

Mashuda Corporation and Gary V. Singer. Case 6–
CA–33414

April 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

On December 19, 2003, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Mashuda Corporation, Cranberry Township, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

“(b) Make Gary V. Singer whole for any loss of earnings he may have suffered by reason of the discrimina-

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.

Because we adopt the judge's finding that the Respondent did not make a valid job offer of a night-shift position to Singer, we find it unnecessary to pass on whether a night-shift position would be substantially equivalent to the day-shift mechanic position unlawfully denied to Singer.

Chairman Battista would leave to compliance the separate issue of whether Singer's comment to Mashuda, arguably showing a disinterest in a night-shift position, was a breach of the duty to mitigate backpay.

Members Liebman and Walsh find it inappropriate to leave this issue to compliance. Because Mashuda's statement to Singer was not a valid offer of employment, Singer had no obligation to reply. Moreover, the Board does not evaluate a discriminatee's response to an offer unless the respondent has established that the offer was valid. *Cassis Management Corp.*, 336 NLRB 961, 969 (2001); *Consolidated Freightways*, 290 NLRB 771, 772 (1988), enfd. in relevant part 892 F.2d 1052 (D.C. Cir. 1989), cert. denied 498 U.S. 817 (1990).

² We shall modify the judge's recommended Order in accordance with *Indian Hills Care Center*, 321 NLRB 144 (1996). We shall also substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

tion against him, as set forth in the remedy section of this decision.”

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any 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 inform job applicants that they are too union to work for Mashuda Corporation.

WE WILL NOT refuse to hire job applicants because of their support for or activities in behalf of the International Union of Operating Engineers, Local 132, AFL–CIO, or any other labor organization.

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

WE WILL, within 14 days from the date of the Board's Order, offer Gary V. Singer employment in the day shift mechanic position for which he sought to apply, without prejudice to his seniority or any other rights or privileges to which he would have been entitled absent the discrimination against him.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to employ Gary V. Singer, including but not limited to our March 14, 2003 letter, and within 3 days thereafter, notify him in writing that this has been done and that this personnel action will not be used against him in any way.

WE WILL make Gary V. Singer whole for any loss of earning and benefits he may have suffered by reason of the discrimination against him, plus interest.

MASHUDA CORPORATION

Dalia Belinkoff, Esq., for the General Counsel.

Charles R. Volk, Esq., of Sewickley, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on October 1, 2003. The charge was filed on May 2, 2003, by Gary V. Singer against Mashuda Corporation (Respondent). The complaint issued on July 21, 2003, and alleges that: Respondent violated Section 8(a)(1) of the Act by informing an applicant he was not hired because of his support for and activities on behalf of International Union of Operating Engineers, Local 132, AFL-CIO (Local 132); and Respondent violated Section 8(a)(1) and (3) of the Act by refusing to hire Singer since on or about March 14, 2003.¹

On the entire record, including my observation of the demeanor of the witnesses,² and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with an office and place of business in Cranberry Township, Pennsylvania, has been engaged in the business of highway construction. During the 12-month period ending April 30, Respondent in the operation of its business, purchased and received, at its Cranberry Township location, goods valued in excess of \$50,000 directly from points outside of Pennsylvania. Respondent admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 132 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent has been in business since 1922. Ralph Mashuda has been Respondent's president and owner since February 2001.³ Mashuda has worked for Respondent for 32 years in various capacities. Mashuda testified Respondent has a longstanding affiliation with the Operating Engineers. Singer has been a member of Local 132 for 27 years. Singer and Local 132 Business Agent Mike O'Hara testified that Local 132 operates a hiring hall where when a contractor obtains a job within Local 132's jurisdiction, they call the union, state the

¹ All dates are in 2003, unless otherwise specified.

² In making the findings herein, I have considered all the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), reversed on other grounds 340 U.S. 474 (1951).

³ Ralph Mashuda is the only individual named Mashuda to testify in this proceeding and will be referred to as Mashuda. Respondent admits that Mashuda, General Manager Robert Mellon, Equipment Foreman Ronald Huffman, and Superintendent D. J. Lombardo are its supervisors and agents within the meaning of Sec. 2(11) and (13) of the Act.

skills required, and the first person on Local 132's list with the appropriate skills is sent to the job.

A. *Singer's employment history and efforts to obtain work at Respondent*

Singer's testimony reveals:⁴ Respondent employed Singer pursuant to Local 132 referrals in 1982, 1985, and 1990. In 1982, Singer worked for Respondent as a drill operator and his supervisor was Superintendent Dave Mashuda. In 1985, Singer worked for Respondent as a master mechanic, and he reported to Superintendent Lombardo. Singer worked for Respondent in 1990 as a master mechanic and Huffman was the equipment foreman on that job. The company mechanic on the job was Dennis Drummond. The company mechanic is a union position with skills similar to a master mechanic, but they travel with the employer from job to job, as opposed to being referred by the union hall. When Singer was a master mechanic in 1985 and 1990, Respondent rented Singer's truck and Singer negotiated with Vic Mashuda, Ralph Mashuda's father, for the rental rate.

Singer's testimony reveals that: As Respondent's 1990 job was winding down, Huffman told Singer that he was going to be laid off. Singer responded, Drummond is out of Operating Engineers Local 66 (Local 66), this is my area referring to Local 132's jurisdiction, and Drummond should be laid off before Singer.⁵ Huffman said Drummond was Respondent's company mechanic, had been with them for years and they were going to keep him. Singer said, according to our contract, it was Singer's area and Singer should be the one to stay. Singer contacted the job steward who asked Local 132's business manager to intervene and the business manager interceded in Singer's behalf with management. As a result, Drummond was transferred to another jobsite within a few days, and Singer remained working at the jobsite in question for another 3 or 4 months. Singer was not laid off until the job ended. Singer testified that while he worked on this job in 1990, Respondent had pieces of equipment that were greasy and needed cleaning. Respondent brought in a steam jenny to steam clean the equipment and Respondent assigned a laborer to operate the steam jenny. Singer told Huffman, running the steam jenny was operators' work. Huffman responded, in Pennsylvania it was laborers' work. Singer said, we are not in Pennsylvania and according to their contract the steam jenny belongs to operators not laborers. The import of Singer's testimony was that he was assigned to run the steam jenny, rather than the laborer, as a result of Singer's protest.

In February 2003, Singer learned Respondent would be working on a job, widening a section of Route 2 in West Virginia (the Follansbee job). Singer called Local 132 and was told the planned start date was early March. Singer testified he

⁴ I have found, considering his demeanor, that Singer was a credible witness and have credited his testimony in all respects unless otherwise stated in this decision.

⁵ Local 66 is based in Pennsylvania, and Local 132 is based in West Virginia.

was the top mechanic on Local 132's referral list at the time of his call.⁶

On February 25, Mashuda, Mellon, and Lombardo attended a prejob conference on behalf of Respondent for the Follansbee job. There were several union officials present representing different trades, including O'Hara representing Local 132. Mellon prepared the typewritten minutes of the meeting. The minutes reveal that Lombardo was the project superintendent, the anticipated start date for the job was March 3, and the anticipated completion date is October 2004. The minutes reveal that the project was "identified and confirmed by all present as a "Targeted WV Agreement"" referencing Local 132's master agreement. The minutes state Mashuda identified the project as a significant waste hauling job that was very dependent on a production schedule "with 2.3 million yards of earth to move in only 104 days." It is stated in the minutes "timing is critical to the success of the project." Respondent did not list any special skills in the minutes for the operating engineers to be referred on the job, although it did so for Teamster referrals. O'Hara credibly testified that during the conference O'Hara was told Respondent needed mechanics. O'Hara responded, Singer was the first on the list, and he named two other mechanics.

Singer contacted the Local 132 in mid to late March and spoke to O'Hara.⁷ During the conversation, Singer asked O'Hara if Singer was going to be assigned to the Follansbee job. O'Hara said he had bad news, that Mashuda had sent O'Hara a letter stating that he did not want Singer on the job. The letter marked to O'Hara's attention and signed by Mellon states, "Due to past performance and personality conflicts with other mechanics and employees we are requesting at this time not to have Mr. Singer sent to our project." Singer said he did not understand why he was not wanted. O'Hara said Mashuda said he would be at the Follansbee jobsite the following Wednesday, and Singer could meet Mashuda there.

Singer testified that: Singer went to the Follansbee site the Wednesday after his call with O'Hara. At the site, Singer was told that Mashuda was not there, that he was in meetings all day. Singer called O'Hara and informed him of what transpired. O'Hara gave Singer a phone number for Mashuda. Singer called Mashuda, who apologized and agreed to meet Singer at the jobsite the following week.

Singer testified he rode out to the jobsite with O'Hara the following Monday. Singer spoke to Mashuda in the parking lot. No one else was present for the conversation. Singer's credited testimony reveals the following: Singer asked Mashuda why he did not want Singer for the job. Mashuda said his people said Singer was a pain in the neck. Singer said he did not understand and asked who made this accusation.

⁶ Singer's testimony on this point is confirmed by Local 132's March 2003 out-of-work list. Singer is 64 on the list with a December 13, 2002 signup date. Singer is listed as a master mechanic, a welder, and as having a truck with tools. Andrew Potter, who Respondent hired for the Follansbee job rather than Singer, is listed as 132 on the list with a February 28, 2003, signup date.

⁷ Singer estimated that this conversation took place on March 14. However, Singer testified that, during the phone call, O'Hara informed Singer of a letter O'Hara received from Respondent, and the letter is dated March 14.

Mashuda said, "maybe you just PO'd somebody real good." Singer asked how, and Mashuda replied you bad mouthed Respondent. Singer said he did not know where that was coming from. Singer said he worked for Respondent on several different occasions and Singer drove up to one of the company picnics in Evans City, Pennsylvania, because Mashuda's father had a 50-year anniversary party for the business. Singer told Mashuda if Singer thought poorly of the company, he would not have gone out of his way to attend this function. Mashuda said it was not a problem with Singer's ability to do the job and there was no problem with his truck, it was just a personality conflict. Singer told Mashuda he did not understand the personality conflict assertion because he was not aware that he had any problems with anyone. Singer asked who the problem was with, but all Mashuda would say was it was his people. Mashuda then said, "maybe you was too union for us." Mashuda went on to state you are a union man. Singer replied he was and was proud of it.⁸ Mashuda told Singer that Mashuda wanted mechanic Andy Potter on the job because Potter was well versed in repairing Respondent's 90's scrapers, which are dirt moving machines. Mashuda said he would talk to some more people and get back to Singer. Mashuda said in a couple of weeks he would be starting a night shift. Singer cut him off, and said, "if Gary Singer is not good enough to work for you on day shift, he sure is not good enough to work night shift for you."⁹

O'Hara credibly testified to the following: O'Hara spoke to Mashuda around March 28 and Mashuda requested a mechanic the following week stating he wanted Andrew Potter for his expertise on the 90's scrapers. O'Hara told Mashuda that he had to refer Singer because he was first on the list. Mashuda said do what you have to do. O'Hara testified that since Singer was qualified as a master mechanic Singer should have the skills to repair every piece of equipment including the 90's scrapers. O'Hara testified, besides the 90's scrapers, there were numerous other pieces of equipment on the job including hoes, dozers, and trucks. O'Hara testified that, following his conversation with Mashuda, O'Hara had Singer referred out to the job, not as a master mechanic, but as a mechanic. O'Hara testified that he and Mashuda had already agreed that Owens was going to be the master mechanic on the job.

Singer testified Mashuda called him on March 31, and told Singer he had not gotten a chance to talk to other people, but that he was going to stick with the letter he sent. Singer said he could not let the matter go because this was how he made his living, and this was the only job in the area. Singer called Local 132 on March 31, and told Donnie Miller, the dispatcher, that Mashuda called and said he was going to stick with the letter. Singer asked to speak with O'Hara, who returned Singer's call and said he had spoken with the Local 132's at-

⁸ Singer testified he understood Mashuda to mean Singer was a strong union person.

⁹ I have credited Singer's testimony as to this conversation. Mashuda admitted to having a conversation with Singer at the jobsite, and Mashuda did not dispute Singer's account of the conversation, except Mashuda testified he offered Singer a position on the night shift. To the extent their testimony varies on this point, I have credited Singer's account over that of Mashuda's.

torney, who told O'Hara that until Singer was hired there was nothing the Union could do for him.

Singer's testimony reveals that: On April 2, Miller called Singer and said Mashuda called for a mechanic the next morning, and Miller asked if Singer was interested. Miller said he knew about Respondent's letter, but O'Hara told Miller to offer Singer the job. Singer went out to the Follansbee site on April 3, and there were three men there, one of whom Singer recognized from prior work. Singer asked where he should sign up. All three stated they did not know Respondent was hiring today. Singer said the Operating Engineers hall sent him as a mechanic. One of them obtained a W-2 form and other paperwork for Singer to fill out. After Singer completed the paper work, one of the men returned and asked Singer who actually sent you here. Singer said the Operating Engineers union hall. The man told Singer that he just spoke with Lombardo, the superintendent, who said he did not call for a mechanic, and they had no need for a mechanic. Before leaving the site, Singer saw Paul Owens, the master mechanic at the site, and asked him what was going on. Singer said Local 132 referred him to the site, but no one in the office knows anything about it. Owens said he had been trying to get them to put another man on because he needed help, but they would not hire anyone. Lombardo, who Singer had known from prior jobs, came over and said he did not know what was going on, that he never called for a mechanic. He said he did not have enough work to keep Owens working, let alone another mechanic. Singer said he would contact the union hall and then left.

Singer's testimony reveals that: After Singer arrived home on April 2, Lombardo called Singer and apologized about telling Singer they were not hiring. Lombardo said he checked into it, and knew all about the letter Mashuda sent. Lombardo said he was a 30-year veteran with Mashuda and he did not want to jeopardize his job. Lombardo said Mashuda told him to stick with the letter, so Lombardo could not hire Singer. Singer asked if Lombardo had a problem with Singer on the job. Lombardo said no, but he worked for Mashuda and did not want to jeopardize his job. Singer told Lombardo he did not expect him to stick his neck out for him. Singer said he considered Lombardo his friend. Lombardo said yeah we are friends because we went to ox roasts and everything else together.

Singer testified that during the three occasions he worked for Respondent, he was never let go before the job ended, he never received discipline, and no one spoke to him about the quality of his work. Singer testified he has worked on 90's scrapers in that he has operated them, assembled them, adjusted frictions and brakes, and has done anything that needs to be done to them. Singer testified he worked on these machines during jobs in the 1990, as well [as] on the other jobs for Respondent.

Singer has worked for the Trumbull Corporation on three different occasions, the last time in 2001 as a master mechanic, day shift. Singer testified Owens also worked on that job on the night shift. They did not work together and their jobs did not overlap. Singer testified he has never worked with Owens. Singer left the job when it was completed. Singer was not disciplined on that job.

Singer testified the day shift is a lot faster paced than the night shift, and you have to know more to work on the day shift as a mechanic since it is a higher profile job. At the time of the hearing, Singer was working as a night-shift master mechanic for Beaver Excavating Company at a location in West Virginia. Singer testified that this is a union job and the night-shift pay is the same as that on dayshift.

B. Respondent's Witnesses

Respondent called Mashuda, Huffman, and Owens as witnesses and their testimony was contradictory, and internally inconsistent. Considering their demeanor and the content of their testimony, I did not find them to be worthy of belief concerning their claims about Singer's past performance.

Mashuda testified as follows: Follansbee is an "incentive-deceptive" project in which there were only 104 days to move about 2 million yards of dirt, or face a penalty per each day over. Respondent uses hydraulic excavators, mass excavators, 90's scrapers, 50- and 100-ton rock trucks, drill rigs, graders, dozers, and compactors at the jobsite that require servicing. The master mechanic comes on the job first to assemble the equipment. The master mechanic orders the parts and lays out the work for the other mechanics. The night-shift mechanic does the work the day-shift mechanic instructs him to do. Respondent uses a lot of older equipment and its mechanics are very important on a job where time is of the essence. Mashuda testified no other contractor uses the equipment Mashuda was running, the newest scraper on the Follansbee job was a 1952 model, and the newest dozer was a mid-1960's model.

Mashuda testified that: Singer's name was on the referral list Mashuda received from O'Hara during the February 25 prejob conference. Mashuda had never worked with Singer, but knew Singer had worked on Respondent's jobs in the past. Mashuda told O'Hara that he needed to check Singer out before he hired him.

Mashuda testified that: Mashuda talked to Huffman, who had worked for Respondent for 35 years, about Singer. Huffman said he only worked with Singer on and off a little bit on Singer's last job for Respondent. Huffman relayed a story about two employees putting a transmission in a 50-ton truck while Singer sat in his pickup watching because it was raining. Huffman told Mashuda that Singer could fix things like a truck with no problem, but Singer only did what he had to do and nothing more.¹⁰ Some of the people who had worked with Singer in the past, including Huffman, felt that with the Follansbee job on the fast track and using 90's scrapers, Singer could not keep up. Huffman also told Mashuda that, during the 1990 job Singer worked on, Respondent assigned a laborer to operate a steam jenny. Singer said they should have an operator rather than a laborer assigned to run the machine. However, when the operators found out it was a dirty job they declined the work resulting in a laborer running the steam jenny for almost a year. At the end of the job when Respondent was going to lay an operator off, Singer, the master mechanic on the

¹⁰ Mashuda testified he also spoke with Vic Mashuda, Mashuda's father, and was told that Singer could perform the work as a mechanic, but had problems with the pace of his work.

job, protested stating an operator should be working the steam jenny rather than a laborer. As a result of Singer's protest, the laborer was laid off in lieu of an operator who replaced the laborer on the steam jenny, and worked an extra couple of weeks or months on the job. Mashuda testified this story "left a bad taste in some people's mouths."

Mashuda sent a letter to O'Hara, under Mellon's signature dated March 14, which, as set forth above, requested that Singer not be sent out to the Follansbee job at that time due "to performance and personality conflicts with other mechanics." Mashuda testified he thought the major personality conflict was with Huffman because Mashuda had not hired anyone else at the time of the letter. Mashuda testified the "personality conflict" referenced in the letter was Singer's involvement in the steam jenny situation as well as Huffman's view that he did not think Singer was much of a worker since Singer watched others work while it was raining.

Mashuda testified that Mashuda selected Owens to be the master mechanic for the Follansbee job because Mashuda has worked with Owens on another large project for a year, and he knew Owens and Owens' truck. The union and the contractor agree who should be the master mechanic. While Mashuda testified Singer had worked for Respondent as a master mechanic in the past, Mashuda did not know whether Singer could rebuild a power unit on Respondent's 90's scrapers, although Mashuda had heard Singer had performed other maintenance on these units. Mashuda inquired as to whether Singer had a boom, compressor, and welder on his truck. Mashuda heard that Singer did not have a boom and Mashuda testified that a boom, welder, and an air compressor are necessary to work on the 90's scrapers. Owens has all of this equipment on his truck.

Mashuda testified that when Owens first reported to the job, Mashuda mentioned to Owens that O'Hara was a little upset because Owens was sent out before Singer. Mashuda told Owens that Singer was first on the list but Owens was hired because Mashuda needed the boom truck and someone to help put the equipment together. Mashuda told Owens that O'Hara wanted to send Singer out there to work. Mashuda testified Owens said if O'Hara sends Singer out, Mashuda should get someone to replace Owens because Owens would not work with Singer. Owens said when he worked at Trumbull, he ended up doing all of the work on the night shift Singer could have been doing on the day shift. Mashuda testified this conversation took place after Respondent sent the March 14 letter to Local 132 requesting that Singer not be referred to the job.

Mashuda testified he talked to Charles Hinkle, who works as a supervisor for Trumbull, a competitor of Respondent, about Singer on the same day, but after Mashuda had spoken to Singer at the jobsite. Singer had worked for Trumbull the prior year on a project. Hinkle was on the Follansbee jobsite assembling equipment and he asked if Mashuda had been talking to Singer. Mashuda testified Hinkle said you are not going to hire him are you because you are not going to get much work out of him. Mashuda testified that, after talking to Hinkle, Mashuda made up his mind that he did not think Singer could handle a day shift position. Mashuda called Singer the following week and said he did not hear anything that changed his mind con-

cerning the day shift. Mashuda denied that Singer's union activity had anything to do with Mashuda's decision not to hire Singer on the day shift.

Mashuda testified that: Mashuda issued the March 14 letter requesting Singer not be sent out, and then Mashuda brought Owens in as master mechanic. O'Hara then wanted to send Singer out for a day-shift mechanic position, but Mashuda requested mechanic Andy Potter because of Potter's experience working on Respondent's 90's scrapers and drills. Owens and Potter staffed the day shift, along with another mechanic Respondent brought in from its shop. Respondent had to provide a truck to its shop mechanic who worked at the Follansbee site. Mashuda testified that Owens and Potter were behind Singer on Local 132's referral list. However, Mashuda thought he had a right to select Owens and Potter ahead of Singer because there was a provision in the union contract that during a certain time period an employer could call back employees who had previously worked for the employer. Mashuda testified the contract allows Respondent to request people with specific equipment. Mashuda testified that Owens had worked for him before and that Potter had worked with Mashuda on three other projects, while Singer had only worked for Mashuda's father, brother and uncles. Nevertheless, Mashuda testified if he had heard everything he wanted to hear, he might have offered Singer a job as a mechanic on the day shift, but he would not have offered Singer the master mechanic job. Mashuda testified he also staffed Follansbee with a night-shift mechanic.

While Mashuda claimed that whenever he hired a new mechanic, he made the same inquiries about the mechanic's background that he made about Singer, Mashuda could not provide the name of the mechanic Respondent had working on the night shift at the Follansbee job at the time of the hearing. He also testified Respondent had gone through 3 or 4 night shift mechanics because one of them was not getting his work done, and another one burned up a new engine. Mashuda testified he was not sure if the third mechanic quit or Respondent let him go. Mashuda testified they were not good employees.

Huffman, at the time of his testimony, was working for Respondent as a master mechanic at another location. Respondent had employed Huffman, a member of Local 66, for most of 36 years. Huffman worked at the Follansbee job for a short period of time in 2003, before Huffman was transferred to the other jobsite. Huffman testified he had worked with Singer in the mid or late 80's. Huffman testified he had a discussion with Mashuda around March 12 or 14 at the Follansbee job where Mashuda asked Huffman about Singer. Huffman testified he told Mashuda that he did not think Singer applied himself on the job. When asked for an explanation, Huffman testified as follows:

Q. Well, he didn't work—you said something there and I don't want to repeat it, what did you see or hear him do that made you think that he was what you just said?

A. I can't really recall that, you know, I mean as far as his work ethics or whatever, you know.

Despite this initial response, Huffman then testified he did not think Singer applied himself as well as the other mechanics. When pressed for further explanation, all Huffman could say

was Respondent worked in the rain, “I didn’t think, you know, Gary liked to work in the rain or not quite as well as the other mechanics.” Huffman testified, “I didn’t really recommend” Singer for hire. Noticeably absent from Huffman’s testimony was that he told Mashuda about Singer’s protest about the steam jenny job assignment, which Mashuda testified was reported to him by Huffman as leaving a bad taste in people’s mouths.

Owens, a member of Local 132, was working for Respondent a master mechanic at the time of his testimony. He testified he had been qualified as a master mechanic for 5 years and that he had previously worked for Respondent in 1995 or 1996. Owens testified he started working for Respondent on March 18, and that he learned he was going to be the master mechanic on the Follansbee job sometime the prior week. Owens testified that when he started working for Respondent, the actual work on the road had not started. Rather, Owens was putting equipment together. When he started on the job, Owens was working with Huffman and a mechanic named Jeff from Respondent’s shop.

Owens testified he learned Singer was in contention to work at the Follansbee job after Owens had been on the job for at least a week because O’Hara brought a list to the jobsite and showed it to Owens. Owens testified the following week he told Mashuda that if he hired Singer, that Owens would quit. When asked if Owens told Mashuda why he was going home if Mashuda hired Singer, Owens testified, “No. He didn’t ask.” Then following a somewhat leading question, Owens’ testimony changed. He now testified that Mashuda did ask him why he was going home if Singer was hired to which Owens replied, “He was on the lazy side.” Owens testified he had only previously worked with Singer for 7 months for Trumbull Corporation when Singer was on the day shift and Owens was working nights. Owens testified he knew Singer was lazy because when he came in early, he heard from others that Singer was “Sitting in his truck, wouldn’t report to the master mechanic for other stuff to do.”¹¹ Owens testified there was nothing else he heard about Singer. Owens testimony changed again on cross-examination. Owens now testified when Owens came to work Singer would be sitting in his truck.

C. Analysis

1. The alleged violation of Section 8(a)(1) of the Act

Singer’s credited and undisputed testimony reveals Singer had a conversation with Mashuda sometime in March at the

¹¹ I did not find Owens or Huffman to be credible witnesses. They were both employed by Mashuda and testifying in his presence at the hearing. In addition to the several shifts in Owens’ testimony, Owens’ claim that Singer would not report to master mechanic for work was contradicted by Singer’s credible testimony that Singer was in fact the master mechanic on the day shift at Trumbull. I also do not credit Mashuda’s claim that Hinkle, a supervisor at Trumbull, gave him a negative reference about Singer’s work. Mashuda placed his conversation with Hinkle as taking place the same day, but after he spoke to Singer at the jobsite. However, Singer credibly testified that the week following his conversation with Mashuda at the site, Mashuda called Singer and told him that he did not have a chance to talk to anyone else, but that Mashuda was sticking with the letter not to hire Singer.

Follansbee jobsite. Singer asked Mashuda why he did not want Singer for the job. Mashuda said his people said Singer was a pain in the neck. Singer persisted in questioning Mashuda for an explanation and Mashuda said, “maybe you just PO’d somebody real good.” Mashuda went on to state that Singer bad mouthed Respondent. Mashuda said it was not a problem with Singer’s ability to do the job and there was no problem with his truck, it was just a personality conflict. Singer told Mashuda he did not understand the personality conflict assertion because he had worked for Respondent before and never knew he had any problems with anyone. Mashuda then said, “maybe you was too union for us.”¹² Mashuda went on to state you are a union man. Singer replied he was and was proud of it. Mashuda told Singer that Mashuda wanted mechanic Andy Potter because Potter knew the 90’s scrapers inside and out to repair them. Mashuda said he would talk to more people and get back to Singer. Mashuda said in a couple of weeks he would be starting a night shift. Singer cut him off, and said, “if Gary Singer is not good enough to work for you on day shift, he sure is not good enough to work night shift for you.” I find Mashuda’s remark to Singer in explanation of why he was not being hired that maybe you are too union for us to be coercive and violative of Section 8(a)(1) of the Act. See *Colden Hills, Inc.*, 337 NLRB 560 (2002), where a statement that a union organizer’s application was not taken seriously because of his union status was found violative of Section 8(a)(1) of the Act. See also *J.S. Alberici Construction Co.*, 231 NLRB 1038, 1042 (1977), *enfd.* 591 F.2d 463 (8th Cir. 1979).

2. The refusal to hire Singer

In *Wayne Erecting*, 333 NLRB 149, 1212 (2001), the Board citing *FES*, 331 NLRB 9 (2000), set forth the following framework of required proof by the General Counsel concerning refusal-to-hire allegations:

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

The Board went on to state:

Once the General Counsel has met his initial burden for the refusal to consider and refusal to hire, respectively, the burden shifts to the respondent to show that it would not have considered or hired, respectively, the applicants even in the absence of their union activity or affiliation.

It is clear here that Respondent had concrete plans to hire. O’Hara testified that when he met with Mashuda at Respondent’s prejob conference on February 25 for the Follansbee job, Mashuda told O’Hara that Respondent was going to need me-

¹² Respondent admits at page 6 of its posthearing brief that “Mr. Mashuda did say something like ‘and maybe you were too union’” to Singer.

chanics. At that time, O'Hara informed Mashuda that Singer was first on Respondent's list for referral. In fact, Mashuda's testimony reveals that following the February 25 meeting, after sending Local 132 a letter stating that Singer should not be sent out to the jobsite because of "past performance and personality conflicts with other mechanics and employees," Respondent hired Owens for the position of master mechanic day shift, Potter as a day-shift mechanic, and transferred a third mechanic to the site to man the day shift.

I find that Singer had the experience and qualifications to perform on Respondent's day shift as either a master or plain mechanic. Singer was listed on Local 132's referral list as a master mechanic with his own truck. Singer has been a member of Local 132 for 27 years, and worked for Respondent on three occasions, the last two serving as a master mechanic in 1985 and 1990.¹³ Singer's credited testimony reveals that during the three times he worked for Respondent, he was never let go before the job ended, he never received discipline, and no one spoke to him about the quality of his work. Singer testified he has worked on 90's scrapers including assembling them, adjusting frictions and brakes, and has done anything that needs to be done to them. Singer testified he worked on these machines during the job in 1990, as well as on the other jobs for Respondent. Moreover, I have credited Singer's undisputed testimony that when he met with Mashuda and asked him why he was not being hired, Mashuda told Singer that there was no problem with Singer's ability to do the job, and it was not Singer's truck. Rather, Mashuda said it was a personality conflict, that Singer was a pain in the neck, that he "PO'd somebody real good" and when pressed for a further explanation, Mashuda finally told Singer "maybe you was too union for us." Accordingly, I find that Singer had the experience for the announced position, and had successfully worked for Respondent as a master mechanic in the past on two separate occasions.

I also find that antiunion animus contributed to the decision not to hire Singer. In *Blount Bros. Corp.*, 291 NLRB 242 fn. 1 (1988), the Board held:

The judge recognized that the facts supported finding the Kisers engaged in protected concerted activity, as well as union activity However, he found that the failure and refusal to recall the Kisers violated only Sec. 8(a)(3), even though the complaint also alleged an independent 8(a)(1) violation. We find merit in the General Counsel's limited cross-exceptions to the judge's failure to find an independent violation of Sec. 8(a)(1). We therefore also find that the Respondent violated Sec. 8(a)(1) by failing and refusing to recall the Kisers because of their complaints about the work reassignment, i.e., protected activity under *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967), approved in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984).

¹³ Singer was qualified as a master mechanic at least dating back to 1985, while Owens, the individual Respondent hired as a master mechanic for the Follansbee site had only been qualified as a master mechanic for 5 years at the time of the hearing.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) we rely on *Interior Alterations*, 264 NLRB 677 (1982).

Finally, we note that the record fails to support Respondent's contention that the Kisers' actions were not in good faith. Rather, the record shows that the Kisers' complaints were based on an honest and reasonable belief that the work in question should have been assigned to iron workers.¹⁴

Further, the record establishes that the Kisers based their challenge on a belief that as a matter of past practice the performance of a minimum number of hours of work on a job constituted a jurisdictional assignment. As the existence or non-existence of the past practice was not definitively established, we have no basis for finding the Kisers' challenge unreasonable.

In *Interior Alterations, Inc.*, 264 NLRB 677 fn. 3 (1982), enfd. 738 F.2d 373 (10th Cir. 1984), two carpenters confronted two laborers and told them to stop performing a certain assignment claiming it was carpenters work. The Board concurred with the judge's assessment that the two carpenters "were engaging in protected concerted activity when they protested Respondent's use of laborers to move two garage doors." The Board affirmed the judge's finding that the carpenters were discharged in violation of Section 8(a)(1) and (3) of the Act.

Singer's credited testimony reveals that in 1990, while working for Respondent, as the job was winding down, Huffman came to Singer and said they were going to have to cut back one mechanic and they were going to lay Singer off. Singer responded Drummond is out of Local 66, this is my area referring to Local 132's jurisdiction, and Drummond should be laid off before Singer. Huffman persisted that Drummond was Respondent's company mechanic, had been with them for years and they were going to keep him, and lay Singer off. Singer said, according to our contract, it was Singer's area and Singer should be the one to stay. Singer contacted the job steward who contacted Local 132's business manager who interceded in Singer's behalf with management. As a result, Drummond was transferred to another jobsite within a few days, and Singer remained working at the jobsite in question for another 3 or 4 months. Singer testified that while he worked on this job in 1990, Respondent had equipment that needed cleaning. Respondent brought in a steam jenny to steam clean the equipment and Respondent assigned a laborer to operate the steam jenny. Singer told Huffman it was operator's work to run the steam jenny. Huffman responded that in Pennsylvania it was laborers' work. Singer said we are not in Pennsylvania and according to their contract, the steam jenny belongs to operating engineers not laborers. The import of Singer's testimony was that he was assigned to run the steam jenny, rather than the laborer, as a result of Singer's protest.

¹⁴ In *Blount Bros. Corp.*, supra at 244, the Kisers, who were iron workers, objected when they were told they were being laid off because certain work they believed to belong to iron workers was assigned to sheet metal workers. Their protest upset the superintendent on the job resulting in his refusal to recall the Kisers back to work following their layoff.

Mashuda testified that Huffman reported to him Singer's protest over the steam jenny assignment. He testified that as a result of Singer's protest, a laborer was laid off in lieu of an operator who replaced the laborer on the steam jenny, and worked an extra couple of weeks or months on the job. Mashuda testified this story "left a bad taste in some people's mouths."

I find that Singer was engaged in protected concerted activity and union activity when he lodged these protests, which were as he testified his attempts to enforce Local 132's contract based on the contract language itself or the past practice within Local 132's jurisdiction. See *Blount Bros. Corp.*, supra and *Interior Alterations, Inc.*, supra. The bonafides of Singer's contractual based demands in this situation are not in question since Respondent acceded to his assertions in each instance and assigned the work to an operator and or a Local 132 member.¹⁵ That Mashuda viewed Singer's attempts to enforce Local 132's contract as union activity is similarly not in question as Mashuda told Singer point blank that his people said Singer was a pain in the neck, "maybe you just PO'd somebody real good," and Mashuda then said, "maybe you was too union for us."

I find the other reasons advanced by Respondent for its refusal to hire Singer as a day-shift mechanic to be pretextual. Mashuda testified he spoke to Vic Mashuda, his father, and was told there were problems with the pace of Singer's work. However, Vic Mashuda failed to testify. Moreover, Singer had worked for Respondent on three occasions without complaint to him about his performance, and on the latter two occasions he worked there as a master mechanic. Singer's testimony reveals that Vic Mashuda was involved in his hiring on the two occasions Singer worked for Respondent as a master mechanic, because Vic Mashuda negotiated the renting of Singer's truck when Singer was hired. I do not find Respondent's assertion credible that there was a performance problem with Singer, when it repeatedly hired him without informing him of any problems, until after his last stint there in 1990 when Singer participated in union activity, which by Mashuda's admission left a bad taste in people's mouths.

Similarly, I do not credit Huffman's claim that Singer did not apply himself on the job. Huffman, an admitted supervisor, was testifying in front of Mashuda, Huffman's boss. Huffman, considering his demeanor, was not an impressive witness as he had difficulty substantiating his claim that Singer did not apply himself. Moreover, while Huffman claimed that Singer did not like to work in the rain, Huffman failed to testify that he ever spoke to Singer about this alleged deficiency. Thus, I do not credit Huffman's testimony as to Singer's past performance. I also do not credit Mashuda's claim that Huffman informed him that Singer sat in his truck while it was raining and watched other employees install a transmission in a 50-ton truck. For

¹⁵ While Mashuda failed to testify that Huffman informed him of Singer's protest about the work assignment dispute between the Local 66 and Local 132 mechanics, I have concluded this dispute also colored Huffman's report on Singer to Mashuda. Mashuda testified the reference to personality conflicts in the March 14 letter concerning Singer related to his conversation with Huffman, who was the only mechanic at the site at the time the letter was written.

no explanation was offered as to why, if this occurred under Huffman's observation, Huffman failed to intervene and put Singer to work.

I also do not credit Mashuda or Owens' testimony concerning their alleged conversation about Singer. Mashuda testified that Owens, who had been hired as the master mechanic on the Follansbee job, told Mashuda that Owens would not work with Singer because when Owens had worked on the night shift for Trumbull, Owens ended up doing the work Singer should have been doing on the day shift. Owens, who was in Respondent's employ at the time of his testimony, did not corroborate Mashuda's testimony. Owens initially denied even telling Mashuda the reason he did not want to work with Singer, stating Mashuda did not ask him the reason. Owens then changed his testimony stating he heard from others that Singer was lazy and that he sat in his truck. Owens' testimony then changed a third time reporting that, although they worked on different shifts, when Owens came to work early he saw Singer sitting in his truck. Owens never testified that he was forced to do Singer's work on the night shift. Moreover, Singer credibly testified he met Owens at the Follansbee jobsite in 2003, at which point Owens told Singer he was trying to get Respondent to hire another mechanic. I do not find Respondent's claim credible that Owens had a problem working with Singer, but then divulged to Singer that Owens wanted Respondent to hire another mechanic when he knew Singer was seeking employment.

Finally, I do not find as credible Mashuda's testimony that he had concerns about Singer's ability to work on the 90's scrapers or concerns about Singer's truck or equipment. In this regard, Mashuda met with Singer at the jobsite and told Singer he did not have a concern about Singer's ability to do the work and did not have a problem with Singer's truck. Mashuda also did not ask Singer about his experience on the 90's scrapers, or any questions about Singer's truck during their meeting. The only explanation Mashuda gave Singer at that time for not hiring Singer was that maybe Singer was "too union" for Respondent. Moreover, I have credited Singer's testimony that having worked for Respondent in the past, he could perform, as he had done in the past, all the work necessary to service the 90's scrapers as well as Respondent's other equipment.

Having found that Respondent was hiring day shift mechanics, that Singer was first on Local 132's referral list and met the qualifications for a day-shift mechanic, that Singer engaged in union and protected concerted activity, that Respondent harbored strong animus toward this activity in that it was brought up to Singer over 12 years after the activity took place when Mashuda informed Singer that he was too union for Respondent, and that the reasons advanced for not hiring Singer as a day shift mechanic were pretextual, I find that Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to hire Singer as a day-shift mechanic. I find that Singer should have been hired as the first day-shift mechanic at the Follansbee job, prior to Respondent hiring Potter on the day

shift, or transferring another mechanic to the Follansbee site from Respondent's shop.¹⁶

While I find that Singer was fully qualified to serve as master mechanic on the day shift rather than Owens, I do not find that Respondent's failure to hire him in that capacity is violative of Section 8(a)(1) and (3) of the Act in view of counsel for the General Counsel's assertion at page 10, footnote 2 of her posthearing brief that "Counsel for the General Counsel does not assert that Mashuda's hiring of Owens as the master mechanic violated Section 8(a)(3) of the Act, inasmuch as the Union and Employer have the right to agree on a master mechanic."

I accede to the General Counsel's position here although counsel for the General Counsel cites no authority in the contract or by way of past practice granting the parties thereto the right to skip qualified candidates for referral in order to agree on a master mechanic. In this regard, the hiring hall procedures under Local 132's master agreement provide for specific order of referral and the following contractual provisions have pertinence here:

Section 12. The order of referrals set forth above shall be followed except in cases where:

(i) The Employer requires and requests employee(s) possessing special skills and/or abilities, licenses or certificates in which case the Union shall refer the first applicant on the list possessing such special skills and abilities.

(iv) The Employer requests the referral of an individual who has been employed by the Employer within a period of six (6) months prior to such requests and such individual is registered on the referral list.

Owens testified that, prior to being hired by Respondent in March 2003, he had last been employed by Respondent in 1995 or 1996. Moreover, Owens was not on Local 133's out-of-work list at the time he was referred to Respondent's jobsite as a master mechanic. Therefore, the exception in section 12(iv) in Local 132's master agreement does not apply to Respondent's hiring of Owens. As far as section 12(i) is concerned, I find that Singer, based on his credited testimony, possessed all the special skills and abilities to perform as a day-shift master mechanic for Respondent as he had successfully performed in that capacity in the past. I also note that any agreement by Local 132 and Respondent to exclude Singer as master mechanic on the Follansbee job was clearly under duress because

¹⁶ Respondent did not show that Potter had worked for Respondent within the past 6 months of his hiring as required by Local 132's contract for Potter to bypass Singer on the referral list. Moreover, O'Hara did not feel that Respondent had a contractual basis to by pass Singer with Potter in that O'Hara informed Mashuda that Singer should be referred before Potter. Even assuming Respondent had a valid contractual argument to hire Potter before Singer, which Respondent failed to establish herein, I have concluded that Respondent's reasons for selecting Potter over Singer were based on animus towards Singer's union activity, not on the relative abilities of the two mechanics to perform the necessary work. As Mashuda admitted, had he heard the right things about Singer there might have been a slot for him as a day shift mechanic.

before Local 132 referred Owens, Respondent had issued Local 132 a letter stating Respondent would not accept Singer's referral to the jobsite. I have concluded Respondent's issuance of its March 14 letter was based on discriminatory considerations. In fact, Mashuda testified he told Owens that Local 132 official O'Hara was upset that Owens was sent out a head of Singer.

While I have concluded that Singer was qualified to perform as a master mechanic on Respondent's day shift, in view of the counsel for the General Counsel's concession in her brief that Respondent and Local 132 had the right to negotiate the hiring of a master mechanic outside the literal terms of Local 132's master agreement, I will not recommend that Singer be offered the master mechanic position at the Follansbee site. I assume that counsel for the General Counsel is privy to some past practice incorporated in the contract that has not been set forth in the record. I also note that Mashuda testified that he needed a mechanic on the job that had a boom or crane on their truck to work on the 90's scrapers. Mashuda's testimony on this point was not rebutted by Singer and therefore has been credited. Moreover, Mashuda's testimony that Owens had a crane on his truck, and Singer did not has been credited since Singer also failed to refute this claim. Since Respondent has advanced a nondiscriminatory reason for selecting Owens as a master mechanic over Singer, and the General Counsel is not seeking to enforce the hiring hall provisions as written but rather defers to a proffered past practice, I do not find Respondent's failure to hire Singer as master mechanic is violative of Section 8(a)(1) and (3) of the Act. This does not disturb my finding that Singer was entitled to the first day-shift mechanic position available at the jobsite. There was no substantiated claim by Respondent that it needed more than one truck with a crane at the jobsite, or that either Potter or the day-shift mechanic that Respondent transferred to the site had equipment that was not available to Singer. In fact, the evidence reveals Respondent provided a truck to the day-shift mechanic it transferred to the site.

I reject Respondent's contention that Singer suffered no harm as a result of Respondent's discrimination. Respondent argues that Mashuda offered Singer a night-shift position at the same rate of pay and benefits as the day shift position. However, I do not find that Respondent made a bona fide job offer to Singer. In *All Pro Painting Co.*, 339 NLRB No. 157, slip op. at 3 (2003), it is stated that, "it is well established that to toll the backpay period, an offer of reinstatement to a discriminatee must be 'specific, unequivocal, and unconditional.'" (Citation omitted.) It was noted that, "the employer bears the burden of proving a reinstatement offer was valid. Any ambiguity in the explanation of the offer should be construed against the employer." (Citations omitted.) Singer's credited testimony reveals that Mashuda did not make a specific, unequivocal, and unconditional offer of employment of a night shift position to Singer. Rather, Mashuda just stated that in a couple of weeks he was going to start a night shift, at which point Singer cut him off, stating if Singer was not good enough to work on the day shift for Respondent, he was not good

enough to work on the night shift.¹⁷ Whether, Mashuda would have made an offer to Singer to work nights has not been established, because after Singer's response, Mashuda never made a firm offer to him for such a position, and it is Respondent's burden to establish such an offer was made if it is attempting to escape further obligations to an employee resulting from its unlawful conduct. Moreover, Singer credibly testified that the day shift mechanic is a higher profile job in that it is a lot faster paced than the night shift, and the day-shift mechanic has to know more than the night shift. I do not find it to be incumbent on Singer, after being told that he was "too union" for Respondent, to be required to accept a less favorable shift and a position of less stature as a result of his union activities and thereby exonerate Respondent from making a bona fide offer of the day shift mechanic's position to him, even assuming I were to find that Mashuda belatedly offered Singer a night-shift position.

CONCLUSIONS OF LAW

1. By informing an applicant that he was too union to work there, Respondent violated Section 8(a)(1) of the Act.

2. By refusing to hire applicant Gary V. Singer for a day-shift mechanic position as its Follansbee, West Virginia jobsite because of his support for and activities on behalf of the International Union of Operating Engineers, Local 132, AFL-CIO (Local 132), Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act. I shall also recommend that the Respondent be ordered to offer Gary V. Singer employment in the day shift mechanic position which he sought to apply without prejudice to his seniority or other rights or privileges he would have enjoyed had he been hired, and make him whole for any loss he may have suffered as a result of Respondent's refusal to hire him in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987), terminating the employee, if necessary, hired as result of Respondent's refusal to hire Singer.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁸

¹⁷ I do not accept Respondent's argument that Singer's statement that he was not good enough to work nights if he was not good enough to work days leads to the conclusion that Mashuda and Singer were discussing Singer's ability as opposed to his union activity. For I have credited Singer's uncontested testimony that Mashuda told Singer that Mashuda did not have a problem with Singer's ability to do the job or with Singer's truck.

¹⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Mashuda Corporation, Cransberry Township, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from.

(a) Informing applicants they are too union to work for Respondent.

(b) Refusing to hire job applicants because of their union support and activities.

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

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

(a) Within 14 days from the date of the Board's Order, offer Gary V. Singer employment in the day-shift position for which he sought to apply without prejudice to his seniority or other rights or privileges to which he would have been entitled absent the discrimination against him.

(b) Within 14 days from the date of the Board's Order, make Gary V. Singer whole for any loss of earnings he may have suffered by reason of the discrimination against him as set forth in the remedy section of this decision.

(c) Within 14 days of the Board's Order, remove from its files any reference to the unlawful refusal to employ Gary V. Singer, including but not limited to Respondent's March 14, 2003 letter and within 3 days thereafter, notify him in writing that this has been done and that this personnel action will not be used against him in any way.

(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 facility in Cranberry Township, Pennsylvania, and at all its current jobsites copies of the attached notice marked "Appendix."¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and

¹⁹ 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."

former employees employed by the Respondent at any time since March 14, 2003.

(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.