) by withdrawing recognition from one union, committing unilateral actions before and after that withdrawal, refusing to provide relevant bargaining information before and after that withdrawal, and thereafter refusing to recognize a second union as the lawful successor to the first. The second area of alleged unfair labor practices to be considered is that of alleged unlawful refusals to reinstate strikers; the striker-reinstatement issues arise from complaint allegations that the Respondent has violated Section 8(a)(3) by refusing to reinstate 10 employees who had unconditionally offered to return to work from strikes that were caused, at least in part, by the Respondent's bargaining violations and by its failure to remedy certain previously adjudicated unfair labor practices. Because the first and second areas of complaint allegations are so closely related, I shall consider them together in subsection A. The third area of alleged unfair labor practices to be considered is that of alleged unlawful refusals to hire employee-applicants; the refusal-to-hire issues arise from complaint allegations that, also in violation of Section 8(a)(3), the Respondent has refused to hire some 22 employee-applicants because of their known or suspected prounion sympathies. I shall consider the refusal-to-hire allegations in subsection B.

A. Alleged Unlawful Refusals to Bargain and Refusals to Reinstate Strikers

1. The evidence upon which the General Counsel relies

a. Overview

The Respondent is a construction industry contractor that has, for many years, employed plumbers and pipefitters at various construction sites in southwestern Michigan. The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-

³ An appendix that the General Counsel filed with his brief has been helpful in marshaling the facts relevant to the refusal-to-hire allegations.

CIO (the UA), maintains several local unions in southwestern Michigan to represent plumbers and pipefitters such as those employed by the Respondent. Historically, two of those unions have been Local 337 in Kalamazoo and Local 513 in Benton Harbor.

In 1991, pursuant to a Board settlement agreement of charges that had been filed by Local 337, the Respondent agreed to bargain with Local 337. Pursuant to the 1991 settlement agreement (as I shall call it), bargaining was conducted until mid-1998, but no contract was ever reached. Over the years following the 1991 settlement agreement, Local 337 filed several other unfair labor practice charges against the Respondent. One group of those resulted in an administrative law judge's decision, a Board order, and an enforcing court decree; a second group of those charges resulted in an administrative law judge's decision that is now pending before the Board; and a third group of those charges resulted in a second settlement agreement. On March 1, 1998, the UA merged Locals 337 and 513 to create Local 357, the Charging Party herein. The charges in this case involve Respondent's 1998 conduct after that merger.

Local 337 called two strikes that are involved in this case, one in December 1996 and the other in July 1997. On March 1, 1998, the UA consolidated Locals 337 and 513, and those two locals jointly became the Charging Party. On March 2, 1998, on behalf of the 10 employees who had participated in the two strikes, the Charging Party offered to return to work. The Respondent, however, has refused to reinstate the 10 employees to date. On July 22, 1998, the Respondent announced that it was withdrawing recognition from Local 337, and it further announced that it would not bargain with the Charging Party.

The General Counsel contends that, by virtue of the 1991 settlement agreement, the Respondent and Local 337 had a mandatory bargaining relationship under Section 9(a) of the Act.⁴ The General Counsel further contends that the Charging Party is the lawful successor to Local 337 and that the Respondent has a continuing duty to bargain, again under Section 9(a), with the Charging Party. The General Counsel contends, therefore, that the Respondent was not free to withdraw from bargaining with Local 337 or the Charging Party for a "reasonable period of time" following the execution of the 1991 settlement agreement. The Respondent contends that it was free to withdraw from bargaining with Local 337 (and free never to recognize any successor to Local 337 such as the Charging Party), because no contract had ever been reached between it and Local 337 and because its bargaining with Local 337 had not been mandatory under Section 9(a) but only permissive under Section 8(f).⁵ Alternatively, the Respondent contends that it has

proved that, even if the 1991 settlement agreement did establish Local 337 as a 9(a) representative of its employees, it has shown that it had a good faith doubt of Local 337's majority status and that Local 337 did not, in fact, represent a majority of its employees. As an alternative to this alternative, the Respondent contends that, even if Local 337 had been the 9(a) representative of its employees, the Charging Party is not Local 337's lawful successor and the Board can issue no prospective bargaining order on its behalf. The Respondent further contends that it has committed no unfair labor practices and that the strikers are not, therefore, unfair labor practice strikers. The Respondent does not deny that the strikers have made an unconditional offer to return to work, and it does not contend that it permanently replaced them before they made that offer; the Respondent, however, contends that it had no duty to reinstate the strikers, even as economic strikers, because their activities were not protected by the Act for various reasons.

Ultimately, I find and conclude that the 1991 settlement agreement did not establish Local 337 as a Section 9(a) representative of the Respondent's employees, that the Respondent was free to withdraw from the process of bargaining with Local 337 or any labor organization that may have been Local 337's lawful successor, that the Charging Party was not, in any event, the lawful successor to Local 337, that the strikes were not unfair labor practice strikes but they were protected economic strikes, and that Respondent unlawfully refused to reinstate the strikers upon their unconditional offer to return to work.

b. Chronology

To consider the many bargaining and striker-replacement issues that are raised by the complaint, it is necessary to detail the history of the relationship between the parties, including the extensive amount of litigation that has been conducted between them.

In late 1989 or early 1990, Local 337 began an organizational attempt of the Respondent's plumbers and pipefitters. From February 6, 1990, through October 22, 1990, Local 337 filed various unfair labor practice charges against the Respondent (none of which are in evidence). On April 24, 1990, Local 337 submitted to the Respondent a letter demanding recognition as the collective-bargaining representative of the Respondent's employees, reciting that it "now represents a majority" of the Respondent's plumbers and pipefitters, and offering to "demonstrate proof of our majority status to a mutually agreed-upon third party." Such a demonstration of majority status (by presentation of authorization cards or otherwise) was never made; nor have the Respondent's employees selected Local 337 (or any other labor organization) as their collective-bargaining representative in a Board-conducted election.

On December 13, 1990, in Case GR-7-CA-30196, et al., the General Counsel issued a complaint (the 1990 complaint) alleg-

⁴ Sec. 9(a) of the Act provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment

⁵ Sec. 8(f) provides:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and

construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement

ing that: (a) Respondent's plumbers, pipefitters and certain other employees constitute a unit appropriate for bargaining under Section 9(b) of the Act (the unit); (b) on or about April 24, 1990, a majority of the unit employees designated Local 337 as their collective-bargaining representative by signing union authorization cards; and (c) the Respondent had committed against the unit employees numerous unfair labor practices within Sections 8(a)(1) and (3) of the Act. The 1990 complaint further alleged that a bargaining order was an appropriate remedy for the Respondent's violations of Section 8(a)(1) and (3), but it did not allege that the Respondent had violated Section 8(a)(5) by refusing to recognize and bargain with Local 337. The Respondent duly filed an answer to the 1990 complaint, denying that it had committed any unfair labor practices, denying that the unit was appropriate for bargaining, denying that the employees had designated Local 337 as their collective-bargaining representative, and denying that a bargaining order was an appropriate remedy for any unfair labor practices that could be found by the Board.

On July 30, 1991, Local 337, the Respondent and the General Counsel entered an "informal" Board settlement agreement of the 1990 complaint. (A Board "informal" settlement agreement is a written agreement but, unlike a "formal" settlement agreement, it is one that does not provide for a withdrawal of a respondent's answer, and it does not provide for a Board order or enforcing court decree.) The 1991 settlement agreement provided that the Respondent would not thereafter engage in various actions that constitute violations of Section 8(a)(1) and (3) such as threatening employees or laying them off because of their union activities; it provided that the Respondent would make whole certain employees who had allegedly been discriminated against; and it further provided that the Respondent would

. . . recognize and, upon request, bargain in good faith with [Local 337] as the exclusive collective bargaining representative of the employees set forth in the unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of [employment], and if an understanding is reached, embody it in a signed collective bargaining agreement: [Then followed the precise unit description.]

The Respondent and Local 337 engaged in some collective bargaining over the ensuing 7 years, but no contract was ever reached.

On July 14, 1993, in Case GR-7-CA-34274, et al., the General Counsel issued another complaint (the 1993 complaint) alleging that the Respondent had violated Section 8(a)(3) by refusing offers of economic strikers to return to work and that the Respondent had violated Section 8(a)(5) by making a unilateral change in the unit employees' terms and conditions of employment. The 1993 complaint, at its paragraph 8, further alleged that: "Since July 30, 1991, and at all material times [Local 337] has been the designated exclusive collective-bargaining representative [of the unit employees] and since that date [Local 337] has been recognized as such representative by the Respondent. This recognition has been embodied in a settlement agreement dated July 30, 1991." The 1993 complaint, at its paragraph 9, further alleged that: "At all times since July

30, 1991, based on Section 9(a) of the Act, [Local 337] has been the exclusive collective-bargaining representative of [the unit employees]." The Respondent filed an answer to the 1993 complaint, denying the commission of any unfair labor practices but admitting that, pursuant to the 1991 settlement agreement, it had recognized Local 337 as the exclusive collective-bargaining representative of the unit employees; it further specifically denied that Local 337 had ever been designated as the majority representative of the unit employees based on Section 9(a).

On July 19, 1994, after a trial and briefing, Administrative Law Judge Richard H. Beddow issued his decision in the 1993 complaint case. Judge Beddow concluded, inter alia, that the following employees had offered to return from economic strikes in 1992 and 1993, but that the Respondent had refused to reinstate them in violation of Section 8(a)(3): Ted Fuller, Harold Hill, Grant Maichele, Gil Ragsdale, Max Roggow, Steve Titus, Jim Bronkhorst, Ken Falk, Marty Preston, and Brian Rowden. Judge Beddow further found that the Respondent had not changed any term or condition of employment of the unit employees and recommended dismissal of the 8(a)(5) allegation solely on that basis. Because Judge Beddow had found that no change had been made, he was not required to pass on the issue of whether, by virtue of the 1991 settlement agreement, the Respondent's recognition of Local 337 had been based on Section 9(a) or Section 8(f) of the Act.

On December 18, 1995, at 320 NLRB 32, the Board affirmed Judge Beddow's 8(a)(3) findings and conclusions, except pertaining to Ragsdale (who was found not to have offered to return to work), and it further affirmed Judge Beddow's finding that no changes to the unit employees' terms and conditions of employment had been made. (The Board, therefore, also did not pass on the question of whether, by entering the 1991 settlement agreement, the Respondent had agreed to bargain with Local 337 under Section 9(a) or Section 8(f).) On May 16, 1997, the Court of Appeals for the Sixth Circuit, at 113 F.3d 623, enforced the Board's order in full, thereby ordering the Respondent not to unlawfully reject strikers' offers to return to work again.

On December 19, 1996, in Case GR-7-CA-38022, the General Counsel issued another complaint (the 1996 complaint). As the 1993 complaint had done, the 1996 complaint alleged that, by virtue of the 1991 settlement agreement, Local 337 was the majority representative of the unit employees under Section 9(a). The 1996 complaint alleged that, in violation of Section 8(a)(5), the Respondent had announced that it would not bargain with Local 337, had unilaterally laid off employees, and had committed several other unilateral actions. The 1996 complaint further alleged that the Respondent had refused to furnish Local 337 with relevant bargaining information, had directly dealt with employees about an insurance program, and had refused to meet with Local 337 since March 26, 1996. The 1996 complaint further alleged that employees Todd Hayes, Jeff Kiss,⁶ Mark Lemmer, Ron Parlan, Kirk Wood, and Jeff Warren had begun an unfair labor practice strike during the

⁶ I correct the transcript where, at various places, it misspells Kiss' name as "Gist."

summer of 1996, and that thereafter the Respondent had terminated the employment of those employees (the summer-of-1996 strikers) in violation of Section 8(a)(3). The Respondent duly filed an answer to the 1996 complaint, again admitting that it had recognized Local 337 under the 1991 settlement agreement but denying that Local 337 was the majority representative of the unit employees under Section 9(a) of the Act and further denying the commission of any unfair labor practices.

David Knapp is an organizer for various Michigan local unions of the UA. By letter dated December 23, 1996, Knapp, on behalf of Local 337, notified the Respondent that its employees Jon Kinney and Tobin Rees were about to begin an unfair labor practice strike against it. The Respondent replied by letter, also dated December 23, asking what unfair labor practices Knapp was referring to, and asking what remedies Local 337 sought. By letter dated December 24, Knapp replied by referring to a "continuance to refuse to bargain in good faith and the other unfair labor practices set forth in the most recent National Labor Relations Board complaint." (That would have been the 1996 complaint, as described above.) Knapp also stated that, upon the Respondent's cessation of its refusal to bargain, and upon its remedying all unfair labor practices in the last complaint, the employees would be "prepared to end their unfair labor practice strike." Kinney and Rees began strike and picketing activities at one of the Respondent's jobsites on December 26, 1996. Knapp testified before me that the causes of the December 1996 strike were failures by the Respondent to furnish Local 337 with certain unspecified information (presumably that mentioned in the 1996 complaint), and failures by the Respondent to reinstate the six summer-of-1996 strikers who had been named in the 1996 complaint. Knapp further testified that he discussed the reasons for the December 1996 strike with Kinney and Rees before sending his December 23 letter. Also before me, Kinney and Rees corroborated that testimony and further testified that they agreed with Knapp as to the purposes of the December 1996 strike. As well, Kinney testified that he and Rees struck for "wages." (As discussed below, Kinney and Rees continued their strike until March 2, 1998, at which time Knapp made an offer on their behalf to return to work along with eight other employees who began a strike in July 1997.)

On February 11 through 14, and on September 15 and 16, 1997, Judge Beddow conducted the hearing on the 1996 complaint.

Knapp testified that, during the early summer of 1997, "through the grapevine" and his organizing efforts, he heard that the Respondent had hired new employees. On June 10, Knapp requested information about all employees that the Respondent had hired in 1997. In early July, the Respondent furnished at least some of the requested information. (The amount is not shown in the record.)

On July 9, 1997, the Respondent offered reinstatement to the employees who had gone on strike in 1993, and whom the Sixth Circuit, on May 16, had ordered reinstated and made whole; to wit: Fuller, Hill, Maichele, Roggow, Titus, Bronkhorst, Falk, Preston, and Rowden. All but Hill accepted. The Respondent, however, offered none of those nine employees any backpay that may have been due them as a result of its unlawful delays in refusing to reinstate them during the period

between their 1992 or 1993 offers to return to work and their July 9 reinstatements.

Knapp testified that Maichele, after his reinstatement, gave him a copy of the Respondent's then-current mileage-reimbursement policy for employees who were required to drive certain distances to the Respondent's jobs. Knapp testified that, although the Local 337 and the Respondent had been discussing the implementation of a new mileage policy in negotiations, the Respondent had not proposed the policy that Maichele showed him. Received in evidence was a copy of a mileage policy statement dated April 15, 1997; it is undisputed that the Respondent instituted that mileage policy on that date without notice to the Union.

As previously noted, in July 1997, the Respondent furnished Local 337 with at least some of the information that had been requested about the unit employees' names and rates of pay. Thereafter, however, Knapp came to believe that two other employees had been hired, Terry Miller and Matt Mueller. On July 22, Knapp, by letter of that date, requested information about Miller and Mueller; further Knapp requested: ". . . an updated list of all employees hired through today and/or are in the process of being hired." By letter dated August 6, 1997, Knapp repeated his requests for information regarding Miller, Mueller, and all other new hires. In the same letter, Knapp asked for copies of all employee evaluations that either had been completed or were then in the process of being completed.

By letter dated July 23, 1997, Knapp informed the Respondent that Fuller, Maichele, Roggow, Titus, Bronkhorst, Falk, Preston, and Rowden (again, the eight employees who had accepted the Respondent's July 9, 1997, offers of reinstatement pursuant to the May 16, 1997, decree of the Sixth Circuit) were beginning an unfair labor practice strike. Knapp stated:

The unfair labor practice strike is for, and is not limited to, the following reasons.

1) Allied Mechanical Services' failure to fully remedy unfair labor practices as found by both the National Labor Relations Board and the U.S. Sixth Circuit Court of Appeals, including its failure to make whole the affected employees and failure to post a notice to employees.

2) Suspension of Steve Titus.

3) Assault and battery of Steve Titus and Jay Titus.

4) Allied Mechanical Services' unilateral determination and implementation of wage rates for the (9) nine returning strikers without bargaining with the Union.

5) Allied Mechanical Services' threat of bodily harm to an employee.

6) Denial of overtime opportunities to union supporters.

The eight employees named in Knapp's letter ("the July 1997 strikers") began a strike on July 25 (and they continued that strike, along with the December 1996 strikers, until March 2, 1998, as discussed below).

Knapp testified that, before the July 1997 strike began, he discussed with the July 1997 strikers the reasons for the strike which included, in addition to the failure to pay them (and Hill) backpay under the Sixth Circuit's decree, the Respondent's failure to reinstate the six summer-of-1996 strikers, the Re-

spondent's failure to furnish information for bargaining purposes, and the Respondent's unilateral institution of the mileage policy. Each of the eight July 1997 strikers testified that Knapp discussed with them as a reason for the strike the Respondent's failure to pay them backpay according to the Six Circuit's order; as well, Preston, Rowden, and Titus testified that Knapp mentioned as a reason for the strike the fact that the six summer-of-1996 strikers not been reinstated after their offers to return to work. Maichele, Preston, Roggow, and Titus testified that a reason for the strike was the Respondent's failure to furnish information. Roggow, Rowden, and Titus also testified that a reason for the strike had been the Respondent's unilateral institution of a mileage policy. Roggow and Titus testified that Knapp also mentioned the unilateral change in the mileage policy as a cause of the strike. These eight employees also testified to other reasons that Knapp mentioned as reasons for the strike; they were not perfectly consistent in their inclusions and exclusions, but they all testified that they agreed with reasons for the July 1997 strike that were given to them by Knapp.

Knapp and the eight July 1997 strikers conducted picketing of the Respondent's offices in Kalamazoo from July 25 through July 30, 1997. Picket signs that were used during that period said: "Allied Mechanical Services, Inc., Has Committed Unfair Labor Practices In Violation Of Federal Law." The picketing ceased on July 30, but the strikers did not offer to return to work until March 2, 1998, as discussed infra. Other than the eight employees who had been reinstated pursuant to the Sixth Circuit's decree, no employees of the Respondent engaged in the strike (except Kinney and Rees who had been on strike since December 26, 1996, and who also continued to strike until March 2, 1998).

By letter dated August 6, 1997, Knapp asked the Respondent again for information on Miller and Mueller and further asked for completed employee annual evaluations (and future ones as they were completed). On August 22, John Huizinga, the Respondent's president, by letter of that date, replied with the requested information regarding Miller (who had been hired on April 30, 1997), but Huizinga denied the existence of any employee named Mueller. Huizinga further denied hiring any other employees through August 15. Finally, Huizinga replied that the evaluations were not yet completed and that they "contain confidential information about employees, some of which is highly personal." Huizinga concluded: "Therefore, please articulate the reason that the Union has a need for this information and its alleged relevance to the Union's collective bargaining function." Knapp did not respond to Huizinga.

On September 29, 1997, the General Counsel issued a complaint in Case GR-7-CA-40066, alleging, again on the basis of the 1991 settlement agreement, that Local 337 was the Section 9(a) representative of the unit employees and further alleging that the Respondent had violated Section 8(a)(5) by engaging in unilateral actions and refusing to furnish information that was relevant to the bargaining processes. The Respondent duly filed an answer stating that: "The settlement agreement speaks for itself, as well as the Respondent's current relationship with [Local 337] based upon that agreement." Additionally, and again, the Respondent denied the allegation that Local 337 was the Section 9(a) representative of the unit employees.

On February 5, 1998, the parties entered into an informal settlement agreement in Case GR-7-CA-40066 (the 1998 settlement agreement). That settlement agreement repeated the above unit description; it recited an agreement by the Respondent that it would bargain upon request with Local 337 as the exclusive representative of the unit employees; it recited that the Respondent agreed that it would not make unilateral changes; and it recited that the Respondent would furnish relevant bargaining information.

On February 9, 1998, Judge Beddow issued his decision based on the 1996 complaint and his 1997 hearing. Judge Beddow found that the Respondent had violated Section 8(a)(3) by discharging the six summer-of-1996 strikers (whom Judge Beddow found to have been unfair labor practice strikers). Judge Beddow further found that the Respondent had violated Section 8(a)(5) by engaging in unilateral actions, by refusing to furnish information, by directly dealing with employees, and by failure to meet at reasonable times with Local 337. To introduce his discussion of the issues before him, Judge Beddow stated: "These proceedings arose during a period of unfruitful collective bargaining attempts by the Respondent and [Local 337] after [Local 337] had been certified as the bargaining representative for the Respondent's plumber/pipefitter employees in July 1991." Judge Beddow's second decision (as I shall call it) is at this time before the Board on exceptions, including exceptions by the Respondent to Judge Beddow's finding that Local 337 had been "certified."

On February 26, 1998, the UA's general executive board issued an order consolidating Local 337 in Kalamazoo with its Local 513 in Benton Harbor. The general executive board further declared that after March 1, the two merged local unions would thereafter constitute the UA's Local 357, the Charging Party. The UA gave the employee-members of neither Local 337 nor Local 513 an opportunity to vote on the matter of consolidation. Robert Williams was the business manager and financial secretary of Local 337; he was appointed to the same position with the Charging Party by the UA. By letter dated March 2, Williams notified the employees who had been members of Locals 337 and 513:

. . . As a condition of the [UA's] consolidation order, this organization [the Charging Party] will operate under the direct supervision of International Representative Joseph L. Sposita.

Additionally, the other consequences of this order that impact you are: the by-laws have been suspended, the regular meetings of the local union are discontinued, and officers and committee members are terminated.

All meetings will be called by the International Representative. The meetings can be of an informational nature only. The International Representative will appoint interim officers until the consolidation is complete and elections are held. By-laws will be established at a later date to define the operations of the local union.

The local union office will continue to operate in much the same manner as you are accustomed to.

Williams testified that, as a result of the UA's action, Local 357 was placed in receivership for 3 years. There is no evidence

that the election suggested in Williams' quoted letter was ever held. Williams did testify that those who had been members of Local 337 or Local 513 automatically became members of the Charging Party.

(The complaint alleges that, at all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act. The Respondent denies that allegation. Section 2(5) of the Act defines labor organizations as entities ". . . in which employees participate . . ." As Williams' letter would seemingly demonstrate, employee participation was suspended by the UA's actions, and there is no evidence that their participation ever resumed. Section 8(a)(3) prohibits discrimination against employees only if it is ". . . to encourage or discourage membership in any labor organization . . ." Even assuming, however, that after the consolidation of Locals 337 and 513 the Charging Party was not a statutory "labor organization" because employees did not "participate" in it, the Respondent did not know this, and I would not dismiss the 8(a)(3) allegations of the complaint on that basis. Moreover, Local 337 was unquestionably a statutory labor organization (as previously found by the Board and the Sixth Circuit), and retaliation against employees because of their activities on behalf of that entity would necessarily be designed to discourage their membership, or discourage the membership of other employees, in any labor organization that might become Local 337's successor. Finally on this point, even if I am in error in finding that certain conduct of the Respondent discussed herein violated Section 8(a)(3), it nevertheless violated Section 8(a)(1) because it was clearly carried out in retaliation for the employees' protected concerted activities.)

Also on March 2, 1998, Knapp sent a letter to the Respondent making an unconditional offer to return to work on behalf of the 10 employees who were then on strike (again, Kinney and Rees who had begun their strike on December 26, 1996, and Bronkhorst, Falk, Fuller, Maichele, Preston, Roggow, Rowden, and Titus who had begun their strike on July 25, 1997). Knapp testified that before he sent the offer to return to work, he discussed the matter with each of the named employees, telling them that it was time to end their strikes and turn their efforts to the attempt to organize the Respondent's shop. The 10 strikers corroborated Knapp's testimony; each of the 10 further testified that they were then willing to return to work had they been offered reinstatement by the Respondent. The Respondent has made no offers of reinstatement to any of the 10 strikers, and the Respondent's failure to reinstate them is the subject of 8(a)(3) allegations before me.

By letter to the Respondent dated June 29, 1998, Knapp requested information "[f]or the Union to carry on constructive negotiations and to properly represent your workers." Then follow 21 numbered requests for information, 3 of which the General Counsel herein contends that the Respondent unlawfully refused to comply with; to wit:

15. A list of all Allied Mechanical licensed plumbers within the State of Michigan with current wage rates.

16. A list of all Allied Mechanical welders who are carbon-steel certified.

17. A list of all Allied Mechanical welders who are stainless-steel certified.

Wilbert Weidenaar, the Respondent's comptroller, replied to Knapp by letter dated July 9.⁷ In response to request number 15, Weidenaar stated that all of the Respondent's plumbers (except apprentices) were licensed and that: "You have a detailed listing of all employees and their wage rates." In response to numbers 16 and 17, Weidenaar stated that the Respondent employed 19 welders who were carbon-steel certified and 14 welders who were stainless-steel certified. Weidenaar further stated: "Wages for these people are as follows: 10 @ \$20; 1 @ \$20.75; 4 @ \$21.00; 2 @ \$18; 2 @ \$15.50." Weidenaar did not provide the names of any of the 19 employees who were certified for welding carbon steel, or stainless steel, or both. On cross-examination, Weidenaar admitted that the "detailed listing" to which he had referred in his letter of July 9 had been submitted in July or August 1997. Weidenaar further admitted that he did not know, and could not remember if he checked to find out, if the Respondent had hired any employees during the year following that submission. The complaint before me alleges that by Weidenaar's incomplete response the Respondent has refused to furnish information in violation of Section 8(a)(5).

Williams (again, the Charging Party's business manager) testified that the Respondent and the Charging Party met nine times for purposes of collective bargaining after the March 1, 1998, consolidation of Locals 337 and 513 into Local 357. On July 17, 1998, by letter of that date to Weidenaar, Williams stated that "the Union" had bargained in good faith, but that the Respondent had not. Williams requested Weidenaar to meet another time for purposes of collective bargaining, specifically on August 4.

In a letter to Williams dated July 22, 1998, Weidenaar stated that the Respondent had bargained in good faith pursuant to the 1991 settlement agreement, but that Local 337 had not. Weidenaar concluded his letter by stating:

As a result, AMS finds it necessary to notify you that it is terminating the voluntary collective bargaining process for the following reasons:

1. AMS has met all of its legal obligations pursuant to the settlement agreement dated July 30, 1991.

2. The bargaining process created by the settlement agreement was, and is, a voluntary 8(f) relationship that AMS is free to unilaterally terminate and is doing so.

3. The UA has never established majority status among AMS' employees and AMS has, as of today's date, objective considerations that establish a good faith doubt as to majority status.

4. Recently, on March 9, 1998, we were notified during the bargaining process that Local 337 had been merged/consolidated with Local 513 to create Local 357.

⁷ On brief, the Respondent makes much of the fact that Knapp's June 29 request had the number "335" typed into a letterhead space for "Local No." Weidenaar, however, promptly replied to the request with no reservation about which local union Knapp was seeking to represent or which union's stationery Knapp had used. This lawyer's afterthought, therefore, is without merit.

AMS has no legal obligation to continue to bargain with the surviving entity, Local 357, pursuant to the settlement agreement or under law.

5. Independent of the reasons listed above, 1 through 4, AMS is also withdrawing from the voluntary bargaining process due to the disingenuous approach to bargaining UA/337 has [employed] by using the bargaining process for purposes other than reaching [an] agreement.

In short, we are terminating the voluntary bargaining process, and our final offer on all issues is withdrawn.

There has been no further contact between the parties.

On August 1, 1998, the Respondent, without prior notice or consultation with the Charging Party, revised its application procedure to require applicants to appear at its office in Kalamazoo, rather than to allow them to mail in their applications to that office. The complaint before me alleges that by this unilateral change the Respondent violated Section 8(a)(5). The Respondent, of course, contends that by August 1, it had no duty to bargain with Local 337 (or the Charging Party as its successor) because it had lawfully withdrawn recognition by that point. (Alternatively, the Respondent contends that it had no duty to bargain about the issue because hiring processes are not mandatory subjects of bargaining within Section 8(d) of the Act.)

2. The evidence upon which the Respondent relies

a. The striker-reinstatement issues

The Respondent admits that it failed to respond to Knapp's March 2, 1998, offer to return to work that he made on behalf of the 10 strikers (again, the 2 December 1996 strikers and the 8 July 1997 strikers). The Respondent does not contend that the 10 strikers were economic strikers whom it had permanently replaced by March 2. The Respondent contends, rather, that it had no duty to reinstate the 10 strikers because: (a) all of the strikers immediately secured substantially equivalent employment elsewhere and thus became ineligible for reinstatement; (b) all of the strikers were "salts" who were not engaging in a strike against the Respondent so much as they were obeying their joint employers, the local unions of which they were members; (c) the strikers sought no specific remedy; and (d) at least the July 1997 strikers had engaged in a pattern of "intermittent" work stoppages which, the Respondent further contends, were unprotected under the Act.

It is undisputed that all of the 10 unreinstated strikers were, at the time that they went on strike, being paid by Local 337 (or one of the other Michigan UA locals) to assist in organizing the Respondent's employees and were therefore "salts," as that term is commonly used in labor relations law. During his cross-examination, Knapp admitted that he and the 10 strikers had agreements that they would go on strike when he told him to and that they would return to work (or, at least, offer to return to work) when he told them to.

On cross-examination, December 1996 striker Kinney testified that he had become a member of Local 335 of the UA while working for the Respondent earlier in 1996. Kinney also testified that, from the point that he went on strike until the time of trial, he was never without work (and during some periods

he worked 12 hours per day, 7 days per week). Kinney testified that when he went on strike Local 335 immediately referred him to a contractor that paid union scale and that Local 335 kept him in such referrals through time of trial. The union scale was higher than the wage rate that Kinney had earned while working for the Respondent; also, the fringe benefits were greater with the union contractors. Kinney testified that he never had to sign an out-of-work list at Local 335's hiring hall to obtain these referrals because there were no employees "on the bench" (or out of work) during this period. Kinney acknowledged that during his testimony before Judge Beddow on September 15, 1997, he stated that he had "no present plans" to return to work with the Respondent. When asked during this trial what he had meant by that testimony before Judge Beddow, Kinney replied: "Well, if I remember, I was employed at Diversified. I liked what I was doing and I didn't want to leave, I guess." Kinney testified that he agreed to return to work from the December 1996 strike because: "I had an understanding with him [Knapp] at anytime—anytime he wanted us to go back to work that we could go back to work." (Kinney added that he also thought that March 1998 was a good time to end the 1996 strike ". . . and continue to try to organize the shop.")

During their cross-examinations, Rees and the eight July 1997 strikers also acknowledged (in effect or exactly) that they had agreed to go on strike when Knapp told them to, and they acknowledged that they had agreed with Knapp that they would offer to return to work for the Respondent, and would actually do so, at any time that Knapp told them to. The July 1997 strikers also testified that their local unions paid them union scale for picketing during the week of July 25, and that those locals thereafter kept them lined up with union-scale jobs during much or all of the remainder of the time that they were on strike against the Respondent and even after the March 2, 1998, offer to return to work.

b. The bargaining issues

In support of its contention that the 1991 settlement agreement did not establish a Section 9(a) relationship between it and Local 337, the Respondent points to Local 337's only written proposal for recognition that Local 337 made in bargaining after the 1991 settlement agreement; to wit:

The Employer voluntarily recognizes the Union consistent with Section 8(f) of the National Labor Relations Act, and the employer shall recognize the Union's majority status upon presentation of objective evidence as set forth in Section 9(a) of the National Labor Relations Act.

The Respondent contends that by such proposal Local 337 acknowledged that it was not a Section 9(a) representative and that it could have become such only after it demonstrated its majority status to the Respondent. As noted above, Local 337 never made such demonstration, by card-check or otherwise. Specifically, no certification, as mentioned by Judge Beddow in his second administrative law judge's decision, was ever issued (no election was even conducted), and only the 10 salts (and Knapp, himself) joined in the strikes and picketing against the Respondent.

The Respondent contends that, because it and Local 337 had negotiated with each other only pursuant to Section 8(f), it was free to withdraw from the negotiations at any time and that its July 28, 1998, withdrawal of recognition was therefore not a violation of the Act. The Respondent further contends that, to the extent that it ever had a duty to furnish bargaining information to Local 337 by virtue of the 1991 settlement agreement, the evidence discussed above demonstrates that it has done so.

3. Conclusions—The bargaining and striker-reinstatement issues

a. *The bargaining issues*

Section 8(f), as quoted above, permits employers and unions in the construction industry to bargain with each other and enter collective-bargaining agreements without being subjected to 8(a)(2) or 8(b)(1)(A) allegations solely because the unions may not have demonstrated their majority status under Section 9(a). Section 8(f), however, does not require construction industry employers or nonmajority unions to meet and bargain with each other, and the General Counsel does not contend that it does. The General Counsel contends, and the complaint alleges, that the Respondent has refused to bargain with the Charging Party in violation of Section 8(a)(5). As that section of the Act plainly states:

Sec. 8. It shall be an unfair labor practice for an employer . . .
(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

The immediate issue, therefore, is whether Local 337 (or its alleged successor, the Charging Party) was ever the Section 9(a) representative of the unit employees or whether the Respondent recognized Local 337 only pursuant to the permissive provisions of Section 8(f).

Under *John Deklewa & Sons*, 282 NLRB 1375, 1385 fn. 41 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), a collective-bargaining relationship in the construction industry is presumed to be governed by Section 8(f) rather than by Section 9(a). That presumption is a strong one, and the showing necessary to overcome it and to establish the existence of a Section 9(a) relationship must be persuasive. For example, in *Stack Electric*, 290 NLRB 575 (1988), the Board summarized this rule of *Deklewa* by stating:

[I]n light of the legislative history of Section 8(f) and the prevailing practice in the construction industry, the party to an 8(f) relationship who asserts the existence of a collective-bargaining relationship under Section 9(a) has the burden of proving the existence of such a relationship, through either (1) a Board-conducted representation election or (2) a union's express demand for, and an employer's grant of, recognition, based on a clear showing of support for the union among a majority of the employees in an appropriate unit. (Emphasis supplied.)

In *Casale Industries*, 311 NLRB 951 (1993), moreover, the Board was clear that, once established, a Section 9(a) relationship may not be belatedly disturbed by claims that a labor organization did not possess a majority status when that relationship was created, but the Board further agreed with prior cases

that the issue of whether the parties had originally intended a Section 9(a) relationship could be raised at any time that a contract was not in effect. The Board reasoned (emphasis supplied):

In nonconstruction industries, if an employer grants Section 9 recognition to a union and more than 6 months elapse, the Board will not entertain a claim that majority status was lacking at the time of recognition.¹⁵ A contrary rule would mean that longstanding relationships would be vulnerable to attack, and stability in labor relations would be undermined.¹⁶

These same principles would be applicable in the construction industry. In *Deklewa*,¹⁷ the Board said that unions in the construction industry should not be treated less favorably than those in nonconstruction industries. As shown above, parties in nonconstruction industries, who have established and maintained a stable Section 9 relationship, are entitled to protection against a tardy attempt to disrupt their relationship. Parties in the construction industry are entitled to no less protection. Accordingly, if a construction industry employer extends 9(a) recognition to a union, and 6 months elapse without a charge or petition, the Board should not entertain a claim that majority status was lacking at the time of recognition.¹⁸

¹⁵ *Bryan Mfg. Co.*, 362 U.S. 411 (1960).

¹⁶ *Id.* at 429.

¹⁷ *John Deklewa & Sons*, supra at fn. 53.

¹⁸ *Brannan Sand & Gravel Co.*, 289 NLRB 977 (1988), does not require a contrary result. There was no showing in that case that the parties intended a 9(a) relationship. Rather, the General Counsel argued, unsuccessfully, that the Board should presume that pre-1959 relationships were 9(a) relationships. By contrast, in the instant case, there is a showing that the parties intended a 9(a) relationship.

Similarly, in *J & R Tile*, 291 NLRB 1034 (1988), and in *American Thoro-Clean*, 283 NLRB 1107 (1987), there was no showing that the parties intended to have a 9(a) relationship.

In this case, the Respondent's challenge to the majority status of Local 337 did not come within 6 months after recognition was granted and bargaining began; it came 7 years later. Therefore, under *Casale Industries*, if the General Counsel has shown that the parties originally intended to enter a Section 9(a) relationship by entering the 1991 settlement agreement, as the General Counsel contends,⁸ the challenge clearly comes too late.

Evidence that the parties originally intended to enter a Section 9(a) relationship has been found in several cases where the

⁸ On brief, the General Counsel does not contend that the 1998 settlement agreement somehow extended the Respondent's obligation to recognize Local 337 and bargain with it (or its alleged successor, the Charging Party).

parties agreed to a check of authorization cards,⁹ or they agreed to a private election to verify a union's majority status (which was the case in *Casale Industries*). Even without such demonstrations, the Board has found that the parties intended a Section 9(a) relationship if they enter a contract or a collateral agreement that indicates that recognition had been requested on the premise, and granted on the premise, that the labor organization represents a majority of the employer's employees. An example of such a contract is found in *Decorative Floors, Inc.*, 315 NLRB 188 (1994), where the construction industry employer withdrew recognition from a union and committed unilateral actions after its collective-bargaining agreement with that union expired. The Board noted that the expired contract had recited that "the union represents a majority of [the employer's] eligible employees in an appropriate unit and . . . pursuant to Section 9(a) . . . the union is the sole and exclusive bargaining representative." The Board held that such language, "standing alone is sufficient to establish that such a [Section 9(a)] relationship existed here." The Board accordingly found that the employer violated Section 8(a)(5) by its unilateral actions and withdrawal of recognition. An example of a collateral agreement that would similarly bind an employer is found in *Oklahoma Installation Co.*, 325 NLRB 741 (1998), where the construction industry employer repudiated all bargaining obligations after a collective-bargaining agreement had expired. The Board noted that before the collective-bargaining agreement had been entered the parties had executed a separate letter of assent stating that the employer was "satisfied that the union represents a majority of its employees." The Board found that the employer had violated Section 8(a)(5), reasoning that: "Because the Act confers 9(a) status only on majority unions, and because Section 8(f) permitted these parties to contract without concern for the Union's majority status, it is clear that the Respondent's recognition of the Union as the majority representative of unit employees constituted recognition on the basis of Section 9(a)."

In this case, of course, there was no collective-bargaining agreement that was entered by the Respondent and Local 337. On brief, however, the General Counsel attempts to equate the 1991 settlement agreement with the collateral agreement in *Oklahoma Installation Co.* I do not believe that the comparison can validly be made. The 1991 settlement agreement did not recite that Local 337 represented a majority of the Respondent's employees, and it made no other reference to Section 9(a), expressly or by implication. The 1991 settlement agreement did require that the Respondent treat Local 337 as an "exclusive" bargaining representative of the unit employees, but a labor organization that seeks, and is granted, recognition under Section 8(f) is no less an "exclusive" representative, at least for as long as an employer is willing to recognize it as such. When the parties here entered the 1991 settlement agreement, they, of

⁹ See, e.g., *Goodless Electric Co.*, 321 NLRB 64, 66 (1996), enf. denied 124 F.3d 322 (1st Cir. 1997), and *Golden West Electric*, 307 NLRB 1494, 1495 (1992). See also *Triple A Fire Protection, Inc.*, 312 NLRB 1088 (1993) (fringe benefit report "confirming that all, or nearly all . . . employees are members of and represented by [the involved union]").

course, could have included some reference to Section 9(a), or they (at least) could have included some reference to Local 337 as the "majority" representative of the unit employees. They did neither, and it is not the province of the Board to retroactively engraft such phraseology into what they did agree to by entering the 1991 settlement agreement.

The General Counsel further contends that, even if the parties did not execute any agreement that would, itself, indicate that they intended to enter a 9(a) relationship, Local 337 did demand recognition as a majority representative and the General Counsel did issue a complaint alleging that status. From these facts, the General Counsel argues that, by entering the 1991 settlement agreement, the Respondent must have acceded to Local 337's demand, or the Respondent must have agreed with the General Counsel's allegation, or both. It is true that Local 337 did demand recognition as majority representative on April 24, 1990; no more need be said of that fact than the demand was ignored by the Respondent.¹⁰ It is also true that the General Counsel did issue a complaint on December 13, 1990, alleging that a majority of the Respondent's employees had selected Local 337 as their collective-bargaining representative; nevertheless, the General Counsel did not in that complaint allege that by ignoring Local 337's prior demand for recognition the Respondent had violated Section 8(a)(5). Because there had been such a prior demand, of course, the General Counsel could have alleged a 8(a)(5) violation under *Trading Port*, 219 NLRB 298 (1975), and its progeny. Rather than do that, however, the 1990 complaint sought a bargaining order only as a matter of remedy for certain alleged violations of Section 8(a)(1) and (3). There is no law or logic for holding that a settlement agreement that provided a bargaining order only as a remedy for alleged violations of Section 8(a)(1) and (3), and specifically not as a remedy for any alleged violations of Section 8(a)(5), somehow establishes a union as a Section 9(a) representative. In any event, the Respondent denied the allegation that Local 337 represented a majority of the unit employees in its answer to the 1990 complaint,¹¹ and neither by operation of the 1991 settlement agreement nor by any other act did the Respondent withdraw that answer.¹² In summary, the Respondent did not agree to the premise of either Local 337's 1990 demand for recognition or General Counsel's 1990 allegation that Local 337 was a majority representative; accordingly, it cannot be said that any agreement was reached on the basis of that demand or that allegation.

Moreover, in labor law, like all other varieties of litigation, parties enter settlement agreements for all manner of reasons. Obviously, potential litigation costs would have been a factor. Also, in agreeing to the bargaining order of the 1991 settlement

¹⁰ The Respondent also ignored the one oral demand for Section 9(a) recognition that Local 337 made during the parties' 7-year course of bargaining.

¹¹ As well, the Respondent has consistently denied the Section 9(a) status of Local 337 in its answers to all other complaints that the General Counsel has issued.

¹² The General Counsel's arguments in this regard would seemingly elevate the informal 1991 settlement agreement, which did not provide for a withdrawal of the answer, to the status of a formal settlement agreement that did.

agreement, Respondent may well have thought it could reach an agreement that was advantageous to it. The Respondent may have anticipated, as did happen, that Local 337 would be unable to get anyone but its salts to strike against it, and the Respondent thereby knew that it would be in a strong bargaining position during all negotiations that were to follow the 1991 settlement agreement. But no matter how well the Respondent may have thought it could do at the bargaining table, such construction industry bargaining is exactly what Congress intended to encourage by enacting Section 8(f), according to the legislative history as discussed in *Deklewa*.

Additionally, and again, the 1990 complaint contained only 8(a)(1) and (3) allegations and, for purposes of remedy only, an allegation of the majority status of Local 337. In 1991, while considering whether to enter the proposed settlement agreement that was based on those allegations, the Respondent would logically have considered what remedies might subsequently be sought against it if it breached the agreement. It would have realized that a subsequent breach would possibly require it to defend against the underlying unfair labor practice allegations in the 1990 complaint, but certainly it would not have viewed a subsequent breach as subjecting itself to litigation of allegations that were not in the 1990 complaint; to wit: the 8(a)(5) allegation that is made here.

Finally on this point, that the parties did not intend to enter a 9(a) relationship by entry into the 1991 settlement agreement is made quite clear by Local 337's conduct after bargaining began. The only written recognition proposal that Local 337 made during the 7-year course of negotiations was that:

The Employer voluntarily recognizes the Union consistent with Section 8(f) of the National Labor Relations Act, and the employer shall recognize the Union's majority status upon presentation of objective evidence as set forth in Section 9(a) of National Labor Relations Act.

If the agents of Local 337 had truly believed that they had entered a Section 9(a) relationship with the Respondent when they entered the 1991 settlement agreement, they would not have advanced the language of either the first or second clause of this proposal. Rather, by advancing this proposal the agents of Local 337 acknowledged that, in order to achieve a Section 9(a) relationship with the Respondent, they needed to present it with "objective evidence as set forth in Section 9(a) of National Labor Relations Act," as the proposal plainly states.

In summary, Local 337 and the Respondent did not intend to enter a 9(a) relationship when they entered the 1991 settlement agreement. Accordingly, the Respondent was free to question the majority status of Local 337 (or its alleged successor, the Charging Party), even after 6 months had elapsed.¹³ As Local 337 never attempted to make any showing of majority status,¹⁴ I find and conclude that the General Counsel has not overcome

¹³ See, especially, the cases cited in fn. 18 of *Casale Industries*, as quoted above.

¹⁴ Indeed, there is no evidence in the record to indicate the size of the unit at any point during the 7 years that elapsed between the execution of the 1991 settlement agreement and the 1998 withdrawal of recognition, much less evidence of the size of any theoretical majority that Local 337 may have achieved during that period.

the strong presumption that recognition agreements in the construction industry are made pursuant to Section 8(f), not Section 9(a), and I further find and conclude that by its withdrawal of recognition from Local 337 (or its alleged successor, the Charging Party) the Respondent did not violate Section 8(a)(5).

Assuming, however, that the General Counsel did somehow establish Local 337 as the majority representative of the unit employees, the General Counsel nevertheless makes no valid argument that the Respondent's withdrawal of recognition was unlawful. On brief, the General Counsel argues that, once a 9(a) relationship was established by the 1991 settlement agreement, recognition could be withdrawn only after the parties had bargained "for a reasonable period of time." The argument that an employer can withdraw recognition if it has bargained for a reasonable period of time would, of course, be radically inconsistent with the current law that an employer may withdraw recognition from an established Section 9(a) representative only by a showing of a good faith doubt of a union's majority status or by a showing that the union did not, in fact, represent a majority.¹⁵ Moreover, in support of his position, the General Counsel cites only *Douglas-Randall, Inc.*, 320 NLRB 431 (1995). That case, however, did not involve a refusal-to-bargain complaint allegation; that case was not a complaint case at all; that case was a Board decision on an issue of whether a regional office should process a decertification petition that conflicted with the settlement of a 8(a)(5) complaint in another case. The Board rejected the decertification petition, holding that the employer and the union should be allowed a "reasonable period of time" to bargain after the settlement agreement was entered without the interference of a question of the union's majority status. In this case, again, the 1991 settlement agreement did not settle an 8(a)(5) charge or complaint; it settled a 8(a)(1) and (3) complaint only. But even if the 1991 settlement agreement had settled 8(a)(5) allegations, it is to be noted that, although the General Counsel cites the "reasonable period of time" language of *Douglas-Randall*, he (tellingly) does not come out and argue that bargaining in this case was not permitted a reasonable period of time before the Respondent withdrew from negotiations. Indeed, bargaining was conducted from mid-1991 through mid-1998; 7 years is long enough.¹⁶

I would further find and conclude that, even if a Section 9(a) relationship had been established between the Respondent and Local 337, the Charging Party is not a successor that can legitimately assert Local 337's bargaining rights. The law of union successorship, or affiliation, is succinctly stated in *Sullivan Bros. Printers*, 317 NLRB 561 (1995), *enfd.* 99 F.3d 1217 (1st Cir. 1996):

¹⁵ See, e.g., *Hajoca Corp.*, 291 NLRB 104 (1988), *enfd.* 872 F.2d 1169 (3d Cir. 1989); *Station KKHI*, 284 NLRB 1339 (1987), 891 F.2d 230 (9th Cir. 1989). Antiunion employers would seemingly welcome the General Counsel's "reasonable period of time" theory as a lower standard of proof for defending against allegations of unlawful withdrawals of recognition.

¹⁶ The General Counsel does not contend that any of the intervening settled, or even adjudicated, unfair labor practice allegations should somehow extend the process.

Once certified by the Board or voluntarily recognized by an employer as the majority representative of unit employees, a union enjoys a presumption of continued majority support and the employer has a corresponding continuing obligation to recognize and bargain with the union. *Minn-Dak Farmers Cooperative*, 311 NLRB 942, 944 (1993), enfd. 32 F.3d 390 (8th Cir. 1994), citing *Burger Pits, Inc.*, 273 NLRB 1001 (1984), and cases cited therein. A change in internal structure or affiliation does not necessarily change this obligation.

Consistent with the Supreme Court's admonition in *NLRB v. Food & Commercial Workers Local 1182 (Seattle-First National Bank)*, 475 U.S. 192 (1986), that the paramount policy of the Act, i.e., encouraging stable bargaining relationships to preserve industrial peace, should not be unnecessarily disrupted, [and] the Board will interject itself only in the most limited of circumstances involving such internal changes. Thus, only where an affiliation vote is conducted with less than adequate due process safeguards or where the organizational changes are so dramatic that the postaffiliation union lacks substantial continuity with the preaffiliation union will the Board find the employer's duty to bargain does not continue. *Minn-Dak*, 311 NLRB at 945; *City Wide Insulation*, 307 NLRB 1, 3 (1992); *May Department Stores Co.*, 289 NLRB 661 (1988), enfd. 897 F.2d 221 (7th Cir. 1990), cert. denied 111 S.Ct. 245 (1990); and *Quality Inn Waikiki*, 297 NLRB 497 (1989). Further, the Board has consistently held that a party seeking to avoid its bargaining obligation by virtue of a change has the burden of demonstrating that the change was not accomplished with minimal due process, e.g., *News/Sun-Sentinel Co.*, 290 NLRB 1171, 1176 (1988), enfd. 890 F.2d 430 (D.C. Cir. 1989); and *Quality Inn Waikiki*, 297 NLRB at 501 fn. 13; or was sufficient to raise a question concerning representation, e.g., *Minn-Dak*, 311 NLRB at 945, citing *H. B. Design & Mfg.*, 299 NLRB 73 (1990). [Footnotes omitted.]

Sullivan Bros. Printers was expressly followed in the recent case of *CPS Chemical Co.*, 324 NLRB 1018 (1997), enfd. 160 F.3d 150 (3d Cir. 1998), and there is no doubt that it states the law. For a successorship to be established so that one labor organization may assert the Section 9(a) bargaining rights of another, the affected member-employees must have been afforded a chance to vote on the matter of affiliation, with provision of adequate due process safeguards for that voting, and there must be a substantial continuity between the preaffiliation and postaffiliation unions. In this case, whether or not there was substantial continuity after the UA's March 1, 1998, merger of Local 337 in Kalamazoo with Local 513 in Benton Harbor to create the Charging Party, the fact is that the UA gave none of the affected employees (even those who were its members) an opportunity to express their wishes by voting on the matter, with or without adequate due process safeguards.

On brief, the General Counsel recognizes the present status of the law as stated in *Sullivan Bros. Printers* and *CPS Chemical*, and the General Counsel concedes the binding effect that those decisions have on my decision herein. The General

Counsel, however, argues that the Board should overrule *Sullivan Bros. Printers*, *CPS Chemical*, and all other cases¹⁷ that hold that affected employees (or, at least, affected union members) must be allowed to vote on affiliation or consolidation issues. The General Counsel argues that the Board should establish new law that, if there is substantial continuity between preaffiliation and postaffiliation unions, that factor alone should be controlling. The General Counsel further argues that there was such continuity here. Given the current state of the law, this is an argument that I need not address.¹⁸ That is, even assuming such continuity, the Board and the courts are far from holding that employees are to be given no voice in whether they shall be represented by a consolidated labor organization, which is what happened in this case. Again, none of the members of Local 337 were given an opportunity to vote on whether their union should be dissolved and incorporated into a completely new entity, the Charging Party. Therefore, even if Local 337 had once had a Section 9(a) relationship with the Respondent, the Charging Party did not succeed to Local 337's bargaining rights with the Respondent. The Respondent's refusal to recognize the Charging Party, therefore, did not violate Section 8(a)(5).

I shall further recommend dismissal of the allegations that the Respondent has unlawfully refused to furnish Local 337 (or its alleged successor, the Charging Party) relevant bargaining information and has unlawfully committed unilateral actions. As described above, the Respondent did withhold requested, relevant information about employees' wages and qualifications, and it did act unilaterally by changing hiring procedures. Like allegations of unlawful withdrawals of recognition, however, allegations of failures to provide relevant bargaining information and allegations of unlawful unilateral actions cannot be sustained when made on behalf of a union such as Local 337 (or its alleged successor) that does not, and never has, represented a majority of unit employees. That is, although the Respondent committed unilateral actions and failed to supply bargaining information, and although that conduct may have been a breach of the 1998 settlement agreement (something that the complaint does not allege), that conduct did not constitute violations of Section 8(a)(5).

b. *The striker-reinstatement issues*

The General Counsel contends that the two December 1996 strikers (again, Kinney and Rees) and the 8 July 1997 strikers (again, Bronkhorst, Falk, Fuller, Maichele, Preston, Roggow, Rowden, and Titus) were unfair labor practice strikers because

¹⁷ See, for example, *Insulfab Plastics*, 274 NLRB 817, 821 (1985), enfd. 789 F.2d 961 (1st Cir. 1986).

¹⁸ Nevertheless, I feel constrained to point out that the only argument that the General Counsel advances for giving controlling consideration to the substantial-continuity half of the test for the lawfulness of successorship is that sometimes it is difficult to ascertain whether adequate due process safeguards had been provided when affiliation votes are conducted. This argument, of course, ignores the real possibility that the affected employees may not like, or even trust, the potential personnel or the structure of a proposed consolidated union. In such circumstances, the employees should be afforded a choice, even if substantial continuity between preaffiliation and postaffiliation unions would be maintained after the affiliation is accomplished.

they struck over one or more of the following alleged unfair labor practices: (a) the Respondent's refusals to furnish information and its unilateral actions, (b) its discharges of the summer-of-1996 strikers (again, Hayes, Kiss, Lemmer, Parlan, Wood, and Warren), and (c) its failure to pay backpay to the July 1997 strikers (plus Hill) for the period from 1992 or 1993, when those employees offered to return to work from a prior strike, until the Respondent reinstated them (or offered reinstatement to Hill) on July 9, 1997, pursuant to the Sixth Circuit's decree. Although disputed by the Respondent, I find that there is enough credible testimony that each of the 10 strikers struck, at least in part, because of one or more of those alleged unfair labor practices. (I am counting the alleged failure to comply with the make-whole provision of the Sixth Circuit's decree as an unfair labor practice itself.) I do not, however, find that the 10 strikers in this case were unfair labor practice strikers because I conclude that the General Counsel has not proved that the Respondent's actions were, in fact, unfair labor practices. My reasons are as follows: (a) I have rejected the allegations that the Respondent has unlawfully refused to furnish relevant bargaining information and has unlawfully engaged in unilateral actions because I have found that the Respondent had no duty to furnish the information, or refrain from unilateral actions, under Section 8(a)(5); again, the Respondent had no such duties because Local 337 (or its alleged successor, the Charging Party) was not the Section 9(a) representative of the unit employees. (b) The allegation that the Respondent unlawfully refused to reinstate the six summer-of-1996 strikers has not been proved. In his second administrative law judge's decision, Judge Beddow found that the Respondent had unlawfully discharged the summer-of-1996 strikers. That administrative law judge's decision, however, has not been reviewed by the Board as of this date. That is, Judge Beddow's unreviewed decision does not establish the discharges as adjudicated unfair labor practices, and the General Counsel did not seek to introduce in this hearing any evidence that the discharges had been unlawful. (c) Finally, the eight July 1997 strikers did strike, at least in part, because they (and Hill) had not received any backpay from the Respondent pursuant to the Sixth Circuit's decree. The General Counsel, however, offered no evidence that any of those nine employees were entitled to backpay under the decree. The July 1997 strikers were "salts," and, as they testified, when they were on strike against the Respondent, Local 337 (and other UA local unions) kept them constantly employed elsewhere, at higher wages and benefits. Their interim earnings, therefore, could well have exceeded the pay that they would have earned had the Respondent honored their 1992 or 1993 offers to return to work, and there is a real question that any of them were entitled to any backpay. Accordingly I find and conclude that none of the 10 alleged striker-discriminatees in this case were unfair labor practice strikers.

Nevertheless, the Respondent was not necessarily free to disregard, as it did, the 10 strikers' March 2, 1998, offer to return to work made on behalf of the 10 strikers. As stated by Judge Beddow in his first decision between these parties, and as approved by the Board and the Sixth Circuit:

Moreover, as pointed out by the General Counsel, the traditional approach by the Board is that if the strike is not an unfair labor practice strike, it is nevertheless an economic strike. See, e.g., *Commercial Candy Vending Division*, 294 NLRB 908 (1989), and when unfair labor practices cease to be the motivating factor for a strike, the strike is viewed as economic. *Trident Seafoods Corp.*, 244 NLRB 566, 569-570 (1979), *enfd.* 642 F.2d 1148 (9th Cir. 1981).

Particularly in this case, each of the strikers had economic objectives of which Knapp clearly informed the Respondent. First of all, Kinney and Rees testified that they struck beginning in December 1996 because the Respondent had failed to furnish Local 337 with "information." Although the Respondent did not have a statutory duty to furnish information to Local 337, the attempt by Kinney and Rees to get the Respondent to furnish information to Local 337, as if there had been a lawful obligation for the Respondent to do so, was necessarily an attempt to get the Respondent to recognize Local 337. A recognition objective is an economic objective, and Kinney and Rees therefore engaged in an economic strike. The Respondent knew this, even beforehand, by virtue of Knapp's December 24, 1996, letter which referred to the allegations (necessarily including the information allegations) of the 1996 complaint. Also, Kinney and Rees testified that they struck because the Respondent had failed to reinstate the summer-of-1996 strikers, another economic (if not unfair labor practice) objective of which the Respondent was also apprized by Knapp's letter. As well, the eight July 1997 strikers may or may not have been entitled to backpay as a matter of law; nevertheless, their strike for backpay was a purely economic objective, and they were economic strikers solely on that account, as the Respondent knew by virtue of the first listed item of Knapp's July 23, 1997 letter. Also the eight July 1997 strikers testified that they struck because of one or more of the other reasons listed in Knapp's letter, such as the suspension of another employee. Those other matters did not involve unfair labor practices, but they were economic objectives of the strikers.

The 10 strikers who offered to return to work on March 2, 1998, therefore, were economic strikers who were entitled to reinstatement unless they previously had been permanently replaced or their strike activities had not been protected by the Act for some reason. The Respondent does not contend that it had replaced the 10 strikers by the time it received their offer to return to work, but it does contend that the strikers cannot be considered to have engaged in activity that was protected by the Act.

The Respondent first contends that the 10 strikers did not possess "employee" status under the Act at the time that they offered to return to work. Section 2(3) of the NLRA states, in pertinent part:

The term "employee" shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment

The Respondent quotes this section of the Act and argues that each of the 10 strikers had secured “other regular and substantially equivalent employment” before their offer to return to work. The factual premise for this argument is correct; the 10 strikers did secure regular, substantially equivalent, employment while they were on strike. The conclusion that the Respondent seeks, however, is invalid.

In *Phelps Dodge Corp.*, 19 NLRB 547, 598–599 (1940), the Board held that, even if a striker obtains other regular and substantial employment, reinstatement is still an appropriate use of the Board’s remedial powers under Section 10(c) of the Act. The Second Circuit refused to enforce the Board’s order, but the Supreme Court sustained the Board’s position in *Phelps Dodge v. NLRB*, 313 U.S. 177 (1941). The Court concluded that Section 2(3) and the remedial provisions of Section 10(c) must be read together and that Section 2(3) does not limit the Board’s power to award reinstatement to an employee even if he obtains substantially equivalent employment. 313 U.S. 190–191. The Court noted that the Board exists to adjudicate public, not private, rights.

Although dicta in some subsequent cases would arguably support the literal interpretation of Section 2(3) that the Respondent advances in this case, the Board has consistently held that, even if an employee secures substantially equivalent employment while on strike, his struck employer may deny him reinstatement only if that employer shows that the employee unequivocally intended to abandon his employment with it. In *Marchese Metal Industries*, 313 NLRB 1022 (1994), the Board so held, affirming the correctness of an exhaustive analysis of the issue by Judge Steven B. Fish. In that analysis, Judge Fish recited the holding of *Phelps Dodge* and thereafter noted:

Subsequently, in *Mastro Plastics Corp.*, 136 NLRB 1342 (1962), the Board set forth various principles in connection with backpay, and citing *Phelps Dodge*, supra, held that employees who have obtained regular and substantial employment are still employees entitled to the Board’s remedies. The Board noted the dilemma that employees would be placed in, if a contrary interpretation were to be made. Thus, an employee could be deprived of his claim because he did not make reasonable efforts to find interim employment, and on the other hand would be deprived of his total claim by obtaining the interim employment. Finally, the Board also cited, as did the Supreme Court, the Board’s power to vindicate public rights and not merely correcting private injuries. *Id.* at 1350 fn. 20.

Judge Fish acknowledged that some cases that came after *Phelps Dodge* and *Mastro Plastics* contained dicta that would be consistent with the Respondent’s interpretation of Section 2(3), but Judge Fish concluded:

Thus, it would seem that the Board has abandoned its previous position in *Phelps Dodge* and *Mastro*, that the obtaining of substantially equivalent employment does not end employee status. But see *Rose Printing Corp.*, 304 NLRB 1076 fn. 3 (1991), in which the Board observed that even if the returning strikers had obtained regular and substantially equivalent employment elsewhere “that would not per se establish

that they had abandoned interest in pre-strike jobs.” See also *Daniel Construction Co.*, 276 NLRB 1093 fn. 3 (1985), in which the Board citing *Phelps Dodge* found that the responsibility to reinstate discharged employees does not terminate in the event the employees obtain substantially equivalent employment elsewhere. Accord: *Standard Materials*, 237 NLRB 1136 (1978).¹⁹

In *Marchese Metal Industries*, the interim employment of two employees was also at higher wages and benefits. Nevertheless, Judge Fish, and the Board, ordered reinstatement because the employer had failed to show that the employees had said or done anything to indicate that they had intended to abandon their struck employment. In this case, the Respondent points to the testimony of only one of the 10 strikers as indicating an intent to abandon his employment with the Respondent. Kinney acknowledged that in 1997, before Judge Beddow, he testified that he had “no present plans” to return to work with the Respondent. Before me, Kinney was asked what he had meant by that testimony, and he replied: “Well, if I remember, I was employed at Diversified. I liked what I was doing and I didn’t want to leave, I guess.” This answer was probative of nothing. Kinney’s testimony before me about what he had meant by an answer that he gave 2 years before was, at best, retroactive speculation.²⁰ Certainly, there is no authority for the proposition that Kinney’s testimony before Judge Beddow forever waived his rights to reinstatement. Moreover, even though in 1997, Kinney expressed no “present” plans to return to work for the Respondent, “present” plans are always subject to change with changes in circumstances. Indeed, the circumstances did change because Kinney had quit Diversified at the time of the 10 strikers’ March 2, 1998 offer to return to work, and he was then working elsewhere. Finally on this point, reasons for declining reinstatement are examined only after valid offers of reinstatement have been made. *Domsey Trading Corp.*, 310 NLRB 777 (1993), *enfd.* 16 F.3d 517 (2d Cir. 1994). The Respondent’s valid offer of reinstatement to Kinney, or to any other of the 10 strikers involved in this case, has yet to be made.

The Respondent next contends that all of the strikers were salts who were not engaging in a strike against the Respondent so much as they were obeying their joint employers, the local unions of which they were members. It is true that the 10 strikers were paid, and paid well, to be salts. It is also true that, although the Supreme Court in *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), held that a salt is an “employee” under the Act, the Court also stated that: “. . . this is not to say that the law treats paid union organizers like other company employees in every labor law context.” *Id.* at 97. Nevertheless, all salts are paid by a labor organization, and the Board has never held that acceptance of emoluments somehow make salts incapable of also being statutorily protected strikers. The 10 strikers wanted the emoluments that the local unions offered,

¹⁹ On brief, in its argument that the law is what it is not, the Respondent quotes only the first sentence of this paragraph.

²⁰ On brief, the Respondent quotes Kinney’s answer before me with the (obviously intentional) excision of his qualifying appositive, “I guess.”

and for that reason they were willing to go on strike when Local 337 told them to do so, and they were willing to offer to return to work for the Respondent when Local 337 told them to do so. There is, however, nothing but speculation on the part of the Respondent that they did not, as well, seek the economic benefits that they listed in their testimonies, especially the economic benefits of money and recognition of Local 337 as their collective-bargaining representative. Finally on this point, the Board and the Sixth Circuit rejected this very argument by the Respondent in their respective 1995 and 1997 decisions involving these parties.

The Respondent's next argument, that the 10 strikers sought no specific remedy, is strictly a make-weight proposition. Again, Knapp's letters to the Respondent plainly stated the economic, if not unfair labor practice, objective of the strikes. Moreover, a bill of particulars of desired objectives need not be submitted before, or even during, a strike for it to be protected. It is sufficient that employees let their employer know, before or during a strike, why they are striking.²¹

The Respondent's final argument, that the December 1996 and July 1997 strikes were unprotected under the Act because they were "intermittent," is equally invalid. On brief, the Respondent concedes that there is no way that the strike activity of Kinney and Rees could be considered "intermittent." The Respondent argues, however that the eight July 1997 strikers did engage in unprotected activities, stating:

In the cases of Jim Bronkhorst, Ken Falk, Ted Fuller, Grant Maichele, Marty Preston, Max Roggow, Brian Rowden and Steve Titus, these series of strikes began in 1992. Those strikes are chronicled in the Board's decision and the records of Case Nos. 96-5208, 96-5332 and 96-5411. The strikers then returned to work in early July 1997 and went back out on strike on July 23, 1997. The pattern has been established and the purpose is obvious: to disrupt and harass the operations of AMS; to wobble jobs; and to abuse and misuse the National Labor Relations Act in an attempt to force feed the union to AMS' employees. This is not activity protected by the National Labor Relations Act. This activity should be viewed for what it is—unprotected, disruptive harassment.

Of course, a requirement that a strike not be disruptive of an employer's operations, or harassing to it, is a requirement that the strike not be conducted. Moreover, in support of its argument the Respondent cites only one Board and one court case, each of which involved employees' repeatedly returning to work from strikes and soon thereafter going back out on strikes again. When they were returning to work on July 9, the eight July 1997 strikers were not returning from a strike. They were returning to work from effective discharges. They had been, in effect, discharged because the Respondent had unlawfully rejected their 1992 and 1993 offers to return to work, as held by the Board and the Sixth Circuit. Therefore, although the July 1997 strikers had been at work just a short time before they initiated the July 1997 strike, that strike activity was their first in 4 or 5 years, and it cannot be considered "intermittent" on any account.

²¹ *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

As economic strikers whom the Respondent had not permanently replaced by the time of their March 2, 1998, offer to return to work, Kinney, Rees, Bronkhorst, Falk, Fuller, Maichele, Preston, Roggow, Rowden, and Titus were entitled to reinstatement upon that offer. The Respondent's failure to reinstate the 10 strikers on that date therefore violated Section 8(a)(3), as I find and conclude.²²

B. Alleged Unlawful Refusals to Consider and Hire Union Applicants

1. Overview and contentions

Before August 1, 1998,²³ the Respondent did not utilize application forms in its hiring processes. Instead, it accepted individually created resumes as applications for employment. But it had certain requirements for such resumes, and a statement of those requirements was available to applicants at its Kalamazoo office. The pre-August 1 published hiring policy²⁴ contained:

WHAT TO DO IF YOU SEEK EMPLOYMENT AT ALLIED MECHANICAL SERVICES

1. Submit a Resume with: (a) Name (b) Social Security number (c) Driver's license number and state of issue . . . (g) Education (h) Job History (i) Job Experience (j) Special Skills (k) References with phone numbers—List the names of any Allied Mechanical management employees that you know.

2. AMS will consider resumes current for 30 days. After that period, unless there is contact made by the prospective employee in person, resumes will be considered inactive.

3. When AMS is preparing to hire, we will go over all current resumes. [Emphasis in original.]

The final paragraph of the pre-August 1 stated policy, in bold face and underlined completely, is: "A Certification and Release form must be signed and attached to your resume. Failure to do this will terminate your opportunity to be considered for employment at Allied Mechanical Services, Inc." The Respondent attached a copy of the required "Certification and Release" paragraph to each of the distributed copies of its statement of hiring policies. The "Certification and Release" paragraph is lengthy; generally, it states that an applicant understands that falsification is grounds for termination, that a drug test will be required, that prior employers (and others) may be contacted

²² As case authority for this conclusion, I can do no better than cite *Allied Mechanical Services*, 320 NLRB 32 (1995), enf. 113 F.3d 623 (1997). That case, as discussed above, not only involved this respondent, it involved this respondent's discrimination against 8 of the 10 economic strikers in this case (Kinney and Rees being the exceptions). The Respondent's unlawful discrimination against returning strikers that I find in this case began in 1998, but whether the office of the General Counsel has sought a citation for contempt of the Sixth Circuit's 1997 decree is not reflected by the record herein.

²³ All dates subsequently mentioned are in 1998, unless otherwise indicated.

²⁴ Just when the Respondent first published its pre-August 1 statement of hiring policy was not shown. On brief, however, the General Counsel concedes that it was in effect ". . . from the time the unions starting applying in March until August 1, 1998."

for references, and that such employers (and others) are released from liability for their responses.

The complaint, as amended, alleges:

14. On various dates between, March 31, 1998, and August 5, 1998, the Charging Party Union sent Respondent employment applications for Elton Bennett, Scott Calhoun, Terri Jo Conroy, Mike Curran, Eric Englehart, Ken Falk, Ted Fuller, Marty Hampton, Harold Hill, Jeff Kiss, Dave Knapp [i.e., the Local 337 representative mentioned above], Grant Maichele, Rod Newcomb, Tom Patterson, Marty Preston, Tobin Rees, Max Roggow, Brian Rowden, Jeff Warren, Todd West and Randy Wood.

15. Respondent failed and refused to hire or consider for employment the employees named above in paragraph 14.

The complaint further alleges that by its conduct toward these applicants the Respondent violated Section 8(a)(3). In its answer, the Respondent claimed no knowledge of the facts that are alleged in paragraph 14; at trial, however, its counsel stipulated that: “. . . these were resumes that were received, on or about the dates indicated, by the Respondent in this case.” The Respondent admitted paragraph 15, but it denies any violation of law by its conduct.

Knapp testified that he created a resume-application form for use by members of UA Locals 335 and 337 who wished to assist him in organizing the Respondent by becoming employee-organizers (salts). The form that Knapp initially created contained spaces for almost all of the information required by the Respondent’s pre-August 1 stated policy, but it did not contain a “Certification and Release” paragraph to be signed by an applicant, and it did not have a space for entry of an applicant’s driver’s license number and state of issue. In a space for “References with phone numbers,” Knapp’s initial resume-application form had preprinted Knapp’s name and telephone number and the name and telephone number of one Richard Frantz; Frantz was a member of the Local 337 negotiating team that was then attempting to secure a contract with the Respondent.

From March 31 through August 5, first by certified mail and sometimes by facsimile transmission (fax), and later by regular mail, Knapp submitted to the Respondent resume-applications individually signed by the 21 applicants named in paragraph 14 of the complaint, including himself. For this purpose, Knapp used only envelopes that had in the return-address areas the hand-stamped legend: “DAVE KNAPP—UA ORGANIZER [address].” Knapp obtained return receipts for the resume-applications that he sent by certified mail, and he obtained confirmation reports for those that he sent by fax.

(At some point, the Respondent began a practice of refusing to accept certified mail, the envelope of which showed that it was from Knapp. I discredit all testimony offered by the Respondent that this practice had reasons other than that it suspected that such certified mail contained applications of pro-union employees. Nevertheless, the Respondent thereafter did accept applications that Knapp sent by regular mail, and only two union applicants, Thomas Patterson and Randy Wood, could possibly have been affected by the practice of refusing

certified mail from Knapp. As I find *infra*, however, there is insufficient evidence to show that Patterson and Wood were prejudiced by the Respondent’s refusals to accept certified mail from Knapp.)

In mid-April Knapp discovered that the Respondent required that a signed “Certification and Release” paragraph be submitted along with each resume-application. By that time, however, Knapp had already submitted several resume-applications without the paragraph. Upon his discovery, Knapp revised his resume-application form to include the paragraph (and to include a space for an applicant’s driver’s license number and state of issue), and all resumes that the Respondent received from Knapp after April 15, did contain the “Certification and Release” paragraph.

The dates that the Respondent received the union applicants’ resume-applications from Knapp were as follows: Bennett, April 10; Calhoun, two applications, April 10 and July 29; Conroy, July 30; Curran, March 31; Engelhart, May 1; Falk, April 8; Fuller, April 8; Hampton, May 1; Hill, two applications, April 10 and July 30; Kiss, three applications, April 3, May 1, and July 28; Knapp (i.e. Knapp’s own), April 6; Maichele, three applications, April 14, May 1, and August 3; Newcomb, May 1; Patterson, two applications, April 17 and August 13; Preston, April 13; Rees, three applications, April 9, May 7, and July 30; Roggow, April 10; Rowden, three applications, April 6, May 1, and July 28; Warren, two applications, April 16 and August 3; West, April 23; and Wood, two applications, April 10 and August 13.²⁵ Several of these union applicants had previously worked for the Respondent. As held above, the Respondent unlawfully denied Rees reinstatement after his March 2 offer to return to work from a strike that he and Kinney began on December 26, 1996; Fuller, Hill, Maichele, Roggow, Falk, Preston, and Rowden were previous employees of the Respondent whom the Board and the Sixth Circuit, as discussed *supra*, have found to have been unlawfully discriminated against by the Respondent’s refusals of their 1992 and 1993 offers to return to work from strikes during those years.

It is undisputed that the Respondent hired no new employees from January 1 through August 4. The Respondent admits that it began interviewing (considering) new employees during the first week in July, and it admits that it hired 15 employees from August 5 through December 28. (And I find *infra* that the Respondent hired six more employees in 1999, on the basis of applications that it considered in 1998.) The Respondent does not contend that any of the employees named in paragraph 14 of the complaint were not qualified for any of the plumbing or

²⁵ For the dates of the Respondent’s receipts of the union applicants’ resume-applications, I rely on Respondent’s record of receipts of all applications, the accuracy of which the General Counsel does not question. The Respondent’s record of receipts sometimes lists two dates that are quite close together; this was because, for some union applicants, Knapp submitted multiple copies of the same application, by certified or regular mail, by fax, or by some combination thereof. In such circumstances, I use only the date of the last copy that the Respondent recorded as received.

pipefitting jobs that it filled in 1998.²⁶ Instead, as well as contending that the General Counsel has proved no prima facie case, the Respondent advances three defenses for its failures to consider any of the union applicants for employment: (A) The Respondent contends that it did not consider eight of the union applicants because they never submitted “compliant” applications; that is, applications that were facially compliant with its then-current requirements as stated on forms that it distributed at its Kalamazoo office.²⁷ The Respondent includes in this group union applicants Bennett, Curran, Falk, Fuller, Knapp, Preston, Roggow, and Wood. Except for Wood, Knapp submitted only one application for each of these eight alleged discriminatees, and he did so before he came to know that the Respondent’s stated requirements for resumes included the “Certification and Release” paragraph for an application to be compliant. On August 13, Knapp submitted a resume-application signed by Wood which included the “Certification and Release” paragraph, but the Respondent contends that that application was noncompliant with requirements that it instituted on August 1, as discussed infra, that applicants complete Company-created application forms and that they complete such forms at the Respondent’s premises. (B) The Respondent contends that it did not consider the applications of eight other of the union applicants because, although they did submit compliant applications at one time or another, it considers even compliant applications to be “active” or “current” only for 30 days,²⁸ and the applications of those eight applicants were more than 30 days old when it started to consider hiring new employees in early July. The Respondent includes in this group union applicants Engelhart, Hampton, Maichele, Newcomb, Patterson, Rowden, Warren, and West. There is no dispute that these eight union applicants did not have on file with the Respondent compliant resume-applications that were less than 30 days old when it began considering hiring new employees in early July. Rowden, however, submitted another application on July 28; the Respondent contends that that application was noncompliant because Rowden did not include a valid driver’s license number.²⁹ (C) Finally, the Respondent contends that it did not consider the remaining five union applicants because, although their applications were “active” or “current” when it considered other applicants in 1998, those applications were not filed until after it had begun a process of considering only applicants who were recommended by current employees or supervisors. The alleged discriminatees whom the Respondent contends were lawfully rejected for this reason are Calhoun, Conroy, Hill, Kiss, and Rees.

Marinus DeJong, Jr., is the Respondent’s director of human resources. The complaint, at paragraph 19, alleges:

²⁶ Indeed, on brief the Respondent contends, inter alia, that all of the union applicants were overqualified as plumbers or pipefitters because it was seeking only apprentices at almost all times that are relevant.

²⁷ The Respondent’s pre-August 1 requirements for resume-applications are quoted above; the Respondent issued other statements of requirements on August 1 and October 14, as discussed infra.

²⁸ See numbered pp. 2 and 3 of the above-quoted pre-August 1 stated policy.

²⁹ See numbered paragraph 1(c) of the above-quoted pre-August 1 stated policy.

On August 1, 1998, Respondent, by [DeJong], changed its employment application procedure by requiring all applicants to submit their applications in person and [to] use an application form provided by Respondent and by prohibiting applicants from submitting their resumes or applications by mail or facsimile.

The Respondent admits this allegation of the complaint. The complaint, at paragraphs 22 and 23, further alleges that the Respondent instituted the changes noted by paragraph 19 in order to discourage union membership and activities of employees in violation of Section 8(a)(3).³⁰ The General Counsel contends that the changes were designed to thwart the efforts of union applicants. The Respondent denies these allegations, and it contends that the changes were made solely for legitimate business reasons.

2. The applicants

a. *The union applicants*

Although, as I find infra, the Respondent’s owner and president, John Huizinga, made all decisions regarding which applicants would be interviewed and which applicants would be hired, the Respondent called only DeJong to testify in defense of the refusal-to-hire allegations of the complaint.

DeJong testified that he reviews applications when they are received, and he notes in a computer file, or log, whether they are facially compliant, or noncompliant, with the Respondent’s then-current requirements for applications. The Respondent placed into evidence a hard copy of DeJong’s 1998 computer log of applications. The log is a table with the far left column designated for the names of all applicants, and the next column is designated for the dates of receipts of the applications. If an application is noncompliant with the Respondent’s then current requirements for applications, DeJong logs it in as such by entering across the remaining columns “NONCOMPLIANT” (in capital letters, but without the quotation marks). After logging in a noncompliant application. DeJong places the hard copy in an office file with other noncompliant applications. (What DeJong did with two noncompliant applications after placing them in that file is a matter to be discussed infra.) If an application is compliant, DeJong logs it in as such by entering nothing into the columns following the name of the applicant and the date of receipt. (That is, DeJong does not enter, in addition to the applicant’s name and the date of receipt, another notation such as “compliant.”) After logging in a compliant application, DeJong places the hard copy in an office file with other compliant applications. As discussed infra, DeJong goes to that file to pull those applications that are still current when Huizinga tells him that the Respondent needs to hire new employees. To keep an application current under the Respondent’s standards, an applicant need not file an application every 30 days. An applicant may express his continued interest in employment by updating his application every 30 days. If an

³⁰ The changes noted by paragraphs 19, 22, and 23 of the complaint are also subjects of 8(a)(5) allegations that I have dismissed above on the basis of my finding that the Respondent had no duty to bargain with the Charging Party.

applicant who has submitted a compliant application comes to the Respondent's Kalamazoo office, in accordance with paragraph 2 of the above-quoted policy (or only telephones DeJong, according to DeJong's testimony), to update his application, DeJong enters into the columns following the applicant's name and date of original application the dates of such updates without any further comment. (That is, DeJong does not enter, in addition to the date of the update, another notation such as "update" along with the date of the update). As quoted above, the Respondent's pre-August 1 hiring policy stated that the Respondent accepted resumes as applications, and it stated that resumes could be updated only if the applicant appeared at its office (in person).

On August 1, the Respondent issued a revised statement of its hiring policy; to wit:

Employment Application Process

1. Allied Mechanical Services, Inc. (AMS), conducts all recruiting and hiring from its Kalamazoo office. All individuals interested in employment at any AMS location must complete an AMS employment application in person at the Kalamazoo office.

2. All applicants, in order to be considered for employment, must complete an AMS employment application. Resumes will not be accepted.

3. An application must be completed in its entirety at [address] by the prospective employment candidate.

4. Only completed original applications will be accepted. No faxed resumes or applications will be accepted. No batch resumes or applications will be accepted.

5. All completed applications will be considered current for thirty days. If candidates wish their application to remain active beyond that point, they must make a personal appearance at the office at [address] prior to the expiration of the thirty day period. Each update will keep the application active for thirty days from the last candidate appearance.

6. When the need to add to our staff arises, AMS will review all current applications . . .

8. Applications can be completed between the hours of 7:30 a.m. and 9:30 a.m. Monday through Thursday, or by appointment. (The underlining is original.)

As previously noted, the complaint alleges that the Respondent violated Section 8(a)(3) by instituting these August 1 policy changes to the extent that they require applicants to complete a Company-created application form and require applicants to complete such forms at the Respondent's premises, rather than submit applications by mail. On direct examination, DeJong testified that the use of the Company-created application form was necessitated to secure a consistency of the type of information that the Respondent received from applicants; he further testified that: "It would give us the opportunity to see how well people followed instruction. [And] when it would be completed on site, we would make sure that the person who was on the document was the same person that completed the application." Also on cross-examination, DeJong testified that the reason that the August 1 policy prohibited "batch applications"

(or applications sent as a group, as Knapp had done) was: ". . . because we wanted the individual to make out the application on site so we could see that it was the individual that completed the application." DeJong further testified that, although he did the drafting, Huizinga made the decision to issue the August 1 policy.

The Respondent introduced into evidence a July 31 memorandum from DeJong to Huizinga that states, inter alia:

By form of this memo the office staff are being informed that all applications for employment must be acquired from me or a designated representative, be completed on site, and be immediately returned to me or the designated representative.

It is these changes that are highlighted by DeJong's memorandum that the General Counsel alleges to have been violative of the Act.

On October 14, the Respondent further amended its stated application policy by, inter alia, deleting the express requirement that applicants appear in person to update their applications; the October 14 policy stated that updates may be made by "contact" with the Respondent's human resources department.³¹ DeJong testified that, although the Respondent's published policy at all times before October 14, was that applications could be updated only by personal appearance at the Kalamazoo office, from the time that he was hired by the Respondent as human resources manager in late 1997, and continuing thereafter, he allowed applicants to update their applications by telephone. (The General Counsel contends that DeJong's allowing applicants to update their applications by telephone, contrary to the published hiring policy as that policy existed prior to October 14, is evidence of discrimination against union applicants. I reject this contention because no union applicant testified that he attempted to update his application by telephone but was refused.)

DeJong further testified that, when Huizinga tells him that the Respondent needs to hire another employee, he reviews his computer file log to see what applications are "active" or "current" (that is, according to DeJong and the statements of hiring policy quoted above, those compliant applications which had been filed or updated within the last 30 days). DeJong pulls the hard copies of all such active applications and confers with Huizinga. At that point, DeJong may make recommendations to Huizinga about who he thinks should be interviewed; however, as copious quoted testimony will demonstrate, Huizinga then makes all decisions about which applicants will be interviewed, and Huizinga makes the decisions about which applicants will be hired.³²

None of the union applicants filed Company-created applications after August 1. All of the union applicants filed resume-applications before August 1, and some of them filed resume-applications after August 1. In October, some of the union

³¹ The October 14 policy did not state how that contact might be made, but I find that any reasonable applicant would conclude that the required contact could be made by telephone.

³² By March 31, DeJong had worked for the Respondent only for a few months; his prior personnel-relations experience was in the pharmaceuticals industry, not the construction trades.

applicants also sent letters to DeJong expressing continued interest in employment with the Respondent. How DeJong treated the union applicants' resume-applications, and how DeJong responded to their October letters, is as follows:

Bennett, Curran, Falk, Fuller, Knapp, Preston, Roggow and Wood. As noted above, Knapp submitted resume-applications on behalf of these 8 applicants before he discovered in mid-April that the Respondent's published requirements for resume-applications included a signed "Certification and Release" paragraph and an applicant's driver's license number and state of issue. DeJong testified that, because those resume-applications did not have the "Certification and Release" paragraph, he logged them in as non-compliant, and he did not consider any of them when the Respondent began to consider hiring new employees in early July. (DeJong did not, however, testify that any of the 8 applications that were submitted on Knapp's original form were considered non-compliant because of the omission of a driver's license number and state of issue.)

Roggow made no further attempts to secure employment with the Respondent.

On August 13, Wood (through Knapp) submitted a second resume-application to the Respondent. Although Wood's second resume-application did contain the "Certification and Release" paragraph, it was received after the Respondent's August 1 change of policy that mandated that its application forms be completed (and that the forms be completed at the Kalamazoo office, rather than mailed in). DeJong therefore logged in Wood's second resume-application also as noncompliant. Additionally, by letter dated August 13, DeJong responded to Wood stating:³³

Please be informed that, effective August 1, 1998, our pre-employment policy and procedures changed. We no longer accept resumes, faxed or otherwise. All applicants are required to complete an application at our premises. If you are interested in employment at Allied Mechanical Services, Inc., please visit our facility at [address]."

Wood made no further attempt to contact the Respondent about employment.

On October 14, Fuller and Knapp submitted letters stating that each was ". . . still interested in obtaining employment with Allied Mechanical Services." (Several other union applicants, after they also had heard nothing in response to their submissions of resume-applications, sent letters with the identical text to the Respondent; I shall refer to any such letter as a "still interested" letter.) DeJong responded to Fuller and Knapp that:

Please be informed that effective August 1, 1998, our pre-employment policy and procedures changed. All applicants are required to complete a company application on our premises at [address].

(The text of this letter was repeated to other applicants who submitted "still interested" letters, and, for brevity, I shall refer

to such responses by DeJong as "new-policy letters." Some of the new-policy letters also included: "If you are still interested in being considered for employment, you can complete an application anytime between 7:30 a.m. and 9:30 a.m., Monday through Thursday, at our office." Knapp made no further attempt to contact the Respondent about his employment; Fuller sent one more "still interested" letter.

On October 29, Curran, Falk, Preston, and Fuller submitted "still interested" letters to the Respondent. DeJong responded to each with a new-policy letter. Curran, Falk, Preston, and Fuller made no further attempts to contact the Respondent about employment.

Engelhart, Hampton, Maichele, Newcomb, Patterson, Rowden, Warren, and West. As indicated above, before April 15 Knapp filed applications on behalf of Engelhart, Hampton, Maichele, Newcomb, Patterson, Rowden, and Warren (but not West), which applications DeJong testified that those applications were noncompliant with the Respondent's requirements because they did not have the "Certification and Release" paragraph. (DeJong did not testify that any of those applications were noncompliant because they did not bear a driver's license number or state of issue.) For those applicants, and West, Knapp subsequently submitted resume-applications that the Respondent received on the following dates: Patterson's on April 17, West's on April 23, Warren's on April 24, and those of Engelhart, Hampton, Maichele, Newcomb, and Rowden on May 1. At the time that Knapp submitted these applications, he did know of the Respondent's requirement of the "Certification and Release" paragraph, and he had revised his resume-application form to include that paragraph and to include a space for an applicant's driver's license number and state of issue. All eight, therefore, completed applications with the "Certification and Release" paragraph; as well, all eight entered their driver's license numbers. DeJong logged in all of these applications as compliant (including specifically, it is to be noted for purposes of later discussion, the May 1 resume-applications of Maichele and Rowden). None of these eight applicants, however, attempted to contact the Respondent to update their (revised-form) resume-applications within 30 days after filing. DeJong testified that each of the applications therefore became "inactive," under the Respondent's system, on the 30th day after they were filed. Neither Hampton nor West made any further attempts to contact the Respondent about employment, but Engelhart, Maichele, Newcomb, Patterson, Rowden, and Warren did.

Engelhart submitted a "still interested" letter to the Respondent on November 13. DeJong's reply is not in evidence, but at trial DeJong testified that he responded to Engelhart (and others who will be named below) with the same letter that he sent to a nonunion applicant, Michael Collier. The letter to Collier, which is in evidence, recites the same information that is stated in the new-policy letters. The General Counsel does not question the testimony by DeJong that he sent to Engelhart (and others) the same text that he sent to Collier; in fact, in an index to the General Counsel's brief, the General Counsel repeatedly refers to the text of DeJong's letter to Collier as that which was sent to several of the alleged discriminatees.

³³ All of DeJong's responses to the union applicants were by letter.

Maichele submitted another resume-application on August 3. DeJong responded with the text of his above-quoted letter to Wood. On October 2, Maichele submitted a "still interested" letter to the Respondent. DeJong responded to Maichele with the new-policy letter, but as a preface to the letter DeJong also recited: "Please be informed that your application for employment expired on May 31, 1998." (May 31 was, of course, 30 days after Maichele's May 1 submission of a resume-application which the Respondent concedes was compliant.) After receiving this new-policy letter, Maichele made no further attempts to contact the Respondent about employment.

Newcomb submitted a "still interested" letter to the Respondent on October 14. DeJong responded with a new-policy letter. Newcomb made no further attempts to contact the Respondent about employment.

Patterson submitted another resume-application that the Respondent received on August 13. DeJong responded to that submission as he had to Wood. On October 19, Patterson submitted a "still interested" letter. DeJong sent no reply. (DeJong testified that he did not send another letter about the Respondent's August 1 policy to an applicant if he had already sent one such letter to that applicant.) Patterson made no further contact with the Respondent about employment. The General Counsel contends that Patterson was prejudiced by the Respondent's refusals to accept certified mail from Knapp. Patterson's signature on his last resume-application is dated July 22, but there is no evidence that it was mailed before August 1, when the Respondent began requiring Company-created application forms. (Knapp did not testify as to when he mailed it, and the refusal date was not shown on the envelope that the General Counsel placed in evidence.) As I find *infra*, that requirement was lawful. The General Counsel does not make the same contention for Wood, who signed his resume-application on July 30, but my ruling would be the same.

Warren submitted a second resume-application to the Respondent on August 3; DeJong responded with a new-policy letter. On October 29, Warren submitted a "still interested" letter. DeJong sent no reply. Warren made no further contact with the Respondent about employment.

Rowden submitted another resume-application on July 28. The Respondent was still accepting resume-applications through July 31, and Rowden's July 28 application was on Knapp's revised application form, and it therefore did have the "Certification and Release" paragraph, and it did have a space for entry of his driver's license number and state of issue. DeJong testified that Rowden's July 28 resume-application was noncompliant solely because Rowden had entered on that application an incomplete driver's license number; specifically, Rowden entered only "R350" in a space on the resume-application for "Driver's License Number and State." Rowden's driver's license number, as indicated by his unquestionably compliant, but expired, May 1 application is: "R350-098-465-552." As DeJong was asked and he testified on cross-examination:

Q. Apparently, he [Rowden] didn't finish completing that application, correct? Or that entry? It looks like he has R350, but it doesn't give a full number?

A. Yes. It would appear that he just did not finish completing that. That's correct.

DeJong did not contact Rowden to indicate that his resume-application was considered noncompliant by the Respondent because it did not include a complete driver's license number.³⁴

On April 22, one Jay Ponicki filed a resume-application with no driver's license number. DeJong initially recorded the application as noncompliant; on April 30, DeJong recorded the application as compliant and added the notation "Sent in DL #." DeJong admitted that he had told Ponicki in a telephone call about his omission of his driver's license number and that, if he had not done so, Ponicki would not have known about it. DeJong at first claimed that Ponicki had called him, but he later admitted that he did not have a "specific recollection" of whether he called Ponicki or Ponicki called him. (Ponicki was not subsequently interviewed or hired.)

On May 22, one Mark Sloan filed a resume-application with no driver's license number, but DeJong did not record his application as noncompliant. DeJong interviewed Sloan on July 9, and the Respondent hired him on August 10, all without Sloan ever having submitted a driver's license number. On cross-examination, DeJong conceded that Sloan's application was noncompliant. DeJong further admitted that he had had Sloan's application before him during Sloan's July 9 interview. On redirect examination, DeJong testified that he had not noticed the absence of a driver's license number on Sloan's application at any time before it was shown to him at trial.

On August 31, one Joseph Stevenson filled out one of the Company-created application forms that the Respondent began using on August 1. The legend of one space on the form is: "Do you have a valid driver's license? If so, please provide the number." In that space, Stevenson wrote: "No, however transportation [is] not a problem." The August 1 application form has a total of 5 pages of questions and spaces for employment information (including the "Certification and Release" paragraph), all of which Stevenson completed. Stevenson did not update his August 31 application during the following 30 days, but on October 9 he came to the Respondent's premises to submit a new application. Stevenson then completed only the first and the signatory pages of another application form. For the remainder of the required information, DeJong, as he admitted on cross-examination, went to his file of noncompliant and inactive applications, pulled Stevenson's (expired) August 31 application, and used a combination of the two as a compliant application. The Respondent hired Stevenson on October 14. On cross-examination, DeJong testified that: "In this [Stevenson's] case, we knew he did not have a driver's license. So we would not have allowed him to drive a company vehicle"

³⁴ There is no issue raised about the fact that Rowden also did not include his driver's license's state of issue in his July 28 resume-application; Rowden had not included the state of issue in his resume-application of May 1, and the Respondent still considered that application to have been compliant; the same is true of an application by non-union applicant Kerry Blouin (who was hired). Also, the application form that the Respondent instituted on August 1, calls for driver's license number, but not the state of issue.

We wouldn't have allowed him to drive a company vehicle if he didn't have a valid driver's license."

On September 4, one Richard Raith also filed a company-created application form. Like Stevenson, Raith let his application go 30 days without updating it, and the application became "inactive" under the Respondent's policies. On October 16, Raith came to the premises to file a second application. Raith then filled out only the first and signatory pages of the form. As he had done with Stevenson, DeJong used Raith's expired September 4 application as a source of required employment information, and the Respondent hired Raith on October 16.

On cross-examination, DeJong was asked and he testified:

Q. Now . . . with respect to the re-application or new application that Mr. Raith submitted on October 16th, 1998, is it fair to say that you were willing to simply rely upon his prior application [of September 4] for the bulk of the information that was required in AMS' application?

...

A. Yes, it's fair to say that.

Q. And, with respect to [Exhibit] G.C. 65(b), that's Mr. Stephenson's new or, well, updated or new application that he submitted on October 9th, 1998. Is it again fair to say that you were willing to rely on his expired, but prior, application of August 31st, 1998, which is General Counsel's Exhibit 65(a), for the bulk of the information that you needed on the AMS application?

A. Yes, that's fair to say that . . .

Q. Is it fair to say that, when Mr. Rowden submitted his July 28th, 1998 application, you were not willing to simply rely upon his previously submitted application [of May 1] to obtain his driver's license number?

A. I think it's fair to say that, yes.

During redirect examination, DeJong was not asked why he had been willing to look to the expired August 31 and September 4 applications of Raith and Stevenson for the great bulk of the information that was needed for their October 14 and 16 applications to be compliant but he was not willing to look at Rowden's May 1 application for his driver's license number.

On October 2, Rowden submitted a "still interested" letter to the Respondent. DeJong responded to Rowden with a new-policy letter, but as a preface to that letter DeJong also recited: "Please be informed that your application for employment expired on August 27, 1998." (August 27, of course, was 30 days after Rowden's July 28 submission of a resume-application which the Respondent does not concede to have been compliant because it included an incomplete driver's license number.) Rowden made no further attempts to secure employment with the Respondent.

Calhoun, Conroy, Hill, Kiss, and Rees. As indicated above, before April 15 Knapp filed resume-applications on behalf of Calhoun, Hill, Kiss, and Rees (but not Conroy), which applications DeJong testified were noncompliant with the Respondent's requirements because they did not have the "Certification and Release" paragraph. Knapp thereafter submitted revised form resume-applications for Calhoun, Conroy, Hill, Kiss, and Rees on the following dates: Kiss on July 28, Calhoun on July 29, and Rees, Hill and Conroy on July 30. De-

Jong logged in each of those applications as compliant (again, by making no notation that they were noncompliant). In his subsequently described testimony about how he processed the application of nonunion applicant Scott Andrews, DeJong admitted that, if he interviews, or even makes "some sort-of attempt to contact" an applicant during any period in which the Respondent is considering the hiring of new employees, that applicant's application remains current, or active, under the Respondent's requirements for as long as that period lasts (whether the applicant makes additional efforts to update his application or not). DeJong further admitted specifically that if he had decided to interview Calhoun, Conroy, Hill, Kiss, or Rees, their applications would have remained active throughout the period that the Respondent continued to consider hiring new employees (which was, as I find *infra*, at least through the end of 1998). Nevertheless, DeJong freely admitted that the Respondent did not consider Calhoun, Conroy, Hill, Kiss, or Rees for employment. As DeJong responded to questioning on cross-examination:

Q. Did you look at the union applications that were still current at the time that you were looking for these people in August? The ones that were compliant? Did you look them over?

A. I believe when we were looking for people in August, we were well into the process of talking to our employees and finding out about their recommendations on any individuals that we hired.

Q. So as a short answer to my question, "No," you didn't look at their resumes?

A. That would be correct.

During further cross-examination, DeJong further asserted the Respondent's "into the process" defense (as I shall call it) for not considering Calhoun, Conroy, Hill, Kiss, and Rees:

Q. BY MR. HOWELL: Why was it you didn't interview any of the Union applicants . . . in July and August?

A. Well, I believe, as I indicated earlier, we had already gotten well into the process of going through checking with those people that were listed or that we knew, employees that referred these people.

Q. Let me—in so many words, you are saying even though they had timely submitted an application and were still active, they were too late?

A. I think that is a fair assessment to say, yeah, because we were into the process already.

JUDGE EVANS: Process of what, now?

THE WITNESS: Of the reference-checking. Checking with our current employees' status, these other people, and any other references that we might have checked, scheduling interviews, that type of thing . . .

Q. And you are not saying that you had already decided to offer the other person [a nonunion applicant] a job, are you?

A. I would say that is a correct statement.

Q. So what is it about the process that prevented you from considering the Union applicants?

A. Again, we were into the process of talking to our fellow employees that knew these individuals. We were

into the process of, if we did any reference calls—and I don't know that we did, but if we did, we made those and then [did] the scheduling of the interviewing.

Q. Okay. But . . . you couldn't have contacted the Union applicants? What about your process, if there was anything, prevented you from doing that?

A. Time constraint, for one. I was in the middle of all—doing all that. I have a number of responsibilities outside the human resource function, and we had a pool of candidates that we had started a process with, and we did not feel that we could bring into the process new candidates at the time

Q. So the only reason you didn't interview Union applicants is because you ran out of time? Is that—I mean, does that summarize it fairly?

A. No, I think—I think the answer is we had enough viable candidates that we were far enough along in the process with that we could select.

Q. How long have you worked in human relations, sir?

A. Almost ten years.

JUDGE EVANS: Let me ask you this, sir.

THE WITNESS: Yes?

JUDGE EVANS: Did Mr. Huizinga ever tell you not to interview the Union applicants, directly or in words to that effect?

THE WITNESS: I don't recall him ever doing that, no.

JUDGE EVANS: Did he tell you not to consider their applications?

THE WITNESS: I don't recall that either.

Further on cross-examination, DeJong admitted that nonunion applicant Robert Holler³⁵ submitted his resume-application on July 24, that Holler was interviewed on August 1, and that Holler was hired on August 26. DeJong was therefore asked, and he testified:

Q. So when did the process begin and when did the process end? Or when did you—Well, when was the point you stopped considering further applications because you were already in the process?

A. I believe it was immediately after the [July] 24th.

Q. And . . . you're saying, [July 24 was] the day you stopped receiving—considering any more applications?

A. That's certainly a possibility.

Q. Well, I'm not saying it's a—I'm asking you for your best recollection, sir, not a possibility.

A. My best recollection is that would be it, yes

Q. You [then] had enough applications and you didn't need anymore? You were in the process of reviewing the ones you had?

A. We were in the process of reviewing the ones we had, yes.

The General Counsel never did get an answer to the part of his (compound) question that asked when the "process" of considering only applicants who had known referrals ended. De-

³⁵ Holler's name is sometimes misspelled "Hollar" in the transcript and exhibits.

Jong's subsequently described testimony makes it clear that, as far as the union applicants were concerned, it continued at least through the end of 1998. As I discuss *infra*, however, the Respondent started taking new applications from nonunion applicants on August 5.

Although DeJong testified at one point that he did not look at the applications of the union members, he testified that he knew that some of them had worked for the Respondent in the past because Huizinga told him that ". . . they used to work for us as recently as 1997." When asked (again) if Huizinga told him not to consider applicants who were union members, DeJong responded (again): "I don't recall him saying that, no."

DeJong's 1998 log of applications reflects that one Kerry Blouin (who is nonunion) filed an application form on July 29, and that one Charles Schewe (who is also nonunion) filed an application form on August 4. During his redirect examination, DeJong testified that, as well as the applications of Calhoun, Conroy, Hill, Kiss, and Rees he also did not consider the applications of Schewe and Blouin "at that time."

b. The nonunion applicants

Although the Respondent's answer admits that it did not consider any of the 21 union applicants for employment, and although DeJong admitted that he did not interview any of the union applicants in 1998, from early July through December 31, DeJong interviewed 23 applicants whose applications indicated no union affiliations, and he interviewed one more applicant whose application is not in evidence but who was shown to be nonunion.

As previously noted, the Respondent's pre-August 1 application policy included: "List the names of any Allied Mechanical management employees that you might know." The application form that the Respondent instituted on August 1 included a space designated for: "List anyone you know who works for us." Although the Respondent has also always required applicants to list prior employers, DeJong admitted that he did not check any such listings by the 1998 applicants. As DeJong testified:

The method that we use now of using—of having our employees refer acquaintances of theirs, relatives of theirs, has proven successful. We have gotten some very good people. It's been done for I don't know how long.

It is something that John Huizinga and I talked about when I first came on board, that he likes to hire people he has knowledge of.

None of the applicants whom DeJong interviewed in 1998 testified; nor did any of the current employees or supervisors who, according to DeJong, recommended them; nor did Huizinga, as previously noted. The Respondent therefore relies solely on the testimony of DeJong in its attempt to establish why, in fact, only nonunion applicants were interviewed or hired in 1998.

In his testimony about how decisions to interview or hire were made, DeJong invariably employed the indefinite pronoun "we" (e.g., "we decided") or the indefinite passive voice verb tense (e.g., "it was decided"). At other times, DeJong was led to testify that he had made an interview or hiring decision (e.g., "And you made a decision to provide Mr. Schewe [a nonunion

applicant] with an offer of employment, is that correct?"), or DeJong was asked a question that was couched in the passive voice (e.g., "Why was the decision made to hire [nonunion applicant Stevenson]?). These tactics were obviously employed to convey the false impression that DeJong, not Huizinga, made the critical decisions of who should be interviewed and who should be hired. Nevertheless, at other points in his testimony DeJong admitted that he conferred with Huizinga before he interviewed any applicants, and he admitted that he did not "individually" make decisions to interview applicants. DeJong even admitted several times that applicants were interviewed, or hired, because Huizinga "told me to." Accordingly, where I state in this decision that DeJong interviewed an applicant, or I state "the Respondent hired" an applicant, I am making the finding that Huizinga made the decision to interview or hire an applicant and DeJong merely carried that decision out.

During his testimony about who was selected to be interviewed, DeJong had before him his log of applications which indicated how the applications had been processed. In that log, along with the names of most (but not all) applicants who were interviewed, DeJong listed, in parentheses, one or more names of other persons. DeJong testified that a parenthesized name in his log of applications was an indication that the applicant had either named such other person in his application as a reference or that such other person had recommended the applicant, whether he had been named in the application or not. DeJong testified that those other persons were current employees or supervisors who were acquainted with the interviewed applicant. (And, in one instance, the name that was listed along with that of the interviewed applicant was the name of that applicant's high school principal.) Except in three instances (those of nonunion applicants Orrin Dennis, James Meeuwse, and Jeffrey Linblom, as discussed below), DeJong only interviewed applicants for whom he had listed such acquaintances in his log. When the Respondent's counsel examined DeJong on direct examination, he did not ask DeJong about any applicant who was hired after August 30. Therefore, the record evidence of which applicants the Respondent considered and hired, and why, consists only of DeJong's direct examination and cross-examination about those applicants who were interviewed or hired before August 30, his cross-examination about who was interviewed or hired afterwards, the hard copy of DeJong's log of applications, and some other records that show when certain applicants began working after being hired by the Respondent and how they were classified (apprentice or journeyman).

(When the General Counsel began his cross-examinations of DeJong about applicants who were interviewed or hired after August 30, the Respondent objected on the ground that such examinations went "beyond anything in the complaint." On brief, the Respondent does not discuss the applicants who were interviewed or hired after August 30, and it continues to argue that: "Paragraph 14 of the complaint, as amended at the hearing, specifically lists the relevant time frame as March 31, 1998 through August 5, 1998." As quoted above, however, paragraph 14 of the complaint alleges those dates only as the period in which the union applicants (through Knapp) applied. Paragraph 15 of the complaint then alleges that the Respondent "failed and refused to hire or consider for employment the em-

ployees named above in paragraph 14," without any limitation as to time. Paragraph 23 further alleges that the Respondent's refusals violated Section 8(a)(3), and the prayer seeks that the Respondent be ordered to "cease" such violations. These were plainly allegations that the Respondent is unlawfully continuing to refuse to consider or hire the union applicants. Moreover, even if the complaint were as temporally limited as the Respondent argues, the evidence of how the Respondent treated all of the 1998 nonunion applicants is obviously relevant to the issue of whether the union applicants were unlawfully discriminated against.)

In 1998, DeJong interviewed 25 applicants for journeymen or apprentice jobs.³⁶ The applications of 23 of those applicants are in evidence.³⁷ None of those 23 applications reflect any union affiliations. Those 23 applicants, in alphabetical order, were:

1. Scott Andrews, who had experience in industry only as an employee of an insulation company, filed a resume-application on July 9. Andrews listed 5 persons as references, one of whom was Dave Ellison; DeJong identified Ellison as one of the Respondent's supervisors. Andrews did not update that application before August 7 and, under the Respondent's policies, the application would have become inactive on August 8. DeJong testified, however, that on August 7 he called Andrews to schedule an interview. Andrews was not at home at the time, so DeJong left a message for Andrews to call him back. DeJong did not testify when (or even if) Andrews did call him back. If Andrews returned DeJong's call on August 7, DeJong presumably would have so testified.

As discussed *infra*, the Respondent contends that several of the union applicants were rejected because, although they filed compliant applications, those applications expired for lack of updating before the Respondent began considering the hiring of new employees in early July. On cross-examination, DeJong was asked about the fact that he interviewed Andrews on the basis of an application that was more than 30 days old:

Q. So you ignored the 30-day period in that instance, did you not?

A. No, I didn't. I placed a call to him I believe on August the 7th and I think that [a note indicating such] can be found on the top of his resume

Q. So is it that you start ignoring the 30-day period as soon as you decide you want to interview them?

A. As soon as we make a contact within a 30-day period, yes. If we make the contact, if we make some sort-of attempt to contact him in 30 days.

³⁶ DeJong's log of applications indicates that he interviewed one "C. Leep" on December 28, and that the Respondent hired Leep on December 31 to start on January 4, 1999. In an appendix to his brief, the General Counsel asserts that Leep, whose application is in evidence, was hired as either an apprentice or a journeyman, but DeJong's log indicates that Leep was hired as an office (off) employee for the Respondent's Grand Rapids office.

³⁷ The exceptions are the applications of David Anthony Walker and John Jamerson. DeJong interviewed Walker on November 17, but he was not offered a job. DeJong interviewed Jamerson on December 18, and he was offered a job on January 18, 1999, to start on February 3, 1999.

DeJong also affirmed elsewhere in his testimony that, if an applicant is interviewed while the Respondent is hiring, the 30-day update requirement is suspended. (This testimony is the basis of my finding above that, had the Respondent considered Calhoun, Conroy, Hill, Kiss, Rees, and Rowden at any time within the 30-day period after the submissions of their July 28-30 applications, those applications would have remained current, without any efforts at updating on their parts, throughout the remainder of 1998.)

DeJong interviewed Andrews on August 11. Although Andrews had indicated on his application that Ellison would be his reference, DeJong did not ask Ellison if he would be a reference for Andrews. DeJong testified that he thought that Andrews had come well recommended by the Respondent's current employees, Chris Goland and Sean Free, but he also did not speak to Goland or Free (or anyone else) to obtain a reference for Andrews. DeJong testified that he believed (from an note on Andrew's resume-application that was received in evidence) that Huizinga had done so. The Respondent hired Andrews as an apprentice on August 31. (Again, the preceding sentence is to say that Huizinga made the decision to hire Andrews and DeJong implemented that decision.)

On direct examination, DeJong was asked about Andrews, and he testified:

Q. Why . . . is it that Mr. Andrews was selected to be interviewed?³⁸

A. He worked closely with both Mr. Goland and Mr. Free at an insulating company that we use as a subcontractor. He—they also work in a team kind of environment which is—which is something that we look for. He came highly recommended by both of these individuals . . .

Q. BY MR. BUDAY: Any other reasons?

A. Well, he worked around piping and so on by being part of that insulation company. He had some exposure to the kind of work we do and he had—he had I believe some of the skills we were looking for.

Q. Okay. And what skills were you looking for at that time?

A. An apprenticeship level but not [so] completely green that they couldn't come in and do some work . . . We didn't want everyone to be a first-year apprentice, no experience.

(DeJong also mentioned apparent ability to work with a "team" in regard to almost all of the other interviewed, nonunion, applicants; DeJong acknowledged on cross-examination, however, that he had no reason to believe that any of the union applicants would not be able to work with a team. Also, union applicants Rees, Fuller, Hill, Maichele, Roggow, Falk, Preston, and Rowden were previous employees, but the Respondent offered no evidence that their prior employment reflected any degree of inability to work with others as a "team.")

DeJong has no experience in the industry, and he had only worked for the Respondent for a few months when the Respondent began considering the hiring of new employees in early July. DeJong's testimony about the Respondent's needs and

the allegedly desirable qualities of applicants, therefore, necessarily rested on what Huizinga had told him. That is, it was necessarily hearsay.

Although I received evidence of any reports that might be relevant, Respondent did not ask DeJong to testify whether Huizinga told him that the qualities that were reflected by Andrews' application were the reason that Huizinga had decided that DeJong should interview Andrews. (In fact, the Respondent did not ask DeJong to testify whether Huizinga told him that apparent possession of desirable qualities was the reason that he decided that DeJong should interview any of the non-union applicants.) The Respondent also did not ask DeJong to testify whether Huizinga told him why he decided that Andrews should be hired. (In fact, the Respondent did not ask DeJong to testify whether Huizinga told him why he decided that any of the nonunion applicants should be hired.)

The Respondent relies heavily on a defense that it hired only nonunion applicants because they came well recommended by current employees and supervisors, but that the union applicants listed only union representatives on their resume-applications. In Andrews' case, however, DeJong admitted that he did not discuss Andrews with Goland and Free, and the Respondent relies on DeJong's hearsay testimony for propositions that (1) Huizinga received recommendations for Andrews from Goland and Free, and (2) Huizinga decided to hire Andrews, at least in part, on the basis of those recommendations. That is, although Huizinga made all decisions about which applicants DeJong would interview, and although Huizinga made all decisions about which applicants would be offered employment, there is no evidence (hearsay or otherwise) of why Huizinga decided that DeJong should interview Andrews, and there is no nonhearsay evidence of why Huizinga decided to hire that nonunion applicant.

2. Kerry Blouin, who had little experience in the industry, filed a resume-application on July 29, and he updated it on August 11. On August 31, Blouin also completed a Company-created application form which he updated on September 30, October 28, and November 10. DeJong interviewed Blouin on November 10, and the Respondent hired Blouin as an apprentice on November 13. On his August 31 application, Blouin, like Andrews, listed Ellison as a reference. Elliptically, DeJong testified that: "Mr. Blouin came recommended to us by Mr. Ellison," but he did not testify that he spoke to Ellison, and there is no record testimony that Huizinga did so. There is no evidence (hearsay or otherwise) of why Huizinga decided that DeJong should interview Blouin, and there is no nonhearsay evidence of why Huizinga decided to hire that nonunion applicant.

3. Verden Campbell filed a resume-application on June 23, and in that application Campbell did not indicate that he knew any of the Respondent's supervisors. DeJong, however, testified that, at some undefined point, the Respondent's foreman, Ricky Sargeant, came to him and stated that he was a "good friend" of Campbell's. (Again, none of the interviewed applicants testified, and why Campbell would have failed to list his "good friend" as a reference went unexplained.) Campbell had very little experience in the industry, and on cross-examination DeJong admitted that Sargeant told him that he had never

³⁸ Note the passive voice of the question.

worked with Campbell. (Nevertheless, DeJong also testified that Sergeant told him that Campbell “was a hard worker.”) DeJong further testified that, when he conferred with Huizinga about whether to interview Campbell, he told Huizinga that Sergeant knew Campbell; then Huizinga “looked at his resume and said, ‘Well, you go ahead.’”

On July 7, DeJong did interview Campbell, and on August 3, DeJong extended to Campbell an offer of an apprentice’s position. DeJong testified that Campbell told him that he could not leave his current employer until October 14. DeJong told Campbell that the offer would remain open; DeJong testified that he told Campbell this because: “I believe we thought he would be a valuable employee and we were willing to wait the time.” (Emphasis added.) At some point before October 14, however, Campbell called DeJong and stated that he was staying with his current employer.

Although DeJong testified that Huizinga looked at Campbell’s resume before telling him to interview Campbell, DeJong did not testify that Huizinga told him what it was in that resume (or what Huizinga had learned elsewhere) that caused him to decide that DeJong should “go ahead” and interview Campbell. That is, there is no evidence (hearsay or otherwise) of why Huizinga decided that DeJong should interview Campbell, and there is no nonhearsay evidence of why Huizinga decided that DeJong should extend an offer of employment to that nonunion applicant.

4. Orrin Dennis filed a Company-created application form on November 24 claiming a great deal of job experience, including experience in welding. DeJong interviewed Dennis on November 28; and the Respondent hired him as a journeyman on December 14. As previously noted, Dennis was one of three nonunion applicants who were interviewed without having had any references. Although DeJong testified that he thought that the Respondent could have used certain welding skills that were claimed in Dennis’ application, DeJong did not testify that Huizinga told him to interview Dennis, or to extend an offer of employment to Dennis, for that reason. There is, therefore, no evidence (hearsay or otherwise) of why Huizinga decided that DeJong should interview Dennis, and there is no nonhearsay evidence of why Huizinga decided to hire that nonunion applicant.

5. Michael Doorlag applied on December 7, and was interviewed on December 14; he was offered employment on January 18, 1999, and began working on February 3, 1999. DeJong was not asked any questions about Doorlag, and it is not known whether Doorlag was hired as an apprentice or a journeyman. Doorlag’s application states that he knows “James Doorlag, Ray Bosma” who work for the Respondent, but DeJong’s log bears no indication that Doorlag had any recommendations. Because DeJong did not testify about Doorlag, and because Huizinga did not testify at all, there is no evidence (hearsay or otherwise) of why Huizinga decided that DeJong should interview Doorlag, and there is no nonhearsay evidence of why Huizinga decided to hire that nonunion applicant.

6. Robert Eifler, who had previously worked for the Respondent and who had become a member of Local 337 during that employment, filed a Company-created application form on October 19. DeJong testified that Huizinga had known Eifler

when he had previously worked for the Respondent. DeJong testified that Huizinga “instructed me go ahead and interview him immediately.” DeJong did so, and the Respondent hired Eifler on October 26. DeJong was asked:

Q. And why was the decision made to hire Mr. Eifler?³⁹

A. He possessed the skills, having worked for us before. We had a track record of—of what he was capable of and he was also familiar with a lot of the Upjohn [project] work because that is where he had worked before, and we had a need for additional help at Upjohn.

In this testimony, of course, DeJong is offering the hearsay that Huizinga made the decision to interview and hire Eifler because of these qualities. DeJong at first testified that Eifler was a union applicant that the Respondent had hired, but later he was forced to admit that he knew that Eifler had renounced his membership at the time that the Respondent rehired him. Presumably Huizinga had such knowledge also, but, because Huizinga was not presented as a witness, he was not cross-examined about that knowledge and whether it could have affected his decision to hire Eifler. That is, there is no evidence (hearsay or otherwise) of why Huizinga decided that DeJong should interview Eifler, and there is no nonhearsay evidence of why Huizinga decided to hire that nonunion applicant.

7. Dale Heyboer filed a Company-created application form on December 11. DeJong was not examined about Heyboer, but his log indicates that he interviewed Heyboer on the same day. DeJong’s log further indicates that he offered Heyboer a job on December 22, and that Heyboer actually started working on January 14, 1999. On his application, Heyboer listed “Sid H” as someone whom he knew that worked for the Respondent, and DeJong noted in his log that Heyboer was recommended by one “Holwerda.” Because Heyboer did not testify, and because DeJong was not examined about Heyboer, there is no precise record evidence whether Heyboer was hired as a journeyman or apprentice. The record also does not reflect who “Holwerda” is. Assuming that “Holwerda” was an employee or supervisor, the record also does not reflect whether DeJong contacted him or, as in Blouin’s case, Heyboer only listed “Holwerda” on his application as a reference but “Holwerda” was not contacted by DeJong. Also, “Holwerda” may have recommended Heyboer to Huizinga, and Huizinga may have accepted that recommendation as a reason for deciding to hire Heyboer, but there is no evidence (hearsay or otherwise) of why Huizinga decided that DeJong should interview Heyboer, and there is no nonhearsay evidence of why Huizinga decided to hire that nonunion applicant.

8. Robert Holler filed a resume-application on July 24. Holler listed as a reference one Don Reed whom DeJong identified as one of the Respondent’s foremen. DeJong interviewed Holler on August 1, and the Respondent hired him to start as an entry-level apprentice on August 26. Holler’s application listed no prior experience in the industry, but DeJong testified that Reed told him that he and Holler had worked together on some “outside” jobs and that he would be a good employee. Assum-

³⁹ Id.

ing that DeJong reported such to Huizinga, there is no evidence that Huizinga relied on the report when making his decision that DeJong should interview Holler or his decision that the Respondent should hire Holler. That is, there is no evidence (hearsay or otherwise) of why Huizinga decided that DeJong should interview Holler, and there is no nonhearsay evidence of why Huizinga decided to hire that nonunion applicant.

9. Daniel Robert Kilgore, who had no prior experience in the industry, filed a resume-application on July 23, and DeJong interviewed him on that date. The Respondent hired Kilgore on August 12 as an apprentice. DeJong testified that Kilgore had the recommendation of his father, who was a foreman for the Respondent, and that Kilgore made a strong impression on him during the interview. There is, however, no nonhearsay evidence of why Huizinga decided that DeJong should interview Kilgore, and there is no nonhearsay evidence of why Huizinga decided to hire that nonunion applicant.

10. Michael Kopenol filed a Company-created application form on December 23. The form lists no prior experience in the industry, but it does list as a current-employee reference "Jason Dykstra." DeJong was not examined about Kopenol, but, assuming that Dykstra was, in fact, a current employee or supervisor of the Respondent's, there is no indication that DeJong spoke to him about Kopenol, and, certainly there is no indication that Huizinga did so. DeJong's log further indicates that Kopenol was interviewed (probably by DeJong) on the same day that he filed his application. DeJong's log further indicates that Kopenol had a projected hiring date of December 28, but apparently Kopenol was not put on the payroll until 1999. DeJong's log does not indicate at what position Kopenol was hired (journeyman or apprentice), but other records show that it was as an apprentice. There is no nonhearsay evidence of why Huizinga decided that DeJong should interview Kopenol, and there is no nonhearsay evidence of why Huizinga decided to hire that nonunion applicant.

11. Jeffrey Linblom was a nonunion applicant who was neither hired nor offered a job; DeJong did, however, interview Linblom, and, according to DeJong's log, DeJong at one point was "ready to offer" Linblom a job. On brief, the General Counsel states that DeJong did not offer Linblom a job only because Linblom became injured; Linblom did become injured, but DeJong was not asked why he did not offer Linblom a job, and the matter was not otherwise proved. Nevertheless, none of the union applicants were even interviewed, and, certainly, there is no evidence that DeJong was ever "ready to offer" any of them a job. The testimony of how Linblom got to the "near-offer stage" (as I shall call it) is therefore relevant on those points. Also, the testimony about Linblom was offered through DeJong (again, the Respondent's only witness on the refusal-to-hire issues), and it does a great deal to demonstrate the credibility that should be afforded to DeJong's testimony at various points in the refusal to hire case.

As previously noted on August 1, the Respondent instituted a policy of requiring applicants to complete Company-created application forms, and to complete such forms at the Respondent's Kalamazoo office, rather than requiring applicants to submit resume-applications and allowing such submissions by mail. As also noted, DeJong logged in all resume-applications

that were submitted by the union applicants after August 1 as noncompliant, and he sent new-policy letters to those applicants stating that they must appear at the Kalamazoo office and complete Company-created application forms while there.

On August 5, Linblom, a journeyman pipefitter with extensive experience in the industry, filed a resume-application at the Respondent's Grand Rapids office. That office faxed the resume-application to DeJong at the Kalamazoo office on the same date. DeJong did not log in Linblom's resume-application as noncompliant as he had done with the resume-applications that were filed by the union applicants after August 1. (When asked on direct examination why he had not logged in Linblom's post-August 1 resume-application as noncompliant, DeJong replied: "I don't recall why I didn't.") As I find *infra*, instead of logging Linblom's post-August 1 resume-application in as noncompliant and placing the hard copy with other noncompliant applications, DeJong: (1) telephoned Linblom and found that Linblom could not, or would not, come to Kalamazoo to complete an application, (2) agreed to drive 50 miles to meet with Linblom and present him with a Company-created application form, (3) did make the drive, (4) did present the application form to Linblom, but then (5) allowed Linblom to complete that form wherever he wished.

Before his direct examination, DeJong was called by the General Counsel as an adverse witness. DeJong then admitted that on August 11 he called Linblom and scheduled an appointment with him at a restaurant in Grand Rapids; the purpose of the appointment was to allow Linblom to complete a Company-created application form and to allow DeJong an opportunity to interview Linblom. Grand Rapids is 50 miles from Kalamazoo. The appointment was originally scheduled for Saturday, August 15, but DeJong did not meet with Linblom on that date because Linblom "had an accident," according to DeJong. Further according to DeJong, again as an adverse witness, the appointment was rescheduled to Thursday, August 27, and DeJong met Linblom at the Grand Rapids restaurant on that date. DeJong further testified as an adverse witness that he brought a Company-created application form to the August 27 meeting with Linblom and:

I recall him filling it out at the Bob Evans [restaurant] with me at a later, at that 8/27 date.

An application form that Linblom had completed was received in evidence. At the top of the form, Linblom wrote, in spaces designated for "Today's date" and "Time": "8/27/98" and "8 PM." Also, at the last part of the application form, Linblom's signature is dated "8/27/98." DeJong had Linblom's resume-application before him as he testified. The application form that Linblom signed is date-stamped as having been received at the Respondent's Kalamazoo office on "Sep 2 1998." There were 3 work days between August 27 and September 2 (August 28 and 31, and September 1), and, if DeJong actually had received Linblom's application form on August 27, he would presumably have had it stamped in on his first day back to the office, or, at least, on the second or third. At any rate, DeJong obviously would not have waited until September 2, to have

Linblom's application date-stamped.⁴⁰ When this became apparent at trial, DeJong testified "I can't explain why that date is stamped there." DeJong further insisted that his "August 27" meeting with Linblom was a breakfast meeting and that Linblom's entry on the application form, that it was completed at "8 PM," was "not correct."

On the day following his appearance as an adverse witness, the Respondent called DeJong as its witness. The first questions and answers about Linblom were:

Q. Do you recall who initiated the communication that resulted in you having an appointment with Mr. Linblom?

A. I believe he called me seeking how he should apply, sometime before August 11th.

Q. Why do you say that?

A. Because of this notation here [on the resume-application] that says, "Left message 8/11/98," that would be my return call to that voice mail message I received from him.

Q. Okay. What happened after he called you to set up an appointment?

A. We set up the appointment for 7:30 on Saturday, the 15th of August up at Bob Evans on 28th Street in Grand Rapids. I was to bring an application or I was—I had told him I would bring an application with me

Q. Do you recall why you allowed Mr. Linblom to complete his application at home or wherever he completed it? I guess not on site?

A. This was like the second application that we had in our new system and the first one that we had away from Kalamazoo. And I believe I just allowed him to take it. This was the first time we had done it away from Kalamazoo.

After again explaining that his meeting with Linblom on August 15 was postponed because of Linblom's accident, DeJong was further asked on direct examination, and he testified:

Q. Yesterday when you testified, did you testify that you met on the 27th of August?

A. Yes, I think—I believe I did.

Q. Why has your testimony changed?

A. I had placed a call to Mr. Linblom last night because I was

MR. HOWELL: I am going to object to hearsay.

JUDGE EVANS: Overruled. Go ahead.

A. I placed a call to Mr. Linblom last night just to verify that this, indeed, was how the events progressed And Mr. Linblom informed me that he did call me to set up that appointment after he initially submitted a fax . . . application. And then he remembers us meeting but he did not remember the exact date. We talked briefly about the injury that he had and did recall that we met for breakfast

⁴⁰ This is especially true since DeJong had made a 100-mile round trip to get Linblom's application. Also, as quoted above, DeJong's July 31 interoffice memorandum states that all completed application forms must be "immediately" returned to him, clearly expressing a strong sense of urgency in the handling of applications after they are received.

at Bob Evans and that he took the application home with him to fill out.

Q. BY MR. BUDAY: And yesterday you had testified that he had filled it out in your presence, correct?

A. Yes, I did. And I was mistaken.

DeJong then identified a Bob Evans restaurant receipt for "9:53" (apparently a.m.) on August 25, and he testified that he obtained the receipt on that date after his breakfast with Linblom.

I believe, and find, that the Grand Rapids meeting between DeJong and Linblom occurred on the morning of August 25 (after being rescheduled from August 15). I further believe, and find, that it was at that August 25 date that DeJong gave the Company-created application form to Linblom to complete elsewhere. I further find that, as indicated twice by Linblom's entries, Linblom completed the application on August 27 (and he did so about "8 PM"). I further find, however, that Linblom mailed the application to the Respondent rather than bringing it to DeJong at his office in Kalamazoo. If Linblom had brought the application 50 miles to the Respondent's Kalamazoo office, rather than mailed it, DeJong would assuredly have so testified. DeJong's allowing Linblom to complete the form outside of DeJong's presence, of course, was inconsistent with the Respondent's reasoning for instituting the August 1 policy that applications had to be completed on the premises because the Respondent wanted to be sure that the person completing the application was, in fact, the applicant.⁴¹ Allowing Linblom to mail the form to the Kalamazoo office was even more inconsistent because DeJong did not even require Linblom to affirm in his presence that it was he who had completed the application form. DeJong's original testimony was obviously an attempt to cover these inconsistencies, but he was caught by the inconsistency between his testimony that Linblom completed the form in his presence at a breakfast meeting and Linblom's entry on the form that he completed it at "8 PM." DeJong's testimony that he had initiated a call to Linblom to schedule an appointment, rather than sending him a new-policy letter as he had done with the post-August 1 union applicants, also bears an obvious admission against interest that he treated the union applicants differently from this nonunion applicant. The testimony that DeJong had given as an adverse witness therefore required restructuring, and the Respondent attempted to provide such when it called DeJong as its witness during the next day of trial.

Whether I credit DeJong's revised testimony or not, that testimony proves that he was more than simply "mistaken" when he gave his original, resolute, testimony that: "I recall him filling it out at the Bob Evans with me at a later, at that 8/27 date." DeJong's revised testimony proves that his original testimony was a conscious attempt to delude the Board into finding that there was no significant inconsistency between his handling of Linblom's submission of a resume-application after August 1, and his handling of the resume-applications that were submitted by the union applicants after August 1. Moreover, DeJong's

⁴¹ As quoted above, DeJong testified that the reason for the requirement was: ". . . we would make sure that the person who was on the document was the same person that completed the application."

original, false, testimony about watching Linblom sign his application form was obviously designed to comport with the Respondent's theory of the case that it changed its policies on August 1, to require that application forms be completed at the Respondent's Kalamazoo office solely to verify that the person who completed the form was truly the applicant and to see if an applicant could follow instructions.

DeJong's willingness to lie about seeing Linblom sign his application impels immediate incredulity about DeJong's other revised testimony that Linblom initiated the Grand Rapids meeting when Linblom "... called me seeking how he should apply, sometime before August 11th." Moreover, that revised testimony simply makes no sense. If Linblom had called before August 1, DeJong assuredly would have so testified (even though that would not have explained why DeJong did not log in Linblom's resume-application as noncompliant when he received it on August 5). If Linblom called DeJong on or after August 1, but "before August 11th," he would not have been "seeking how he should apply" because Linblom had already submitted his resume-application, and he would have had no reason to think that that application was inadequate unless someone had alerted him to the fact.

Linblom's application shows that he would have been an extremely attractive applicant for a journeyman's position, and it indicated no union affiliation on his part. I believe, and find, that it was because of both of these factors that DeJong consciously did not log in the resume-application that he received from Linblom on August 5, that DeJong initiated a telephone call to Linblom to tell him to file a Company-created application form, and that DeJong drove 50 miles to present the application form to Linblom, as DeJong first testified. DeJong then, however, allowed Linblom to complete the form outside his presence, contrary to the purpose of the Respondent's August 1 policy, as DeJong admitted when called by the Respondent. On brief, the Respondent suggests no other resolution of the problems created by DeJong's revisions of his testimony. In fact, although the General Counsel entered formidable objections to the receipt of DeJong's revised testimony (which contained a great deal of hearsay and which violated the sequestration order that I had entered), and although I stated that I would not strike the testimony at the time but would consider the matter when briefed, the Respondent's only mention of the issue on brief is to say that: "... Mr. DeJong's mistake in allowing an individual to fill out an application away from the premises of AMS was due to the fact that AMS had just instituted the new system—this was only the second application issued by AMS—and Mr. DeJong admitted that he simply made an error." (The name of the "individual" was "Linblom," a name that the Respondent tellingly does not mention on brief.) DeJong, as quoted above, did give the newness of the system as his reason for making the off-premises appointment with Linblom (a matter that will be discussed separately below), but he did not testify that by doing so he had "made an error." Moreover, any newness of the system cannot explain how DeJong could have testified that he witnessed Linblom filling out the application, and it does not explain why DeJong did not log in Linblom's August 5 application as noncompliant in the first place.

On neither his resume-application nor on his Company-created application form did Linblom indicate that he knew any employees or supervisors who worked for the Respondent, and DeJong did not testify that Linblom ever received a recommendation upon which he relied before he was "ready to offer" Linblom a job. There is, therefore, no evidence (hearsay or otherwise) of why Huizinga decided that DeJong should interview Linblom, and there is no nonhearsay evidence of why Huizinga decided, at least at one point, that DeJong should be "ready to offer" employment to that nonunion applicant.

12. James Meeuwse filed a resume-application on April 6, and he updated it on April 28, May 7, May 22, and June 15. DeJong interviewed Meeuwse on July 8, and the Respondent hired him on August 5, as an apprentice. Meeuwse listed 4 individuals as references, but DeJong did not identify any of them as current employees or supervisors, and DeJong did not testify that he (or Huizinga) spoke to any references about Meeuwse. On direct examination DeJong first testified that both he and Huizinga knew Meeuwse personally; then DeJong testified that he and Huizinga "were familiar with the references that he [[Meeuwse] listed." Then DeJong again testified that he knew Meeuwse "personally"; then DeJong testified that: "I went to the same high school he went to and I am an acquaintance of his brother." Then on cross-examination DeJong testified that he was at the high school at the same time that Meeuwse was there. DeJong did not testify that he (or Huizinga) ever talked about Meeuwse with anyone who had ever worked with Meeuwse. DeJong further testified on cross-examination that Huizinga "told" him to hire Meeuwse. There is, however, no evidence (hearsay or otherwise) of why Huizinga decided that DeJong should interview Meeuwse, and there is no nonhearsay evidence of why Huizinga decided to hire that nonunion applicant.

13. Kevin Moerman filed a Company-created application form on November 24; DeJong interviewed him on November 29, and the Respondent hired him as an apprentice on December 14. (Other records show that Moerman's employment was terminated on December 17.) As current employees who knew him, Moerman listed Steve Huizinga and Ryan VanderLugt. On his log of applications, DeJong listed Steve Huizinga and one Matt Durian as references for Moerman (but not VanderLugt). DeJong was not asked anything about Moerman on direct examination; on cross-examination he testified that Durian and Steve Huizinga, both pipefitters for the Respondent, were high school classmates of Moerman, but he did not testify that he spoke to Durian or Steve Huizinga about Moerman. Whether John Huizinga spoke to either Steve Huizinga or Durian about Moerman is unknown. That is, there is no evidence (hearsay or otherwise) of why Huizinga decided that DeJong should interview Moerman, and there is no nonhearsay evidence of why Huizinga decided to hire that nonunion applicant.

14. Bennie Oliver filed a Company-created application form on December 21, and DeJong interviewed him the same day. DeJong's log indicates that he attempted to offer Oliver a job (apparently as an apprentice) on January 18, but DeJong testified on cross-examination that he was unable to contact Oliver at the telephone numbers that Oliver had listed on his applica-

tion. DeJong testified that Oliver told him that he had been referred to the Respondent by his high school principal, but there is no evidence (hearsay or otherwise) of why Huizinga decided that DeJong should interview Oliver, and there is no nonhearsay evidence of why Huizinga decided that DeJong should extend an offer of employment to that nonunion applicant.

15. Richard Raith filed a Company-created application form on September 4. That application expired without Raith's updating it, but on October 16 (as mentioned in the case of Rowden, supra), DeJong allowed Raith to complete the first and last pages of another application form and use that, with his original application, as a new, compliant application. Also on October 16, after conferring with Huizinga, DeJong interviewed Raith. DeJong further testified that Raith had the recommendation of Harold Immekus, a project manager for the Respondent who reported to DeJong that he had worked with Raith on a "side job." The Respondent hired Raith as an apprentice, also on October 16. Although DeJong testified that he spoke to Immekus about Raith, he did not testify that he conveyed Immekus' recommendation to Huizinga. There is, therefore, no evidence (hearsay or otherwise) of why Huizinga decided that DeJong should interview Raith, and there is no nonhearsay evidence of why Huizinga decided to hire that nonunion applicant.

16. Chris Schewe, who had no experience in the industry, filed a Company-created application form on August 4, and he updated it on August 24, September 10, and October 23. DeJong interviewed Schewe on November 5, and the Respondent hired Schewe as an apprentice on that date. DeJong testified that he knew Schewe's parents, and he testified that he spoke with pipefitters Durian and Steve Huizinga (who had gone to high school with Schewe, but who had not worked with him) about Schewe. DeJong did not testify if he told Huizinga whatever he learned from Durian and Steve Huizinga about Schewe, and there is no evidence (hearsay or otherwise) of why Huizinga decided that DeJong should interview Schewe, and there is no nonhearsay evidence of why Huizinga decided to hire that nonunion applicant.

17. Mark Sloan filed a resume-application on May 22 (which application contained no valid driver's license number, as mentioned above in connection with alleged discriminatee Rowden's case), and DeJong allowed Sloan to update that (noncompliant) application on June 15. DeJong interviewed Sloan on July 9; DeJong testified that, at the time, the Respondent was in need of a journeyman with welding experience. (Again, such testimony necessarily rests on what Huizinga had reported to DeJong.) Sloan's application listed one Ken Klein as a current-employee reference. DeJong did not speak with Klein about Sloan; he ventured: "I believe John Huizinga talked with Mr. Klein." The Respondent hired Sloan as a journeyman on August 3. Although DeJong testified that he thought the Respondent could use certain welding skills that Sloan listed on his application, there is no evidence (hearsay or otherwise) of why Huizinga decided that DeJong should interview Sloan, and there is no nonhearsay evidence of why Huizinga decided to hire that nonunion applicant.

18. Joe Stevenson filed a Company-created application form on August 31 (which application contained no valid driver's

license number, as mentioned above in connection with alleged discriminatee Rowden's case). That application expired without Stevenson's updating it, but on October 9, Stevenson came to the Kalamazoo office and DeJong allowed him to complete the first and last pages of another application form and use his original application to complete the new application (as also mentioned in Rowden's case). DeJong first ventured that Stevenson found out that his old application had expired by calling DeJong; then DeJong admitted that he could not recall how it came about that Stevenson appeared at the Respondent's office on October 9.⁴² On the same day, the Respondent hired Stevenson as a journeyman pipefitter. DeJong, necessarily relying on what Huizinga had told him, testified that when the Respondent hired Stevenson it needed a journeyman pipefitter. DeJong also testified that, "We have a past history with Mr. Stephenson who was formerly employed by us." There is, however, no evidence (hearsay or otherwise) of why Huizinga decided that DeJong should interview Stevenson, and there is no nonhearsay evidence of why Huizinga decided to hire that nonunion applicant.

19. Phil Sullivan filed a Company-created application form on December 17, and DeJong interviewed him the same day. DeJong was not asked any questions about Sullivan, but his log indicates that the Respondent offered Sullivan a job (apparently as an apprentice) on January 18, 1999, and Sullivan began working on February 1. Sullivan listed VanIngen as a current employee-reference; as noted below, VanIngen was hired by the Respondent on December 14. Because DeJong was not asked any questions about Sullivan, there is no evidence that he discussed Sullivan with (3-day) employee VanIngen; certainly there is no evidence that VanIngen told DeJong that he had ever worked with Sullivan. That is, there is no evidence (hearsay or otherwise) of why Huizinga decided that DeJong should interview Sullivan, and there is no nonhearsay evidence of why Huizinga decided to hire that nonunion applicant.

20. Kenneth Summers, who had no prior experience in the industry, filed a Company-created application form on October 14, and DeJong interviewed him the same day. DeJong testified that Huizinga knew Summers personally and that Huizinga "instructed" him to interview Summers. On October 16, the Respondent hired Summers as an apprentice. Although DeJong testified that Huizinga knew Summers personally, that testimony was hearsay, and there is no evidence (hearsay or otherwise) of why Huizinga decided that DeJong should interview Summers, and there is no nonhearsay evidence of why Huizinga decided to hire that nonunion applicant.

21. Tom VanIngen filed a Company-created application form on November 27, listing only "Jeff Matthews" as a current employee whom he knew. DeJong testified that Mike Welcher was a foreman who had once worked on a construction site with VanIngen, at which time VanIngen was employed by another employer. DeJong testified that "[Welcher] recommended that Mr. VanIngen come in and apply," but whether

⁴² DeJong was under some understandable personal stress at the time that he testified, and he needed a break at this point in his testimony. When he was recalled, however, he did not change his testimony that he could not recall how his meeting with Stevenson came about.

Welcher was ever consulted about VanIngen by DeJong (or Huizinga) is unknown. The Respondent hired VanIngen on December 14 as an apprentice, but there is no evidence (hearsay or otherwise) of why Huizinga decided that DeJong should interview VanIngen, and there is no nonhearsay evidence of why Huizinga decided to hire that nonunion applicant.

22. Ryan VanderLugt, who had some pipe-laying experience, filed a Company-created application form on September 24, and the Respondent hired him as an apprentice on October 14. On his application VanderLugt listed four individuals as current employees of the Respondent whom he knew, but DeJong did not speak to any of them about VanderLugt. DeJong interviewed VanderLugt on September 29, and the Respondent hired him as an apprentice on October 2. On direct examination, DeJong was led to testify that he had made the decision to hire VanderLugt. On cross-examination, however, DeJong was asked and he testified:

Q. Is this an individual that Mr. Huizinga told you to hire?

A. Yes.

Q. So you didn't—This wasn't based on your recommendation?

A. No. We had a discussion. I agreed with his decision, of course, and we went ahead.

DeJong admitted that Huizinga did not tell him whether he (Huizinga) had talked to any of the four employees whom VanderLugt listed on his application. There is, therefore, no evidence (hearsay or otherwise) of why Huizinga decided that DeJong should interview VanderLugt, and there is no nonhearsay evidence of why Huizinga decided to hire that nonunion applicant.

23. Mark Vlietstra, who had had no prior experience in the industry, filed a Company-created application form on December 14, and DeJong interviewed him on that date. DeJong extended to Vlietstra an offer of a job as an apprentice on January 18, 1999 to begin working on February 2, of that year. DeJong testified he thought that pipefitter Steve Huizinga and apprentice pipefitter Paul Visscher knew Vlietstra, because they were high school acquaintances of Vlietstra's. DeJong acknowledged, however, that he did not talk to either Steve Huizinga or Visscher about Vlietstra. DeJong first testified that the decision to interview Vlietstra was "a mutual decision of John Huizinga and myself," but he later admitted that he interviewed Vlietstra because Huizinga told him to do so. That is, there is no evidence (hearsay or otherwise) of why Huizinga decided that DeJong should interview Vlietstra, and there is no nonhearsay evidence of why Huizinga decided to hire that nonunion applicant.

As noted above in footnote 37, in addition to the 23 applicants whose applications are in evidence, DeJong also conducted interviews of applicants David Anthony Walker and John Jamerson in 1998. Walker was not offered a job, but Jamerson was. Jamerson's application is not in evidence to indicate his union sympathies, but DeJong was asked at trial if he knew of any union members whom the Respondent had hired, and DeJong named only Rob Eifler and Mike Trout. (DeJong later admitted that he knew that Eifler had repudiated

his union membership before being hired in 1998, and DeJong later admitted that he really did not know that Trout was a union member. Also, just when Trout was hired went unexplained.) I therefore find that Jamerson was a nonunion applicant when he was hired.

According to DeJong's log, Jamerson filed an application for employment on November 24, he was offered a job on January 18, 1999, and that began working on February 3, of that year. The Respondent asked DeJong nothing about Jamerson on direct examination, but on cross-examination DeJong testified that Jamerson was hired as an apprentice. Along with Jamerson's name in DeJong's log is "(Brownell)," indicating either that Jamerson mentioned Brownell on his application as a reference or that DeJong (or Huizinga) otherwise decided that one Brownell could be used as a reference for Jamerson. DeJong further testified on cross-examination that Dave Brownell was the Respondent's shop foreman. DeJong further testified that Brownell was "an acquaintance of Mr. Jamerson's father" and that Jamerson received an interview on December 18, for that reason. DeJong, however, did not testify that he talked to Brownell about Jamerson's father; DeJong also did not testify that Huizinga told him that he (Huizinga) had spoken to Brownell about Jamerson's father. There is, therefore, no nonhearsay evidence of why Huizinga decided that DeJong should interview Jamerson, and there is no nonhearsay evidence of why Huizinga decided to hire that nonunion applicant.

In summary, in 1998, DeJong conducted interviews of 25 applicants for journeymen and apprentice jobs. Twenty-four of those applicants were not members of any union. (Walker's union status was not proved.) The Respondent hired 21 of those 24 nonunion applicants, 15 in 1998,⁴³ and 6 in January or early February 1999.⁴⁴ Additionally the Respondent offered employment to one other nonunion applicant who declined (Campbell); and DeJong testified that he was "ready to offer," or "attempted to offer," jobs to the 2 other nonunion applicants (Linblom and Oliver). Huizinga made all decisions about which applicants DeJong should interview and which applicants should be offered employment, but the Respondent did not call Huizinga to testify. Therefore, because the Respondent offered only the hearsay testimony of DeJong, there is no probative evidence of the reasons that Huizinga decided that DeJong should interview the 24 above-listed nonunion applicants, and there is no probative evidence of why Huizinga decided that DeJong should extend offers of employment to every one of them.

⁴³ These were Andrews, Blouin, Dennis, Eifler, Holler, Kilgore, Meeuwse, Moerman, Raith, Schewe, Sloan, Summers, Stevenson, VanIngen, and VanderLugt.

⁴⁴ These were Doorlag, Heyboer, Jamerson, Kopenol, Sullivan, and Vlietstra. (Actually, Kopenol and Heyboer could properly be considered as being hired in 1998 because hiring commitments were made to them in that year. The Board gives great weight to such commitments; for example, the Board recognizes that strike-replacements who receive such commitments are employees, even though they may not have actually started working when strikers offer to return to work. See, e.g., *JMA Holdings, Inc.*, 310 NLRB 1349 (1993).)

3. Analysis and conclusions

a. *The prima facie case*

In *Wright Line*,⁴⁵ the Board set forth the test to be employed in cases where General Counsel alleges 8(a)(1) and (3) violations that turn on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support an inference that known protected employee conduct was a motivating factor in the employer's action. If General Counsel does establish a prima facie case, the burden then shifts to the employer to demonstrate that it would have taken the same action notwithstanding the known protected conduct of the alleged discriminatees. Just as the General Counsel must prove the prima facie case by a preponderance of the evidence, the Respondent's evidentiary demonstration must be by a preponderance of the evidence; if it is not, a violation will be found.⁴⁶

Specifically in cases where unlawful refusals to hire employees are alleged, the required elements of the prima facie case are as follows: (1) an application by each alleged discriminatee; (2) refusals to hire each alleged discriminatee; (3) a showing that each alleged discriminatee was a union member or sympathizer; (4) a showing that the employer knew of or suspected such membership or sympathy; (5) availability of at least some jobs for the applicants; and (6) proof of a degree of animus against the known union membership or sympathy sufficient to support an inference that protected conduct was a motivating factor in the employer's action in refusing to consider or hire each alleged discriminatee.⁴⁷ The initial inquiry therefore is whether the General Counsel has presented a prima facie case that the Respondent unlawfully refused to consider or hire the union applicants.

(On brief, the Respondent contends that there is an additional element of a prima facie case and that the General Counsel failed to establish it. Citing *Clock Electric Inc. v. NLRB*, 162 F.3d 907, 912 (6th Cir. 1998), the Respondent argues that the General Counsel was required to show that after the Respondent rejected the union applicants, the positions remained open and that the Respondent ". . . continued to seek applications from [other] persons with the [applicants'] qualifications." All of the union applicants, however, had applied at least once before early July when the Respondent began to consider the hiring of new employees. Those initial applications were, at minimum, rejected, and any additional requirement by *Clock Electric* has been satisfied. The Respondent's arguments that the union members' applications should be disregarded because (1) they originally had not been compliant with its requirements, or (2) they had expired under its 30-day rule, or (3) when they were received, the Respondent had already begun a process of interviewing only applicants who came recom-

mended by current employees and supervisors, are all matters of defense, and those arguments will be addressed as such infra.)

The Respondent admits that the 21 alleged discriminatees filed their applications on the dates indicated above, it admits that the Respondent did not consider or hire any of those alleged discriminatees, and it admits that it hired 15 employees in 1998, after March 31, when Knapp began submitting the applications of the union members. (And I have found that it hired six additional employees after their 1998 interviews.) Knowledge of the membership or activities of the union applicants has also been established. As well as the fact that the envelopes of the union members' applications showed that they came from Knapp, and the fact that the applications referred to Knapp and Union Representative Franz as their references, Huizinga knew, or knew of, Fuller, Hill, Maichele, Roggow, Falk, Preston, and Rowden because they were prior employees and they were discriminatees in the 1997 Sixth Circuit case; also, Rees was a prior employee who is found to be a discriminatee in this case because he is one of the 1996 strikers whose March 2 offer to return to work was unlawfully refused by Huizinga. Therefore, there is no issue that the General Counsel has established the first five elements of a prima facie case that the Respondent unlawfully refused to consider or hire the union applicants. The Respondent denies, however, that the General Counsel has established the sixth element of a prima facie case, proof of animus which would support an inference of unlawful motivation in the Respondent's refusals to consider or hire any of the union applicants. I disagree.

It was not until after the 1995 and 1997 orders of the Board and the Sixth Circuit that the Respondent ceased its unlawful refusals to reinstate its employees who had offered to return to work from the 1992 and 1993 strikes, as noted above. This factor, alone, supplies the required element of animus. Moreover, as I have found infra, the Respondent has refused, in apparent contempt of the Sixth Circuit's order, to reinstate Kinney, Rees, Bronkhorst, Falk, Fuller, Maichele, Preston, Roggow, Rowden, and Titus after their March 2 offers to return to work from economic strikes. (And, again, the last 8 of these discriminatees were discriminatees in the Sixth Circuit case.) It is obvious, therefore, that the Respondent's animus toward its employees' exercises of their statutory rights continues.

Even without such a labor relation's history, and even without my findings of discrimination against the 1996 and 1997 returning strikers herein, however, I would find that the General Counsel has proved the Respondent's animus toward the union applicants.

Although 21 known union members applied for work with the Respondent, the Respondent admits that it did not consider one of them for employment. On the other hand, after the union applicants had begun applying, the Respondent interviewed (considered) 24 of 24 nonunion applicants who had applied, and it hired 21 of them. This extreme ratio clearly demonstrates animus against the known union applicants.⁴⁸

⁴⁵ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983).

⁴⁶ *Wright Line*, 251 NLRB at 1087; *Roué Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

⁴⁷ See *Hoboken Shipyards*, 275 NLRB 1507, 1514 (1985), citing *Big E's Foodland*, 242 NLRB 963, 968 (1979), and *Pan American Electric*, 326 NLRB No. 7 (1999) (not published in Board volumes), citing *GM Electrics*, 323 NLRB 126, 128 (1977).

⁴⁸ Citing *San Angelo Packing Co.*, 163 NLRB 842, 846 (1967), and *Continental Radiator Corp.*, 283 NLRB 234, 248 (1987), the Board in *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), found that such a "blatant

Moreover, DeJong essentially admitted that Huizinga told him not to hire or consider union applicants. DeJong was unequivocal in his denials at many other points, but when I asked: "Did Mr. Huizinga ever tell you not to interview the Union applicants, directly or in words to that effect?," DeJong replied: "I don't recall him ever doing that, no." When I asked: "Did he tell you not to consider their applications?," DeJong replied: "I don't recall that either." When the General Counsel additionally asked if Huizinga told him not to consider applicants who were union members, DeJong responded: "I don't recall him saying that, no." DeJong did not have a background in the mechanical trades, but he had worked in labor relations for 10 years and he assuredly knew that is against the law to refuse to consider or hire applicants because of their union memberships. Therefore, if Huizinga had told DeJong not to interview union members, DeJong assuredly would have recalled it. On the other hand, if Huizinga had never said such a thing to DeJong, DeJong would assuredly have responded with a firm "No" to each of the questions that were put to him about what Huizinga had said about interviewing union members. DeJong's do-not-recall answers, therefore, are incredible. I accordingly find that Huizinga did tell DeJong not to interview applicants who were union members. Such instruction is unquestionably a manifestation of animus that supports an inference of unlawful discrimination against the 21 union applicants.

The disparity of Respondent's treatment of the two groups of applicants further reflects animus.

The most obvious case of disparate treatment is the Respondent's treatment of Rowden as it compares with its treatment of nonunion applicants Ponicki, Sloan, Raith, and Stevenson. DeJong testified that he refused to consider Rowden's July 28 application because, although Rowden had entered the first four digits of his driver's license number, ". . . he just did not finish completing that." Ponicki, however, did not include his driver's license number on his application originally, but DeJong called him and told him to send it in. (I discredit DeJong's testimony that he could not recall whether Ponicki called him or he called Ponicki; Ponicki would not have known that he had made the omission and would not have known to call DeJong about the matter.) Sloan did not include a driver's license number on his application, and the Respondent hired him without his ever having done so. DeJong testified that he had not noticed Sloan's omission until Sloan's application was showed to him at trial; the obvious response to that testimony is that DeJong must have been scrutinizing union applications such as Rowden's much more closely than he was scrutinizing nonunion applications such as Sloan's. (Moreover, as I find *infra*, DeJong did not even notice that Rowden "just did not finish" his driver's license number for at least 3 months after Rowden filed his July 28 application.) Also, Raith and Stevenson were allowed to "complete" their last applications by reference to their expired previous ones; DeJong admitted that he had been willing to refer to the expired applications for most of the information for Raith's and Stevenson's applications but that he was not willing to refer to the expired May 1 application

disparity" in the selection of applicants supported a finding of a *prima facie* case of discrimination.

of Rowden for his driver's license number. DeJong did not express at trial, and the Respondent does not argue on brief, that there was a legitimate reason for DeJong's refusal to afford Rowden the indulgence that he afforded to Raith and Stevenson.

The next case of disparate treatment is found in DeJong's handling of Linblom's application. DeJong admitted that Linblom's August 5 resume-application was noncompliant because it was received after the Respondent's August 1 institution of the policy that Company-created application forms must be used. Nevertheless, DeJong did not log in that application as noncompliant and he did not send Linblom one of the new-policy letters, which is what DeJong did when the union applicants submitted resume-applications after August 1. Instead, DeJong called Linblom, made an appointment with Linblom (who would not, or could not, come to the Respondent's Kalamazoo office), drove 50 miles to hand him an application, allowed Linblom to complete it as his leisure, and allowed Linblom to mail it in. DeJong testified that he allowed Linblom to take his application home because his application was one of the first applications that was received under the Respondent's "new system," but he did not testify that the "new system" caused him entirely to fail to log in Linblom's resume-application. When DeJong was asked why he had not logged in Linblom's August 5 resume-application as noncompliant, he responded: "I don't recall why I didn't." DeJong's claim of memory loss, again, is not credible. Also, although Huizinga gave final approval to all policy changes, DeJong had necessarily put a lot of thought and work into the drafting of the "new system" that required applicants to appear at the office, rather than mail applications in; it is inconceivable that he could have forgotten the Respondent's new rule, or its reason, before he drove 50 miles to Grand Rapids and agreed to let Linblom complete his (delivered) application form anywhere he wished. In fact, DeJong's memorandum of July 31 states that all office-staff members are being informed that: ". . . all applications for employment must be acquired from me or a designated representative, be completed on site, and be immediately returned to me or the designated representative." It is unlikely to the point of firm disbelief that DeJong forgot his own words, or the August 1 policy that he drafted (for Huizinga's approval), within 6 days. Indeed, the Respondent's spurious contention that DeJong handled Linblom's application as he did because the Respondent's August 1 policy was so new fortifies my conclusions that it was because Linblom's August 5 application reflected no union allegiance that DeJong: (1) did not log it in as noncompliant, even though it was; (2) drove 50 miles (making, of course, a 100-mile round trip) to deliver a Company-created application form to Linblom; (3) allowed Linblom to complete that form wherever he wished, and (4) allowed Linblom to mail it to the Kalamazoo office.

I further find that, as well as calling Linblom to tell him to file a compliant application, and calling Ponicki to tell him that he had forgotten to enter his driver's license number on his application, DeJong called Stevenson to tell him that his application had expired and that he needed to file a new one. (I reject DeJong's testimony that he could not recall whether he called Stevenson or Stevenson called him.) Additionally, De-

Jong called Andrews the day before his July 9 application was to expire and told him to come in for an interview. Again, DeJong did not call Rowden to tell him that “he just did not finish completing” his driver’s license number, and he did not call any other union applicant to alert him that his application was about to expire or that he should come in and file a new one because his application had expired.

DeJong’s treatment of nonunion applicant Campbell is further evidence of disparate treatment toward the union applicants. On August 3, DeJong extended a job offer to Campbell. Campbell refused by responding that he could not leave his current employer until October 14. DeJong told Campbell that the offer would remain open until then. That is, the Respondent afforded Campbell and the other nonunion applicants multitudinous and multifarious indulgences, but it afforded none to the union applicants.

In summary, the Respondent’s animus toward the union applicants is shown by the Respondent’s labor relation’s history, its continuing unlawful discrimination against returning strikers, Huizinga’s instruction to DeJong not to interview union members, and the Respondent’s disparate treatment of the union applicants. I conclude, therefore, that the General Counsel has presented a prima facie case of unlawful discrimination against the union applicants, and the Respondent’s defenses for not considering or hiring them must be reviewed to decide if the Respondent has demonstrated, by a preponderance of the evidence, that it would have refused to consider, or hire, the union applicants even absent its knowledge of their memberships.

b. The defenses

(1) Calhoun, Conroy, Hill, Kiss, and Rees

Hill and Rees were journeymen, and on brief the Respondent argues that they were not considered for that reason. Calhoun, Conroy, and Kiss were advanced apprentices, and on brief the Respondent argues that they were not considered for that reason. DeJong, however, did not testify that the Respondent refused to consider Hill or Rees because they were journeymen or that the Respondent refused to consider Calhoun, Conroy or Kiss because they were advanced apprentices. Although DeJong testified that the Respondent was “primarily” seeking apprentices from early July through December, he did not testify that the Respondent rejected any applicant, union or nonunion, because he or she was a journeyman or too advanced as an apprentice (or had been making too much money while working for a prior employer, or anything like that). The Respondent’s lawyer’s argument, therefore, is only that. Moreover, the Respondent hired, or it at least interviewed, the following nonunion journeymen after Calhoun, Conroy, Hill, Kiss, and Rees applied on July 28–30: Sloan (hired on August 8); Stevenson (hired on October 14); Linblom (near-offer after September 14); Eifler (hired on October 26); and Dennis (hired on December 14). Also, DeJong testified that VanIngen was an apprentice when he was hired on December 14, 1998. The record does not reflect at what rate VanIngen was hired, but one record does show that, by July 13, 1999, VanIngen was making \$2.75 per hour more than journeyman Sloan, and only \$.25 less

than journeymen Dennis. VanIngen, therefore, must have been a very advanced apprentice when he was hired.

The defense for not hiring Calhoun, Conroy, Hill, Kiss, and Rees to which DeJong did testify is encapsulated in this exchange during his cross-examination:

Q. Let me—in so many words, you are saying even though they had timely submitted an application and were still active, they were too late?

A. I think that is a fair assessment to say, yeah, because we were into the process already.

JUDGE EVANS: Process of what, now?

THE WITNESS: Of the reference-checking. Checking with our current employees’ status, these other people, and any other references that we might have checked, scheduling interviews, that type of thing.

DeJong repeated this defense by stating: “I believe when we were looking for people in August, we were well into the process of talking to our employees and finding out about their recommendations on any individuals that we hired,” and “[W]e had already gotten well into the process of going through checking with those people that were listed or that we knew, employees that referred these people.” It was only for this “into the process” defense that DeJong offered testimony; he did not offer any testimony that the Respondent refused to consider Calhoun, Conroy, Hill, Kiss, and Rees because they were too skilled or too experienced. Therefore, it is only the Respondent’s “into the process” defense that needs to be further addressed.

When DeJong was asked why the Respondent could not have also interviewed Calhoun, Conroy, Hill, Kiss, or Rees at the same time that the Respondent was “into the process” of interviewing and hiring other nonunion applicants, he replied: “Time constraint, for one. I was in the middle of all—doing all that. I have a number of responsibilities outside the human resource function” The General Counsel then specifically asked DeJong if he really meant that his reason was that “you ran out of time?” DeJong, obviously recognizing the feebleness of what he had said, responded: “No, I think—I think the answer is we had enough viable candidates that we were far enough along in the process with that we could select.” That is, when the “too busy” answer was exposed for the lie that it was, DeJong retreated to the defense that the Respondent already had enough applications to satisfy any needs before Calhoun, Conroy, Hill, Kiss, and Rees filed their applications on July 28–30.

By July 28–30, the Respondent did have six applications that resulted in interviews; to wit: those of Meeuwse, Sloan, Andrews, Kilgore, Holler, and Campbell. Those six applicants, however, were obviously not “enough viable candidates” because the Respondent continued accepting applications, and continued interviewing those which were filed by nonunion applicants, well after July 28–30. In 1998, after Calhoun, Conroy, Hill, Kiss, and Rees had filed their July 28–30 applications, the Respondent accepted 19 nonunion applications which

resulted in interviews,⁴⁹ it hired 11 of those applicants in 1998,⁵⁰ and it hired 6 of those applicants in early 1999.⁵¹ Moreover, it did not take long after Calhoun, Conroy, Hill, Kiss, and Rees filed their July 28–30 applications for the Respondent to begin seeking nonunion applicants; DeJong not only considered Linblom's noncompliant application of August 5, he went to extraordinary lengths to help Linblom file a (facially) compliant one. Under any theory of the Respondent's case, therefore, the July 28–30 applications of Calhoun, Conroy, Hill, Kiss, and Rees were current, or active, while the Respondent was considering other new applicants, as DeJong admitted.

The Respondent's pre-August 1 published hiring policy was that: "When AMS is preparing to hire, we will go over all current resumes." The August 1 policy also stated: "When the need to add to our staff arises, AMS will review all current applications." The Respondent's October 15 revision of its stated policy repeated: "When the need to add to our staff arises, AMS will review all current applications." All underlinings in these quotations are original, doubly emphasizing that the Respondent's policy was that applications that were compliant and were not expired because of lack of updating, would be considered. In his testimony, DeJong further emphasized the primacy of all current applications when he was asked on direct examination about what happened when Huizinga told him that new employees were needed:

Q. And what would you look at, what candidates would you look at?

A. I would look at every one that was active in the file.

Neither the Respondent's statements of hiring policy, nor DeJong's testimony about the Respondent's policy that existed before Calhoun, Conroy, Hill, Kiss, or Rees applied, contains any qualification that current applications will not be considered if the Respondent is already "into the process" of reviewing the applications that it had already received or if the Respondent was already "into the process" of checking with current employees and supervisors to see if they could recommend other individuals, any other individuals, as new employees. The Respondent's "into the process" defense, therefore, appears to have been retroactively concocted for the occasion that compliant applications were filed by Calhoun, Conroy, Hill, Kiss, and Rees at the very time that it was considering the hiring of new employees. At any rate, the July 28–30 applications of Calhoun, Conroy, Hill, Kiss, and Rees were compliant when they were filed, and they were current when the Respondent was "into the process" of considering hiring new employees; therefore, by refusing to consider those current applications, the Respondent abandoned its repeatedly published, underlined, policy that "all current" applications will be considered when

the Respondent is seeking new employees. This is the essence of discrimination.

Even if the evidence of the Respondent's continuing to consider nonunion applicants in 1998 could be disregarded, and even if the published policy of considering all current applications could be disregarded, the Respondent has failed to prove that it considered and hired only nonunion applicants because they were well recommended and because Calhoun, Conroy, Hill, Kiss, and Rees were not.

It is not as if the Respondent had two sets of applicants, one of which was well recommended and another which was not; DeJong admitted that the applications of Calhoun, Conroy, Hill, Kiss, and Rees were not even considered. If Huizinga had considered the applications of Calhoun, Conroy, Hill, Kiss, and Rees, he would have noted that Calhoun, Hill, Kiss, and Rees were former employees and that any of the Respondent's current supervisors and employees were potential sources of recommendations for them. DeJong was willing to search out, or at least accept, recommendations from individuals who were not listed on the applications of the nonunion applicants, but he was not willing to do the same for Calhoun, Hill, Kiss, and Rees. The Respondent does not suggest that those four had had anything but satisfactory records with it when they were previously employed, and it does not suggest that they would have received anything but positive recommendations from its current employees and supervisors, had they been asked. (On cross-examination, DeJong testified that the Respondent gave no preference to former employees; nevertheless he testified that Stevenson was hired because: "We have a past history with Mr. Stephenson who was formerly employed by us," and DeJong testified that Eifler (who had repudiated his union membership) was hired because: "He possessed the skills, having worked for us before.")

On brief, the Respondent argues that: "It simply is not illegal disparate treatment to favor an applicant whom current employees highly recommend." I agree, but the "recommendations defense" is easy to assert and realistically impossible to rebut. (Certainly, a beneficiary of unlawful discrimination is unlikely to testify that he did not know who had recommended him, or why.) The Board therefore requires as proof of that defense more than the hearsay and inveracity that the Respondent offered through DeJong. For example, in *Belfance Electric, Inc.*, 319 NLRB 945 (1995), the Board accepted the "recommendations defense," but in that case the individual who made the decisions to interview and the decisions to hire, one David Belfance, appeared at the Board hearing and testified under oath and subject to cross-examination; and decisionmaker Belfance was credited. Similarly, in *WACO, Inc.*, 316 NLRB 73, 78 (1995), cited by the Respondent on brief, one Kirk Hawk made all hiring decisions based on recommendations. The Board concluded that there was no prima facie case in *WACO, Inc.*, and the "recommendations defense" was therefore not addressed; but at least Hawk testified. In this case, however, decisionmaker Huizinga did not testify.

Notwithstanding the leading questions to, and the hearsay and obfuscating answers by DeJong, the record is clear that it was Huizinga, and not DeJong, who made the critical inter-

⁴⁹ They were: Schewe, Walker, Stevenson, Blouin, Linblom, Raith, VanderLugt, Summers, Eifler, Dennis, Jamerson, Moerman, VanIngen, Doorlag, Heyboer, Sullivan, Vlietstra, Oliver, and Kopenol.

⁵⁰ They were: Schewe, Stevenson, Blouin, Raith, VanderLugt, VanIngen, Summers, Eifler, Dennis, and Moerman.

⁵¹ They were: Heyboer, Jamerson, Sullivan, Vlietstra, Doorlag, and Kopenol.

viewing and hiring decisions.⁵² The *Wright Line* issue, therefore, is whether the Respondent has demonstrated by a preponderance of the evidence that Huizinga, in fact, made the critical decisions because of his personal knowledge of the nonunion applicants (not DeJong's) or because of the recommendations that he (not DeJong) received.

There is, however, no nonhearsay testimony that Huizinga actually made any of the critical interviewing and hiring decisions on the basis of his personal knowledge or on the basis of recommendations that he received, directly or through DeJong. Unlike the employer involved in *Belfance Electric*, the Respondent here did no more than send an emissary (DeJong) to present hearsay testimony that Huizinga had made his decisions because: (1) Huizinga personally knew 2 of the 24 nonunion applicants who were interviewed in 1998 (Meeuwse and Summers); (2) although DeJong did not check the references of 12 of nonunion applicants who were hired (Andrews, Sloan, Blouin, Heyboer, Kopenol, Moerman, Oliver, Sullivan, VanIngen, Jamerson, VanderLugt, and Vlietstra), Huizinga, himself, may have done so; and (3) Huizinga may have accepted DeJong's reports of recommendations for the remaining nonunion applicants (even though Linblom, Meeuwse, and Dennis did not have even putative references). Huizinga, however, did not appear to give this critical testimony and make himself subject to cross-examination. It must therefore be found that the Respondent has failed to demonstrate that the decisions not to hire or consider the union applicants were made on the basis of the recommendations that the nonunion applicants received rather than the antiunion animus that the Respondent has clearly demonstrated.⁵³

Even if DeJong could have offered competent evidence of how the Respondent acted on the recommendations for the nonunion applicants that it received, his testimony is not worthy of credit. As well as the obfuscations embodied in his passive-voice answers, DeJong was specifically shown to be untruthful by the following:

1. DeJong testified that the Respondent offered Campbell employment, in part, because Campbell had the recommendation of the Respondent's foreman Sargeant who was a "good friend" of Campbell's. On his application, however, Campbell did not list his "good friend" Sargeant as a reference. DeJong further testified (with further incredibility) that Sargeant told him that Campbell was a "good worker" even though Sargeant had never worked with Campbell. When the General Counsel asked DeJong how Sargeant could have made such a statement, DeJong evaded answering.

2. DeJong's testimony about Meeuwse's references was confusing and contradictory (either DeJong knew Meeuwse personally, or Huizinga did, or Huizinga was

familiar with the nonemployee or nonsupervisors whom Meeuwse listed as references on his application, or DeJong knew Meeuwse's brother in high school, or DeJong knew Meeuwse in high school).

3. DeJong's testimony that he did not recall whether Huizinga had told him not to interview union applicants was an insult to the forum.

4. DeJong's testimony that he did not recall why he did not log in Linblom's noncompliant resume-application of August 5 is another insult.

5. DeJong's testimony that he recalled seeing Linblom fill out his Company-created application form was exposed for the lie that it was.

6. DeJong also advanced the lie that Eifler was a union applicant whom the Respondent hired, but he later admitted that he knew that Eifler had repudiated his union membership when the Respondent hired him.

7. When DeJong was asked when the Respondent went "into the process" of considering only those applicants who were recommended by current employees and supervisors, he looked at his application log and, obviously relying on the date of the last application that was filed before Calhoun, Conroy, Hill, Kiss, and Rees filed their applications on July 28-30, announced that it was July 24. When asked if it had really been July 24, DeJong testified: "That's certainly a possibility." Such evasiveness permeated DeJong's testimony.

That is, DeJong was generally an incredible witness, and, even if he could have given competent testimony about Huizinga's interviewing and hiring decisions, he did not do so.

All of which is to say that the Respondent's "into the process" defense is one of those self-serving, tell-them-anything, kind of concoctions that the trier of fact is not required to accept, and I do not.⁵⁴ Moreover, even if there had been a grain of truth in the "into the process" defense, it is an admission that the Respondent changed its procedures of reviewing all current applications while the applications of Calhoun, Conroy, Hill, Kiss, and Rees were still active, or current, under the Respondent's hiring policies. DeJong's bare, evasive testimony that the Respondent had stopped considering any more applications by the time that Calhoun, Conroy, Hill, Kiss, and Rees applied on July 28-30 was disproved by the fact that the Respondent did consider 19 nonunion applicants who filed their applications thereafter. (I also do not credit DeJong's bare, self-serving testimony that he also did not consider the July 29 application of nonunion applicant Blouin, or the August 4 application of nonunion applicant Schewe, "at that time" because the Respondent was "into the process." DeJong was led to this answer and it squarely conflicts with his admissions that he considered the August 5 (noncompliant) application of nonunion applicant Linblom that was also filed "at that time.")

The Respondent therefore has not rebutted General Counsel's prima facie case by a demonstration that, even absent its knowledge of their union memberships, it would have refused to consider for employment, and hire, Calhoun, Conroy, Hill,

⁵² The truth is encapsulated in DeJong's admission: "It is something that John Huizinga and I talked about when I first came on board, that he likes to hire people he has knowledge of."

⁵³ DeJong's testimony about what Huizinga had decided was admissible because it would have been corroboration for testimony that Huizinga might have given had Huizinga been called to testify. Standing alone, however, it was probative of essentially nothing.

⁵⁴ *Taylor Machine Products*, 317 NLRB 1187, 1213 (1995); *enfd.* in *rel.* part 136 F.3d 507 (6th Cir. 1998).

Kiss, and Rees. I accordingly conclude that the Respondent refused to consider for employment, and refused to hire, Calhoun, Conroy, Hill, Kiss, and Rees in violation of Section 8(a)(3).

(2) Rowden

Rowden filed his last resume-application during the same July 28–30 period that Calhoun, Conroy, Hill, Kiss, and Rees filed theirs, but the Respondent does not assert its sham “into the process” defense in answer to the allegations that it unlawfully refused to consider or hire Rowden. The Respondent’s defense for not considering Rowden’s July 28 application is solely that his application was not compliant with its requirements for applications because it did not contain the last digits of Rowden’s driver’s license number. Consistent with this defense, appearing on the hardcopy of DeJong’s log that the Respondent placed in evidence, next to Rowden’s name and the date of “7/28/98,” in 12-point capital letters, is: “NONCOMPLIANT INVALID DRIVER’S LICENSE.” I do not, however, believe that DeJong considered Rowden’s July 28 application to have been noncompliant when he received it, and I do not believe that DeJong originally logged it in as such. Rather, I believe, and find *infra*, that DeJong originally logged in Rowden’s July 28 application as compliant, and he made the “NONCOMPLIANT INVALID DRIVER’S LICENSE” entry into his log well after he received that application, certainly after October 4.

To most of the nonunion applicants who sent “still interested” letters to the Respondent, DeJong replied with new-policy letters that were not prefaced with any references to when their resume-applications had expired. For cases such as that of Bennett, Curran, Falk, Fuller, Knapp, Preston, and Roggow, the reason is obvious; they never filed compliant applications, and their noncompliant applications, by definition, had never had an expiration date. (Something that was never viable could never have had an expiration date.) DeJong did, however, preface his replies to the “still interested” letters of Maichele and Rowden with references to expiration dates of their last compliant resume-applications. Maichele filed a “still interested” letter with the Respondent on October 2, and on that date DeJong replied with a new-policy letter that was prefaced with: “Please be informed that your application for employment expired on May 31, 1998.” May 31, was 30 days after the Respondent’s receipt of Maichele’s May 1 application; that application was, and DeJong had logged it in as, compliant with the Respondent’s then-outstanding requirements for resume-applications. Maichele’s May 1 application, however, was not the last application that Maichele had filed; Maichele had filed another application on August 3. But DeJong, in citing an expiration date to Maichele in his October 2 letter, passed over his log’s notation of Maichele’s August 3 application, obviously because that application had been, and had been logged in as, noncompliant.⁵⁵ That is, because Maichele’s last application had been noncompliant, DeJong did not refer to its expiration

⁵⁵ Maichele’s last application was noncompliant because it was a resume application that was received after August 1, when the Respondent started requiring the completion of Company-created application forms.

date because that application had never had an expiration date because it was not compliant when it was filed. On the other hand, DeJong did preface his October 4 new-policy letter to Rowden by referring to the date of Rowden’s last application; to wit: Rowden’s application of July 28. (And in his October 4 response to Rowden DeJong decidedly did not refer to the expiration date of Rowden’s May 1 application, the last application by Rowden that the Respondent concedes to have been compliant.) In his October 4 letter, DeJong told Rowden: “. . . your application for employment expired on August 27, 1998.” Rowden’s July 28 application, however, would never have had an expiration date if, when received, it had been noncompliant with the Respondent’s then-outstanding requirements for resume-applications. If DeJong had considered Rowden’s July 28 application to have been noncompliant when he received it, and if DeJong had originally logged that application in as non-compliant, DeJong would have passed over his log’s reference to that application (as he passed over his log’s reference to Maichele’s last application), and in his October 4 letter to Rowden DeJong would have cited the expiration date of Rowden’s May 1 application (as DeJong’s October 2 letter to Maichele referred to the expiration date of Maichele’s May 1 application). Instead, in his new-policy letter to Rowden, DeJong cited the expiration date of Rowden’s July 28 application, even though that application had contained an incomplete driver’s license number.

In summary, it is clear to me, and I find, that DeJong originally viewed Rowden’s July 28 application as compliant, even though it had an incomplete driver’s license number, and DeJong originally logged it in as compliant. Specifically, DeJong did not originally log in Rowden’s July 28 application with “NONCOMPLIANT INVALID DRIVER’S LICENSE” (which, being in 12-point type, as well as capitals, would have been impossible for DeJong to have missed when he was composing his October 4 new-policy letter to Rowden, had it actually been there). Then, at some point after October 4, DeJong reviewed Rowden’s application searching for any putative defect that the Respondent could advance as a defense to the refusal-to-hire allegations that the General Counsel makes on Rowden’s behalf. It was at that unknown subsequent date, and not before, that DeJong found that Rowden “just did not finish” (DeJong’s words) completing his driver’s license number. It was then, I find, that DeJong altered his log of applications correspondingly. Rowden’s oversight, therefore, was no more than an afterthought and a pretext upon which the Respondent has seized to defend its unlawful discrimination against Rowden.⁵⁶

I further find that the Respondent’s sole defense for Rowden’s case is pretextual because the Respondent actually does not have a requirement that its employees have a valid driver’s license. The Respondent rehired Stevenson knowing he did not have a driver’s license. When asked how that could have been, DeJong replied that the Respondent just would not have assigned him to drive company vehicles. That is, not all of the

⁵⁶ By employing the passive voice and other techniques of obfuscation, DeJong avoided the out-and-out perjury of testifying that he did log in Rowden’s July 28, as noncompliant when he first received it.

Respondent's employees drive company vehicles, and there is no reason to believe that the Respondent could not have used Rowden as an employee even if he did not have a valid driver's license. (Certainly, the Respondent does not contend that when it previously employed Rowden it relied on him to drive company vehicles.) Finally on this point, near the first of the application form that the Respondent instituted on August 1, is the preprinted question: "Do you have a valid driver's license? If so, please provide the number." The optional nature of the instruction ("If so, . . .") shows that the Respondent does not absolutely require its employees to have valid driver's licenses. (Certainly, the question does not add, as the stated requirement of the "Certification and Release" paragraph adds: "Failure to do this will terminate your opportunity to be considered for employment at Allied Mechanical Services, Inc.")

In summary, the Respondent's treatment of Rowden is a blatant case of discrimination, as I have found above. (Again, DeJong admitted that he was willing to refer to expired applications of Stevenson and Raith for the bulk of the information that was needed for their new applications, but he was not willing to look at Rowden's expired, May 1 application for Rowden's complete driver's license number, and the Respondent has made no effort to explain why. When Ponicki forgot to include his driver's license number, DeJong called him up and reminded him. When Sloan applied without a driver's license number, DeJong literally overlooked it.) Rowden was a former employee of unquestioned ability, but he was also an employee who had directly suffered the Respondent's animus by its unlawful refusal to reinstate him for over 2 years after he had offered to return to work from the 1993 strike (as found by the Board and the Sixth Circuit). Therefore, the defense that the Respondent has submitted for its refusal to consider or hire Rowden is a pretext.

The Respondent therefore has not rebutted General Counsel's prima facie case by a demonstration that, even absent its knowledge of his union membership, it would have refused to consider for employment, and hire, Rowden. I accordingly conclude that the Respondent refused to consider for employment, and refused to hire, Rowden in violation of Section 8(a)(3).

(3) Bennett, Curran, Falk, Fuller, Knapp, Preston, and Roggow

For himself and Bennett, Curran, Falk, Fuller, Preston, and Roggow, Knapp submitted only one resume each. Knapp submitted these resumes before April 15, at a time when he was unaware that the Respondent required a signed "Certification and Release" paragraph with each application. Nevertheless, after he learned of the requirement in late April, Knapp did not submit any additional applications on behalf of himself or the others in this group. Before April 15, union applicants Calhoun, Hill, Kiss, Rees, Rowden, Warren, and Wood also submitted (through Knapp) applications without the "Certification and Release" paragraph; after April 15, however, they also submitted (again, through Knapp) applications that contained the paragraph. On brief, the General Counsel does not question the validity of the Respondent's requiring the "Certification and Release" paragraph with each application, and he suggests no

reason why Calhoun, Hill, Kiss, Rees, Rowden, Warren, and Wood were willing and able to submit second applications that contained the "Certification and Release" paragraph but Bennett, Curran, Falk, Fuller, Knapp, Preston, and Roggow were either unwilling or unable to do so. (Indeed, the entirety of what the General Counsel states in this respect is: "When the [other] union applicants started including a signed "Certification and Release" form, AMS looked for other technical reasons to disqualify them.") Moreover, the files of all 1998 applicants for employment with the Respondent were made available to the General Counsel at trial, but the General Counsel makes no suggestion that any nonunion applicant failed to include the "Certification and Release" paragraph and was still considered for employment. An employer has the right to establish facially union-neutral requirements for its application processes, and as long as it does not enforce such requirements disparately, it cannot be held to have violated Section 8(a)(3) by not considering a union applicant who does not comply.⁵⁷ I therefore shall recommend dismissal of paragraph 15 of the complaint as it applies to Bennett, Curran, Falk, Fuller, Knapp, Preston, and Roggow.

(4) Maichele, Patterson, Warren, and Wood

Before August 1, the Respondent accepted resume-applications. On August 1, Respondent began utilizing application forms and modified its stated policy to require applicants to come to the Kalamazoo office to complete them. Maichele, Patterson, Warren, and Wood filed resume-applications, by mail, after August 1. The General Counsel contends that, both by institution of the form and by institution of the requirement that applicants appear at the Kalamazoo office, the Respondent violated Section 8(a)(3). Because Maichele, Patterson, Warren, and Wood did submit their last resume-applications after August 1, the General Counsel's contentions bear directly on their cases.

The Respondent's pre-August 1 policy of accepting resume-applications was probably the exception rather than the rule. That is, most employers have their own application forms, and there is certainly nothing unusual, or unlawful, about an employer's beginning to require completion of such, even if it does so because it is receiving a great number of resume-applications from a union. To hold otherwise is to hold that, once a union starts a salting campaign, an employer may not make any changes in its hiring procedures. Even if there had been an established collective-bargaining relationship between the UA locals and the Respondent, such a holding would be beyond the requirements established by Section 8(d) of the Act.⁵⁸ The General Counsel offered no evidence that the union applicants in this case could not have completed the Company-created application forms, and he offers no argument that a requirement of completion of a Company-created application forms is inherently more burdensome to a union applicant. The same may be said of the Respondent's August 1 stated re-

⁵⁷ See *Industrial Construction Services*, 323 NLRB 1037 (1997), where no violation was found because union applicants disregarded an employer's written, uniformly enforced, hiring policy that "Photocopies of this form will NOT be accepted."

⁵⁸ See *Star Tribune*, 295 NLRB 543 (1989).

quirement that applicants appear at the Kalamazoo office to complete the Company-created application forms. The General Counsel does not contend that coming to an employer's office to complete an application is inherently more onerous on union applicants, and he makes no argument that the union applicants could not have come to Kalamazoo to do so. The General Counsel contends that DeJong's allowing Linblom to complete his Company-created application form elsewhere is proof that the requirement was enforced only against union applicants. Maichele, Patterson, Warren, and Wood, however, received new-policy letters stating that they needed to appear at the Kalamazoo office to complete the Company-created application forms, and they did nothing in response. I do not believe that the singular exception of Linblom is enough to excuse their ignoring those letters. Also, although DeJong ignored the August 1 changes to secure the application of nonunion applicant Linblom, the Respondent did have logical reasons, institutionally, for wanting (1) consistency of information from applicants, (2) a test to see if the applicants could follow instructions, and (3) a test to make sure that the person completing the application was in fact the applicant. Accordingly, I shall recommend that the Board dismiss the allegations that the Respondent unlawfully instituted hiring requirements that Company-created application forms be completed by applicants and that such applications be completed on the Respondent's premises. I further find and conclude that, because Maichele, Patterson, Warren, and Wood made no attempt to comply with these requirements of which they had actual knowledge (by virtue of the new-policy letters), the Respondent has shown that it would have refused to consider or hire them, even absent its knowledge of their union memberships.⁵⁹

(5) Englehart, Hampton, Newcomb, and West

West filed a compliant resume-application on April 23; Englehart, Hampton, and Newcomb filed compliant resume-applications on May 1. The Respondent contends that the applications of Englehart, Hampton, Newcomb, and West expired 30 days after they were filed, and well before it began to consider the hiring of new employees in early July, because those four applicants did nothing to update their applications after filing them. The Respondent's 30-day policy, like the "Certification and Release" requirement, was a facially nondiscriminatory policy, and the Respondent had no duty to consider the applications of Englehart, Hampton, Newcomb, and West when it started considering the hiring of new employees, if it followed its 30-day policy without discriminating against the union applicants by considering or hiring nonunion applicants whose applications had expired. As I have found above, however, Stevenson's August 31 application had expired when DeJong called him, to the Kalamazoo office to file a new one, and to be hired. Stevenson may not fairly be considered an isolated case. Andrews' July 9 application did not expire only because, the day before it was scheduled to do so, DeJong

called Andrews to come for an interview and to be hired. Such extraordinary efforts to excuse the nonunion applicants, while holding the union applicants to strict compliance with its 30-day rule, is nothing short of unadulterated, unlawful discrimination.

The Respondent therefore has not rebutted General Counsel's prima facie case by a demonstration that, even absent its knowledge of their union memberships, it would have refused to consider for employment, and hire, Englehart, Hampton, Newcomb, and West. I accordingly conclude that the Respondent refused to consider for employment, and refused to hire, Englehart, Hampton, Newcomb, and West in violation of Section 8(a)(3).

CONCLUSIONS OF LAW

1. By refusing to reinstate the following-named economic strikers upon their March 2, 1998, unconditional offers to return to work, the Respondent violated Section 8(a)(3): Jim Bronkhorst, Ken Falk, Ted Fuller, Jon Kinney, Grant Maichele, Marty Preston, Tobin Rees, Max Roggow, Brian Rowden, and Steve Titus.

2. By refusing to consider for employment, and by refusing to hire, the following named job applicants because of their known union memberships, the Respondent violated Section 8(a)(3): Scott Calhoun, Terri Jo Conroy, Eric Englehart, Marty Hampton, Harold Hill, Jeff Kiss, Rod Newcomb, Tobin Rees, Brian Rowden, and Randy West.

3. The Respondent has not otherwise violated the Act as alleged herein.

THE REMEDY

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

The Respondent has been shown herein to have unlawfully discriminated against two groups: 10 economic strikers who had offered to return to work on March 2, and 10 employee-applicants who applied for employment on and after April 23. (Two individuals, Rees and Rowden, are members of both groups.) The rights of the 10 strikers to remedy under the Act vested on the date of their offers to return to work, and that date was well before the Respondent began to discriminate against nonunion applicants by interviewing and hiring only nonunion applicants. (The first interview that DeJong conducted after April 23 was his interview of Campbell on July 7, and the first hiring by the Respondent in 1998 was that of Meeuwse on August 5.) Therefore, any remedy to which the unlawfully rejected union applicants are entitled must not prejudice the rights of the strikers whom the Respondent had previously denied reinstatement unlawfully.

Inasmuch as the Respondent has failed and refused to reinstate timely Bronkhorst, Falk, Fuller, Kinney, Maichele, Preston, Rees, Roggow, Rowden, and Titus upon their March 2 offers to return to work from economic strikes, I shall order Respondent to reinstate them to the jobs that they held when they went on strike, or if those jobs no longer exist to substantially equivalent positions of employment, dismissing if neces-

⁵⁹ It is true that the new-policy letters to Maichele, Patterson, Warren, and Wood did not contain a reference to the possibility of appointments, as did the Respondent's full August 1 policy statement. Nevertheless, none of those four union applicants testified that, if he had known that appointments were possible, he would have responded.

sary any employees hired after March 2, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any losses of earnings or other benefits that they may have suffered because of the discrimination practiced against them by payment to them of a sum of money equal to that which they normally would have earned from March 2, to the date of their reinstatements, with interest.

Inasmuch as the Respondent has unlawfully failed and refused to consider for employment, and hire, Scott Calhoun, Terri Jo Conroy, Eric Englehart, Marty Hampton, Harold Hill, Jeff Kiss, Rod Newcomb, and Randy West on and after April 23, it shall be ordered to hire them and make them whole, with interest, dismissing if necessary any employees hired after the dates of their applications, provided that in order to satisfy this obligation the Respondent shall not be permitted or required to disregard the reinstatement and make-whole remedies provided herein for Bronkhorst, Falk, Fuller, Kinney, Maichele, Preston, Rees, Roggow, Rowden, or Titus. As I have found, the Respondent has also unlawfully refused to consider for employment and hire Rowden and Rees; their remedies as reinstated strikers, with seniority and other benefits that accrued prior to

their going on strike, are paramount to their remedies as unlawfully rejected employee-applicants. Remedial provisions for Rees and Rowden as unlawfully rejected employee-applicants, therefore, shall apply only if on review I am not upheld in my requirements that they be reinstated and made whole as returning economic strikers.

Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws.

Because the Respondent has demonstrated a proclivity for violating the Act (see, e.g., *Allied Mechanical Services*, 320 NLRB 32 (1995), enfd. 113 F.3d 623 (1997)), and because of the serious nature of the violations found herein which demonstrate a general disregard for employees' fundamental rights, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]