

Beacon Electric Co. and International Brotherhood of Electrical Workers, Local Union No. 212, AFL-CIO. Case 9-CA-35127

July 12, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

On July 14, 1998, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief to the General Counsel's exceptions. On June 9, 2000, the Board remanded this proceeding for further consideration pursuant to *FES*, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). On December 20, 2000, Judge Beddow issued a supplemental decision, also attached here. The Respondent filed exceptions to the supplemental decision, the General Counsel filed a brief answering the Respondent's exceptions, and the Respondent filed a reply to the General Counsel's answering brief. On July 28, 2003, the Board remanded the case "for further consideration of whether, under *FES*, the Respondent can demonstrate that it would not have considered or hired the alleged discriminatees, even in the absence of their union activity or affiliation." On May 5, 2004, Administrative Law Judge Pargen Robertson issued the attached second supplemental decision.¹ The Respondent filed exceptions to the second supplemental decision.

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

The Board has considered the initial decision, the supplemental decision, the second supplemental decision, and the record in light of the exceptions and briefs, and has decided to affirm the judges' rulings, findings,² and conclusions as modified and set forth in full below.³

¹ At the time of the second remand, Judge Beddow had retired.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless 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.

³ We shall modify the recommended Order to more closely conform to the 8(a)(3) violation found. We shall also modify the judge's recommended Order in accordance with our decision in *Ferguson Electric*, 335 NLRB 142 (2001). In light of our instatement and backpay order for all of the alleged discriminatees, we shall further modify the recommended Order insofar as it includes a remedy for the Respondent's failure to consider them for employment. *Jobsite Staffing*, 340 NLRB 332, 333 (2003) ("[W]hen both a refusal-to-hire and a refusal-to-consider for hire violation are found regarding the same applicant and an instatement and backpay remedy is ordered for the refusal-to-hire

For the reasons stated herein, we find that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to hire and consider for hire the 49 alleged discriminatees⁴ based on their union affiliation.

I. BACKGROUND

The Respondent is an electrical contractor in Cincinnati, Ohio. Pursuant to a "salting" campaign, organizers and members of the International Brotherhood of Electrical Workers, Local Union No. 212, AFL-CIO (the Union) attempted to apply for work with the Respondent on several occasions between January and May 1997.⁵ Although the Respondent hired electricians during each month of the salting campaign, it did not permit any of the 49 alleged discriminatees in this proceeding to apply for employment. The Respondent contends, among other things, that it did not hire the alleged discriminatees, or consider them for hire, because they were not referred pursuant to its hiring policy. The Respondent further asserts that individuals without referrals are not allowed to apply for employment (the referral policy). In finding that the Respondent violated Section 8(a)(3) and (1) by refusing to hire or consider the alleged discriminatees, Judge Beddow rejected the Respondent's referral policy defense as pretextual. As explained below, we agree that the Respondent's referral policy defense fails because it is pretextual.⁶

violation, the remedy for the refusal-to-consider violation is subsumed by the broader refusal-to-hire remedy." We shall further modify the recommended Order to conform with the General Counsel's amendment of the complaint at the hearing to correct the spellings of discriminatees Steger (not "Steber"), Longmire (not "Lingmire"), and Johantges (not "Johantes"). We shall substitute a new notice to conform to the Order as modified and in accordance with *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

⁴ The 49 alleged discriminatees are: Matthew Kolbinsky, Ken Mueller, Paul Mahoney, Paula Smith, Steve Jaeger, Annette Garza, Bob Lloyd, Paul Elbisser Sr., Milbert Thornton, Kevin Stenger, Ed Kaueper, Mike Miller, Jerry Smith, Tony Wartman, Walter Zimmer, Bill Heinzelman, James Rosenberger, Louis Proctor, Bill Steger, Jim Traynor, Tim Seller, Gary White, Ronald Krumme, Donnal Ruehl, Jane Cooper, Kevin Voisine, James Wakefield, Steven Dunaway, Ron Smith, Gary Blanchet, Larry Hunter, Robert Longmire, Nelson Davies, Thomas Lana, Robert Oliver, Gary Johantges, Charlie Cupp, Scott Painter, Jay Rizzuto, Jerry Vaughn, Jerry W. Jones, Eleanor Kumler, Al Neiderhelman, Ralph Stewart, Valeria Riley, Wayne J. Whalen, Charles Fribourg, Tim Ward, and Ken Smith. The General Counsel amended the Complaint at hearing to withdraw the allegations made on behalf of Buck Conn.

⁵ Hereafter, unless otherwise indicated, all dates are in 1997.

⁶ In so finding, the Board does not address the legality of the Respondent's referral policy itself. Accordingly, Members Liebman and Walsh find it unnecessary to decide whether, as Judge Beddow concluded, the referral policy "constitutes a discriminatory practice inherently destructive of important employee rights" and whether the Respondent violated the Act by maintaining and hiring pursuant to such a policy. In Chairman Battista's view, a referral hiring policy constitutes

II. FACTS

A. *The Referral Policy*

The Respondent adopted its referral policy in 1994, but never put it in writing. Timothy Ely, the Respondent's general superintendent, testified that the Respondent hires electricians (journeymen and apprentices) exclusively by referral, and the company "turns away" anyone who arrives at its office seeking to apply without a referral. The Respondent's referral sources include current employees, contacts in the industry, professional associations, vocational schools, temporary agencies, and personal contacts.

The referral policy—never disclosed to the public—differs from the "Applications for Employment Policy" that the Respondent posted in its office lobby throughout the salting campaign:

BEACON ELECTRIC COMPANY
APPLICATIONS FOR EMPLOYMENT POLICY

Beacon makes every effort to select the most qualified employees for employment. To accomplish this, it develops a pool of applicants who are evaluated and ranked so that the most qualified are selected from the pool. Accordingly, Beacon accepts applications and resumes only at specific times of the year, whether or not it is currently hiring. The periods during which applications and resumes are accepted are determined by the President of Beacon.

When applications are being accepted, they must be completed in person at the main office of the company. When the company is hiring, the applicants selected from the pooled applications will be interviewed and be required to pass certain skills, aptitude and substance abuse tests.

As shown, the posted applications for employment policy makes no mention of the fact that an applicant without a referral will not be permitted to enter the pool from which the Respondent selects its employees. By this omission, the policy implies that anyone can enter the pool. In fact, the only way to enter the applicant pool is to be referred by one of the Respondent's sources.

B. *The Salting Campaign*

Believing that the Respondent needed to hire electricians in order to meet a contractual commitment, union organizers and members made numerous attempts to apply in person for employment with the Respondent between January 21 and May 5. The Respondent was

hiring during this period. In fact, the Respondent hired 71 electricians between January 21 and August 22.⁷ Despite the Respondent's ongoing need for labor, however, the 49 alleged discriminatees were not allowed to apply.

As detailed below, during the salting campaign the Respondent did not tell the alleged discriminatees that they could not apply because they did not have referrals. Instead, the Respondent deceived them by denying that it was hiring and deliberately sought to divert them from discovering its referral policy by leading them to believe that—when it started hiring—they would be permitted to apply, without referrals, in accordance with the posted applications for employment policy.

1. January 21

The first application attempt occurred on January 21. On that date, 10 union members, including organizers Matt Kolbinsky and Ken Mueller, traveled to the Respondent's office and attempted to apply as a group.⁸ On this and subsequent application attempts, the members openly displayed their union affiliation.

On behalf of the group, Kolbinsky, a journeyman wireman, asked the Respondent's receptionist whether the Respondent was hiring. The receptionist said that the Respondent was "not hiring" and "not accepting applications." Accordingly, she did not permit anyone in the group to apply.

The Respondent did not hire any electricians that day, but it hired an electrician both on January 22 and 23. Between January 22 and February 3, the Respondent hired a total of 10 electricians. None of the 10 union applicants who sought to apply on January 21 were considered for these positions.

2. January 29

Four union members attempted to apply on January 29. The Respondent hired three electricians that day, but it

⁷ The Respondent hired both journeyman and apprentice electricians during this period. The record is silent as to the number of individuals hired in each classification.

⁸ During the salting campaign, the union maintained a log that recorded the dates of the application attempts it organized and the names of the union members who attempted to apply on each date. The judge found that, with only one exception (the March 6 entry concerning Buck Conn), the log "accurately reflects the presence of Union applicants at Respondent's facility during the various application attempts[.]" The General Counsel does not except to this finding and we find no merit in the Respondent's exception concerning the log. Accordingly, the Union's log (GC Exh. 11) is determinative as to the identities of the union applicants who attempted to apply on the dates set forth therein. Although Judge Beddow found that 11 union electricians attempted to apply on January 21, the log shows that there were 10 union applicants on that date (organizers Mueller and Kolbinsky, as well as members Gerald Smith, Valeria Riley, Paul Mahoney, Jean Kumler, Louis Proctor, Paula Smith, Al Neiderhelman, and Ralph Stewart).

a "legitimate employment practice" and he does not adopt the judge's findings to the contrary. See *Dilling Mechanical Contractors, Inc.*, 348 NLRB 98, 101–103 at 4–6 (2006).

did not permit any of the union applicants to submit an application.

The January 29 group consisted of Kolbinsky, Mueller, and two former employees of the Respondent, Charles Fribourg and Wayne Whalen. Mueller and Whalen each had approximately 30 years of experience as an electrician. Fribourg, a journeyman wireman for approximately 25 years, worked for the Respondent as a foreman/journeyman for approximately 3 years before quitting in 1988.

On this occasion, Fribourg initially asked to speak with the Respondent's president, Joe Mellencamp, but the receptionist told him that Mellencamp was out of town. Fribourg then asked the receptionist for the name of the Company's "hiring agent," identifying himself as a former employee and stating he had heard that the Respondent had a sizeable job and was calling back some former employees. The receptionist summoned Ely, who recognized Fribourg and told him "we can't take applications." Ely then referred the group to the applications for employment policy posted in the reception area of the Respondent's office.

Whalen then told Ely that he "wanted to make sure my application was still in there. They said they had kept my name on a [recall] list when I got laid off." Ely replied negatively and again said, "we're not taking applications." Ely then shut the window through which he was speaking to the group as Whalen attempted to ask another question.

By referring the union applicants to the posted applications for employment policy, Ely implied that that policy remained in effect and that the union applicants would be allowed to apply when the company started hiring. In other words, Ely implied that the union applicants had simply mistimed their application attempt. Mellencamp reinforced that impression a few days later.

The applications for employment policy states that "the President of Beacon" determines when the Respondent will accept applications and resumes. Accordingly, Fribourg followed up on the January 29 application attempt by writing to Mellencamp to express his interest in joining the Respondent's applicant pool. Fribourg's letter, dated February 1, referenced the applications for employment policy and asked Mellencamp to notify him when he planned to accept applications or resumes. Fribourg stated that he knew other electricians who were also interested in joining the applicant pool. Additionally, Fribourg stated that "[i]f you do not plan to open your pool then please inform me which Hiring service Beacon is using."

Mellencamp's response, dated February 5, did not disavow the applications for employment policy, and did not disclose the unwritten referral policy:

Thank you for your letter dated 2/1/97. Beacon Electric is not advertising for applications or resumes for electricians at this time. As you are aware, business needs dictate when it may be necessary to place an advertisement for personnel. At this time we cannot predict when such need may arise.

The clear implication of this letter is that the posted applications for employment policy remained in effect but the Respondent was not hiring at that time. Neither implication was true.

3. February 21

Nineteen union members, including organizers Kolbinsky and Mueller, attempted to apply on February 21. The receptionist did not permit any of them to apply, stating that the Respondent was "not accepting applications right now." The Respondent hired an electrician a few days later, on February 24. And it hired five more on March 17.

In his February 1 letter to Mellencamp, Fribourg had asked for the names of any "Hiring service" utilized by the Respondent. Mellencamp responded by saying that the company was not hiring (advertising for applications or resumes).

On February 21, the Respondent, through a receptionist, specifically denied that it was hiring through temporary employment agencies. On that date, after the receptionist said that the Respondent was "not accepting applications right now," Kolbinsky asked whether the Respondent was hiring through any temporary employment agencies. The answer was an unequivocal "Nope." The receptionist gave the same answer when Kolbinsky asked the question a second time. These representations were false. In fact, the Respondent accepted referrals from temporary employment agencies during each month of the salting campaign.

4. February 27–May 5

Judge Beddow found that union applicants made "about 16" application attempts between January 21 and May 5. In addition to the three attempts discussed above, the judge described the attempts on the following dates: February 27, March 3, 6, 11, and 19, and April 17. According to the Union's log, the other attempts organized by the Union occurred on March 27; April 3, 10, and 25; and May 1 and 5. During these attempts, the union applicants were never allowed to apply for employment and were never told of the Respondent's referral policy. Instead, they were repeatedly told that they could not apply

because the Respondent was not hiring and/or not accepting applications when, in fact, the Respondent was hiring throughout this period, frequently within days of refusing to allow the union applicants to apply.⁹

C. The Judges' Decisions

In his initial decision, dated July 14, 1998, Judge Beddow rejected the referral policy defense as pretextual. In addition, he found that the referral policy "constitutes a discriminatory practice inherently destructive of important employee rights" and that the Respondent violated Section 8(a)(3) and (1) by "maintaining and enforcing" its referral policy, "failing to inform" the union applicants of its referral policy, and "refusing to accept application, to hire or to consider applicants for employment unless they were referred by non-union sources."

Following the Board's remand for further consideration in light of *FES*, Judge Beddow issued a supplemental decision, dated December 20, 2000. Therein, he denied the Respondent's request to reopen the record and bolstered his conclusion that the Respondent violated the Act by refusing to hire or consider for hire the alleged discriminatees. In doing so, he again rejected the Respondent's referral policy defense, finding it pretextual.

On July 28, 2003, the Board remanded the case for a second time, finding that "the General Counsel met his initial burden under *FES* of establishing an unlawful refusal to consider or to hire the union applicants," but that the judge improperly denied the Respondent "an opportunity to present evidence to show that it would not have considered or hired the alleged discriminatees even in the absence of their union activity or affiliation." On remand, the Respondent waived its right to a further hearing, electing to rely on the existing record. Judge Robertson, substituting for the retired Judge Beddow, concluded that he was not authorized to review Judge Beddow's decisions and, instead, determined that he could consider only "whether Respondent proved at the reopened hearing that it would not have considered or hired the alleged discriminatees in the absence of their union activity or affiliation." Because the Respondent decided not to reopen the record, Judge Robertson concluded that the Respondent did not meet its burden of proof in the proceeding before him.

⁹ Chairman Battista notes that on more than one occasion the union applicants appeared en masse at the Respondent's office armed with a tape recorder or video camera. In Chairman Battista's view, such actions may be viewed as inconsistent with a genuine interest in obtaining employment. In any case, he agrees that under the facts of this case, and applying current law, the recordings were not inconsistent with a genuine interest in employment for the reasons stated by the judge.

III. ANALYSIS

In *FES*, supra, the Board set forth its analytical framework for determining whether an employer violates Section 8(a)(3) by failing or refusing to consider or hire job applicants because of their union activities or affiliation. With respect to discriminatory refusals to hire, the Board held:

[T]he General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

If the General Counsel meets his burden and the respondent fails to show that it would have made the same hiring decisions even in the absence of union activity or affiliation, then a violation of Section 8(a)(3) has been established.

331 NLRB at 12 (footnotes omitted). Regarding discriminatory refusals to consider for hire, the Board stated:

[T]he General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

"If the respondent fails to meet its burden, then a violation of Section 8(a)(3) is established." *Id.* at 15.

In its second remand order, dated July 28, 2003, the Board agreed with Judge Beddow's finding that the General Counsel met his initial burden under *FES* of establishing an unlawful refusal to hire the alleged discriminatees or consider them for employment. That finding is

the law of the case.¹⁰ In any event, we reaffirm our finding that the General Counsel met his initial burden under *FES*, as to both a refusal to hire and refusal to consider, for the reasons set forth in Judge Beddow's decisions.

As the General Counsel has met his initial burden under *FES* regarding the Respondent's refusal to hire and refusal to consider the union applicants, the burden shifted to the Respondent to show that it would not have hired or considered them even in the absence of their union activity or affiliation. *FES*, supra at 12, 15. In attempting to meet its burden, the Respondent argues that its consistent application of its referral policy, which it adopted for legitimate business reasons, proved that it would not have hired the alleged discriminatees or considered them for employment, even in the absence of their union activity or affiliation.

Regardless of whether the Respondent normally adhered to its referral policy, this defense fails because it is pretextual. *Jesco, Inc.*, 347 NLRB 903, 907 (2006) ("The Respondent cannot rebut the General Counsel's initial showing of discriminatory motivation with a pretextual explanation."); *Leading Edge Aviation Services*, 345 NLRB 977, 978 (2005), enf. 212 Fed.Appx. 193 (4th Cir. 2007) ("Because the Respondent's reasons for not hiring Host for the second shift QC inspector position have been found to be pretextual—i.e., they either did not exist or were not actually relied on—they cannot form the basis for a valid rebuttal to the General Counsel's case."). Accord: *McKee Electric Co.*, 349 NLRB 463, 465 (2007); *Golden State Foods Corp.*, 340 NLRB 382, 385–386 (2003). The Respondent never revealed its referral policy to the union applicants. The Respondent did not rely on its referral policy when it rejected the applicants. To the contrary, it gave other reasons for not hiring, and each of the other reasons was false. The Respondent deceived the union applicants by denying that it was hiring (either directly or through temporary employment agencies) and deliberately sought to divert them from discovering its referral policy by suggesting that, once the company started hiring, they would be considered for employment pursuant to its posted applications for employment policy (i.e., without referrals).¹¹

¹⁰ *Teamsters Local 75 (Schreiber Foods)*, 349 NLRB 77, 80 (2007); *Morgan Services, Inc.*, 339 NLRB 463 fn. 1 (2003) (adhering to law of the case established by prior Board order); *Technology Service Solutions*, 332 NLRB 1096 fn. 3 (2000), order modified on reconsideration 334 NLRB 116 (2001) (recognizing that unpublished orders of the Board establish the law of the case in subsequent proceedings).

¹¹ The Respondent excepts to the judge's finding that its receptionists gave false answers to the union applicants, arguing that its receptionists "were not intentionally untruthful." We find no merit in this exception. Irrespective of whether the receptionists intentionally gave false information, the fact is that false information was given, and that

For instance, on January 29, the same day that the Respondent hired three electricians, Ely turned away four union electricians, including two former employees of the Respondent, claiming, "we're not taking applications." Compounding the lie, Ely referred the group to the posted applications for employment policy, which does not mention a referral policy and, in fact, at least implicitly indicates that applications will be accepted from anyone who arrives at its office on a date when the company is accepting applications. In his letter to Fri-bourg dated February 5, Mellencamp also implied that the posted policy remained in effect. The implication of the Respondent's false representations was that the Respondent was not hiring anyone and that, once it did start hiring, the union applicants would be permitted to apply at its office, the same as nonunion applicants. In fact, the Respondent was hiring throughout the salting campaign, pursuant to its unwritten and undisclosed referral policy, and even if the union applicants had attempted to apply every day during that campaign, they would never have entered the Respondent's hiring pool owing to the absence of referrals.

By virtue of the Respondent's deliberate misrepresentations, it is obvious that there is no rebuttal to the General Counsel's initial showing that the Respondent had an overall scheme of refusing to hire or consider union applicants. *Progressive Electric, Inc. v. NLRB*, 453 F.3d 538, 548 (D.C. Cir. 2006) ("Having deliberately sought to divert the Union Applicants from its normal hiring process, Progressive cannot now take refuge therein."); *Commercial Erectors, Inc.*, 342 NLRB 940, 943 (2004) (rejecting employer's "hiring preference" affirmative defense where the employer "did not reveal this purported hiring priority" to the union applicants and, instead, made "misleading or even false statements" to the union applicants about its hiring); *Jesco*, 347 NLRB 903, 906–907 (rejecting the employer's affirmative defense—conformity with a facially nondiscriminatory hiring policy—because "the Respondent did not in fact rely on the policy when it rejected the discriminatees"). Consequently, we affirm Judge Beddow's finding that by failing and refusing to hire and consider the discriminatees,

the Respondent is responsible for the false information given by its agents. The judge found, and we agree, that the Respondent's receptionists were its agents within the meaning of Sec. 2(13) of the Act, at least with respect to its hiring process. See *Diehl Equipment Co.*, 297 NLRB 504, 504 fn. 2 (1989) (employee handling applications who had apparent authority to provide information found to be an agent). In any event, Mellencamp and Ely themselves deceived union applicants regarding whether the Respondent was hiring and/or misled them about its hiring policy and these agents of the Respondent were well aware of the company's manpower needs and its hiring practices at all relevant times.

the Respondent violated Section 8(a)(3) and (1) of the Act.

AMENDED REMEDY

Having found that the Respondent discriminatorily refused to hire the discriminatees, and consider them for employment, the Respondent must make them whole for its unlawful conduct against them. The duration of the backpay period shall be determined in accordance with *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007).¹² Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹³

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, Beacon Electric Co., Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in the International Brotherhood of Electrical Workers, Local 212, AFL-CIO, or any other labor organization, by deceiving union members and sympathizers concerning its hiring policy and practice.

(b) Failing and refusing to consider applicants for employment and failing and refusing to hire them because of their union affiliation.

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

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

(a) Within 14 days from the date of this Order, offer employment to Matthew Kolbinsky, Ken Mueller, Paul Mahoney, Paula Smith, Steve Jaeger, Annette Garza, Bob Lloyd, Paul Elbisser Sr., Milbert Thornton, Kevin Stenger, Ed Kaeper, Mike Miller, Jerry Smith, Tony Wartman, Walt Zimmer, Bill Heinzelman, James Rosenberger, Louis Proctor, Bill Steger, Jim Traynor, Tim Seiler, Gary White, Ronald Krumme, Donnal Ruehl,

Jane Cooper, Kevin Voisine, James Wakefield, Steven Dunaway, Ron Smith, Gary Blanchet, Larry Hunter, Robert Longmire, Nelson Davies, Thomas Lana, Robert Oliver, Gary Johantges, Charlie Cupp, Scott Painter, Jay Rizzuto, Jerry Vaughn, Jerry W. Jones, Eleanor Kumler, Al Neiderheman, Ralph Stewart, Valeria Riley, Wayne J. Whalen, Charles Fribourg, Tim Ward, and Ken Smith in the electrician positions for which they sought to apply or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights and privileges to which they would have been entitled absent the discrimination against them.

(b) Make whole all of those individuals identified in subparagraph (a) for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this Decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire or to consider for employment Matthew Kolbinsky, Ken Mueller, Paul Mahoney, Paula Smith, Steve Jaeger, Annette Garza, Bob Lloyd, Paul Elbisser Sr., Milbert Thornton, Kevin Stenger, Ed Kaeper, Mike Miller, Jerry Smith, Tony Wartman, Walt Zimmer, Bill Heinzelman, James Rosenberger, Louis Proctor, Bill Steger, Jim Traynor, Tim Seiler, Gary White, Ronald Krumme, Donnal Ruehl, Jane Cooper, Kevin Voisine, James Wakefield, Steven Dunaway, Ron Smith, Gary Blanchet, Larry Hunter, Robert Longmire, Nelson Davies, Thomas Lana, Robert Oliver, Gary Johantges, Charlie Cupp, Scott Painter, Jay Rizzuto, Jerry Vaughn, Jerry W. Jones, Eleanor Kumler, Al Neiderheman, Ralph Stewart, Valeria Riley, Wayne J. Whalen, Charles Fribourg, Tim Ward, and Ken Smith, and within 3 days thereafter, notify them in writing that this has been done and that the unlawful conduct of the Respondent will not be used against them in any way.

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

(e) Within 14 days after service by the Region, post at its facility in Cincinnati, Ohio, copies of the attached

¹² Members Liebman and Walsh dissented in relevant part in *Oil Capitol*. See 349 NLRB 1348, 1357 et seq. Regarding the present proceeding, they recognize that the majority view in *Oil Capitol* is current Board law, and accordingly, for institutional reasons only, they approve its application in compliance.

¹³ While our order herein provides for reinstatement, the reinstatement 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*, 349 NLRB 1348, 1354.

notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 9, 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 employees employed by the Respondent on or at any time since January 21, 1997.

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

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 discourage membership in the International Brotherhood of Electrical Workers, Local 212, AFL-CIO, or any other labor organization, by deceiving union members and sympathizers concerning our hiring policies and practices.

WE WILL NOT fail and refuse to hire or consider for employment job applicants because of their membership in, or affiliation with, the International Brotherhood of

Electrical Workers, Local 212, AFL-CIO, or any other labor organization.

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

WE WILL, within 14 days from the date of the Board's Order, offer employment to Matthew Kolbinsky, Ken Mueller, Paul Mahoney, Paula Smith, Steve Jaeger, Annette Garza, Bob Lloyd, Paul Elbisser Sr., Milbert Thornton, Kevin Stenger, Ed Kaueper, Mike Miller, Jerry Smith, Tony Wartman, Walt Zimmer, Bill Heinzelman, James Rosenberger, Louis Proctor, Bill Steger, Jim Traynor, Tim Seiler, Gary White, Ronald Krumme, Donnal Ruehl, Jane Cooper, Kevin Voisine, James Wakefield, Steven Dunaway, Ron Smith, Gary Blanchet, Larry Hunter, Robert Longmire, Nelson Davies, Thomas Lana, Robert Oliver, Gary Johantges, Charlie Cupp, Scott Painter, Jay Rizzuto, Jerry Vaughn, Jerry W. Jones, Eleanor Kumler, Al Neiderheman, Ralph Stewart, Valeria Riley, Wayne J. Whalen, Charles Fribourg, Tim Ward, and Ken Smith in electrician positions for which they sought to apply or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights and privileges to which they would have been entitled absent the discrimination against them.

WE WILL make the named individuals whole for any loss of earnings and other benefits that they have suffered as a result of our unlawful refusal to hire them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful refusal to hire or to consider for employment the named individuals and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that our unlawful conduct will not be used against them in any way.

BEACON ELECTRIC CO.

Eric Taylor, Esq., for the General Counsel.

Jeffrey A. Mullen and Lowell Woods, Esqs., of Dayton, Ohio, for the Respondent.

Matthew D. Kolbinsky, of Cincinnati, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Cincinnati, Ohio, on May 5-8, and 12-13, 1998. Subsequently, briefs were filed by the General Counsel and the Respondent. The proceeding is based upon a charge

¹⁴ 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."

filed July 18, 1997,¹ by International Brotherhood of Electrical Workers, Local Union No. 212 AFL-CIO. The Regional Director's complaint dated January 28, 1998, as amended, alleges that Respondent Beacon Electric Co., of Cincinnati, violated Section 8(a)(1) and (3) of the National Labor Relations Act by maintaining and enforcing a policy of only hiring employees through referrals from existing employees, trade schools, and temporary agencies and failing to inform union employee applicants of its hiring policy and by refusing to hire and/or consider for hire named employee applicants because the named employee applicants formed, joined or assisted the Union and engaged in union or concerted activities and to discourage employees from engaging in these activities.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged as an electrical contractor in the construction industry in southwestern Ohio and it annually purchases and receives goods and materials valued in excess of \$50,000 directly from points outside Ohio. It admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

During 1997, the Respondent acted as an electrical contractor on several large scale projects as well as a number of smaller projects. The larger projects included the "Olestra" job in Cincinnati for the Proctor and Gamble Company, a job in northern Kentucky (City-Corp job), and a joint venture at Roxanne Laboratories in Columbus, Ohio. The "Olestra" job and the City Corp jobs required a substantial manpower commitment. During the peak months of May through September, Respondent had about 60 electricians on the "Olestra" and during the peak of the City Corp job between January and June 1997, it had about 45 to 50 electricians. One of the more notable smaller projects worked on by Respondent in the summer of 1997 was a warehouse project it performed for Halls of America where 10 to 12 electricians were utilized. That project had three or four phases and a much larger phase, requiring 50 to 60 electricians, began in about December. As of early January, Respondent had a need for a substantial number of skilled journeymen and apprentices to work on these and other projects and between January 21, and the end of August, Respondent hired about 71 employees to meet these needs (9 of these employees were hired in January, 2 in February, 5 in March, 12 in April, and 12 more were hired in August). Additionally, during the January to May time frame, Respondent utilized a number of temporary employees and paid finder's fees to other contractors who referred employees to it. Some of the electricians and apprentices hired worked on the Olestra project, however, during the spring and summer months, Respondent and the other

electrical contractors on the project (Indecon, Inc. and Garfield Electric), had some difficulty providing enough electrical manpower to the project. Numerous options were discussed (with the Respondent's participation) in an attempt to meet projected shortfalls in electricians and electrical hours of work required for the project and some of the discussed options were implemented. For example, the Respondent and the other electrical contractors went to rolling a 4-day a week, 10-hour a day schedules that provided employees with bonus pay. Additionally, some of Respondent's employees were given pay raises just for the duration of the Olestra project (it is unclear whether other options, such as the payment of per diem to all electricians located more than 50 miles from the project, were actually implemented).

The Respondent is partially owned by Joseph N. Mellenkamp, who is also Respondent's president. Timothy Ely is general superintendent and is responsible for the hiring of individuals to fill electrical positions, including journeymen and apprentices. Mellenkamp is in the Respondent's Cincinnati office on a nearly daily basis and Ely is also often there. At all material times, Respondent has utilized at least three individuals to perform receptionist duties at this office. Part of these duties include interacting with the public and responding to individuals who arrive at Respondent's facility seeking employment. Employment and hiring inquiries were most often fielded by Payroll Administrator Angel LaFollette and receptionist Mona Lisa (Mounce) (both admitted agents of Respondent). Beth Rutherford, a part-time receptionist who ceased working for Respondent in the early summer of 1997, also handled some inquiries.

The Olestra project acquired three electrical contractors from outside the greater Cincinnati area in July to provide additional electricians. A prior attempt had been made in February to supplement the "local" work force with nonunion electrical contractors Wilmar Electric and Town & Country Electric but they declined an offer to participate on the project because of project commitments that left them with insufficient manpower. Previously, the project's general contractor, Fru-Con, Inc., said that the reason Respondent and the other electrical subcontractors had been selected was because they had available manpower to perform this project and that "we wouldn't have to do as Flour Daniel had done in previous projects, bring in people from all over the United States to do their project."

Respondent was awarded the subcontract to perform electrical work on the Olestra job in mid 1996 and it initially was planned that three electrical subcontractors, including Respondent, would be expected to supply the project with about 60 electricians each for the better part of a calendar year.

In January, the Union learned that the Respondent had a contract for electrical work on the Olestra job. The Union's organizing department (led at that time by full-time organizers Matt Kolbinsky and Ken Mueller), then coordinated efforts for union members who were primarily unemployed at the time to apply for employment at Respondent. A secondary goal of the Union's actions was to attempt to organize the Respondent's employees and to obtain a bargaining relationship with the company. Members who were interested in attempting to obtain employment at Respondent and other nonunion electrical con-

¹ All following dates will be in 1997 unless otherwise indicated.

tractors learned of application efforts at regularly scheduled union meetings or through telephone contact initiated by them or by one of the organizers.

A set procedure was followed with respect to each application attempt in which interested members gathered in the organizing department at the appointed time and signed their names or had their names affixed to a sign-in log before going to the Respondent's facility. I find that the logbook accurately reflects the presence of union applicants at Respondent's facility during the various application attempts (except for March 6, when Buck Conn signed his name in the logbook at the organizing department but did not go to make an application with Respondent), inasmuch as the entries are corroborated by the testimony of numerous witnesses as well as by several audio-visual recordings which show the applicants in the reception area or just outside of Respondent's office.

Between January 21 and May 5, about 16 separate attempts were made in person by union members to file applications for employment with Respondent. Additionally, a number of unsuccessful attempts to obtain employment were also made by telephone during that same time frame. Specifically, 11 union electricians, including Kolbinsky and Mueller, met in the organizing department on January 21, signed a logbook and went to Respondent's facility for the purpose of applying for employment as electricians. On this occasion and subsequent visits the vast majority of them wore union jackets, hats, shirts, pins, or other items identifying them as members of the Union. Additionally, during each application attempt either Kolbinsky or Mueller identified themselves as organizers for the Union and left their business cards on the ledge or counter in the reception area.

When the union applicants arrived at Respondent's facility on January 21, several of them crowded in the small reception area while the others waited just outside the door. Kolbinsky rang a bell on the counter, spoke to the receptionist, and asked if the employer was hiring. When she replied that the employer was not hiring, he asked if he and the other applicants could fill out applications and the receptionist said that Respondent was not accepting applications.

A second attempt to apply for employment at Respondent was made on January 29 when two former employees of Respondent, Charles Fribourg and Wayne Whalen accompanied Kolbinsky and Mueller. Fribourg asked if Mellencamp was in and when told by the receptionist that he was out of town, he identified himself as an exemployee and asked to talk to the company's "hiring agent" as he has heard that they has a sizable job and were calling back some exemployees. The receptionist got General Superintendent Ely who immediately recognized Fribourg and told him that they couldn't take his application. Ely then referred the group to a sign on the wall that reads as follows:

BEACON ELECTRIC COMPANY APPLICATIONS
FOR EMPLOYMENT POLICY

Beacon makes every effort to select the most qualified employees for employment. To accomplish this, it develops a pool of applicants who are evaluated and ranked so that the

most qualified are selected from the pool. Accordingly, Beacon accepts applications and resumes only at specific times of the year, whether or not it is currently hiring. The periods during which applications and resumes are accepted are determined by the President of Beacon.

When applications are being accepted, they must be completed in person at the main office of the company. When the company is hiring, the applicants selected from the pooled applications will be interviewed and be required to pass certain skills, aptitude and substance abuse tests.

Whalen then spoke to Ely and said he "wanted to make sure my application was still in there. They said they had kept my name on a list when I got laid off." Ely replied, "Nah," then repeated that they were not taking applications right now and he shut the sliding window as Whalen attempted to question further whether he was on a rehire list.

The group left, however, Fribourg followed up with a letter to Mellencamp dated February 1 in which he referred specifically to the posted hiring practice pointed out by Ely and he asked Mellencamp to notify him when he planned to set a date to accept applications or resumes. He advised Mellencamp that he knew of other electricians who would be interested in placing applications or resumes in Respondent's employment pool and he asked Mellencamp to please inform him which temporary hiring service Respondent was utilizing if it did not plan on opening up its application pool. Mellencamp responded by letter dated February 5 that merely states that: "[Respondent] is not advertising for applications or resumes for electricians at this time. As you are aware, business needs dictate when it may be necessary to place an advertisement for personnel. At this time we cannot predict when such a need may arise."

A group of union electricians next attempted to apply for employment with Respondent on February 21. They asked to fill out applications and were told by a receptionist that Respondent was "not accepting applications right now." Kolbinsky asked if they were hiring through any temporary agencies or anything and was told "Nope." He again asked "You're not hiring through any temporary agencies, you're not hiring at all?" and the Receptionist repeated "Nope." Applicant Walt Zimmer testified that on February 27, the receptionist said that Respondent was not hiring, was not taking applications, and would not take their resumes. A videotape was made of this application attempt for the purpose of providing additional documentation as to the union electricians who were present at Respondent's facility on that date. Unemployed electrician and applicant Jim Rosenberger took the videotape which was shot from the outside of the facility and shows the union electricians who attempted to apply on that date.

A videotape recording was made by applicant electrician Ron Smith of the March 6 attempt, and on this occasion, each of the union applicants stated their name for the camera. The next application attempt occurred on March 11 and applicants were videotaped. When Kolbinsky started to ask about their hiring policy the receptionist quickly said "we're just not hiring or accepting applications right now," the same response given on March 6.

Former company employee Fribourg also attempted to apply

in person for employment with Respondent on March 3, and March 11. On March 3, he went alone and spoke with receptionist Angel LaFollette (Kelly). Fribourg told her that he had heard Respondent was hiring a number of people and he asked if Respondent was taking applications. LaFollette told him, "No." He was met with the same results on March 11.

On March 19 union electrician Thomas Lana went to Respondent's facility with a small group, Kolbinsky asked if Respondent was hiring and if the union applicants could fill out applications. The receptionist said Respondent was not hiring and was not accepting applications for employment. On April 17, a group of applicants with Mueller were told that the company "was not accepting applications" when he asked if Beacon "was hiring." When he tried to ascertain the possible distinction between "hiring" and accepting applications the receptionist shut the window and did not respond.

The Respondent's president testified about his personal background, the history of the company from when he took over until the present, and his early reorganizational efforts in which he cut the number of field electricians from over 100 to 28. Mellencamp also reduced the number of foreman at Beacon from approximately 60 to 6 in February or March 1987. One of the foremen who remained during the early cutbacks was Charles Fribourg. Mellencamp then gratuitously testified that Fribourg would likely have been terminated following the cutbacks, but it was not necessary to do so because Fribourg voluntarily left Beacon in 1988.

The Respondent's current hiring policy for field personnel was developed jointly by Mellencamp and Ely over the course of several years. Mellencamp said that before that, the company did not have a focused method for hiring its field employees but hired workers through newspaper ads, walk-in applications, temporary agencies, employee referrals and any other available source.

Mellencamp said that he rethought the wisdom of utilizing walk-in applicants as a source for potential employees in the early 1990's because he was not impressed with either the quality or quantity of such applicants, most had no electrical experience and the company did not have an in-house training program for applicants at that time. He also said that processing walk-in applicants was a significant administrative burden for Ely and other office staff and he discontinued its practice of taking walk-in applicants in 1991 and posted a policy concerning employment applications in its office entry area that Beacon would accept applications and resumes only at specific times of the year.

The Respondent continued to utilize newspaper ads, in conjunction with a variety of referral sources, to recruit prospective employees subsequent to 1991, but found itself paying for expensive advertisements which produced only a handful of job applicants. Additionally, as a result of a tight labor market, the individuals who responded to these ads were often less than desirable job candidates and assertedly substantial amounts of time was necessary to check with prior employers and investigate the references of individuals who responded to newspaper ads. The referral system consisted primarily of employee referrals, contacts in the industry, professional associations, vocational schools, temporary agencies, and personal referrals.

When Ely utilized referral sources outside of the Company he assertedly relied on individuals whom he had known for some period of time and in whom he had a degree of trust and confidence and therefore he did not spend time checking references or past work histories.

When the Respondent began using the referral network as its claimed exclusive method for recruiting employees in early 1994, the policy statement concerning employment applications remained posted in the office entry area, assertedly because it was possible that it might wish to utilize newspaper ads or other means to recruit electricians if the referral network faltered and the posted message was still applicable with respect to the issue of not taking applications from walk-in candidates. The Respondent asserts that it has not accepted any walk-in applicants or advertised in the newspaper for any electrical positions since adoption of the current policy.

Trade and vocational schools also were cultivated as referral sources to recruit young workers by Ely, who sits on a number of advisory committees for such programs. Ely is also involved in several other professional organizations within the construction industry which serve as valuable referral sources. In addition to trade schools, the Respondent developed the Construction Training Institute (CTI) in 1995 as a separate entity to train unskilled individuals who were interested in becoming electricians. The school functions as an entry level apprenticeship program in which students work while attending classes. Candidates are recruited through trade schools, newspaper advertisements and other sources, and participants in the program are often referred to Respondent for employment.

The Respondent also uses temporary agencies as another source for potential employees. Such workers are used to supplement its short-term labor needs without incurring administrative expenses and burdens and also present an opportunity to recruit permanent employees inasmuch as temporary workers can be evaluated on a trial basis without any obligation on the Respondent's part and good workers may be offered a permanent position with the company (the agency has an obligation to perform references and prior employers checks prior to referring the employee). Other employees are referred from other electrical contractors and contacts within the industry and may be in the form of a temporary loan from another contractor. The Respondent also has "shared" employees on a temporary basis with Henderson Electric, Garfield Electric, Kerry Electric, Packard Electric, and Cosmos Electric, all local, nonunion contractors.

M.W. Electric referred its employees to the Respondent on a permanent basis because it was going out of business. The referral came through Randy Allen, a business acquaintance of Ely who worked for another nonunion contractor in the Cincinnati area who was using the employees. The Respondent asserts that referrals from contractors often provide experienced labor as opposed to the novice workers recruited from trade schools and CTI. Other referrals come from current employees and such referrals have provided a substantial number of new employees for the company. As with referrals from sources outside of the Company, Ely does not check the references or past employers of applicants referred by its current employees.

The Respondent asserts that since Ely developed the referral

network and is aware of its parameters, neither Ely nor Mellencamp ever felt that it was necessary to reduce the hiring policy to written form. It also asserts that because it operates in a highly competitive market for labor the Company has a vested interest in not divulging its policy or its referral sources to the general public. It Ely is not available to meet with a referred applicant at the office, he gives the receptionist an employment application, the name of the applicant and the time of the scheduled appointment. If an unscheduled walk-in attempts to apply at the office, the receptionist is under specific instructions to state that it is not accepting employment applications.

Ely personally interviews all job applicants, but does not maintain a list of the referral sources for each and every individual with whom he speaks. He also testified that he was unaware of any situation where an exception was made to the rule concerning walk-in applicants.

The Respondent presented evidence tending to show that between January and August 1996, the company employed an average of 98 permanent employees. During the same period in 1997, this average declined slightly to 93. It admits that it did engage a few more temporary workers during 1997, but asserts that the overall difference in manpower utilized between the 2 years is negligible. Mellencamp testified that in 1996 it committed to provide between 45 and 60 electricians during the course of the construction of the Olestra project. As other electrical contractors were engaged for the project, its involvement was limited to its assigned portion of the facility and he said that the projected labor demand for electricians and other trades fluctuated significantly. The Respondent admits that additional electrical contractors were ultimately brought in to meet the construction schedule, but states that its commitment of 60 electricians was not increased beyond the scope of its original agreement. It agrees that the Olestra project was one of its largest ventures in 1997, but states that the project's impact on the company's overall manpower requirements was far from unusual. Mellencamp testified that the company had no responsibility to increase its work force in connection with the Olestra project, and in fact it actively opposed taking a larger role because its management personnel were not being used in controlling positions on the project.

DISCUSSION

This proceeding involves the Respondent's apparent failure or refusal to consider union affiliated applicants for hire for positions as electricians.

The Board endorses a causation test for cases turning on employer motivation, see *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), however, the foundation of Section 8(a)(1) and (3) "failure to hire" allegations rests on the holding of the Supreme Court ruling that an employer may not discriminate against an applicant because of that person's union status, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-187 (1941).

In a case of this nature the General Counsel meets his initial burden of proof when he establishes that (1) an individual attempted to file an employment application, (2) the employer refused to accept or consider the application, (3) the applicant is

or might be expected to be a union supporter, (4) the employer had knowledge of the applicant's union sympathies, (5) the employer maintains animus against union activity, and (6) the employer refuses to consider or hire the applicant because of such animus. In order to rebut the General Counsel's case, the employer must establish that the applicant would not have been considered or hired absent the discriminatory motive. The qualifications of the job applicant may be an expected element of why an employer might refuse to hire any individual and, accordingly, it is customary in relation to criteria (1) that the record be developed to show that an applicant has the basic job experience or training to match up with the position for which an employer is filling at any particular time, see *Norman King Electric*, 324 NLRB 1077 (1997), and cases cited therein.

This proceeding arises in the jurisdiction of the United States Court of Appeals for the Sixth Circuit and, as in the *King Electric* case, I find that the record here meets the requirement of the court's test set forth in *NLRB v. Fluor Daniel, Inc.*, 102 F.3d 1818 (6th Cir. 1996).

Here, it is shown that in 1997 the Respondent was seeking job applicants (through its so-called "referral" process), that it hired numerous electricians during this relevant period, and that the alleged discriminatees who attempted to apply for employment were experienced journeyman electricians who were qualified to do the work for which the Respondent hired other persons. The Respondent, however, contends that the alleged discriminatees are not bona fide job applicants and that there was no union animus in the development of its hiring policy. It also maintains that this policy is not inherently destructive of employees' rights and that it otherwise was not applied in a discriminatory manner.

Turning to the specific criteria and the evidence of record I find that it is clear that (1) that the alleged discriminatees were qualified electricians who went to the Respondent's place of business with the intention of filing applications for employment but, (2) were not allowed to do so even though the Respondent was hiring electricians during this period of time when it received applications under its so called "referral" policy, and (3) the applicants overtly displayed their union affiliation by wearing union paraphernalia announcing their affiliation and leaving business cards. With regards to criteria (4), on each visit some of the applicants spoke directly with either the Respondent's receptionists (and admitted agents), or General Superintendent Ely and it appears that the Respondent does not dispute the fact that it was aware of the Union's involvement.

The Respondent contends that there was no union animus, criteria (5), in the development of its hiring policy, however, I find this argument disingenuous at best. While the Respondent's president presents the appearance of a benign attitude towards unions, it is unnecessary for the General Counsel to show blatant actions on the part of an employer in order to demonstrate antiunion animus and here the Respondent does not persuasively show valid reasons why it did not consider accepting and looking at union related applications for employment.

As noted by the general counsel, the Respondent's animus toward union applicants may be implied through the actions of Mellencamp, Ely, and the receptionists in concealing Respon-

dent's purported referral hiring procedures from the applicants. Ely directed the applicants to a posted policy that Respondent now claims was not in effect at the time. Mellencamp also advised Fribourg only that Respondent was not then advertising for applications and that it was difficult to predict when a need to advertise for positions might arise at a time when the Respondent was actively hiring electricians. In no instance were the applicants told about the referral policy and otherwise they did not receive truthful answers to inquiries about such things as whether the Respondent was hiring or using temporary agencies.

The Respondent referred would be applicants to its posted policy but failed to disclose its asserted referral policy and, in effect, the Respondent lied to the union applicants about the procedures it actually used. This lie is further demonstrated by the fact that union applicants (especially Fribourg), sought to come within the posted policy by seeking to apply at some time when the company president would be hiring. This moment was apparently a very fleeting one and only occurred without advance notice, when the Respondent had, in effect, a pre-approved referral that it could hire, and this moment never was disclosed to any of the alleged discriminatees, not even the two former employees, or, apparently, to its own receptionist.

As noted by the General Counsel, former employee Fribourg had been one of the six foremen retained by Mellencamp when he reorganized the company, yet when he sought reemployment as a regular journeyman (by letter, after he had sought to apply in the presence of the union organizers), Mellencamp replied in a form letter that deceptively said the Respondent was "not advertising" for applicants "at this time" and in his testimony Mellencamp gratuitously disparaged Fribourg's abilities by insinuating that he "likely" would have been terminated in 1988 if he had not voluntarily left.

I find a further basis for inferring union animus and anti-union motivation in the element of the Respondent's hiring policy relative to referrals from CTI. Mellencamp's testimony in this respect shows that he and the company went to great length to set up and sponsor an electrician apprenticeship training school that would provide less skilled workers through on the job training and ultimately provide trained electricians, who incidentally would be untainted by the existing alternative of the union affiliated apprenticeship program. This elaborate effort must be compared with the Respondent's assertion that it was too much trouble to check references or prior employment records of walk in or unrefereed applicants and I find that this comparison provides added support for the inference that the Respondent harbors union animus.

While any single inference drawn here might be inadequate to persuasively show animus, the overall circumstantial evidence clearly shows union animus and antiunion motivation and it is further supported by the direct, credible testimony of witness Kumler. Here, it appears that the Respondent may have made a tactical mistake and opened a "can of worms" when it called alleged discriminatee Kumler as its own witness and then questioned her about the circumstances of her contacts with the company when it did not know what her probable answers would be.

Eleanor Jean Kumler testified that in addition to attempting

to apply for employment at Respondent with the group on January 21, 1997, she had actually succeeded in obtaining and filling out an application for employment at the Respondent in the spring of 1996. She telephoned Respondent (who is located near where she lives), spoke to a woman who said that Respondent was hiring and that Respondent would be interested in her because of her years of experience and because she was female. She was told by Respondent's representative to "Come in and fill out an application." Kumler, whose demeanor was highly credible, testified that she arrived at its facility a few minutes later and was handed an application by the receptionist she had spoken with on the telephone. She completed the application in the small reception area and noted thereon a work history that reflected that she had recently worked for unionized employers. She handed the completed application back to the receptionist, who told her to, "wait a minute," because, "he's in his office." The receptionist then took the application and turned into a doorway on her right that was next to the lobby area.

The receptionist came back to the reception area after delivering the application and, after a brief time, Kumler heard a male voice call the receptionist back into the office. The voice remarked to the receptionist that Kumler was a "union person," and that she should just throw her application in the trash or the, "circular file." She next heard the receptionist caution: "Shhh, she's still out there." Kumler then heard a male voice reply, "I don't care, just get rid of it and her too." The receptionist then came out of the office looking embarrassed and apologetic and told Kumler, "You're gonna have to leave." Kumler replied, "Okay" and left.

My overall impression of Kumler's testimony is that she was a believable and trustworthy witness who gave highly credible testimony about the details of an event that occurred shortly before any organized application effort took place and which was independent of the Union's organizational drive. The Respondent claims that the office to the right of the reception area was at that time occupied by Office Manager Patricia Hughes, not Ely, and Ely denies that he was involved in the incident. As noted by the General Counsel, Hughes and Ely were Respondent's two most senior employees and Ely had probable reasons that might lead him to be in Hughes' office at any given time. Thus, the receptionist was either simply mistaken when she referred to "his" office, or meant merely that he was in the office, or Ely was incorrect about the time frame when he moved into that particular office. It also is possible that Mellencamp could have been in that office, however, he did not testify about this event.

In any event, I conclude that Kumler truthfully testified about her attempt to file an application and I find that a male in an apparent position of authority made the antiunion remarks that Kumler recalled hearing and that these remarks constitute direct evidence of the Respondent's animus at a time less than a year prior to the events involved in the complaint.

The Board has held that where there is evidence, as here, that an employer has concealed its methods and pattern of hiring from applicants or would-be applicants such evidence supports a finding of unlawful motivation. See *American Press*, 280 NLRB 937, 942 (1986). Furthermore, as discussed below, the record shows that the Respondent's established hiring policy

establishes criteria and practices which result in the exclusion of union members and it constitutes a discriminatory practice inherently destructive of important employee rights. Accordingly, I find that the record is sufficient to show animus and that animus otherwise is implicit in its discriminatory practices and can be found here even without proof of antiunion motivation, see *J.E. Merit Constructors*, 302 NLRB 301, 304 (1991), and *Great Dane Trailers*, 388 U.S. 26, 34 (1967).

Lastly, (6) I find that the record is sufficient to support an inference that the Respondent's antiunion animus was a motivating factor in its decision to fulfill its hiring needs almost exclusively by referrals, conduct which precluded even the consideration of union affiliated applicants.

Here, the Respondent attempts to refute the General Counsel's showing by asserting the legitimacy of its hiring practices and by making a collateral attack on the Union's organizational practices. Applications by full time regular union business agents or organizers (not primarily employed in the trade), even if currently qualified in the trade may be legally justified, but appears to be counter productive in a practical sense, where other bona fide applicants who are actually, usually, and regularly employed in the trade are shown to have experienced possible discrimination and the pursuit of changes on behalf of regular union staff personnel merely acts as a distraction from an evaluation of any direct and (more relevant) evidence of discrimination. Otherwise, however, the Board's decisions in *Sunland Construction Co.*, 309 NLRB 1224 (1992), and *Ultra-systems Western Constructors*, 310 NLRB 545 (1993), have found unequivocally that paid union organizers are statutory employees entitled to the protection of the Act, and the fact that their employment period might be of limited duration does not act to invalidate that status.

The law also does not require that job applicants must be obtrusive in respect to their union affiliation in order to be considered to be bona fide applicants and the possibility that more subtle tactics might be more effective with any particular company does not make discrimination in the application process any less unlawful or any less deserving of a remedy and it does not offer an employer an excuse for engaging in discriminatory practices.

A job seeker's participation in group attempts to file applications and the fact that a union may have supplemental objectives in supporting its members in their attempts to obtain employment does not act to preclude their viability as legitimate job applicants. Here, the majority of the alleged discriminatees were unemployed and were seriously interested in engaging in employment that might have the advantage of keeping them at a particular jobsite for a lengthy period and they were experienced electricians and presumptively qualified for positions that the Respondent would need to fill to meet its manpower requirements.

The fact that the tactics used by the Union may be unwise or unsuccessful does not make a Respondent's conduct any less discriminatory. The propriety of an employer's conduct in a failure to hire proceeding turns on the nature of the act, not on the motive or intent of the job applicant, unless special circumstances, not shown here, exist. Also, the use of "testers" by a party or someone representing their interest (in this case the

Union fits into both roles), that is the perceived victim of discrimination is a legitimate practice in attempts to protect the rights of any victim whether it be in an area such as equal housing or educational opportunities or in hiring practices or whether it be because the discrimination is because of their national origin, religious discipline, sex, or membership or nonmembership in a union.

If information is obtained that shows the probability of illegal discrimination, the credibility or reliability of that information is not adversely affected by the circumstance under which it was obtained. In a similar fashion, the Union's obvious use of audio and video recording devices may be a wise or unwise strategy but as long as it is not so intrusive as to unlawfully intimidate an employer, the law otherwise permits a union to make nonmalicious and noncoercive efforts to put pressure on a company to accede to a union's bargaining demands or organizational efforts or to protest unfair labor practices, see *Burns International Security Services*, 324 NLRB 485 (1997), and here the Respondent shows no extraordinary circumstance that would strip the Union of its rights to engage in organizational activities and to maintain the economic status of its members. (Here, for example it is not improbable that an employer in the Respondent's situation might respond by at least allowing applications to be filed). Although the Respondent objects on brief to the video taping and related union conduct, there is no showing that Respondent's supervisors or receptionists were threatened or intimidated and there was no request made for the Union to stop and compare the extreme factual circumstances in *Heiliger Electric Corp.*, 325 NLRB 966 (1998). Under these circumstances, I find that consistent with Board precedent and the Supreme Court's decision in *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), all the involved applicant discriminatees are bona fide applicants. Otherwise, I find that the real issue here is the basic question of whether the union affiliated job applicants were discriminated against because of the Respondent's bias against their status.

Here, the Union and its members were not acting without legitimate reason but sought employment following the Union's receipt of information about the Respondent's selection for a construction contract that would require the employment of a large number of electricians. Although the Respondent never advertised for added electricians, it did in fact hire 71 new employees between January 21 and the end of August, 1997 and it also utilized a number of temporary employees from employment services or on loan from other contractors. Accordingly, discrimination can be shown if the Respondent's hiring practices are such that they are inherently destructive of the applicant's rights to be treated without discrimination.

Despite the fact that it needed skilled electricians because of the nature of the Olestra job and its other jobs, it chose to ignore journeyman union electricians and to rely on word of mouth referrals (some apparently fresh from school), without checking any of their reference or work records. And, in spite of the fact that it hired on 71 occasions in a 7-month period it asserts, in effect, that none of these hiring occasions occurred exactly at or near the 16 or more times the Union or individuals attempted to file applications (for example, three new employees were hired on January 29 the same day the Union sought to

file application and five were hired 6 days after the Union's March 11 visit). Thus, no union applicant was ever told that the company was hiring and no union applicant was ever able to apply precisely when the Respondent was hiring during "the period" when the president of the Respondent "determined" he would accept applications, the criteria stated in its posted policy. Here, I find the absurdity of these circumstances to be indicative of a pretextual motive and I find that its actions were in large measure designed to screen out applications by union affiliated job seekers.

Although the Respondent seeks to disavow its posted policy and claim that it relied on its undisclosed referral policy, the fact that it kept this so-called policy secret from potential applicants and did not even reduce its policy to writing clearly does not contribute to the Respondent's burden to persuasively show that it would have ignored or failed to allow job seekers to file applications even in the absence of their probable status as union affiliated electricians. See the court's decision in *Transportation Management Corp.*, supra; where it pointed out that:

an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected concerted activity.

The Respondent used an unpublicized referral procedure that was different than the posted policy it pointed out to the union applicants. This procedure was exclusive in nature and basically insured that it would receive applications only by referrals from known sources that would refer only nonunion applicants. This essentially precluded union members from ever being considered and this hiring procedure allowed the Respondent to perpetuate a nonunion work force. The "practical effect" of the Respondent's hiring practice was to preclude employment of union members and it reinforces the conclusion that the union applicants were not allowed to be considered simply because of their union affiliation. See *P. S.E. Concrete Forms*, 303 NLRB 890 (1991).

Under these circumstances, I find that the Respondent has failed to persuasively rebut the General Counsel's showing of unlawful motivation and, accordingly, I find that the General Counsel has met its overall burden and shown that the Respondent's failure and refusal to consider and hire the discriminatees named below violated Section 8(a)(3) and (1) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By engaging in a pattern or practice that allows screening of job applicants to determine suspected union sympathizers by maintaining and enforcing a policy of only hiring employees through referrals from personal and business acquaintances, existing employees, certain trade schools and certain temporary agencies, by failing to inform union employee applicants of its hiring policy and by refusing to accept applications, to hire or to consider applicants for employment unless they were re-

ferred by nonunion sources, Respondent discriminated in regard to hire in order to discourage union membership in violation of Section 8(a)(3) and (1) of the Act.

REMEDY

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

It having been found that the Respondent unlawfully discriminated against job applicants including Matthew Kolbinsky, Ken Mueller, Paul Mahoney, Paula Smith, Steve Jaeger, Annette Garza, Bob Lloyd, Paul Elbisser, Sr., Milbert Thornton, Kevin Stenger, Ed Kaueper, Mike Miller, Jerry Smith, Tony Wartman, Walt Zimmer, Bill Heinzelman, James Rosenberger, Louis Proctor, Bill Steber, Jim Traynor, Tim Seiler, Gary White, Ronald Krumme, Donnal Ruehl, Jane Cooper, Kevin Voisine, James Wakefield, Steven Dunaway, Ron Smith, Gary Blanchet, Larry Hunter, Robert Lingmire, Nelson Davies, Thomas Lana, Robert Oliver, Gary Johantes, Charlie Cupp, Scott Painter, Jay Rizzuto, Jerry Vaughn, Jerry W. Jones, Jean Kumler, Al Neiderheman, Ralph Stewart, Valeria Riley, Wayne J. Whalen, Charles Fribourg, Tim Ward, and Ken Smith based on their suspected union sympathies and because they were not "referred" to the Respondent under the Respondent's exclusive and unlawful hiring procedure and practices, it will be recommended that Respondent be ordered to consider them for employment and make them whole for any loss of earnings they may have suffered by reason of the failure to give them nondiscriminatory consideration for employment, by payment to them of a sum of money equal to that which they normally would have earned in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), computed on a quarterly basis with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).² It also will be recommended that the Respondent be ordered to modify its referral policy to accept referrals from the Union or other union related sources and that this policy be memorialized in writing and posted or otherwise disclosed to potential applicants.

Other considerations regarding the remedy and the specifics of the relief granted must wait until the compliance stage of the proceeding, see *Fluor Daniel, Inc.*, 304 NLRB 970, 981 (1991), *Dean General Contractors*, 285 NLRB 573-574 (1987), and *The 3E Co.*, 322 NLRB 1058 (1997). Otherwise, it is not considered necessary that a broad Order be issued.

On the findings of fact and conclusions of law, and on the entire record, I hereby issue the following recommended³

ORDER

Respondent, Beacon Electric Co., its officers, agents, succes-

² Under *New Horizons*, interest is computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1996 amendment to 26 U.S.C. § 6621.

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

sors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a policy and practice of hiring only by referrals from personal and business acquaintances, existing employees, certain trade schools, and certain temporary employment agencies.

(b) Failing to fully inform prospective applicants of its hiring policies and practices.

(c) Refusing to accept applications or to consider for employment job applicants for the position of electrician because they are members or sympathizers of a union or because they were not referred to the Respondent under its exclusive policy.

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

2. Take the following affirmative action:

(a) Within 14 days from the date of this Order, consider for hire Matthew Kolbinsky, Ken Mueller, Paul Mahoney, Paula Smith, Steve Jaeger, Annette Garza, Bob Lloyd, Paul Elbisser Sr., Milbert Thornton, Kevin Stenger, Ed Kaeper, Mike Miller, Jerry Smith, Tony Wartman, Walt Zimmer, Bill Heinzelman, James Rosenberger, Louis Proctor, Bill Steber, Jim Traynor, Tim Seiler, Gary White, Ronald Krumme, Donnal Ruehl, Jane Cooper, Kevin Voisine, James Wakefield, Steven Dunaway, Ron Smith, Gary Blanchet, Larry Hunter, Robert Lingmire, Nelson Davies, Thomas Lana, Robert Oliver, Gary Johantes, Charlie Cupp, Scott Painter, Jay Rizzuto, Jerry Vaughn, Jerry W. Jones, Jean Kumler, Al Neiderheman, Ralph Stewart, Valeria Riley, Wayne J. Whalen, Charles Fribourg, Tim Ward, and Ken Smith in positions for which they sought to apply, or if such positions no longer exist, to substantially equivalent positions and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them as set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, modify its referral policy to accept referrals from the Union or other union related sources, memorialize this policy in writing and post or otherwise disclose this policy to potential applicants.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days of service by the Region, post at its Cincinnati, Ohio, facilities and all current jobsites, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 9, 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.

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

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain and enforce a policy and practice of hiring only by referrals from personal and business acquaintances, existing employees, certain trade schools, and certain temporary employment agencies.

WE WILL NOT fail to fully inform prospective applicants of our hiring policies and practices.

WE WILL NOT refuse to accept job application, to hire or to consider for employment job applicants for the position of electrician helper because they are members of sympathizers of a union or because they have not been referred to us.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, consider for hire Matthew Kolbinsky, Ken Mueller, Paul Mahoney, Paula Smith, Steve Jaeger, Annette Garza, Bob Lloyd, Paul Elbisser Sr., Milbert Thornton, Kevin Stenger, Ed Kaeper, Mike Miller, Jerry Smith, Tony Wartman, Walt Zimmer, Bill Heinzelman, James Rosenberger, Louis Proctor, Bill Steber, Jim Traynor, Tim Seiler, Gary White, Ronald Krumme, Donnal Ruehl, Jane Cooper, Kevin Voisine, James Wakefield, Steven Dunaway, Ron Smith, Gary Blanchet, Larry Hunter, Robert Lingmire, Nelson Davies, Thomas Lana, Robert Oliver, Gary Johantes, Charlie Cupp, Scott Painter, Jay Rizzuto, Jerry Vaughn, Jerry W. Jones, Jean Kumler, Al Neiderheman, Ralph Stewart, Valeria Riley, Wayne J. Whalen, Charles Fribourg, Tim Ward, and Ken Smith in positions for which they sought to apply, or if such positions no longer exist, to substantially equivalent positions and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them in the manner specified in the section of the administrative law judge's decision entitled "The Remedy."

WE WILL modify our referral policy to accept referrals from the Union or other union related sources and memorialize this

⁴ 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."

policy in writing and post or otherwise disclose this policy to potential applicants.

BEACON ELECTRIC COMPANY

Eric Taylor, Esq., for the General Counsel.

Jeffrey A. Mullen and Lowell Woods, Esqs., of Dayton, Ohio, for the Respondent.

Matthew D. Kolbinsky, of Cincinnati, Ohio, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Cincinnati, Ohio, on May 5–8, and 12–13, 1998, briefs were filed and a decision (JD-115-98), was issued on July 14, 1998.

On June 9, 2000, the Board remanded this case to me for further consideration in light of the May 11, 2000 decision in *FES*, 331 NLRB 9. On August 2, 2000, the parties were invited to file supplemental briefs addressing the issues set forth in the Board's remand including, as stated by the Board: (1) whether the General Counsel established that the Respondent unlawfully refused to hire the alleged discriminatees for openings filled by other applicants, and (2) the entry of an appropriate recommended remedy and order.

In this connection I noted that in my decision dated July 14, 1998, I had found that the Respondent refused to consider 49-named applicants and that I made a factual finding that the alleged discriminatees were journeymen electricians qualified to do the work and that the Respondent was seeking job applicants (through its so-called "referral" process), for a commitment to supply between 45 and 60 electricians to a specific construction project and that in a relevant 7-month period it hired 71 electricians.

In view of my further statement that "it is not readily apparent that further briefing on the issues would result in a need to reach any significantly different conclusion," the General Counsel elected not to file a supplement brief. On October 2, 2000, the Respondent filed a supplemental brief in which it requested further hearing to address the issues of (1) the announced or generally known requirements of the position for hire and (2) the qualifications of the applicants in relation to the first issue.

It contends that there is no evidence in the record to show the criteria Respondent used to screen applicants, and little or no evidence in the record establishing what the generally known requirements were for employment at Respondent or any other similar employer. The Respondent also contends that the record does not show the training and/or experience of the applicants or the electricians that hired Respondent during the relevant timeframe, that the training and experience of the alleged discriminatees have not been shown, and that the hiring criteria used has not been shown.

I find that these arguments are contrary to the record and also fail to show the likelihood that a further hearing would produce anything material that would affect my initial findings of fact. First, the record and my prior decision show that the Respon-

dent is an electrical contractor who works in large scale construction projects and employs "electricians" in both "journeyman" and "apprentice" classifications. In January 1997, it had a sign in its reception area setting forth its application policy. This sign said nothing about specific or unique qualifications but only that when interviewed they would be "required" to pass certain skill, aptitude—test." Moreover, two applicants, Wayne Whalen and Charles Fribough (who previously was a foreman for the Respondent), were formerly employed by the Respondent before being placed on layoff and therefore they were presumptively familiar with the requirement for employment with the Respondent and had met those requirements. Also, the Respondent's president and its general superintendent both testified regarding their current hiring policy for field personnel (electricians), as set forth in pages 5 and 6 of the prior decision. The net result of the asserted policy is that the Respondent relies upon the opinions of other employees or contacts who "refer" applicants and relieve the employer of its burden of checking references or past work histories. The record also shows that the Respondent's referral contacts include the Construction Training Institute (CTI) which was developed by the Respondent as a separate entity to train unskilled individuals interested in becoming electricians.

Under these circumstances, I conclude that additional evidence to show the Respondent's position criteria would be in effect an impeachment of its own principal witnesses and their testimony at the original hearing.

Finally, the Respondent argues that the term "qualification" includes whether the applicants fully intend to work for the employer if hired and that in the prior hearing I prohibited its attempt to litigate that issue by not enforcing its subpoena for various documents and by sustaining objections of the General Counsel on its attempted questioning of applicant witnesses concerning other things done to attempt to find a job and their bona fide status as applicants.

These evidentiary rulings were not timely challenged in Respondent's original brief and as I otherwise find the relevancy the material to the applicants' qualifications are not apparent, I find that Respondent's request is inappropriate and insufficient to show good cause for further hearing.

In this respect the prior decision stated that:

The qualifications of the job applicant may be an expected element of why an employer might refuse to hire any individual and, accordingly, it is customary in relation to criteria (1) that the record be developed to show that an applicant has the basic job experience or training to match up with the position for which an employer is filling at any particular time, see *Norman King Electric*, 324 NLRB 1080 (1997), and cases cited therein.

This proceeding arises in the jurisdiction of the United States Court of Appeals for the Sixth Circuit and, as in the *King Electric* case,¹ I find that the record here meets the requirement of the court's test set forth in *NLRB v. Fluor Daniel, Inc.*, 102 F.3d 1818 (6th Cir. 1996).

¹ The Board's order in this case was enforced in *Kentucky General, Inc. v. NLRB*, 177 F.3d 430 (6th Cir. 1999).

The decision goes on to make findings that:

The fact that a union may have supplemental objectives in supporting its members in their attempts to obtain employment does not act to preclude their viability as legitimate job applicants. Here, the majority of the alleged discriminatees were unemployed and were seriously interested in engaging in employment that might have the advantage of keeping them at a particular job site for a lengthy period and they were experienced electricians and presumptively qualified for positions that the Respondent would need to fill to meet its manpower requirements.

.....

Here, the Respondent attempts to refute the General Counsel's showing by asserting the legitimacy of its hiring practices and by making a collateral attack on the Union's organizational practices. Applications by full time regular Union Business Agents or organizers (not primarily employed in the trade), even if current qualified in the trade may be legally justified, but appears to be counter productive in a practical sense, where other bona fide applicants who are actually, usually, and regularly employed in the trade are shown to have experienced possible discrimination and the pursuit of changes on behalf of regular union staff personnel merely acts as a distraction from an evaluation of any direct and (more relevant) evidence of discrimination. Otherwise, however, the Board's decisions in *Sunland Construction Co.*, 309 NLRB 1224 (1992) and *Ultrasystems Western Constructors*, 310 NLRB 545 (1993), have found unequivocally that paid union organizers are statutory employees entitled to the protection of the Act, and the fact that their employment period might be of limited duration does not act to invalidate that status.

.....

Under these circumstances, I find that consistent with Board precedent and the Supreme Court's decision in *NLRB v. Town & Country Electric*, 116 S.Ct. 450 (1995), all the involved applicant discriminatees are bona fide applicants. Otherwise, I find that the real issue here is the basic question of whether the union affiliated job applicants were discriminated against because of the Respondent's bias against their status.

As noted, I consider the requirement of the Sixth Circuit's test in *Fluor Daniel*, supra, and the bona fide status of the applicants.

It also is observed that subsequent to the issuance of my prior decision, the Sixth Circuit enforced the cited *Norman King Electric* case supra, in *Kentucky General, Inc. v. NLRB*, 177 F.3d 430 (6th Cir. 1999). Here, as in the latter case, the Employer also sought word of mouth referrals and looked for prospects from training schools and I also find that the employer's generalities and speculative concerns about employee "qualifications" are pretextual. The Respondent does not hint at what relevant evidence would spring forth from the documents or its further cross examination of the General Counsel's witnesses and I find that the General Counsel had a valid basis

for his objections. I otherwise find that the Board's *Thermo Power* criteria does not create some expanded right to pursue tangential or nonrelevant matters or to engage in "a fishing expedition" that would burden the record with information that normally would not be relevant or would be relevant to the compliance stage of the proceeding. Accordingly, I conclude that it is not shown to be necessary (the term specified in the Board's remand Order) to obtain the evidence the Respondent appears to suggest as evidence that would be required to decide the case under the *FES* framework.

Otherwise, I my prior findings of fact, discussion, and conclusions of law as set forth in the prior decision and as supplemented by the additional discussion and the modified remedy and Order set forth below and I find that good cause is not shown that would require reopening of the record.

Discussion

In *FES*, supra, the Board held that in order to establish a discriminatory refusal to hire, the General Counsel must first show:

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

In order to establish a discriminatory refusal to consider for hire, the General Counsel must show:

- (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment.

Once this is established, the burden shifts to the Respondent to show that it would not have hired or considered the applicants even in the absence of their union activity or affiliation.

Refusal to Consider

The prior decision and the discussion below address the General Counsel's animus burden. Otherwise, the *FES* criteria require the General Counsel to show that the Respondent excluded applicants from the hiring process. As noted in the prior decision the record shows that the Respondent failed and refused to review the application or to interview 49 union-affiliated applicants and it used its asserted policy of hiring primarily by referrals (including referrals it apparently gained from its related training institute), to screen out union-affiliated applicants for employment and thus it effectively removed the union applicants from its hiring process.

Here, the Union and its applicant members (who were predominantly unemployed at the time they attempted to apply), were not acting without legitimate reason but sought employment following the Union's receipt of information that the Respondent had been selected for a large construction contract that would require the employment of a large number of elec-

tricians. Although the Respondent did not advertise for added electricians, it hired 71 new employees between January 21 and the end of August 1997, and it also utilized a number of temporary employees from employment services or on loan from other contractors.

Despite the fact that the Respondent needed many skilled electricians because of the nature of the new Olestra job and its other jobs, it chose to ignore journeyman union electricians and to rely on word of mouth referrals (some apparently fresh from school) without accepting applications from union applicants and without checking their qualifications, references, or work records. Here, the General Counsel clearly has met his burden and I further find for the reasons set forth in the prior decision that the Respondent's referral policy defense is pretextual and that it otherwise fails to persuasively show that it would not have considered these applicants even in the absence of their union affiliation.

Refusal to Hire

Between January 21, and the end of August, 1997, Respondent hired 71 employees to meet its needs for skilled journeymen and apprentice electricians (9 of these employees were hired in January, 2 in February, 5 in March, 12 in April, and 12 more were hired in August). Additionally, during the January to May timeframe, Respondent utilized a number of temporary employees and paid finder's fees to other contractors who referred employees to it. Moreover, as found in the prior decision:

Some of the electricians and apprentices hired worked on the Olestra project, however, during the spring and summer months, Respondent, and the other electrical contractors on the project (Indecon, Inc. and Garfield Electric), had some difficulty providing enough electrical manpower to the project. Numerous options were discussed (with the Respondent's participation), in an attempt to meet projected shortfalls in electricians and electrical hours of work required for the project and some of the discussed options were implemented. For example, the Respondent and the other electrical contractors went to rolling 4-day[s] a week, 10-hour[s] a day schedules that provided employees with bonus pay. Additionally, some of Respondent's employees were given pay raises just for the duration of the Olestra project (it is unclear whether other options, such as the payment of per diem to all electricians located more than 50 miles from the project, were actually implemented).

Accordingly, I find that the record supports a conclusion that the Respondent was hiring and had concrete plans to hire to meet its project performance needs.

The record also shows that union applicants Fribough and Whalen must have had the experience and training relative to the requirement of the job inasmuch as they were formerly employed by the Respondent, see *Fred'K Wallace & Son, Inc.*, 331 NLRB 914 (2000), and the record also shows that the other applicants were experienced journeyman electricians and therefore had the necessary experience and training, see *Kaminski Electric & Service Co.*, 332 NLRB 452 (2000), and they had

skills and experience at least as extensive as the applicants who were hired. Moreover, and despite her experience, the only applicant who was able to make out an application, Eleanor Kumler, overheard someone in an apparent position of authority direct the receptionist to place her application in the "circular file" not because of her qualifications or experience, but because she was a "union person." Accordingly, the General Counsel has established that the discriminatees met the employer's requirements for the position for which they applied (and that the employer's qualification rationale is pretextual).

As noted, animus has been established and I conclude that the record fully supports a conclusion that the General Counsel has met the three-point refusal to hire criteria.

The Respondent's original defense was addressed in the prior decision and its supplemental defense is substantially addressed in the discussion above concerning its request for further hearing. Otherwise, it is noted that while it could be argued that there was no apparent departure from the Respondent's normal practice of reliance on referrals, that practice itself as applied by the Respondent clearly is discriminatory. The net effect is that the Respondent unlawfully refused to hire union applicants for job openings filled by other applicants. Moreover, even though it had plans and the opportunity to place additional electricians on the Olestra jobsite, it apparently changed its plans and cut back on its numerical commitment to supply electricians, an action which I infer was motivated, at least in part, by its desire to avoid filling any of its positions with union-affiliated electricians.

Under these circumstances, I find that the policies and practices upon which the Respondent relies to justify its actions are more pretextual than persuasive, and I again find that the Respondent has failed to persuasively rebut the General Counsel's showing of unlawful motivation.

In summation, I find that the Respondent maintained policies and engaged in practices that are contrary to basic prohibitions against discrimination in regard to hire, accordingly, I find that the General Counsel has met his overall burden and shown that the Respondent unlawfully refused to consider and unlawfully refused to hire the discriminatees named below for openings filled by other applicants and thereby violated Section 8(a)(3) and (1) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By engaging in a pattern or practice that allows screening of job applicants to determine suspected union sympathizers, by maintaining and enforcing a policy of only hiring employees through referrals from personal and business acquaintances, existing employees, certain trade schools and certain temporary agencies, by failing to inform union employee applicants of its hiring policy, by refusing to accept applications, and failing and refusing to hire or to consider applicants for employment unless they are referred by nonunion sources, Respondent discriminated in regard to hire in order to discourage union membership in violation of Section 8(a)(3) and (1) of the Act.

REMEDY

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

It having been found that the Respondent unlawfully discriminated against job applicants including Matthew Kolbinsky, Ken Mueller, Paul Mahoney, Paula Smith, Steve Jaeger, Annette Garza, Bob Lloyd, Paul Elbisser Sr., Milbert Thornton, Kevin Stenger, Ed Kaueper, Mike Miller, Jerry Smith, Tony Wartman, Walt Zimmer, Bill Heinzelman, James Rosenberger, Louis Proctor, Bill Steger, Jim Traynor, Tim Seiler, Gary White, Ronald Krumme, Donnal Ruehl, Jane Cooper, Kevin Voisine, James Wakefield, Steven Dunaway, Ron Smith, Gary Blanchet, Larry Hunter, Robert Longmire, Nelson Davies, Thomas Lana, Robert Oliver, Gary Johantges, Charlie Cupp, Scott Painter, Jay Rizzuto, Jerry Vaughn, Jerry W. Jones, Eleanor Kumler, Al Neiderhelman, Ralph Stewart, Valeria Riley, Wayne J. Whalen, Charles Fribourg, Tim Ward and Ken Smith based on their suspected union sympathies and because they were not "referred" to the Respondent under the Respondent's exclusive and unlawful hiring procedure and practices, it will be recommended that Respondent be ordered to consider them for employment. It also is recommended that the Respondent be ordered to offer immediate and full reinstatement to each discriminatee in the position of electrician, without prejudice to their seniority or other rights and privileges and make them whole for any loss of earnings they may have suffered by reason of the failure to give them nondiscriminatory consideration for employment, by payment to them of a sum of money equal to that which they normally would have earned in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NRB 1173 (1987).²

In accordance with *Thermo Power*, supra, and *Dean General Contractors*, 285 NLRB 573 (1987), refusal-to-hire discriminatees are entitled to a make-whole remedy, see also *Kentucky General, Inc.*, supra at 439. Here, there are 49 qualified discriminatees that were not hired as electricians between January 21 and the end of August 1997, when, at the same time, the Respondent hired 71 electricians, utilized several temporary employees and declined the opportunity to attempt to meet projected electrical employees shortfalls by increasing its work force. Thus, it appears that if each of the union journeymen had been hired they would have been approximately half of the employer's average staffing (93 to 98 permanent employees) and would have placed approximately 60 percent of its newly filled positions. It is noted that it is well established that when ambiguities or uncertainties existed in compliance proceedings doubts should be resolved in favor of the wronged party rather than the wrongdoer, see *Paper Moon Milano*, 318 NLRB 962, 963 (1995), and *United Aircraft Corp.*, 204 NLRB 1068 (1973). Under these circumstances, it appears that each of the discriminatees who was refused reinstatement is entitled to reinstatement

² Under *New Horizons*, interest is computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

and a make-whole remedy, leaving to compliance the determination of specific individuals and any limits on the reinstatement remedy and the extent or tolling of the Respondent's liability where the Respondent will have the opportunity to show limiting factors, see *Ferguson Electric Co.*, 330 NLRB 514 (2000), and *Serrano Painting*, 331 NLRB 928 (2000). Otherwise it is not considered necessary that a broad Order be issued.

[Recommended Order omitted from publication.]

Eric Taylor, Esq., for the General Counsel.

Jeffery Mullins, Esq. and *Fred Ungerman, Esq.*, of Cincinnati, Ohio, for the Respondent.

Jerry Spicer, Esq., for the Charging Party.

SECOND SUPPLEMENTAL DECISION

This matter was tried before Administrative Law Judge Richard H. Beddow Jr. in May 1998. Judge Beddow issued a decision (JD-174-00) on July 14, 1998. The Board remanded that matter in light of its May 11, 2000 *FES* decision (331 NLRB 9). The judge issued a December 20, 2000 supplemental decision.

On July 28, 2003, the Board again remanded this matter to Judge Beddow. The Board stated in that order remanding the case:

Although we agree with the judge that the General Counsel met his initial burden under *FES* of establishing an unlawful refusal to consider or to hire the union applicants, we find that the Respondent was improperly denied an opportunity to present evidence to show that it would not have considered or hired the alleged discriminatees even in the absence of their union activity or affiliation. Accordingly, we shall remand this aspect of the case to the judge for further consideration of whether, under *FES*, the Respondent can demonstrate that it would not have considered or hired the alleged discriminatees, even in the absence of their union activity or affiliation.¹

Judge Beddow having retired, this matter was assigned to me, Pargen Robertson, Administrative Law Judge, for action in accord with the Board's July 28, 2003 remand. I set this matter down for an April 5, 2004 hearing.

Respondent Beacon Electric Co. filed an April 2 motion in which it waived its right to hearing and stated if "the hearing were to be held, Respondent, consistent with the Board's limited remand order, and without waiving Respondent's exceptions previously filed with the Board, would rest on the record." Respondent's motion was granted and the parties were given a deadline for receipt of briefs. Respondent then filed a brief.

Respondent's Argument

Respondent stated in its brief, "it appears clear from the Board's Order that Judge Robertson may not, in this remand, revisit the issues surrounding the General Counsel's prima facie case." However, Respondent went on to argue that Judge Beddow erred in his finding that Respondent's referral system was

¹ The Board stated at fn. 1, "In remanding this case, we are not passing on the issues raised by the parties' exceptions and briefs at this time, except as detailed herein."

inherently destructive of employees' Section 7 rights.

Respondent argued in that regard that General Counsel failed to establish a prima facie case in that he failed to show that Respondent's exclusive use of a referral system for the selection of new hires was discriminatorily motivated. According to Respondent's argument, its exclusive use of its referral system predated any union activity and Respondent continued to exclusively use that same referral system throughout the events alleged in the complaint.

Findings

I must consider whether I am authorized to consider Respondent's argument. As shown above, Respondent waived its right to a hearing on the question of whether it would not have considered or hired the alleged discriminatees even in the absence of their union activity.

To a limited degree, Respondent does argue that it would not have considered for hire, or actually hired, the alleged discriminatees even in the absence of their union activities. However, instead on putting on evidence to support that claim, Respondent argued that the record already contained that evidence and that that evidence showed that the General Counsel failed to prove a prima facie case. Respondent argued that Judge Bed-

dow's finding that Respondent's referral system was inherently destructive of Section 7 rights was incorrect and that that finding should be reversed.

Perhaps Respondent is correct in that claim. However, consideration of that claim would involve review of the Decision and, perhaps, the Supplemental Decision, of Judge Beddow. I am not authorized to review those decisions. Instead I am specifically limited in my deliberations by the order of the Board. That order as shown above, limits my authority to consideration of whether Respondent proved at the reopened hearing that it would not have considered or hired the alleged discriminatees in the absence of their union activity or affiliation.

I am aware of the Board's statement in footnote 1 that by this remand, it is "not passing on the issues raised by the parties' exceptions and briefs at this time, except as detailed herein." However, the Board said nothing in that regard about extending the scope of its remand to include consideration of those issues raised by the parties.

I find that Respondent did not prove in these proceedings that it would not have considered or hired the alleged discriminatees even in the absence of their union activity or affiliation.