

SKC Electric, Inc. and International Brotherhood of Electrical Workers, Local Union No. 124 and International Brotherhood of Electrical Workers, Local Union No. 257. Cases 17–CA–19438, 17–CA–19613, 17–CA–19935, 17–CA–19544, and 17–CA–19934

August 17, 2007

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On November 16, 1999, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief, and the General Counsel and Charging Party filed answering briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The unfair labor practice issues in this case arise from separate campaigns by IBEW Local 124 and IBEW Local 257 to organize, respectively, Respondent's employees working out of facilities in Lenexa, Kansas, and Columbia, Missouri. For the reasons stated by the judge, we adopt his findings that the Respondent violated Section 8(a)(1) of the Act by threatening employees with stricter supervision and working conditions, by discriminatorily restricting employees from discussing the Union, by telling employees it will try to keep them segregated so as to prevent union organizational efforts, by coercively interrogating employee Kevin O'Brian,² by telling employees that the Respondent will avoid hiring union sympathizers, by discriminatorily refusing to permit striking employees to attend company meetings, and by telling employees they were transferred because they engaged in protected activities.³ We also adopt the judge's findings that the Respondent violated Section

8(a)(3) and (1) by discharging Robert Terhune,⁴ by denying training to Kevin O'Brian, by transferring Eric Yatsook, and by imposing more onerous working conditions on Rick Brockman.

However, for the reasons set forth below, we reverse the judge's findings that the Respondent violated Section 8(a)(3) and (1) by refusing to hire Jim Beem, Roger Lake, Matt Mapes, Chris Heegn, and Gary Fisher because of their union membership or sympathies.⁵ We also reverse the judge's finding that Section 10(b) of the Act does not bar the complaint allegations that the Respondent violated Section 8(a)(1) by threatening employees with job loss and by telling employees that the Respondent would never sign a contract. Accordingly, as discussed below, we dismiss those complaint allegations.

Finally, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union as the collective-bargaining representative of the Respondent's Columbia, Missouri employees. Our reasons for so finding are set forth below.

I. THE SECTION 10(B) ISSUE

A. Background

In April 1997, International Brotherhood of Electrical Workers, Local Union No. 257 (Local 257) began an organizing effort at the Respondent's Columbia, Missouri facility. On September 26, 1997, Local 257 won a Board election, and, on October 6, 1997, was certified as the representative of the Respondent's Columbia electricians, helpers, and apprentices.

On February 5, 1998, Local 257 filed the original unfair labor practice charge in Case 17–CA–19544. This charge alleged the following violations of Section 8(a)(1) and (3): (1) within the past 6 months, the Respondent refused to hire or consider for hire Gary Fischer, Greg Schrock, and Peter Rector because of their union or protected concerted activities; (2) within the past 6 months, the Respondent denied employees training because of their union or protected concerted activities; and (3) about November 3, 1997, the Respondent laid off Peter Rector and Kevin O'Brian (and refused to recall Rector) because of their union or protected concerted activities.

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

² We agree with the judge that this allegation is not barred by Sec. 10(b) of the Act, but we do so for the reasons set forth below.

³ Member Schaumber adopts, for institutional reasons, the judge's finding that the Respondent violated Sec. 8(a)(1) by telling Eric Yatsook that he was transferred because he was organizing in the parking lot. Although he would find that the statement under scrutiny was part of the *res gestae* of the unlawful transfer of Yatsook and is subsumed by that violation, Member Schaumber recognizes that current Board precedent requires the finding of a violation. See *TKC, a Joint Venture*, 340 NLRB 923 fn. 2 (2003), *enfd.* 123 Fed.Appx. 554 (4th Cir. 2005), citing *Benesight, Inc.*, 337 NLRB 282, 283–284 (2001).

⁴ In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by discharging Terhune, Member Schaumber finds it unnecessary to pass on whether the discharge also violated Sec. 8(a)(3).

⁵ We note that the judge's decision preceded issuance of *FES*, 331 NLRB 9 (2000), *enfd.* 301 F.3d 83 (3d Cir. 2002), in which the Board modified its analysis of allegations of unlawfully motivated discriminatory refusals to hire. Our analysis of the refusal to hire allegations in this case is unaffected by the *FES* modification. As explained below, we find that the General Counsel has failed to prove that there were any discriminatory actions taken against the five union applicants.

On April 22, 1998, Local 257 filed an amended charge in Case 17-CA-19544, and for the first time alleged that certain conduct in September 1997 violated Section 8(a)(1). Of course, this amended charge was filed more than 6 months after the alleged September 1997 unfair labor practices occurred. Specifically, the amended charge repeated the original charge allegations concerning the denial of training and the refusal to hire Fisher and Schrock (Rector was omitted). The amended charge also deleted the allegations concerning the layoffs of Rector and O'Brian and the refusal to recall Rector, and added the following Section 8(a)(1) unfair labor practice allegations: (1) on September 12, 1997, the Respondent threatened employees with job loss if they engaged in a strike or other protected concerted activities; (2) about September 24, 1997, the Respondent informed employees that it would be futile to select the Union as their collective-bargaining representative; and (3) in late September, the Respondent interrogated employees about their union activities and sympathies. These three 8(a)(1) allegations were incorporated into the consolidated complaint that the Regional Director issued on April 23, 1998.⁶

The Respondent argued to the judge that the three 8(a)(1) allegations of the complaint were barred by Section 10(b) because they were not asserted until the filing of the amended charge on April 22, 1998, more than 6 months after the alleged 8(a)(1) conduct occurred. The judge rejected this argument. Applying the "closely related" test set forth in *Redd-I*, 290 NLRB 1115 (1988),⁷ he concluded that the three disputed 8(a)(1) allegations of the complaint were "closely related" to the allegations of the timely-filed original charge. In this connection, the judge emphasized that both sets of allegations involved the same legal theory in that they alleged conduct designed to defeat the Union's organizational campaign. He also found that the allegations arose from "the same factual sequence of events wherein it is alleged the Respondent sought to suppress union support at its operations." The judge further found that the Respondent asserted the same defenses to the allegations, i.e., that it

⁶ The complaint also included the charge allegations concerning the refusal to hire Fischer and Schrock, and the denial of training. (The complaint identified the employee denied training as Kevin O'Brian.) However, the complaint did not include the original charge allegations concerning the refusal to hire Rector, the layoffs of Rector and O'Brian, or the refusal to recall Rector.

⁷ There are three parts to the "closely related" test. First, the Board examines whether the untimely allegations involve the same legal theory as the timely allegations. Second, the Board considers whether the timely and untimely allegations arise from the same factual circumstances or sequence of events. Finally, the Board may consider whether the respondent would raise the same or similar defenses to both allegations. *Redd-I*, supra, 290 NLRB at 1118.

bears no animus towards the Union and that it did not engage in conduct designed to unlawfully discourage its employees from supporting the Union. Therefore, the judge found that the litigation of the three 8(a)(1) complaint allegations was proper. On the merits, he concluded that the Respondent violated the Act as alleged.

The Respondent excepts to the judge's "closely related" finding and argues that Section 10(b) bars litigation of the three 8(a)(1) complaint allegations.

B. Analysis

In *Carney Hospital*, 350 NLRB 627 (2007), the Board recently overruled *Ross Stores, Inc.*, 329 NLRB 573 (1999), enf. denied 235 F.3d 669 (D.C. Cir. 2001), to the extent that it held that "the requisite factual relationship under the 'closely related' test may be based on acts that arise out of the same antiunion campaign." 329 NLRB at 574. As stated in *Carney*, the Board "will not find that the second prong [of *Redd-I*] is satisfied merely because timely and untimely allegations pertain to events that occurred during or in response to the same union campaign. But where the two sets of allegations demonstrate similar conduct, usually during the same time period with a similar object, or there is a causal nexus between the allegations and they are part of a chain or progression of events, or they are part of an overall plan to undermine union activity, we will find that the second prong of the *Redd-I* test has been satisfied." *Carney*, supra, 350 NLRB 627, 630 (footnote and internal quotations deleted).

Applying *Carney* to the facts of the instant case, we conclude, for the following reasons, that the untimely allegation concerning the interrogation of O'Brian is closely related to the timely filed allegations, but that the untimely job loss threat and futility statement allegations are not.

We find that the untimely O'Brian interrogation allegation is factually related to the timely charge allegation that O'Brian was denied training because of his union activities. The record shows that O'Brian was an open union supporter and served as the Union's observer at the September 26, 1997 election. Shortly after the election, O'Brian was the only employee to volunteer for certain training that the Respondent was planning known as the "TEGG training," and the Respondent told him that it would "get the wheels rolling" regarding the training. According to the credited testimony, however, about a week later, Estimator/Project Manager Doug Iles had a conversation with O'Brian about the TEGG training.⁸

⁸ 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 preponder-

Iles told O'Brian that the Respondent did not want anyone to receive the TEGG training who was going to be leaving in September or going on strike.⁹ Iles asked O'Brian what he would do if the Union called him out on strike. O'Brian told Iles that he would honor the strike. Iles replied, "Bill [Love, the Respondent's owner] would want to know that." Thereafter, the Respondent selected another employee, who had not volunteered, for the TEGG training. The judge found, and we agree, that O'Brian was unlawfully denied selection for the TEGG training because of his union sympathies.

These facts establish a close factual link between the denial-of-TEGG-training allegation of the charge and the interrogation allegation of the complaint. Both sets of allegations targeted the same employee and occurred very close in time. The Respondent questioned O'Brian to determine if he would participate in a strike because the Respondent did not want to offer the TEGG training to anyone who might do so. There is therefore a "causal nexus" between the allegations, in that the interrogation provided the information that directly led to the denial of training. Thus, the allegations are part of a "chain or progression of events." In *Carney*, the Board stated that such a factual relationship would be sufficient to satisfy the second prong of the *Redd-I* test. *Carney*, supra, 350 NLRB 627, 630. We therefore find that the two allegations arose from "the same factual situation or sequence of events" within the meaning of *Redd-I*. 290 NLRB at 1118.¹⁰

Unlike the interrogation allegation, however, we find that the job loss threat and the statement of futility alleged in the untimely amended charge and the complaint lack a close factual relationship to the discriminatory conduct alleged in the timely charge. The two sets of allegations do not involve similar conduct during the

ance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

⁹ The judge found, and we agree, that Iles was an agent of the Respondent.

¹⁰ We further find that the first prong of *Redd-I* (common legal theory) has been satisfied concerning the O'Brian interrogation. Although they involve different sections of the Act, both the timely denial of training allegation and the untimely interrogation allegation turn on the theory of interference with O'Brian's protected right to strike. See *Peerless Pump Co.*, 345 NLRB 371, at 377-378, fn. 22 (2005).

In addition, although we stated in *Carney* (fn. 8) that prong three (common defenses) is not a mandatory aspect of the *Redd-I* test, we observe that the O'Brian complaint and charge allegations share common defenses that O'Brian was not a credible witness, that the alleged interrogation never occurred or cannot be attributed to the Respondent, and that there was no causal relationship between the denial of training and O'Brian's union sympathies. Thus, we find that prong three of *Redd-I* has been satisfied.

same time period with a similar object, nor is there a causal nexus between the allegations. There is no showing that the alleged September 12, 1997 threat of job loss or the alleged September 24, 1997 statement to employees that it would be futile to select the Union as their collective-bargaining representative were part of a chain or progression of events related to the refusals to hire, denial of training, layoffs or refusal to recall asserted in the timely filed charge. The alleged job loss threat was not directed specifically at any of the employees mentioned in that charge, but rather appeared in a letter sent to all unit employees concerning what could happen in the event of a strike. There is no showing that the alleged job loss threat led to any of the discriminatory conduct alleged in the timely filed charge. Similarly, although the alleged futility statement was made to Rector, who was named as a discriminatee in the timely filed charge, there is no showing that the futility statement led up to or caused any of the alleged discriminatory acts against him. Nor has it been shown that these discrete unfair labor practice allegations were part of an overall organized employer plan to undermine the Union. The 8(a)(1) allegations in the amended charge and complaint and the 8(a)(3) allegations in the initial charge have not been shown to be any more than separate actions carried out independently by several different Respondent officials. Although the events occurred during the same organizational campaign and the same general time period, "a chronological relationship without more is insufficient to support a finding of factual relatedness." *Carney*, supra, 350 NLRB 627, 631.

Having determined that the second prong of the *Redd-I* test has not been established with respect to these two allegations, the final inquiry is whether the untimely 8(a)(1) allegations can nonetheless survive a 10(b) time-bar defense even if, as found by the judge, the first prong, i.e., the common legal theory prong, of *Redd-I* has been met. As in *Carney*, we find that they cannot. Thus, even assuming that the allegations are related by legal theory, we cannot find them closely related in the absence of sufficient factual relatedness.¹¹

In sum, we find that the statement of futility and the threat of job loss allegations are not closely related to the timely filed charge under *Redd-I*. Therefore, we find that these two 8(a)(1) complaint allegations are time-barred

¹¹ In the absence of a factual nexus between the timely and untimely allegations, we also cannot find here that the Respondent would have raised similar defenses to the allegations. The defense to the timely filed charge allegations would primarily be that there was a lawful motive for the employment decisions, while the defense to the untimely complaint allegations would be either that the conduct did not occur (alleged statement of futility) or that the conduct did not reasonably tend to interfere with Section 7 rights (alleged threat of job loss).

by Section 10(b), and they shall be dismissed. However, with respect to the third untimely complaint allegation (the interrogation of O'Brian), we find that the *Redd-I* factors have been satisfied. On this basis, we conclude that this complaint allegation is not barred by Section 10(b).

II. REMAINING ISSUES RAISED BY THE RESPONDENT'S EXCEPTIONS

A. *The Failure to Hire Four Union Applicants*

The judge found that the Respondent violated Section 8(a)(3) and (1) by failing to hire union applicants Jim Beem, Roger Lake, Matt Mapes, and Chris Heegn. Specifically, the judge found that the Respondent applied stricter hiring criteria to the union applicants than it did to the other employees it hired for the jobs in question. The Respondent excepts to this finding on the ground that the four union applicants did not meet the Respondent's legitimate hiring criteria, and that it did not "hire" the temporary workers it obtained through an employment service to fill the positions at issue. We find merit in the Respondent's exceptions.

In 1994, International Brotherhood of Electrical Workers, Local Union No. 124 (Local 124) initiated an organizing effort at the Respondent's Lenexa, Kansas, facility. During the course of this campaign, Local 124 filed several unfair labor practice charges. On July 17, 1997, Local 124 and the Respondent entered into a non-Board settlement, which required, *inter alia*, that the Respondent use Local 124 as its primary source of journeymen electricians at its Lenexa facility for a period of 2 years. Employees referred by Local 124 had to meet certain qualifications outlined in the settlement agreement, including passing the Respondent's "Sheig" preemployment test.

On July 30, 1997, pursuant to the settlement agreement, the Respondent notified Local 124 that it needed 15 journeymen electricians for approximately 3 weeks. Local 124 representative Jim Beem informed the Respondent that it would be difficult to find applicants who would be willing to work for only 3 weeks. Nonetheless, on August 1 and 4, 1997, four union members applied for work at the Respondent's office. Pursuant to the settlement agreement, the Respondent gave the applicants its "Sheig" test, which they failed. The Respondent then contracted with a third-party employment agency to provide workers to fill the temporary positions. The Respondent did not require the contract workers to take the Sheig test or otherwise satisfy the hiring criteria set forth in the settlement agreement.

The judge found that the Respondent discriminatorily applied the terms of the settlement agreement to the un-

ion applicants. We disagree. Although the settlement agreement applied by its terms to all applicants for hire, we agree with the Respondent that the temporary contract workers were not "hired" by the Respondent, and thus the hiring criteria contained in the settlement agreement were inapplicable to those workers.¹² The record shows that the Respondent has obtained the services of contract workers in the past for emergency, short-term situations, or has "borrowed" idle employees from other electrical contractors on an as-needed basis. These temporary workers were not offered permanent employment and were paid benefits and wages directly from the third-party employer. Because the Respondent did not hire these workers, they were not required to pass the Sheig test or otherwise meet the Respondent's hiring criteria.¹³ Consequently, the Respondent's use of such workers provides no basis for finding that the union applicants were treated in a disparate manner with respect to the Respondent's legitimate hiring criteria. Accordingly, we reverse the judge's finding that the Respondent discriminatorily refused to hire the four union applicants who failed the Respondent's preemployment test, and we shall dismiss this complaint allegation.

B. *The Failure to Hire Gary Fisher*

The judge found that the Respondent violated Section 8(a)(3) and (1) by failing to hire union applicant Gary Fisher. Specifically, the judge found that the Respondent discriminatorily applied its hiring criteria to Fisher when it refused to hire him because he did not have the requisite electrical experience to be considered for a position. The judge found disparate treatment based on the Respondent's decision to hire another applicant, Peter Rector, even though Rector did not pass his preemployment drug test. Unlike Fisher, who revealed his union affiliation to the Respondent, Rector concealed his union membership. The Respondent excepts to the judge's findings on the ground that Fisher and Rector's situations are not comparable. We find merit in the Respondent's exceptions.

The Respondent's hiring policy requires all electrician applicants to meet the following conditions: (1) submit an application in person; (2) be "current in trade," meaning that they have worked at least 12 out of the last 24 months as an electrician; (3) not have had in excess of

¹² The General Counsel has not alleged that the subcontracting arrangement itself was unlawful. Nor do we find evidence in the record to suggest that the Respondent used the subcontracting arrangement as a subterfuge to conceal an intent not to hire union applicants. To the contrary, the Respondent has shown that it would have hired the union applicants if they had passed the Sheig preemployment test.

¹³ There is no showing of a failure to apply the "Sheig" requirement to applicants for employment by the Respondent.

two employers in the past 3 years; (4) be eligible for rehire with their last employer; (5) score 49 or higher on the Sheig test; (6) successfully complete an interview; and (7) pass a drug and alcohol test.

The record shows that Fisher was not hired because he did not meet condition (3) above, i.e., he had more than two employers in the last 3 years. The record also shows that the Respondent has refused to hire a number of applicants who failed to satisfy this condition.

The essential facts with regard to Rector's application are not in dispute. On June 1, 1997, Rector applied for work with the Respondent. Rector met every condition for hire except that he failed the drug test. The Respondent's policy requires applicants who fail the drug test to wait 6 months before retaking it. Nonetheless, the Respondent's owner, Bill Love, waived the 6-month requirement for Rector if he would agree to pay for the second drug test and sign a waiver consenting to random drug tests during his first 3 months of employment. Rector took and passed the second drug test and began working for the Respondent in August 1997.

We disagree with the judge's finding that the Respondent's treatment of Fisher and Rector shows a disparate application of hiring policies between union and nonunion applicants. Rector satisfied every other preemployment condition, including the experience-related condition that he not have had more than two employers in the last 3 years. Fisher, who had more than two employers in the last 3 years, could never have satisfied this experience-related condition. As to the drug test, however, the Respondent's policy permitted Rector to retake this test 6 months after his first test and, if he passed, he would be eligible for employment. In Rector's case, Love waived the 6-month waiting period in exchange for Rector's agreement to meet certain additional conditions during his first 3 months of employment—pay for the second test and be subjected to random testing. Nothing in the Respondent's hiring policy prevents the Respondent from making such an agreement with an applicant that places additional constraints on his employment.

In sum, Fisher and Rector failed to meet different hiring criteria, and the Respondent had legitimate reasons, unrelated to union activity, for treating their situations differently. "An essential ingredient of a disparate treatment finding is that other employees in similar circumstances were treated more leniently than the alleged discriminatee was treated." *Thorgen Tool & Molding*, 312 NLRB 628 fn. 4 (1993) (emphasis added). Here, as explained above, the circumstances of the two employees were not "similar." Accordingly, we reverse the judge's finding that Fisher was treated disparately, and we shall

dismiss the complaint allegation that the Respondent unlawfully failed to hire him.

C. *The Withdrawal of Recognition From Local 257*

The judge found that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from Local 257 on the basis of a decertification petition that was tainted because it was circulated by the Respondent's supervisor and agent, Paul Stovall.¹⁴ For the reasons stated below, we adopt the judge's unfair labor practice finding, but not his entire rationale.

As stated above, on September 26, 1997, Local 257 won a Board-conducted election at the Respondent's Columbia facility and, on October 6, 1997, was certified as the collective-bargaining representative of the Columbia electricians. Paul Stovall voted in the election and, for purposes of our analysis, we shall assume that, at all relevant times, he remained a member of the bargaining unit.

From May to early September 1998, Stovall was the project manager on the Respondent's Westminster project. When that project ended, Stovall was assigned to oversee the Respondent's various projects in the Columbia area, which required that he drive a company truck from project to project.

On about September 1, 1998, Stovall and Columbia Branch Manager Jim Miller discussed ways to decertify the Union. Miller told Stovall to "get a piece of paper, get a title on it and get signatures." Stovall drafted such a document and, on September 1 and 2, 1998, while visiting the various jobsites during working hours, obtained the signatures of approximately 75 to 80 percent of the Columbia employees.

Stovall immediately attempted to file the petition with the Board's office in Kansas City, but was told that the petition was untimely. Stovall reported this information to Miller, who told him that he would be sent back to Kansas City at the appropriate time to file the petition.

On October 7, 1998, Stovall drove his company truck during working hours to Kansas City and filed the decer-

¹⁴ After the judge issued his decision, the Board issued *Levitz*, 333 NLRB 717 (2001), in which it overruled *Celanese Corp.*, 95 NLRB 664 (1951), and its progeny insofar as they permitted an employer to withdraw recognition from an incumbent union on the basis of a good-faith doubt of the union's continued majority status. The *Levitz* Board held that "an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees." 333 NLRB at 717. *Levitz*, however, has no bearing on our decision today. *Levitz* did not change the settled principle applied by the judge that an employer may not withdraw recognition "based on a decertification petition which it circulated or was responsible for circulating." *Tyson Foods*, 311 NLRB 552, 556 (1993). In addition, the Board held in *Levitz* that its analysis and conclusions in that case would only be applied prospectively. 333 NLRB at 729.

tification petition. On October 19, 1998, based on the filing of this petition, the Respondent withdrew recognition from Local 257 as the bargaining representative of its employees.

The judge found that Stovall was both a 2(11) supervisor and a 2(13) agent at the time he circulated and filed the representation petition. In its exceptions, the Respondent argues that Stovall was not a supervisor or an agent. In addition, the Respondent contends that even if Stovall was a supervisor, he was included in the bargaining unit and, therefore, his conduct cannot be attributed to the Respondent.

We agree with the judge that Stovall was an agent of the Respondent. We find it unnecessary to resolve whether Stovall was a statutory supervisor. In any event, his decertification efforts are attributable to the Respondent.

The Board has held that the conduct of statutory supervisors who are also bargaining unit members will not be imputed to the employer “in the absence of evidence that the employer encouraged, authorized, or ratified” such conduct or that the employer “acted in such [a] manner as to lead employees reasonably to believe that the supervisor was acting for and on behalf of management.” *Montgomery Ward & Co.*, 115 NLRB 645, 647 (1956), *enfd.* 242 F.2d 497 (2d Cir. 1957), *cert. denied* 355 U.S. 829 (1957).

Assuming that Stovall was a statutory supervisor who was also a member of the bargaining unit, we conclude, applying the *Montgomery Ward* test, that Stovall’s conduct can be attributed to the Respondent. In response to Stovall’s question about how to decertify the Union, Branch Manager Jim Miller instructed him to “get a piece of paper, get a title on it and get signatures,” which Stovall did. Stovall circulated the decertification petition during working hours, while driving a company truck from jobsite to jobsite, all with the authorization of Miller. When Stovall advised Miller in September 1998 that the Kansas City Regional Office rejected the petition as untimely, Miller directed Stovall to return to Kansas City at a later time. Stovall again followed these instructions and drove a company truck during working hours to successfully file the petition the following month. Under these circumstances, we find that the Respondent encouraged, authorized, and ratified Stovall’s decertification activities. Thus, assuming that Stovall was a bargaining unit member and a statutory supervisor, we find that, under the *Montgomery Ward* test, his antiunion conduct is attributable to the Respondent.

Even if Stovall was not a statutory supervisor, his conduct would nonetheless be attributable to the Respondent if he was acting as the agent of the Respondent. In de-

termining whether an individual is an agent of the employer, the Board applies the common law principles of agency as set forth in the Restatement 2d of Agency. See *Dentech Corp.*, 294 NLRB 924 (1989); *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988). Agency status may be established, *inter alia*, under the doctrine of apparent authority, when the principal’s manifestations to a third party supply a reasonable basis for the third party to believe that the principal has authorized the alleged agent to do the acts in question. *West Bay Maintenance*, 291 NLRB at 82–83. “[E]ither the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct [the manifestation] is likely to create such belief.” *Id.* at 83; *Allegheny Aggregates, Inc.*, 311 NLRB 1165 (1993).

Here, as discussed above, Stovall collected the signatures during working hours at a time when he was engaged in overseeing the Respondent’s various projects in the Columbia area. Stovall drove a company truck from project to project and collected the signatures while visiting the various jobsites. Under these circumstances, employees would reasonably believe that Stovall was authorized by the Respondent to circulate the petition and that he spoke and acted on behalf of the Respondent when he did so. Accordingly, we agree with the judge that Stovall was acting as an agent of the Respondent when he circulated the petition.

Therefore, whether or not Stovall was a statutory supervisor at the time he collected the employees’ signatures, we agree with the judge that the decertification petition was tainted by Stovall’s involvement with it and by the assistance the Respondent provided him in creating, circulating, and filing the petition. Consequently, the Respondent was not privileged to rely on the tainted petition, and the Respondent’s withdrawal of recognition from Local 257 violated Section 8(a)(5) and (1) of the Act.¹⁵

¹⁵ There are no exceptions to the judge’s grant of an affirmative bargaining order to remedy the Respondent’s unlawful withdrawal of recognition. Therefore, we find it unnecessary to pass on whether a specific justification for that remedy is warranted. *Heritage Container*, 334 NLRB 455 *fn.* 4 (2001). See *Scepter v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002) (in the absence of particular exceptions, the Board may issue an affirmative bargaining order without specifically stating the basis for such).

We shall modify the judge’s recommended Order in accordance with *Ferguson Electric Co., Inc.*, 335 NLRB 142 (2001). In addition, we shall substitute a new notice in accordance with *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), *enfd.* 354 F.3d 534 (6th Cir. 2004).

ORDER

The National Labor Relations Board orders that the Respondent, SKC Electric, Inc., Lenexa, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with stricter supervision and working conditions because they engage in union activities.

(b) Discriminatorily restricting employees from discussing union matters while working.

(c) Telling union supporters that the Respondent will try to keep them segregated so as to prevent union organizational efforts.

(d) Coercively interrogating employees about their intentions to engage in a strike.

(e) Telling employees that the Respondent will avoid hiring union sympathizers.

(f) Discriminatorily refusing to permit striking employees to attend employee meetings.

(g) Imposing more onerous working conditions on employees because they engage in union activities.

(h) Denying training to employees because of their union membership or sympathies.

(i) Transferring employees, and telling them they were transferred, because they engaged in protected concerted activity.

(j) Discharging or otherwise discriminating against any employee for supporting the International Brotherhood of Electrical Workers, or any other labor organization, or engaging in protected concerted activity.

(k) Unlawfully withdrawing recognition of the International Brotherhood of Electrical Workers, Local Union No. 257 (the Union), as the collective-bargaining representative of the Columbia, Missouri, employees.

(l) 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 Robert Terhune full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Robert Terhune whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of

Robert Terhune and, within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All helper, apprentice, and journeymen electricians employed by the Respondent at its Columbia, Missouri facility but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

(e) 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.

(f) Within 14 days after service by the Region, post at its Lenexa, Kansas, and Columbia, Missouri, facilities copies of the attached notice marked "Appendix."¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 15, 1997.

(g) 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.

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

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

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT threaten you with stricter supervision and working conditions because you engage in union activities.

WE WILL NOT discriminatorily restrict you from discussing union matters while working.

WE WILL NOT tell union supporters that we will try to keep them segregated so as to prevent union organizational efforts.

WE WILL NOT coercively interrogate you about your intentions to engage in a strike.

WE WILL NOT tell you that we will avoid hiring union sympathizers.

WE WILL NOT discriminatorily refuse to permit striking employees to attend employee meetings.

WE WILL NOT impose more onerous working conditions on you because you engage in union activities.

WE WILL NOT deny you training because of your union membership or sympathies.

WE WILL NOT transfer you, and tell you that you are being transferred, because you engaged in protected concerted activity.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting International Brotherhood of Electrical Workers, or any other labor organization, or engaging in protected concerted activity.

WE WILL NOT unlawfully withdraw recognition of the International Brotherhood of Electrical Workers, Local Union No. 257, as the collective-bargaining representative of our Columbia, Missouri, employees.

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

WE WILL, within 14 days from the date of the Board's Order, offer Robert Terhune full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Robert Terhune whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, 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 reference to the unlawful discharge of Robert Terhune, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All helper, apprentice, and journeymen electricians employed by us at our Columbia, Missouri facility but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

SKC ELECTRIC, INC.

Mary Taves and Susan A. Wade-Wilhoit, Esqs., for the General Counsel.

James R. Holland II and Elizabeth P. West, Esqs., for the Respondent.

Michael T. Manley and Anita C. O'Neil, Esqs., (on the brief) for the Charging Party Unions.

DECISION¹

ALBERT A. METZ, Administrative Law Judge. This case involves issues of whether the Respondent has violated Section 8(a)(1), (3) and (5) of the National Labor Relations Act (Act).² On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the parties' briefs, I make the following findings of fact.

1. Jurisdiction and Labor Organization

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Charging Parties (referred to jointly as the Union or individually as Local 124 and Local 257) are labor organizations within the meaning of Section 2(5) of the Act.

¹ This case was heard at Overland Park, Kansas on March 23–26, 1999.

² 29 U.S.C. § 158 (a)(1), (3) and (5).

2. Background

The Respondent is an electrical contractor that is headquartered in Lenexa, Kansas and has a branch office in Columbia, Missouri. Until recently the Respondent was owned by Bill Love. In March 1998 the Respondent and several other nonunion contractors consolidated their operations and offered their stock to the public. At the time of the hearing, Larry Malach was the Respondent's President.

A. The Lenexa Settlement Agreement

In 1994 Local 124 initiated an organizing effort at Respondent's Lenexa facility. During the course of this union campaign Local 124 filed several unfair labor practice charges against the Respondent. On January 6, 1997, an unfair labor practice trial commenced concerning charges against the Respondent. During that trial Local 124 and the Respondent had settlement discussions, and on June 17, 1997, they signed a non-Board settlement agreement.

The settlement contained two agreements particularly relevant to the present proceeding. First, it provided for the reinstatement of discharged electrician Rick Brockman. Second, the parties agreed that the Respondent would use Local 124 as its primary source of hiring journeymen electricians at its Lenexa facility for a period of 2 years. Employees referred by Local 124 had to meet certain qualifications outlined in the settlement agreement.

B. The Columbia Facility

On October 6, 1997, Local 257 was certified as the collective-bargaining representative for a unit of electrician employees at the Respondent's Columbia, Missouri, place of business.³ The parties thereafter entered into collective-bargaining negotiations but no agreement was ever reached.

The Government's complaint alleges numerous violations of the Act ranging over a period of nearly 1 and 1/2 years. The allegations concern both the Lenexa and Columbia offices. They commence with the reinstatement of Rick Brockman and conclude with the Respondent's withdrawal of recognition of Local 257 as the representative of the Columbia employees.

3. July 15, 1997—Closer Supervision of Rick Brockman

Pursuant to the above-discussed settlement agreement, the Respondent offered reinstatement to Rick Brockman in July 1997. During the settlement discussions that preceded reinstatement, Brockman had been offered money to waive his right to be rehired. Brockman rejected this offer and returned to work without monetary compensation. A union organizing committee distributed a newsletter to the Respondent's employees at the time Brockman returned to work. The newsletter made a point of informing the employees that Brockman had given up monetary compensation in order to return to work and organize the Respondent's employees.

On July 15, 1997, Respondent's employee Tim Coder, a nonsupervisory lead-person, reported for work at the Respon-

dent's Harrah's Casino project in Mayetta, Kansas. Also working on the job were Bobby Cunningham, an apprentice and the stepson of supervisor, Richard Oberlechner. Coder met with Cunningham and Oberlechner in a trailer where Cunningham was examining a copy of the Union's newsletter that mentioned Brockman's reinstatement. The men briefly discussed the newsletter.

Brockman was also working at the Mayetta jobsite on this day. He was assigned to work alone in the electrical room area. Coder and some other employees were elsewhere on the project waiting on a backhoe to dig a trench. Since the men were idle, Coder directed some of them to assist Brockman. Shortly thereafter, Coder went to the job trailer where supervisor Oberlechner was working. According to Coder's testimony, Oberlechner asked why he had assigned employees to help Brockman. Coder explained they were nonproductive while they waited for the trench to be dug. Oberlechner angrily told Coder that when he assigned somebody a job he did not want Coder to interfere. Oberlechner continued by saying that he was timing Brockman to see how long it took him to do his work.

Coder left the trailer and went to Brockman. He told Brockman he had better "watch his ass," because "they're" out to get him. Brockman testified that he was told by Coder that Oberlechner was timing his work. Coder testified that he had never been given a time target for the completion of tasks when assigning employees on the Mayetta project, nor had he been questioned about any employee assignments prior to this occasion. Oberlechner denied that he had told Coder he was timing Brockman's work.

Coder was a credible witness whose demeanor was impressive. It was clear from his testimony that Oberlechner's anger at him for assigning help for Brockman had surprised Coder and made a strong impression on him. Coder's testimony that Brockman was being timed likewise was persuasive. Brockman corroborated Coder's version of events by testifying that he had been warned about Oberlechner's remarks shortly after the conversation.⁴ In contrast Oberlechner's demeanor was not convincing in his denials of the conversation. In sum, I credit Coder's version of events. In light of the close proximity between Brockman's return to work, the Union's publicity that he was going to organize Respondent's employees, the angry statement by Oberlechner that he did not want Brockman getting assistance, and his statement he was timing Brockman's work, I infer that the reason for Oberlechner's coercive statements was because Brockman was a known union advocate.

The test of whether an employer's remarks or actions violate the Act's prohibition against interference, restraint or coercion is not whether it succeeds or fails but rather the objective standard of whether it tends to interfere with the free exercise of employee rights under the Act. *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 490 (1995). Oberlechner's statements to Coder that he did not want employees assigned to help Brockman and that he was timing Brockman's work convey the message that employees who engage in activities on behalf of the Union will be subjected to stricter supervision and working conditions. Such

³ The unit is: All helper, apprentice, and journeymen electricians employed by the Respondent at its Columbia, Missouri facility but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

⁴ I permitted this testimony as an exception to the hearsay rule. Fed.R.Evid. 803 (1).

statements are inherently coercive, and destructive of employee rights. I, therefore, find that Oberlechner's statements to Coder are a violation of Section 8(a)(1) of the Act.

I find that the Government has proven that Oberlechner engaged in timing Brockman because he engaged in union activity, that the employer knew of the activity, and that the employer took action adverse to the employee motivated by animus for that activity. The timing of Brockman's work is a discriminatory imposition of more onerous working conditions. Based on the credited testimony, I find that the Respondent has failed to overturn the Government's showing of proof in this regard. *Wright Line*, 251 NLRB 1083 (1980). I find that the Respondent's timing of Brockman's work is violation of Section 8(a)(1) and (3) of the Act.

4. July 23, 1997—Prohibition Against Discussing the Union

On approximately July 21, 1997, Brockman was reassigned to work at the Respondent's Great Plains Mall project in Olathe, Kansas. Respondent's senior project manager at that job was supervisor Bud Bishop. Shortly after Brockman's arrival on the job, supervisor, Jeff Foster, reported to Bishop that Brockman had been bothering other employees during working hours about joining the Union. The Respondent has a no-solicitation policy that prohibits solicitations during working time, and in light of the complaints, Bishop decided to talk to Brockman about the matter. On approximately July 23 Bishop held a safety meeting with Respondent's employees. After the meeting concluded he called Brockman into a nearby mechanical room. Bishop told Brockman that some employees had complained about his bothering them concerning joining the union. Bishop testified he told Brockman that, "I did not want him discussing the Union or his policies during working hours. I didn't care if he did it over the noon hour or after work but I did not want him doing it during working hours because we were in . . . the last four weeks of the Great Plains Mall."

The Respondent argues that it had the right to prohibit Brockman's soliciting for the Union during working hours. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803–804 (1945) (employer may prohibit solicitation on working time). The Respondent concedes that its employees are permitted to talk about a variety of subjects during working hours without restriction, but asserts this privilege is conditioned upon their working while conversing. It defends the restriction placed upon Brockman because he reportedly was in an area remote from his normal assignment and was not working when discussing the union with fellow employees. *Adco Electric Incorporated*, 307 NLRB 1113, 1118 (1992), enf. 6 F.3d 1110 (5th Cir. 1993) (no violation of the Act when the employer prohibited an employee from leaving his work area to discuss the union with other employees.)

I find that the Respondent's defense is misplaced. Bishop's statements to Brockman were not directed at his being away from his work area. Rather Bishop admittedly told Brockman that he could not talk about the Union during work hours. This is a discriminatory application of Respondent's policy that admittedly was not applied to other types of work conversations. I find that the Respondent violated Section 8(a)(1) of the Act by Bishop's discriminatory restriction of Brockman's non-

work related union conversations. *Willamette Industries*, 306 NLRB 1010 fn. 2 (1992).⁵

5. August 1997—Jim Beem, R. Lake, Matt Mapes & Chris Heegn not Hired

As noted above, on June 17, 1997, the Respondent and Local 124 signed an agreement settling certain unfair labor practice charges. The agreement contained provisions that when the Respondent had openings for journeymen electricians, it agreed to contact the Union for workers. The Union then had 3 working days to provide the Respondent with qualified applicants. The term "qualified applicant" was defined by Paragraph 6(b) of the settlement agreement as i) a journeyman electrician with at least 6 months of electrical experience in the last 12 months; ii) an appropriate license if the position sought requires such; iii) successfully passing the preemployment "Sheig" test with a score of 49 or higher;⁶ iv) successfully passing a drug test, and, v) the applicant must be a BAT journeyman or have passed the Union's journeyman certification exam. (G.C. Exh. 13) If the Union failed to provide a qualified applicant within the 3 day time frame, the Respondent could hire from other sources using the same criteria used to screen the Union's applicants.

On July 30, 1997, Respondent's President, Larry Malach, telephoned the Union's Director of Organizing, Jim Beem, and requested 15 journeymen electricians. Beem agreed to locate the applicants and have them apply at the Respondent's office. Later the same morning, Malach sent a fax which stated:

Our notice to you this a.m. requesting (15) journeyman electricians. Please send these people to our office to fill out applications. All applicants will be processed pursuant to paragraph 6 of the agreement. (GC 14)

On the afternoon of July 30 Malach telephoned Beem and told him that the 15 positions were for temporary jobs that could last up to 3 weeks. Beem said he did not know if he would be successful in filling temporary positions, but he would try. Malach said he was not sure if the applicants would need to take the Sheig test, but he would talk to his attorney and find out. Shortly thereafter Malach telephoned Beem and said that the applicants would have to take the Sheig test.

⁵ In a posthearing motion the Respondent sought to reopen the hearing in order to receive additional evidence on the subject of whether witness Robert Fansler was present at work on July 22. The Respondent's purpose in advancing the motion is to dispute Fansler's denial that he worked that day or overheard the conversation between Bishop and Brockman. The Respondent wishes to offer company records to show that Fansler attended the safety meeting. The Government and Charging Party oppose the motion. The evidence that is sought to be presented was not shown to be newly discovered nor unavailable at the time of the hearing. Likewise I do not find that the evidence is of such significance that it necessarily should have been presented at the hearing. I base my findings as to the instant allegation solely on supervisor Bishop's testimony of his admitted statement to Brockman. I deny the Respondent's motion to reopen the record and receive additional evidence. *Board's Rules and Regulations*, Sec. 102.48 (d)(1).

⁶ The preemployment test utilized by Respondent for journeymen electricians was developed by Sheig & Associates and is designed to provide the Respondent with a way to assure that only the top electricians will be considered further for employment.

On August 1, 1997, Beem went to the Respondent's office, applied for employment and took the Sheig test. On August 4 union organizers, Roger Lake, Matt Mapes, and Chris Heegn also applied for work with the Respondent and took the Sheig test. None of these men were hired by the Respondent in connection with their August applications. The Respondent asserts that because Jim Beem, Roger Lake, Matt Mapes, and Chris Heegn did not achieve a score of 49 or higher on the pre-employment Sheig test they were not hired.

On August 4 Malach telephoned Beem to confirm that the time for Local 124 to supply applicants had expired. During that conversation, Beem mentioned that he had seen a newspaper advertisement placed by the Respondent seeking electricians. The ad had stated that the Respondent had "steady work" available for electricians. Malach told Beem that the jobs mentioned in the ad were the same ones for which the Respondent had requested union referrals.

The Respondent did hire the needed electricians using a temporary employment agency, CTS. The parties stipulated that the Respondent did not require any of the CTS employees to meet the hiring criteria outlined in paragraph 6 of the settlement agreement, including making application or taking the pre-employment Sheig test. Malach testified that Respondent did not require the CTS employees to meet the hiring criteria because they were contract workers and therefore Respondent was not "hiring" them. The hiring criteria described in paragraph 6 of the settlement agreement were to be used to evaluate applicants. It makes no mention of contract employees.

Respondent asserts two arguments regarding its alleged discriminatory application of the settlement hiring policy. First, it maintains that temporary employees are excluded from that policy, and second, that the Respondent made an offer to the union not to follow the hiring policy if it would act as a contract labor company. I find that nothing in the settlement agreement allowed the Respondent to treat union applicants for employment different than any other person seeking to work for the company. Likewise, the fact that the Respondent proposed at one point that the Union act as an employment agency, maintaining the electricians on the Union's payroll, does not excuse the Respondent's requiring union applicants to meet hiring criteria not required of the contract employees.

The elements of a discriminatory refusal-to-hire case are the employment application . . . the refusal to hire . . . a showing that [the applicant] was or might be expected to be a union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus. *Big E's Foodland, Inc.*, 242 NLRB 963, 968 (1979).

The Government has made a prima facie showing that the failure to hire the four union applicants was discriminatory. There is no dispute. The Respondent knew of their union affiliation because they were referred for employment by the Union. As found in this decision, the Respondent's other violations of the Act demonstrate its animus towards the Union. The Respondent did not apply the hiring criteria when hiring contract employees. Thus, the union applicants were disfavored

and discriminated against because of their referral through the Union. The Respondent has failed to rebut General Counsel's prima facie case of discrimination.

In *Fluor Daniel, Inc.*, 311 NLRB 498 (1993), the Board articulated the following standard in discriminatory hiring situations:

In *Wright Line*, 251, NLRB 1083 (1980) (and approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983)), the Board set forth its causation test for cases alleging violation of the Act turning on employer motivation. First the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once accomplished, the burden shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved.

I find that the Respondent's discriminatory application of stricter hiring standards applied to union applicants and the resulting failure to hire Beem, Lake, Mapes, and Heegn is a violation of Section 8(a)(1) and (3) of the Act. *Ultrasystems Western Constructors*, 310 NLRB 545, 555 (1993); *Monfort of Colorado*, 298 NLRB 73, 79-83 (1990), enf. in relevant part, remanded as to remedy, 965 F.2d 1538 (10th Cir. 1992), on remand, 309 NLRB 288 (1992).

6. August 12, 1997—Termination of Robert Terhune

Robert Terhune was employed by the Respondent from 1993 to August 12, 1997. Terhune became a member of Local 124 in June 1997 but did not disclose his membership to the Respondent at that time. In August 1997 Terhune was working for the Respondent at the Wilcox project in Overland Park, Kansas. A union pipefitting contractor, U.S. Mechanical, was also working at that jobsite. On approximately August 11, 1997, Terhune asked some of U. S. Mechanical union employees to assist him in promoting the benefits of unionization among the Respondent's employees. When Terhune came to work on August 12 he observed that U.S. Mechanical's gang boxes (large tool boxes) and other items on the job had International Brotherhood of Electrical Worker stickers on them. Terhune testified that he decided he wanted to support the union effort more overtly and thus wrote some comments on his drill box. Terhune then put his drill box on top of the Respondent's gang box for other of Respondent's employees to read. Terhune's written comments stated:

4 YEARS EMPLOYMENT FOR SKC INC
4 YEARS 97% OR BETTER IN SCHOOL
4 YEARS BELOW POVERTY LEVEL WAGES
4 YEARS OF WELFARE AND MEDICAID FOR MY FAMILY
4 YEARS OF RECORD BREAKING PROFIT FOR BILL
(Respondent's president at the time.)
ATTITUDE PROBLEM—NAW

R. TERHUNE

Terhune testified that he wrote the comments for other employees to see because he wanted to get their attention so, “we could vote and get Respondent organized and get some better wage packages out there, and get some insurance and some benefits.”

Shortly before lunch another employee turned the drill box over so the written comments were obscured. During lunch Terhune again prominently placed his drill box so his written comments could be read by fellow employees. Several employees discussed the sign with Terhune. Some of the discussion centered upon the employees’ opinions that he was going to get in trouble over the sign. Other conversations involved “various comments of yes or no on it.”

Eventually Respondent’s Project Manager, Dennis Schulz telephoned Vice-President Larry Malach about Terhune’s sign. Malach said, “I guess one has the right to express their own opinion, but if you want I could come out and review it with you.” Malach then went to the job to investigate the matter. Malach and Terhune discussed the written remarks and Malach told Terhune he thought the comments were untrue. Malach said that Terhune was an A6 apprentice and thus making good wages. Terhune said that he had taken the Union’s skills tests and the Union had classified him as a journeyman electrician. Terhune testified that he noticed a change in Malach’s demeanor at that point and that Malach became mad. Malach stated that the Respondent had been liberal with Terhune regarding his poor absenteeism and disciplinary record. Terhune acknowledged this treatment and thanked Malach for that consideration. Malach testified that “during that discussion I just made up my mind that enough is enough, this is the straw that broke the camel’s back.” Malach said that Terhune’s attitude was disruptive and it disrupted the other employees on the job. Malach then told Terhune to get his tools and leave the job. Terhune’s termination report reads:

Robert has had excessive absenteeism as well as problems on jobsites such as smoking in public buildings when instructed not to, other employees complaining about his attitude and lack of working in harmony, and engaging in behavior designed to create discord. (G.C. Exh. 22)

Malach prepared some paper work regarding Terhune’s discharge. In one memo he describes the sign as “one of several issues with Robert.” (G.C. Exh. 24(a)). Malach cites Terhune’s absenteeism and an incident in which Terhune was removed from a school project for violating policy by smoking in the building. The memo also mentions complaints from other employees regarding Terhune’s attitude, lack of working in harmony and “engaging in behavior designed to create discord.” Notes, which Malach prepared about the incident state that Terhune, had “mounted the case on top of the drill box for other worker’s [sic] to see.” (G. C. Exh. 23).

The General Counsel has the initial burden of establishing that union or other protected activity was a motivating factor in Respondent’s action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support such a showing of discriminatory motivation are union activity, employer knowledge, timing, and employer animus. Once such unlawful motivation is shown, the burden of

persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Electromedics, Inc.*, 299 NLRB. 928, 937 (1990), *enfd.*, 947 F.2d 953 (10th Cir. 1991); *Presbyterian/St. Luke’s Medical Center*, 723 F.2d 1468, 1478–1479 (10th Cir. 1983). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302, *fn.* 2 (1984). “A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.” *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd. sub nom.* 705 F.2d 799 (6th Cir. 1982).

Terhune had job problems in the past yet the Respondent had tolerated his conduct. Terhune was candid when testifying about these problems and impressed me as a truthful witness. Malach’s demeanor and testimony were not persuasive. He admittedly did not intend to do anything about Terhune’s sign when he went to the jobsite. Yet after discussing the matter with Terhune, Malach fired him on the spot. There is a dispute as to whether Terhune mentioned he had taken the Union’s test and that the Union classified him as a journeyman electrician, thus informing Malach of his union sympathies. Malach denied Terhune mentioned the union during their conversation. Schulz testified that he was present during the entire conversation and that Terhune did not tell Malach that he was a “member of the union.” Terhune’s testimony contradicts Schulz on this point. Terhune testified that Schulz stepped away during part of the conversation. Assessing the witnesses’ demeanor on this point I find that Terhune is the more accurate and persuasive and that he did tell Malach he had taken the Union’s test and been classified by the Union as a journeyman. As to the element of animus this decision finds several violations of the Act that demonstrate the Respondent harbored animus towards the Union and its supporters. I find that the Respondent has failed to overcome the Government’s prima facie case that Terhune was immediately discharged when Malach learned of his union sympathies. I find that Terhune’s termination was, at least in part, motivated by his union activities and that such discharge is a violation of Section 8(a)(1) and (3) of the Act. *Wright Line*, *supra*.

Terhune undoubtedly made the sign in an effort to express his opinion on Respondent’s working conditions. He also prominently displayed the sign in an effort to draw fellow employees into supporting his position. Terhune discussed the sign with his fellow employees. Malach noted Terhune’s purpose when he wrote that he had “mounted the case on top of the drill box for other worker’s (sic) to see.” Terhune also discussed organizing with U.S. Mechanical employees who worked on the same jobsite and asked them to assist him in organizing the Respondent. Upon seeing their visible support being displayed on the job, Terhune decided to join in the effort and publicize his feelings by creating his sign. In sum, I find that Terhune was engaged in concerted activity when he displayed his sign

on the jobsite and the Respondent had knowledge of his concerted activities. *Cincinnati Suburban Press*, 289 NLRB 966 (1988); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

The Respondent argues that it discharged Terhune based on his absenteeism, failure to follow company rules and general poor attitude. Malach's testimony does not clearly define what the Respondent meant about his attitude problem. Specific evidence of what "discord" Terhune was creating on the jobsite was likewise not forthcoming from the Respondent. Malach admitted that Terhune's sign was the "straw that broke the camel's back" when he made the discharge decision. I find that at least part of the reason Terhune was discharged was his displaying the sign for fellow employees to see. This was an extension of his discussing organizing the Respondent with the U. S. Mechanical employees and resulted in his having discussions with other of Respondent's employees about their views on what was stated in the sign. I conclude that in basing the discharge, in part, on this concerted protected activity that the Respondent independently violated Section 8(a)(1) of the Act. *Manimark Corp.*, 307 NLRB 1059 (1992);

7. August 20, 1997—Statement of Segregating Union Advocate

In August 1997 Rick Brockman was working for the Respondent at the Sunflower Ammunition Plant, in Desoto, Kansas. Another of Respondent's employees on the job was Robert Gibson. Their supervisor was Service Manager, Craig Petty. On August 20, 1997, Gibson arrived at work and noticed for the first time that Brockman was working on the jobsite. Gibson asked Petty if it was Rick Brockman he had seen that morning. Petty said that it was, "and I'll try and keep him away from you so he doesn't try and get you to go over to the Union."

Shortly after that conversation Gibson went to Brockman. Gibson testified he told Brockman that Petty had told him he would keep him away from Brockman. Brockman testified that Gibson said to him that Petty had told him to stay away from Brockman, as he was a bad influence on people.

Petty testified that on the Friday before August 20 that Brockman was being assigned to the job the following week. Petty testified that it was his practice to inform other men on the job of new arrivals so he could learn of any concerns. Petty recalled that Gibson had said he would rather not "be approached" by Brockman. Gibson was then off for a few days and when he returned Petty testified he told Gibson he would see what he could do to satisfy his request to keep Brockman away from him.

Gibson denied ever making a request of Petty that Brockman be kept away from him and that he had not been aware that Brockman was to be working on the job until he saw him on August 20. Gibson, who has worked with Petty on several other jobs, testified that he has never been told by Petty about new employees coming on the job or asked if he had any conflicts with them.

I found Petty's uncorroborated testimony of his practice in asking men about conflicts with new arrivals to be unpersuasive. Petty's demeanor and explanation as to why he told Gibson that he try to keep Brockman at length from him is not credited. Gibson was a convincing witness whose demeanor was impressive. Gibson's version of events is credited. I find

that Petty's telling an employee that he would keep Brockman away from him was an effort by the Respondent to restrict union supporter Brockman from talking about the Union with fellow employees. I find this conduct is a violation of Section 8(a)(1) of the Act.

8. September 12, 1997—Threat of Job Loss

Local 257 initiated its organizational campaign at Respondent's Columbia facility in April 1997. On September 12, 1997, Respondent's president, Bill Love, sent a letter to the Columbia employees expressing the Respondent's positions on certain matters concerning the Union's campaign. The letter, in pertinent part, made the following statements:

Here are the legal facts about what could happen if you were called out on strike over Union contract demands: . . .

4) YOU COULD LOSE YOUR JOB TO A REPLACEMENT: This is the most important of all. Under the law, the Company can continue operating by hiring new employees to take the place of striking employees. The Company has the right to hire permanent replacements for economic strikers. If you are replaced the Company does not have to make room for you when the strike ends.

The Government alleges that the statement in the September 12 letter is a violation of the Act because it unlawfully threatens employees with losing their jobs for engaging in a strike. The Respondent defends against this allegation by asserting that the claim is barred by Section 10(b) of the Act; and regardless of that defense, the statement is an accurate recitation of the law and is proper under existing Board precedent.

A. Respondent's Section 10(b) Defenses

Section 10(b) of the Act states: "That no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board. . . ." The Respondent argues that the allegation concerning Love's September 12 letter, as well as other allegations discussed below were untimely.⁷ The charge in case number 17-CA-19544 was filed by Local 257 on February 5, 1998. That charge alleged several unfair labor practices: (1) refusals to hire or consider for hire employees because of their union affiliation and/or concerted protected activities; (2) a refusal to offer training to an employee; and (3) a discriminatory layoff.

An amended charge in Case 17-CA-19544 was filed on April 22, 1998. The amended charge contained the following pertinent allegations: (1) on or about September 12, 1997, Respondent threatened employees with job loss if they engaged in a strike or other concerted protected activities; (2) on or about late September, Respondent interrogated employees about their union activities and sympathies; and, (3) on or about September 24, 1997, Respondent informed employees that it would be futile to select the Union as their collective-bargaining representative. These three allegations were incorporated into the Consolidated Complaint which was issued by the Region on

⁷ Paragraphs 5(e), (f), and (g) of the Consolidated Complaint. Complaint paragraph 5(e) is discussed in this section of the Decision. Paragraphs 5(f) and (g) are discussed in sections 10 and 9 respectively of this Decision.

April 23, 1998.

There is no dispute that the September 1997 8(a)(1) allegations took place within 6 months of the filing of the original charge on February 5, 1998. The Respondent argues, however, that because the noted allegations were not asserted until after the lapse of the 10(b) period they are untimely and should be dismissed. The Government and Union argue that the amended charge allegations are closely related to the underlying original charge and are therefore properly litigated.

The Board assesses the timeliness of amended charges based on a three part “closely related” test. *Citywide Service Corp.*, 317 NLRB 861, 862, (1995); *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988). In applying this test, the Board considers the following factors: (1) whether the allegations involve the same legal theory; (2) whether the allegations arise from the same factual circumstances or sequence of events; and (3) whether the respondent would raise similar defenses to both allegations.

The allegations here in dispute involve Section 8(a)(1) of the Act. They all go to a central theme in the Union’s original charge, i.e., the Respondent’s alleged animus towards the Union, and the repercussions that follow employee support for the Union. Thus, the original charge went to the theory that the Respondent had engaged in unlawful conduct against employees to discourage their membership in, and support for, the Union. The September 8(a)(1) allegations are in the same class, i.e. involve the same legal theory—unlawful conduct designed to defeat the Union’s organizational campaign. The contested allegations likewise arise for the same factual sequence of events wherein it is alleged the Respondent sought to suppress union support at its operations. Finally, the Respondent asserts the same defenses, i.e., that it bears no animus towards the Union and that it did not engage in conduct designed to unlawfully discourage its employees from supporting the Union. I find that the noted allegations contained in the amended complaint are sufficiently related to the underlying charge, and are properly subject to litigation in this case. *Pincus Elevator & Electric Co.*, 308 NLRB 684, 690 (1992) (Section 8(a)(1) and 8(a)(3) (violations held to be of the same class because the legal theory that the respondent engaged in unlawful conduct as part of an effort to prevent the organization of its employees was the same); *NLRB v. Braswell Motor Freight Lines*, 486 F.2d 743, 746 (7th Cir. 1973) (amendments allowed that deal with acts that are all “part of an overall plan to resist organization.”); *Recycle America*, 308 NLRB 50 fn. 2 (1992) (amendment permitted “whether or not the acts are of precisely the same kind and whether or not the charge specifically alleges the existence of an overall plan on the part of the employer); *Outboard Marine Corp.*, 307 NLRB 1333, 1334 (1992) (threats of plant closure closely related to charge allegations where all allegations center on respondent’s plan to defeat the union organizing campaign.)

B. Analysis of the Letter’s Language

The statement in Love’s letter clearly tells employees that if they go on strike, “you could lose your job to a replacement.” There was no accompanying explanation to employees of what the law allows in terms of preferential rehiring in the case of an economic strike. The Board in assessing similar language has

found such a threat to be violative of the Act. In *Larson Tool and Stamping*, 296 NLRB 895 (1989) the Board determined that statements such as “you can lose your job to replacements” are impermissible threats because it “leaves employees on their own to divine that the ‘loss’ is somehow less than total because it is conditioned by a right to return to work after the replacement’s departure.” See also *Baddour Inc.*, 303 NLRB 275 (1991) (employer cannot tell employees without explanation that they will lose their jobs as a consequence of a strike or permanent replacement.) I find, therefore, that Love’s job loss statement in the letter is a violation of Section 8(a)(1) of the Act.

9. September 24, 1997—Futility of Selecting Union

On September 24, 1997, a meeting of Respondent’s Columbia, Missouri employees took place at its office in Lenexa, Kansas. The Columbia employees traveled in a group to and from this meeting. After the meeting concluded, employee Peter Rector was driven back to his vehicle by Respondent’s Project Superintendent, Dennis Albrecht. During that drive the two men discussed the union organizing campaign that was then in progress and the pending Board election. Rector testified that he stated that he could read between the lines, and he did not believe that the Respondent’s owner, Bill Love, would negotiate in good faith, or would ever reach an agreement with the Union. According to Rector, Albrecht replied to this comment, “I know the NLRB would like to hear me say this, but Mr. Love feels the same way that I do and would never sign an agreement.” Albrecht denied making such a statement to Rector.

Considering the relative demeanor of these two witnesses I found Rector to be the more credible. He was detailed in his testimony of the event and left the impression he was accurately remembering what was said. Albrecht impressed me as not being candid about the conversation, and I do not credit his denial of having made the statement. Albrecht’s statement that the Respondent would not sign a contract with the Union conveys to employees that it would be futile for them to select the union as their collective-bargaining representative. The Board has consistently held that such statements violate the Act. *Feldkamp Enterprises*, 323 NLRB 1193, 1200–1201 (1997) (supervisor’s statement to employees that there was “no way” that employer would sign a collective-bargaining agreement was violative of the Act because it told employees it would be futile to vote for union representation in a pending election). *Outboard Marine Corp.*, 307 NLRB 1333, 1335 (1992); *Sivalls, Inc.*, 307 NLRB 986, 1001 (1992). I find Albrecht’s remark is a violation of Section 8(a)(1) of the Act.

10. September 30, 1997—Interrogation of O’Brian

On September 26, 1997, the Board conducted a representation election at the Respondent’s Columbia, Missouri, facility. Employee Kevin O’Brian served as the Union’s observer for the election. The Union won the election and was ultimately certified as the collective-bargaining representative of the Columbia employees. O’Brian was a union member and an open union supporter, which included wearing union insignia to work.

Shortly after the election Jim Miller was appointed as the

Respondent's Columbia branch manager. At this time the Respondent was initiating a new diagnostic service for customers designated as the TEGG program. Miller conducted a meeting with the Columbia employees and asked if anyone was interested in volunteering for training for the TEGG program. O'Brian was the only employee who volunteered. According to O'Brian, Miller told him he would "get the wheels rolling" regarding the training.

About a week after the TEGG meeting, Estimator/Project Manager, Doug Iles asked O'Brian to step out onto a balcony at the Columbia office. Another employee, Jeff Armstaid, was also standing on the balcony. According to O'Brian, Iles asked him what he would do if the Union called him out on strike. O'Brian told Iles that if the Union called him out, he would go. According to O'Brian, Iles said, "Bill (Love, the company owner) would want to know that." Armstaid testified that he recalled overhearing a conversation between Iles and O'Brian regarding the TEGG training. He remembered that Iles told O'Brian that the Respondent did not want anyone that was going to be leaving in September or going on strike. Iles testified that he did not recall having a conversation in September with O'Brian concerning TEGG training. He denied that he ever questioned O'Brian about whether he would participate in a strike. Iles admitted on cross-examination that in talking to government counsel he "perhaps" would not deny having such a conversation with O'Brian. I found Iles' demeanor not convincing when he testified about his recollection of what he may have said to O'Brian. O'Brian by contrast impressed me as truthfully recalling the event to the best of his recollection. His testimony is corroborated by Armstaid who recalled overhearing Iles saying something similar to what O'Brian remembered. I credit O'Brian's version of the conversation.

Respondent's defends against this allegation on the basis that Iles is not a supervisor within the meaning of the Act. Respondent further argues that if Iles is found to be a supervisor, he nonetheless never made the statement. The Government disputes these arguments and asserts Iles is either a supervisor or agent of Respondent and that his statements violate the Act.

A. Iles' Supervisory Status

Iles was the owner of Merit Electric, an electrical contractor located in Columbia, Missouri, which was purchased by Respondent. After his company was bought, Iles was hired by the Respondent as a Project Manager/Estimator. In this capacity Iles did estimating, worked on blue prints, worked with suppliers, and supervised branch operations when Branch Manager John Welch was away. Iles did go to jobsites to discuss and solve problems with employees. Iles usually did this in the absence of Welch. One estimate of how frequently Welch was gone from the office was as much as 60 percent of the time. Iles never worked with his tools on jobsites. Iles would frequently estimate job costs such as labor and materials and submit them as bids for jobs. Iles's job description does not assign him supervisory authority. On one occasion when a problem arose at a jobsite with employee Jeff Armstaid, Iles sent him home for the day.

Employee Peter Rector testified that when he was first hired, John Welch told him that when Welch was absent, Iles was the

one that employees were to go to and that Iles was the one in charge. Rector testified that Welch introduced Iles to him as second in command. When employee Jeff Armstaid was hired, Welch introduced Iles as Columbia's Project Manager. Armstaid testified that this led him to conclude that Iles was second in command. During the Union's organizing campaign, Iles' signature appeared on the Respondent's campaign propaganda, along with the signatures of admitted supervisors Owner Bill Love, Vice-President Larry Malach and Branch Manager John Welch. Iles testified that he signed these letters at the request of either John Welch or Bill Love. Iles further testified that he signed these letters because "Respondent was new to the workers and I knew the workers, some of the workers had worked for me for many years and I felt I was a little bit closer to the workers at the time."

Section 2(11) of the Act defines the term "supervisor" as:

The term supervisor means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The burden of proving supervisory status is on the party asserting that supervisory status exists. *Ferguson-Williams, Inc.*, 322 NLRB 695, 702, (1996). Supervisory status is not determined by title or job classification, but by the nature of the individual's functions and authority in the workplace. *Mack's Super Markets*, 288 NLRB 1082 (1988).

Iles was shown to be an important link with Respondent's acknowledged supervision. The extent of his supervisory authority, however, was not conclusive. His frequent substitution for Welch did not demonstrate that he exercised on an independent basis the direction of work of employees. Instances of his using authority were shown to be sporadic, e.g., on one occasion sending an employee home. In sum, I find that the Government has failed to carry its burden of establishing that Iles was a supervisor within the meaning of the Act.

Section 2(13) of the Act provides:

In determining whether any person is acting as an "agent" of another person so as to make such person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

The Board looks at the issue of agency in terms of the person's apparent authority to act for the employer. *Southern Bag Corp.*, 315 NLRB 725 (1994) (respondent placed the disputed individuals in positions where employees could reasonably believe that they spoke on behalf of management and thus statements and conduct of the disputed individuals are imputable to the Respondent.); *Dentech Corp.*, 294 NLRB 924, 925 (1989) ("Apparent authority is created through a manifestation by the principal to a third party that that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question.") Therefore, in

deciding the issue of Iles' agency status, the relevant test is whether under all the circumstances employees would reasonably believe that Iles spoke for and acted on behalf of the company.

The evidence shows that the Respondent held Iles out to employees as a person of authority. That was conveyed to Rector and O'Brian when they were hired. Welch, told employees Iles was "second in command." Iles was a person to whom the employees looked for guidance with work problems and they acted according to his instructions. Iles was retained by the Respondent as an Estimator/Project Manager. Respondent provided Iles with a business card that reflected this title. He signed the antiunion letter—a letter whose only other signatures were those of Respondent's admitted managers.

Based on the forgoing circumstances, it was reasonable for employee O'Brian to conclude that Iles was acting and speaking for Respondent when he was interrogated by Iles about TEGG training and the possibility of his going out on strike. This conclusion is especially warranted given the fact that Iles said that he was going to report to Bill Love the response O'Brian had given about supporting a strike. The record evidence supports the conclusion that Iles was an agent of Respondent within the meaning of the Act. Given all the circumstances in this case, it was reasonable for employees to believe that Iles was reflecting company policy and speaking and acting for management. I find that the Government has established that Iles had apparent authority as an agent of the Respondent when he spoke to O'Brian.

B. Analysis of Iles' Interrogation of O'Brian

The Board assesses interrogations of known union adherents on the basis of: "whether under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House*, 269 NLRB 1176, 1177 (1984); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). Iles' interrogation of O'Brian about whether he would go on strike was followed by the implicit threat that the Respondent's owner would want to know that O'Brian would support the Union in such an event and the potential denial of TEGG training. I find that such an interrogation is coercive and a violation of Section 8(a)(1) of the Act.

11. September 30, 1997—O'Brian Denied Tegg Training

As discussed above, O'Brian was the only volunteer to take the TEGG diagnostic service training. Miller told O'Brian that he would "get the wheels rolling." Shortly thereafter O'Brian was interrogated by Iles about supporting a strike.

O'Brian never did receive the TEGG training. Employee, Paul Stovall, was assigned to take the training instead. Stovall testified that he did not volunteer for the training. At the time that Stovall was awarded the training, he was performing work as an apprentice. In contrast, O'Brian was a block certified journeyman electrician. Since Stovall received TEGG training, no other employees at the Columbia facility have been sent for TEGG training. The Respondent argues that Stovall had been employed with Respondent longer than O'Brian when the Respondent decided to send him for training. The reason that only one employee received TEGG training is that the program did not succeed as anticipated and there was no need to send any-

one else to receive the training.

An employer violates Section 8(a)(1) and (3) of the Act if it denies a training opportunity to an employee because that employee engaged in union and/or protected concerted activities. *Scott-New Madrid-Mississippi Electric Cooperative*, 323 NLRB 421, 423 (1997). The elements of proof of discrimination are the well-known union sympathy of the discriminatee, knowledge of such activity by the employer, timing of the discrimination in relation to the union activity and union animus on the part of the employer. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

O'Brian was the Union's election observer and openly wore union insignia at work. The Respondent does not contend it had no knowledge of his union sympathies. Iles interrogated O'Brian regarding what he would do in the case of a strike and received an answer supporting the Union. The timing of the denial of training to O'Brian was shortly after the election and the interrogation. The Respondent's animus towards the Union is demonstrated by the various violations of the Act set forth in this decision.

Kevin O'Brian was the only employee who expressed an interest in receiving the TEGG training. Despite this fact, the Respondent selected another employee, Paul Stovall, to receive the training. Stovall had not expressed any interest in receiving the training. In addition, Stovall was only an apprentice electrician, while O'Brian was a journeyman. These circumstantial factors—in combination with the Respondent's union animus and knowledge of O'Brian's union affiliation—are sufficient to establish a prima facie case that Respondent denied O'Brian TEGG training because of his union affiliation.

The Respondent presented scant explanation as to why O'Brian was not selected for the training. The reason stated is that Stovall had slightly more seniority and that the TEGG project was not economically successful so only Stovall was trained. O'Brian had 1 month less seniority than Stovall and was a journeyman electrician—Stovall was an apprentice. (Employees Jeff Wells, Jim Frazee, and Mike Aldridge were also more senior than Stovall, but the Respondent offered no explanation why they were not selected to receive the training.) The decision as to which employee would receive training in the TEGG service system was made by Branch Manager, Jim Miller, and, Senior Vice President, David Conner. Neither of these individuals testified at the hearing. Under the adverse inference rule when a party has relevant evidence within its control which is not produced, that failure gives rise to an inference that the evidence would be unfavorable to the party. *Auto Workers v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972). Such an adverse inference is appropriate in this case. I find that had Miller or Conner testified their testimony would have been contrary to the Respondent's defense that it did not unlawfully discriminate against assigning O'Brian the TEGG training because of his protected concerted activities. *International Automated Machines*, 285 NLRB 1122–1123 (1987).

I find that the Respondent has failed to rebut the Government's prima facie case of discrimination against O'Brian. I conclude that O'Brian was denied selection for the TEGG training because of his union sympathies, and find such a denial is a

violation of Section 8(a)(1) and (3) of the Act. *Wright Line*, supra.

12. October 9, 1997—Avoidance of Hiring Union Applicants

In October 1997 Respondent's employee Darrel Shackleford was working on the Johnson County Detention Center jobsite in Gardner, Kansas. Dan Laubner was the Respondent's Project Manager on this job. Shackleford testified that on about October 9 he asked Laubner when they might be getting some additional help on the project. Laubner replied that they were not getting any more help at that time. Shackleford then inquired if they could get some help from the Union pursuant to the settlement agreement. Laubner told Shackleford that the Respondent would not be hiring any Union help, that they had other plans to get some people on the job. Shackleford asked about getting a truck to transfer materials around the jobsite. Laubner told Shackleford that the truck they thought they were getting went to CraMar, a subsidiary of Respondent. Shackleford then asked what the deal was with CraMar. Shackleford testified that Laubner responded that Bill Love was pretty smart and was going to get around the settlement agreement by hiring people through CraMar and bringing them to work for Respondent. Shackleford asked Laubner if that violated the settlement agreement. Laubner replied, "Well, Bill lays awake at night thinking of ways to get around the agreement." Shackleford asked Laubner where he had heard about using CraMar to get around the settlement agreement. Laubner told Shackleford that it had been discussed at the last project managers' meeting.

Laubner testified that he and Shackleford had daily conversations about project staffing. Laubner recalled that during one such conversation Shackleford asked if the Respondent had gone to the union to get additional workers pursuant to the terms of the settlement agreement. Laubner testified he replied that Respondent had requested applicants from the union, but he did not know how many the union had sent. Shackleford asked if any of the CraMar employees could be utilized to fill in the shortages at the project. Laubner said all he could do was request employees from the shop and hope that he got them. Laubner denied that he told Shackleford that Bill Love had laid awake at night thinking about how to get around a settlement agreement or that Bill Love had ever said he was going to utilize CraMar to avoid the terms of the settlement agreement.

Shackleford's demeanor was that of a witness who was accurately remembering the conversation. He left the favorable impression of a witness who was not embellishing the truth. I found Laubner's demeanor to be suspect and his testimony less credible. I credit Shackleford's testimony of what was said in the conversation.

An employer violates the Act by telling employees that it will not hire persons who are affiliated with the union. *J. L. Phillips Enterprises*, 310 NLRB 11, 13 (1993); *Pioneer Hotel*, 276 NLRB 694, 700 (1985). I find that Laubner's comments to Shackleford concerning the Respondent's plans to avoid hiring union sympathizers is a violation of Section 8(a)(1) of the Act.

13. Failure to Hire Gary Fisher and Greg Schrock

Gary Fisher, a member of the Union, applied for employment with the Respondent at its Columbia, Missouri office on December 2, 1997. On January 26, 1998, another union mem-

ber, Greg Schrock, also applied for work at the Columbia location. Fischer and Schrock listed on their applications the union employers where they had previously worked. Each also was wearing items of clothing with union logos when they made application and took Respondent's preemployment test. Neither man was hired by the Respondent.

A. Gary Fisher

Fisher also applied for work with the Respondent on several subsequent occasions. His December 1997 application is the only situation litigated in this case. The Respondent states that it did not hire Fischer because he did not meet one of its hiring criteria. The Respondent has a number of guidelines it uses for hiring electricians. Under this policy applicants must (1) submit an application in person at either Respondent's main office in Lenexa, Kansas or one of its branch offices; (2) be "current in the trad," meaning that they have worked at least 12 out of the last 24 months as an electrician; (3) not have had in excess of two employers in the past 3 years; (4) must be eligible for re-hire with the last employer; (5) score 49 or higher on the Scheig test; (6) successfully complete an interview; and, (7) pass a drug and alcohol test.

In order to determine if an applicant meets the criteria of electrical experience and two jobs in the last 3 years, the Respondent calculates an "employment score." The applicant receives two points for every year of electrical work he has had with his two most recent employers. If the applicant has an employment score of six or more, this indicates he has had two or fewer jobs in the last 3 years and has at least 3 years of electrical experience with his two most recent employers. The applicant must have an employment score of at least six points to be considered any further for employment.

According to the Respondent, Fisher was not hired because his application showed that he had more than two jobs in the last 3 years and that he did not have 3 years of electrical experience with his two most recent employers. Fisher's failure to satisfy these two criteria resulted in him having an employment score of less than six points under Respondent's hiring policy. Respondent has refused to hire a number of applicants that failed to satisfy the same requirements as Fisher.

Employee Peter Rector was a union member who concealed his union membership when he applied for work with the Respondent on June 1, 1997. Rector took the drug test and failed to pass. Welch informed Rector of the test results and said he wished Rector had said something and the test could have been postponed. Welch said it was the Respondent's policy that by failing the drug test Rector would be ineligible for employment for 6 months. Welch, however, told Rector he would see if there was any way around this policy. Welch subsequently contracted Rector and said he had discussed the situation with the Respondent's Director of Human Resources who informed him that there was nothing that could be done.

Welch then contacted the Respondent's owner, Bill Love. Love told Welch that he would waive the 6 month reapplication requirement if Rector would agree to pay for the second drug test and sign a waiver consenting to random drug tests during his first 3 months of employment. Love told Welch that Rector could re-take the drug test at such a time as he felt he could

pass. Welch also suggested to Rector that he take a drug test locally before taking the second drug test given by the Respondent in order to insure that he passed the company's test. Rector took and passed the second drug test during the first week in March. Rector began working for the Respondent in August 1997. He never paid for the second drug test and was never randomly drug tested during his employment with the Respondent.

The disparate application of hiring policies between union and nonunion applicants is unlawful under the Act. *Fluor Daniel, Inc.*, 311 NLRB 498 (1993), *enfd.* in pertinent part 102 F.3d 818 (6th Cir. 1996). Fisher and Rector each failed to meet one of the conditions of the Respondent's hiring policy. Fisher revealed his union affiliation, while Rector concealed his association with the Union. The Respondent does not satisfactorily explain why it went to such lengths to ignore its policy in order to hire Rector while strictly applying the criteria to Fisher. The Board has inferred a discriminatory motive from the disparate application of hiring policies between union and nonunion applicants. *Little Rock Electrical Contractors, Inc.*, 327 NLRB 932, 941 (1999); *Starcon, Inc.*, 323 NLRB 977, 982 (1997); *Monfort of Colorado*, 298 NLRB 73, 79–83 (1990), *enfd.* in relevant part, remanded as to remedy, 965 F.2d 1538 (10th Cir. 1992), on remand, 309 NLRB 288 (1992). I find that the Respondent did discriminatorily apply its hiring criteria in refusing to hire Fisher for employment and that this was a violation of Section 8(a)(1) and (3) of the Act.

B. Greg Schrock

Schrock filled out an application seeking work with the Respondent on January 26, 1998. He was interviewed on February 6, 1998, by supervisor Jim Miller. Schrock wore a union T-shirt and jacket during the interview. Miller asked Schrock whether his Columbia and Jefferson City, Missouri, electrical licenses were current. Schrock told Miller he was certain they were and he would confirm this fact and notify Miller. Shortly thereafter Schrock telephoned the Respondent and confirmed that his licenses were current. The Respondent did not hire Schrock.

The parties stipulated that the Respondent has a policy of keeping applications active for 30 days. The Respondent does not contest the fact that Schrock met all of its hiring criteria, but states that he was not hired because it was not hiring at the time Schrock applied and when it did start to seek electricians his application had expired.

Brenndan Riddles was the electrician hired just before Schrock sought work. Riddles had applied for employment on January 20, 1998, 6 days prior to Schrock's application. The Respondent did not hire any journeymen electricians after Riddles for approximately 3 months. On March 5, 1998, the Columbia Daily Tribune newspaper sent a fax receipt to the Respondent confirming its order to run an advertisement for electricians. The ad was to run March 8–14, 1998. The Respondent did not contact Schrock about these job openings. The Respondent subsequently hired Troy Hudson, who had applied for employment on March 23, 1998. Troy Hudson began working for Respondent on April 13, 1998. He was the first journeyman electrician hired by Respondent in Columbia following Riddles.

The Government has proven that Schrock made application

for employment, he was not hired, the Respondent had knowledge of his union sympathies, and that the Respondent had animus towards the Union. As to the refusal to hire Schrock because of his union support, the record shows that his application expired 30 days after he applied on January 26, 1998, i.e., February 25. The Respondent did not seek applications for employment until it advertised in the newspaper starting on March 8. There is no evidence that anyone was hired as an electrician at Columbia until April 13. There is no evidence that there were openings for the employment of electricians at the Respondent's Columbia facility during the Schrock's 30-day application period. A Respondent may refuse to hire an applicant when there are no positions available for that applicant. *Norris Elec. Corp.*, 324 NLRB 1178 (1997). I find that the Government has failed to sustain its burden of proof establishing that Schrock was refused employment because of his union sympathies. There has been no showing that the Respondent had concrete plans to hire at the time Schrock's application was active and, thus, I additionally find that the Government has not established that he was refused consideration for employment because of his union sympathies. I find that the Respondent has not violated Section 8(a)(1) and (3) of the Act by refusing to hire, or refusing to consider for hire, Greg Schrock. *Big E's Foodland, Inc.*, 242 NLRB 963, 968 (1979).

14. March 12, 1998—Brockman Denied Access to Company Meeting

On August 29, 1997, employee Rick Brockman decided that he would commence an unfair labor practice strike against the Respondent. In a letter dated September 3, 1997, the Respondent informed Brockman that it was prepared to return him to work upon his unconditional request for reinstatement. Brockman continued on strike in March 1998 when the Respondent sent a letter to its employees announcing a March 12 meeting at the Holiday Inn in Lenexa, Kansas. The purpose of the meeting was to discuss with the employees how the Respondent's ESOP plan would be effected by the merger of the Respondent with five other companies. A copy of the letter was not sent to Brockman but he did learn of the meeting.

On March 12 Brockman went to the Holiday Inn where he met fellow employee Bob Fansler. Before the meeting started these two employees handed out literature about the types of questions that employees should consider asking during the meeting. They were observed by several company officials distributing the handouts. Brockman and Fansler then went into the motel meeting room and sat down. Shortly thereafter Respondent's Senior Vice-President, Larry Malach, approached the two men and asked to speak with Brockman in the hall. Fansler joined them and the three men went to the hallway. Malach told Brockman that the meeting was for current employees and asked him to leave. Brockman asked Malach why he could not participate in the meeting. Malach replied that Brockman was not an employee of the Respondent and that Brockman was not an ESOP member. Brockman asked if Malach was sure that Brockman was not an employee or a member of the ESOP. Malach said that he did not consider Brockman to be a current employee because he was not actively working and

that he did not see Brockman's name on the list of ESOP participants. Brockman then left the meeting. Malach testified that he did not tell Brockman that he was not an employee, but only that he was not an "active" employee.

The Respondent now concedes that at the time of the meeting Brockman was its employee and an ESOP participant. Respondent claims, however, that because Brockman was not an "active" employee he was thus denied access to the March 12 meeting.

The only reason that Brockman was not considered "active" was because he was engaged in an unfair labor practice strike. The notice of the meeting did not restrict attendance to active employees. Moreover, the Respondent offered no explanation why a person on strike could not attend even though they were an employee and an ESOP participant.

The Board has held that an employer may not discriminate against strikers absent some compelling legitimate reason. In *Duncan Foundry and Machine Works, Inc.*, 176 NLRB 263, 264 (1969) the Respondent was found to have violated Section 8(a)(1) and (3) of the Act by refusing to pay benefits to striking employees solely because they were not working on a certain date. The Board stated:

Accordingly, we hold that the act of paying accrued vacation benefits to one group of employees while withholding the benefits from another group of employees who are distinguishable only by participation in protected concerted activity, absent a legitimate or substantial business justification, was discrimination in its simplest form, and was destructive of important employee rights, and the Respondent thereby violated Section 8(a)(1) and (3) of the Act.

I find that the Respondent excluded Brockman from the meeting because he was on strike. The Respondent has offered no legitimate or substantial business justification for the exclusion of Brockman. I find that the Respondent's refusal to permit Brockman to attend the meeting with other employees is a violation of Section 8(a)(1) of the Act

15. October 15, 1998—Prohibiting Union Solicitation

Employee Eric Yatsook was assigned to work on the Respondent's Johnson County Detention Center project in January 1998. Yatsook was an open union supporter who regularly discussed the union with fellow employees in an effort to get them to join that labor organization. One of the Respondent's supervisors assigned to the Detention Center job was project manager Dennis Schultz.

Yatsook was transferred from the Detention Center project in the fall of 1998. Yatsook testified that, the day before his transfer, he had a conversation with Schulz. Schulz told Yatsook that other employees had complained about Yatsook's organizing activities holding up production and about Yatsook using a cell phone on the job. Yatsook testified that Schulz told him he "could organize before work, at lunch, after work, but not on the job site." Schulz recalled similar remarks but did not say that Yatsook could not organize on the "job site." Yatsook conceded that no agent of the Respondent ever tried to prohibit him from talking about the Union or soliciting union membership during working time.

I found Schulz to be the more precise witness and credit his testimony as to what he told Yatsook. The Respondent has a no-solicitation rule, which the Government does not contend is invalid. I find that Schulz did not tell Yatsook he could not talk about the Union while working, but rather reiterated the Respondent's no-solicitation policy. I find that the Respondent did not violate Section 8(a)(1) when Schulz so advised Yatsook.

16. October 16, 1998—Transfer of Eric Yatsook

As noted above Eric Yatsook was employed by the Respondent at its Johnson County Detention Center project in October 1998. There is no dispute that Yatsook was an open union supporter and the Respondent had knowledge of his union sympathies. Shortly after Schulz cautioned Yatsook about soliciting on the job, Yatsook was transferred to Respondent's Waterside III project. Yatsook was the only rank and file employee assigned to that jobsite.

The week after the transfer, Yatsook was eating lunch with his supervisor, Project Manager, Todd Harlow. Yatsook testified he asked Harlow why he had been transferred. Harlow replied that Dennis Schulz had told him that Yatsook was organizing in the parking lot after work. Harlow testified that it was Yatsook who speculated that he was run off the Johnson County jobsite because he had been organizing during working hours. Based on the demeanor of the witnesses I credit Yatsook's version of the conversation that it was Harlow who broached the subject and stated that he was transferred because of his union organizing activities in the parking lot. I find that the Respondent violated Section 8(a)(1) and (3) of the Act by transferring, Yatsook, and telling him he was transferred, because he engaged in protected concerted activity under the Act.

17. October 19, 1998—Withdrawal of Recognition of Local 257

On September 26, 1997, the Board conducted a representation election at the Respondent's Columbia facility. On October 6, 1997, Local 257 was certified as the collective-bargaining representative for a unit of the Columbia electricians. Paul Stovall was one of the employees who participated in the September 26, 1997, representation election. Shortly after the election Jim Miller became Branch Manager of the Columbia office.

On September 1–2, 1998, Paul Stovall circulated a petition among the unit employees seeking an election to decertify the Union as their representative. Stovall ultimately filed that petition with the Board on October 7, 1998. On October 19, based on the petition, the Respondent withdrew recognition of Local 257 as the Columbia employees' collective-bargaining representative. The Government alleges Stovall was a supervisor or Respondent's agent at the time he circulated the petition. The Government also alleges that the Respondent's withdrawal of recognition of the Union was unlawful. The Respondent denies Stovall was its supervisor or agent and asserts it lawfully refused to deal with the Union because the Union had lost its majority support.

A. Stovall's Work Duties

In January 1997 Paul Stovall was hired by the Respondent as an apprentice. Stovall later began doing service work. In May 1998 Branch Manager Miller designated Stovall to be the Pro-

ject Manager on the Westminster College project in Fulton, Missouri. Stovall was assigned a company pickup truck at that time. The only other persons assigned a truck were Branch Manager, Jim Miller and Project Manager, Kim Wischmeyer.

About 30 to 35 employees were working out of the Columbia office at the time of the Westminster project. Approximately 10 to 20 would work on the Westminster project on a given day. Stovall was the Respondent's highest-ranking official who regularly worked on this project. The Westminster project lasted through September 1, 1998. On September 1, 1998, Stovall started circulating the decertification petition.

Stovall worked with his tools about 10 percent of his time on the Westminster project. Stovall's project manager job duties included attending meetings with the project's general contractor along with Miller and Doug Iles. Stovall independently selected Kevin O'Brian and Jeff Armstaid to work as foremen under his direction. Stovall regularly assigned work to employees, either directly or by funneling the assignments through O'Brian or Armstaid. Stovall independently assigned overtime to employees. He had the authority to grant time off for periods of less than a week. On one occasion when Armstaid complained about the poor work being performed by an employee, Stovall sent the employee to the office. Stovall regularly completed the daily log for the Westminster project as part of the Respondent's documentation of the progress of work. If he was unable to do this task he assigned it to one of his foremen.

Stovall's duties at the Westminster project included dealing with the general contractor regarding changes and modifications and estimating the time and material necessary to perform the work. Iles was responsible for printing copies of a change agreement for the general contractor to sign authorizing the work. Stovall was the person who would instruct Iles as to what the agreement should contain. If the change required no additional material, but only additional labor hours, Stovall would personally do the necessary paperwork and would not consult with any one else before writing up a change order.

If problems arose regarding the work to be performed, employees would go to Stovall to rectify those problems. Stovall had the authority to independently assign employees to work overtime. If employees needed time off for periods of less than a week, they sought approval from Stovall.

At the time Stovall was working on the Westminster project he had an office in the jobsite trailer. Stovall also had a cubicle in the Respondent's Columbia office. Project Manager Kim Wischmeyer, Project Manager/Estimator Doug Iles and Branch Manager Jim Miller were the only other persons possessing office space at the Columbia facility. Stovall was one of the few persons who had a key to the Columbia office. When bonuses were being calculated by the Respondent for the Westminster project the company paperwork identified Stovall as the project manager of that job.

The Westminster job ended in early September 1998 and Stovall was then assigned to check work at all of the Respondent's jobs in the Columbia area. He looked for problems on the jobs and insured that the jobs had sufficient materials. When inspecting a job Stovall would commonly make his rounds with the foreman and they would discuss any problems. Stovall would suggest ways to solve whatever problems there

were and the foreman would typically follow Stovall's suggestions. During this period, Stovall estimated that he spent approximately 25 percent of his time working with his tools.

In December 1998 Jim Miller left the Respondent's employment. The week before Christmas a meeting was held at Columbia to announce the appointment of Kenny Brand as the new Branch Manager. Stovall was told by Malach that he should "stick around" because Brand might need his help "until his feet get wet."

B. The Decertification Petition

In early September 1998, during the time Stovall was assigned to oversee the Respondent's Columbia projects, he had discussions with some employees about how to decertify the Union. Stovall also discussed the matter with Miller who told him to, "get a piece of paper, get a title on it and get signatures." Stovall did draft such a document and solicited employees to sign the petition. He sought the employees' signatures during working hours, while he went from project to project. The petition was signed by employees on September 1-2. Stovall testified that he considered himself to be a supervisor at the time he was collecting the signatures. Approximately 75 percent to 80 percent of the Columbia employees signed the decertification petition.

Stovall immediately attempted to file the petition with the Board's Kansas City Regional office, but was told the petition was untimely as 1 year had not yet elapsed from the time of the September 26, 1997, election. Stovall reported this turn of events to Miller. Stovall was told by Miller that he would be sent back to Kansas City at the appropriate time to file the petition and that Miller would arrange for him to pick up some supplies at the Respondent's suburban Kansas City office in Lenexa, Kansas, at the same time.

Stovall drove his company truck to Kansas City on October 7, 1998, during working hours to file the decertification petition. After filing the petition, Stovall drove to the Respondent's Lenexa office. Stovall told Malach about filing the decertification petition and Malach made a copy of the document. Stovall then went to lunch and when he returned to the Lenexa office he was told by Malach to get some supplies from the parts department lady. This employee gave Stovall two small boxes—one containing paperclips and another containing sticky pads. Stovall then drove back to Columbia. On October 19, 1998, based on the filing of the decertification petition, the Respondent withdrew recognition from Local 257.

Immediately after the September 1 conclusion of the Westminster job, Stovall was assigned to check on all of Respondent's projects in the Columbia area. This included assisting foremen. At this same time Stovall was circulating the decertification petition among the employees on these projects. In October 1998, Stovall was assigned to work on the Radiology project in Columbia, Missouri. Stovall's duties on this project were the same as his work at the Westminster jobsite.

By October 7, the day that Stovall filed the petition, he had been assigned to a project at the Radiology Department, University Hospital, Columbia, Missouri. Stovall's duties at the hospital were similar to the project manager duties he performed at the Westminster jobsite. One difference was that

Stovall had the authority to assign overtime, however, he had to first obtain approval of the hospital.

During December Stovall worked in the office, insuring jobs had sufficient materials and dealing with whatever problems arose. Stovall would assign employees to projects and direct them as to what work to perform. Stovall eventually asked to be assigned to fieldwork and in January he was sent to work on the Dollar General Store project.

By letter dated January 11, Local 257's Organizer, Jim Winemiller, notified the Respondent that the Union now represented Stovall and he was organizing on behalf of the Union. Shortly after this letter was sent, Stovall withdrew the decertification petition. At about the same time, Stovall learned that the Respondent had started classifying him as a "J-2" journeyman 2 electrician. Stovall questioned Brand and Connor about the classification, arguing that he had been performing work as a Project Manager. Connor and Brand told Stovall that he could not be classified above a "J-2" level unless he had a Block license. During this meeting, Connor told Stovall that, because he was only classified as a J-2, he would have to return the truck which Miller had assigned him a year earlier.

C. Analysis

1. Stovall's supervisory status

It is well settled that the possession of any one of the indicia of supervisory authority specified in Section 2(11) of the Act is sufficient to confer supervisory status on an employee, provided such authority is exercised with independent judgment on behalf of management. *California Beverage Co.*, 283 NLRB 328 (1987). The burden of proving that an individual is a supervisor is on the party alleging that supervisory status exists. *Health Care Corp.*, 306 NLRB 63 fn. 1 (1992). Thus, in this instance, the burden is on the Government to prove that Stovall is a supervisor or agent of the Respondent.

The test for determining whether a person is an agent of an employer when the individual is not a supervisor, hinges on the person's apparent authority, i.e., whether under all the circumstances, the employees could reasonably believe that the person in question was reflecting company policy and speaking and acting for management. *Dentech Corp.*, 294 NLRB 924, 925-926 (1989)

Stovall exercised extensive authority over the Respondent's employees working on the Westminster project, including: assigning and directing work, granting time off promoting employees to foreman status, disciplined an employee by sending him back to the main office. Stovall was referred to as the project manager and was the highest-ranking official of the Respondent who was commonly on the project. Stovall was assigned a company truck and a cubicle at the Columbia office.

As the project manager of the Westminster job and as the traveling overseer of the Respondent's projects at least through the time he circulated the petition, Stovall had the authority to assign and direct employees and resolve any problems on behalf of the Respondent. Additionally, on the Westminster job he could grant time off, assign overtime, promote employees to the position of foremen, to discipline employees by sending them back to the shop. Stovall was frequently referred to by Respondent's management as a project manager, a position which

Respondent admits is supervisory. At the time that Stovall circulated and filed the decertification petition, he considered himself to be a supervisor, as did the employees whose names he solicited. Thus, I find that the Government has sustained its burden of showing that Stovall was a statutory supervisor at the time he solicited employees to sign the decertification petition. Even if Stovall were found not to be a statutory supervisor at the time he circulated the petition, I find that the record supports the conclusion that he was at a minimum an agent of the Respondent pursuant to Section 2(13) of the Act, and that employees viewed him as such at that time. Under all the circumstances, it is found that employees would reasonably believe that Stovall spoke and acted on behalf of Respondent. *Dentech, supra. Kidd Electric, Inc.*, 313 NLRB 1178, 1180 (1994) (leadman found to acting as agent for employer where admitted supervisor used leadman to transmit instructions to other employees).

2. Respondent's Withdrawal of Recognition

The Board determines whether an Employer's withdrawal of recognition is lawful under the following test set forth in *Tyson Foods, Inc.*, 311 NLRB 552, 555 (1993):

An employer, before it may lawfully withdraw recognition from an incumbent union, must have actual proof that the union in fact no longer enjoys majority support, or it must possess a good faith doubt, founded on a sufficient objective basis, as to the union's continuing majority status.

An employer may not rely upon a decertification petition where it has given assistance to the decertification drive. *Tyson, supra* at 556. Such unlawful assistance may come about when a statutory supervisor employed by the employer encourages or circulates a decertification petition. *Cypress Lawn Cemetery Assn.*, 300 NLRB 609, 617-626, 627-628 (1990). Similarly, circulation of a decertification petition by an agent of the employer will also taint the petition so that it may not be relied upon to withdraw recognition. *Tyson, supra* at 561-566.

Stovall has been found to be the Respondent's supervisor and agent at the time he circulated the decertification petition. The Respondent also assisted him in filing that petition by telling him how to create the petition and allowing him to drive to Kansas City in a company truck and on company time, to file the petition. I find that the petition was tainted by being circulated by Respondent's supervisor and agent, Stovall. I determine that because of this fact, as well as the assistance provided Stovall by the Respondent in creating and filing the petition, that the petition does not provide objective evidence upon which to base a good faith doubt as to Local 257's majority status. Accordingly, I find that the Respondent's withdrawal of recognition from Local 257 violates Section 8(a)(1) and (5) of the Act.

18. Settlement Agreement in the Prior Case

In its brief, the Union restates its argument that the non-Board settlement between the parties in the earlier case should be set aside. The Union notes that the General Counsel has the authority to reinstate previously withdrawn charges, which have been the subject of a non-Board settlement, where a respondent either fails to comply with the terms of the settlement

agreement or if post-settlement unfair labor practices are committed. *Norris Concrete Materials*, 282 NLRB 289, 291 (1986); *Jordan Graphics, Inc.*, 295 NLRB 1085, 1092 (1989); *Kime Plus, Inc.*, 295 NLRB 127, 146–147 (1989); *Hospital San Rafael*, 308 NLRB 605, 606, fn. 3 (1992); *Sterling Nursing Homes*, 316 NLRB 413, 416 (1995); *Outboard Marine Corp.*, 307 NLRB 1333 (1992); *Golden Age Chairmobile, Inc.*, 243 NLRB 160 fn. 1 (1979).

In the present case the Government did not choose to revoke the earlier settlement and seek to litigate the allegations of those charges in this proceeding. I did not permit the Union to litigate the earlier matters in this trial as the pleadings did not contain those allegations. I reiterate my trial ruling and decline to set aside the parties' non-Board settlement agreement.

CONCLUSIONS OF LAW

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

2. The International Brotherhood of Electrical Workers, Local Unions Nos. 124 and 257, are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1), (3), and (5) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated the Act except as herein specified.

[Recommended Order omitted from publication.]