

Brown & Root Power and Manufacturing, Inc., A Subsidiary of Brown & Root, Inc. and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 229. Cases 15-CA-12752-S and 15-CA-12875-S

September 28, 2007

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND KIRSANOW

On August 13, 1996, Administrative Law Judge J. Parzen Robertson issued his decision in this proceeding. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party Boilermakers filed cross-exceptions and supporting briefs, the Respondent and Charging Party Boilermakers filed answering briefs, and the Respondent filed a reply brief.

On June 7, 2000, following the issuance of *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002), the Board remanded this proceeding to the administrative law judge. Thereafter, on May 10, 2001, the judge issued a supplemental decision. The General Counsel, Charging Party Boilermakers, and the Respondent filed exceptions and supporting briefs, Charging Party Boilermakers filed an answering brief, the Respondent filed answering briefs, 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, supplemental decision, and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, as modified below, and to substitute a new Order and notice for that of the judge.

The judge found that the Respondent violated Section 8(a)(3) and (1) by discriminatorily failing to hire, and to consider for hire, job applicants at a paper mill operated by Stone Container, Inc. (Stone Container). The Respondent was the general contractor at the Stone Container project. For the reasons set forth by the judge, as modified below, we adopt the judge's findings, in part,

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

that the Respondent violated the Act by failing to hire, and consider for hire, job applicants at the project. We also adopt the judge's dismissal of allegations that the Respondent unlawfully failed to hire, or consider for hire, other applicants, as modified below.

1. In the spring of 1994,² the Respondent performed scheduled maintenance work at the Stone Container facility. On April 13, a serious accidental explosion caused extensive damage at the facility, and Stone Container contracted with the Respondent to rebuild portions of the facility. This work consisted of demolition, clean-up, and rebuilding of the facility. The Respondent received 1740 applications and hired 291 employees in various construction trades, including electricians, ironworkers, pipefitters, pipewelders, and structural welders.

Commencing in late April, members of the Boilermakers, Pipefitters, and Electrical Workers (IBEW) unions applied for employment at the Stone Container facility. Most of their applications, except as noted below, identified the applicants as voluntary union organizers or indicated that the applicant was an active union member.

On May 5 and 6, Charging Party Unions, Pipefitters Local 229 (Local 229) and the Boilermakers, picketed the facility. On June 1, Local 229 Business Agent Greg Boggs complained to the Respondent's Project Manager Joe Bob Caperton that over 30 of his members had applied and not one had been hired. Caperton told Boggs that Local 229 members "had wrote union organizer on their application and I [Boggs] didn't have any qualified people that actually wanted to go to work." Boggs replied that the union applicants averaged 15 years of experience. Caperton replied that "you don't have one qualified man who wants to come down here and go to work." When Caperton said he would hire anyone brought by Local 229 that was qualified, Boggs responded that he would bring in 30 union applicants the next morning. Caperton told Boggs "oh no, no, no, don't do that. We're not hiring now." As noted below, the Respondent subsequently hired a number of nonunion pipefitters, pipe welders, and structural welders in June and July who did not fit within any preferential hiring category, instead of hiring union-affiliated applicants.

With the exception of applicant Tony Mack, the Respondent hired no applicants who indicated that they were voluntary union organizers or who claimed active membership with Local 229 or the Boilermakers. Mack initially applied on May 17, mentioned Local 229 on his application, and listed Business Agent Boggs as a reference. Mack was not hired. He applied again, 2 months

² All dates are in 1994, unless noted otherwise.

later, and made no reference to Local 229 or to Business Agent Boggs. Mack was hired on July 19.

Under *FES*, the General Counsel must establish, to show an unlawful refusal to hire, that (1) the Respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire (or that the Respondent has not adhered uniformly to such requirements or that the requirements are pretextual or applied pretextually); and (3) antiunion animus contributed to the decision not to hire the applicants. *FES*, supra at 12. Once the General Counsel has met this burden, the Respondent must show that it would have made the same hiring decisions even absent the applicants' union affiliation.

The Respondent hired numerous employees, and the alleged discriminatees applied during the hiring stages of the project.³ Accordingly, we find that the Respondent was hiring or had concrete plans to hire at the time of the alleged unlawful conduct. Further, for the reasons set forth by the judge, those applicants coded and classified by the Respondent as electricians, ironworkers, pipefitters, pipewelders, and structural welders had the requisite training and experience relevant to those positions.⁴

We also adopt the judge's findings that antiunion animus contributed to the decision not to hire the alleged discriminatees. As the judge found, Project Manager Caperton's comments to Business Agent Boggs are instructive as to the Respondent's treatment of the union-affiliated applicants seeking to organize.⁵ Boggs' credited testimony shows that Caperton essentially considered applicants who expressed the intent to organize or indicated active union affiliation unqualified for hire.⁶ It is also noteworthy that applicant Mack, the only applicant hired who revealed an active connection to those seeking to organize at the facility, was hired only after cleansing his initial application of any reference to the union organizers.⁷ In these circumstances, we find that

the General Counsel established that union animus contributed to the Respondent's decision not to hire the discriminatees, and that he met his initial *FES* burden. Therefore, the burden shifted to the Respondent to demonstrate that it would have made the same hiring decisions even in the absence of the applicants' union affiliation.

The Respondent defends its hiring decisions by arguing that they were made pursuant to its preferential hiring system. As the judge found in his supplemental decision, the Respondent demonstrated that it gave preference to (1) former employees of the Respondent, (2) applicants referred by the Respondent's supervisors, and (3) applicants referred by on-site mill operator Stone Container. We agree with the judge that the Respondent demonstrated that applicants hired within these three non-discriminatory preferential categories lawfully were hired instead of the alleged discriminatees.

The Respondent contends that it gave preference to a fourth category of "gate hires." Hall testified that gate hires were applicants who personally applied when an opening existed or were checking back when an opening arose—and were hired virtually on the spot. But the judge discredited Hall and found that "his testimony as to the basis for selection of applicants was especially suspect." Thus, the testimony in support of the legitimacy of this alleged preferential category is not credible. Further, many of the alleged discriminatees applied in person "at the gate" and none was hired. This includes applicants Roland Gilmore (pipewelder) and Greg Johnson (pipefitter), who applied on June 8. Neither Gilmore nor Johnson was hired and, instead, the Respondent on June 8 hired pipewelder Darrow Simmons Jr. and pipefitter James M. Peaden, neither of whom was a preferential hire under the three nondiscriminatory preferential categories, nor was either evidently a walk-in "gate hire" (Simmons and Peaden applied on June 1 and 2, respectively).⁸ In these circumstances, we agree with the

³ As discussed below, openings for different job classifications occurred at different times and, in some cases, there were more discriminatees than there were openings in their classification. We shall leave to compliance the determination of which specific applicant within each classification would have been hired for a specific opening.

⁴ The judge found in his supplemental decision that "there may be a question" whether applicants coded as boilermakers were qualified for available positions. This question is discussed below in sec. 2.

⁵ Although recruiter Kara Hall made decisions as to specific hires, Caperton had overall responsibility for the project, and job requisitions, when necessary, went through Caperton.

⁶ Caperton did not testify.

⁷ As discussed, Mack's second application was submitted 2 months after his first. The Respondent logged each applicant with a number, and Mack's first application in May is logged as #791. Mack's July

application appears to have been initially logged as #1589, with that number crossed out and Mack's original #791 then inserted. The judge discredited Hall's testimony regarding much of the hiring process. As to Mack, Hall initially testified that Mack was hired twice—once in July and another time later in the year when Hall was not at the project. But, later in his testimony, Hall conceded that he did not know why there were two applications by Mack on file. We agree with the judge that the Respondent's treatment of Mack's applications—denied hire when he revealed his union activities and then hired after omitting those references—supports a finding of antiunion animus.

⁸ The judge admitted into evidence R. Exh. 17, without objection, although he may have declined to consider it because he found that this exhibit was not "in accord with the requirements of [the] Federal Rules of Civil Procedure, 1006." (The judge undoubtedly meant the Federal Rules of Evidence.) This exhibit summarizes, by craft, information regarding those applicants who were hired, including whether they fit

judge's finding that the Respondent has not shown that "gate hire" was a nondiscriminatory preferential category, and we therefore adopt the judge's finding that the Respondent has not carried its evidentiary burden to show that the alleged discriminatees would not have been hired because "gate hires" purportedly had priority over them.

2. The Respondent contends that the Respondent had no openings at the project that constituted boilermakers work.⁹ In his supplemental decision, the judge found that "there may be a question" whether applicants coded as boilermakers were qualified for particular positions. The judge left this matter to compliance. But, under *FES*, the General Counsel must show that the alleged discriminatee has experience or training relevant to the position at issue. For the reasons below, we find that applicants coded as boilermakers were qualified to perform as structural welders.¹⁰

Hall testified that he preferred to keep boilermakers within their craft but also admitted that welding is not exclusive to other crafts. Indeed, Hall testified that an applicant with boilermaker skills was capable of performing work at the project as a structural welder. According to Hall, structural welding is less exacting than, for example, pipewelding. Other witnesses testified that boilermakers were capable of performing welding. Applicant David Greer testified that boilermakers possess a mix of skills, including welding. Night-shift Foreman James Parker testified that the Respondent performed boilermakers work at the project. And Foreman Nalta Branning testified that boilermakers were qualified to perform work at the project, including welding. Based on the foregoing, we find that boilermakers were qualified to perform structural welding at the project.¹¹

3. We adopt the judge's finding that the Respondent had knowledge of the union organizing campaign on

within a preference category. We have considered this admitted exhibit as a summary of Respondent's hiring at the project, but it does not establish that a "gate hire" was a preferential category.

⁹ The Respondent's job recruiter Hall coded some applicants exclusively as boilermakers or boilermaker foremen. These included alleged discriminatees Jimmy Vickers, Hulon French, Terry Cozart, Bobby Kelly, Shirlin Railey, Timmy Bradbury, Joseph Gleason, William Tomlinson, Bobbie Harvey, Crawford Kemp, William Robichaux, Joseph Mixon, James Robshaw, and David Greer. Several others were classified both as boilermakers and another craft category.

¹⁰ The judge found that applicants coded as boilermakers might be qualified to perform as electricians. No party so contends, however, and the record does not support the judge's finding.

¹¹ The record is unclear as to whether applicants coded as boilermakers were qualified to perform other types of welding (i.e., other than structural welding) or to perform pipefitting or work within other coded classifications. As the General Counsel bears the evidentiary burden to show qualifications, we shall limit an instatement remedy to the structural welding classification.

May 2, when alleged discriminatee Gerald Motley applied and stated on his application that he was a union organizer.¹² We therefore agree with the judge that the Respondent's discrimination in hire commenced with respect to openings as of May 2, when the Respondent had such knowledge and denied employment to applicants for discriminatory reasons.

As the Respondent contends, an instatement remedy for a discriminatory failure to hire must be tailored here to the job classification in which a discriminatee was qualified. Here, instatement is appropriate for openings, within each classification (as coded by the Respondent, other than as boilermakers), that were discriminatorily filled by nonpreference hires, i.e., by those who did not qualify for any of the three nondiscriminatory preference categories, as described above. Thus, a position filled by a nonpreference hire was an available opening for a discriminatee who had applied at or before the time that position was filled. Accordingly, we shall order instatement on that basis.¹³

¹² The Charging Party contends that the Respondent had knowledge of the campaign on April 29, when alleged discriminatee Singletary applied and wrote "union organizer" on his application. Although the judge erroneously listed Singletary's application as filed on April 29 in his decision, the record shows that Singletary applied on May 4. Accordingly, we find no merit to the Charging Party's contention. We also find no merit to the Respondent's contention that the Respondent did not have knowledge of the campaign on May 2.

¹³ Four discriminatees were coded as electricians: Motley (applied on May 2), Fenaes (May 13), Clark (May 19), and Jason Greer (June 7). Openings for electricians were filled by nonpreference hires on May 31, June 22 and 28, July 6 (two openings), July 8, 11 (three openings), 14, 15, 17 (two openings), 18, 19, 21, 23, 27, 28, and 30. One discriminatee, Childree, was coded as an ironworker. He applied on May 17. Openings for nonpreference ironworkers were filled on May 30 and June 19. Thirteen discriminatees were coded as pipefitters. They are Wicker (April 29), Thibodaux (May 9), Andrews (May 10), Roy Cooper (May 10), Stan Cooper (May 10), McNeil (May 10), O'Brien (May 10), Seale (May 10), Wallace (May 10), Maddox (May 17), Ost (May 27), Johnson (June 8), and Jasperson (May 23). Openings for nonpreference pipefitters were filled on May 12 and 25, and June 8. Accordingly, the number of discriminatees exceeds the number of openings. Those pipefitters entitled to instatement shall be determined at compliance, with the remaining entitled to a failure to consider remedy. Thirteen discriminatees were coded as pipewelders. They are Joe Cooper (April 29), Singletary (May 4), Thomas (May 10), Collins (May 10), Hamm (May 17), Holmgren (May 17), Wilford Kelly (May 18), Richardson (May 18), Baxley (May 25), Gilmore (June 8), John Kelly (July 13), Bonifay (May 2), and Ferguson (July 13). Openings for nonpreference pipewelders were filled on May 2, June 6 and 8, July 1, 12, and 19. The July 1 opening was filled by Lee Wright. The judge erroneously found that Wright was hired on June 21. The July 12 opening was filled by J.L. Moss. The judge erroneously found that Moss was hired on April 27. In view of the number of discriminatees in relation to the number of openings, those pipewelders entitled to instatement shall be determined at compliance, with the remaining entitled to a failure to consider remedy. Ten discriminatees were coded as structural welders. They are Meeks (May 17), Richbourg (May 17), George Odom (May 18), King (June 8), Peterson (June 8), Huggins

4. On July 13, Boilermakers Business Manager James Estes and International Organizer Dennis King submitted to the Respondent the applications of Joseph Mixon and Dale Ferguson, along with several other applications expressly identifying the applicants as union organizers. Estes identified himself to Hall as a Boilermakers official. Although the applications of Mixon and Ferguson do not, on their faces, show an intent to organize or active union membership, we find, based on the circumstances of their proffer, that it is reasonable to impute knowledge to the Respondent that Mixon and Ferguson were aligned with the union campaign. Thus, their applications were submitted directly to the Respondent by union representatives identified to Hall as union officials and were submitted with other applications expressly indicating a current intent to organize. Further, the Respondent had long been aware of the union organizing campaign by the time of these applications. We also find that the Respondent was aware of the intent to organize and active union affiliation of Jasper Jaspersen and Mike Bonifay. Both of their applications list Local 229 Business Agent Greg Boggs as a reference, and Bonifay's application identifies Boggs as a Pipefitters business agent. The Respondent was keenly aware of Boggs' involvement in the union campaign, as Boggs protested to Project Manager Caperton regarding the Respondent's failure to hire Local 229 members. In these circumstances, we find that the Respondent reasonably would be aware of the active union involvement and organizational intent of applicants who listed Boggs as a reference on their applications.¹⁴

(June 9), Picardo (July 13), Samuel Odom (May 18), Berthaut (June 8), and McVay (July 18). As discussed above, we have found that discriminatees coded as boilermakers and boilermaker foremen were qualified as structural welders. They are Jimmy Vickers (May 4), Hulon French (May 17), Terry Cozart (May 18), Bobby Kelly (May 18), Railey (May 18), Bradbury (June 8), Gleason (June 8), Tomlinson (June 8), Harvey (July 13), Kemp (July 13), Robichaux (July 13), Mixon (July 13), Robshaw (June 8), and David Greer (June 9). Further, as discussed below, Arthur Tison attempted to apply as a boilermaker. Tison applied on July 25. Openings for nonpreference structural welders were filled on May 4 and 12, June 24 (two openings), and July 22. Jimmy Vickers was the only discriminatee in this classification who applied before the May 4 and 12 openings were filled. Accordingly, Vickers is entitled to an instatement remedy. We shall leave to compliance the determination of the identity of those otherwise entitled to instatement for the subsequent openings and those entitled to a failure to consider remedy. Tison applied after the last nonpreference vacancy was filled in his classification. He is entitled to a failure to consider remedy for future openings, as he was excluded (as were similarly situated discriminatees) from the hiring process.

¹⁴ The Respondent contends that it hired applicants who evinced some form of union affiliation on their applications. The applications of these hires, however, do not clearly show a present intention to organize or current active union membership. Rather, these applications show only some form of previous union affiliation or past enrollment in

We also find that the Respondent had knowledge of the active union organizational intent of applicant Arthur Tison. Tison's application was submitted by Boilermakers International Representative Michael Peterson and states on its face that Tison is a volunteer union organizer. In these circumstances, we find that the Respondent had knowledge of Tison's active organizational intent.¹⁵ Hall glanced at Tison's application and refused to accept it because it did not list an emergency contact number. Hall testified that omissions on an application did not necessarily warrant rejection of an application, and there is no evidence that the Respondent maintained a policy of rejecting applications lacking emergency contact numbers. Accordingly, we find that the Respondent failed to establish that it rejected Tison for non-discriminatory reasons.

The applications of certain alleged discriminatees do not show an active intent to organize or present union affiliation. The application of alleged discriminatee Jeff Mitchell shows only a prior trade school reference to the Pipefitters union, and alleged discriminatees Tramis Bush, James Danley Jr., Qulon Carl French, and Joseph Vickers listed only prior union apprentice programs or previous employers who were union contractors. We agree with the judge that this is insufficient to establish knowledge of organizational intent or current union affiliation. Our review of the record shows that the Respondent treated applicants who identified themselves as voluntary union organizers or evinced a present union affiliation in a discriminatory manner compared to those showing only prior union apprentice programs or previous employment with union contractors. Accordingly, we shall dismiss the allegations as to these applicants.¹⁶

union apprentice programs. As the judge found, the discrimination here was directed toward those having a current intent to organize and those actively affiliated with those intending to organize. The Respondent also contends that, in view of the large number of applicants, it was statistically unlikely that a specific alleged discriminatee would be hired for a specific opening. That may be true, but this alleged "unlikelihood" does not meet the Respondent's *FES* burden to rebut the General Counsel's showing and to demonstrate that it would have made the same hiring decisions even absent the union activities here.

¹⁵ The judge did not mention certain notations on the applications of some of the alleged discriminatees. Thus, applicant John Baxley wrote "union organizer" on his application. As noted above, applicant Mike Bonifay listed Union Business Agent Boggs as a reference. Applicant Rozier Collins indicated that he was referred by Local 229. Applicant Stan Cooper indicated that he was referred by Local 229 and listed Boggs as a reference. Applicant Roy Eugene Cooper wrote "union organizer" on his application and listed Boggs as a reference. Applicant Jimmy Vickers indicated on his application that he was a "Boilermaker Union Job Steward." Applicant Pat O'Brien listed Boggs as a reference on his application.

¹⁶ The Respondent asserts that Dennis King, Michael Peterson, and John Kelly were not bona fide applicants because they were paid union officials. In finding that the salts were within the Act's protection,

5. Under *FES*, in order to establish a refusal to consider violation, the General Counsel has the burden of showing that the Respondent excluded the applicants from the hiring process and that antiunion animus contributed to that decision. *FES*, supra at 15. Once this is established, the burden shifts to the Respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation. *Id.* Here, it is evident that the Respondent effectively excluded the alleged discriminatees from the hiring process. Although the Respondent accepted applications from most of the alleged discriminatees and inserted craft classifications and other data into its applicant log, the evidence shows that it had no intention of considering (or hiring) them. As discussed above, Project Manager Caperton told Local 229 Business Agent Boggs that those indicating on their applications that they were union organizers were not qualified, as far as Caperton was concerned. When Boggs offered to bring in numerous qualified applicants the next day, Caperton declined. This shows that the Respondent effectively considered any applicant who expressed the intent to organize or indicated current union affiliation to be unqualified for consideration. In these circumstances, we find that the Respondent had no intention to seriously consider the purportedly “unqualified” union applicants (notwithstanding their years of experience), and effectively excluded them from the hiring process. Accordingly, we find that the Respondent has failed to show that, even in the absence of their union activities, it would not have considered the union applicants for hire.

AMENDED REMEDY

Having found that the Respondent discriminatorily refused to hire the discriminatees, and to consider them for hire, the Respondent must make them whole for its unlawful conduct against them. The duration of the backpay period shall be determined in accordance with *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007). Instatement is subject to defeasance under *Oil Capitol* if, at the compliance stage, the General Counsel fails to carry his burdens both of going forward with evidence and of persuading that the discriminatees would still be employed by the Respondent if they had not been the victims of discrimination. *Id.* at 1354.¹⁷ Backpay shall

Chairman Battista and Member Kirsanow note that there are or may be other circumstances where an alleged discriminatee is not a bona fide applicant and is therefore not entitled to the protection of the Act. However, they find that these alleged discriminatees’ status as paid union officials does not remove them from the category of bona fide applicants.

¹⁷ Member Liebman dissented in relevant part in *Oil Capitol*. See supra at 1357, et seq. Regarding the present proceeding, she recognizes

be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Brown & Root Power and Manufacturing, Inc., a subsidiary of Brown & Root, Inc., Panama City, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire, or to consider for hire, job applicants because of their union or other protected concerted activities.

(b) 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 those applicants named in paragraph 2(b) below instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against by the Respondent.

(b) Make the applicants named below whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge’s supplemental decision as modified by the amended remedy section of this decision.

Howard Michael Childree	Noel Clark
Gerald Motley	Robert Fenaes
Jason Greer	Jimmy A. Vickers

(c) Offer to those applicants listed below who are identified in the compliance stage of this proceeding as the individuals who would have been employed at the Stone Container jobsite instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against by the Respondent.

Don Andrews	George Curtis Odom
Timmy Bradbury	Michael C. Peterson
Rozier Lanier Collins	Kenneth Richardson
Stan Cooper	James R. Robshaw

that the majority opinion in *Oil Capitol* is current Board law, and accordingly, for institutional reasons only, approves its application in compliance.

Hulon French	Norvin Thibodeaux
David A. Greer	William Tomlinson
Bobbie Wayne Harvey	Mark Wicker
Greg Johnson	George W. Berthaut
Wilford Kelly	Roy Eugene Cooper
Steve Maddox	Joseph E. Gleason Jr.
Dennis Alan Meeks	Marty Hamm
Pat O'Brien	Chester Huggins
Marty Ost	Dennis H. King
Shirlin E. Railey	Michael McVay
Randall Wade Richbourg	Samuel T. Odom
Bobby Singletary	Juan Picardo
Steve Wallace	William T. Robichaux
John Baxley	John D. Kelly
Joe Cooper Jr.	Dale Ferguson
Jerry Roy Cozart	Donald Seale
Roland L. Gilmore	Gary Thomas
Joel Holmgren	Joseph Mixon
Bobby F. Kelly	Jasper Jaspersen
Crawford Lee Kemp	Mike Bonifay
Mike McNeil	

(d) Make whole those individuals set forth above in paragraph 2(c) who are identified in the compliance stage of this proceeding as discriminatees who would have been hired for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's supplemental decision as modified by the amended remedy section of this decision.

(e) Consider the remaining applicants named in paragraph 2(c) who do not receive an instatement order, as determined at compliance, and the applicant named below, for future job openings in accord with non-discriminatory criteria, and notify them, the Charging Party Unions, and the Regional Director for Region 15 of future openings in positions for which these individuals applied or substantially equivalent positions. If it is shown at the compliance stage of this proceeding that, but for the failure to consider these applicants, the Respondent would have selected any of them for job openings arising after the beginning of the hearing, or for any job openings arising before the hearing that the General Counsel neither knew nor should have known had arisen, the Respondent shall hire them for any such positions and make them whole for any losses, in the manner set forth in the remedy section of the judge's supplemental decision as modified by the amended remedy section of this decision.

Arthur S. Tison

(f) Notify the applicants named above in paragraphs 2(c) and (e) in writing that any future job applications will be considered in a nondiscriminatory way.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire, and to consider for hire, the individuals named above, and within 3 days thereafter notify them in writing that this has been done and that the unlawful refusal to hire or consider them will not be used against them in any way.

(h) 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.

(i) Within 14 days after service by the Region, post at all of its jobsites within a 75-mile radius of Panama City, Florida, copies of the attached notice marked "Appendix."¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 15, 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 this proceeding, the Respondent has gone out of business or no longer performs work at the facility involved in this proceeding, 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 May 2, 1994.

(j) 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.

¹⁸ 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."

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT discourage employees from engaging in activities on behalf of a labor organization by refusing to hire job applicants, or consider them for hire, because they are members or supporters of unions, or because they indicate on their employment applications that they are voluntary union organizers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer the applicants named below employment in the positions they applied for or, if those jobs no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if we had discriminated against them and WE WILL make them whole for any loss of earnings and other benefits resulting from our unlawful refusal to hire them upon application, less any net interim earnings, plus interest.

Howard Michael Childree	Noel Clark
Gerald Motley	Robert Fenaes
Jason Greer	Jimmy A. Vickers

WE WILL offer to those applicants named below who are identified in the compliance stage of the Board's proceeding as the individuals who would have been employed at the Stone Container jobsite, employment in the positions for which they applied or, if those positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against by the Respondent, and WE WILL make each of the individuals thus identified in compliance whole for any loss of earnings and other

benefits suffered as a result of the discrimination against them.

Don Andrews	George Curtis Odom
Timmy Bradbury	Michael C. Peterson
Rozier Lanier Collins	Kenneth Richardson
Stan Cooper	James R. Robshaw
Hulon French	Norvin Thibodeaux
David A. Greer	William Tomlinson
Bobbie Wayne Harvey	Mark Wicker
Greg Johnson	George W. Berthaut
Wilford Kelly	Roy Eugene Cooper
Steve Maddox	Joseph E. Gleason Jr.
Dennis Alan Meeks	Marty Hamm
Pat O'Brien	Chester Huggins
Marty Ost	Dennis H. King
Shirlin E. Railey	Michael McVay
Randall Wade Richbourg	Samuel T. Odom
Bobby Singletary	Juan Picardo
Steve Wallace	William T. Robichaux
John Baxley	John D. Kelly
Joe Cooper Jr.	Dale Ferguson
Jerry Roy Cozart	Donald Seale
Roland L. Gilmore	Gary Thomas
Joel Holmgren	Joseph Mixon
Bobby F. Kelly	Jasper Jaspersen
Crawford Lee Kemp	Mike Bonifay
Mike McNeil	

WE WILL consider the individuals listed above who do not receive an offer of employment, as determined at the Board's compliance proceeding, and the individual named below, for future job openings in accord with nondiscriminatory criteria, and notify them, the Charging Party Unions, and the Regional Director for Region 15 of future openings in positions for which these individuals applied or substantially equivalent positions. If it is shown at the compliance stage of the Board's proceeding that, but for the failure to consider these applicants, the Respondent would have selected any of them for job openings arising after the beginning of the hearing, or for any job openings arising before the hearing that the General Counsel neither knew nor should have known had arisen, WE WILL hire them for any such positions and make them whole for any losses.

Arthur S. Tison

WE WILL notify the individuals named above, who are entitled to consideration for future positions, in writing that any future job applications will be considered in a nondiscriminatory way.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful refusal to hire or to consider for hire the individuals named above, and within 3 days thereafter, notify them in writing that this has been done and that the unlawful refusal

to hire them or consider them for hire will not be used against them in any way.

BROWN & ROOT POWER AND
MANUFACTURING, INC., A SUBSIDIARY OF
BROWN & ROOT, INC.

Andrea J. Goetze, Esq. and *Zoe Panarites, Esq.*, for the General Counsel.

Thomas J. McGoey II, Esq. and *Bart N. Sisk, Esq.*, of New Orleans, Louisiana, for the Respondent.

Michael T. Manley, Esq., of Kansas City, Kansas, for the Charging Party Boilermakers Union.

Greg A. Boggs, of Panama City, Florida, for the Charging Party Pipefitters Union.

DECISION

J. PARGEN ROBERTSON, Administrative Law Judge. This hearing was on September 5, 7, and 8, 1995, and on March 4 and 5, 1996, in Panama City, Florida. The charge in Case 15-CA-12752 was filed by the Boilermakers Union on July 22, 1994, amended on September 30, and second amended on December 12, 1994. The charge in Case 15-CA-12875 was filed by the Pipefitters Union on September 26, and amended on December 20, 1994. A consolidated complaint issued on December 27, 1994.

Respondent, the General Counsel, and Charging Parties were represented, were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Upon consideration of the entire record and briefs filed by Respondent, the General Counsel, and Charging Party Boilermakers, I make the following findings

Jurisdiction

Respondent admitted that it is a corporation with an office and place of business in Panama City, Florida, where it is engaged as a general contractor in the building and construction industry. It admitted that during the 12 months ending September 30, 1994, in conducting its business operations it purchased and received at its Panama City facility goods valued in excess of \$50,000 directly from points outside Florida. It admitted that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (Act), at all material times.

Labor Organizations

Respondent admitted that International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 229 (Unions) have been labor organizations within the meaning of Section 2(5) of the Act, at all material times.

Motion to Correct Record

On May 31, 1996, counsel for the General Counsel filed a motion to correct record. That motion was not opposed. I grant the motion and direct correction of the record as shown in General Counsel's motion.

The Unfair Labor Practice Allegations

It is alleged that Respondent refused to hire some 65 employees because of union activities. At issue is whether Respondent refused to hire members of the Boilermakers, Pipefitters, and IBEW Unions because of their union membership.

Respondent's senior craft recruiter Kara Hall recruited employees to staff projects. He recruited employees for the Panama City Stone Container papermill project that is the subject of this litigation. In April 1994, he was at Stone Container recruiting manpower for an outage. An outage occurs when some or all of a plant is temporarily closed for repairs. Respondent was the contractor for 1994 outage repairs as well as being the full-time maintenance contractor. There was an accidental explosion at Stone Container on April 13, 1994. That explosion resulted in a substantial change in the nature of Respondent's work at Stone Container. The job became a rebuild job and lasted substantially longer than originally planned. Although Kara Hall was at Stone Container originally to recruit manpower for the outage, his job was enlarged because of the explosion and it lasted from April through August 1994.

Hall testified that after the explosion he recruited general laborers to clean up the debris. He selected employees at the direction of Project Superintendent Joe Bob Caperton. Hall recalled that he hired around 60 employees for the cleanup phase of Respondent's work.

There was a short time after the clean up while Stone Container decided whether to rebuild. Respondent was eventually selected as the rebuild contractor. At the direction of Joe Bob Caperton, Hall recruited for demolition work. The demolition was the second phase of the job. The third and final phase involved the rebuild. Approximately 200 employees were hired for the demolition phase. Hall testified that Caperton told him that he wanted "(i)ronworkers, pipefitters, welders." Those employees were hired because they could continue to perform the rebuild work after completion of the demolition and clean up.

After the rebuild started it was occasionally necessary to hire additional people. Those were hired by Hall through requisitions. Requisitions, according to Hall, were sometimes verbal and sometimes in writing. Those requisitions came to Hall through Joe Bob Caperton.

Jeffrey Mitchell testified that he is a pipefitter/welder. He has been a member of Local 229 for 16 years. He applied for work with Respondent on April 27, 1994. Mitchell wrote on his application that he was a member of the United Association of Pipefitters. Mitchell identified Kara Hall as the one he spoke to when he picked up his application. Hall told Mitchell that they would be hiring pipefitters and that a drug test would be required. Mitchell told Hall that he would take a drug test. All the previous employers listed on Mitchell's application were union contractors. After submitting his application Mitchell was told that Respondent was not hiring at that time. Subsequently he phoned back three times and was told on each occasion that Respondent was not hiring.

Joseph Vickers is on the finance committee at Pipefitters Local 229. He applied for work with Respondent on April 27, 1994. He talked with a woman at Respondent's office. She told him that Respondent would be in touch, that they would

probably be hiring in a week or two. His previous employers listed on his application were all union contractors. There was nothing on his application showing that Vickers is a Local 229 member. Vickers usually wears a union cap and he believed that he had on the cap when he applied with Respondent. Vickers phoned to check on jobs around twice a week for a couple of months but he has not been offered a job.

Qulon French is a boilermaker. He is not a union member but he holds a permit. He applied with Respondent on April 28, 1994. All his recent prior employers listed on his application, are union contractors. French was told by Kara Hall that Respondent had no boilermaker work at that time but that he had just missed out on a structural welding job. Hall told French there would most likely be some work in a week or a week and a half. French told Hall that he could do structural welding and fitting as well as boilermaker's work. French went back to Respondent and inquired about work three times over the next 2 weeks. He also phoned Respondent on three occasions. Qulon French participated in the May 5 or 6, 1994 picketing against Respondent. He was never offered work by Respondent.

Joseph Cooper Jr., a member of Pipefitters Local 229, is a pipefitter/welder. Cooper applied for work with Respondent on April 29, 1994. Cooper wrote on his application that he attended the Local 229 apprenticeship school. He listed Greg Boggs, pipefitter B.A. and Jerry Motley, electrician B.A. as references. Cooper spoke with a woman who told him to come back on "Tuesday" after Cooper turned in his job application. Cooper phoned on Tuesday but was told there was no news and that he should phone again. Cooper phoned the following Tuesday. Again he was told there was no news.

Pipefitters Local 229 as well as the Boilermakers, IBEW, and other trade unions, picketed Respondent's Stone Container job on May 5 and 6, 1994. The Pipefitters and Boilermakers were the two main Unions involved in the picketing. There were approximately 150 pickets the first day and around 75 the second. Their signs advocated local jobs for local people and attacked the use of out-of-state workers.

Joseph Vickers picketed Respondent on May 5 and 6, 1994, along with Donny Wicker, Greg Boggs, Jimmy Vickers, Mark Wicker, Ben Nunery, Jeff Mitchell, and others. Vickers' sign protested Respondent's failure to hire local people. Dennis Meeks also participated in the picketing against Respondent. The parties stipulated that picketing occurred on May 5 and 6, 1994. Gary Thomas picketed Respondent around May 6, 1994. Norvin Thibodaux was one of the pickets on May 5 or 6, 1994.

Norvin Thibodaux is a certified pipefitter. He has worked in that craft for 20 years. He has been a member of Pipefitters Local 229 for 6 years. Thibodaux applied for work with Respondent on May 9, 1994. He wrote on his application that he attended Pipefitter Local 229 school. Thibodaux was one of the pickets on May 5 or 6, 1994. He was interviewed by Kara Hall. Hall looked over his application and said that Thibodaux was the type worker they were interested in, a skilled worker with experience. Hall said they should be hiring in a week or two and that he would be in touch with Thibodaux. Later in May, Thibodaux stopped by Respondent's office and inquired about his application. A woman told him that things were slow and

they were not hiring as yet. She said they should be hiring in a week or so. Thibodaux phoned Respondent's office in late June. At that time the woman told him they had pretty much hired all they planned to hire.

Stan Cooper, a member of Pipefitters Local 229, is a pipefitter/welder. Cooper was involved in the picketing against Respondent on May 5 and 6, 1994. He passed out leaflets each day while wearing a union T-shirt. Cooper applied for work with Respondent on May 10, 1994. Stan Cooper wrote on his application that he had been through a union apprenticeship school. Also some of his references were union people and he worked for a union contractor. Cooper talked with Kara Hall. He told Hall that he was interested in a pipefitting welding job. Hall said they were hiring pipefitters and welders. He told Cooper that he would be in touch. Cooper checked back with Respondent a week later but was told they were not hiring. He admitted that Respondent phoned in August 1994, but he was working out of town. Respondent sent Cooper a letter in October or November. He was out of town working at that time.

Don Andrews, a member of Pipefitters Local 229, is a pipefitter and certified welder. He is the president of Local 229. Before January 1995, Andrews was the Local vice president. He was one of the pickets at Respondent on May 5 and 6, 1994. He applied for work with Respondent on May 10, 1994. He wrote union organizer on his application. Andrews talked with Kara Hall. Hall told him that it may be 3 weeks before they hired anyone. Hall said that they were still in the demolition phase and were not hiring any fitters or welders at that time.

Jimmy Vickers testified that he is a union boilermaker. Vickers participated in the May 5 and 6, 1994 picketing against Respondent. He applied for work with Respondent in early May 1994. On every occasion that Vickers went to Respondent's office he was wearing a "Boilermaker's Local 199" T-shirt. Vickers talked with a woman. She handed him a business card of Kara Hall and told him to call that number to check on hiring. Vickers phoned Respondent on May 23, and talked with Kara Hall. Hall told Vickers they did not need anyone and they would contact Vickers if they needed him. Vickers phoned again on June 3, and July 25, 1994. He left his name, phone number, address, and social security number. Vickers finally talked with someone in Respondent's office. He left word for Kara Hall to phone but he heard nothing from Hall.

Kara Hall admitted that he became aware that the Stone Container job was targeted by both Pipefitter and Boilermaker Unions when they set up picket lines at the job on May 5, 1994.

Gary Thomas is a member of Pipefitters Local 229. He testified that he is a pipewelder and has been one for 17 years. Thomas picketed Respondent around May 6, 1994. He applied for work with Respondent on May 10, 1994. Thomas wrote Union Organizer 229 on his application. He talked with Kara Hall. Hall told Thomas to keep in touch. Thomas called three times after submitting his application. After July 4, 1994, Thomas went into Respondent's office and told Hall his name. Hall told Thomas that he was not hiring pipewelders at that time. Hall said that he was hiring laborers. Thomas asked about the laborers' pay and Hall told him that he was over qualified for that job. Thomas was not offered a job.

On May 13, Local 229 Business Manager Greg Boggs and three others passed out leaflets at the main entrance to Stone Container. The leaflets complained about Respondent using nonunion and out-of-state workers.

Boilermaker International Representative Dennis King testified that he has worked as a journeyman boilermaker. He is a graduate apprentice. King went to Respondent at Stone Container on May 16, 1994. King asked Kara Hall for an application. Hall asked if King was a certified welder. King told him yes and that he could do rigging. Hall asked about the difference between structural welding and King explained that he could do TIG welding and some other forms of welding. King told Hall that he was a boilermaker. Hall told King that he would need him in a couple of weeks. King asked for and received some other application forms.

Dennis Meeks has been a member of the Boilermakers Union since 1990. He applied for work as a boilermaker/welder with Respondent on May 17, 1994. Meeks interviewed with Kara Hall. Hall mentioned that Meeks had brought in more than one application. Meeks asked if Hall would like to see the other men saying they were outside in the truck. Hall responded that he did not need to see them. In addition to his own Meeks turned in applications for Randy Richbourg, Mike Childree, and Qulon French. Meeks wrote on his application that he was a voluntary union organizer and listed on his application union contractors as his previous employers. Meeks participated in picketing against Respondent before he applied for work on May 17, 1994. As shown above the parties stipulated that picketing occurred on May 5 and 6, 1994. Hall looked at the applications and said, "boilermaker, well, we really don't have boilermaker work." Meeks responded, "you're burning, welding, gouging, rigging. We do all that type of work."

Meeks has phoned Respondent twice after submitting his application. He was connected to an answering machine and he left his name. He has not been offered a job. However, on May 2, 1995, he received a postcard from Respondent stating that they were going to have about 6 days of work at Stone Container. Meeks did not respond to the postcard. He testified that he was working at the time.

Randall Richbourg is a Boilermakers Local 199 member. Richbourg gave his application to Dennis Meeks and waited in the truck while Meeks took several applications into Respondent's office. Richbourg as well as the other two applicants with him and Meeks, included on his application that he was a voluntary union organizer. He listed union contractors as past employers on his application. Richbourg was never contacted by Respondent. He phoned Respondent's office sometime in July 1994, and left his name and number on an answering machine. He never received a response from his message.

Steve Maddox, a member of Pipefitters Local 229, has been a pipefitter/welder for 23 years. Maddox applied for work with Respondent on May 17, 1994. The prior employers listed on Maddox' application are union contractors. He also listed a union business manager in Tallahassee and Local 229 Business Manager Greg Boggs as personal references. Maddox wrote on his application that he had attended union organizing school. He gave his application to a woman at Respondent's office.

She told Maddox that Respondent was not hiring at that time but that they would probably be hiring the following week. Maddox phoned the following week. At that time a woman told him that Respondent would not be hiring any more pipefitters or welders.

On May 18, Dennis King returned to Respondent's trailer and gave six completed job applications to Kara Hall. Hall again asked about King's qualifications and King responded that he was a certified welder.

Samuel Odom is a journeyman boilermaker. He has been a member of Boilermakers Local 199 for 15 years. His application for work with Respondent is dated May 18, 1994. He wrote volunteer union organizer on his application. It was delivered to Respondent by Wilford Kelly, another Boilermaker union member. The previous employers listed by Odom are all union contractors. On July 20, 1994, Odom phoned Respondent and spoke with the personnel manager. Odom was asked if he would take a job as a structural welder if one was offered by Respondent. He replied that he would. Odom has heard nothing else from Respondent.

Jasper Jasperson, a member of Pipefitters Local 229, is currently general superintendent for an employer that handles plumbing, heating, and air conditioning at the U.S. Navy Training Center. Jasperson applied for work with Respondent on May 23, 1994. He applied for pipefitter. Jasperson wrote on his application Plumbers & Pipefitters Local 229 App. School—5 years. He spoke with Bowman at Respondent's office. She told Jasperson that Respondent was doing demolition work and it would be about 2 weeks before they started hiring pipefitters. Bowman said that Respondent would call Jasperson when they were ready to hire him.

Local 229 Business Manager Greg Boggs testified that 30 Local 229 members made applications to Respondent on the Stone Container rebuild job and only one was hired. The one hired was not hired as a pipefitter. Instead Tony Mack was hired as an electrician's helper.

Tony Mack submitted a May 17, 1994 application in which he stated that he was in Plumbers and Steamfitters Local Union 229 and had attended apprenticeship school from 1990 through 1994. He listed Greg Boggs, business agent Local 229 as a reference.

After submitting his first application Mack was not hired before submitting a second application on July 16, 1994. There was no showing on that application that Mack was affiliated with the Union and he did not list anyone connected with the Union as a reference. Mack was first hired by Respondent as an electrician's helper on July 19, 1994.

Kara Hall testified from two applications that Mack was actually hired twice on the Stone Container job. He was first hired as an electrician's helper because he was persistent in telling Hall that he had to have a job and would take any job. Hall recalled that he was personally involved in hiring Mack as an electrician's helper on July 19, 1994. Thereafter he did not see Mack when he was hired the second time. According to Hall, Mack was later called back, given a welder test and hired a second time.

On June 1, 1994, Greg Boggs phoned Respondent's Project Manager Joe Bob Caperton. He and Caperton became involved

in a heated conversation. Boggs mentioned that he had over 30 of his members apply for work and Brown & Root had not hired a single person. Caperton stated that Boggs' members had written union organizer on their applications and Boggs did not have any qualified people that actually wanted to go to work. Caperton told Boggs that he would hire anyone brought in by the Union that was qualified. Boggs responded that he would bring in 30 men the next morning. Caperton responded, "no, no, no, don't do that. We're not hiring now."

Boggs admitted that he would have asked Local 229 members to organize Respondent if any had been hired. Boggs denied that the Local either paid or offered to pay any of the applicants for their work with Respondent.

David Greer has been a Boilermakers Local 199 member for over 20 years. He mailed a job application to Respondent during the first part of June 1994. Greer wrote on his application volunteer union organizer. He listed prior employers that are union contractors. Greer applied for work as a certified welder and rigger. His prior work history included structural and pipe welding. He has also worked as a heavy rigger. Greer phoned Respondent on July 13, 1994, and was told that the job was already filled. He has never received an employment offer from Respondent.

Michael Peterson a Boilermakers Local 199 member, is employed as Boilermakers international representative. Peterson testified about the skills of boilermakers and compared those skills to that of a pipefitter. Peterson applied for work with Respondent on June 6, 1994. Peterson wrote on his application volunteer union organizer. Michael Peterson sent in his application through someone else. He applied for pressure welder, fitter and rigger.

On June 8, Dennis King accompanied Roland Gilmore, a member of Local 199, Boilermakers Union. The parking lot was filled and King stayed in the car while Gilmore delivered applications for Gilmore, King, and some others. Gilmore and King wrote volunteer union organizer on their applications.

John Kelly is assistant business manager for Boilermakers Local 582 in Baton Rouge, Louisiana. Kelly applied for work with Respondent on June 23, 1994. Kelly wrote volunteer union organizer on his application. One other boilermaker from Local 582 applied for work with Respondent. That was William Robichaux. Robichaux also wrote volunteer union organizer on his application. Those applications were mailed to Local 199 to be turned into Respondent. Kelly was not offered a job at Stone Container.

Dennis King returned to Respondent's trailer on July 13, 1994. He was accompanied by Boilermakers Local 199 Business Manager James Estes. Estes gave Kara Hall eight applications and identified himself as being with the Boilermakers. Hall looked at the applications and said these are boilermaker applications and we are not hiring boilermakers. King asked Hall if he was hiring anyone else. Hall replied they were only hiring instrument persons and structural welders. King said to Hall that if you will look at those applications you will see that the majority of them are structural welders. King then pointed out an interoffice memo on Respondent's bulletin board that listed boilermaker as the first craft. Hall then said, "oh, welders . . . well, if you'd have been here yesterday, we tested some."

"And we'll be getting back with you because we're going to need some more."

On July 25, 1994, Michael Peterson turned in job applications with Respondent for Michael McVay and Arthur Tison. McVay and Tison wrote volunteer union organizer on each of their respective applications. Peterson talked with Kara Hall. Hall asked him what he did. Peterson replied "welder, a rigger, a fitter, a boilermaker." Hall said, "Oh, boilermaker. This is not a boilermaker job, and we don't have any boilermaker work." Peterson responded that as a boilermaker he could perform any of the skills needed there on the jobsite. Hall repeated that they did not have any boilermaker work. Peterson gave Hall the two applications. Hall said how can I hire these guys sight unseen. "Are they boilermakers, too?" Peterson replied they were boilermakers. Hall wrote the code for boilermaker on the application of Michael McVay. After examining the application of Arthur Tison, Hall said that he could not hire that man because there was no showing of anyone to contact in the event of an emergency. Hall gave back to Peterson Tison's application. Hall said, "this has never been a boilermaker job." Peterson said, "boilermakers are welders, riggers and fitters. We work on all kinds of equipment, not just boilers, and including digesters." Hall said, "Yeah, right, whatever."

Arthur Tison has been a Boilermakers Local 199 member for 14 years. As shown above he wrote voluntary union organizer on his application and he listed union contractors as prior employers. Michael Peterson turned in job applications with Respondent on July 25, 1994, for Michael McVay and Arthur Tison.

Kara Hall testified that he does not remember the application of Arthur Tison.

On August 2, 1994, Michael Peterson took applications for George Spicer and Carl Ferguson to Respondent. Hall told Peterson they were not accepting applications.

Kara Hall testified that he selected all Respondent's employees from applications filed with Respondent at Stone Container after Hall started taking applications in April 1994. Hall marked classification codes on each application as it was received showing whether the applicant was a journeyman of a particular craft. He also numbered each application to show when it had been received in relation to other applications. Hall maintained a log of all applications. Additionally Hall maintained an applicant log on his computer. Applications are maintained by Respondent throughout a particular project.

Kara Hall testified that he stopped taking applications during the week before he left the project on August 15, 1994. At that point he was closing down his office in Panama City.

Hall testified that he has hired boilermakers on other jobs. When he is aware that a boilermaker can perform other crafts, he may consider that particular person for those other jobs. As an example Hall hired ex-Brown & Root boilermakers that have demonstrated other crafts such as pipefitting and welding. Hall was asked about the various jobs specified on the Stone Container pulp mill restoration scope of work and he repeatedly responded that those jobs were not considered as boilermaker jobs. Hall recalled there were perhaps two boilermakers working on the Stone Container job when he arrived in April 1994. Perhaps one of those two was hired shortly after Hall arrived.

He was not sure of that. However, other than that one possible hire, Hall did not hire anyone in the boilermaker classification at Stone Container.

The parties stipulated that three of the boilermaker job applicants were paid employees of the Boilermakers Union or one of its Local Unions. Those three applicants are Dennis King, Michael Peterson, and John Kelly.

Nalta Wayne Branning was a pipefitter foreman for Respondent until September 2, 1994. Branning testified that Respondent's employees at Stone Container routinely included pipefitters, pipewelders, helpers, laborers, boilermakers, iron workers, and others. During outages he was promoted to general foreman. He testified that boilermakers have welding and fitting skills and pretty much any craft that has to do with structural work. Branning testified that boilermakers were qualified to perform the work Respondent had at Stone Container after a digester blew up in 1994. Boilermakers had the skills to perform demolition, rebuild and installation phases of that job. Branning testified that Respondent did employ one boilermaker on that job and Branning had no problems with the boilermaker's work. The one boilermaker was Foreman John Bozman. According to Branning it was Respondent's practice to give welding tests to anyone that applied for a welding job. Respondent followed that practice following the 1994 blow up of the digester.

James Parker formerly worked for Respondent from 1989. He was laid off in September 1994. Parker did some of the demolition work for Respondent at Stone Container after the digester exploded. Parker was promoted to night-shift foreman. He had laborers, helpers, pipefitters, structure welders, and boilermakers on his crew. He was a member of the Boilermakers Union until before he started working for Respondent. In Parker's opinion Respondent was performing boilermaker work at the Stone Container job in the summer of 1994. Parker admitted that craft work on the Stone Container job could have been performed by crafts other than boilermakers.

The parties stipulated that Respondent did not question whether assertions in the various applications were truthful. Respondent in its brief at footnote 2 argued that skill comparison by anyone in this litigation, would result in substitution of others' judgment for Respondent's. However, the stipulation that Respondent did not question written assertions in the applications, illustrated that Respondent did not engage in skill comparisons. I am convinced from the stipulation and the record, that applicants that illustrated competency on their respective applications were not rejected on a basis that involved comparison of competency.

Respondent started its defense with Kara Hall. Hall referred to General Counsel Exhibit 18 and identified boilermakers, insulators, painters, surveying, reported chief, instrument man, and rod man as jobs not employed by Respondent at Stone Container.

Hall testified that the digester installation or rebuild, required welders, ironworkers, structural fabricators (which was the same as ironworkers), structural welder, millwright, and a pipefitter. Hall testified that a boilermaker would be required to build a digester but not to install a prefabricated one. Accord-

ing to Hall Respondent did not perform any work at Stone Container which was exclusive to the boilermaker craft.

Kara Hall testified that hiring preference was given to ex Brown & Root employees, to referrals from supervision inside the plant, to client's referrals, and to a walk-in applicant if Respondent happened to have a requisition for a position for which the applicant qualified. Hall was never instructed to not hire anyone because of their union affiliation. He never tried to determine an applicant's union affiliation. He did not try to determine if any applicant had participated in May 5 and 6, 1996 picketing.

Hall testified that when an application was received it would be filed under the respective craft, unless that applicant was selected for an opening. Thereafter, when an opening occurred Hall would select at random, a qualified applicant from the files unless one of the above priority applications was made in the interim. However, Hall later testified that if an application was filed on an ex-Brown & Root employee, that application would be pulled and considered ahead of applicants that had never worked for Respondent.

When Hall first came on the Stone Container job Respondent already had a permanent maintenance work force.

Findings

Credibility

Local 229 Business Manager Greg Boggs testified in a credible manner. There were no serious disputes over Boggs' testimony. His testimony about a phone conversation he had with Project Manager Caperton on June 1, 1994 was not rebutted. I credit Boggs' testimony.

I found the testimony of Kara Hall to be less than believable. His testimony was not consistent. Among other things his testimony as to his method of selecting past applicants for vacant positions was confused. As shown herein his testimony was in conflict with that of many other witnesses. His testimony as to the basis for selection of applicants was especially suspect. In view of Hall's demeanor and the record, I found that he could not be credited.

I credit the testimony of Boilermaker International Representative Dennis King on the basis of his demeanor and the full record.

The testimony of Michael Peterson was not contested. Kara Hall testified that he did not recall receiving the application of Arthur Tison. Peterson testified that Hall refused to accept Tison's application. As shown above I am unable to credit the testimony of Hall. I credit Peterson in view of his demeanor and the full record.

I credit the testimony of Jeffrey Mitchell, Samuel Odom, Joseph Vickers, Qulon French, Arthur Tison, David Greer, Dennis Meeks, Gary Thomas, Randall Richbourg, Norvin Thibodaux, Stan Cooper, Don Andrews, Steve Maddox, Jimmy Vickers, Joseph Cooper, Jasper Jaspersen, and John Kelly. Their testimony was substantially uncontested. I credit their testimony on the basis of their demeanor and the record as a whole.

I also credit Nalta Wayne Branning and James Parker. Branning and Parker were former foremen for Respondent. I found their testimony was forthright and candid. I make my determi-

nation in view of their demeanor and the full record. In that regard I reject Respondent's objection to the testimony of the former foremen. The evidence illustrated that Branning and Parker did not elect to avail themselves of the services of Respondent's attorneys before their interviews with NLRB investigating personnel. At the time each of them gave affidavits to the NLRB they were no longer employed by Respondent. *Southern Maryland Hospital Center*, 288 NLRB 481 fn. 1 (1988).

Conclusions

The General Counsel alleged that Respondent refused to hire 65 job applicants on various occasions during 1994 because of the Union. On motion I dismissed the allegations regarding four alleged discriminatees. Respondent's motion to dismiss as to alleged discriminatees John Fadio, Donnie Wicker, Alvin Parrish, and Wayne Simmons was granted in view of there being no evidence that Respondent received job applications from any of those alleged discriminatees.

The alleged discriminatees remaining after the dismissal of the four mentioned above are:

Don Andrews	John Baxley	George W. Berthaut
Mike Bonifay	Tramis Bush	Timmy Bradbury
Howard Michael	Noel Clark	Rozier Lanier Collins
Childree		
Joe Cooper Jr.	Roy Eugene Cooper	Stan Cooper
Jerry Roy Cozart	James A. Danley Jr.	Robert Fenaes
Dale G. Ferguson Jr.	Carl French	Hulon French
Roland L. Gilmore	Joseph E. Gleason Jr.	David A. Greer
Jason Greer	Marty Hamm	Bobbie Wayne Harvey
Joel Holmgren	Chester Huggins	Jasper Jasperson
Greg Johnson	Bobby F. Kelly	John D. Kelly
Wilford Kelly	Crawford Lee Kemp	Dennis H. King
Steve Maddox	Mike McNeil	Michael McVay
Dennis Alan Meeks	Jeff Mitchell	Joseph E. Mixon
Gerald Motley	Pat O'Brien	George Curtis Odum
Samuel T. Odum	Marty Ost	Michael C. Peterson
Juan Picardo	Shirlin E. Railey	Kenneth Richardson
Randall Wade	William T.	James R. Robshaw
Richbourg	Robichaux	
Donald Seale	Bobby Singletary	Norvin Thibodeaux
Gary Thomas	Arthur S. Tison	William Tomlinson
Jimmy A. Vickers	Joe Vickers	Steve Wallace
Mark Wicker		

Some of the alleged discriminatees wrote on their job applications they were union organizers. See *NLRB v. Town & Country Electric*, 116 S.Ct. 450 (1995); *Town & Country Electric*, 309 NLRB 1250 (1993); *Fluor Daniel, Inc.*, 311 NLRB 498 (1993); *Casey Electric*, 313 NLRB 774 (1994).

As to whether Respondent illegally refused to employ some or all of the alleged discriminatees, I shall first consider whether the General Counsel proved through persuasive evidence that the Respondent acted out of antiunion animus in refusing to hire the alleged discriminatees. *Manno Electric*, 321 NLRB 278 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

See *J.E. Merit Constructors*, 302 NLRB 301, 303-304 (1991), where in a refusal-to-hire allegation the test applied included a requirement that General Counsel prove (1) the ap-

plications were filed during hiring stages, (2) the Respondent knew of their source, (3) it harbored union animus, and (4) it acted on that animus in failing to hire any from this group.

Was Respondent Hiring?

The full record shows that Respondent originally planned to hire for work during an outage at Stone Container. However, those plans were altered because of an accidental explosion on April 13, 1994. Thereafter, a decision was made to rebuild and Respondent was awarded that contract. Respondent then hired for the rebuild. The plans for an outage were canceled.

There is no dispute but that Respondent hired employees for its Stone Container work in 1994. Its own records in evidence show that between March 21, 1994, and August 15, 1994, Respondent hired 291 employees. According to Kara Hall Respondent classified those employees on the basis of whether they were referred as prior employees of Respondent, requisition—referral and gate hires. The alleged discriminatees fall within the gate hire category. Respondent's records show that 172 of the 291 employees hired were gate hires.

Kara Hall testified that he started taking applications in April 1994. Hall maintained a log of all applications. Additionally Hall maintained an applicant log on his computer. Applications were retained by Respondent throughout its projects. Hall testified that the digester installation or rebuild, required welders, ironworkers, structural fabricators (which was the same as ironworkers), structural welder, millwright, and a pipefitter. According to Hall Respondent did not perform any work at Stone Container which was exclusive to the boilermaker craft.

As shown above Wayne Branning was a pipefitter foreman and a general foreman for Respondent until September 2, 1994. Branning testified that Respondent's employees at Stone Container routinely included pipefitters, pipewelders, helpers, laborers, boilermakers, iron workers, and others. He testified that boilermakers have welding and fitting skills and pretty much any craft that has to do with structural work. Branning testified that boilermakers were qualified to perform the work Respondent had at Stone Container after the explosion in 1994. Boilermakers had the skills to perform demolition, rebuild and installation phases of that job.

James Parker formerly worked for Respondent from 1989, and was laid off in September 1994. Parker did some of the demolition work for Respondent at Stone Container after the digester exploded. Parker was promoted to night-shift foreman. He had laborers, helpers, pipefitters, structure welders, and boilermakers on his crew. He was a member of the Boilermakers Union until before he started working for Respondent. In Parker's opinion Respondent was performing boilermaker work at the Stone Container job in the summer of 1994.

I credit the evidence showing that from March through August 15, 1994, Respondent did hire 291 employees I credit the testimony of Branning and Parker showing that Respondent performed boilermaker and pipefitter type work during that period of time. The credited evidence proved that Respondent had work for electricians during that same period of time and the record evidence proved that Respondent actually hired applicants that showed on their respective applications capabilities to perform boilermaker, pipefitter, and electrician work.

The parties stipulated that Respondent did not question whether assertions in the various applications were truthful.

Did the Alleged Discriminatees Apply for Work?

There is a dispute as to whether alleged discriminatee Arthur Tison actually applied for work.

As shown above I credit the testimony of Michael Peterson. Peterson turned in job applications with Respondent on July 25, 1994, for Michael McVay and Arthur Tison. Peterson talked with Kara Hall. Hall asked him what he did. Peterson replied "welder, a rigger, a fitter, a boilermaker." Hall said, "Oh, boilermaker. This is not a boilermaker job, and we don't have any boilermaker work." Peterson responded that as a boilermaker he could perform any of the skills needed on the jobsite. Hall repeated that they did not have any boilermaker work. Peterson gave Hall the two applications. Hall said how can I hire these guys sight unseen. "Are they boilermakers, too?" Peterson replied they were boilermakers. Hall wrote the code for boilermaker on the application of Michael McVay. After examining the application of Arthur Tison, Hall said that he could not hire that man because there was no showing of anyone to contact in the event of an emergency. Hall gave Tison's application back to Peterson. Hall said, "this has never been a boilermaker job." Peterson said "boilermakers are welders, riggers and fitters. We work on all kinds of equipment, not just boilers, and including digesters." Hall said, "Yeah, right, whatever."

It is not disputed that Respondent accepted numerous applications that were not fully complete. An examination of the applications in the record show that was the case. Moreover, Kara Hall admitted that he did not reject applications if the applicant left spaces blank. He admitted that the absence of an emergency contact on an application was not grounds for rejection of that application. The credited testimony of Peterson proved that Hall read Tison's application before rejecting the application. Tison wrote on the application that he was a union organizer. With those facts in mind I find that Respondent acted in a discriminatory fashion when Hall refused to accept Tison's job application. *Manno Electric*, supra at 278.

There is no dispute as to the remaining 60 alleged discriminatees filing applications. All those applied for work on dates shown herein.

Did the Alleged Discriminatees Engage in Union Activities; and Did the Employer Have Knowledge of That Activity?

The parties stipulated that three of the boilermaker job applicants were paid employees of the Boilermakers Union or one of its local unions. Those three applicants are Dennis King, Michael Peterson, and John Kelly. It is obvious that those applicants were involved in union activity.

Pipefitters Local 229 as well as the Boilermakers, IBEW and other trade unions, picketed Respondent's Stone Container job on May 5 and 6, 1994. As shown herein I credit testimony showing that the Pipefitters and Boilermakers were the two main unions involved in the picketing. There were approximately 150 pickets the first day and around 75 the second. Their signs advocated local jobs for local people and attacked the use of out-of-state workers. Hall admitted that he became aware that the Stone Container job was targeted by both Unions when they set up picket lines at the job on May 5, 1994.

Joseph Vickers picketed Respondent on May 5 and 6, 1994 along with Donny Wicker, Greg Boggs, Jimmy Vickers, Mark Wicker, Ben Nunery, Jeff Mitchell, and others. Vickers' sign protested Respondent's failure to hire local people. Dennis Meeks participated in picketing against Respondent before he applied for work on May 17, 1994. The parties stipulated that picketing occurred on May 5 and 6, 1994. Gary Thomas picketed Respondent around May 6, 1994. Norvin Thibodaux was one of the pickets on May 5 or 6, 1994. Don Andrews, was one of the pickets at Respondent on May 5 and 6, 1994.

On May 13, Local 229 Business Manager Greg Boggs and three others passed out leaflets at the main entrance to Stone Container. The leaflets complained about Respondent using nonunion and out-of-state workers.

The General Counsel argued that 57 of the alleged discriminatees showed their union affiliation on their job application with Respondent. Thirty-seven of those 57 applicants wrote on their job applications that they were union organizers. Fifty five of the alleged discriminatees listed union contractors as prior employers and four other alleged discriminatees indicated on their applications that they would work for union scale. Of those 55 only four, Joseph Vickers, Danley, Qulon French, and Mixon did not indicate their union affiliation on their application. Fifty-one that listed union contractors as past employers also showed on their job applications that they were affiliated with one of the Unions. All four of the alleged discriminatees that wrote they would work for union scale showed they were affiliated with one of the Unions.

The applications of the following alleged discriminatees printed in italics show that the applicant listed himself as a "union organizer," or that the applicant showed himself to be a union member or otherwise directly involved with one of the Unions. The other alleged discriminatees shown below either did not mention union connection other than having worked for a union contractor or the inclusion on their respective application, of attendance at a Union school:

<i>Don Andrews</i>	<i>(Union Organizer)</i>
<i>John Baxley</i>	<i>(Boilermakers Helpers Trainee Program Local 199; James Estes-B/M Local 199)</i>
<i>George W. Berthaut</i>	<i>(Volunteer Union Organizer)</i>
<i>Mike Bonifay</i>	<i>(Apprenticeship Pipefitter Union Local 229)</i>
<i>Tramis Bush</i>	<i>(Local 229 Apprenticeship School)</i>
<i>Timmy Bradbury</i>	<i>(Volunteer Union Organizer)</i>
<i>Howard Michael Childree</i>	<i>(Union Organizer 199)</i>
<i>Noel Clark</i>	<i>(Union Organizer-27 Years IBEW)</i>
<i>Rozier Lanier Collins</i>	<i>(Local Union 229)</i>
<i>Joe Cooper Jr.</i>	<i>(Local 229 Apprenticeship School, Greg Boggs, Pipefitter B.A. & Jerry Motley, Electrician B.A.)</i>
<i>Jerry Roy Cozart</i>	<i>(Union Organizer L. 199)</i>
<i>James A. Danley Jr.</i>	
<i>Robert Fenaes</i>	<i>(IBEW Organizer-4 Years)</i>
<i>Dale G. Ferguson Jr.</i>	<i>(Boilermakers Apprentice)</i>
<i>Qulon Carl French Sr.</i>	
<i>Hulon French</i>	<i>(B/M 20 Yrs. Vol. Union Organizer)</i>
<i>Roland L. Gilmore</i>	<i>(Volunteer Union Organizer)</i>
<i>Joseph E. Gleason Jr.</i>	<i>(Volunteer Union Organizer)</i>
<i>David A. Greer</i>	<i>(Volunteer Union organizer)</i>

Jason Greer	(Organizer—2 Yrs. IBEW LU 1001)
Marty Hamm	(I Marty D. Hamm am a U.A. Member; Greg Boggs Local 229)
Bobbie Wayne Harvey	(Volunteer Union Organizer)
Joel Holmgren	(Union Organizing School)
Chester Huggins	(Boilermakers App. Program; Boilermakers Local 199 Member)
Jasper Jaspersen	(Plumbers & Pipefitters Local 229 App. School—5 Yrs.)
Greg Johnson	(U.A. Member for 13 Years)
Bobby F. Kelly	(Volunteer Union Organization; James Estes—B.A.)
John D. Kelly	(Volunteer Union Organizer)
Wilford Kelly	(Union Organizer Local 199)
Crawford Lee Kemp	(Volunteer Union Organizer)
Dennis H. King	(Int. Organizer—Int. Rep.)
Steve Maddox	(Union Organizing School)
Mike McNeil	(U.A. Local 229 Member; Plumbers—Apprentice School; Greg Boggs—Reference)
Michael McVay	(Volunteer Union Organizer)
Dennis Alan Meeks	(Vol. Union Organizer 199)
Jeff Mitchell	(United Association of Pipefitters)
Joseph E. Mixon	
Gerald Motley	(I am a Skilled Union Organizer for the IBEW)
Pat O'Brien	(LU 229 Past 6 Yrs.)
George Curtis Odom	(Volunteer Union Organizer)
Samuel T. Odom	(Volunteer Union Organizer)
Marty Ost	(U.A. Member Local 229)
Michael C. Peterson	(Volunteer Union Organizer)
Juan Picardo	(Volunteer Union Organizer)
Shirlin E. Railey	(Volunteer Union Organizer L. 199)
Kenneth Richardson	(Volunteer Union Organizer; James Estes—Business Manager)
Randall Wade Richbourg	(Vol. Union Organizer—199)
William T. Robichaux	(Volunteer Union Organizer)
James R. Robshaw	(Volunteer Union Organizer; James Estes—Boilermaker B.A.)
Donald Seale	(Union Organizer)
Bobby Singletary	(Pipefitters Local 229; Pipefitter App. School; Greg Boggs, B.A.)
Norvin Thibodeaux	(Pipefitters Local 229 School; Greg Boggs, Local 229 B.A.)
Gary Thomas	(Union Organizer 229)
Arthur S. Tison	(Volunteer Union Organizer)
William Tomlinson	(Volunteer Boilermakers Union Organizer)
Jimmy A. Vickers	(Tom B. Haney Vocational Technical School)
Joseph Vickers	
Steve Wallace	(Local 229 Trade School; Greg Boggs, LU B.A.)
Mark Alan Wicker	(4 Yrs. U.A. Apprenticeship School; Greg Boggs, Pipefitter B.A.)

The General Counsel argued that although James A. Danley Jr., Qulon French, Joe Vickers, and Joseph E. Mixon failed to show direct union affiliation, all four listed prior employers that are union contractors. Respondent argued that Kara Hall was not shown to have knowledge of the union affiliation of any of the four. *Dorey Electric Co.*, 312 NLRB 150 (1993).

As to Danley, French, and Mixon there is a question as to whether the inclusion on an application of prior employers that are union contractors illustrates knowledge of the applicant's

union activities. In the case of Vickers, in addition to the question regarding prior employers that are union contractors, he engaged in picketing against Respondent on May 5 or 6, 1994. Respondent was aware of the picketing even though there was no evidence showing that Respondent knew Vickers was involved in the picketing.

As to Respondent's knowledge, I find that Respondent was aware of the contents of the applications. As to the alleged discriminatees I find that Respondent knew that each listed union organizer, union member, union affiliation, or union school on each of the respective applications. I also find that Respondent became aware of the prior employers listed on each respective application. As shown below, unlike the situation with applicants that listed themselves as union organizers or union members, there is a question of whether Respondent discriminated against applicants that attended union schools and listed union contractors as prior employer(s).

Were the Employer's Actions Motivated by Union Animus?

I credit the testimony that Greg Boggs talked with Respondent's Project Manager Joe Bob Caperton on June 1, 1994. He and Caperton became involved in a heated conversation. Boggs mentioned that he had over 30 of his members apply for work and Brown & Root had not hired a single man. Caperton stated that Boggs' members had written union organizer on their applications and Boggs did not have any qualified people that actually wanted to go to work. Caperton told Boggs that he would hire anyone brought in by the Union that was qualified. Boggs responded that he would bring in 30 men the next morning. Caperton responded, "no, no, no, don't do that. We're not hiring now."

As shown above all requisitions for hire came through Joe Bob Caperton. He was Kara Hall's immediate supervisor. The above evidence that I credit shows that Caperton was opposed to hiring anyone that indicated on his application that he was a union organizer. Caperton's comments also show that he associated union membership with people that were not qualified and that did not want to work. I find those comments by Caperton illustrate that Respondent was opposed to hiring anyone that showed himself to be a union organizer, a union member, or directly affiliated with one of the Unions herein.

The record shows that Respondent did refuse to hire all the alleged discriminatees that showed themselves to be union organizers, union members, or directly affiliated with one of the Unions herein.

The credited record showed that after Respondent learned that the Boilermakers and Pipefitters Unions had targeted Respondent for organizing campaigns on or before Respondent was picketed on May 5 and 6, 1994, Respondent followed a policy of rejecting boilermaker applicants and all applicants that listed themselves as union organizers, union members, or otherwise directly affiliated with a Union. Except for Tony Mack, no one that fell into one or more of those categories was hired by Respondent after May 5, 1994. Tony Mack was hired as an electrician's helper only after he submitted a second application that made no reference to any union affiliation. As shown herein, I find that the record shows that Respondent's policy resulted from an effort by Respondent to avoid employ-

ing anyone that may be interested in organizing its employees for the Union.

In view of the full record I find that the alleged discriminatees were engaged in protected union activity when each included on his application that he was a union organizer or that he was affiliated with one of the Unions. *H.B. Zachary Co.*, 319 NLRB 967 (1995). I find that Respondent was aware of the contents of the applications and Respondent was motivated to reject those applicants because of its antiunion animus. The evidence showed that Respondent discriminated against applicants that showed themselves to be union organizers or union members or directly affiliated with one of the Unions herein, by discriminatorily refusing to hire all such applicants. The record proved that Respondent was motivated out of concern that the Unions were intent on organizing its employees at Stone Container. As shown below there remained questions as to whether Respondent was so motivated that it refused to hire anyone with any union connections.

There remains a question of whether Respondent would have refused to hire the alleged discriminatees in the absence of protected activity. *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Did Respondent Engage in Discrimination in Hiring?

As shown above the parties stipulated that Respondent did not investigate into whether assertions in the applications were true.

The alleged discriminatees listed on their respective applications experience that Respondent sought on the Stone Container job. The record shows that Respondent actually hired some applicants with substantially less experience in the material crafts. The alleged discriminatees' applications show as follows regarding relevant experience:

Don Andrews	12 Yrs. Pipefitter & Welder
John Baxley	Cert. Welder-16 Yrs.; Lay out; Rigging; Burning-18 Yrs.
George W. Berthaut	Boilermaker Welder-33 Yrs.
Mike Bonifay	Welder/Pipefitter, Welder
Tramis Bush	Pipewelder; Pipefitter
Timmy Bradbury	Boilermaker-12 Yrs.; Welder-12 Yrs.
Howard Michael Childree	Boilermaker; Welder-Certified
Noel Clark	Electrician-27 Years
Rozier Lanier Collins	Pipefitter/Welder-25 Years
Joe Cooper Jr.	Pipefitter-29 Years
Roy Eugene Cooper	Pipefitter/Welder-16 Years
Stan Lee Cooper	Pipefitter/Boilermaker-5 Yrs. Apprenticeship Local 229
Jerry Roy Cozart	Boilermaker-29 Yrs.; Welder
James A. Danley Jr.	Boilermaker/Welder; Pipefitter/Welder
Robert Fenaes	Elect.-25 Years/Welder-8 Years
Dale G. Ferguson Jr.	Tube Welder-15 Yrs.; Rigger-18 Yrs.
Qulon Carl French Sr.	Boilermaker Welder-5 Years
Hulon French	Boilermaker; Boilermaker Foreman
Roland L. Gilmore	Welder-15 Yrs.; Boilermaker-18 Yrs.
Joseph E. Gleason Jr.	Boilermaker-17 Yrs.
David A. Greer	Boilermaker & Cert. Welder-21 Yrs.; Welder over 20 Yrs.
Jason Greer	Journeyman Wireman-8 Years; Welder-5 Years

Marty Hamm	Pipe Welder-12 Yrs; Pipefitter-12 Yrs.
Bobbie Wayne Harvey	Boilermaker-29 Years
Joel Holmgren	Pipefitter Welder-10 Years
Chester Huggins	Welder
Jasper Jasperson	Pipefitter-35 Years
Greg Johnson	Pipefitter Welder & Pipefitter-13 Years
Bobby F. Kelly	Boilermaker Welder-28 Yrs.
John D. Kelly	Tube Welder-20 Yrs.; Rigger-20 Yrs.
Wilford Kelly	Jobs Held: Certified Welder, Rigger, Flagger; Tube Welder
Crawford Lee Kemp	Boilermaker-16 Yrs.; Welder-19 Yrs.
Dennis H. King	Cert. Welder, Boilermaker
Steve Maddox	Pipefitter-Welder Pipe
Mike McNeil	Fab. Pipefitter-29 Yrs.; Instrument Fitter-10 Yrs.
Michael McVay	Boilermaker-4 Yrs; Welder-10 Yrs.
Dennis Alan Meeks	Boilermaker Welder-5 Yrs.; Rigger-5 Years
Jeff Mitchell	Pipe Welder & Pipefitter-12 Years
Joseph E. Mixon	Job Held: Welder on Baghouse
Gerald Motley	Electrician-33 Yrs.
Pat O'Brien	Pipefitter-13 Yrs.; Welder-9 Yrs.
George Curtis Odom	BM Welder/Rigger/Helper; BM Fitter-4 Yrs.
Samuel T. Odom	Boilermaker Welder-12 Yrs.; Rigger Fitter-12 Yrs.
Marty Ost	Pipefitter-19 Years
Michael C. Peterson	Pressure Vessel Welder-12 Yrs.; Fitter Rigger-18 Yrs.
Juan Picardo	Welder Plate Welder, Mechanic
Shirlin E. Railey	Cert. Welder Boilermaker; Boilermaker-40 Yrs.
Kenneth Richardson	Jobs Held-Welder & Certified Welder
Randall Wade Richbourg	BM Welder-5 Yrs.; BM Fitter-5 Yrs.
William T. Robichaux	Boilermaker-24 Yrs.
James R. Robshaw	Boilermaker Welder; Boilermaker Rigger
Donald Seale	Pipefitter Welder-10 Yrs; Pipefitter-10 Yrs.
Bobby Singletary	Welder-12 Yrs.; Fitter-12 Yrs.
Norvin Thibodeaux	Pipefitter-19 Years
Gary Thomas	Pipe Welder-15 Yrs.
Arthur S. Tison	Boilermaker
William Tomlinson	Boilermaker High Rigger; Boilermaker Fitter
Jimmy A. Vickers	Boilermaker-16 Yrs.; Welder-20 Yrs.
Joe Vickers	Pipefitter-20 Yrs.
Steve Wallace	Pipefitter-13 Yrs.
Mark Alan Wicker	Pipefitter/Welder-12 Yrs.; Pipewelder-12 Yrs.

In consideration of the entire record, the stipulation that Respondent did not investigate into whether the applications were accurate and including the credited testimony of Branning and Parker, the above illustrates that from Respondent's point of view, all the alleged discriminatees were qualified to perform work on the Stone Container job.

The job applications of those actually hired by Respondent during the relevant period show qualifications that do not exceed and frequently fall short of those of the alleged discriminatees. (See CP Exh. 10.)¹ That evidence illustrates that Re-

¹ CP Exh. 10 was submitted following close of the hearing in accord with stipulation of the parties.

spondent was not justified on the basis of qualifications in repeatedly selecting other applicants in lieu of the alleged discriminatees. As shown above 172 of the 291 employees hired between March 15 and August 15, 1994 were gate hires. All the alleged discriminatees would fall into the gate hire category.

The record evidence shows that after Respondent learned of the Unions' organizing activity, it did not hire anyone that included on his application that he was a union organizer, a union member, or that he was directly affiliated with one of the Unions herein. However the record showed that Respondent did hire applicants that listed union contractors as prior employers. Respondent also hired some applicants that showed on their respective applications attendance at union schools.

As to those applicants that attended union school or listed union contractors as prior employers but did not show any other affiliation with a Union, I find those applicants also engaged in protected activity. I also find that Respondent was aware of the contents of those applications.

However Respondent proved that it hired a substantial number of employees that attended union schools and employees that listed union contractors as former employers. Respondent offered two exhibits showing that it hired applicants that listed prior experience with union contractors and that it hired applicants that demonstrated in their applications union affiliation other than prior employment with a union contractor.

In that regard the law is clear that the hiring of applicants displaying some link to a union is significantly different from an applicant that states he is a voluntary union organizer. *Fluor Daniel, Inc.*, 311 NLRB 498 (1993). A showing that Respondent hired some applicants that showed some affiliation with a union is not dispositive of the question of animus. *Kidd Electric Co.*, 313 NLRB 1178, 1187 (1994).

Counsel for Boilermakers Union cited *KRI Constructors*, 290 NLRB 802, 812-813 (1988):

The statistics utilized by Respondent lists as applicants with union backgrounds persons who pose no threat to Respondent's open shop operation. For example persons listed included: supervisors for union companies; employees for a company which later went non-union; employees who worked only a short time for a union employer; non-bargaining unit employees; employees who worked for a company which is now union but was non-union at the time of the employment; employees of a union company which closed; and employees who were members of industrial unions rather than a craft or construction union.

The Boilermakers Union argued that a close analysis of those employees whom Respondent claim show prior experience with union contractors reveals that none of those applicants worked exclusively for union contractors. As to other union affiliation, the Boilermakers Union argues that those applications that show other affiliation such as attendance at union schools, demonstrate that the applicant would pose no danger to Respondent from an organization standpoint.

The above-named alleged discriminatees did include a showing of union affiliation on their respective applications, as follows:

John Baxley	(Boilermakers Helpers Trainee Program Local 199; James Estes-B/M Local 199)
Mike Bonifay	(Apprenticeship Pipefitter Union Local 229)
Tramis Bush	(Local 229 Apprenticeship School)
James A. Danley Jr.	
Dale G. Ferguson Jr.	(Boilermakers App.)
Qulon Carl French Sr.	
Jasper Jaspersen	(Plumbers & Pipefitters Local 229 App. School- 5 Yrs.)
Joseph E. Mixon	
Joseph Vickers	

As shown above, unlike the records included in Respondent's Exhibits 11 and 13, the records illustrated that John Baxley demonstrated a current relationship with the Union by listing as a reference the current business manager of Local 199. However, the remaining above-mentioned alleged discriminatees were not shown to be distinguishable from applicants shown in Respondent's Exhibits 11 and 13. I find that record evidence proved that Respondent did not discriminate against applicants Mike Bonifay, Tramis Bush, James A. Danley Jr., Dale Ferguson, Qulon Carl French Sr., Jasper Jaspersen, Joseph E. Mixon, and Joseph Vickers.

Respondent argued that three of the boilermaker job applicants were paid employees of the Union and were not authentic job applicants and employees. Those three applicants are Dennis King, Michael Peterson, and John Kelly.

Boilermaker International Representative Dennis King testified that he has worked as a journeyman boilermaker. He is a graduate apprentice. King went to Respondent at Stone Container on May 16, 1994. King asked Kara Hall for an application. Hall asked if King was a certified welder. King told him yes and that he could do rigging. Hall asked about the difference between structural welding and King explained that he could do TIG welding and some other forms of welding. King told Hall that he was a boilermaker. Hall told King that he would need him in a couple of weeks.

Michael Peterson a Boilermakers Local 199 member, is employed as Boilermakers international representative. Peterson applied for work with Respondent on June 6, 1994. Peterson wrote on his application volunteer union organizer.

Michael Peterson turned in job applications with Respondent on July 25, 1994, for Michael McVay and Arthur Tison. Peterson talked with Kara Hall. Hall asked him what he did. Peterson replied "welder, a rigger, a fitter, a boilermaker." Hall said, "Oh, boilermaker. This is not a boilermaker job, and we don't have any boilermaker work." Peterson responded that as a boilermaker he could perform any of the skills needed there on the jobsite. Hall repeated that they did not have any boilermaker work. Hall said, "this has never been a boilermaker job." Peterson said "boilermakers are welders, riggers and fitters. We work on all kinds of equipment, not just boilers, and including digesters." Hall said, "Yeah, right, whatever."

John Kelly is assistant business manager for Boilermakers Local 582 in Baton Rouge, Louisiana. Kelly applied for work with Respondent on June 23, 1994. Kelly wrote volunteer union organizer on his application. One other boilermaker from Local 582 applied for work with Respondent. That was William Robichaux. Robichaux also wrote volunteer union organ-

izer on his application. Those applications were mailed to Local 199 to be turned into Respondent. Kelly was not offered a job at Stone Container.

Respondent argued that Dennis King had not worked with the tools of the boilermaker trade for 10 years and that King did not personally drop off his application despite making several trips to Respondent's hiring trailer. Respondent also pointed out that King admitted that he had never worked for a non-union contractor.

Michael Peterson did not personally deliver his application nor did he follow up on his application.

John Kelly worked for the Local in Baton Rouge, Louisiana. He did not personally deliver his application. Kelly had been off his tools for 7 years. He did not follow up on his application.

Respondent does not contend that King, Peterson, and Kelly are unprotected. *NLRB v. Town & Country Electric*, 116 S.Ct. 450 (1995). Instead it argues that none of the three was a sincere applicant. However, the record does not show that Respondent rejected those three applications because it questioned the sincerity of the applications. Respondent did not conduct any test on any of the three nor did it do anything else to determine if any of the three were bona fide applicants.

As to the general proposition that anyone that is a union organizer is not a sincere applicant for work, the Supreme Court in *NLRB v. Town & Country Electric*, supra, answered that argument to the contrary. Despite Respondent's evidence I am not convinced that the record proved that King, Peterson, and Kelly were not sincere applicants.

I am convinced that Respondent failed to prove that it would have hired any of the above-mentioned applicants in the absence of their showing themselves to be union organizers or union members. I find that action is inherently destructive of Section 7 rights. Moreover, in view of my findings above, I find that the General Counsel proved violations of Section 8(a)(1) and (3) through use of a *Wright Line* analysis. The record shows that Respondent refused to consider the discriminatees for hire because of their union status and affiliation and Respondent failed to demonstrate that it would have disqualified them in the absence of union activities. *Brown & Root USA, Inc.*, 319 NLRB 1009 (1995); *Tualatin Electric, Inc.*, 319 NLRB 1237 (1995); and *E & L Transport Co.*, 315 NLRB 303 (1994).

Respondent argued that it refused to hire boilermakers regardless of union affiliation and that it did not discriminate against the alleged boilermaker discriminatees. Respondent contended that it had a universal practice of not hiring boilermakers on the Stone Container job. *Bay Control Services*, 315 NLRB 30 (1994). As shown below I find that alleged grounds for Respondent's action is a pretext.

NAME	APPLICATION DATE
George W. Berthaut	June 8, 1994
Timmy Bradbury	June 8, 1994
Jerry Roy Cozart	May 18, 1994
James A. Danley Jr.	May 3, 1994
Hulon French	May 17, 1994
Joseph E. Gleason Jr.	June 8, 1994
David A. Greer	June 9, 1994

Bobbie Wayne Harvey	July 13, 1994
Bobby F. Kelly	May 18, 1994
Crawford Lee Kemp	July 13, 1994
Michael McVay	July 26, 1994
Joseph E. Mixon	July 13, 1994
Samuel T. Odom	May 18, 1994
Shirlin E. Railey	May 18, 1994
William T. Robichaux	July 13, 1994
James R. Robshaw	June 8, 1994
William Tomlinson	June 8, 1994
Jimmy A. Vickers	May 4, 1994

I note that in addition to the boilermakers mentioned above and in Respondent's brief the following alleged discriminatees showed themselves to be boilermakers on their respective applications:

Howard Michael Childree	Boilermaker; Welder-Certified
Qulon Carl French Sr.	Boilermaker Welder-5 Years
Roland L. Gilmore	Welder-15 Yrs.; Boilermaker-18 Yrs.
Dennis Alan Meeks	Boilermaker Welder-5 Yrs.; Rigger-5 Yrs.
George Curtis Odom	BM Welder/Rigger/Helper; BM Fitter-4 Yrs.
Randall Wade Richbourg	BM Welder-5 Yrs; BM Fitter-5 Yrs.
Arthur S. Tison	Boilermaker

Testimony by Kara Hall may lend support to Respondent's argument. At the time of the hearing herein Hall did express an intention to exclude all boilermakers from hire on the Stone Container job. However, the credited evidence showed that was not Respondent's plan until after it learned that the Boilermakers Union intended to organize its employees.

As shown above when Qulon French applied with Respondent on April 28, 1994, he was told by Kara Hall that Respondent had no boilermaker work at that time but that he had just missed out on a structural welding job. Hall told French there would most likely be some work in a week or a week and a half.

As of April 28, 1994, Respondent had not adopted a plan to avoid hiring boilermakers. As shown above Hall said that he had no boilermaker work at that time but there would most likely be some work.

Jimmy Vickers phoned Respondent on May 23, and talked with Kara Hall. Hall told Vickers they did not need anyone and they would contact Vickers if they needed him.

The above-credited testimony of Jimmy Vickers also tends to dispute Respondent's argument that it never planned to hire boilermakers. Vickers wore a Boilermakers Local 199 shirt and his application showed that he had been a boilermaker for 16 years. Vickers listed his work preference on his application as "Boilermaker." Nothing was said to Vickers about Respondent not hiring boilermakers.

Pipefitters Local 229 as well as the Boilermakers, IBEW, and other trade unions, picketed Respondent's Stone Container job on May 5 and 6, 1994. The Pipefitters and Boilermakers were the two Unions most involved in the picketing. Kara Hall admitted that he became aware that the Stone Container job was targeted by both Unions when they set up picket lines at the job on May 5, 1994.

Boilermaker International Representative Dennis King went to Respondent at Stone Container on May 16, 1994. King

asked Kara Hall for an application. Hall asked if King was a certified welder. King told him yes and that he could do rigging. Hall asked about the difference between structural welding and King explained that he could do TIG welding and some other forms of welding. King told Hall that he was a boilermaker. Hall told King that he would need him in a couple of weeks. King asked for and received some other application forms.

King's testimony proved that Kara Hall had not decided to avoid hiring boilermakers on May 16, 1994.

Dennis Meeks applied for work as a boilermaker/welder with Respondent on May 17, 1994. Meeks interviewed with Kara Hall. Hall mentioned that Meeks had brought in more than one application. Meeks asked if Hall would like to see the other men saying they were outside in the truck. Hall responded that he did not need to see them. In addition to his own Meeks turned in applications for Randy Richbourg, Mike Childree, and Qulon French. Meeks wrote that he was a voluntary union organizer and listed on his application union contractors as his previous employers. Hall looked at the applications and said "boilermaker, well, we really don't have boilermaker work." Meeks responded, "you're burning, welding, gouging, rigging We do all that type of work."

Meeks' testimony shows that May 17, 1994, was the first occasion on which Hall expressed an intent to avoid hiring boilermakers. That was some 11 days after the Boilermakers was one of the two principal Unions that picketed Respondent's operations. It was several days after applicants first put union organizer on their applications. Hall looked at Meeks' application which showed that Dennis Meeks was a union organizer.

Greg Boggs phoned Respondent's Project Manager Joe Bob Caperton on June 1, 1994. He and Caperton became involved in a heated conversation. Boggs mentioned that he had over 30 of his members apply for work and Brown & Root had not hired a single man. Caperton stated that Boggs' members had written union organizer on their applications and Boggs did not have any qualified people that actually wanted to go to work. Caperton told Boggs that he would hire anyone brought in by the Union that was qualified. Boggs responded that he would bring in 30 men the next morning. Caperton responded, "no, no, no, don't do that. We're not hiring now."

The record illustrated that Caperton was not truthful. Respondent's application log shows that it accepted 15 walk-in applications on June 1, and it continued to accept applications thereafter until August 15, 1994. Respondent hired approximately 29 applicants between June 1 and 10, 1994.

Although Boggs is a pipefitter rather than boilermaker, the above shows that from before June 1, 1994, Respondent was opposed to hiring applicants that listed themselves as union organizers or union members.

Local 199 Business Manager Estes and King visited Respondent's trailer on July 13, 1994. Estes gave Kara Hall eight applications and identified himself as being with the Boilermakers. Hall looked at the applications and said these are boilermaker applications and said we are not hiring boilermakers. King asked Hall if he was hiring anyone else. Hall replied they were only hiring instrument persons and structural welders. King said to Hall that if you will look at those applications you

will see that the majority of them are structural welders. King then pointed out an interoffice memo on Respondent's bulletin board that listed boilermaker as the first craft. Hall then said, "oh, welders . . . well, if you'd have been here yesterday, we tested some." "And we'll be getting back with you because we're going to need some more."

Samuel Odom's application for work with Respondent was delivered to Respondent by another Boilermaker union member. Odom spoke with Kara Hall on July 20, 1994. Odom was asked if he would take a job as a structural welder if one was offered by Respondent. He replied that he would. Odom has heard nothing else from Respondent.

Michael Peterson turned in job applications with Respondent on July 25, 1994, for Michael McVay and Arthur Tison. Peterson talked with Kara Hall. Hall asked him what he did. Peterson replied "welder, a rigger, a fitter, a boilermaker." Hall said, "Oh, boilermaker. This is not a boilermaker job, and we don't have any boilermaker work." Peterson responded that as a boilermaker he could perform any of the skills needed on the jobsite. Hall repeated that they did not have any boilermaker work. Peterson gave Hall the two applications. Hall said how can I hire these guys sight unseen. "Are they boilermakers, too?" Peterson replied they were boilermakers.

Both McVay and Tison wrote volunteer union organizer on their applications.

After examining the application of Arthur Tison, Hall said "this has never been a boilermaker job." Peterson said "boilermakers are welders, riggers and fitters. We work on all kinds of equipment, not just boilers, and including digesters." Hall said, "Yeah, right, whatever."

Peterson's testimony tends to support a finding that it was not until around July 25, 1994, that Respondent openly expressed an intent to reject applicants because of their having boilermaker qualifications.

In view of the above and the record as a whole, I find that the record shows that Respondent engaged in pretext in its contention that it refused to hire specific boilermakers because the Stone Container job did not include boilermaker crafts. As shown above it was not until well after the May 5 and 6, 1994, picketing when Respondent learned that the Unions intended to organize its employees, that Respondent first demonstrated a policy of not hiring boilermakers on the Stone Container job. That evidence and the full record proved that Respondent's contention that it never planned to hire boilermakers was a pretext.

In view of the full record I find that Respondent discriminatorily refused to hire the below-named applicants, that Respondent failed to prove that it would not have hired those applicants in the absence of protected union activity and that Respondent engaged in pretext in alleging that it refused to hire boilermakers for legitimate reasons.

CONCLUSIONS OF LAW

1. Brown & Root Power and Manufacturing, Inc., a subsidiary of Brown & Root, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO and

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 229, are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent by refusing to hire any of the following employees because of their union affiliation and preference has engaged in conduct violative of Section 8(a)(1) and (3) of the Act:

Don Andrews	John Baxley	George W. Berthaut
Timmy Bradbury	Howard Michael Childree	Noel Clark
Rozier Lanier Collins	Joe Cooper Jr.	Roy Eugene Cooper
Stan Cooper	Jerry Roy Cozart	Robert Fenaux
Hulon French	Roland L. Gilmore	Joseph E. Gleason Jr.
David A. Greer	Jason Greer	Marty Hamm
Bobbie Wayne Harvey	Joel Holmgren	Chester Huggins
Greg Johnson	Bobby F. Kelly	John D. Kelly
Wilford Kelly	Crawford Lee Kemp	Dennis H. King
Steve Maddox	Mike McNeil	Michael McVay
Dennis Alan Meeks	Jeff Mitchell	Gerald Motley
Pat O'Brien	George Curtis Odom	Samuel T. Odom
Marty Ost	Michael C. Peterson	Juan Picardo
Shirlin E. Railey	Kenneth Richardson	William T. Robichaux
Randall Wade	James R. Robshaw	Donald Seale
Richbourg		
Bobby Singletary	Norvin Thibodeaux	Gary Thomas
Arthur S. Tison	William Tomlinson	Jimmy A. Vickers
Steve Wallace	Mark Wicker	

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

THE REMEDY

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

As I have found that Respondent has illegally refused to hire any of the below-named employees in violation of sections of the Act, I shall order Respondent to offer those employees immediate and full employment to positions for which they are qualified or, if those positions no longer exist, to substantially equivalent positions. I further order Respondent to make those employees whole for any loss of earnings suffered as a result of the discrimination against them. Backpay shall be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Those employees are:

Don Andrews	John Baxley	George W. Berthaut
Timmy Bradbury	Howard Michael Childree	Noel Clark
Rozier Lanier Collins	Joe Cooper Jr.	Roy Eugene Cooper
Stan Cooper	Jerry Roy Cozart	Robert Fenaux
Hulon French	Roland L. Gilmore	Joseph E. Gleason Jr.
David A. Greer	Jason Greer	Marty Hamm
Bobbie Wayne Harvey	Joel Holmgren	Chester Huggins

Greg Johnson	Bobby F. Kelly	John D. Kelly
Wilford Kelly	Crawford Lee Kemp	Dennis H. King
Steve Maddox	Mike McNeil	Michael McVay
Dennis Alan Meeks	Jeff Mitchell	Gerald Motley
Pat O'Brien	George Curtis Odom	Samuel T. Odom
Marty Ost	Michael C. Peterson	Juan Picardo
Shirlin E. Railey	Kenneth Richardson	William T. Robichaux
Randall Wade	James R. Robshaw	Donald Seale
Richbourg		
Bobby Singletary	Norvin Thibodeaux	Gary Thomas
Arthur S. Tison	William Tomlinson	Jimmy A. Vickers
Steve Wallace	Mark Wicker	

Despite the above findings, the record failed to resolve several issues that may be relevant to the employment and make-whole portions of the remedy. Those issues which may include among others, when each alleged discriminatee would have been hired in the absence of union activities under Respondent's normal nondiscriminatory practices and if and when each alleged discriminatee may have been laid off in the absence of union activities under Respondent's normal nondiscriminatory practices may be considered in compliance proceedings if necessary. *Casey Electric*, 313 NLRB 774 (1994); *Dean General Contractors*, 285 NLRB 573 (1987).

Upon the foregoing findings, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is hereby ordered that Respondent, Brown & Root Power and Manufacturing, Inc. a subsidiary of Brown & Root, Inc., Panama City, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to employ job applicants because of their union or other protected activities.

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

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

(a) Within 14 days of this Order, offer the following named applicants immediate and full employment to positions for which they were qualified or, if those positions no longer exist, to substantially equivalent positions without prejudice and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them plus interest, in the manner set forth in the remedy section of the decision.

Don Andrews	John Baxley	George W. Berthaut
Timmy Bradbury	Howard Michael Childree	Noel Clark

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Rozier Lanier Collins	Joe Cooper Jr.	Roy Eugene Cooper
Stan Cooper	Jerry Roy Cozart	Robert Fenaes
Hulon French	Roland L. Gilmore	Joseph E. Gleason Jr.
David A. Greer	Jason Greer	Marty Hamm
Bobbie Wayne Harvey	Joel Holmgren	Chester Huggins
Greg Johnson	Bobby F. Kelly	John D. Kelly
Wilford Kelly	Crawford Lee Kemp	Dennis H. King
Steve Maddox	Mike McNeil	Michael McVay
Dennis Alan Meeks	Jeff Mitchell	Gerald Motley
Pat O'Brien	George Curtis Odom	Samuel T. Odom
Marty Ost	Michael C. Peterson	Juan Picardo
Shirlin E. Railey	Kenneth Richardson	William T. Robichaux
Randall Wade Richbourg	James R. Robshaw	Donald Seale
Bobby Singletary	Norvin Thibodeaux	Gary Thomas
Arthur S. Tison	William Tomlinson	Jimmy A. Vickers
Steve Wallace	Mark Wicker	

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

(c) Post at its facility in Panama City, Florida, copies of the attached notice.³ Copies of the notice, on forms provided by the Regional Director for Region 15, 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.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 15, 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the act gives employees these rights

To organize
To form, join, or assist any union

³ 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."

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

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

WE WILL NOT refuse to hire job applicants because they identify themselves as union organizers, or show affiliation with International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, with United Association of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 229, or with any other labor organization.

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

WE WILL, within 14 days of this Order, offer the following named applicants immediate and full employment to positions for which they are qualified or, if those positions no longer exist, to substantially equivalent positions without prejudice:

Don Andrews	John Baxley	George W. Berthaut
Timmy Bradbury	Howard Michael Childree	Noel Clark
Rozier Lanier Collins	Joe Cooper Jr.	Roy Eugene Cooper
Stan Cooper	Jerry Roy Cozart	Robert Fenaes
Hulon French	Roland L. Gilmore	Joseph E. Gleason Jr.
David A. Greer	Jason Greer	Marty Hamm
Bobbie Wayne Harvey	Joel Holmgren	Chester Huggins
Greg Johnson	Bobby F. Kelly	John D. Kelly
Wilford Kelly	Crawford Lee Kemp	Dennis H. King
Steve Maddox	Mike McNeil	Michael McVay
Dennis Alan Meeks	Jeff Mitchell	Gerald Motley
Pat O'Brien	George Curtis Odom	Samuel T. Odom
Marty Ost	Michael C. Peterson	Juan Picardo
Shirlin E. Railey	Kenneth Richardson	William T. Robichaux
Randall Wade Richbourg	James R. Robshaw	Donald Seale
Bobby Singletary	Norvin Thibodeaux	Gary Thomas
Arthur S. Tison	William Tomlinson	Jimmy A. Vickers
Steve Wallace	Mark Wicker	

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

BROWN & ROOT POWER & MANUFACTURING, INC., A
SUBSIDIARY OF BROWN & ROOT, INC.

SUPPLEMENTAL DECISION

PARGEN ROBERTSON, Administrative Law Judge. The National Labor Relations Board remanded the decision (JD(ATL)-21-96) in this matter for consideration in light of its decision in *FES*, 331 NLRB 9 (2000).¹ Some of the parties responded to

¹ The Board, in *FES*, held "To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line* . . . first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire,

an order to show cause and Respondent, Boilermakers, and the General Counsel filed briefs following my Order. I shall consider the underlying record and the parties' briefs. However, my consideration shall be limited to the extent of the remand (*Monark Boat Co.*, 276 NLRB 1143, 1143 fn. 3 (1985), enf. 800 F.2d 191 (8th Cir. 1986)).

I found in the underlying decision that (1) Respondent was hiring at the time of the alleged unlawful conduct; (2) that the applicants had experience relevant to the announced or generally known positions for hire;² and (3) that antiunion animus contributed to the decision not to hire the unlawful discriminatees. However, it is clear from reading the Board's decision in *FES*, that more was needed than was included in the underlying decision. At the time of the alleged unfair labor practices Respondent received over 1700 job applications and filled 291 positions. I must consider whether (1) Respondent refused to consider the alleged discriminatees because of antiunion animus; and, if I find it unlawfully failed to consider those applicants, I must consider (2) whether Respondent would have hired the alleged discriminatees if it had considered their respective applications in a nondiscriminatory manner.

As to the first question, I am convinced that my findings in the underlying decision show that Respondent unlawfully refused to consider for hire, the alleged discriminatees because of antiunion animus. Among other things, I credited the testimony of Greg Boggs that Respondent's Project Manager Joe Bob Caperton told him on June 1, 1994, that applicants that had written union organizer on their applications were not qualified applicants that actually wanted to work³ (JD(ATL)-21-96, slip op. at 19, LL. 14-19, and 24-30). I found that Respondent learned the unions' had targeted it for organizing campaigns on or before it was picketed on May 5 and 6, 1994.⁴ Respondent engaged in activity including pretext, in an effort to justify its refusal to hire the alleged discriminatees.

The remaining issue in these proceedings involves the question of whether Respondent would have hired the alleged discriminatees, if their applications had been considered in a nondiscriminatory manner. Respondent's job involved in these proceedings consisted of construction work it performed at the Stone Container paper mill. The projected job initially involved an "outage" but following an April 13, 1994 explosion, it was converted to a cleanup, demolition, and rebuild opera-

tion. There is no question but that Respondent was hiring at material times. Moreover, I found in the underlying decision, that those applicants found to have been unlawful discriminatees had the experience or training relevant to the announced or generally known positions for hire. I found that Respondent's contention that it was not hiring "boilermakers" was a pretext initiated after it learned the Boilermakers Union was seeking to organize its job.

Respondent used a preferential hire system. Applicants with prior Brown & Root experience were given first priority; second were applicants referred by respondent supervisors; third were applicants referred by Stone Container; and finally were applicants which Respondent referred to as walk-ins and/or gate hires. (Tr. 765-768; R. Exhs. 14 and 17.) Respondent, in its brief, argued that the term "gate hires" was incorrectly applied in the underlying decision and that it should be limited to those "individuals who did not fit within the other three preference categories *and* were present at the hiring trailer when a position was available." I am convinced that question is outside the scope of this remand and the term gate hire was correctly applied in the underlying decision to include all applicants that did not qualify for preferential consideration as a former employee or an applicant recommended by a Brown & Root supervisor or by Stone Container. Nevertheless, I shall briefly address that issue. In fact the evidence showed that Respondent's records did not use the term "gate hire" until it prepared Respondent's Exhibit 17⁵ for use in the underlying litigation (Federal Rules of Civil Procedure, 1006). The source document that was available to Respondent when it considered hiring was Respondent's Exhibit 14 and that document does not use the term "gate hire." Moreover, the term itself denotes someone that has been hired and, therefore, would not logically be a term available at a time when Respondent was considering which applicant to hire. The actual source document (R. Exh. 14), uses the term "walk-in" and does not use gate hire. "Walk-in" is a term applied to practically all the applicants listed on Respondent's Exhibit 14. Specifically, 1724 of the 1740 applicants shown on Respondent's Exhibit 14 are identified as "walk-in." Moreover, Respondent's senior craft recruiter, Kara Hall, identified gate hires as falling outside the hiring preference applications. (Tr. 778.) Hall testified that Respondent's Exhibit 17 (R. Exh. 17) included gate hires but he also testified that Respondent's Exhibit 17 included some people that had been former employees⁶ or applicants referred by current supervision. In the underlying decision I found that Respondent employed 172 gate hires⁷ (e.g., JD, slip op. at 14, LL. 26-26). Contrary to Respondent's argument, Hall testified that "gate hire" had a dual meaning—either someone who happened to apply the same day that Hall needed someone, or someone who had previously applied. (Tr. 778, LL. 15-19; see also Tr. 767-

at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants." *FES*, supra at 12.

² One question in the underlying decision involved Respondent's contention that it was not hiring boilermakers but I made specific findings on that matter and it is not subject to reconsideration in this supplemental decision.

³ Caperton told Boggs that union "members had wrote Union organizer on their application and [Boggs] didn't have any qualified people that actually wanted to go to work." (Tr. 220.)

⁴ Both the Boilermakers and Pipefitters Unions put up a picket line outside Stone Container protesting Respondent's hiring practices. Several of the alleged discriminatees participated in the picketing.

⁵ Kara Hall testified that R. Exh. 17 was prepared by use of the application log. (R. Exh. 14; Tr. 780.)

⁶ As shown below Respondent argued there were 137 applicants listed on R. Exh. 17 that were not true gate hires. Instead those 137 were former Brown & Root employees or referrals by supervision of Stone Container.

⁷ I found that of the 291 applicants hired from March through August, 172 of those were gate hires.

768.) I am convinced from the record that Respondent applied the term “gate hire” in preparation for this litigation and the record failed to show that Respondent used a preferential hiring system that included “gate hires” at the fourth step. Instead Respondent applied a four-step preferential hiring scheme. It considered all qualified applicants that were former employees, that were referred by a supervisor, and that were referred by Stone Container, before considering all other applicants. Respondent argued that 22 of the alleged discriminatees were not gate hires because those 22 did not submit their application in person and therefore, could not have been present at the time of hiring. Even though Hall testified that he hired some applicants because they happened to be present when a job opened during the rebuilt phase, the above-cited testimony by Hall and the full record, illustrated that walk-in was not restricted to applicants that were at the facility when a job opened. Moreover, it is important to keep in mind that I found Respondent engage in pretext in order to cover up its unlawful refusal-to-hire applicants that listed boilermaker experience but whom it associated with the union organizing campaigns. For that reason among others, I am not persuaded by Respondent’s contention that I should use its actions in selecting or rejecting applicants on the basis of factors such as their presence or absence from the job-site, at the time Respondent elected to hire. The record shows and I find that from at or shortly after the time when it first learned of the two Unions’ intent to organize its job, Respondent pursued a course of action designed to avoid hiring anyone connected with the Unions’ organizing efforts. Those actions included activity designed to mislead and cover up its unlawful motivation and unlawful refusals to consider or hire qualified job applicants associated with the organizing campaigns. In view of my finding above, I disagree with Respondent and find that applicants that were not present when the respective jobs opened were properly considered by me in the underlying decision as falling within the gate hire category.⁸

Respondent also argued that 137 of the 172 people identified as gate hires in Respondent’s Exhibit 17 were not truly gate hires. Instead those 137 were either former Brown & Root employees or referred by a supervisor. Therefore, those 137 applicants should be considered under Respondent’s nondiscriminatory hiring preference ahead of all gate hires. Here the record offers support for Respondent’s argument even though Respondent’s use of the term “gate hire” is unsupported by its actual source document.⁹ The basic document showing applications received by Respondent is in evidence as Respondent’s Exhibit 14. (R. Exh. 14.) That was the applicant log maintained by Kara Hall. That document includes some 1740 names and all applicants are identified under source 1 as walk-ins except for the following: Three were identified as mail-ins, one

⁸ Respondent contended those 22 included Jerry Cozart, George Odom, Kenneth Richardson, Shirlin Railey, Bobby Kelly, Samuel Odom, Arthur Tison, John Kelly, William Robichaux, Juan Pichardo, Bobbie Harvey, Crawford Kemp, David Greer, James Robshaw, Michael McVay, Joseph Gleason, George Berthaut, Timmy Bradbury, William Tomlinson, Randall Richbourg, Michael Childree, and Dennis King.

⁹ As shown below, I have used the term “gate hire” in order to refer to portions of R. Exh. 17 that are material to the current discussion.

as newspaper ad, four as referral, six as unknown, and two were blank. Therefore, approximately 1724 were identified under the column source 1, as “walk-in,” which Hall identified as applicants that may or may not have personally appeared on the job. Respondent prepared for this litigation its Exhibit 17 (R. Exh. 17), which shows 291 applicants. Respondent’s Exhibit 17 purports to show that Respondent actually hired 291 of the 1740 applicants shown on Respondent’s Exhibit 14. Of those 291 hires, approximately 172 are listed as gate hires. Of those 172 gate hires, approximately 137 are also listed under the column “prior B&R Exp.” or under the column “requisition/referral,” or under both those columns. Thirty-five of the applicants listed on Respondent’s Exhibit 17 are listed solely under the “gate hire” column. Respondent argued that by categorizing those 35 as gate hires, Respondent’s Exhibit 17 showed those hired applicants were neither former Brown & Root employees nor referrals by a supervisor or by Stone Container, and were applicants that were actually present at the time of hiring.¹⁰ As shown above, I have rejected Respondent’s argument that the gate-hire applicant had to be present at the time of the job opening, and I find that the number of applicants hired as a gate hire or walk-in without preference 1, 2, or 3, exceeded 35.¹¹ In addition to those 35 shown on Respondent’s Exhibit 17 solely as gate hires, 32 other applicants are listed on Respondent’s Exhibit 17 as being hired but there was no check mark opposite their names under any of the preference categories. Therefore, Respondent’s exhibit prepared for litigation (R. Exh. 17), shows that it hired 67 (35 plus 32) applicants without prior Brown & Root experience and without reference from either a supervisor or Stone Container. In consideration with the Board’s finding in *FES*, 331 NLRB 9 (2000), I find that the evidence supports the General Counsel only to the extent of showing that Respondent hired 67 applicants to jobs for which the 53 alleged discriminatees were qualified.¹²

As shown above, Kara Hall testified that he occasionally hired an applicant at the gate, but in view of the full record including additional testimony by Kara Hall, I am convinced that that may not have been an actual practice or, if Hall did hire under those conditions, those occasions constituted an exception to its hiring preference rule.¹³ Respondent’s general practice was to first consider applicants that were former employees or applicants referred by a supervisor or Stone Con-

¹⁰ Kara Hall testified regarding hiring applicants that were present at the time Respondent received a requisition. During the rebuilt phase of the job, Respondent did not have a lot of time to wait for an applicant for 3 or 4 days and, if an applicant walked in while Hall had a requisition for an employee, he went ahead and made an offer to the applicant. (Tr. 766.)

¹¹ Thirty-five hired applicants were listed on R. Exh. 17 without having any preference other than “gate hire.”

¹² When, as here, the General Counsel seeks a backpay and reinstatement remedy, the General Counsel must prove how many job openings actually existed at the time the union applications were submitted. There may be a question regarding whether discriminatees classified by Respondent as boilermaker qualified for those positions.

¹³ As shown in the underlying decision I did not find Kara Hall to be a fully credible witness. After reviewing the record prior to issuing this decision, I continue in my belief that he did not always testify truthfully.

tainer, and then to consider all other applicants. I disagree with Respondent and find that it was not proved that any of the alleged discriminatees would not have been considered for hire, in the absence of their protected activity, if that respective applicant had been present when a job opening occurred. Respondent argued that the 53 discriminatees found in the underlying decision should be coded for hire into three groups: (1) those in groups in which Respondent was hiring including electrician, ironworker, pipefitter, pipewelder, and structural welder; (2) those in the boilermaker craft in which Respondent was not hiring; and (3) Arthur Tison whose application was never coded. I rejected that argument in the underlying decision and it is outside the scope of this remand. I found that Respondent discriminatorily changed from a policy of receiving applicants with boilermaker experience to one of rejecting those applications including that of Arthur Tison, in an unlawful manner. As to the question of whether applicants should be placed in the various crafts, that matter should be determined in compliance proceedings if necessary, without reliance on Respondent's Exhibit 17. As shown below, I find that Respondent's Exhibit 17 is not a credible record in accord with the requirements of Federal Rules of Civil Procedure 1006. Respondent also argued there were only 17 "nonpreference" hires coded in areas it was hiring, after qualified discriminatees applied (Tr. 17) and that the number of discriminatees found to have been denied hire should be limited to that number. I have given additional attention to that argument below. However, as shown here Respondent actually hired 67 applicants to jobs for which the alleged discriminatees were qualified and no preferential distinction was actually granted to applicants that actually appeared on the job. Moreover, the underlying decision shows that Respondent discriminatorily denied employment to employees referred to as boilermakers even though those employees possessed skills to perform available work.

Respondent argued that no inference of discrimination could be drawn from the mere fact that the alleged discriminatees were not selected for hire. That argument raises matters that were considered in the underlying decision and is outside the scope of this remand. Moreover, I found in the underlying decision that there were factors other than the failure to select alleged discriminatees for hire that proved Respondent's animus.

Respondent argued that the alleged discriminatees were unlikely hires because of the date of their respective applications in relation to applications of others in the same crafts and the statistical improbability of selecting the alleged discriminatees when considered along side all the other applications. Respondent cited *Kaminski Electric & Service Co.*, 332 NLRB 452 (2000), to support its argument. Respondent does not dispute that it filled positions in the respective crafts (excluding boilermaker¹⁴) after each respective alleged discriminatee ap-

plied. However, when considered in light of the numerous other applications received before it next hired after those applications were filed, the probabilities were substantial that none of the alleged discriminatees would have been hired if their applications had been considered in a nondiscriminatory manner. I disagree with Respondent. I find that the Board in its written opinion in *Kaminski Electric* did not direct that I must apply Respondent's statistical improbability argument. Indeed, the record proved that Respondent unlawfully refused to consider the applications of the alleged discriminatees because of its antiunion animus and Respondent used pretext in order to cover up its unlawful action. It would be nonsensical to apply statistical records compiled at a time after Respondent learned of the Unions' organizing campaigns and while it was engaged in pretext in order to cover up its actions. Such reasoning would require me to credit statistics while recognizing that those statistics were in part, the result of Respondent's activity at a time while it was actively covering up unfair labor practices. In light of my finding herein that the credited evidence supported the General Counsel in all the elements required by the Board in *FES*, the burden of proving that it would have refused to hire any of the alleged discriminatees in the absence of protected activity shifted to the Respondent, *FES*, 331 NLRB 9 (2000). A showing as Respondent asserts, of a high probability that the alleged discriminatees would not have been selected for hire solely on the basis of the number of applications received by Respondent after the respective alleged discriminatee applied, does not satisfy that burden.

I find that the General Counsel proved that (1) the Respondent was hiring at the time of the alleged unlawful conduct; (2) the alleged discriminatees had experience or training relevant to the announced or generally known positions, or in the alternative, that the Respondent did not adhere uniformly to its requirements for available positions or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to Respondent's decisions not to consider and not to hire the alleged discriminatees. I find that Respondent failed to prove that it would not have considered or that it would not have hired the alleged discriminatees in the absence of protected activity nor did it prove that it would not have hired the alleged discriminatees if it had treated those applications in a nondiscriminatory manner except to the extent shown below.

I shall consider the timing of the alleged discriminatees' applications in light of Respondent's actual hiring of applicants that did not qualify as either former Brown & Root employees, or as applicants referred to Respondent by a supervisor or by

ers for hire has been litigated and is outside the scope of the Board's remand order. The record shows and I have found herein, that Respondent unlawfully refused to consider Arthur Tison for hire. Moreover, Respondent's arguments regarding Kara Hall and union animus; that alleged discriminatees Mitchell, Vickers, Collins, S. Cooper, Hamm, Huggins, Johnson, McNeil, O'Brien, Ost, Singletary, Thibodaux, Wallace, Wicker, and Baxley should be dismissed; and the credibility findings as to Kara Hall; are outside the scope of the Board's remand and will not be considered in this supplemental decision other than specifically shown here.

¹⁴ Respondent contended that it was not hiring boilermakers but the underlying decision included a finding that rejected that argument. In consideration of Respondent's arguments in its brief, I find that the General Counsel did prove that applicants identified as boilermakers "should have been hired" and that determination is shown in the underlying decision. I find that the underlying determination that Respondent engaged in pretext by unlawfully refusing to consider boilermak-

Stone Container. The record shows as follows regarding the applications of the alleged discriminatees:

NAME	APPLI- CATION DATE ¹⁵	CRAFT	CRAFT CODE ¹⁶
Motley, Gerald	05/02	Electrician	1631
Fenaes, Robert	05/13	Electrician	1631
Clark, Noel	05/19	Electrician	1631
Greer, Jason	06/07	Electrician	1631
Childree, Howard ¹⁷	05/17	Ironworker	1649
Wicker, Mark	04/29	Pipefitter	1668
Thibodaux, Norvin	05/09	Pipefitter	1668
Andrews, Don	05/10	Pipefitter	1668
Cooper, Roy	05/10	Pipefitter	1668
Cooper, Stan	05/10	Pipefitter	1668
McNeil, Mike	05/10	Pipefitter	1668
O'Brien, Pat	05/10	Pipefitter	1668
Seale, Donald	05/10	Pipefitter	1668
Wallace, Steve	05/10	Pipefitter	1668
Maddox, Steve	05/17	Pipefitter	1668
Ost, Marty	05/27	Pipefitter	1668
Johnson, Greg	06/08	Pipefitter	1668
Mitchell, Jeff	04/27	Pipewelder	1695
Cooper, Joe	04/29	Pipewelder	1695
Singletary, Bobby	04/29	Pipewelder	1695
Thomas, Gary	05/10	Pipewelder	1695
Collins, Rozier	05/10	Pipewelder	1695
Hamm, Marty	05/17	Pipewelder	1695
Holmgren, Joel	05/17	Pipewelder	1695
Kelly, Wilford	05/18	Pipewelder	1695
Richardson, K.	05/18	Pipewelder	1695
Baxley, John	05/25	Pipewelder	1695
Gilmore, Roland	06/08	Pipewelder	1695

¹⁵ Except as noted the application is the date agreed to by Respondent and noted in its brief. All the dates referenced herein occurred in 1994.

¹⁶ James Danley applied for boilermaker welder in his application and was coded by Kara Hall as 1611. Carl Qulon French, who was not found to be a discriminatee, applied for boilermaker welder and was coded by Hall as 1696. Jim Vickers applied for boilermaker was coded 1611. Randal Richbourg applied for BM welder and was coded 1696. Howard Childree applied for boilermaker and was coded 1649. Hulon French applied for boilermaker and was coded 1611. Dennis Meeks applied for boilermaker welder and was coded 1696. William Tomlinson applied for boilermaker high rigger and was coded 1611. James Robshaw applied for boilermaker welder and was coded 1311. Terry Cozart applied for boilermaker and was coded 1611. George Odom applied for BM welder/rigger/helper and was coded 1696. Shirlin Railey applied for certified welder boilermaker and was coded 1611. Bobby Kelly applied for boilermaker/welder and was coded 1611. Samuel Odom applied for boilermaker/welder and was coded 1611 and 1696. George Berthaut applied for boilermaker/welder and was coded "1611 or 1696." Timmy Bradbury applied for boilermaker and was coded 1611. Joseph Gleason applied for boilermaker and was coded 1611. David Greer applied for boilermaker and certified welder and was coded 1311. William Robichaux applied for boilermaker and was coded 1611. Crawford Kemp applied for boilermaker and was coded 1611. Bobbie Harvey applied for boilermaker and was coded 1611. Joseph Mixon did not fill in the "position applied for" blank but was coded 1611. Michael McVay applied for boilermaker and was coded "1611 or 1696."

¹⁷ Howard Childree listed boilermaker under "work preference" on his application.

Kelly, John	07/13	Pipewelder	1695
Meeks, Dennis	05/17	Struct./Welder	1696
Richbourg, R.	05/17	Struct./Welder	1696
Odom, George ¹⁸	05/18	Struct./Welder	1696
King, Dennis	06/08	Struct./Welder	1696
Peterson, Michael	06/08	Struct./Welder	1696
Huggins, Chester	06/09	Struct./Welder	1696
Picardo, Juan	07/13	Struct./Welder	1696
Vickers, Jim	05/04 ¹⁹	Boilermaker	1611
French, Hulon	05/17 ²⁰	Boilermaker	1611
Cozart, Terry	05/18 ²¹	Boilermaker	1611
Kelly, Bobby	05/18 ²²	Boilermaker	1611
Odom, Samuel	05/18 ²³	Boilermaker	1611/ 1696
Railey, Shirlin	05/18 ²⁴	Boilermaker	1611
Berthaut, George	06/08 ²⁵	Boilermaker	1611/ 1696
Bradbury, Timmy	06/08 ²⁶	Boilermaker	1611
Gleason, Joseph	06/08 ²⁷	Boilermaker	1611
Tomlinson, William	06/08 ²⁸	Boilermaker	1611
Harvey, Bobbie	07/13 ²⁹	Boilermaker	1611
Kemp, Crawford	07/13 ³⁰	Boilermaker	1611
Robichaux, William	07/13 ³¹	Boilermaker	1611
McVay, Michael	07/18 ³²	Boilermaker	1611/ 1696
Danley, James	05/03 ³³	Boilermaker	1611
Mixon, Joseph	07/13 ³⁴	Boilermaker	1611
Robshaw, James	06/08 ³⁵	Boilermaker	1311
		Foreman	
Greer, David	06/09 ³⁶	Boilermaker	1311
		Foreman	

Respondent's Exhibit 17 which it prepared for this litigation, showed that it hired the following employees that did not qualify for a hiring preference as either a former employee or a reference from a supervisor or from Stone Container:

NAME	JOB CODE	HIRE DATE
<u>Larry Altom</u>	<u>1631³⁷</u>	<u>04/24</u>
Michael Andrews	1631	05/31
<u>John D. Ashley Jr.</u>	<u>1631</u>	<u>04/29</u>
<u>James E. Bell</u>	<u>1631</u>	<u>03/21</u>
Jarrod Bennington	1631	07/11

¹⁸ Listed "BM Welder/Rigger/Helper" under work preference on his application.

¹⁹ Taken from the application.

²⁰ Taken from the application.

²¹ Taken from the application.

²² Taken from the application.

²³ Taken from the application.

²⁴ Taken from the application.

²⁵ Taken from the application.

²⁶ Taken from the application.

²⁷ Taken from the application.

²⁸ Taken from the application.

²⁹ Taken from the application.

³⁰ Taken from the application.

³¹ Taken from the application.

³² Taken from the application.

³³ Taken from the application.

³⁴ Taken from the application.

³⁵ Taken from the application.

³⁶ Taken from the application.

³⁷ 1631 is the code for electrician.

Ronald Boles	1631	07/23
Brian Burks	1631	07/27
Robert Byrd	1631	07/11
John Dukes	1631	07/08
<u>Johnnie Hand</u>	<u>1631</u>	<u>04/27</u>
Leroy Johnson	1631	07/18
Tod Kuhn	1631	07/30
William Laprime	1631	07/21
Ernest McClellan	1631	07/14
Charles Miller	1631	07/15
Philip Mitchell	1631	07/17
Paul Mitchell	1631	07/17
C. Eric Pitts	1631	07/11
Curran Prescott	1631	07/28
Victor Robert	1631	06/28
Otis Smith Jr.	1631	07/06
Joseph Stanfa Jr.	1631	07/06
William Turner	1631	06/22
<u>Harold Whatley</u>	<u>1631</u>	<u>04/24</u>
James Zaccour	1631	07/19
<u>Kerry Bowen</u>	<u>1649³⁸</u>	<u>04/27</u>
<u>Hal Cutting</u>	<u>1649</u>	<u>04/25</u>
<u>Ernest Frederick</u>	<u>1649</u>	<u>04/26</u>
Norman Kirkpatrick	1649	06/19
Richard McCurley	1649	05/11
Joseph Ward	1649	05/30
<u>Robert Daniels</u>	<u>1668³⁹</u>	<u>04/23</u>
<u>Michael Hawk</u>	<u>1668</u>	<u>04/22</u>
Randall Hill	1668	05/25
<u>Johnny Hinds</u>	<u>1668</u>	<u>04/27</u>
James Hudgins III	1668	05/12
<u>David Inman</u>	<u>1668</u>	<u>04/24</u>
James Peaden	1668	06/08
<u>Craig Anderson</u>	<u>1695⁴⁰</u>	<u>04/27</u>
<u>Kevin Bowen</u>	<u>1695</u>	<u>04/27</u>
<u>Jerry Corbett</u>	<u>1695</u>	<u>04/27</u>
<u>Marcus Curti</u>	<u>1695</u>	<u>04/24</u>
<u>Arthur Donnell</u>	<u>1695</u>	<u>04/28</u>
<u>Charles Ingalls</u>	<u>1695</u>	<u>04/26</u>
Walter Long	1695	05/02
Tony Mack ⁴¹	1695	07/19
<u>J.L. Moss</u>	<u>1695</u>	<u>04/27</u>
<u>Louis Paul</u>	<u>1695</u>	<u>04/27</u>
<u>Kenneth Randall</u>	<u>1695</u>	<u>04/18</u>
Darrow Simmons	1695	06/08
<u>Robert Swimline</u>	<u>1695</u>	<u>04/27</u>
<u>Quenton Washington</u>	<u>1695</u>	<u>04/27</u>
Ricky Weathers	1695	06/06
Donald Welch	1695	04/24
Lee Wright	1695	06/21
<u>Harold Youngblood</u>	<u>1695</u>	<u>04/29</u>
<u>Phillip Asuncion</u>	<u>1696⁴²</u>	<u>04/29</u>
<u>Michael Dorch</u>	<u>1696</u>	<u>04/25</u>
Richard Gaff	1696	06/24
<u>Brian Gerrald</u>	<u>1696</u>	<u>04/24</u>
Raymond Gossman	1696	05/04
<u>Thomas Hagood</u>	<u>1696</u>	<u>04/25</u>
James Harrison	1696	06/24

³⁸ 1649 is the code for ironworker/structural.

³⁹ 1668 is the code for pipefitter.

⁴⁰ 1695 is the code for welder/pipe.

⁴¹ See the underlying decision wherein Mack was found to be a discriminatee.

⁴² 1696 is the code for welder/structural.

Douglas Johnson	1696	05/12
Bobby Mays	1696	07/22
<u>Bobby Price</u>	<u>1696</u>	<u>04/24</u>
<u>Robert Roberson</u>	<u>1696</u>	<u>04/25</u>

As shown in the underlying decision, it was concern with the Unions' efforts to organize its job that led Respondent to unlawfully refuse to consider or hire applicants affiliated with the unions. I found that Respondent initially learned of efforts to organize its Stone Container job through picketing on May 5 and 6, 1994, and through statements on applications that the respective applicant was a union organizer. Applicant Gerald Motley submitted an application on May 2 that included the statement "I am a skilled union organizer for the I.B.E.W." In view of the record evidence I find that Respondent's first knowledge of any organizing activity occurred no sooner than May 2, 1994 when it received Motley's application.⁴³ With that in mind it is apparent that none of the jobs filled by Respondent before May 2, should be considered in determining the number of jobs available for any of the discriminatees. I have underlined all the above positions that were filled before May 2, and I shall not consider those as jobs that should have been filled by any of the discriminatees. Thirty-one positions were underlined. The number of available positions after Respondent first learned of union organizing efforts was 36 (67 minus 31). The record does not include facts necessary to make an exact determination of which specific discriminatees were unlawfully denied employment⁴⁴ especially in view of my finding of Respondent's pretextuous activity in regard to boilermakers.⁴⁵ However, at the very least the following is apparent. There were four alleged discriminatees that applied for electrician positions on and after May 2, 1994. The record showed that Respondent filled 21 electrician positions after May 2. There may be a question regarding whether discriminatees classified by Respondent as boilermaker as well as other discriminatees, qualified for those positions. Respondent hired three employees classified as ironworker/structural on May 11 and 30, and on June 19. The only discriminatee that Respondent classified as ironworker was Howard Childree.⁴⁶ There may be a question regarding whether discriminatees classified by Respondent as boilermaker as well as other discriminatees, qualified for those positions. There were 12 discriminatees that qualified for pipefitter (1668). Respondent hired three employees classified as pipefitter (1668) after May 10. There may be a

⁴³ Although Respondent first learned of union organizing activity in early May, that knowledge resulted in its refusal to consider or hire several applicants that applied before that date but illustrated on their applications some relationship with one of the unions. It refused to consider or hire those applicants and others that applied at subsequent dates, for positions that came available on or after May 2.

⁴⁴ The determination of which of the discriminatees must be offered reinstatement with backpay may be determined in compliance, if necessary, [FES, 331 NLRB 9 (2000)].

⁴⁵ Because of its pretextuous and unlawful activity in refusing to consider or hire boilermakers, Respondent's records, especially ones prepared for this hearing, do not show there were any boilermaker jobs available at material times.

⁴⁶ As noted in fn. 12, Childree applied for the position of boilermaker.

question regarding whether discriminatees classified by Respondent as boilermaker as well as other discriminatees, qualified for those positions.

Five employees were hired and classified as “welder–pipe” on May 2, June 6, 8, and 21, and on July 19. The discriminatees classified as pipewelder by Respondent applied on April 27, two on April 29, two on May 10, two on May 17, two on May 18, one on May 25, one on June 8, and one on July 13. There may be a question regarding whether discriminatees classified by Respondent as boilermaker as well as other discriminatees, qualified for those positions. There were five employees hired as “welder–structural” on May 4 and 12, two on June 24, and another on July 22. Seven discriminatees applied and were classified as structural welder by Respondent. Although none of those seven applied before May 12, there may be a question regarding whether discriminatees classified by Respondent as boilermaker as well as other discriminatees, qualified for those positions. In any event, Respondent did hire three structural welders after Dennis Meeks and Randal Richbourg applied on May 17, and George Odom applied on May 18.

I have found herein that Respondent unlawfully refused to consider the hire of 53 discriminatees. The Board held that the “appropriate remedy for such a violation was a cease-and-desist order; an order to place the discriminatees in the position they would have been in, absent discrimination, for consideration for future openings and to consider them for openings in accord with nondiscriminatory criteria; and an order to notify the discriminatees, the charging party, and the Regional Director of future openings in positions for which the discriminatees applied or substantially equivalent positions” [*FES*, 331 NLRB 9, 15]. Moreover, the General Counsel proved that Respondent unlawfully refused to hire some of the 53 discriminatees. The record shows that Respondent’s unlawful action resulted in discriminatees being deprived of a minimum of 4 electricians; 1 ironworker; 3 pipefitters; 5 pipe welders; and 3 structural welders, positions (total of 16) and a maximum of 21 electricians; 3 ironworkers; 3 pipefitters; 5 pipewelders; and 5 structural welders, positions (total of 37). A finding of refusal to hire would necessitate a remedy that would include immediate reinstatement with backpay. If necessary the question of which discriminatees are entitled to a full reinstatement remedy may be determined in compliance proceedings.⁴⁷

CONCLUSIONS OF LAW

1. Brown & Root Power and Manufacturing, Inc., a Subsidiary of Brown & Root, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 229, are labor organizations within the meaning of Section 2(5) of the Act.

⁴⁷ In determining which employees were unlawfully denied reinstatement, R. Exh. 17 should not be considered. The record showed that document was not a reliable summary in accord with Federal Rules of Civil Procedure Rule 1006.

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

Don Andrews	John Baxley	George W. Berthaut
Timmy Bradbury	Howard Michael Childree	Noel Clark
Rozier Lanier Collins	Joe Cooper Jr.	Roy Eugene Cooper
Stan Cooper	Jerry Roy Cozart	Robert Fenaes
Hulon French	Roland L. Gilmore	Joseph E. Gleason Jr.
David A. Greer	Jason Greer	Marty Hamm
Bobbie Wayne Harvey	Joel Holmgren	Chester Huggins
Greg Johnson	Bobby F. Kelly	John D. Kelly
Wilford Kelly	Crawford Lee Kemp	Dennis H. King
Steve Maddox	Mike McNeil	Michael McVay
Dennis Alan Meeks	Jeff Mitchell	Gerald Motley
Pat O’Brien	George Curtis Odom	Samuel T. Odom
Marty Ost	Michael C. Peterson	Juan Picardo
Shirlin E. Railey	Kenneth Richardson	William T. Robichaux
Randall Wade Richbourg	James R. Robshaw	Donald Seale
Bobby Singletary	Norvin Thibodeaux	Gary Thomas
Arthur S. Tison	William Tomlinson	Jimmy A. Vickers
Steve Wallace	Mark Wicker	

4. Respondent by refusing to hire any of the above-named employees because of their union affiliation and preference has engaged in conduct in violation of Section 8(a)(1) and (3) of the Act.

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

THE REMEDY

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

As I have found that Respondent has illegally refused to consider for hire any of the below-named employees in violation of sections of the Act, I shall order Respondent to cease-and-desist from refusing to consider applicants because of its concern with union organizing; to place all the below-listed discriminatees in the position each would have been placed in, absent discrimination, for consideration for future openings in accord with nondiscriminatory criteria; and to notify each discriminatee, the Charging Parties, and the Regional Director of future openings in positions for which the discriminatees applied or substantially equivalent positions.

Don Andrews	John Baxley	George W. Berthaut
Timmy Bradbury	Howard Michael Childree	Noel Clark
Rozier Lanier Collins	Joe Cooper Jr.	Roy Eugene Cooper
Stan Cooper	Jerry Roy Cozart	Robert Fenaes
Hulon French	Roland L. Gilmore	Joseph E. Gleason Jr.
David A. Greer	Jason Greer	Marty Hamm
Bobbie Wayne Harvey	Joel Holmgren	Chester Huggins
Greg Johnson	Bobby F. Kelly	John D. Kelly
Wilford Kelly	Crawford Lee Kemp	Dennis H. King
Steve Maddox	Mike McNeil	Michael McVay
Dennis Alan Meeks	Jeff Mitchell	Gerald Motley

Pat O'Brien	George Curtis Odom	Samuel T. Odom
Marty Ost	Michael C. Peterson	Juan Picardo
Shirlin E. Railey	Kenneth Richardson	William T. Robichaux
Randall Wade Richbourg	James R. Robshaw	Donald Seale
Bobby Singletary	Norvin Thibodeaux	Gary Thomas
Arthur S. Tison	William Tomlinson	Jimmy A. Vickers
Steve Wallace	Mark Wicker	

As I have found that Respondent has illegally refused to hire an undetermined number of unidentified discriminatees from among those 53 discriminatees listed above, I shall order Re-

spondent to offer those employees immediate and full reinstatement to positions for which they applied or were qualified, or, if those positions no longer exist, to substantially equivalent positions to which they are qualified. I further order Respondent to make those employees whole for any loss of earnings suffered as a result of the discrimination against them. Back-pay shall be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]