BCE Construction, Inc. *and* International Brotherhood of Carpenters & Joiners of America, Local # 978. Cases 17–CA–18556, 17–CA–18619–1, and 17–CA–18619–2

August 31, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On August 11, 1997, Administrative Law Judge Pargen Robertson issued the attached initial decision in this case. The Respondent filed exceptions to the judge's decision and a supporting brief, the Charging Party filed an answering brief to the Respondent's exceptions, and the General Counsel filed exceptions and a memorandum in support of them.

On June 7, 2000, the National Labor Relations Board remanded the case to the judge for further consideration in light of the Board's decision in *FES,* 331 NLRB 9 (2000), supplemental decision 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002), which sets forth the analytical framework for refusal-to-hire and refusal-to-consider allegations.

On July 9, 2001, the judge issued the attached supplemental decision. The Respondent filed exceptions to the judge's supplemental decision and the General Counsel filed an answering brief.

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

The Board has considered the decisions 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 and set forth in full below.[2]

This case centers on whether the Respondent unlawfully failed to consider and/or refused to hire nine applicants, in violation of Section 8(a)(3) and (1) of the Act. The complaint also alleged that the Respondent discharged an employee in violation of Section 8(a)(3) and (1) of the Act. Finally, the complaint alleged that the Respondent independently violated Section 8(a)(1) in various respects.

We agree with the judge's findings, for the reasons he sets forth, that the Respondent violated Section 8(a)(1) of the Act by threatening to discharge employees because of their protected concerted activities,[3] by creating an impression of surveillance of employee union activities, by forbidding employees to talk about the Union,[4] and by interrogating employees about their protected and union activities. However, concerning this last violation, we base our finding on the Respondent's unlawful conduct in an incident on February 6, 1996,[5] when Superintendent Leonard DeClue asked employee Anthony Twitty if employee Terrence McCulloch was also in the Union. We find it unnecessary to pass on the other incidents of DeClue's alleged unlawful interrogation on February 6 and April 4 because they would be cumulative and have no effect on the remedy. See *W & M Properties of Connecticut, Inc.*, 348 NLRB 358 at fn. 1 (2006); *V&B, Inc.,* 322 NLRB 996 fn. 2 (1997), enfd. mem. 132 F.3d 1483 (D.C. Cir. 1997).

We also adopt the judge's finding that the Respondent violated Section 8(a)(1) of the Act by informing employees that it would be futile to support unionization. We adopt this finding, pro forma, because we agree with the Charging Party's contention that the Respondent's exception on this point fails to conform to Section 102.46 of the Board's Rules and Regulations. We note that the Respondent excepted to the judge's finding of this violation in its enumerated exceptions. The Respondent therein stated only that the judge's decision was "contrary to the law establishing the charges" and "contrary to the evidence adduced at the hearing." Although the Respondent set forth specific arguments on the merits for all other points in its exceptions, it did not do so for this one. Further, it failed to "designate by precise citation of page the portions of the record relied on" (Sec. 102.46(b)(1)(iii)). See *Holsum de Puerto Rico*, 344

[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.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Ferguson Electric Co.,* 335 NLRB 142 (2001). We shall also include the judge's inadvertent omissions of violations of Sec. 8(a)(1) of the Act and correct other minor inadvertent errors. Finally, we shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

[3] We note that the protected concerted activities at issue involved employee Anthony Twitty's cooperative efforts with his fellow employees to gather information about the Respondent's alleged failure to pay employees for the type of work they performed and his seeking redress from the State Division of Labor Standards, with the Union's help.

[4] The judge found that the Respondent's supervisor's, DeClue, statement to employee McCulloch that he could not talk about the Union while on the job constituted a promulgation of an unlawful rule. Member Liebman would adopt that finding. Chairman Battista and Member Schaumber find that the evidence is insufficient to establish that the Respondent, by this statement, promulgated a general rule. However, they agree that DeClue's statement unlawfully informed McCulloch that he could not talk about the Union, and thus they adopt the judge's 8(a)(1) finding.

[5] All dates are in 1996 unless otherwise indicated.

NLRB 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006); *QSI, Inc.*, 346 NLRB 1117, 1118 (2006). Indeed, the Respondent did not respond at all to the Charging Party's procedural attack.

Finally, we agree with the judge, for the reasons he sets forth, that the Respondent violated Section 8(a)(3) and (1) of the Act. The judge, applying the Board's holding in *FES*, above, concluded that the Respondent unlawfully refused to consider for hire, and refused to hire, the following nine individuals: Jim Carsel, Larry Sowers, Davis Carson, Michael Rand, Kenneth Owens,[6] Ted Birch, Steven Wilson, Robert Wirth, and William Grooms. In its exceptions to the judge's supplemental decision, the Respondent submits that the judge erred in failing to find that the Respondent's "hiring policy" would in any event have resulted in its hiring applicants other than the alleged discriminatees. The judge specifically discredited the Respondent's evidence. We adopt the judge's decision.[7]

Finally, the judge, applying *Wright Line,*[8] concluded that the Respondent unlawfully discharged employee Anthony Twitty. In its defense, the Respondent's chief argument is that Twitty was not discharged. Rather, according to the Respondent, Twitty stopped showing up for work. However, the judge discredited the Respondent's defense that Twitty quit. We adopt the judge's decision.[9]

[6] The Respondent's exception alleging that applicant Owens was unqualified is without merit. Owens' application indicates that he applied for an ironworker, rather than carpenter, position. However, Superintendent Larry Wright reviewed the applications of the discriminatees and testified that they were all qualified to perform at least some of the Respondent's work. Superintendent DeClue testified that the Respondent hired employees with specialized skills but employed them in the laborer/carpenter classification. DeClue cited the example of Terrence McCulloch who applied for a cement finisher position but was classified as a laborer/carpenter. Accordingly, we conclude that Owens was qualified to perform the Respondent's work and that Owens' application for an ironworker position did not disqualify him from employment with the Respondent. See *Wolfe Electric Co.,* 336 NLRB 684, 691 (2001), enfd. 314 F.3d 325 (8th Cir. 2002) (journeyman ironworker and certified welder was qualified for a position with the employer where the employer, in addition to hiring journeyman electricians, hired inexperienced workers to meet its other needs, including apprentices).

[7] In Member Schaumber's view, some of the discriminatees' conduct during the application process, such as appearing en masse at the Respondent's premises and videotaping the process, raises questions concerning the applicants' bona fide interest in employment. However, under extant Board precedent, which Member Schaumber applies for institutional reasons, genuine applicant status is largely irrelevant. He agrees that under current Board law the judge properly found that the Respondent violated Sec. 8(a)(3) by refusing to hire these individuals.

[8] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).

[9] To remedy the Respondent's unlawful discharge of Twitty, the judge recommended reinstatement and backpay. Twitty is not a "salt" and thus *Oil Capitol* does not apply to him. In addition, Chairman Battista and Member Schaumber apply *Dean General Contractors,* 285 NLRB 573 (1987). In this regard they note that the Respondent has not asked that *Dean General Contractors* be overruled. Chairman Battista and Member Schaumber recognize that *Dean General* represents current Board law, but they have concerns as to whether that case was correctly decided.

[10] Member Liebman dissented in *Oil Capitol* but acknowledges that it now represents current Board law.

[11] While our order provides for instatement, the instatement award is subject to defeasance if, at the compliance stage, the General Counsel fails to carry his burden of going forward with evidence that the discriminatees would still be employed by the Respondent if they had not been the victims of discrimination. *Oil Capitol Sheet Metal,* above, slip. op. at 7.

AMENDED REMEDY

Having found that the Respondent discriminatorily refused to hire the nine applicants, and refused to consider them for employment, the Respondent must make them whole for its unlawful conduct against them. The duration of their backpay period shall be determined in accordance with *Oil Capitol Sheet Metal,* 349 NLRB 1348 (2007).[10] Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be computed in accordance with the *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[11]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, BCE Construction, Inc., Branson, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Cease and desist from

(a) Threatening to discharge its employees because of their protected concerted activities.

(b) Creating the impression that it is engaged in surveillance of its employees' union activities.

(c) Discriminatorily prohibiting its employees from talking about the Union.

(d) Interrogating its employees about their union activities.

(e) Refusing to consider for hire and refusing to hire employees that show an affiliation with, or an intent to organize for, International Brotherhood of Carpenters & Jointers of America, Local # 978, or any other labor organization.

(f) Discharging its employees because of their protected and union activities.

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

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

(a) Within 14 days from the date of this Order, offer employment to Jim Carsel, Larry Sowers, Davis Carson, Michael Rand, Kenneth Owens, Ted Birch, Steven Wilson, Robert Wirth, and William Grooms, in the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled absent the discrimination against them.

(b) Make whole the nine discriminatees identified in paragraph (a) for losses sustained by reason of the discrimination against them as set forth in the amended remedy section of this Decision.

(c) Within 14 days from the date of this Order, offer Anthony Twitty full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(d) Make Anthony Twitty whole for any loss of earnings or other benefits suffered as a result of his unlawful discharge, in the manner set forth in the remedy section of the judge's decision.

(e) Within 14 days from the date of this Order, notify, in writing, the nine discriminatees who applied for employment at the Respondent's office on February 22, 1996, and who were unlawfully denied employment, that any future job applications will be considered in a nondiscriminatory manner.

(f) Within 14 days from the date of this Order, expunge from its records all reference to the unlawful actions taken against the nine discriminatees and Twitty, and within 3 days thereafter advise them in writing that this has been done and that these actions shall not be used against them in any manner in the future.

(g) 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.

(h) Within 14 days after service by the Region, post at its facility in Branson, Missouri, and at each of its various job locations, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 17, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 16, 1996.

(i) Within 21 days after service by the Region, file with the Regional Director, Region 17, 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.

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 threaten to discharge our employees because of their protected concerted activities.

WE WILL NOT create the impression that we are engaged in surveillance of our employees' union activities.

WE WILL NOT discriminatorily prohibit employees from talking about International Brotherhood of Carpenters & Joiners of America, Local # 978 or any other labor organization.

WE WILL NOT interrogate our employees about their union activities.

WE WILL NOT refuse to employ or consider for employment anyone because of our belief that the applicant

[12] 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."

may engage in organizing activity for International Brotherhood of Carpenters & Joiners of America, Local #978, or any other labor organization.

WE WILL NOT discharge our employees because of their protected and union activities.

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

WE WILL, within 14 days from the date of the Board's Order, offer employment to the nine discriminatees listed below in the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed.

Jim Carsel	Ted Berch
Larry Sowers	Steven Wilson
Davis Carson	Robert Wirth
Michael Rand	William Grooms
Kenneth Owens	

WE WILL make those nine discriminatees whole for any loss of earnings and other benefits suffered as a result of our refusal to hire them.

WE WILL, within 14 days from the date of the Board's Order, notify in writing the nine discriminatees who applied for employment at our office on February 22, 1996, and who were denied employment, that any future job applications will be considered in a nondiscriminatory manner.

WE WILL, within 14 days from the date of the Board's Order, offer employment to Anthony Twitty to his former job or, if that job no longer exists, to a substantially equivalent position without loss of benefits.

WE WILL make Anthony Twitty whole for any loss of earnings and other benefits suffered as a result of our discharge of him.

WE WILL expunge from our records all reference to the actions taken against the nine discriminatees and Anthony Twitty and advise them in writing that this has been done, and that such acts shall not be used against them in any manner in the future.

BCE CONSTRUCTION, INC

Stanley Wilson, Esq., for the General Counsel.
Thomas M. Moore, Esq., of Kansas City, Missouri, for Respondent.
Michael J. Stapp, Esq., of Kansas City, Kansas, for the Charging Party.

DECISION

PARGEN ROBERTSON, Administrative Law Judge. This matter was heard in Springfield, Missouri, on May 5 and 6, 1997. The charge in Case 17–CA–18566 was filed on February 7 and amended on April 30, 1996. The charge in Case 17–CA–18619–1 was filed on May 8, 1996. The charge in Case 17–CA–18619–2 was filed on May 8, 1996. A consolidated complaint issued on July 17, 1996.

Respondent, Charging Party (Union), and General Counsel were represented and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Respondent, Charging Party, and General Counsel filed briefs.

On consideration of the entire record and briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admitted that at material times it has been a corporation with a place of business in Branson, Missouri, where it has been engaged as a general contractor in the construction business doing commercial construction; that during the 12 months ending May 31, 1996, in conducting those business operations, it purchased and received at its facility and jobsites in Missouri goods and services valued in excess of $50,000 directly from points outside Missouri; and that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (Act).

II. LABOR ORGANIZATION

Respondent admitted that the Charging Party (Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE ALLEGATIONS

Terrence McCulloch, a carpenter, is a member of the Union. He worked for Respondent from January 16–30, 1996. McCulloch was directed by the Union to apply for work with Respondent. He did not reveal his union affiliation when hired by Respondent.

McCulloch was hired by Superintendent Leonard DeClue after he applied at Respondent's Cooper Park Tennis Stadium job. Respondent showed that its superintendents were both fully responsible and completely independent to run their respective projects. DeClue was Respondent's highest official on the Cooper Park job.

A. Section 8(a)(1): By Leonard DeClue: Threat of Discharge

At the end of their work shift on January 16, 1996, DeClue talked with McCulloch. McCulloch tape recorded the conversation. During the conversation DeClue told McCulloch that one of three employees on the job was causing him grief, that "somebody is causing me some real grief with my Labor Rela-

tions Board."[1] He went on to say, among other things:

> They don't think I'm paying them good enough and somebody here on this job has been stealing my documents out of my trailer and I'm just gonna tell you this between me and you and don't mention it to them guys, but I'm gonna find out who done it and I'm gonna fire their ass.
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> . . . .
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> I don't know what kind of shit Tony (Anthony Twitty) is putting to you, but he, I think, you know, I think that's my culprit, I'm not sure about it. I can't, you know, I can't say for certain, but I guarantee you not one of em will own up to it, whoever is doing it to me. But I've had some real f—kin' grief on this job. I been paying $13.70 or whatever it is, laborer scale, to those guys and they're whining, you know, wanting more money. I don't know what the f—k to do, you know what I'm saying.
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> . . . .
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> And they just ain't, you know, they haven't been getting it done for me and some chickenshit has went behind my back and back stabbed me right square in the ass and I'm gonna find out who it is and when I do, he's gone. So that's just between me and you, so I don't know what kind of smoke he's put to you there, but
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> . . . .
>
> I know I've got some grief on this job and somebody here has been copying my records and turning them over to the Labor Relations Board. They called a grievance against me . . . about it. These guys got a problem, they just need to come to me and talk to me, you don't like that. If you come talk to me, I might deal with it, but if you try to stick it in my back like that, I'll get rid of his ass in a heartbeat, you know. I don't need that shit. I know it wasn't you, you just got here.

1. Findings: Credibility

The evidence as to this issue is not in dispute. I find in view of the full record, that the tape recordings of Terrence McCulloch's conversations with Leonard DeClue are accurate.

2. Conclusions

An examination of the taped conversation shows that Leonard DeClue threatened that he would fire the employee causing him grief. DeClue mentions that the suspect employee is stealing and copying records from his trailer, but the overall conversation shows that it is the suspected activity of revealing evidence to the "Labor Relations Board," bringing a grievance against DeClue and inciting the employees to demand more money, that are the true motivating factors behind DeClue's threat. The credited tape recording shows that DeClue suspects that employee "Tony" Twitty is the employee that caused all those problems for DeClue. The suspected activity of giving evidence to the state division of labor standards, filing a grievance and encouraging employees to seek higher wages, are all protected concerted activity under the National Labor Relations Act (Act). DeClue's threat against an employee because of the employee's suspected activity constitutes a violation of Section 8(a)(1) of the Act.

B. Create Impression of Surveillance and Told of Futility of Unionization: Promulgated Rule Against Talking About the Union

McCulloch tape recorded a conversation with employee George Pallicere on the morning of January 24, 1996. The tape recording continued when Leonard DeClue arrived. McCulloch told DeClue that McCulloch was a member of the Union and that he was on that job to try and organize Respondent. DeClue replied that would not happen because Respondent "ain't gonna go union." McCulloch told DeClue that the Union also wanted him to investigate prevailing wage. DeClue told McCulloch that he already knew that McCulloch was union. De Clue said:

> I know how to make phone calls, too. I make phone calls on everybody anymore. I've had such f—kin' reason. I ain't puttin up with that shit. They're paying the minimum wage, they're paying union scale. This ain't a carpenter's job, this is a f—kin' concrete job. There you go.

Terrence McCulloch and DeClue had a second conversation on the morning of January 24, 1996. Among other things DeClue told McCulloch:

> BCE is not gonna go union and I don't want to hear any union bullshit on my job while you're out here working with my guys, cause you're not entitled to do that. If you are a union organizer, you can do that after work on your time, but not on my time while you're out here working.

DeClue agreed that McCulloch could talk about the Union before and after work and during lunch. He told McCulloch that he did not want to hear any union talk on the job and that BCE had told him they were not going to go union. McCulloch testified that no one had said anything about restrictions on talking until DeClue told him that he could not discuss the Union while on the job. In fact the employees did talk while working.

DeClue told McCulloch that he had been injured by the Carpenters and the Steelworkers unions when he started a company in 1978, and that those unions had been unable to man his job. DeClue told McCulloch the he would be tickled if McCulloch stayed on the job even if only part time, until it finished but the scale was what he had been paying.

1. Findings: Credibility

DeClue admitted that he did tell Terrence McCulloch that he could not talk about the Union while he was on the job.

Again, as shown above, I fully credit the tape recordings of conversations involving Leonard DeClue.

[1] Respondent contended and General Counsel agreed that on the occasions when DeClue referred to the Labor Relations Board, he was talking about the Missouri Division of Labor Standards.

2. Conclusions

After McCulloch told Leonard DeClue that he was a union organizer, DeClue replied that he knew he was with the Union in that he had made phone calls. General Counsel alleges that by holding out that he was aware of McCulloch's union activities, even though DeClue subsequently testified that he was actually unaware of McCulloch's union affiliation until told by McCulloch, Respondent created the impression of surveillance. *Gupta Permold Corp.*, 289 NLRB 1234 (1988). Leonard DeClue had full authority to discharge the Cooper Park employees. He was the only contact the employees had with Respondent. As shown above, he had already threatened to discharge an employee for going to the State division of labor standards and he told McCulloch that Respondent would not go union. As shown below other employees learned of his comments to McCulloch. Respondent argues that the actions of McCulloch and Anthony Twitty show that DeClue was not successful in coercing the employees. However, the test is not whether DeClue was successful but whether his comments tend to coerce the employees. I am convinced that the comments were coercive and constitute violation of Section 8(a)(1) of the Act.

The tape recording also shows during a later conversation on January 24 that DeClue prohibited McCulloch from talking to other employees about the Union during worktime. The full record revealed without rebuttal, that the employees were permitted to talk about anything other than the Union during work. Before January 24 there had been no restrictions on employees talking. As shown below the credited evidence also showed that in a later conversation Leonard DeClue admitted to employee Anthony Twitty that he had told McCulloch that McCulloch could not talk union during work. That evidence illustrates the pervasive nature of DeClue prohibition.

Respondent cited *Central Hardware Co. v. NLRB*, 439 F.2d 1321 (8th Cir. 1971), in arguing that an employer has the right to prohibit union solicitation during work hours. *Central Hardware* is not applicable here where the issue was not solicitation but talking and the record shows that employees were allowed to talk about anything other than the Union.

The prohibition on talking constitutes a discriminatory rule designed to coerce employees into foregoing discussions about the Union. *McGraw of Puerto Rico, Inc.,* 322 NLRB 438 (1993); *Willamette Industries*, 306 NLRB 1010 (1992); *Industrial Wire Products,* 317 NLRB 190 (1995); *Marriott Services,* 318 NLRB 144 (1995).

In view of the full record, including especially comments made by Superintendent Leonard DeClue regarding the employees' union and other protected activities, I find that Respondent engaged in 8(a)(1) violations by creating the impression of surveillance of its employees' union activities; by telling employees that efforts to organize Respondent's jobs will be futile and by promulgating a discriminatory rule against talking about the Union. DeClue made comments about knowing of union activity at a time when employees were making initial efforts to support the Union. Comments such as those by DeClue illustrating surveillance, the futility of organizing efforts and rules against discussing the Union, tend to be especially coercive at that early stage of union activity.

C. Interrogated Employees

1. February 6, 1996

During a February 6, 1996 phone conversation Leonard DeClue asked Anthony Twitty what the employees were doing walking a picket line. Twitty replied that he felt his rights had been violated when DeClue told Terry McCulloch that he didn't want anybody talking any union shit on his job. DeClue asked Twitty if he was "joining the f—kin' union now?" In the conversation DeClue denied that he had ever said Twitty could not talk about unions but he admitted telling Terrence McCulloch that he "didn't want anybody talking any union shit on (his) job." At the end of their phone conversation, DeClue told Twitty to "get your ass up here and talk to me like a man."

Twitty went to the job where he and DeClue talked. Donny Shuler was also present. Twitty tape recorded that conversation. DeClue asked if Mike McCulloch "was in the union too?" Twitty replied that Mike was not in the union as far as he knew. Twitty and DeClue argued about Terrence McCulloch's right to talk about the Union while on the job. DeClue accused Twitty of calling him a "f—kin' liar" by saying that DeClue had said that nobody could talk about the Union on the job. DeClue said that he was talking specifically to Terrence McCulloch and did not include the other employees in that comment. DeClue said that he said to Terrence McCulloch only that he could not talk about the Union on the job. Twitty explained that he was walking the picket line because he thought he heard DeClue tell Terrence McCulloch that none of the employees could discuss the Union on the job.

2. April 4, 1996

On April 3, Twitty and another employee named Greg, incorrectly drilled holes in a landing for handrails. DeClue came to the job the following morning and talked with Twitty. DeClue was angry. He asked Twitty who was going to pay for the mistake. He said, "I know you filed charges with me with the National Labor Relations Board . . . if it wasn't for the fact that I was afraid you would go file more charges on me, I'd fire your ass a long time ago." Twitty denied that he had filed charges against DeClue.

DeClue then asked Twitty, "Have you gone working for the union now?"

DeClue and Twitty had another conversation that afternoon. Twitty recorded that conversation. DeClue repeated that Twitty would have been gone a long time but for the possibility that he would file charges against DeClue.

3. Findings: Credibility

I credit the tape recordings and the testimony of Anthony Twitty. As shown herein, I do not credit the testimony of Leonard DeClue. I make that finding on the basis of his demeanor and the full record including evidence showing that DeClue's version of why Twitty was terminated conflicted with Respondent's statement of position to the NLRB.

4. Conclusions

The credited record shows that Leonard DeClue asked why Twitty was picketing the job. DeClue asked Twitty if he was joining the Union. DeClue asked if Mike McCulloch, another

employee, was in the Union. DeClue prohibited Twitty from picketing Respondent's Cooper Park job.

The credited evidence shows that DeClue again interrogated Twitty on April 4, 1996, as to whether Twitty had gone working for the Union. The evidence shows that Anthony Twitty never did reveal himself to be a union supporter.

I find that DeClue unlawfully interrogated Twitty about employees' union activities in February and April 1996. At the time of those conversations the union organizing campaign was not covert and it was not shown that Anthony Twitty was ever a known union advocate. The record illustrated that Respondent through Leonard DeClue took a strong position in opposition to the Union. The information sought by DeClue included whether employees Mike and Terrence McCulloch and Anthony Twitty were union members. DeClue was the highest ranking supervisor on the Cooper Park Tennis job with full authority to discipline including discharge. The record shows that Anthony Twitty was not truthful in his response to DeClue. Twitty untruthfully denied that he was affiliated with the Union. There was no showing that Respondent had a valid purpose in seeking to determine the extent of its employees' union activity. DeClue did not tell Twitty why he needed the information and he did not assure Twitty against reprisals. The above convinces me that DeClue's questioning was coercive even though one of the standards for determining that question was not litigated. There was no evidence offered regarding the history of Respondent's attitude towards its employees. *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964); *Cooper Tire & Rubber Co. v. NLRB*, 957 F.2d 1245, 1255–1256 (5th Cir. 1992); *Baptist Medical System*, 288 NLRB 1160 (1988); *Southwire Co.,* 282 NLRB 916 (1982); *Rossmore House*, 269 NLRB 1176 (1984); and *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

Respondent cited *NLRB v. McCulloch Environmental Services,* 5 F.3d 923 (5th Cir. 1993), in arguing that Respondent had a valid purpose in interrogation of Twitty (i.e., the cause of his picketing). However, DeClue did not limit his questioning to the cause for picketing. DeClue also asked Twitty about employees becoming union members. There was no legitimate purpose shown to support that inquiry. That interrogation tends to coerce employees in the exercise of their rights to engage or refuse to engage in union activities.

D. Section 8(a)(3)

1. February 22, 1996 refusal to hire

Jim Carsel, an organizer for the Carpenters District Council in Kansas City, applied for work along with several other applicants on February 22, 1996. There were nine applications including those of Jim Carsel, Michael Rand, Ted Berch, Robert Wirth, Larry Sowers, Kenneth Owens, Steven Wilson, William Grooms, and Davis Carson. General Counsel submitted a video recording and a transcript of the applicants in Respondent's office on February 22.

When Carsel greeted Respondent's receptionists on February 22, he announced that he and the other eight applicants were with the Union and would like to apply for work. Carsel told the receptionists that they were willing to work under Respondent's terms and conditions of employment and the money.

Several of the February 22 applications included comments to the effect that the applicant was a union organizer that would try to organize Respondent's job during his own time.

Carsel went to Respondent's Boatman's Bank job in December 1995 and talked with Superintendent Rick Shuler. Ken Shuler, another union representative and a cousin of Rick Shuler, was with Carsel. Rick Shuler said he was having a hard time getting qualified help. Carsel asked how he felt about having union help. Rick Shuler replied that he wished it was all union and that way he did not have to worry about it. Carsel asked about the process of applying for work. Rick Shuler told him to put in applications down at BCE in Branson, Missouri, and the office would send the applications out to the various job superintendents.

Jim Carsel and Danny Hyde, from the Union, went to Respondent's Branson City Hall site about a week after February 22, 1996, and talked with Superintendent Robert Younger. Carsel and Hyde had on jackets that identified them as being from the Carpenters Union. Younger told them that he might need some help and that they would have to go to the BCE office and apply for work. He said that the applications would then be sent to the various job superintendents. This was the same information Carsel had received from Respondent's Boatman's Bank job superintendent, Rick Shuler.

Rick Shuler testified that his cousin, Ken Shuler, is business agent for the Plumbers Union. He recalled talking with Ken Shuler and Jim Carsel while at the Boatman's Bank job. Shuler testified that he did not recall talking to Carsel and Ken Shuler about the Union or about hiring employees. He admitted on cross that they could have talked about hiring and that he did not remember it. According to Shuler, he could hire from applications sent to him from the main office or he could hire people walking in to the job.

Shuler testified that since he started working for Respondent in June 1995 he has hired only one employee that had no previous experience with Respondent. That was James Glover and Shuler has known Glover for 20 years. Shuler contacted Glover about working for Respondent and he hired Glover as a laborer on the Southwest Power job. The parties stipulated that no job application was included in Glover's personnel file.

Although Shuler testified that he hired Glover as a laborer, Glover's pay record shows that he was paid for concrete construction, concrete floors, carpentry, and dry wall construction.

At the time he hired Glover, Shuler had two other employees on that job. Those were Shane Perkins and Shane McGinnis. Perkins and McGinnis came to the Southwest Power job from another of Respondent's jobs, the Cooper Tennis Stadium job. Subsequently Leonard DeClue worked for Shuler on the Southwest Power job. DeClue was a leadman. DeClue brought some of his people from the Cooper Tennis job over to the Southwest Power job.

Rick Shuler testified that Carsel has visited him on the Southwest Power job. Ken Shuler was with Carsel at that time too.

Shuler was shown the employment applications of February 22, 1996. He testified that he received copies of those applications from Respondent's office. He also recalled receiving a copy of Robert Teitel's application. Shuler testified that he does not recall any of those applicants including Robert Teitel, actu-

ally coming on his jobsite.

Rick Shuler testified that he has never hired anyone whose application was sent out to him by Respondent's office. He has received no instructions from Respondent about how to handle those applications.

On cross-examination, Shuler testified that he along with Leonard DeClue and another superintendent, Larry Wright, sat down together with Respondent's attorney and discussed their anticipated testimony.

Robert Teitel testified that he is a carpenter and has been a member of the Union for 3 years. He was a member of another Carpenters' local before becoming a member of the Union. Teitel talked to Respondent Superintendent Bob Younger at the Branson City Hall job about January 15, 1996. Younger told Teitel that he did not need anyone at that time but to check back in a week. Teitel did nothing to reveal his affiliation with a union.

Teitel checked back a week later and Younger told him to check back again in another week. On his third visit to the site, Younger told Teitel that he did not do the hiring at that site. Younger said that Teitel needed to go to the main office in Branson and fill out an application. Teitel went to Respondent's main office on February 8, 1996, where he talked to a woman. He was given an application which he filled out and returned to the woman. She told Teitel that she would fax his application out to all the job superintendents and that if anyone of them needed a carpenter they would call Teitel at home.

Robert Teitel has heard nothing from Respondent.

The Union subpoenaed personnel files from Respondent and none of those files contained an application for work.

Larry Wright is Respondent's superintendent on its James River Power Station job. He has handled several jobs for Respondent since 1991, and he has always been in charge of hiring and firing on the particular job. He formerly worked for Davern Schoonover. The employer was Schoonover Brothers, a union company and Wright worked for it in the late 1960's or early 1970's.

Wright explained Respondent's hiring procedure. The superintendent may select new hires from applications sent to them from the main office or they may select people from previous jobs. He may also hire someone that comes on the jobsite looking for work. Wright could recall only one applicant that he has hired after receiving his application from Respondent's office. In that instance he first checked with a former employer listed on the application, then contacted the applicant. Normally, when Wright receives applications from the office he looks over the application then files it. He testified that he did not hire any of the alleged discriminatees because when he received their applications from the office he did not need any new employees.

After reviewing the applications of the alleged discriminatees while testifying, Larry Wright agreed that all the applicants appeared to be qualified to perform some of Respondent's work.

Wright testified that he was never prohibited by Respondent from hiring anyone with a union background.

Kendall Schoonover, Respondent vice president, recalled receiving the batch applications of the alleged discriminatees. He does not hire anyone for the field and he does not conduct interviews for those jobs. Schoonover could not recall any field applicant other than applicants for superintendent positions, ever being interviewed in the main office. Respondent currently has four superintendents, Rick Shuler, Larry Wright, Leonard DeClue, and Kenny Green. All field employees other than superintendents, are hired by the respective job superintendent. The job, or project, superintendent has 100 percent control and is 100 percent accountable for the respective job.

Schoonover testified that he does not know why none of the alleged discriminatees were hired.

Leonard DeClue testified that the Cooper Park Tennis job was his first job after being employed by Respondent. DeClue testified that he did not hire any of the alleged discriminatees because none of them came to the jobsite. He did not hire Robert Teitel because he did not need anyone at the time Teitel applied. Subsequently, on cross-examination, DeClue testified that he did not hire any of the alleged discriminatees because each applicant listed carpenter as the job sought and he did not need carpenters.

2. Findings: Credibility

In consideration of the full record and his demeanor, I find that Jim Carsel truthfully testified that Superintendents Shuler and Younger informed him of the procedure for applying for work with Respondent. To the extent there are conflicts, I do not credit the testimony of Rick Shuler or Robert Younger. Shuler admitted that he talked with Carsel and Ken Shuler while working on the Boatman's Bank job and he admitted that they may have talked about hiring even though he testified that he did not recall them discussing that subject. I credit Rick Shuler's testimony that he could hire from applications that he received from Respondent's main office.

I credit the testimony of Robert Teitel in view of his demeanor and the full record. That credited testimony shows that after Teitel was told twice to check back with Superintendent Bob Younger, Younger told him around January 29, 1996, that it would be necessary for Teitel to apply at Respondent's main office.

The credited testimony showed that Respondent advised all potential job applicants that were known to be affiliated with the Union, that the procedure for hiring required them to apply at Respondent's office. After being told to check back with Superintendent Bob Younger on two occasions, Robert Teitel was also advised that he must apply through Respondent's office.

The record evidence including the testimony of Larry Wright and Kendall Schoonover proved that Respondent rarely hired from applications made at its office. However, the credited evidence showed that none of the potential applicants known to be affiliated with the Union were ever advised to also apply at respective jobsites.

As shown herein, I do not credit the testimony of Leonard DeClue. I base that determination of DeClue's demeanor and the full record.

3. Conclusions

General Counsel alleged that Respondent refused to consider

for hire and to hire nine job applicants from February 22, 1996, because each of those nine applicants were shown to be affiliated with the Union. *NLRB v. Town & Country Electric,* 516 U.S. 85 (1995); *Town & Country Electric,* 309 NLRB 1250 (1992); *Waco, Inc*., 316 NLRB 73 (1995); *Fluor Daniel, Inc*., 311 NLRB 498 (1993); *Casey Electric,* 313 NLRB 774 (1994); and *AJS Electric*, 310 NLRB 121 (1993).

In *J. E. Merit Constructors*, 302 NLRB 301, 303–304 (1991). The Board applied the following standard in a refusal to hire question: (1) the applications were filed during hiring stages, (2) the Respondent knew of their source, (3) it harbored union animus, and (4) it acted on that animus in failing to hire.

There is no dispute but that Respondent received the applications. Applications for the below named alleged discriminatees were submitted to Respondent's office on February 22, 1996. Respondent made no effort to look behind the matters stated on the applications. The applicants were shown to be qualified to perform some of Respondent's work:

Jim Carsel	Michael Rand
Ted Berch	Robert Wirth
Larry Sowers	Kenneth Owens
Steven Wilson	William Grooms
Davis Carson	

None of the applicants were hired by Respondent. None were shown to have been considered for hire.

As to the question of whether Respondent was hiring when the applications were submitted on February 22, the Respondent's records[2] show that it hired more than nine employees over the next 2 months. Two were hired on the day after the alleged discriminatees submitted their applications. Those two, Robert Bidwell and Gregory Carr, were hired on February 23, 1996, at the Cooper Park Tennis Stadium job under Superintendent Leonard DeClue. In consideration of Respondent's records including workmen's compensation codes, Bidwell was shown to perform concrete construction and Gregory Carr performed concrete construction and carpentry.

On March 11, 1996, Respondent hired two more employees at the Cooper Park Tennis Stadium. Mark Daniel and Lloyd Trail both performed carpentry work on that job.

On March 20, 1996, Respondent hired James Glover. Glover worked at the Southwest Power Station job. He worked at concrete construction; concrete floors, drives, walk; carpentry and as wall board installer.

On March 27, 1996, Respondent hired Shannon D. Smalley. Smalley did concrete construction and carpentry at Respondent's Cooper Park Tennis Stadium job.[3]

On April 1, 1996, Respondent hired Lewis Eugene Warren. Warren did concrete construction and carpentry at Respondent's Springfield Community Center job.

David Shannon Burns was hired on April 3, 1996. Burns worked at the Cooper Park Tennis Stadium where he did concrete construction and carpentry.[4] Edward Hurley was hired on the Cooper Park Tennis Stadium on April 5, 1996. Hurley did carpentry work.

Respondent went on to hire three more employees later in April. It hired another employee in July, one in September, and at least four more in October 1996.

As shown herein Leonard DeClue complained to both Terrence McCulloch and Anthony Twitty about the poor quality of work he was receiving from the other Cooper Park Tennis Stadium employees. Rick Shuler complained to Jim Carsel and Ken Shuler that he needed qualified workers on the Boatman's Bank job.

Respondent was seeking qualified employees and Respondent actually hired applicants during the period after the nine alleged discriminatees submitted their applications on February 22, 1996.

Respondent pointed to its Exhibit 2 as showing that it received applications from a total of 25 applicants between January and July 1996, that were not hired. Those 25 applications included 16 that failed to show affiliation with a union. In consideration of that argument and the evidence mentioned above, it appears that Respondent hired 13 employees from February 23 through July 1996; it received applications from 16 employees that showed no union affiliation during that period that it did not hire; and it received 9 applications from union affiliated employees on February 22, 1996, that it did not hire.
Respondent did not consider any of the union affiliated applicants for employment. None of those applicants were interviewed by Respondent either by phone or in person.

The record does not show whether the 16 other applicants were considered for employment.

The evidence clearly proved that Respondent was hiring during the period immediately following February 22. Despite Respondent's argument I am unable to conclude that it did not discriminate against the alleged discriminatees. The record failed to show whether it considered hiring any of the 16 applicants not affiliated with the Union. On the other hand, none of the alleged discriminatees were considered for employment despite the fact that all were admittedly qualified to perform some of Respondent's work.

As to whether Respondent knew of the source of the nine alleged discriminatees, Jim Carsel submitted nine applications to the receptionist at Respondent's office on February 22. Jim Carsel announced they were with the Union and would like to apply with BCE.

Several of the applications submitted by Carsel on February 22 in a batch, included comments about the Union. Among other things, Jim Carsel's application includes the notation, "Union organizer Member 311 Carpenters if hired I will try to organize BCE People on my own time." Michael Rand's application includes a comment "Carpenter for 19 years Local 978." Ted Berch listed "Danny Hyde, Carpenter Union BA" as a reference. Robert Wirth included the comment, "member Carpenters Local 978 would like to organize on my time" on his

[2] See BCE Exh. 1 and records of Respondent submitted by General Counsel.

[3] GC Exh. 27 shows that Shannon D. Smalley formerly worked for Respondent until January 12, 1996, on the Cooper Park Tennis Stadium. Smalley came back to work at Cooper Park on March 27, 1996.

[4] GC Exh. 16(b) shows that David Shannon Burns formerly worked for Respondent until January 12, 1996, on the Cooper Park Tennis Stadium. Burns came back to work at Cooper Park on April 3, 1996.

application. Steven Wilson included on his application the comment, "If hired I will work to my abilities and attempt to organize workers on my own time. I am a member of Carpenters Local # 978 Spfld. Mo." Will Grooms wrote on his application, "I am a member of Carpenter's 978 in Springfield, Mo. I intend to organize on my own time." David Carson wrote on his application, "Trained union organizer—have taught classes in organizing. If hired I do intend to work to organize any non-organized workers during my own time. Member of Carpenters Local Union # 978."

In view of the above I find that Respondent knew that the alleged discriminatees were affiliated with the Union and would attempt to organize Respondent's jobs.

As to the question of animus, the record shows that Respondent harbored union animus. Respondent created the impression of surveillance of the employees' union activities; it promulgated a rule against its employees talking about the Union; it interrogated employees about employees' union affiliation and it warned that it would not go union.

In determining the issue of animus I am mindful of the fact that all the 8(a)(1) activity came from Superintendent Leonard DeClue. Nevertheless, during the time when DeClue engaged in unlawful activity, Respondent through Superintendents Shuler and Younger were informing obvious union supporters that it was necessary to apply for work at Respondent's main office.

If, as Respondent argues, it was unnecessary to apply at the office and if it was unlikely anyone would be hired unless they applied on a job, it appears that more than one of Respondent's superintendents was involved in misleading prounion applicants into a job search that was unlikely to be successful. Therefore, I am not persuaded that Respondent's unlawful activity was limited to one superintendent. As to the issue of refusal to hire, it appears that others were also involved.

I find that the record also shows that Respondent used pretext in order to hide the true reason it did not hire or even consider hiring any of the alleged discriminatees. *Fluor Daniel, Inc.,* supra; *Adam Wholesalers,* 322 NLRB 313 (1966). When the alleged discriminatees appeared at Respondent's office on February 22, the receptionists gave them application forms. She subsequently thanked them for submitting applications. They were told by Respondent's receptionists that their applications would be faxed to all Respondent's jobs for consideration by the superintendents. She gave the applicants a list of jobs but told them that the phone numbers on that list were not correct.

Respondent Superintendent Rick Shuler told Jim Carsel and Ken Shuler that they needed to go to Respondent's office to apply for a job. Robert Younger, another superintendent, told Union Representatives Carsel and Danny Hyde and applicant Robert Teitel the same thing.

Respondent, at a time before it learned that the applicants' appearance at its office on February 22 was video recorded, submitted a letter of position to the NLRB Regional office. In that June 17, 1996 letter, Respondent pointed out that the February 22 applicants were told that BCE did not hire from its home office, that generally it did not take applications for hire at its home office and that field employees were hired by the respective project superintendents upon application made directly to the respective superintendent.

The video recording of the February 22 appearance of Jim Carsel and other applicants at Respondent's office proved that Respondent was not truthful. The applicants were not told that BCE generally did not take applications for hire at its home office and they were not told that field employees needed to make application directly to the respective project superintendents.

I also find pretext in Respondent's contentions that it did not consider hiring any of the alleged discriminatees because they were carpenters and Respondent did not have a need for carpenters. The record, as shown above, proved that some of the employees hired after February 22, actually worked as carpenters. Moreover, the record failed to show that a single superintendent actually determined not to consider one or more of the alleged discriminatees for that reason. Leonard DeClue testified that he was not seeking carpenters but he failed to show that he actually rejected a specific applicant for that reason. Actually, as shown herein, DeClue hired Anthony Twitty after Twitty told DeClue that he was a carpenter. Nevertheless, DeClue offered Twitty a job as a laborer. I find that Respondent's claim that the nine alleged discriminatees were rejected because they were seeking carpenter jobs was a fabrication.

In fact the entire record shows that the applicants were not rejected because they were carpenters. Throughout the record Leonard DeClue was shown to complain about the incompetence of his employees. DeClue repeatedly praised one employee shown to be a carpenter, Terrence McCulloch. Additionally, Superintendents Rick Shuler and Bob Younger expressed their need for qualified help. That evidence illustrates that Respondent was not in a position of rejecting qualified help because the application failed to show with precision they were seeking an available job. As shown herein, Respondent's own records showed that many of its employees engaged in carpentry. That was shown through Respondent's use of employment security codes in some of its records.

Despite its claim to the contrary, Respondent did not routinely require applicants to appear at the jobsite. In fact employees were hired even though they did not appear at the jobsites. Those included William Baker and Ronnie Hardesty.

Moreover, it would not improve Respondent's position to show that overt union organizers were not hired because they failed to apply with its superintendents in view of evidence that they were never told to apply at the respective jobs. Two of its superintendents told the union representatives including applicant Jim Carsel, that they needed to apply for work at Respondent's office. If the alleged discriminatees were misled at a time after Respondent knew of their union affiliation, that action in itself should constitute a violation of Section 8(a)(1) and (3) of the Act.

General Counsel proved that Respondent was motivated to refuse to consider for hire and to hire the below named job applicants and that Respondent engaged in pretext in an effort to hide the fact that it took that action because of the alleged discriminatees union affiliation. I also find that Respondent failed to prove that it would have refused to consider or to hire the following applicants in the absence of protected and union activities. As shown above, the reasons given by Respondent

were shown to be false. *Manno Electric, Inc*., 321 NLRB 278 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983):

Jim Carsel	Michael Rand
Ted Berch	Robert Wirth
Larry Sowers	Kenneth Owens
Steven Wilson	William Grooms
Davis Carson	

E. The May 6, 1996 Layoff of Anthony Bank Twitty

Anthony Twitty is a carpenter and a member of the Union. He has been a local union member since September or October 1994. Before that he belonged to another local. He worked for Respondent from around September 1995 until April 26, 1996.

He applied for work with Leonard DeClue at Respondent's Cooper Park Tennis Stadium after the Union asked him to apply. Twitty told DeClue that he was a journeyman carpenter. DeClue told him that he could hire him as a laborer, that he was not hiring carpenters. DeClue said that everything on the job paid laborers' wages. Twitty did not reveal his union affiliation to Respondent.

Twitty maintained a daily log while he worked for Respondent. He listed the employees and the work performed by each and the time spent at each job. He explained what he was doing to the other employees. Twitty routinely turned his information in to the Union. Eventually employees' were awarded backpay pursuant to a prevailing wage complaint. On December 13, 1995, and January 8, 1996, Twitty received backpay equivalent to carpenters' wages for installing reinforcing steel and installation of prefabricated forming systems for Respondent.

Anthony Twitty overheard part of a conversation in late January or early February 1996 involving Terrence McCulloch and Leonard DeClue. Twitty and Mike McCulloch walked up as Terrence and Leonard were talking. Twitty overheard DeClue say that he did not want anybody talking any union shit on his job. Afterward Twitty talked to Mike McCulloch about what he had overheard. Before that occasion there had been no restrictions placed on the employees talking while working.

After overhearing DeClue tell Terrence McCulloch that he could not talk about the Union at work, Twitty prepared a sign against Respondent and walked a picket line outside the Cooper Park job. The sign stated that BCE had committed unfair labor practices. He walked the picket line for about 15 to 20 minutes each morning until time to report for work. Then Twitty would put up the picket sign and report for work. He also walked the picket line during lunch.

On February 6, Twitty received a phone call from Leonard DeClue. Twitty recorded that phone conversation.

During the phone conversation DeClue asked what the employees were doing walking a picket line. Twitty replied that he felt his rights had been violated when DeClue told Terry McCulloch that he didn't want anybody talking any union shit on his job. DeClue asked Twitty if he was "joining the f—kin' union now?" DeClue denied that he had said Twitty could not talk about unions but he admitted telling Terrence McCulloch that he "didn't want anybody talking any union shit on (his) job." DeClue told Twitty to "get your ass up here and talk to me like a man."

Twitty went to the job where he and DeClue talked. Donny Shuler was also present. Twitty tape recorded that conversation. DeClue asked if Mike McCulloch "was in the union too?" Twitty replied that Mike was not in the union as far as he knew. Twitty and DeClue argued about Terrence McCulloch's right to talk about the Union while on the job. DeClue accused Twitty of calling him a "f—kin' liar" by saying that DeClue had said that nobody could talk about the Union on the job. DeClue said that he was talking specifically to Terrence McCulloch and did not include the other employees in that comment. DeClue said that he told Terrence McCulloch only that McCulloch could not talk about the Union on the job. Twitty explained that he was walking the picket line because he thought he heard DeClue tell Terrence McCulloch that none of the employees could discuss the Union on the job. DeClue said to Twitty:

> This is not a union job.
>
> . . . .
>
> and we're not gonna go union.
>
> . . . .
>
> Okay, it don't, it don't and I wanted this all behind me. Now, what I'm saying is now, I've had some complaints from people on this job, I don't know who did it.
>
> . . . .
>
> About f—kin' pay scale, they're not getting paid for this, they're not getting paid for that. I know that you've told guys to watch their times for what they do.
>
> . . . .
>
> If you've got a beef about the pay scale, I'm the mutherf—ker you need to talk to, not the rest of the crew, Tony.
>
> . . . .
>
> Now listen to me, I don't need you out there walking a f—kin' picket on me, causing me some more shit.
>
> . . . .
>
> If you're gonna picket me, and I have this legal right, if you're gonna picket me, for some f—kin' reason, that's not what you're entitled to do.
>
> . . . .
>
> There is no way that you're gonna work for this company and walk the picket on their job.
>
> . . . .
>
> If you've got a beef, you need to go to the Labor Relations Board or something or somebody else. Because that's not the way to handle it by walking picket out here.
>
> . . . .
>
> No, you won't be out there walking no picket on me, see.
>
> . . . .
>
> There's no reason for you to even try to think about walking

> a picket on me out there, Tony. For what reason are you doing it.
>
> . . . .
>
> And I got guys on my job that's causing me all kind of f—kin' grief.
>
> . . . .
>
> There's no need in it, cause, you can, if you want to talk about the union out there, you talk about the union to yourself all you want to.

Twitty received a letter from Respondent dated February 9, 1996. It advised Twitty that Respondent had learned that Twitty was walking a picket on Pythian Street. Twitty was advised to confine his picketing to the gate used by Respondent.

Anthony Twitty testified that he stopped picketing upon receiving the February 9 letter from Respondent.

On April 3 Twitty and another employee named Greg incorrectly drilled holes in a landing for handrails. DeClue came to the job the following morning and talked with Twitty. DeClue was angry. He asked Twitty who was going to pay for the mistake. He said, "I know you filed charges with me with the National Labor Relations Board . . . if it wasn't for the fact that I was afraid you would go file more charges on me, I'd fire your ass a long time ago." Twitty denied that he had filed charges against DeClue.

DeClue then asked Twitty, "Have you gone working for the union now?"

DeClue and Twitty had another conversation that afternoon. Twitty recorded that conversation. DeClue repeated that Twitty would have been gone a long time, but for the possibility that he would file charges against DeClue.

Twitty's last day of work for Respondent was April 26, 1996. The following morning he reported for work but was told by Leonard DeClue there was no work. However, there were several other employees working on the site. Twitty reported to work the next day, but again was sent home by DeClue.

The following Friday Twitty phoned DeClue and asked if he could come by and pick up his check. When he arrived at the trailer his check was taped to the door. Twitty started walking toward DeClue, but DeClue walked away. Twitty was unable to talk with DeClue. Twitty noticed that some of the employees were working on the Tennis Stadium site.

Twitty was sent home after reporting for work the following Monday. It had rained and Twitty and another employee were sent home. After that occurrence Twitty started looking for work.

After refreshing his memory with a prehearing affidavit, Twitty testified about a phone conversation he had with Leonard DeClue about May 8, 1996. Twitty asked DeClue about work. DeClue told him there was no need coming back to the job because the work was finished.

Early in his work for Respondent, Leonard DeClue told Twitty that he was impressed with Twitty's work and he had a big Southwest Power plant job. DeClue said that if everything worked out he did not see any problem with taking Twitty to the Southwest Power job.

Leonard DeClue denied that he ever told Twitty that there was no work for Twitty and that he could go home. He testified that Respondent had work for Twitty at the Cooper Park Stadium until that job was completely finished. DeClue testified that he was unsuccessful in efforts to reach Twitty and Twitty did not show up for work after April 26. He phoned Twitty's home on two occasions and left a message on the answering machine that Respondent was in the process of cleaning up and that Twitty still had a job.

On cross-examination, DeClue admitted that he may have sent some employees home due to bad weather after April 26, but that he does not recall. He admitted that it is possible that he sent Twitty home on some of those days. DeClue admitted that the records show that a number of employees on the Cooper Park work force did not work on several occasions after April 26.

1. Findings: Credibility

I am convinced that Anthony Twitty testified to the best of his recollection. I make that finding in view of the full record and Twitty's demeanor. In making that determination I am aware of inconsistencies between Respondent's records and Twitty's testimony as to which employees were working on various days that he appeared on the Cooper Park job after April 26. However, I find nothing in that testimony to show that Twitty intentionally testified untruthfully.

I find that Leonard DeClue was not truthful. I make that finding in view of DeClue's demeanor during both direct and cross-examination, and the full record. Moreover, DeClue's testimony conflicts with Respondent's express position regarding the allegations as to Anthony Twitty's termination. In a June 17, 1996 letter to the NLRB, Respondent stated that Anthony Twitty and a number of other employees were laid off on April 26 because of lack of work. DeClue testified that Twitty was not laid off, but that he had quit by not reporting for work after April 26.

2. Conclusions

I shall consider whether General Counsel proved that Respondent terminated Anthony Twitty because of Twitty's protected activity and, if so, whether Respondent proved that it would have terminated Twitty in the absence of his protected activity. *Manno Electric, Inc*., 321 NLRB 278 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

The record shows that Anthony Twitty engaged in both union and other protected activity. He was sent to the job by the Union. While there he maintained a log and encouraged other employees to maintain their time. Leonard DeClue suspected that Twitty was behind the prevailing wage claims that eventually resulted in Respondent having to pay backpay to its Cooper Park Tennis Stadium employees. As shown above, the credited evidence proved that DeClue told Terrence McCulloch that he though Twitty was the employee behind the prevailing wage dispute.

Twitty picketed Respondent's Cooper Park Tennis Stadium job charging that Respondent engaged in unfair labor practices.

DeClue and Twitty had heated conversations about Twitty's picketing. As shown above, I find that DeClue threatened Twitty that he could not picket Respondent's job. As shown above, DeClue also interrogated Twitty about his and other employees' union affiliation on February 6 and April 4, 1996. Respondent's union animus was demonstrated by that and other unfair labor practice violations as shown above. Those violations included a January 16 threat to discharge employees for complaining to a State agency about Respondent's failure to pay the prevailing wages; by creating the impression it was engaged in surveillance of its employees' union activities; by promulgating a rule which discriminatorily prohibited employees to talk about the Union; and by interrogating employees about its employees' union activities.

I find that Leonard DeClue engaged in pretext by contending that Twitty had quit his job when in fact DeClue told Twitty to leave. After April 26, DeClue routinely sent Twitty home and eventually told Twitty not to return to work. The record shows that DeClue continued to supervise work at the Cooper Park Tennis Stadium after April 26, using employees that he claimed were not competent to perform the work. DeClue used those employees despite the availability of Anthony Twitty. DeClue admitted that Twitty was a good worker.

Respondent also engaged in pretext by contending in its position statement to the NLRB that it had laid off Twitty and other employees at the completion of the Cooper Park Tennis Stadium job. Respondent's records as well as the testimony of Twitty and Leonard DeClue show that was not the case. Respondent continued to use employees on that job past April 26. A finding of pretext may be based in part on a respondent adding to the reasons for discharge. *Sawyer of Napa,* 300 NLRB 131 (1990); *Adam Wholesalers*, supra.

I find in view of the full record and, especially the abovementioned facts, that Respondent terminated Anthony Twitty and thereafter failed and refused to use him to work on the job at Cooper Park and on other jobs to which he would have been transferred because of Respondent's animus against Twitty's union and other protected activities.

The record shows that Respondent would not have terminated Twitty in the absence of his protected activity. Respondent continued to use other employees after April 26 on the Cooper Park job and, on completion of that job, employees were transferred to other jobs. Twitty was not used for the remaining work at Cooper Park and he was not transferred to another job. *Manno Electric, Inc*., supra; *Wright Line*, supra; *NLRB v. Transportation Management Corp*., supra.

CONCLUSIONS OF LAW

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

2. International Brotherhood of Carpenters & Joiners of America, Local # 978 is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening to discharge its employees because of their protected concerted activities; by creating the impression of surveillance of its employees' union activities; by informing its employees of the futility of any effort to unionize; by promulgating a rule that discriminatorily prohibited employees from talking about the Union; and by interrogating its employees about their protected and union activities, Respondent has engaged in conduct violative of Section 8(a)(1) of the Act.

4. By refusing to consider for hire and refusing to hire any of the below named employees because of their union affiliation, Respondent has engaged in conduct violative of Section 8(a)(1) and (3) of the Act:

Jim Carsel	Michael Rand
Ted Berch	Robert Wirth
Larry Sowers	Kenneth Owens
Steven Wilson	William Grooms
Davis Carson	

5. By terminating employee Anthony Twitty and thereafter failing and refusing to employ Twitty, Respondent has engaged in conduct violative of Section 8(a)(1) and (3) of the Act:

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6), (7), and (8) of the Act.

THE REMEDY

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

I have found that Respondent has illegally refused to consider for hire and to hire:

Jim Carsel	Michael Rand
Ted Berch	Robert Wirth
Larry Sowers	Kenneth Owens
Steven Wilson	William Grooms
Davis Carson	

In view of the above, it appears that Respondent would have hired all or at least some of the discriminatees but for its illegal discriminatory action. If it is shown at the compliance stage of this proceeding that the Respondent, but for its discrimination, would have hired any of the discriminatees, I shall order Respondent to offer immediate and full employment to each of those particular discriminatees to a position for which that employee is qualified or, if those positions no longer exist, to substantially equivalent positions. (*B E & K Construction Co.*, 321 NLRB 561 (1996).)

I have also found that Respondent illegally terminated on April 26, 1996, and thereafter refused to employ Anthony Twitty. I shall order Respondent to offer immediate and full employment to Anthony Twitty to his former position or, if that position no longer exists, to a substantially equivalent position.

I shall further order Respondent to make the above-named discriminatees whole for any loss of earnings suffered as a result of the discrimination against them. Backpay shall be computed as described in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the

entire record, I issue the following recommended[5]

ORDER

The National Labor Relations Board orders that the Respondent, BCE Construction, Inc., Branson, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to discharge its employees because of their protected activities.

(b) Creating the impression that it is engaged in surveillance of its employees union activities.

(c) Informing its employees that it is futile for them to support International Brotherhood of Carpenters & Joiners of America, Local # 978, or any other labor organization.

(d) Promulgating a rule that discriminatorily prohibits its employees from talking about the Union.

(e) Interrogating its employees about their protected and union activities.

(f) Refusing to consider for hire and refusing to hire employees that show affiliation with or, an intent to organize for, International Brotherhood of Carpenters & Joiners of America, Local # 978, or any other labor organization.

(g) Terminating and refusing to employ its employees because of their protected or union activities.

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

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

(a) Within 14 days of this Order, offer immediate and full employment to Anthony Twitty to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice and offer immediate and full employment to the discriminatees from the following list who are determined in the compliance stage of this proceeding should have been hired to available positions for which each was qualified after their applications or, if those jobs no longer exist, to substantially equivalent positions:

Jim Carsel	Michael Rand
Ted Berch	Robert Wirth
Larry Sowers	Kenneth Owens
Steven Wilson	William Grooms
Davis Carson	

(b) Within 14 days of this Order, make Anthony Twitty whole for its discrimination in the manner set forth in the remedy section of this decision.

(c) If it is shown at the compliance stage of the proceeding that the Respondent, but for its discrimination, would have hired any of the discriminatees to jobs that became available subsequent to their applications, the Respondent shall make them whole for its discrimination in the manner set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records, reports, and all other records 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 Branson, Missouri, and at each of its various job locations, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 16, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director, Region 17, a sworn certification of a responsible official on a from provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C., August 11, 1997

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 threaten to discharge our employees because of their protected concerted activities.

WE WILL NOT create the impression that we are engaged in surveillance of our employees' union activities.

WE WILL NOT promulgate rules which discriminatorily prohibit employees from talking about International Brotherhood of Carpenters & Joiners of America, Local # 978, or any other

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

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

labor organization and WE WILL NOT inform our employees that it is futile for them to try and organize a union.

WE WILL NOT refuse to employ or consider for employment anyone because of our belief that the applicant may engage in organizing activity for International Brotherhood of Carpenters & Joiners of America, Local #978, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7.

WE WILL NOT discharge our employees because of their protected concerted activities.

WE WILL, within 14 days from the date of the Order, offer employment to any of the following employees that were denied employment because of our unlawful actions:

Jim Carsel	Michael Rand
Ted Berch	Robert Wirth
Larry Sowers	Kenneth Owens
Steven Wilson	William Grooms
Davis Carson	

WE WILL, within 14 days from the date of the Order, offer employment to Anthony Twitty to his former job or, if that job no longer exists, to a substantially equivalent position without loss of benefits.

WE WILL make the above named employees whole for any loss of earnings and other benefits resulting from our discharge and refusal to hire them, less any net interim earnings, plus interest.

BCE CONSTRUCTION, INC.

Stanley Williams, Esq., for General Counsel.
Thomas M. Moore, Esq., of Kansas City, Missouri, for Respondent.
Charles R. Schwartz, Esq., of Kansas City, Kansas, for Charging Party.

SUPPLEMENTAL DECISION

The National Labor Relations Board remanded (GC Exh. 52–A) the decision (JD (ATL)–52–97) in this matter for consideration in light of its decision in *FES,* 331 NLRB 9 (2000). The parties responded to an order to show cause (see GC Exh. 52–B). I found that all the issues raised in *FES* had been covered in my original decision with the exception of the question of whether the alleged discriminatees would have been considered for hire, and actually hired, if Respondent had examined each of their applications in a nondiscriminatory manner. I ordered a limited reopening of the hearing for the sole reason of dealing with that issue (GC Exh. 52–D) and a hearing was held in Overland Park, Kansas, on April 25, 2001.[1] The parties filed briefs.

I found in the underlying decision and in my order for limited reopening of hearing that the record evidence proved that Respondent had both refused to consider for hire and had refused to hire Jim Carsel, Michael Rand, Ted Berch, Robert Wirth, Larry Sowers, Kenneth Owens, Steven Wilson, William Grooms, and Davis Carson on and after February 22, 1996, and that it was motivated in doing so by union animus. I also found that Respondent was hiring at material times and that the alleged discriminatees had experience or training relevant to the jobs that Respondent filled. (*FES,* above.)

In consideration of the one question, which is outstanding for my consideration,[2] Respondent called its vice president, Kendall Schoonover. Schoonover testified that Respondent's policy at relevant times vested complete hiring responsibility with its field superintendents. The practice was for their superintendents to network with each other and hire on the basis of consulting friends, family, relatives, acquaintances, referrals from subcontractors, suppliers, and also referrals like from the Springfield Contractors Association. In the underlying decision, I found that Respondent's superintendents, Rick Shuler and Robert Younger, told potential job applicants that Respondent's policy was that job applicants were required to apply at Respondent's office in Branson, Missouri. I also found that Respondent told all job applicants known to be affiliated with the Union that the procedure for hiring required them to apply at Respondent's office. The record demonstrated that Respondent knew that all the alleged discriminatees were affiliated with the Union.

Kendall Schoonover testified that Respondent's Exhibit 1 shows Respondent's hires from January 1, 1996, until April 16, 1997. He testified that Respondent hired two applicants because each was related to one of its superintendents. Tom Shuler was hired because he is the brother of Superintendent Rick Shuler. Tom Shuler is listed second from the bottom on Respondent's Exhibit 1 as a laborer that was hired on October 31, 1996. Schoonover testified that Respondent also hired Matthew Greene, the son of Superintendent Kenny Greene. However, Matthew Greene was not listed on Respondent's Exhibit 1.

Schoonover testified that a "good portion" of the people listed on Respondent's Exhibit 1 were actually known to the superintendents. On cross-examination, Schoonover admitted that he had nothing to do with hiring. However, he testified that Blain Fries was a referral from a gentleman that was a foreman on the Missouri Rehab Center; Rick West was a former associate of Superintendent Leonard DeClue and DeClue knew Edward Hurley; Andy Simms was an acquaintance of Superintendent Robert Younger; and James Glover was a 20-year friend of Rick Shuler. Charging Party objected and moved to strike the above testimony as hearsay. I denied Charging Party's request to strike but the record shows that Schoonover's testimony was hearsay.

Respondent's Exhibit 1 does not show that Blain Fries was

[1] During a telephone conference involving all parties, I granted Respondent's motion to revoke Charging Party's subpoena duces tecum. Charging Party moved after the conclusion of the hearing to include that subpoena and related documents, in the official record. I grant that request.

[2] As specified in the order for limited reopening of hearing, the outstanding issue for consideration was "whether Respondent would have hired the alleged discriminatees instead of others including applicants that were actually hired, if the alleged discriminatees had been considered on a nondiscriminatory basis."

hired but the word "Fries" is hand printed at the bottom of the page. According to Respondent's Exhibit 1, Rick West was hired on October 23, 1996, as a laborer; Andy Simms was hired on October 20, 1996, as a carpenter; and James Glover was hired on March 20, 1996, as a laborer. Seventeen applicants (not including Blain Fries) were shown on Respondent's Exhibit 1, as being hired after February 22, 1996.

Findings: Credibility

In view of his demeanor and the full record, I am convinced that Kendall Schoonover was not truthful in his testimony during the instant hearing. I am especially convinced that he did not tell the truth in his testimony regarding Respondent's hiring practice. Although he testified to the effect that superintendents were fully responsible for hiring and that acquaintances constituted a "good portion" of those hired, the full record failed to support those assertions. In fact the record shows that superintendents told applicants that it was necessary to go to Respondent's office in Branson to apply. Additionally, the credited record shows Superintendents Rick Shuler and Leonard DeClue told others that Respondent was having trouble getting qualified help or about the poor quality of their employees' work. I found that when Shuler was asked how he felt about having union help he replied that he wished it was all union and that way he didn't have to worry about it. (JD (ATL)–52–97, slip op. at 8.) Additionally, Superintendent Younger told applicant Robert Teitel that he did not do the hiring at the jobsite. Instead, according to Younger, Teitel needed to go to Respondent's Branson office and apply. Moreover, the record showed there is no writing setting forth Kendall Schoonover's professed hiring policy. The record proved, and I find, that Respondent was unable to fulfill its staffing requirements with competent employees at material times and that its superintendents were telling union applicants they must apply at its office in Branson.

Schoonover's testimony that good portions of its hires were acquaintances, his testimony that some of the hires were family members, and his testimony as to why the superintendents hired the employees listed on Respondent's Exhibit 1, was objected to as hearsay. Schoonover had no first hand knowledge of why any of the Respondent's Exhibit 1 hires were selected for employment. Additionally, Schoonover through hearsay testimony was able to identify only five, or perhaps seven,[3] applicants as qualifying under the policy testified to by Schoonover. Moreover, two undercover union members were hired (McCulloch and Twitty) even though both failed to qualify under Schoonover's professed policy of hiring. At least 12 of the applicants hired after February 22, 1996 (as shown R. Exh. 1), were not shown to have qualified under Schoonover's professed hiring policy. In view of the above matters, his demeanor, and the full record, I do not credit the testimony of Kendall Schoonover.

Conclusions

As shown in the order directing the reopening of the hearing, the issue that I shall consider is "would Respondent have hired the alleged discriminatees if it had considered their respective applications in a non–discriminatory manner." I found in the underlying decision that General Counsel proved its case. A review of that decision along with the record at that time, shows that General Counsel proved its case in accord with the guidelines announced in *FES,* above. General Counsel proved that Respondent was hiring during the period after February 22, 1996; that the nine alleged discriminatees had experience or training relevant to the positions for hire; and that animus contributed to Respondent's decisions to not consider and hire the alleged discriminatees (see GC Exh. 52–D). Additionally, the record evidence revealed that Respondent engaged in pretext in order to avoid considering for hire and actually hiring the alleged discriminatees. That evidence and the full record of this hearing as well as the previous hearing, shows that if Respondent had considered the respective applicants in a nondiscriminatory manner, it would have hired all nine alleged discriminatees.

The only evidence Respondent offered to prove that it would have failed to consider and to hire the alleged discriminatees if it had examined each respective application in a nondiscriminatory manner was the testimony of Kendall Schoonover. I have discredited that testimony. Moreover, even if I should consider that Schoonover testified truthfully, his testimony failed to show that Respondent would have rejected the alleged discriminatees' applications if it had considered them in a nondiscriminatory manner. Schoonover was able to identify only five employees listed on Respondent's Exhibit 1, as falling within its alleged hiring policy. Therefore, at the most, Respondent failed to prove that it would have selected 12 applicants listed as hires on Respondent's Exhibit 1, as applicants that would have been selected instead of the alleged discriminatees if the applications had been considered on a nondiscriminatory basis. In consideration of the full record and my credibility findings, I find that Respondent failed to show that it would have hired any of those hired after February 22, 1996, and listed on Respondent's Exhibit 1, ahead to the alleged discriminatees, if it had considered the applications of the alleged discriminatees in a nondiscriminatory manner.

In addition to the testimony by Kendall Schoonover, Respondent argued in its brief that the hiring of others listed on Respondent's Exhibit 1 was justified in consideration of the policy alleged by Schoonover. In that regard Respondent argued that its hire of Robert Bidwell, Greg Carr, Mark Daniel, Lloyd Trail, Lewis Warren, Daryl Theus, Maurice Wright, Rick West, and Robert Lakins was in accord with the practice testified to by Schoonover. The record evidence regarding those hires was considered in reaching the original decision. Of course, Respondent is now contending that evidence should be examined in light of Schoonover's testimony during the instant hearing. However, in view of my findings discrediting Schoonover's testimony, Respondent's argument fails and there is no need to reexamine that evidence. Instead the record evidence as shown in the underlying decision, the order for a limited hearing, and this supplemental decision, shows that one of the outstanding hallmarks of Respondent's hiring practice on and after February 22, 1996, was its determination not to hire

[3] As shown above, neither Blain Fries nor Matthew Greene were included among the typed names on R. Exh. 1.

anyone affiliated with the Union. As shown above, the credited evidence illustrated that if Respondent had not considered union affiliation, when confronted with the applications of the alleged discriminatees, it would have hired all nine at its earliest opportunity after February 22. An examination of Respondent's Exhibit 1 shows the dates when Respondent actually hired nine employees after February 22 and, thereby, illustrates the precise dates when it would have hired the alleged discriminatees if it had considered each respective application on a nondiscriminatory basis.

Nevertheless, Respondent argued,[4] "practically everyone hired by BCE from February 22, 1996 through the end of 1996 were either relatives (Tom Shuler, Matthew Greene was hired on 12/31/96) or were referrals from other BCE employees or long time friends or acquaintances of the superintendents who hired them." However, the record also shows that Respondent's superintendents were unhappy with the quality of the work of its employees in 1996 and those superintendents told others that they were unable to get good employees during that period. The record also shows that Respondent refused to consider for hire or hire the alleged discriminatees because of their union affiliation. Finally, my findings show that Respondent has fabricated a hiring policy to suit the facts rather than showing that it had a hiring policy in place when it hired during 1996. Therefore, I am convinced that the evidence of Respondent's actual 1996 hires failed to show that Respondent would not have hired the alleged discriminatees if it had considered their respective applications on a nondiscriminatory basis.

CONCLUSIONS OF LAW

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

2. International Brotherhood of Carpenters & Joiners of America, Local # 978 is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening to discharge its employees because of their protected concerted activities; by creating the impression of surveillance of its employees' union activities; by informing its employees of the futility of any effort to unionize; by promulgating a rule that discriminatorily prohibited employees from talking about the Union; and by interrogating its employees about their protected and union activities, Respondent has engaged in conduct in violation of Section 8(a)(1) of the Act.

4. By refusing to consider for hire and refusing to hire any of the following employees because of their union affiliation and preference, Respondent has engaged in conduct in violation of Section 8(a)(1) and (3) of the Act:

Jim Carsel	Ted Berch
Larry Sowers	Steven Wilson
Davis Carson	Robert Wirth
Michael Rand	William Grooms
Kenneth Owens	

5. By terminating employee Anthony Twitty and thereafter failing and refusing to employ Twitty, Respondent has engaged in conduct in violation of Section 8(a)(1) and (3) of the Act.

6. The above-unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6), (7), and (8) of the Act.

THE REMEDY

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

As I have found that Respondent has illegally refused to consider for hire and has illegally refused to hire any of the below named employees in violation of sections of the Act, I shall order Respondent to cease and desist from refusing to consider applicants because of its concern with union organizing, and to offer the below listed employees immediate and full instatement to the positions for which the above employees applied or were qualified:

Jim Carsel	Ted Berch
Larry Sowers	Steven Wilson
Davis Carson	Robert Wirth
Michael Rand	William Grooms
Kenneth Owens	

As I have found that Respondent has illegally discharged and refused to employ Anthony Twitty, I order Respondent to offer Twitty immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position.

I further order Respondent to make the 10 above-named employees whole for any loss of earnings suffered as a result of the discrimination against them. Backpay shall be computed as described in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

[4] Respondent also argued that Superintendent DeClue did not have the alleged discriminatees' applications when he made his October 1996 hiring decisions. However, all evidence dealing with that issue was presented during the original hearing and there was no evidence regarding that point offered or received during the instant hearing. Therefore, consideration of that matter is outside the scope of this remand.