

Pro-Tec Fire Services Ltd., a subsidiary of JJ Protective Services, Inc. and International Association of Firefighters Local No. 3694 affiliated with the International Association of Firefighters. Cases 17–CA–21310 and 17–CA–21486

September 27, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS
LIEBMAN AND SCHAUMBER

On August 1, 2002, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,¹ and conclusions² only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified and set forth in full below.

The judge concluded that the Respondent violated Section 8(a)(3) of the Act by refusing to consider or hire employee Robert Manley. The Respondent has excepted. We find merit in this exception.

I. BACKGROUND

The Respondent provides aircraft rescue firefighting services at Will Rogers Airport in Oklahoma City, Oklahoma. Wackenhut, the Respondent’s predecessor, had employed Robert Lindstrom as fire chief and Manley as captain, both supervisory positions, during the last 5 years of Wackenhut’s contract. From 1997 to June 20, 2001, Wackenhut was a party to a collective-bargaining agreement covering firefighting employees. Manley, while serving periodically as union president from the spring of 1996 through mid-June 2001, had a stormy relationship with Lindstrom.

¹ The Respondent has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us they are correct. *Standard Drywall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We adopt the judge’s findings that the Respondent violated Sec. 8(a)(1) by banning all union activities at the workplace and by disparately restricting the personal use of company vehicles to nonunion business. There is no exception to the judge’s recommended dismissal of the allegation that the vehicle restriction also violated Sec. 8(a)(3).

II. FACTS

In early 2001, Manley learned that the Respondent was planning to bid on the Will Rogers Airport contract. Manley phoned Jerry Rynerson, the Respondent’s corporate fire chief, identified himself as president of the Union, and asked if the Respondent would be interested in negotiating a tentative labor agreement or a commitment to retain all Wackenhut employees if the Respondent obtained the contract. Rynerson said that it was the Respondent’s intention to hire all employees, so long as they did not have discipline problems and were not unfit.

On June 12, 2001, Will Rogers Airport awarded the contract to the Respondent. The Respondent provided applications to all Wackenhut employees. On June 21, 2001, Manley applied for a position with the Respondent. On the line of the application designating “Position(s) applied for” and “location,” Manley wrote “any, Will Rogers OKC.”³ During this time, Lindstrom also applied to the Respondent for the position of fire chief.

On June 28, 2001, Rynerson and Cashman interviewed Manley. Each interviewer filled out two forms. One was entitled “Interview Questions,” and the other contained rating numbers from 1–10 (10 being the highest). On both forms, the position “Captain” was circled.

Rynerson rated Manley’s appearance as “not really” polished and noted that he was reserved. Rynerson gave Manley an overall rating of 7, adding the comment: “appears to be authoritative [sic] wants to be in control.” Cashman noted, under “body language” that Manley had appeared “a little cocky and “[n]ot a lot of eye contact not sure being honest with me.” Cashman gave Manley an overall rating of 6 to 7 and placed a star over the number 6.

Later the same day, the Respondent interviewed Lindstrom for the position of fire chief. Then on June 29, 2001, Cashman offered Lindstrom the position of fire chief. Later that day, Cashman told Manley that she was unable to offer him employment.

Cashman initially testified that the Respondent considered Manley for any position. But, in later testimony, Cashman stated that the Respondent considered Manley only for the captain position. At that point, Cashman said that the Respondent was unwilling to consider Manley for a lesser position because he had served as captain, and she believed that difficulties arose when former supervisors return to the bargaining unit. Specifically, Cashman testified that she had interviewed Manley for a

³ There are no exceptions to the judge’s finding that the Respondent would not have selected Manley to be fire captain regardless of his union activity. Therefore, the refusal-to-hire or consider-for-hire allegation involved herein pertains solely to his application for the firefighter position.

captain position; however, she also considered him for the position of firefighter. She stated: “I mean I wasn’t impressed with him, so I wasn’t really considering him. I guess the answer is no, I didn’t consider him for firefighter. I wasn’t impressed with him during the interview.” Rynerson testified that, after looking at everything, he “would not select him . . . for a captain’s position or any other position.”

In subsequent months, various firefighter positions became available at the Respondent and Lindstrom made recommendations for hire to those positions. The Respondent did not consider Manley for these positions although it typically retains employment applications on file for 6 months.

III. THE JUDGE’S DECISION

Applying *FES*, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002), and relying entirely on circumstantial evidence, the judge found that antiunion animus motivated the Respondent’s refusal to hire Manley in June 2001, and to consider him for subsequent firefighter positions. In doing so, she imputed Lindstrom’s personal animus towards Manley to the Respondent. She then rejected the Respondent’s offered reasons for its refusal to hire Manley or to consider him for later positions. Specifically, the judge discredited witnesses Cashman and Rynerson, finding that their explanations for not hiring Manley were incongruent and inconsistent. The judge acknowledged that it would not be an unreasonable personnel decision for the Respondent to decline to consider Manley for positions below that of fire captain because returning former supervisors to the employee corps might create the potential for personnel conflicts. However, the judge found that the testimony of the Respondent’s witnesses did not consistently reflect such a decision by the Respondent.

IV. ANALYSIS

We conclude that the General Counsel has not established that Manley’s protected activity motivated the Respondent’s decision not to hire him or to consider him for hire. Concededly, the judge discredited the testimony of Rynerson and Cashman that they refused to hire Manley because of their concern that problems occur when a supervisor returns to the unit as an employee. However, that discrediting does not affirmatively establish that Rynerson and Cashman were motivated by antiunion animus toward Manley. To the contrary, the judge correctly found no evidence that Rynerson and Cashman independently bore animus at all toward Manley for his prior union activity. Thus, without speculating as to why Rynerson and Cashman were untruthful as to the reason for not hiring Manley, we can find no evidence that anti-

union animus was the real reason.⁴ In concluding otherwise, the judge relied on seven circumstantial factors to impute Lindstrom’s animus toward Manley’s union activities to Rynerson and Cashman. However, we find these factors inadequate to establish the requisite link.

The first two factors cited by the judge (that Lindstrom bore intense antiunion animus toward Manley and wished “to be free” of him as an employee) deal exclusively with Lindstrom’s personal animus toward Manley and his prior union activities. Without additional evidence, however, these factors do not provide a basis for imputing Lindstrom’s sentiments to the Respondent’s officials.

The third factor—that Lindstrom stated that if hired “he would demand influence as to which employees were hired”—is equally unpersuasive. The testimony of witness Frank Prater is the apparent source of the judge’s finding. Prater’s complete testimony, however, is that, prior to Lindstrom being offered a position, Lindstrom told him that he would present demands to the Respondent “*if given a chance*.” However, nothing in Prater’s testimony as to what Lindstrom told him establishes that the Respondent, in fact, gave Lindstrom such a chance to assert his demands, much less acceded to them.

The fourth factor cited by the judge is that the Respondent chose Lindstrom as fire chief before it notified Manley that he would not be hired. This chronology itself, however, is insufficient to establish even that Lindstrom influenced the decision not to hire Manley. It falls woefully short of establishing that Lindstrom’s personal animus towards Manley was a substantial or motivating factor in the Respondent’s ultimate hiring decision.

The fifth factor is the judge’s finding that “upon being hired, Chief Lindstrom told employees [that the] Respondent had met his demands.” But there is no showing of precisely what “demands” Lindstrom allegedly made in his interview or whether any of those demands were actually met by the Respondent.

The next factor cited by the judge is that “except for one employee who was off on disability at the time of the hiring, Mr. Manley was the only unit employee who was not offered employment.” Although correct, this finding is incomplete. It does not reflect the import of the undisputed evidence that the Respondent hired 23 out of 25 former Wackenhut employees—all of whom were union members. Although the judge rejected the relevance of this evidence “when there is evidence of specific animos-

⁴ We recognize that the giving of a false reason can be a factor to support a finding of unlawful motive. However, where as here, there is no evidence of antiunion animus, we do not believe that the General Counsel has established his case.

ity,” the General Counsel failed to demonstrate any such specific animosity on the part of the Respondent.

The last factor is the judge’s finding that Manley’s overall interview rating “was as high, or higher” than that of other employees who were hired. The judge’s observation, however, is true only insofar as it relates to applicant Lance Joy. While the judge also referenced applicant Ron Cummings, Rynerson gave Cummings a higher score than Manley and, while Cashman gave Cummings no overall score, she gave him individual ratings (8,7,6,8) that were higher than Manley’s (7,6,6,6). It is true that both Rynerson and Cashman gave Joy a 6 rating while Rynerson gave Manley a 7, and Cashman gave him a “6*-7.” However, Cashman’s interview notes also indicated that Joy “appears to do as told” as well as “overall, could be a good firefighter.” Cashman made no similar comments about Manley. Indeed, she noted that Manley’s “Communication Style” did not reflect “a lot of ‘team’ more I, authoritative?” Rynerson too indicated that Manley appeared authoritative and wanted to be in control. Most importantly, Manley’s interview preceded Lindstrom’s; therefore, none of Lindstrom’s animus could have had a bearing on Cashman’s and Rynerson’s interview notes.

In sum, the circumstantial factors relied upon by the judge do not establish the necessary antiunion animus. Accordingly, the General Counsel failed to meet his burden of demonstrating that Manley’s protected activity motivated the Respondent’s refusal to hire Manley in June 2001.

We reach the same result with respect to the Respondent’s refusal to consider Manley for hire in subsequent months. The General Counsel failed to show that the Respondent’s original decision not to hire Manley was a product of antiunion animus. In the absence of additional facts subsequent to June 2001 demonstrating an unlawful motive, the mere fact of Lindstrom’s subsequent recommending the hire of other employees (and not Manley) in later months can not convert the Respondent’s originally lawful decision not to hire Manley into a subsequent unlawful refusal to consider him for hire.

Because the General Counsel failed to meet his burden, we do not pass on the Respondent’s asserted defenses under *FES*, supra. Thus, we find that the Respondent did not violate the Act by refusing to hire or to consider Manley for employment.⁵

⁵ Contrary to her colleagues, Member Liebman would adopt the judge’s finding that the Respondent violated Sec. 8(a)(3) by refusing to hire Manley as a firefighter. In Member Liebman’s view, there is sufficient circumstantial evidence to establish by a preponderance of the evidence that the Respondent’s refusal to hire Manley was motivated by antiunion animus toward Manley’s union activity. Thus, the record

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Pro-Tec Fire Services Ltd., a subsidiary of JJ Protective Services, Inc., Oklahoma City, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining overbroad rules that unlawfully prohibit employees from engaging in union activities and using company vehicles for union business.

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

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

(a) Within 14 days after service by the Region, post at its Will Rogers Airport station in Oklahoma City, Oklahoma, copies of the attached notice marked “Appendix.”⁶ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has

establishes that: (1) Chief Lindstrom had for years born intense animosity toward Manley’s union activity; (2) Lindstrom admitted that if hired by the Respondent he wanted input as to who the Respondent hired, and that he would advise the Respondent to get rid of Manley; (3) Lindstrom told Assistant Chief Frank Prater that he would have some demands of the Respondent if hired, including the opportunity “to point fingers” at whom the Respondent should not hire; (4) Lindstrom was hired, and upon being hired he advised the employees that his hiring demands had been met; (5) later the same day that Lindstrom was hired the Respondent notified Manley that he would not be hired; (6) Manley was the only former Wackenhut employee not offered employment, except for one employee who was out on disability; (7) Manley’s overall employment interview rating was as high as, or higher, than that of other employees hired. Member Liebman agrees with the judge that this evidence strongly supports an inference that Lindstrom advised the Respondent not to hire Manley because of his union activities, and that the Respondent refused to hire Manley for that reason. Finally, Member Liebman agrees with the judge’s rejection of the Respondent’s argument that it declined to consider Manley for the firefighter position because returning former supervisors to the employee corps creates “difficulties.” The testimony of the Respondent’s witnesses on this issue was inconsistent.

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

gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since July 1, 2001.

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT promulgate and maintain overbroad rules that prevent employees from engaging in lawful union activities.

WE WILL NOT discriminatorily prevent employees from using company vehicles for union business.

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

PRO-TEC FIRE SERVICES LTD.

Charles T. Hoskins Jr., Esq., for the General Counsel.
Robert W. Burns, Esq., of Green Bay, Wisconsin, for the Respondent.
Stephen Hammer, Secretary-Treasurer, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LANA PARKE, Administrative Law Judge. This case was tried in Oklahoma City, Oklahoma, on June 18, 2002.¹ Pursuant to charges filed by International Association of Fire Fighters Local No. 3694, affiliated with the International Association of Fire Fighters (the Union), the Regional Director of Region 17 of the National Labor Relations Board (the Board) issued a consolidated complaint and notice of hearing (the complaint)

¹ All dates are in 2001, unless otherwise indicated.

on October 22. The complaint alleges that Pro-Tec Fire Services Ltd., a subsidiary of JJ Protective Services, Inc. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

Issues

1. Did Respondent violate Section 8(a)(3) and (1) of the Act by refusing to hire and refusing to consider Robert Manley (Manley) for employment during the period June 29 through December?²

2. Did Respondent violate Section 8(a)(3) and (1) of the Act by discriminatorily restricting its employees' use of company vehicles at its place of business at the Will Rogers World Airport in Oklahoma City, Oklahoma (Will Rogers Airport station)?

3. Did Respondent violate Section 8(a)(1) of the Act since December 1 by orally promulgating and maintaining a rule prohibiting union activity at the Will Rogers Airport station?

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

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with its primary office and place of business in Green Bay, Wisconsin, and an office and place of business in Oklahoma City, Oklahoma, is engaged in the business of providing aircraft rescue firefighting services at the Will Rogers Airport. During a representative 3-month period in 2001, Respondent performed services valued in excess of \$50,000 in states other than the State of Oklahoma. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.³

II. ALLEGED UNFAIR LABOR PRACTICES

A. Relevant Credible Evidence

1. Union activity at Wackenhut Corporation

Before July 1, the Wackenhut Corporation (Wackenhut) held a contract with Will Rogers Airport to provide aircraft rescue fire fighting services. During the last 5 years of Wackenhut's contract term, Wackenhut employed Robert G. Lindstrom (Lindstrom) as fire chief to manage Wackenhut's business at the airport site. During the period December 1997 through June 30, Wackenhut was party to a collective-bargaining agreement with the Union covering firefighting employees. Manley served as union president from spring 1996 through mid-June, except for a 1-year period in 1998.

² At the hearing, I granted the General Counsel's motion to amend the complaint to allege an extended time period during which Manley was neither considered for hire nor hired by Respondent. The amended period corresponds with the length of time Respondent keeps employment applications.

³ Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

While union president, Manley had a stormy relationship with Lindstrom. In dealing with contract grievances, the two had several heated confrontations. Chief Lindstrom found Manley to be the “most confrontational of the IFF presidents.” In a deposition given May 17, 2002, Chief Lindstrom recalled his antagonism:

Q. Mr. Lindstrom, did you make a statement . . . that if you were hired by Pro-Tec, that you would like to have input as to who was going to be hired?

A. Yes.

Q. And did you indicate . . . there were some individuals that you wanted to get rid of?

A. In the form of fantasy.

Q. . . . What did you indicate . . . as to whom you would want to get rid of?

A. In a perfect world, if I had input, Manley.

.....

Q. And why would you want to get rid of Manley?

A. Because he kept the organization in turmoil.

In early 2001, Manley, a captain for Wackenhut as well as union president, learned that Respondent was planning to bid on the Will Rogers Airport contract. He telephoned Jerry A. Rynerson (Rynerson), Respondent’s corporate fire chief, identified himself as president of the Union, and asked if Respondent would be interested in negotiating a tentative labor agreement with the Union covering employees working at the Will Rogers Airport. Manley also talked to Rick Watermolen (Watermolen), vice president of Respondent. Watermolen arranged a meeting between Manley and Rynerson and asked for a copy of the Union’s labor agreement with Wackenhut and any information that would help Respondent in formulating its bid. Manley told him the Union needed a commitment before giving any assistance. Watermolen said he could not commit to retaining all Wackenhut employees at the Will Rogers Airport, that Manley could discuss it with Rynerson.

Manley met with Rynerson in April. Manley asked for a tentative labor agreement or a commitment to retain all Wackenhut employees at the Will Rogers Airport if Respondent obtained the contract. Rynerson said it was Respondent’s intention to hire all employees who were not discipline problems or unfit. Manley asked if Rynerson would put it in writing, but Rynerson said that was Watermolen’s decision. Manley declined to give Respondent a copy of the current labor agreement in the absence of some commitment from Respondent.

2. Refusal to hire and to consider Manley for employment

On June 12, Will Rogers Airport awarded a contract to Respondent to provide aircraft rescue fire fighting services for the airport commencing July 1. Respondent provided applications for all Wackenhut employees with notice they could apply for positions with Respondent. According to Lindstrom, he encouraged all Wackenhut employees to apply. He also telephoned Karen Jeanne Cashman (Cashman), Respondent’s human resources director and recommended that Respondent hire all employees. He insisted that he did not mention Manley.

On June 21, Manley applied for a position with Respondent at the Will Rogers Airport. On the line “Position(s) Applied For and Location,” Manley wrote, “Any, Will Rogers OKC.”

At about the same time, Lindstrom applied to Respondent for the position of fire chief. Before doing so, he told his assistant chief, Frank Prater (Prater) that if hired, he had some demands including time off and the opportunity to “point . . . fingers” at whom Respondent did and did not hire.⁴

On June 28, at about 9:30 a.m., Rynerson and Cashman interviewed Manley for employment. In the course of Manley’s interview, both interviewers filled out two forms. One was entitled “Interview Questions” and the other contained rating numbers from 1 through 10 (10 being highest) for the following criteria: appearance, body language, communication style, and experience level.

The “Interview Questions” form filled out by Rynerson noted “position [applied for]: FF/Equipment Operator, Assistant Chief, Captain, Chief of Training.” The one filled out by Cashman noted, “Position: Assistant chief Captain.” On both, the position “Captain” was circled.

On the form completed by Rynerson, he noted that Manley’s appearance was “not really” polished and that he was “reserved.” He appeared somewhat confident but was not articulate in speech. From Rynerson, Manley received an overall rating of “7” with the comments “appears to be authoritative [sic], wants to be in control.”

On the form completed by Cashman, she noted under the category body language that Manley had very little eye contact and appeared “a little cocky?” As an additional note, Cashman wrote, “Not a lot of eye contact not sure being honest w/me.” Under “Communication Style,” she noted, “Not a lot of ‘team’ more I, authoritative?” Cashman gave Manley an overall rating of “6–7” with a star over the 6 and the following written comments: “Concerns w/each shift completing driver operator (FF) experience training. Complained, no solutions. Gave example of ‘younger guys’ when coaching (in office). Not a big fan of CISD,⁵ kept asking me how I feel. . . .” Cashman testified that her overall impression of Manley was that he was not someone she was looking for as an employee.

Cashman’s notations on interview forms for applicant Ron Cummings (Cummings), who was hired, show that she thought him “cocky maybe,” not really articulate, able to adapt to anyone’s program training, but appearing “to have a chip on his shoulder re: maybe longevity.” Cashman left his overall rating blank. Notations on interview forms for applicant Lance Joy (Joy), who was hired, record that he did not interview well, was not articulate, but “overall could be a good fire fighter, appears to do ‘as told.’” Cashman gave him an overall rating of 6, as did Tynerson.

On June 28, at about one p.m., Respondent interviewed Lindstrom for the position of fire chief at the Will Rogers Airport. He was the only individual interviewed for that position. According to Lindstrom, he did not mention Manley or any

⁴ Although Prater has a pending action of employment discrimination against Respondent, I credit his testimony based on manner and demeanor.

⁵ Critical incident stress debriefing.

other employee during his interview. He testified that he had no input with Respondent about hiring Manley and gave Respondent no information about him.

At mid-morning on June 29, Cashman offered Lindstrom the position of fire chief. About an hour later, he accepted. Lindstrom announced to employees that Respondent had hired him and had met his demands.⁶

On June 29, at about 4 p.m., Cashman telephoned Manley and told him Respondent was unable to offer him employment, that he would get a letter in the mail, and if he had questions, he could contact corporate headquarters. Of employees in the bargaining unit, only Manley and Richard Spalding, who was on disability leave, were not hired.

Rynerson testified that Respondent did not permit Lindstrom to have any input into the hiring process for the Will Rogers Airport contract, as Respondent wanted an unbiased view of potential employees. In past hiring situations, Rynerson had found existing fire chiefs to have preferences for certain employees. He wanted to avoid that at the Will Rogers Airport. Therefore, according to Chief Rynerson, Respondent completed all interviews before it made any selections.

In testifying that Respondent knew nothing of Manley's conduct as union president, Chief Rynerson essentially denied that Respondent wanted to know anything about employees' work records or conduct under Wackenhut. He agreed, however, that Respondent did want to know employees' discipline history especially if discipline were currently pending. When asked how Respondent expected to find out whether an employee was involved in a disciplinary action, Rynerson said, "I don't know that—I guess I have to go back to my statement that we weren't concerned with what [Wackenhut] might provide to us and I think I have to go back to H[uman] R[esources] issue . . . it would be against the law for them to share with us past personal things that happened. . . ."

Initially, Cashman testified that Respondent considered Manley for any position with the company. In later testimony, Cashman said that Respondent considered Manley only for the captain position. Cashman said Respondent was unwilling to consider Manley for a lesser position because he had served as a captain since 1998, and she believed it created difficulties when former supervisors returned to the employee unit. Rynerson testified, "I didn't feel as if we'd hire him for a captain, nor would I—I had the same decision for a fire fighter."

As to his interview perception of Manley, Rynerson said that Manley came across as authoritative, "I'm in control, I'm the boss," which Rynerson considered a negative trait for a supervisory position such as captain. Rynerson also felt from the interview that Manley might lack empathy and understanding in dealing with critical incident stress debriefing. Rynerson testified that after looking at everything, he concluded he "would not select him . . . for a captain's position or any other position. I would not hire him, period." Cashman said that she

interviewed Manley for a captain position. However, she also "took in consideration the position of fire fighter also. I mean I wasn't impressed with him, so I wasn't really considering him. I guess the answer is no, I didn't consider him for a fire fighter. I wasn't impressed with him during the interview."

On July 1, Respondent began operations under its contract with the Will Rogers Airport. Respondent retains employment applications for 6 months after submission. Shortly after July 1, a captain vacancy occurred. Respondent did not offer the position to Manley. Rynerson testified, "The decision was made that we would not hire him. We would not offer him a position, period. So there was no reason to go back and change our minds and reconsider. . . ." In the latter part of August or early September, Lindstrom recommended the hire of four firefighter applicants, three of whom were former employees of Respondent. Respondent did not consider Manley for any of the positions although his application remained on file.

3. Restriction of company vehicles and rule prohibiting union activity

On November 28, off-duty employee Steve Hammer (Hammer), who also serves as union secretary, asked Captain Will McDown (McDown) if he could get a ride to the terminal. Hammer wanted to obtain the public record of the airport's contract with Respondent to use in collective-bargaining negotiations. McDown assigned an on-duty firefighter to drive Hammer to and from the terminal in a rescue vehicle.

Before December 1, Respondent had permitted on-duty employees to use company vehicles for personal errands. On December 1, Denny Clark (Clark), assistant chief, told Hammer that per Lindstrom, company vehicles were not to be used for union business and "no union activities could be done there at the station and nothing could be said about . . . the union." Lindstrom did not testify concerning what, if anything, he told Clark to tell Hammer. Clark did not testify.

Respondent did not discipline Hammer for using the vehicle. Since the December 1 directive from Clark, union discussions have occurred at the workplace without repercussion. Lindstrom testified that he initially believed Hammer had driven a company vehicle while off duty, which concerned him, as company liability insurance does not cover off-duty employees. According to Lindstrom, learning that an on-duty employee had driven the vehicle essentially alleviated his concern. However, there is no evidence that Respondent ever rescinded the rules articulated by Clark regarding union activity or union-business vehicle use.

B. Discussion

1. Respondent's refusal to hire Manley

To establish a discriminatory refusal to hire, the General Counsel must show (1) that Respondent was hiring or had concrete plans to hire; (2) that the applicant had experience or training relevant to the known requirements of the positions for hire; and (3) that antiunion animus contributed to the decision not to hire the applicant. Once the General Counsel has made this showing, the burden shifts to Respondent to show that it would not have hired the applicant even in the absence of his union activity. *FES*, 331 NLRB 9, 12 (2000); *Tim Foley Plumb-*

⁶ Lindstrom did not specifically admit he told employees that Respondent had met his demands. However, when questioned whether he had done so, he answered "[I]f I had made any comments, it would have been after [11:30 a.m., June 29]." I take his answer to be a tacit admission that he told employees Respondent had met his demands.

ing Service, 337 NLRB 598 (2002). There is no dispute that Respondent was hiring. In fact, when Respondent succeeded to Wackenhut's firefighting contract at the Will Rogers Airport, it made employment applications available to all Wackenhut firefighters. There is no dispute that Manley had relevant experience and training for available openings, and there is no dispute that Respondent refused to hire him. The General Counsel alleges that Respondent declined to hire Manley because of its animosity toward his activities as an officer of the Union. Respondent's motive in refusing employment to Manley is, therefore, a critical issue.

The General Counsel has established Manley's union activity. Manley was, at material times, president of the union representing Respondent's future employees at Will Rogers Airport. The General Counsel has also established employer knowledge. Before Respondent obtained the Will Rogers Airport contract, Manley spoke to and then met with representatives of Respondent in his capacity as union president. Manley unsuccessfully sought a commitment from Respondent that in the event of its securing the Will Rogers Airport contract it would hire all of Wackenhut's unit employees. Although Rynerson, somewhat disingenuously, testified that he could not recall Manley disclosing his status as union president, he must have been aware that Manley held an official position with the Union. Respondent was, therefore, at all material times, aware that Manley had an official position with the Union and that he was active in that position.

Whether the General Counsel has established employer animus is not so clear cut. Although Respondent knew Manley held an official union position, there is no evidence that Rynerson or Cashman independently bore him any ill will because of it. The inquiry does not end there, however.

During his tenure as fire chief for Respondent's predecessor, Wackenhut, Lindstrom unquestionably bore animosity toward Manley's union advocacy and unquestionably wanted to be rid of him. By his December 1 direction to Clark to prohibit union activity at work, Lindstrom demonstrated strong general anti-union animus as well. If Lindstrom had any input into Respondent's hiring decision, an inference of unlawful motive would be inescapable. Lindstrom swears he had no such input, and the two ostensible decisionmakers, Rynerson and Cashman, swear he had no such input. The General Counsel presented no direct evidence to the contrary.

In the absence of direct evidence, the Board will infer animus from circumstantial evidence and the record as a whole. *Tubular Corp. of America*, 337 NLRB 99 (2001); *Sears, Roebuck, & Co.*, 337 NLRB 443 (2002). The following evidentiary facts support an inference of motivating animus in Respondent's refusal to hire Manley: (1) Lindstrom bore intense animosity toward Manley's union activities; (2) Lindstrom wished to be free of Manley as an employee solely because of his union activities; (3) Lindstrom stated that if hired by Respondent, he would demand influence as to which employees were hired; (4) Lindstrom was selected as Respondent's fire chief before Manley was notified of his employment rejection; (5) upon being hired, Chief Lindstrom told employees Respondent had met his demands; (6) except for one employee who was off on disability at the time of the hiring, Manley was the only unit

employee who was not offered employment; and (7) Manley's overall interview rating was as high as, or higher, than that of other employees who were hired. From those facts, it is reasonable to infer that after his selection as fire chief, Lindstrom made his opinion of Manley known to Respondent and that his opinion guided Respondent's hiring decision. In drawing this inference, I specifically decline to credit the testimonies of Rynerson, Cashman, or Lindstrom. All three gave inconsistent and inherently incongruous testimony and their manner and demeanor did not favorably impress me. Accordingly, I find the General Counsel has met his burden of demonstrating that Manley's protected activity was a motivating factor in Respondent's decision not to offer employment to Manley.⁷

The General Counsel having met its initial burden of persuasion, the burden of persuasion shifts to Respondent to prove, by a preponderance of the evidence, its affirmative defense that it would have taken the same action even if Manley had not been an active union leader. *Tim Foley Plumbing Service*, above. In assessing Respondent's defense, I am mindful that "[T]he defense does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it." *Merillat Industries*, 307 NLRB 1301, 1303 (1992). I also recognize that the Board does not determine whether a "nondiscriminatory reason for [employment action] is wise or well supported." *6 West Limited Corp.*, 330 NLRB 527 fn. 5 (2000). As Respondent points out (with appropriate authority),⁸ the Board may not substitute its own business judgment for that of Respondent or act as a "super-personnel" department. Even shortsighted or bad business judgments are permissible so long as they are not discriminatory.

The first prong of Respondent's defense is that Manley made such an unfavorable impression in his employment interview that Respondent would not consider him for a fire captain position. Respondent argues that other applicants had qualifications that better fitted them for the captain positions. I accept Respondent's arguments. The applicants selected for captain positions had more ARFF and airport experience than Manley. Further, Rynerson and Cashman articulated specific factors of the interviews that support a conclusion that Respondent, without regard to impermissible considerations, believed the three selected individuals were the best fire captain candidates. I find that Respondent would not have selected Manley as a fire captain regardless of his union activity.

The second prong of Respondent's defense is that it declined to consider Manley for positions below that of fire captain because returning former supervisors to the employee corps created "difficulties." That is not an unreasonable personnel decision. However, the testimony of Respondent's witnesses did not consistently reflect such a decision. Rynerson said that he would not hire Manley as a captain, and he "had the same deci-

⁷ It is irrelevant that the majority of the Wackenhut employees Respondent hired were union members. It is not necessary, contrary to Respondent's argument, to show general union animosity when there is evidence of specific animosity.

⁸ Respondent cites *NLRB v. GATX Logistics, Inc.*, 160 F.3d 353, 357 (7th Cir. 1998), enfg. 323 NLRB 328 (1997); *McCoy v. WGN Continental Broad Co.*, 957 F.2d 368, 373 (7th Cir. 1992); *Furr v. Seagate Tech., Inc.*, 82 F.3d 980, 986 (10th Cir. 1996).

sion for a fire fighter” and concluded he “would not hire him, period.” Yet, Rynerson did not explain what defects precluded Manley’s working as a firefighter. Cashman first testified she *did* consider Manley for a firefighter position and then testified she did not. She also did not explain why Manley was unacceptable as a firefighter. In the absence of consistent testimony, I cannot accept Respondent’s claim that it rejected Manley as a firefighter because of his former captaincy.

The third prong of Respondent’s defense is that, even supposing Respondent considered Manley for a firefighter position, he made such a poor interview showing that neither Rynerson nor Cashman would hire him for any position whatsoever. As to the unfavorable interview impression, Respondent’s interview notes reflect that Rynerson and Cashman both had some reservations about Manley. However, the written comments and pertinent testimony relate primarily to Manley’s suitability for a supervisory position. Very little signals unfitness for a firefighter position especially when compared to the interview records of others. Manley’s interview score was higher than that of Joy who was hired, and Cashman noted criticisms similar to those leveled at Manley on Cummings’s interview form: “cocky maybe,” and “a chip on his shoulder.” Yet, Cummings was hired. This hiring disparity is evidence of unlawful motive.

The inability of Rynerson and Cashman to provide consistent and congruent testimony regarding the interview process also suggests an unlawful motive. Rynerson gave Manley an interview score of 7. Cashman scored Manley at 6 to 7, with a star over the 6, but insisted that the combination of hers and Rynerson’s scores was not more than 6. Rynerson considered the interview form to be very important in the hiring decision. But Cashman testified the scoring was only a general component and “just numbers.” Why Rynerson and Cashman rejected Manley is not a complex question, and the two relatively sophisticated witnesses should have been able to answer it with logical consistency. They failed to do so. Their testimonial tergiversation compels me to infer that a prohibited motive existed for their refusal to hire Manley as a firefighter.

The entire circumstances warrant a conclusion that Respondent’s refusal to hire Manley as a firefighter and its subsequent ongoing refusal to consider him for employment arose from antiunion animus. Accordingly, I conclude that Respondent failed to hire Manley as a firefighter on June 29, and failed to consider him for employment as a firefighter during the following 6-month period, in violation of Section 8(a)(3) and (1) of the Act.

2. Restriction of company vehicles and rule prohibiting union activity

The complaint alleges that on December 1, Respondent restricted employees’ use of company vehicles because of or to discourage their union activities in violation of Section 8(a)(3) and (1) of the Act and, on the same day, orally promulgated and since then has maintained a rule prohibiting union activity in violation of Section 8(a)(1) of the Act.

Without providing evidence to refute Hammer’s testimony, Respondent contends that it never promulgated any unlawful rules. Respondent argues that it had valid reasons for prohibit-

ing off-duty employee vehicle use. Respondent further argues that it never implemented a formal policy regarding company vehicle use and has not prohibited employees from engaging in union activity in the workplace during appropriate breaktimes.

Respondent’s arguments are unavailing. Clark’s uncontroverted statements orally established rules regarding union activity and union-business vehicle use. Respondent has never published any repudiation of the rules announced by Clark or assured employees that it will not interfere with the exercise of their Section 7 rights, or refrain from further violations. See *Webco Industries*, 327 NLRB 172 (1998), and *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). Therefore, regardless of the informality of Clark’s pronouncement and the lack of enforcement, the rules stand.

The rules regarding union activity and vehicle use promulgated by Clark are unlawful. They constitute overbroad and discriminatory restraints on union activity in violation of Section 8(a)(1). However, the General Counsel cites no authority for the proposition that the announced prohibition of company vehicle use for union business, by itself, constitutes discrimination in violation of Section 8(a)(3) of the Act. Respondent has administered no discipline or otherwise applied the rule. Therefore, with respect to the allegations in complaint paragraph 5(b), I recommend only that the Board find a violation of Section 8(a)(1).⁹

CONCLUSIONS OF LAW

1. By refusing to hire and thereafter to consider hiring Robert Manley, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. By its discriminatory restriction of company vehicle use and rules prohibiting union activities, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. Respondent has not violated the Act as otherwise alleged in the complaint.

REMEDY

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

Respondent having refused to hire and, thereafter, to consider hiring employee Robert Manley because of his activities on behalf of or support for the Union, or because he engaged in other protected concerted activities, it must offer him employment in the position of firefighter, or if that position is no longer available, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges, and

⁹ The General Counsel inadvertently miscited *St. Joseph’s Hospital*, as 263 NLRB 275, 277 (1982), and I am unable to review the intended case. *CVN Cos.*, 301 NLRB 789 (1991) cited by the General Counsel concerns an employee disparately required to follow a procedure intended to deter and discourage her from pursuing union activities, which constituted unlawful discrimination within the meaning of Sec. 8(a)(3) of the Act. The present situation differs from *CVN Cos.* Respondent has not required any employee action.

make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of refusal to hire to date of proper offer of employment, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent also must expunge from its files any reference to the unlawful refusal to hire or consider Robert Manley for employment and thereafter notify him in writing that this has been done and that the refusal to hire or consider him will not be used against him in any way.

In the complaint, General Counsel sought an order requiring Respondent to reimburse any discriminatee entitled to a monetary award for any extra Federal and/or State income taxes that might result from the lump-sum payment of the award. The General Counsel has not repeated the request in his brief, and there is no showing that such a remedy is appropriate. *Ishikawa Gasket America*, 337 NLRB 175 (2001).

[Recommended Order omitted from publication.]