

Tradesmen International, Inc. and Central Indiana District Council of Carpenters

Tradesmen International, Inc. and Sheet Metal Workers' International Association Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL-CIO

Tradesmen International, Inc. and Metal Masters, Inc., Joint Employers and Sheet Metal Workers' International Association Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL-CIO

Tradesmen International, Inc. and Post Road Mechanical, Inc., Joint Employers and Sheet Metal Workers' International Association Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL-CIO. Cases 25-CA-24108, 25-CA-24030 Amended, 25-CA-24519 Amended, 25-CA-25815-1, 25-CA-25353 Amended, 25-CA-25545, 25-CA-25885, 25-CA-24126-1 Amended, 25-CA-24126-2 Amended, 25-CA-24520-1, 25-CA-24520-2, 25-CA-24126-3 Amended, and 25-CA-24126-4 Amended

September 29, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On October 6, 2000, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel and the Charging Party filed answering briefs. The Respondent has also filed a reply to the General Counsel's answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings,² and conclusions, except as discussed below, and to adopt the recommended Order as modified and set forth in full below.³

¹ We affirm the judge's decision to admit into evidence the affidavit of discriminatee Aaron Dailey, who was unavailable to testify at the hearing because of illness.

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

³ We shall modify the judge's recommended Order to include the appropriate remedies for the violations found. We shall also substitute

I. INTRODUCTION

As set forth in the judge's decision, this case arises out of a salting campaign conducted by the Union, Sheet Metal Workers' International Association Local Union No. 20 (Local 20), between January 1995, and November 1997. The judge found that the General Counsel met his initial burden under *FES*, 331 NLRB 9, 12 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002), of showing that the applicants for employment had adequately disclosed their union affiliation, that the Respondent was hiring or had concrete plans to hire, that the alleged discriminatees had experience or training relevant to the announced or generally known requirements of the positions for hire, and that antiunion animus motivated the Respondent's refusals to hire. The judge then found that the Respondent failed to demonstrate that it would not have hired the applicants in the absence of their union activity or affiliation. Specifically, the judge found that the Respondent's defenses—that it was not hiring, and that the applicants were not qualified for the positions—were pretextual.

The judge further found that the Respondent violated Section 8(a)(3) by its discharge of four union salts and its failure to refer for employment one member of another union (the Carpenters Union) because of their union activity.

Finally, the judge found that the Respondent unlawfully failed to consider the above-referenced applicants and other discriminatees for future openings. In so finding, the judge concluded that the Respondent was motivated by antiunion animus when it excluded those overt salts from its hiring process, and that the Respondent failed to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

We adopt the judge's findings and conclusions except as noted below.⁴

a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

⁴ We also adopt the judge's finding, for the reasons set forth in his decision, that the Respondent violated Sec. 8(a)(1) by the statements made to union applicant Morris Pauley, by General Manager Ron Dunkelbarger, that Pauley was wasting his time applying for employment as the Respondent was "happy" being nonunion. In view of this finding, we find it unnecessary to pass on the judge's finding that similar statements made by the Respondent's receptionist to Pauley also violated the Act, because any such finding would be cumulative.

Chairman Battista also finds it unnecessary to pass on the judge's finding that the Respondent violated Sec. 8(a)(1) when its manager questioned applicant Brady Piercefield about whether Piercefield's prior employers were merit shops. Any finding of a violation in this regard would be cumulative of other violations found, most particularly the finding that the Respondent violated Sec. 8(a)(1) by questioning discriminatees Pauley and Aaron Young about their union affiliation.

II. BACKGROUND

Local 20 runs an apprenticeship program in which employees from its member companies take a 6-month leave of absence from their jobs to work as apprentices for the Union. As apprentices, their duties include answering advertisements, cold-calling nonunion employers seeking sheet metal, HVAC or general laborer work, and applying as salts with nonunion employers. When engaging in the salting campaigns at issue in this case, some of these Local 20 apprentices applied as “overt” salts, who announced their affiliation with Local 20 early in the application process, or appeared at interviews wearing clothing with the Local 20 insignia. Another group of apprentices applied as “covert” salts, who did not reveal any affiliation with any union. Between January 1995, and November 1997, Local 20 sent approximately 37 salts to apply for HVAC and other positions with the Respondent.

The Respondent is a construction labor leasing company that supplies employees to a number of companies, most of which are nonunion construction contractors. It frequently recruits new employees through referrals and advertisements in the local newspapers. The Respondent’s recruiters arrange interviews by telephone, and then meet with the applicants and have them fill out applications. In the absence of openings, the Respondent’s stated policy is to consider an application “active” for 90 days.⁵

Throughout the relevant period, the Respondent advertised for applicants as openings with its contractors became available. However, not all positions for which the Respondent advertised were filled. According to the Respondent, some openings would “dry up” before an employee could be hired. In addition, if the Respondent anticipated that there would be openings in the near future, the Respondent would, at times, hire an applicant to a lesser-skilled position until a more highly skilled position opened.

⁵ The judge found one exception to this 90-day rule, when the Respondent called an inactive applicant to work after 2 years. On the basis of this single exception, the judge found that the Respondent’s 90-day policy was inconsistently applied, and therefore invalid. Contrary to the judge, we do not find that this single exception to an otherwise consistently applied policy renders the policy invalid.

The judge further found that the Respondent “hires” on two different levels, by first placing an applicant on its active list, and then by placing an applicant on the active list with a client. Because individuals on the active list perform no work and receive no compensation, for the purposes of this decision we find that an individual is “hired” by the Respondent when he is placed in a compensated position with one of the Respondent’s client contractors.

III. THE REFUSALS TO HIRE

The judge found that the Respondent unlawfully refused to hire 23 individuals, most of whom were part of Local 20’s apprenticeship program. In so finding, the judge found that the General Counsel had met his initial burden, under *FES*, of showing that the Respondent was hiring or had concrete plans to hire, that the Respondent knew of the applicants’ union affiliation, and that anti-union animus motivated the Respondent’s decision to reject the union applicants. For the reasons set forth by the judge, we agree that the General Counsel has satisfied his burden, except as to: (a) four applicants (Charles Parsley, Mark Moran, Mike Crull, and William Gary Rogers) who applied while the Respondent was not hiring for any positions; and, (b) one applicant (Brian Stout) for whom there is no record evidence concerning the alleged refusal to hire.

A. *The Respondent’s Hiring*

1. For the reasons stated in his decision, we adopt the judge’s finding that the Respondent was hiring throughout the period in which the Local 20 salts applied, except as to four Local 20 applicants: Parsley, Moran, Crull, and Rogers.

The record shows that Parsley and Moran applied on September 9, 1997, and that Crull applied in November 1997. All three sought HVAC work. At approximately the same time that Parsley and Moran applied with the Respondent, covert applicant Steve Peterson called the Respondent in search of a similar HVAC position and was told that there were no jobs available. There is no evidence that the Respondent hired any HVAC employees during the 90-day period in which Parsley, Moran, or Crull’s applications would have been active. Given this evidence, we find that the General Counsel has not satisfied his initial *FES* burden with regard to Parsley, Moran, and Crull. Therefore, we reverse the judge and dismiss the refusal-to-hire allegations as to these individuals. We agree with the judge’s other factual findings with respect to these individuals and thus adopt the judge’s additional finding that they were unlawfully refused consideration for hire.

Overt applicant Rogers called the Respondent in November 1997, seeking an electrician position. The judge found that the Respondent was hiring electricians during this time, relying on the fact that the Respondent told Rogers it was so hiring. However, the Respondent’s records from this period do not show that the Respondent advertised for, interviewed, or hired any electricians. In view of this documentary evidence, we find that the General Counsel failed to sustain his initial burden for a refusal-to-hire violation, under *FES*, supra. However, we

agree with the judge's other factual findings with respect to Rogers, and thus adopt the judge's additional finding that he was unlawfully refused consideration for hire.

2. In addition, we reverse the judge's finding that the Respondent unlawfully refused to hire Local 20 applicant Stout. Although Stout was listed in the complaint as having applied for a position in March 1995, there is no evidence indicating what position Stout sought or what qualifications he possessed. In view of this absence of evidence, we find that the General Counsel has not sustained his initial burden with regard to Stout, and we shall therefore dismiss the complaint allegation pertaining to him.

B. The Respondent's Refusal-to-Hire/Consider Defenses

The Respondent argues, among other things,⁶ that it rejected several of the Local 20 applicants because they attempted to apply in violation of the Respondent's policy against accepting applications from walk-in candidates who do not first call to schedule an interview. The record establishes that this policy was in place, and consistently enforced, prior to Local 20's salting campaign. Therefore, we find that the judge erred in finding that the Respondent unlawfully refused to hire applicant David A. Walker, and refused to consider applicant Charles Miller, both of whom attempted to apply as walk-in applicants and were rejected for this reason. See generally, *Brandt Construction Co.*, 336 NLRB 733 (2001), rev. denied 325 F.3d 818 (7th Cir. 2003) (no violation where applicants were not hired in accordance with employer's nondiscriminatory hiring policy).

C. The Number of Vacancies

Under *FES*, supra, in resolving cases involving numerous applicants, and where the General Counsel is seeking a backpay and reinstatement remedy, the General Counsel must show that there were openings for the applicants. The Board explained:

⁶ The Respondent also argues that it would not hire paid union organizers because of its "dual employment" policy prohibiting employees from engaging in "any conduct which is disloyal, disruptive, competitive, or damaging to the company," including "employment with another employer or organization while employed by Tradesmen." For the reasons stated by the judge, we agree that the Respondent's dual employment policy was pretextual and discriminatory as applied. However, the record does not support the judge's additional finding that the dual employment policy is discriminatory on its face and that it was promulgated at Indianapolis specifically to disqualify union applicants. As discussed below, the Respondent's central management suggested to its field offices that they adopt such policies to forestall unionization, but there is no evidence that the Indianapolis facility adopted its policy as a result of those suggestions. Accordingly, we shall delete from the Order the judge's requirement that the Respondent rescind the policy.

If the General Counsel seeks an affirmative backpay and reinstatement order he must show that there were openings for the applicants. Consequently, if, as here, there is evidence that the respondent has hired employees or had openings available, the General Counsel must show at the hearing on the merits the number of openings that were available, that the applicants had the training or experience relevant to the openings, and that antiunion animus contributed to the respondent's decision not to hire applicants for the openings.

FES, supra at 14.

Here, the record shows that the number of discriminatees exceeds the number of openings. Therefore, we leave to compliance the determination of which discriminatees will receive a backpay and reinstatement remedy. *FES*, supra at 14. Those who do not receive a backpay and reinstatement remedy will instead receive the customary refusal-to-consider remedy:

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 accordance 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.

R.J. Corman Railroad Construction, 349 NLRB 987, 990-991 (2007) (quoting *FES*, supra at 15).

The numbers of openings are as follows:

1. January-April 21, 1995: The record shows that four discriminatees applied with the Respondent for HVAC positions during this period (James Alumbaugh and Jason Alumbaugh, who applied in January 1995, and Donald McQueen and Morris Pauley, who applied in March 1995). While these discriminatees had active applications pending, the Respondent hired three HVAC employees. Therefore, we find that the General Counsel has shown that the Respondent had three openings during this period.

2. April 25-May 1995: The record shows that seven discriminatees applied for HVAC positions during this period (Bobby Wright, who applied on April 25, and Gary Pierson, Mike Patrick, John Reese, Michael Van Gordon, Aaron Daily, and Gabriel Brooking, all of whom applied in May), and that the Respondent filled four HVAC apprentice and helper positions and one laborer position. Accordingly, the General Counsel has

shown that the Respondent had five openings during this period.

3. September–November 1995: The record shows that two discriminatees applied for HVAC positions during this period (Ron Cornwell and Stephen Hill). On November 10, 2005, the Respondent hired Brady Piercefield, whose HVAC qualifications were similar to these two discriminatees. Thus, the General Counsel has shown that the Respondent had one opening during this period.

4. October–November 1996: The record shows that during this month, four discriminatees (John Carmon, Tony Eldridge, Kenny Miller, and Dorian Wilson) applied for sheet metal positions. While their applications were active, the Respondent hired two covert applicants. Thus, the General Counsel has shown two openings during this period.

5. July 1997: The record shows that three applicants (Chris Meyers, Monty Shoulders, and James Holton) applied for welding positions. The Respondent filled one welding position while these applicants had active applications pending. Therefore we find that the General Counsel has established one opening.⁷

6. Journeyman positions: The record shows that four discriminatees (Mike Patrick, Gary Pierson, John Reese Jr., and Michael Van Gordon) applied for journeyman positions in May 1995. The judge found that all four were entitled to reinstatement and backpay based on the Respondent's hire of one journeyman in 1995, and five journeymen in 1996. However, the applications of these journeymen would not have been active when the Respondent filled the 1996 positions. Therefore, we find that the Respondent had one opening for a journeyman, based on its hire on July 7, 1995.

D. The Respondent's Refusal-To-Hire Applicant Jay Bramlett

We adopt the judge's finding that the Respondent unlawfully refused to hire Carpenter Union member Jay Bramlett. Bramlett applied and interviewed for a carpen-

⁷ The General Counsel seeks to reopen the record to take additional evidence on the Respondent's hiring of welders during the period in which these applicants applied, and the Respondent seeks to reopen the record to introduce additional evidence on its qualification requirements for welders. For the reasons stated by the judge, we find that he did not abuse his discretion in declining to allow the General Counsel to, in effect, expand the scope of the complaint. As for the Respondent, it does not specify the evidence it would introduce if allowed to reopen the record. Moreover, the discriminatees apparently had welding skills similar to those of the successful applicant, and the Respondent does not explain why individuals with such skills were not qualified. In these circumstances, we find that the Respondent was not prejudiced by being prohibited from introducing further evidence concerning welding qualifications. Accordingly, we deny both requests to reopen the record.

try position with the Respondent in May 1995. Shortly after he left the interview, someone from the Respondent's facility—as indicated by Bramlett's caller ID—telephoned Bramlett's house and spoke to his wife. The caller did not identify himself but asked Bramlett's wife if Bramlett was in a union. Bramlett's wife did not inform the caller of Bramlett's union affiliation. Subsequently, Bramlett was not offered a position with any of the Respondent's contractors, despite the Respondent's hire of approximately 18 similarly qualified carpenters and carpenters' helpers in May and June 1995.

Contrary to our dissenting colleague, we find, in agreement with the judge, that the factual circumstances warrant an inference that the telephone call to Bramlett's home came from or at the behest of the Respondent's management, and that it demonstrates that the Respondent either knew of or suspected, and harbored concerns about, Bramlett's union affiliation. Indeed, we can imagine no other plausible explanation for this event, and our colleague suggests none. The record shows that the call originated from the Respondent's facility, that the Respondent's personnel staff had access to Bramlett's telephone number from his employment application, and that the call was placed shortly after Bramlett interviewed with the Respondent. These factors, combined with the unlikelihood that anyone besides the Respondent's managers or employees working under their orders could have had any conceivable reason for placing such a call, clearly support the inference that the Respondent's management either placed the call or directed that it be made.

As found by the judge, the Respondent's claim not to have known—and not to have had suspicions about—Bramlett's union status is “not inherently believable,” in view of the circumstances (i.e., the timing of the call as well as the other unlawful conduct documented in this case). That Bramlett's wife did not answer the caller's questions does not support the Respondent's contention that it had no knowledge or suspicion of Bramlett's union affiliation. Nor does it alter the most reasonable interpretation of the events, specifically that (a) the Respondent was suspicious of Bramlett's union affiliation, (b) the Respondent acted on that suspicion by interrogating Bramlett's wife about this issue, and (c) based on that suspicion, the Respondent decided not to hire Bramlett.⁸ As noted above, the Respondent was hiring a large num-

⁸ Discriminatory action taken in the *belief*—even if erroneous—that an employee supports a union is unlawful. *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003), rev. denied 2004 WL 210675 (D.C. Cir. 2004), citing *Handicabs, Inc.*, 318 NLRB 890, 897 (1995), enf. 95 F.3d 681 (8th Cir. 1996), cert. denied 521 U.S. 1118 (1997). As stated above, we find ample reason to infer that the Respondent at least suspected that Bramlett was a union supporter.

ber of similarly qualified carpenters at the time Bramlett applied. Therefore, in agreement with the judge, we find that the facts establish that the Respondent unlawfully interrogated Bramlett's wife about his union affiliation, and thereafter unlawfully refused to hire Bramlett by failing to assign him to work for any of its client contractors.

IV. REFUSALS TO CONSIDER

The judge's refusal to consider remedy encompasses not only those individuals whom the General Counsel alleged that the Respondent refused to consider, but also those whom the Respondent unlawfully refused to hire. Because those discriminatees unlawfully refused hire would receive no additional relief from the refusal to consider remedy, we will amend the remedy to clarify that those receiving a refusal to hire remedy do not also receive a refusal to consider remedy.

In addition, for the reasons stated by the judge, we find that the Respondent unlawfully refused to consider the following applicants for employment: William Brian Shields, Russell Miller, Brian Mirowski, and James L. Wilson. As found by the judge, these applicants identified themselves to the Respondent as union members when they applied for work, and the Respondent did not consider these applicants for positions. In addition, the Respondent's animus is demonstrated by its numerous expressions of animus towards the Union, set forth in detail in the judge's decision, as well as the 8(a)(1) violations found by the judge, which we adopt. Therefore, we conclude that antiunion animus motivated the Respondent's refusals to consider these individuals, and that the Respondent has not proffered a legitimate explanation for refusing to consider their applications for employment.

We further find that the Respondent unlawfully refused to consider for hire applicants Charles Parsley, Mark Moran, and Mike Crull. As explained above, the judge found that the Respondent unlawfully refused to hire these applicants because of their union affiliation. However, the Respondent was not hiring at the time they applied. Therefore, as explained above, we reverse the judge's refusal-to-hire finding and find instead that the Respondent unlawfully refused to consider these individuals for hire.

However, we reverse the judge's refusal-to-consider findings concerning applicants Mark Chitum, Jon Holsinger, Corey A. Stein, and Kurt Tucker. Although these individuals are named in the complaint, the General Counsel presented no evidence about them. In addition, we reverse the judge's refusal to consider finding concerning applicant Charles Miller, because the record

shows that he was rejected pursuant to the Respondent's lawful policy of not accepting walk-in applicants.

V. UNLAWFUL DISCHARGES

For the reasons stated by the judge, we agree that the Respondent unlawfully discharged Local 20 members Devin Tice, Aaron Young, and Tim Williamson. Further, and contrary to our dissenting colleague, we adopt the judge's finding that the Respondent violated Section 8(a)(3) by failing to assign employee Brady Piercefield to a new position after he was discharged from the Respondent's client contractor, Metal Masters.

The record shows that Piercefield was hired by the Respondent in November 1995, and was immediately assigned to Metal Masters. Shortly thereafter, upon revealing his union affiliation to Metal Masters, Piercefield was discharged from the job, and Metal Masters informed the Respondent that it did not wish to have union members in its employ.⁹ Although the Respondent's manager, Steve Cox, discussed the discharge with Metal Masters, the Respondent made no effort to contact Piercefield with further work assignments.¹⁰

We agree with the judge's finding that the Respondent acquiesced in Metal Masters' decision to terminate Piercefield because of his union activity, that the Respondent made no effort to rectify the termination or to place him with another contractor, and that the record shows no legitimate reason for the Respondent's action.

Under *Capitol EMI Music*, 311 NLRB 997, 1000 (1993), enfd. mem. 23 F.3d 399 (4th Cir. 1994), a nonacting joint employer is liable for the unfair labor practice of the acting joint employer, if: (1) the nonacting employer knew or should have known that the other employer was acting for unlawful reasons; and (2) the nonacting employer "acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it." *Id.* at 1000. Here, we agree with the judge that the Respondent and Metal Masters were joint employers.¹¹ In addition, the record shows

⁹ The complaint also alleged that Metal Masters violated Sec. 8(a)(3) of the Act by discharging Piercefield, but that allegation was settled prior to the hearing in this case.

¹⁰ The record shows that, shortly after Piercefield was returned to the Respondent's facility for reassignment, Manager Cox contacted Metal Masters about his discharge. Cox testified that: "I asked Bill [from Metal Masters] that if what I heard was true that Brady was being released because of his union affiliation. Bill assured me that he was. I reminded Bill that he could not do that because it was illegal. And Bill said his interpretation of our contract for services allowed him to send a Tradesmen employee back for any reason he wanted. I again stressed that an illegal reason was not covered in the contract. Bill stated that he was sending him back anyway and that it was our problem."

¹¹ The record shows that the Respondent determines which employees will be referred to its client contractors. It charges the contractors an hourly rate for each employee's services, and handles the employ-

that the Respondent knew that the actions of Metal Masters were unlawful. Further, although Cox claims to have protested Piercefield's discharge to Metal Masters, the Respondent's subsequent actions, most significantly its failure to reassign Piercefield and its decision to change Piercefield's status from "active" to "terminated," demonstrate that Cox's purported protest was perfunctory at best, and that the Respondent acquiesced in Metal Masters' discharge.

Our dissenting colleague contends that Piercefield was not reassigned because the Respondent had no work for him, and because the Respondent did not hire any new employees from November 1995, until early March 1996. However, once openings arose in March, the Respondent made no attempt to contact Piercefield, and at some point instead changed his status from "active" to "terminated." Thus, the Respondent's conduct makes clear that it had no intention of allowing this known union member to work for one of its contractors.

Our dissenting colleague further argues that Piercefield's failure to regularly inquire for work resulted in his lack of assignment by the Respondent. However, having been terminated by the Respondent's subcontractor because of his union affiliation, the onus was not on Piercefield to seek out assignments from the Respondent. Accordingly, we agree with the judge that the Respondent violated Section 8(a)(3) of the Act by acquiescing in, and making permanent, its contractor's discharge of Piercefield.

AMENDED REMEDY

The judge's recommended Order requires that, for a period of 2 years, the Respondent must include in all of its contracts, nationwide, a statement that it is committed to compliance with the National Labor Relations Act; that it will recruit and refer applicants without regard to union membership; and that it "recognize[s] and support[s] the right of employees to form, join or assist labor organizations of their own choosing, or to refrain from such activities." Contrary to our dissenting colleague, we agree with the judge that a nationwide remedy is appropriate here.

In this case, the Respondent repeatedly violated the Act. Further, this was not an isolated course of conduct.

ees' payroll and other such matters. However, a contractor has the right to require the Respondent to remove a referred employee from a jobsite if the employee is not working out, and thus has the "ultimate authority" over whether to accept or retain any referred employee. Moreover, contractors, not the Respondent, furnish all jobsite supervision over the employees. Accordingly, we agree that Tradesmen and Metal Masters both "take part in determining essential terms and conditions" of the employees, and are therefore joint employers within the meaning of the Act. *Capitol EMI*, supra at 1999.

In a companion case, issued today, we are finding that the Respondent committed serious violations of the Act, similar to those committed here, on other occasions at another of its facilities.¹²

Even more significantly, the Respondent's field representative Larry Paulen indicated to Jay Bramlett that screening out union adherents on behalf of nonunion contractors is practically the Respondent's corporate *raison d'être*. In a tape-recorded conversation, Paulen told Bramlett that the Respondent dealt only with nonunion contractors—i.e., that it was "running a union hall for nonunion people." Paulen also explained that "we have our ways of definitely screening [union organizers] out. We don't send these guys out if we can help it. They usually stick their foot in their mouth some way so we don't have to send them out." Indeed, Paulen told Bramlett that the company's president "just can't stand the union whatsoever," and that *that was one basic reason the company was formed to begin with*.¹³

Accordingly, it is clear that the goal of avoiding referral of union applicants did not originate with the managers at the Respondent's Indianapolis facility. To the contrary, the Respondent's central management set the tone for the unlawful conduct by its communications to its facilities, most particularly the dissemination of facially neutral personnel policies designed to avoid hiring union-affiliated employees. Thus, in 1996, the Respondent conducted training for its recruiters in all field offices nationwide, including advice as to how employers can avoid becoming unionized. Part of that advice was a suggestion to adopt a policy against dual employment *as a means of avoiding hiring union salts*. Thus, the Respondent actively suggested to its field offices that they engage in unlawful conduct in order to remain union-free. Although an employer normally may lawfully adopt and maintain neutral policies, even if those impede union organization, it is unlawful to adopt such policies *in order to impede unionization*.¹⁴ Because the Respondent's central management has set a corporatewide tone encouraging its field offices to engage in unlawful activity, we agree with the judge that a nationwide remedy is warranted.

In addition, as the discriminatees in this case are union salts, we shall modify the judge's remedy in accordance

¹² *Tradesmen Intl.*, 351 NLRB No. 37 (2007).

¹³ This evidence was introduced at the hearing without objection.

¹⁴ See, e.g., *Masiogale Electrical-Mechanical*, 331 NLRB 534, 538–539 (2000), affirmed 337 NLRB 42 (2001), *enfd.* in relevant part 323 F.3d 546 (7th Cir. 2003) (facially neutral hiring policy adopted in order to avoid hiring union applicants violated Sec. 8(a)(1); cf. *Zurn/NEPCO*, 345 NLRB 12, 15 (2005), rev. denied 2007 WL 1805667 (6th Cir. 2007) (facially neutral hiring policy lawful where not implemented for discriminatory reasons).

with *Oil Capitol Sheet Metal*, 349 NLRB 1348 (2007), wherein the Board recently modified the evidentiary requirements to be applied in determining reinstatement, instatement, and backpay-period-duration issues for such discriminatees.¹⁵

Finally, backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded, Inc.*, 283 NLRB 1173 (1987).¹⁶

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Tradesmen International, Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their union affiliation and/or because they have engaged in protected activity, such as organizing.

(b) Refusing to hire or consider for hire employee-applicants because of their union affiliation or to discourage union activities.

(c) Coercively interrogating job applicants or their relatives about their union membership and union activity or by informing job applicants that they would not be hired or considered for hire because of their union membership or activities.

(d) Refusing to assign employees or discriminatorily discharging employees because of their known or suspected union membership or activities.

(e) Enforcing a “dual employment” policy in a discriminatory fashion against union members in order to avoid hiring them or to deny them consideration for employment.

(f) In any other 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 Devin Tice, Aaron Young, Tim Williamson, and Brady Piercefield reinstatement to the positions they would

have held absent the Respondent’s discrimination against them, or if those positions are no longer available, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges to which they would have been entitled if they had not been discriminated against.

(b) Make Devin Tice, Aaron Young, Tim Williamson, and Brady Piercefield whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this Decision.

(c) Offer instatement to Jay Bramlett to the carpenter position for which he applied or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges to which he would have been entitled had he not been discriminated against.

(d) Make Jay Bramlett whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the amended remedy section of this Order.

(e) Offer instatement to the three discriminatees from the following list, who are identified in the compliance stage of this proceeding as the discriminatees who would have been hired, to the positions for which they attempted to apply, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges to which they would have been entitled had they not been discriminated against: James Alumbaugh, Jason Alumbaugh, Donald McQueen, and Morris Pauley.

(f) Offer instatement to the five discriminatees from the following list, who are identified in the compliance stage of this proceeding as the discriminatees who would have been hired, to the positions for which they attempted to apply, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges to which they would have been entitled had they not been discriminated against: Gary Pierson, Mike Patrick, John Reese, Michael Van Gordon, Aaron Daily, Gabriel Brooking, and Bobby Wright.

(g) Offer instatement to the one discriminatee from the following list, who is identified in the compliance stage of this proceeding as the discriminatee who would have been hired, to the position for which he attempted to apply, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges to which he would have been entitled had he not been discriminated against: Ron Cornwell and Stephen Hill.

¹⁵ Members Liebman and Walsh dissented in relevant part in *Oil Capitol*. See supra, slip op. at 10, et seq. Regarding the present proceeding, they recognize that the new majority view in *Oil Capitol* is current Board law, and accordingly, for institutional reasons only, approve its application in compliance.

¹⁶ While our Order provides for reinstatement or instatement of some discriminatees, such reinstatement or instatement is subject to defeasance if, at the compliance stage, the General Counsel fails to demonstrate that a discriminatee would still be employed by the Respondent had the discriminatee not been the victim of discrimination. *Oil Capitol Sheet Metal*, supra, slip op. at 7.

(h) Offer instatement to the two discriminatees from the following list, who are identified in the compliance stage of this proceeding as the discriminatees who would have been hired, to the positions for which they attempted to apply, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges to which they would have been entitled had they not been discriminated against: John Carmon, Tony Eldridge, Kenny Miller, and Dorian Wilson.

(i) Offer instatement to the one discriminatee from the following list, who is identified in the compliance stage of this proceeding as the discriminatee who would have been hired, to the position for which he attempted to apply, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges to which he would have been entitled had he not been discriminated against: Chris Meyers, Monty Shoulders, and James Holton.

(j) Offer instatement to the one discriminatee from the following list, who is identified in the compliance stage of this proceeding as the discriminatee who would have been hired, to the journeyman position for which he attempted to apply, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges to which he would have been entitled had he not been discriminated against: Mike Patrick, Gary Pierson, John Reese Jr., and Michael Van Gordon.

(k) Make whole the discriminatees listed in paragraphs 2(e) through (j) above, 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 amended remedy section of this Decision.

(l) Consider, in accord with nondiscriminatory criteria, the remaining discriminatees listed in paragraphs 2(e) through (j) above for future job openings that arise, and notify the discriminatees, the Charging Party, and the Regional Director of such openings in positions for which the discriminatees attempted to apply, or substantially equivalent positions.

(m) Consider, in accord with nondiscriminatory criteria, the following discriminatees for future job openings that arise, and notify the discriminatees, the Charging Party, and the Regional Director of such openings in positions for which the discriminatees attempted to apply, or substantially equivalent positions: William Brian Shields, Russell Miller, Brian Mirowski, and James L. Wilson, Charles Parsley, Mark Moran, and Mike Crull.

(n) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, refusals to reinstate, refusals to hire, and refusals to consider for hire for the discriminatees listed in paragraphs 2(a), (c), (e) through (j), and (m), above, and within 3 days thereafter, notify them in writing that this had been done and that the discharges, refusals to reinstate, refusals to hire, and refusals to consider for hire will not be used against them in any way.

(o) 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.

(p) Within 14 days of this Order and for 2 years thereafter, set forth, in a prominent manner, at the beginning of all contracts to supply employees to employers and all its applications for employment, whether for its own lists of available employees or for specific requests for employees from any of its client employers, the following language:

Tradesmen International, Inc., is committed to full compliance with the laws of the United States of America, including the National Labor Relations Act. Therefore, we will recruit and refer any and all applicants without regard to their involvement with or membership in, or allegiance to any labor organization. We recognize and support the right of employees to form, join, or assist labor organizations of their own choosing, or to refrain from such activities.

(q) Within 14 days after service by the Region, post at its Indianapolis, Indiana facility, copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Re-

¹⁷ 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."

spondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 15, 1995.

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT discharge employees because of their union affiliation and/or because they have engaged in protected activity, such as organizing.

WE WILL NOT refuse to hire or consider for hire employee-applicants because of their union affiliation or to discourage union activities.

WE WILL NOT coercively interrogate job applicants or their relatives about their union membership and union activity or by informing job applicants that they would not be hired or considered for hire because of their union membership or activities.

WE WILL NOT refuse to assign employees or discriminatorily discharge employees because of their known or suspected union membership or activities.

WE WILL NOT enforce a "dual employment" policy in a discriminatory fashion against union members in order to avoid hiring them or to deny them consideration for employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL, within 14 days from the date of this Order, offer Devin Tice, Aaron Young, Tim Williamson, and Brady Piercefield reinstatement to the positions they

would have held absent Respondent's discrimination against them, or if those positions are no longer available, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges to which they would have been entitled if they had not been discriminated against.

WE WILL make Devin Tice, Aaron Young, Tim Williamson, and Brady Piercefield whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the amended remedy section of this Decision.

WE WILL offer instatement to Jay Bramlett to the carpenter position for which he applied, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges to which he would have been entitled had he not been discriminated against.

WE WILL make Jay Bramlett whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the amended remedy section of this Decision.

WE WILL offer instatement to the three discriminatees from the following list, who are identified in the compliance stage of this proceeding as the discriminatees who would have been hired, to the positions for which they attempted to apply, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges to which they would have been entitled if they had not been discriminated against: James Alumbaugh, Jason Alumbaugh, Donald McQueen, and Morris Pauley.

WE WILL offer instatement to the five discriminatees from the following list, who are identified in the compliance stage of this proceeding as the discriminatees who would have been hired, to the positions for which they attempted to apply, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges to which they would have been entitled if they had not been discriminated against: Gary Pierson, Mike Patrick, John Reese, Michael Van Gordon, Aaron Daily, Gabriel Brooking, and Bobby Wright.

WE WILL offer instatement to the one discriminatee from the following list, who is identified in the compliance stage of this proceeding as the discriminatee who would have been hired, to the position for which he attempted to apply, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges to which he would have been entitled if he had not been discriminated against: Ron Cornwell and Stephen Hill.

WE WILL offer instatement to the two discriminatees from the following list, who are identified in the compliance stage of this proceeding as the discriminatees who would have been hired, to the positions for which they attempted to apply, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges to which they would have been entitled if they had not been discriminated against: John Carmon, Tony Eldridge, Kenny Miller, and Dorian Wilson.

WE WILL offer instatement to the one discriminatee from the following list, who is identified in the compliance stage of this proceeding as the discriminatee who would have been hired, to the position for which he attempted to apply, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges to which he would have been entitled if he had not been discriminated against: Chris Meyers, Monty Shoulders, and James Holton.

WE WILL offer instatement to the one discriminatee from the following list, who is identified in the compliance stage of this proceeding as the discriminatee who would have been hired, to the journeyman position for which he attempted to apply, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges to which he would have been entitled if he had not been discriminated against: Mike Patrick, Gary Pierson, John Reese Jr., and Michael Van Gordon.

WE WILL make whole the discriminatees listed above 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 amended remedy section of the Board's Decision.

WE WILL consider, in accord with nondiscriminatory criteria, the remaining discriminatees listed above for future job openings that arise, and notify the discriminatees, the Charging Party, and the Regional Director of such openings in positions for which the discriminatees attempted to apply, or substantially equivalent positions.

WE WILL consider, in accord with nondiscriminatory criteria, the following discriminatees for future job openings that arise, and notify the discriminatees, the Charging Party, and the Regional Director of such openings in positions for which the discriminatees attempted to apply, or substantially equivalent positions: William Brian Shields, Russell Miller, Brian Mirowski, and James L. Wilson, Charles Parsley, Mark Moran, and Mike Crull.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful discharges, refusals to reinstate, refusals to hire, and refusals to consider for hire for the discriminatees listed above and, within 3 days thereafter, notify them in writing that this had been done and that the discharges, refusals to reinstate, refusals to hire, and refusals to consider for hire will not be used against them in any way.

WE WILL, within 14 days of the Board's Order and for 2 years thereafter, set forth, in a prominent manner, at the beginning of all contracts to supply employees to employers and all our applications for employment, whether for our own lists of available employees or for specific requests for employees from any of our client employers, the following language:

Tradesmen International, Inc., is committed to full compliance with the laws of the United States of America, including the National Labor Relations Act. Therefore, we will recruit and refer any and all applicants without regard to their involvement with or membership in, or allegiance to any labor organization. We recognize and support the right of employees to form, join, or assist labor organizations of their own choosing, or to refrain from such activities.

CHAIRMAN BATTISTA, dissenting in part.

I disagree with my colleagues' findings in the following respects:

1. Contrary to my colleagues, I would reverse the judge's finding that the Respondent unlawfully refused to hire applicant Jay Bramlett. As set forth by the majority, the linchpin of this violation is the fact that, the evening after Bramlett interviewed for a position with the Respondent, an unidentified individual telephoned Bramlett's home and asked Bramlett's wife if he was in a union. According to Bramlett's caller ID, the call originated from the Respondent's facility, but the record is otherwise silent as to the identity of the caller. As noted by the majority, Bramlett was thereafter placed on its active list, but was not assigned to work with any of the Respondent's contractors.

The judge and my colleagues find from these facts that Bramlett was unlawfully not hired. I disagree.

Plainly, the General Counsel has not satisfied at least one element of his initial burden, as there is insufficient evidence that the Respondent knew of Bramlett's affiliation with a union. Indeed, Bramlett did not reveal his union affiliation during his interview, nor did Bramlett sign the applications' Fair Credit Reporting Act statement that would have permitted the Respondent to acquire additional information about him, including his previous employers.

Despite this lack of evidence, my colleagues infer the Respondent's knowledge from the anonymous call received by Bramlett's wife. My colleagues infer that the only possible conclusion is that the call originated from the Respondent's management, which was seeking confirmation of its suspicions regarding Bramlett's union membership. I do not find that such an inference is warranted. Furthermore, even if such an inference is plausible, such an inference alone would not satisfy the General Counsel's burden of establishing, by a preponderance of evidence, that the Respondent knew or suspected that Bramlett was a union member.

Concededly, Bramlett's caller ID identified the call as originating from somewhere in the Respondent's facility. However, the record does not establish that the call was placed or directed by a member of the Respondent's management. Further, Bramlett's wife offered no information to the unidentified caller about Bramlett's possible union affiliation. Nor was there any other evidence supporting a finding that the Respondent either knew of Bramlett's union affiliation or believed that Bramlett was affiliated with a union. The record thus fails to connect the call to any knowledge or suspicion on Respondent's part of Bramlett's union affiliation, and my colleagues' finding of such knowledge or suspicion fills the evidentiary gap with, at best, plausible conjecture.

In view of this lack of evidence, I find that the General Counsel has not sustained his initial burden under *FES*, 331 NLRB 9, 12 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). Accordingly, I would reverse the judge and dismiss this complaint allegation.¹

2. I also disagree with my colleagues that the Respondent unlawfully discharged employee Brady Piercefield. Piercefield was a covert union organizer who was hired by the Respondent in November 1995, and sent to work for one of the Respondent's contractors, Metal Masters. Shortly after his hire, Piercefield revealed his union affiliation to employees at Metal Masters and, on November 10, 1995, Metal Masters sent Piercefield back to the Respondent. As noted by the majority, there is no allegation before the Board that Metal Masters violated the Act with respect to Piercefield. Rather, the only allegation in this regard is that the Respondent's actions violated Section 8(a)(3).

Contrary to my colleagues and the judge, I find that the facts do not establish that the Respondent unlawfully discharged Piercefield. Indeed, following Piercefield's

discharge from Metal Masters, the Respondent's manager, Steve Cox, protested Piercefield's discharge by informing Metal Masters that it was breaking the law by refusing to further employ him. In view of Cox's protest, the record does not support holding the Respondent liable for Metal Masters' discharge of Piercefield. See *Capitol EMI Music*, 311 NLRB 997, 1000 (1993), enfd. mem. 23 F.3d 299 (4th Cir. 1994).

My colleagues find that the Respondent's subsequent failure to assign Piercefield effectively nullifies the significance of Cox's protest to Metal Masters. I disagree. Plainly, Cox made clear to Metal Masters that the discharge was unlawful. The Respondent did nothing thereafter to disavow that statement. Further, no such assignments were available for Piercefield for several months thereafter. Moreover, despite the Respondent's request that Piercefield call to check for work, Piercefield made only sporadic attempts to contact the Respondent during the 3 weeks following his discharge, and thereafter ceased doing so altogether. Thus, it was reasonable to conclude that Piercefield was no longer interested in future employment after those calls had ceased. As such, the Respondent's subsequent actions, including changing his status from "available" to "terminated," have no bearing on the fact that the Respondent duly protested the discharge to Metal Masters.

In these circumstances, I find, contrary to my colleagues, that the Respondent's conduct with respect to Piercefield does not establish that it discharged him in violation of Section 8(a)(3) of the Act.

3. Finally, contrary to my colleagues, I would not order the Respondent to include in all of its contracts and job applications, nationwide, a statement of its compliance with the National Labor Relations Act. Under *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 640-641 (2001), enfd. in relevant part 317 F.3d 316 (D.C. Cir. 2003), a nationwide order is appropriate where there are widespread violations and there is evidence that labor relations policies at the individual facilities were directed by the national headquarters.

Here, there is no evidence that the Respondent's corporate headquarters advised the Respondent to unlawfully reject applicants because of their union affiliation or activity. Indeed, there is no allegation that anyone in the Respondent's corporate headquarters violated the Act. Although my colleagues assert that the Respondent's "raison d'être" was to avoid hiring union members, their only evidence consists of tape-recorded statements by a field representative at the Indiana facility to a union salt posing as a third party contractor about the company president's mental state and one of the reasons why the corporation was founded. There is no evidentiary foun-

¹ Additionally, because there is no evidence that the telephone call came from the Respondent's management, I would also reverse the judge's finding that, by this telephone call, the Respondent unlawfully interrogated Bramlett.

ation for those statements, and even if somehow they are admissible for the purpose the majority uses them, they deserve no weight.

Furthermore, the Respondent's circulation of materials on how to *lawfully* avoid union salting campaigns in no way compels the conclusion that the Respondent has encouraged or condoned unlawful discrimination at its field facilities. Indeed, the record evidence suggests that the Respondent's dual employment policy predates the materials circulated by the Respondent's corporate headquarters.² Thus, the evidence does not establish that the Respondent adopted its dual employment policy in response to advice from its corporate headquarters.

Nor are the violations here so widespread as to justify a nationwide remedy. Rather, taking into account both the findings in this case and others (including the companion case that is issuing today),³ the Respondent's violations [and alleged violations] of the Act are limited to 3 of its 33 field facilities, over an approximately 10-year period. Compare *Beverly Enterprises*, 310 NLRB 222, 228 (1993) enfd. denied on other grounds 17 F.3d 580 (2d Cir. 1994) (finding that, over a 2-year period, the employer committed approximately 135 unfair labor practices at 32 of its 35 facilities at issue). I would therefore limit the notice posting requirement to the facility at issue here, the Respondent's Indianapolis, Indiana facility.

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.

² Although the corporate training materials were supplied to field offices in 1996, the Respondent's recruiter, Thomas Sara, testified that he assisted in drafting the Respondent's policy manual, and that the dual employment policy has been part of the Respondent's policy since at least 1993.

³ *Tradesmen Intl.*, 351 NLRB No. 37 (2007).

WE WILL NOT discharge employees because of their union affiliation and/or because they have engaged in protected activity, such as organizing.

WE WILL NOT refuse to hire or consider for hire employee-applicants because of their union affiliation or to discourage union activities.

WE WILL NOT coercively interrogate job applicants or their relatives about their union membership and union activity or by informing job applicants that they would not be hired or considered for hire because of their union membership or activities.

WE WILL NOT refuse to assign employees or discriminatorily discharge employees because of their known or suspected union membership or activities.

WE WILL NOT enforce a "dual employment" policy in a discriminatory fashion against union members in order to avoid hiring them or to deny them consideration for employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL, within 14 days from the date of this Order, offer Devin Tice, Aaron Young, Tim Williamson, and Brady Piercefield reinstatement to the positions they would have held absent Respondent's discrimination against them, or if those positions are no longer available, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges to which they would have been entitled if they had not been discriminated against.

WE WILL make Devin Tice, Aaron Young, Tim Williamson, and Brady Piercefield whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this Decision.

WE WILL offer reinstatement to the three discriminatees from the following list, who are identified in the compliance stage of this proceeding as the discriminatees who would have been hired, to the positions for which they attempted to apply, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges to which they would have been entitled if they had not been discriminated against: James Alumbaugh, Jason Alumbaugh, Donald McQueen, and Morris Pauley.

WE WILL offer reinstatement to the five discriminatees from the following list, who are identified in the compliance stage of this proceeding as the discriminatees who would have been hired, to the positions for which they attempted to apply, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges to which

they would have been entitled if they had not been discriminated against: Gary Pierson, Mike Patrick, John Reese, Michael Van Gordon, Aaron Daily, Gabriel Brooking, and Bobby Wright.

WE WILL offer instatement to the one discriminatee from the following list, who is identified in the compliance stage of this proceeding as the discriminatee who would have been hired, to the position for which he attempted to apply, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges to which he would have been entitled if he had not been discriminated against: Ron Cornwell and Stephen Hill.

WE WILL offer instatement to the two discriminatees from the following list, who are identified in the compliance stage of this proceeding as the discriminatees who would have been hired, to the positions for which they attempted to apply, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges to which they would have been entitled if they had not been discriminated against: John Carmon, Tony Eldridge, Kenny Miller, and Dorian Wilson.

WE WILL offer instatement to the one discriminatee from the following list, who is identified in the compliance stage of this proceeding as the discriminatee who would have been hired, to the position for which he attempted to apply, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges to which he would have been entitled if he had not been discriminated against: Chris Meyers, Monty Shoulders, and James Holton.

WE WILL offer instatement to the one discriminatee from the following list, who is identified in the compliance stage of this proceeding as the discriminatee who would have been hired, to the journeyman position for which he attempted to apply, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges to which he would have been entitled if he had not been discriminated against: Mike Patrick, Gary Pierson, John Reese Jr., and Michael Van Gordon.

WE WILL make whole the discriminatees listed above 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 amended remedy section of the Board's Decision.

WE WILL consider, in accord with nondiscriminatory criteria, the remaining discriminatees listed above for

future job openings that arise, and notify the discriminatees, the Charging Party, and the Regional Director of such openings in positions for which the discriminatees attempted to apply, or substantially equivalent positions.

WE WILL consider, in accord with nondiscriminatory criteria, the following discriminatees for future job openings that arise, and notify the discriminatees, the Charging Party, and the Regional Director of such openings in positions for which the discriminatees attempted to apply, or substantially equivalent positions: William Brian Shields, Russell Miller, Brian Mirowski, and James L. Wilson, Charles Parsley, Mark Moran, and Mike Crull.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful discharges, refusals to reinstate, refusals to hire, and refusals to consider for hire for the discriminatees listed above and, within 3 days thereafter, notify them in writing that this had been done and that the discharges, refusals to reinstate, refusals to hire, and refusals to consider for hire will not be used against them in any way.

WE WILL, within 14 days of the Board's Order and for 2 years thereafter, set forth, in a prominent manner, at the beginning of all contracts to supply employees to employers and all our applications for employment, whether for our own lists of available employees or for specific requests for employees from any of our client employers, the following language:

Tradesmen International, Inc., is committed to full compliance with the laws of the United States of America, including the National Labor Relations Act. Therefore, we will recruit and refer any and all applicants without regard to their involvement with or membership in, or allegiance to any labor organization. We recognize and support the right of employees to form, join, or assist labor organizations of their own choosing, or to refrain from such activities.

TRADESMEN INTERNATIONAL, INC.

Michael T. Beck and Joseph P. Sbuttoni, Esqs., for the General Counsel.

C. William Klausman and Vincent T. Norwillo, Esqs., of Solon, Ohio, and *Kenneth B. Stark, Esq.*, of Cleveland, Ohio, for the Respondent.

Neil E. Gath, Esq., of Indianapolis, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. These matters were heard in Indianapolis, Indiana, on October 18–24, 1999, January 24–28, and February 1 and 2, 2000. Subsequent to requested extensions in the filing date, briefs were filed by the General Counsel, Sheet Metal Workers Union Local No.

20, and the Respondent. Thereafter, the Respondent requested an opportunity to file a supplemental brief in order to address the possible affect of the Board's intervening ruling in *FES*, 331 NLRB 9 (2000). Over the objections of the General Counsel and the Union, the parties were allowed until June 23, 2000, to file limited supplemental briefs.

At the start of the hearing it was announced that the Regional Director had approved settlement agreement in the title proceedings involving Respondents Metal Masters, Inc., and Post Road Mechanical, Inc., and upon Motion of the General Counsel the following cases were severed from this proceeding; Cases 25-CA-24126-2, 25-CA-24520-2, and 25-CA-24126-4. The remaining consolidated proceeding is based upon a charge filed June 15, 1995 by Sheet Metal Workers' International Association Local No. 20, A/W Sheet Metal Workers' International Association, AFL-CIO¹ and a similar charge filed August 1, 1995, by Central Indiana District Council of Carpenters. The Director's Consolidated Complaint dated April 29, 1999 alleges that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act by refusing to hire or consider for hire named individuals because of the belief that they would engage in union or other protected concerted activities and to discourage employees from engaging in such activities. Certain other charged violations related to allegations that statements were made that applicants would not be hired because of their union affiliation, interrogations concerning union membership, the discharge of several named employees, and the Respondent's dual employment policy.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent is an Ohio corporation with field offices in Indianapolis, Indiana, and numerous other locations in the United States and it has been engaged in the business of providing field employees to construction contractors. The Respondent admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent is a construction labor leasing company that supplies field employees in all types of construction trades, primarily to nonunion construction contractors. It has at approximately 33 field offices throughout the country. Respondent has been in business for approximately 7 years and it opened its Indianapolis, Indiana field office in 1994.

Assertedly, each new office immediately focuses upon recruiting and retaining qualified field employees who view the Respondent as their permanent employer. The Respondent does not provide clients with supervisors or project manage-

ment. It is not party to any construction contracts and it has no regular, physical presence, other than its field employees, on the jobsites of its clients. While on site, its field employees furnish labor under the direction and control of client supervisory personnel. Clients, through these supervisors, have the discretion to terminate or extend the lease assignment of its leased employee without notice to the Respondent.

The field office employ a general manager, a recruiter, an administrative assistant, and several field representatives who are the sales force and who are responsible for acquiring clients for labor leasing service and they normally play no role in recruiting or hiring field employees. However, they participate in daily meetings where work orders (for assignment) are reviewed and matched with Respondent's daily listing of employees available for reassignment. Recruiters also attend the daily meeting and discuss anticipated needs and, if necessary, bring in for "orientation" previously interviewed applicants who the recruiter believes fit the needs of the Company and its customers. If an insufficient number of desirable, previously interviewed applicants are listed as available, the recruiter, after approval from the general manager, will place advertisements for the applicable trade to fill anticipated assignments. The Respondent asserts that the recruiter will not advertise for a craft if there is no anticipated need, but it explains that sometimes, after the advertisement is placed, work does not materialize, and no employees are hired.

The recruiter is responsible for soliciting qualified candidates for work, either through referrals or help wanted advertising but the Respondent does not have any ad or listing in the yellow pages of the local phone directory. The recruiter conducts all field employee interviews but has no authority to terminate after an employee is hired.

Ron Dunklebarger was the first general manager of the Indianapolis office in April, 1994 and Greg Thompson was the recruiter from January to late February 1995. He was replaced by Phil Thomas until late April when Shannon Parks became the recruiter and held the position until July. In early 1995, Larry Paulen (who was working for the Indianapolis office as a field employee) was hired as a field representative. In May 1995, Tom Sara, a quality assurance manager from the Respondent's corporate office in Cleveland, was assigned to work in Indianapolis because of asserted problems with record keeping, attributed to recruiter Parks. Sara worked with Parks to correct these issues and retrained Parks regarding recruitment and hiring procedures, however, the Respondent terminated Parks in July 1995 and replaced him with Larry Paulen. In mid-July, Steve Cox became general manager of the Indianapolis office and supervised a staff consisting of Larry Paulen, recruiter, Laura Petrig, administrative assistant, Oscar Icenogle, safety director and Dan Drake, field representative.

Among other types of craft workers, Respondent's Indianapolis office employs at least two types of sheet metal workers, HVAC installers and HVAC service technicians. HVAC installers are employees who install heating and air conditioning components and systems while HVAC service technicians troubleshoot and service HVAC units once they have been installed. Respondent employs journeymen, apprentices and helpers. Typically, journeymen sheet metal workers at Re-

¹ Reference to the "Union" will relate to the Sheet Metal Workers unless the Carpenters Union is specified.

spondent are experience craftsmen with the ability to work in the field unsupervised. Apprentice and/or helper employees have some experience in the HVAC field, and are able to work unsupervised for some of the time in some skills of the trade.

Michael Van Gordon is employed as a full time organizer by the Union, a position held since 1990. He is a journeyman sheet metal worker, and has been working in the sheet metal industry since 1963. His Union duties include organizing non-union workers into the Local No. 20 and supervising its apprenticeship "Youth to Youth" program.²

On January 22, 1995, the Respondent advertised in the Indianapolis Star for HVAC installers (it also placed other ads for electricians, masons, pipefitters, and construction labor). Two Local 20 participants in the Youth to Youth program, Jason Alumbaugh and James Alumbaugh (each with about 4 years of experience), applied in response to this newspaper ad and both overtly indicated their Union affiliation on their job applications. Jason initially phoned Respondent and talked to a receptionist who told Alumbaugh (who did not reveal his Union affiliation on the phone) to come in and fill out an application, and that he would receive an interview. Jason went with his cousin, James who was wearing a Union baseball cap when they arrived. Each filled out an application. Jason indicated that he was applying for a position as a "HVAC tech," that his most recent previous employer was Apex Ventilating (one of the largest Union sheet metal contractors in the area), and that he was a Sheet Metal Worker's Local Union No. 20 apprentice.

² The Union's apprenticeship programs lasts for 5 years and apprentices typically participate in the Youth to Youth Program during the third year of his apprenticeship. Pursuant to the collective-bargaining agreement between the Union and signatory sheet metal companies, apprentices take a 6-month leave of absence to fulfill the requirements of the Youth to Youth program. During this time, the apprentices maintain the right to return to their jobs with the signatory contractors, however, the apprentice also holds the paid position of "organizer" while participating in the Youth to Youth program. Signatory employers received written notification from Union organizer Van Gordon that an apprentice has been directed to "begin the Youth to Youth portion of his apprenticeship" and also receives written notification from Van Gordon when the apprentices are released from the program to return to work.

Among other things, Youth to Youth organizers review local want ads related to their trade and thereafter visit nonunion employers to complete and submit applications for employment. Organizers utilize both "overt" and "covert," so called "salting" techniques. When applying overtly, Youth to Youth participants reveal their union affiliation to prospective employers by wearing hats and clothing containing Local 20 insignia, listing Local 20 as their employer on employment applications, and sometimes by applying together in groups. When applying covertly, they do not reveal their union affiliation to prospective employers and they usually apply alone.

Youth to Youth organizers are paid the same hourly rate as that paid by the signatory sheet metal companies and until July 1996, if a organizer successfully salted into a nonunion company, the Union would pay the participant the difference between his Union hourly rate and the hourly rate paid by the nonunion company, plus an additional \$2.00 an hour incentive. After July 1996, Youth to Youth organizers who successfully salted into nonunion companies continued to be paid by Local 20 and received whatever hourly rate was paid by the nonunion company as an additional incentive.

Shortly thereafter he was interviewed by recruiter Thompson. During the interview, Alumbaugh, said that if he were hired, his intent was "to do the best job that [he] could do during working hours," but "before work, during lunch and after work [he] was interested in organizing the work force" of Respondent. Thompson told Jason that he would contact him if any jobs became available but did not tell Alumbaugh that he could not work for another employer while working for Respondent.

James Alumbaugh applied for a HVAC position, indicated that he had received training from the Union, and that his most recent employer was Apex Ventilating. He also was interviewed by Thompson. During the 10-minute interview, Thomson told Alumbaugh that Respondent supplied field employees to "roughly 80 companies." Thompson did not indicate to either Alumbaugh that they had to call Respondent back to keep his application active (the Respondent's job application forms states that "I understand that my application will be active for ninety days for consideration. . .") or that they could not work for another employer while working for Respondent. Thomson ended the interview by telling Alumbaugh that he "would get back" with him if respondent had any job openings. No one from Respondent ever contacted either Alumbaugh (except for the subsequent letter to Van Gordon discussed below).

The Respondent ran another ad during the week of March 6, in the Indianapolis West Side Flyer, seeking HVAC personnel with 2 + years commercial experience (the ad did not identify the Respondent by name but had the Respondent's phone number). Youth to Youth organizers Donald McQueen and Morris Pauley called and received an interview appointment for the next day. When Pauley called and spoke to the receptionist she asked him about his experience and whether he was working at the time. Pauley indicated he had four and a half years' sheet metal experience and that he was employed as an organizer for the Union. He explained that, as an organizer, he was interested in "getting to know the people that worked for them" and "before work and at lunch and after work to explain the benefits of being a union member." The receptionist told Pauley that Respondent was a "non-union company" and that if Pauley intended to engage in such activities, Respondent was not interested but she set up an appointment to fill out an application the next day. Pauley was put on hold, "Ron" got on the phone and confirmed that he had set up an interview appointment.

Pauley filled out an application listing the Union as his employer, and organizer as his current position and stated his "duties performed" in his current position included trying "to salt into non-union shops to organize employers on my time and be the best sheet metal worker possible on company time." He then was interviewed by general manager "Ron" Dunklebarger for about 15 minutes who asked him how long he had been with the Union, and whether he was "dissatisfied with the Union." Pauley said he was 'very happy being a union member' and they was asked what he would be doing in furtherance of his organizing duties, and Pauley replied that if he came to work for Respondent he would "work as hard as [he] possibly could on [company] time doing assignments," but that he would "before work or after work and on lunch time" on his own time speak to Respondent employees "about the benefits

of being a union member. Dunklebarger said that Respondent was “perfectly happy being non-union.” The interview was interrupted briefly by a telephone call, and after Dunklebarger got off the phone he told Pauley that he was “wasting his time” because Respondent “was happy being non-Union” and ended the interview.

Jason McKinney and Bobby Wright were Youth to Youth organizers, each with several years’ HVAC and sheet metal experience. They called after seeing an ad and applied for positions with the Respondent on April 25. McKinney and Wright went together but entered Respondent separately, with McKinney entering first. McKinney completed an application, but omitted any references to his Union membership. McKinney indicated that he was seeking a job in the sheet metal trade, and that he had experience in welding and in gutter work. He was interviewed by Tom Sara who said that, while Respondent didn’t have any jobs in sheet metal at that time, he could put McKinney to work “as a laborer, at \$8 an hour and that he would look for sheet metal jobs for him “in the meantime.” McKinney told Sara that he would accept the job but after McKinney reported back to the Union, Van Gordon told him to call Respondent back and decline the laborer position.

When Wright applied he was wearing a cap with the Union’s insignia. He indicated that he was seeking a job in the “sheet metal” trade and listed the Union as his current employer and “organizer” as his present position. During his interview Dunklebarger stated that he noticed that Wright was employed at that time as a Union organizer and mentioned that a couple other organizers had been there already. He did not ask what Wright’s duties were as an organizer or if duties as an organizer for the Union would conflict with his employment at Respondent. Wright was told that they didn’t have anything in the sheet metal field but that he “would probably qualify for a pipefitter job” if Wright wanted to work in that field, Wright did not have any pipefitter experience. During the interview nothing was mentioned about any dual employment or callback policy.

Gary Pierson, Mike Patrick, and John Reese are business representatives for the Union. Each is a journeyman sheet metal worker with over 16 years’ of experience. On May 10, Pierson was told about the ad in the Westside Flyer and he called the Respondent’s number. Pierson initially spoke with the receptionist and he asked if Respondent was “still hiring HVAC installers.” He was transferred to recruiter Parks who said that Respondent was still hiring HVAC installers, and arranged an interview. Pierson then told Parks that he was currently employed as a business representative by the Union. After this conversation, ended, Parks called Pierson back and asked that his interview be rescheduled to latter that day.

Pierson arrived at about 5 p.m., filled out an application and was interviewed jointly by Parks and Dunklebarger. Pierson told them that he had been in the sheet metal industry for 23 years and that he was a business representative for the Union. Dunklebarger asked him whether he “was an organizer,” and Pierson stated that, while that was not his title, it was “part of his job description.” Dunklebarger asked Pierson whether, if hired, he would “try to organize the people [he] would be working with,” and Pierson replied that on his own personal time, he “would inform them in regards to the advantages of being a

union employee. Dunklebarger then asked Pierson some general questions regarding sheet metal and HVAC work, and told Pierson that it appeared that he was “very experienced in regards to” the position advertised. Parks then asked him some more technical questions about sheet metal work. At no time was he told that he could not work for another employer while working for Respondent, however, Parks told Pierson to call back the next week to check on job openings. Pierson called back the next week and spoke with Parks who told him that at that time, they did not have any work available. Pierson then asked Parks what his procedure should be from that point on, and Parks simply told him that Respondent would contact him “if anything came up.”

On May 10, Reese and Patrick also responded to the ad in the Westside Flyer. They told the receptionist that they were business representatives from Local 20, and they were there to fill out applications for an HVAC installer position. The receptionist told them that Respondent did not accept walk-in applicants, and that they would have to call in to get an appointment. Reese and Patrick were not given any information by Respondent regarding any of Respondent’s personnel or application policies but thanked the receptionist and left. On May 16, Reese called Respondent, spoke with the receptionist and identified as a business representative for the Union, and told her that he wanted to apply for an HVAC installer position. The receptionist said that “the position was filled.” Patrick also called applying for employment and was told by the receptionist that Respondent was no longer accepting HVAC position applications.

On May 11 organizer Van Gordon went to the Respondent’s facility, filled out an application and was interviewed by Dunklebarger. He also said he would work hard for the Respondent but would attempt to organize before and after work. Dunklebarger told Van Gordon that he would be the next sheet metal worker or HVAC installer that Respondent would call. Van Gordon called Respondent back on May 17 and again spoke with Dunklebarger who told him that “he still didn’t have anything available” but that Van Gordon would be “the next person called,” that Respondent would contact him if any vacancies came open, and that he didn’t need to call back.

Youth to Youth organizer Aaron Daily also contacted Respondent in response to the ad seeking HVAC installers and told the woman who answered the phone that he wanted to fill out an application. She asked him for what position and gave him an appointment for May 11 at 8:30 a.m. Daily arrived wearing a Union cap and shirt imprinted with the Union’s insignia. Daily noted on his application that he was then currently employed by the Union as an organizer and that he was applying for either an HVAC or welder position. Parks took him into an office, looked at his application and asked, “Union?” Daily said, “Yes.” Parks then said he had a few of Daily’s guys in there before and then told Daily that he was not placing sheet metal workers or welders at that time. Daily thanked him and left. Parks made no inquiries concerning Daily’s skills or work experience. Daily called back around July 10, to inquire about his application. He told the receptionist his name, and after waiting about 5 minutes, he was told that Respondent did not have his application. Daily then asked if he

could fill out another application. The receptionist asked for what position, and Daily said HVAC. She then said there was no work for HVAC at that time.

Also on May 11, Gabriel Brooking attempted to respond to the ad and apply for employment at Respondent. Brooking identified himself to the receptionist as a member of the Union, and told her that he was “looking for a job in sheet metal.” The receptionist told Brooking that they had received a lot of calls on sheet metal, and were not accepting applications or making appointments for sheet metal.

On July 5, Aaron Young responded to an ad in the Indianapolis Star seeking applicants for an HVAC Sheet Metal position and spoke with a receptionist named “Lori.” Young did not mention his union affiliation during this conversation and was given an interview appointment for Friday, July 7. Young applied covertly, and did not wear any union insignia or indicate his union affiliation on his application. Young applied for a sheet metal and HVAC position and was interviewed by Parks. During the interview, Parks asked Young whether Quality Builders, (a fictitious company that Young had listed as his present employer at that time), was “Union or non Union.” Young said non Union. Parks then asked Young “a few questions relating to sheet metal” and about his job experience, and told him that he would check his references and get back to him regarding his application. Parks did not mention a call back or dual employment policy. That afternoon, Parks called Young at his home and offered to assign him to a job working for Metal Masters³ in Lafayette, Indiana. Young began work for Metal Masters on July 10. There were four to five employees on that jobsite, including Young and one other Respondent employee, Jerry Clubs, supervised by Metal Masters foreman Lou Lacke. Young worked at the Lafayette jobsite for about 2 weeks and received paychecks from the Respondent. During that time, no Respondent representative visited the jobsite.

On July 19, Young told foreman Lacke that he was a “Union organizer for Local Union 20.” Lacke replied that he “had a feeling” that Young was in the Union because Young’s work was a higher quality in relation to other of Respondent’s employees. On Friday, July 21, Young was given a letter at the Lafayette jobsite by Respondent representative Keith Allen or Steve Cox. Cox or Allen did not say anything to Young and, after receiving the letter, Young continued to work, and finished the day.

The letter, signed by Manager Allen, stated:

Tradesmen International has learned that you are currently engaged in other employment, in addition to your position with this company. Section XIV of Tradesmen International’s Employee Policy Manual prohibits such dual employment. The company recognizes and respects the right of its employees to engage in organization and other concerted activity protected by the National Labor Relations Act. However, Tradesmen International must uniformly enforce its valid, business motivated dual employment prohibition to preserve the availability of its skilled work force at all times.

³ As noted above other proceedings involving this Employer were the subject of a Settlement Agreement and were severed from this proceeding.

Accordingly, unless you decide to terminate your competing employment position, your employment with Tradesmen will be terminated.

When he returned home from work on the following Monday, he received a phone call from Respondent informing him that, pursuant to the letter, he needed to come into Respondent’s office the next morning. The next day, Young went to Respondent’s office, accompanied by Michael Van Gordon and fellow Respondent employee Devin Tice. Young was called into an office by Cox and Sara who told him that, by virtue of his employment with the Union, he “was engaged in two employments” and that he had to “choose one.” Young said he would not pick between being an organizer with the Union and employment with Respondent. He then was handed a pre-prepared termination letter, effective immediately, which cited his violation of the company’s policy manual prohibition against dual employment.

On July 2, Devin Tice responded to Respondent’s ad for an HVAC installer and was transferred to recruiter Parks. He did not identify himself as a member of the Union and was given an appointment that afternoon. His completed application did not reveal his union membership and he was not wearing any union insignia. He was interviewed by Sara and told Sara that he had worked for two companies in the past 7 years and that he had HVAC and sheet metal experience. Sara gave Tice a short quiz and told him that his contact person at Respondent would be Larry Paulen, and that he should call that evening to find out if any jobs were available.

Tice called and was told nothing was available but to call back the following week. The next week Tice spoke again with Sara, who told him that he might have something for him and instructed Tice to attend Respondent’s orientation session that evening. The 1-hour orientation with 20 to 30 others was run by Sara and two other representatives (including “Dan”), who explained Respondent’s procedures. A representative stated that Respondent was “the Union for non-Union employer.” They also explained that the Respondent had a dual employment policy because they “didn’t want employees working for companies in competition with Respondent.”

After the meeting, Sara told Tice that Respondent “had a job lined up” for him with Post Road Mechanical. Tice reported to foreman Post Road Dale Young the following Monday. After Tice began to work on the roof, one of the other employees yelled “hey Union” in his direction (the roofing contractor was a Company named “New Tech” where Tice had worked previously). Tice ignored the call but foreman Young told Tice that he thought one of the roofing contractor employees wanted to get his attention. Tice waved at the employee and went back to work but at lunch he informed Young that he was a “union sheet metal worker organizer” and that “when it was time to work” he would work and that in his “free time” he would attempt to “organize both Respondent and Post Road Mechanical.” That evening after work, Tice called Sara and gave him the same information.

On Friday Respondent’s Keith Allen and Steve Cox hand delivered a letter of termination to Tice, however, Tice reported for work the following Monday, and worked without incident.

That evening he received a phone call from the Respondent telling him to come to Respondent's office the following morning.

Tice and Van Gordon met with Cox and Sara after Young had met with them. Cox and Sara asked Tice whether he was currently employed by the Sheet Metal Workers and whether he "was going to quit the Sheet Metal Workers." He confirmed that he was with the Union and that he would not quit. Cox, without further explanation, then handed Tice his termination letter.

In the spring of 1995, at the same time the Youth to Youth organizer were seeking sheet metal work with the Respondent, the Respondent was running ads and hiring people in other trades, including carpenters. Jay Bramlett was employed by the Central Indiana District Council of Carpenters as an organizer from April 6, 1992 until January, 1997. Bramlett's duties as an organizer included contacting nonunion contractors and carpenters. He phoned the Respondent on May 10 seeking information about Respondent's business operations. Bramlett initially asked Respondent's receptionist to speak with a "representative" of Respondent and he was transferred to field representative Paulen. Bramlett identified himself as "Bill Knowles," an out of town construction contractor, who was considering using Respondent's job placement services (A transcript of the taped portion of this conversation was entered into evidence and Paulen admitted he was the other speaker on the tape). During the conversation Bramlett asked Paulen whether Respondent had "problems with the unions." Paulen replied that the Respondent dealt basically with nonunion contractors only, and merit shop people only and that Respondent was "running a union hall for non-Union people." Paulen also volunteered to Bramlett that the unions will "send a union guy" to Respondent "every once in a while trying to make" Respondent "hire him and send him out on a certain job. . . so they can try to organize the company" but said "we have our ways of definitely screening them out. We don't send these guys out if we can help it. They usually stick their foot in their mouth some way so we don't have to send them out." In addition, Paulen repeated "we deal with non union only" and added "our company president "just can't stand the union whatsoever," and that was one basic reason Respondent was started in the first place.

Following this conversation, Bramlett, using his real name, applied for employment at Respondent on May 22, in response to a classified ad in the Indianapolis Start seeking carpenters. He spoke with recruiter Parks, said he had 10 to 15 years of experience as a carpenter and made an appointment for later that same day. Bramlett filled out an application in Parks' office, and indicated that he was applying for a position as a carpenter or a helper and that he had 14 years' worth of experience in the trade. He did not indicate his union membership on his application, and he did not reveal his union membership during his application process, however, Bramlett refused to sign page 3 of his application, dealing with the Fair Credit Reporting Act and he left without signing his application.

That afternoon, Bramlett's wife, Anna, received a phone call from someone asking for Jay Bramlett. The caller first asked whether Bramlett was in Indianapolis, and then asked whether he "was in the Union." She replied that Bramlett was not in the

Union. Ms. Bramlett made a note regarding this telephone conversation, including the phone number of the caller recorded from their caller id, and left the note for Bramlett. The next morning, Bramlett called the number recorded off their caller id and confirmed that the call had come from Respondent.

Bramlett returned to Respondent the following Tuesday asked for Parks and then signed the application, which he had previously filled out. He thereafter called back on several occasions in late May and early June and was told no work was available and he was never offered employment.

In the Fall of 1995 a new group of organizers began their Youth to Youth program and several of them made attempts to obtain employment with the Respondent. On September 7, Ron Cornwell was given the Respondent's phone number by Van Gordon. He called, spoke with "Tom" (Sara) and identified himself as a member of the Union. Cornwell was told that the interviewer, "Larry," "was on vacation" and would contact him when he got back from vacation. Cornwell called Respondent again on September 11, and spoke with the receptionist, who took down Cornwell's name and told him that someone would call him back. Cornwell called again the next day and spoke with Larry. Cornwell said he was from the Union, and that he was interested in HVAC work. Larry told him that there "was no reason" for him to put an application in at that time because Respondent "didn't have any work."

Van Gordon also gave the Respondent's number to Stephen Hill who called on September 27. He told a woman named "Holly" that he was a sheet metal worker currently employed by "Local 20 Sheet Metal Workers Union" and that he "wanted to see if [he] could go put an application." Holly replied that Respondent "didn't have any positions available" that Respondent "normally only accepts application when there are positions" available, and to check the classified ads in the Indianapolis Star. He did not give his phone number or address. Hill had no further contact with Respondent. However, as a Youth to Youth organizer, Hill later obtained HVAC employment with Day and Night, Inc., a nonunion contractor, he worked for them for 3 months until the Youth to Youth program was over. He then continued to work for them for an additional 3 months.

Brady Piercefield called Respondent on November 2 and spoke to Holly. Piercefield said he was calling about a sheet metal worker's position and Holly transferred him to Paulen. Piercefield said he was an unemployed sheet metal worker and asked if Respondent had any work available. Paulen asked Piercefield how he had heard of Respondent, and Piercefield responded that he had a friend who knew about Respondent. Paulen asked for his name and Piercefield told him Dave Kent. Paulen asked how much experience he had and Piercefield told him 4 years. Paulen asked Piercefield if he still considered himself an apprentice, Piercefield said yes, and Paulen then asked several questions about his knowledge of the craft and then scheduled an interview for the next day. Nothing was mentioned in this conversation regarding Piercefield's union affiliation.

Piercefield did not wear any union insignia when he went to Respondent's facility, he did not mention his union affiliation on the application and did not reveal that he was then employed as a union organizer. Paulen interviewed Piercefield by asking

where he had previously been employed. When Piercefield answered Paulen said, "I take it that General Sheet Metal is a merit shop." Piercefield asked what a merit shop was, and Paulen replied that it was a nonunion shop. Piercefield then said no, that General Sheet Metal was a union shop but that he had been having trouble getting accepted in the Union's apprenticeship program and that he wanted to get out of it and get on with his life. Paulen then gave Piercefield a written test and Paulen told him that he had the skills to work for Respondent. Paulen told Piercefield that Respondent worked with over 150 contractors and that they currently had 83 employees. He then held up a stack of papers and said that he needed six more guys right away. Paulen said that he would put him to work doing sheet metal work and would give him laborer work during the slow times. Piercefield was told to call the following evening and that he would then hopefully have an assignment.

Piercefield called several days in a row and was told that they did not have any work for him yet. Piercefield called Paulen again on Wednesday, and Paulen assigned him to work for Metal Masters in Fishers, Indiana. Piercefield reported to Metal Master's jobsite foreman, Tim Morgan, on about November 7 and was put to work installing duct and VAB boxes. Piercefield worked all day without incident but the next day Piercefield recognized a high school acquaintance, Jeff Martin, who worked for Metal Masters. Martin said that he knew things had been working out well for Piercefield in the Union and asked what was wrong. Piercefield replied that things just had not worked out. Later that day one of the owners of Metal Masters, came to the jobsite and introduced himself to Piercefield and asked Piercefield how "Rick" was doing. Rick Baldwin is Piercefield's father in law and a long time member of the Union. Piercefield said he was fine, and the owner then asked how old Hale was doing. Jim Hale is a close friend of Piercefield's father in law and also a long time union member. Piercefield said he was also doing fine, and the owner grinned and walked away.

At the end of that day, the foreman told the employees to be at work the following Monday at 6:30 a.m. because they were going to 10-hour days to get caught up. He then told Piercefield that he needed to call Paulen. When Piercefield called he was told by Paulen that Metal Masters no longer needed him because the job was slowing down and to call later to see if any other work became available. Piercefield called Paulen on a couple of occasions after that but was always told that no work was available and he was never again sent out to work.

In the Fall of 1996, seven additional experienced Youth to Youth organizers called the Respondent seeking sheet metal jobs. During this period the Respondent ran an ad seeking: "Metal Bldg. Erectors & Siders", at least 2 year exp." "pre-engineered steel bolt-up and siding application skills and hand tools."

John Carmon called several times starting in October and spoke to the receptionist or Paulen. He indicated he was a Union organizer and was seeking either sheet metal or welding work (he had several years experience in different type of welding), but was told they had no available positions in those areas. Tony Eldridge and Kenny Miller went to the Respondent wearing union hats but were told the Respondent did not accept

walk in appointments. Miller left a resume, which noted his experience, and that he was a union organizer. He called back later that day, identified himself and was told the interviewer was busy and to call back again. Eldridge left a resume and also called back sometime in November when he saw the ad. He was given an interview with Paulen who asked if he was presently employed. Eldridge answered yes, with Local 20, and Paulen said he couldn't be placed because of their dual employment policy. Paulen said the ad was for architectural work, and asked him welding questions (Eldridge had indicated welding experience on his resume and on the phone). Paulen did not talk about the building erections ad but said he might have a welding position if Eldridge were to quit the Union. Eldridge declined but called back in December and was told the welding job involving pipefitters work, not sheet metal and was filled. Eldridge considered metal siding installation to be a regular part of the sheet metal trade and he had personal experience in erection and bolting siding and roofing on a new building prior to November 1996.

On October 30, Dorian Wilson called Respondent, identified himself as a union organizer seeking sheet metal work but was told that Respondent did not have any. He called again on November 18, spoke to Jeff and again was told Respondent was not hiring. Wilson called Respondent again after he saw a November newspaper ad seeking metal building erectors. Wilson once again identified himself and told the receptionist that he was calling about the ad and was transferred to Paulen who told him that the ad was not for sheet metal work but that he needed someone with experience in building pole barns. Wilson said he had experience in architectural, siding and panels, but Paulen said that was not what he was looking for.

In contrast to Carmen, Eldridge, Miller, and Wilson, organizers Lance Hale and Keith Beatty keep their union affiliation hidden when they answered the same ad seeking "Metal Bldg. Erectors ad." Hale was called for an interview on November 12 after he phoned in and stated he had experience in metal buildings and sheet metal work. Hale was interviewed by Paulen who asked about prior employers and his experience, and Hale indicated that he wanted to do sheet metal work. Paulen said he had some metal work coming up and to call him later to check on the status of that work. After calling two or three times, Paulen sent him on a job involving demolition and tearing down decking (work that is included in the sheet metal craft). After 1 week, the contractor informed him that he was no longer needed, and he went back to Paulen to get his next assignment. After calling about three times he was sent on a job at a hospital tearing down drywall. Hale only worked 4 hours before he quit. He called Paulen and told him that he was not a laborer and that he wanted to do sheet metal work and Paulen agreed to send Hale on a metal job. Hale called again and a few days later Paulen sent him on another job. No sheet metal work was involved and after he worked about 3 days, he left the site and went to Respondent's facility where he told an individual in the office that he was a union organizer and not a laborer and that if Respondent had any sheet metal to call him.

On November 11, Beatty spoke to Paulen and said he was calling about the job advertised in the paper. Paulen told him that the job had been pushed back and that he should call later.

After calling again on November 13 Paulen scheduled an interview for November 15. Paulen questioned Beatty about some of his prior employers and then told Beatty that he considered Respondent to be a nonunion hiring hall where he could pretty much be guaranteed year round employment. Paulen then told Beatty that he had a sheet metal job for him but that it was not available yet and that Beatty should call in later to check on its status. Beatty called the following Monday, was told the job still was not available but that he was being sent to a laborer job that was available. Beatty worked for 3 days doing general laborer work until he was told that he was no longer needed. Beatty then called Paulen several times after that but the sheet metal job was never available. Beatty was offered another laborer job, which he declined.

In mid December William Brian Shields was shown an ad at the union hall and he thereafter called the Respondent. He didn't recall the specifics of the ad but told "Jeff" that he was a union sheet metal worker and was responding to an ad and was seeking a sheet metal position but was told the Respondent wasn't accepting applications at that time. He said he had 6 or more years of welding experience but didn't remember or not if he said anything about a welding position on the phone.

In January 1997, Brian Mirowski called Respondent, spoke to a female and told her his name and that he was a union organizer looking for a job. He was told the Respondent was not hiring. On January 29, Russell Miller also called and spoke to a woman and told her his name, that he was from the Union and that he wanted to come in and fill out an application for the job Respondent had advertised in the newspaper (The old ad for metal building erectors). The woman told Miller that Respondent was not taking applications at that time. Miller called Respondent again 2 days later. This time he spoke to another female. He once again identified himself and said he was from the Union. He told her that he wanted to apply for the job that had been advertised in the paper. She also said that Respondent was not hiring at that time and that business was slow. She then told Miller that she did not know when business would pick up. Neither Miller or Mirowski were questioned about their skills or experience or to complete an application or have an interview.

The Respondent maintained some records (no records were kept for 1995 prior to March 25 and no specific interviews were recorded for 1997) that showed its recruiters interview scheduled for HVAC/sheet metal trade as follows:

TABLE A

DATE	EMPLOYEES	TRADE APPLIED	SHOW/NO.
04/25/95	Wright, Bob	SHME/Labor	show
04/25/95	Sims, Ronnie	HVAC	show
05/10/95	Moore, Tyrone	HVAC	show
05/10/95	Pierson, Gary	HVAC	show
05/11/95	Van Gordon, Mike	HVAC	show
05/23/95	Reed, Randell	HVAC	no
06/28/95	Ottenbacher, Tim	HVAC	no
07/05/95	Glenn, Joe	HVAC	show
07/07/95	Young, Aaron	HVAC	show
07/10/95	Honeycut, Paul	HVAC	no
07/10/95	Tice, Devin	HVA	show
07/13/95	Meisner, Steve	HVAC Helper	show

07/13/95	Taft, John	HVAC Helper	show
07/27/95	Polsgrove, Joe	HVAC Helper	show
07/28/95	Tyler, Vincent	HVAC	no
10/19/95	Villarreal, Jose	HVAC/ PLUAPP	show
10/24/95	Villarreal, Jose	HVAC/ PLUAPP	no
11/03/95	Piercefield, Brady	HVAC	show
12/06/95	Seller, Alan	HVAC/SHME	show
03/19/96	Johnson, Chad	HVAC	show
03/22/96	Conley, James	HVAC	show
03/22/06	Johnson, Chad	HVAC	show
04/01/96	Johnson, Kyle	HVAC	show
04/08/96	Nation, Earl	HVAC	show
04/19/96	Griffey, Russell	HVAC	show
05/17/96	Semancik, Steve	HVAC	no
06/10/96	Foxworthy, Rick	HVAC	no
06/12/96	Wolfe, Ken	HVAC	resched./no
06/12/96	Screen, Bill	HVAC	no
06/13/96	O'Connor, Gale	HVAC	show
06/17/96	Ridge, John	HVAC	no
06/27/96	Hechinger, Kevin	HVAC	show
06/27/96	Peacher, Keith	HVAC	show
07/12/96	Craig, Miles	HVAC	show
07/12/96	Alexander, Chip	HVAC	no
07/15/96	Pender, Jeff	HVAC	no
07/26/96	Campbell, Lloyd	HVAC	show
07/31/96	Collins, Mark	HVAC	no
08/01/96	Wright, Dan	HVAC	no
08/05/96	McQueen, Harold	HVAC	show
08/06/96	Franklin, Randy	HVAC	show
08/07/96	Azure, Scott	HVAC	show
09/03/96	Pender, Jeff	HVAC	cancel
09/03/96	McBride, Doug	HVAC	show

During mid-1997 several Youth to Youth organizers, each with 2 or more years of experience and apprenticeship training, contacted the Respondent in search of employment. Monty Shoulders went to Respondent's facility on March 28 wearing a union cap, asked the receptionist if he could put in an application for HVAC work and was told that they did not accept walk ins. In April, James Wilson phoned the Respondent seeking employment, identified himself by name and as an employee of the Union and was told the interviewer was busy and to call back later. Wilson called again 2 days later, after he saw ad Respondent ran in a local newspaper for general labor. This time Wilson spoke to a man, said nothing about his union affiliation but said he was calling about the ad. He was not questioned about his experience but was asked to come in and complete an application. Wilson filled out an application without revealing his union affiliation. He was interviewed by Paulen who asked what kind of work he was interested in. Wilson said metal work and Paulen told him that they currently had no such work but that if he got anything he would call Wilson or Wilson could check the newspaper.

On July 18, Charles Miller went to Respondent's facility with another union organizer, David Walker, who was wearing a union cap. After asking about an application, Miller was told by Cox that Respondent did not accept walk ins, and they left.

On July 18, Chris Meyers overtly contacted the Respondent and asked if he could fill out an application. The individual who answered the phone told Meyers that he would give his

information to Respondent's recruiter. Meyers left his name and phone number but no one from Respondent contacted him. Meyers called again a few days later after he saw Respondent's ad seeking laborers. Meyers spoke to Paulen and told him that he was calling about the general laborer ad. Paulen asked him how long he had been a laborer and Meyers said he was a union sheet metal worker. Paulen then said if the Respondent was looking for sheet metal workers, he would have run an ad for sheet metal workers and abruptly ended the call. Meyers called Respondent again on July 30, after he attempted to apply for work at Metal Masters and was told that they did their hiring through the Respondent. Meyers again spoke to Paulen and said Metal Masters had instructed him to call Respondent. Paulen said Respondent was not hiring any sheet metal workers and that he would run an ad if it needed anyone in that trade.

Shoulders, who had first called in late March, again called the Respondent on July 30, and identified himself to "Mike" with his name and as a union organizer looking for HVAC work. Mike told him that Respondent was not currently hiring in that craft and that he should watch the newspaper because Respondent would run an ad if it needed anyone. Shoulders then explained that he had contacted Metal Masters about employment and had been told that Metal Masters did their hiring through Respondent. Mike again said Respondent was not hiring and that Shoulders should watch the newspaper.

That same day James Holton overtly phoned the Respondent, told the woman who answered that he was looking for sheet metal or welding work and asked if Respondent was hiring. She replied that she was not sure. Holton asked if he could leave his name and number, and she said yes and Holton did so but no one from Respondent ever contacted him.

Tim Williamson also called on July 30. The phone was answered by Paulen and when Williamson said he was from the Union and that he was looking for employment, Paulen hung up the phone. Williamson called again 45 minutes later. This time Williamson introduced himself by name, said he was looking for employment, but he did not mention anything about the Union. The individual (not Paulen), who answered the phone asked Williamson how he had heard about Respondent, and Williamson replied that he had seen a newspaper advertisement. The individual then responded, "Oh, the ad for laborer," and Williamson said yes. Williamson was asked what kind of work he had done, and, he said he had been welding for about 5 years. He was asked what types of welding he had done, and after Williamson identified TIG, MIG, and Arc welding, he was asked to come in that afternoon to fill out an application. Williamson filled out an application, which omitted any reference to his union affiliation or employment, and was interviewed by Paulen who asked how he had heard about Respondent. Williamson again said that he had seen a newspaper ad. When Paulen responded that there had been no ad for welders, and Williamson explained that he had told the individual who answered the phone about his experience as a welder in response to the laborer ad. Paulen then said that he had four contractors at that point who would probably hire a welder and that Williamson should call him later.

Williamson called Paulen and was told that he still did not have any work and that Williamson should give him a couple

more days. When Williamson called back 2 days later, Paulen asked Williamson to come in for another interview. Paulen then gave Williamson an oral test of his welding skills and told him to call in at 5:30 p.m. When Williamson called back, Paulen told him to report to a manufacturing company the following day.

Williamson reported to the jobsite the next day and worked under the supervision of client employee Trent Meyers for 3 or 4 days. On August 22 he declared his union affiliation to the client. Williamson had been sent to the medical clinic by Meyer because Williamson of a serious burn from welding the previous day. Williamson informed Meyers that he was an employee of the Union and also went to Respondent's facility and told Paulen the same thing. Paulen then informed Williamson that he was discharged because he had falsified his application with Respondent.

On August 29, Williamson received a letter from Cox, which stated that Williamson's falsification of his application was not serious enough to warrant discharge and offered to reinstate Williamson. The letter gave a deadline of September 5, 1997 to accept the offer. The letter also incorrectly stated that Williamson had not reported to work at the client's facility on August 22. As soon as he received the letter, Williamson called Cox and set up a meeting for September 8. When Williamson arrived at the meeting, Cox informed him that Respondent's offer to reinstate him had expired on September 5. Williams asked Cox if he could get his job back with the same client and Cox said probably not. Williamson received another letter from Cox dated September 9. That letter, however, did not offer to place Williamson back in the same position he held before Paulen discharged him but said that Cox would "consider" reinstatement to the active roster of welders "subject to all relevant company work rules, policies and procedures. The dual employment policy was not specifically mentioned.

Once again, in the fall of 1997, another group of sheet metal apprentices, Youth to Youth organizers began to seek employment with various employers, including the Respondent. Charles Parsley called on September 9, Mark Moran on November 7, and Mike Crull on November 14 and each identified himself as a union organizer and asked if they were hiring for sheet metal positions (Moran also asked about a welding position), and if they could fill out an application. Parsley and Moran each spoke with Paulen who said if they were taking applications they would have run an ad and hung up the phone, Steve Peterson called on September 26 asked about HVAC hiring but did not say he was an organizer. He was transferred to Paulen who said they did some HVAC hiring and asked if he learned of the Respondent through a newspaper ad. Peterson said no, that he heard about them from an instructor at Ivy Tech. Paulen then asked Peterson about his background and experience, told Peterson that he did not have anything at that time but to call back next week (Peterson said nothing about his union affiliation), Peterson called back again on September 30 and again spoke to Paulen who said that he remembered him but that he still did not have anything available.

On November 12, organizer William Gary Rogers called the Respondent and spoke to Cox. He had heard from the Union that Respondent needed electricians, and as he had 8 years of

experience as an electrician before he joined the sheet metal workers Union, he asked Cox if Respondent had openings for an electrician. Cox said yes but that Rogers would have to call in later and speak to Paulen. Rogers said nothing about his union affiliation to Cox. Rogers called back later that day and spoke with Paulen asking if he had an opening for an electrician. Paulen then asked Rogers how he had heard about him, and Rogers replied that Cox had told him. Paulen asked Rogers about his experience, and Rogers told him that he had worked for Dodds Electric for 8 years. Paulen then questioned him further about what types of electrical work he had done and if he considered himself to be a journeyman electrician and Roger said yes. Paulen then asked where he currently was working, and Rogers said the sheet metal Union. Paulen laughed and asked whether Rogers wanted to do electrical work or sheet metal work, and Rogers said he did not care. Paulen asked what Rogers did for the Union, and Rogers said he was an organizer. Paulen told Rogers he would call him if he needed him. Rogers called Respondent again the next day and spoke to Paulen again. Rogers identified himself and asked if Respondent had any openings. Paulen again said he would call Rogers if he needed him.

A summary listing of all the alleged discriminatee and their application date (including several 1997 applicants who were not called as witnesses) is reflected in the following table:

TABLE B

<i>Discriminatees</i>	<i>Application Date</i>
<i>Position as Journeyman:</i>	
Michael Patrick	05/10/95
Gary Pierson	05/10/95
John Reese Jr.	05/10/95
Michael Van Gordon	05/11/95
<i>Position as Apprentice or Helper:</i>	
Jason Alumbaugh	01/23/95
James Alumbaugh	01/13/95
Donald McQueen Jr.	03/09/95
Morris Pauley	03/09/95
Brian Stout	03/10/95
Bobby Wright	04/25/95
Gabriel Booking	05/11/95
Aaron Dailey	05/11/95
Ronald L. Cornwell Jr.	09/07/95
Stephen M. Hill	09/27/95
John A. Carmon	11/13/96
Dorian J. Wilson	11/18/96
Tony A. Eldridge	11/20/96
Kenneth E. Miller	11/20/96
William Brian Shields	12/19/96
Russell Dean Miller	01/28/97
Brian C. Mirowski	01/31/97
Mark A. Chittum	03/04/97
Monty D. Shoulders	03/28/97, 07/30/97
Johnthan D. Holzinger	04/03/97
Donald A. Walker	04/03/97
James L. Wilson	04/10/97

Corey A. Stein	05/27/97
Christopher H. Meyers	07/18/97, 07/21/97
Charles W. Miller	07/18/97
David A. Walker	07/18/97
James Holton	07/23/97
Charles Parsley	09/02/97
Mark Moran	11/07/97
William Roger	11/12/97
Michael Crull	11/14/97
Kurt Tucker	11/14/97

III. DISCUSSION

This proceeding primarily involves the Respondent's apparent refusal to hire or consider for hire applicants who had mid-level or better skills and experience in the field of Heating, Ventilation and Air Conditioning (HVAC), applicants who also were affiliated with the Sheet Metal Workers Union whose members are trained to perform the full range of skills and functions involved in the HVAC field. Other principal issues concern the validity of the Respondent's alleged dual employment policy, its discharge of union activists, and certain related unfair labor practice allegations, including alleged illegal inter-rogations and antiunion statements by the Respondent.

A. Refusal to Consider or Hire Criteria

The Board endorses a causation test for cases turning on employer motivation, see *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *NLRB v. Transportation Management Corp.*, 103 S.Ct. 2469 (1983). The foundation of Section 8(a)(1) and (3) "failure to hire or consider for hire" allegations also rest on the holding of the Supreme Court that an employer may not discriminate against an applicant because of that person's union status, see *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-187 (1941). At the hearing, I also informed the Parties that, I would evaluate the record in light of the decision in *Norman King Electric*, 324 NLRB 1077 (1987), affirm 177 F.3d 430 (GCA) (1999), and the test set forth in *Fluor Daniel, Inc.*, 304 NLRB 970 (1991) and *KRI Constructors*, 290 NLRB 802, 811 (1988) and cases cited therein.

As noted above and as addressed by the parties in their supplemental briefs, the Board issued its decision in *Thermo Power*, supra, sets forth a modified framework for analysis of cases involving alleged refusals to hire or consider for hire based on union activity or membership and the Board held that this new framework would be applied to all pending cases, in whatever stage. In *Thermo Power*, the Board held that in order to establish a discriminatory refusal to hire, the General Counsel must first show:

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

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

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

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

B. Refusal to Consider

The General Counsel has detailed how the numerous job applicants listed in Table B, above were excluded from the Respondent's hiring process. Specifically, in January, 1995 Jason and James Alumbaugh responded to the Respondent's newspaper ad for HVAC installers, filled out applications and were interviewed by the Respondent's recruiter. Both the applications and the interview disclosed the applicants' status as sheet metal union apprentices and Youth to Youth organizers. Although the interview ended with a comment that the recruiter "would set back" to them, neither was contacted. Thereafter, the Respondent periodically ran other ads and, periodically, other union organizers filled out applications overtly indicating their union affiliation or attempted to apply, while overtly disclosing their status as union organizers. The specific circumstances of each interaction between the applicants and the Respondent are described above. In summary, approximately 11 such overt applicants contacted the Respondent in the first half of 1995. Conversely, in May 1995, organizers Young and Tice covertly (without disclosing their union status or background), responded to the Respondent's newspaper ads, were interviewed hired, and assigned to work for clients. Organizer Piercefield also applied covertly in November 1995, and was hired and sent to work at Metal Masters. Between mid March and August, 1995 the Respondent hired four other nonunion HVAC helpers or apprentices and one journeyman. One apprentice, Joseph Polsgrove, (who was described as having "limited" sheet metal experience), quite client Post Road without notice after working only a few days. In September, however, two overt attempts (by Cornwell and Hill) to file application for HVAC jobs were rejected out of hand, despite the fact that there was an apparent vacancy as Polsgrove had quit shortly before.

In the fall of 1996, seven experienced Youth to Youth organizers sought to apply for sheet metal related jobs. At that time the Respondent had placed an ad seeking "Metal Bldg. Erectors and Siders," 2 years experience and bolt up and siding application skills. Two organizers, Hale and Beatty, applied covertly were interviewed by Paulen, and were sent out on general laborer type jobs while obsentively waiting for the building erection job (or other sheet metal jobs) to become available. In contrast, the other applicants applied in a manner which overtly identified their union status and none were interviewed except Eldridge, who was told he couldn't be placed because of the Respondent's dual employment policy but that he might be placed in a welding position if he quit the Union.

After the Fall of 1996, the Respondent refrained from seeking or interviewing for specific HVAC/sheet metal positions

and, when two overt applicants contacted the Respondent in January 1997, they were told the company wasn't hiring or taking applications at that time.

Between March and July, 1997 six Youth to Youth organizers contacted the Respondent. Four of them were overt in their approach and were not given interviews. Also, Wilson was told the interviewer was busy when he first called overtly (a few days after one of the other overt applicants), but when he called several days later for a labor ad and did not say anything about his union affiliation, he was called in for an interview. He made no overt disclosure of his union status but, after being questioned about what kind of work he was interested in and replying "metal work," he was told they had none. After several other organizers had called the Respondent overtly in July, Williamson also called said he was from the Union and looking for work but the Respondent hung up the phone without further comment (before he identified himself by name). He called again, stated his name but nothing about the Union. He referred to an ad, (which the Respondent assumed to be its ad for laborers), was questioned about his experience and, after indicating that he had some welding experience, was told to come in and fill out an application. He was interviewed by Paulen, who said he had four clients who would probably hire him as a welder. After a further interview and a test of his welding knowledge, he was sent to work for one of the Respondent's clients.

In the fall of 1997, another group of sheet metal apprentices, Youth to Youth organizers sought employment with the Respondent. Parsley called on September 9, Moran on November 7, and Crull on November 14. Each identified himself as a union organizer and asked if they were hiring for sheet metal (Moran asked about a welding position) and if they could fill out an application. Each was told that if they were taking applications they would have run an ad and the phone was hung up. Peterson, however, called covertly on September 26 asked about HVAC hiring and was transferred to Paulen who said they did some HVAC hiring and asked if he learned of the Respondent through a newspaper ad. Peterson said no, that he heard about them from an instructor at Ivy Tech. Paulen then asked Peterson about his background and experience, told Peterson that he did not have anything at that time but to call back next week. Rogers called on November 12 but asked about opening for an electrician (the sheet metal union affiliation initially was not disclosed). Manager Cox, indicated they had openings and referred him to Paulen who interviewed him on the phone, however, when it was disclosed that Rodgers currently was working for the sheet metal workers Union, Paulen discontinued the interview and told Rogers he would call him if he was needed.

In addition to showing that these applicants were excluded from the Respondent's hiring process, the record shows that antiunion animus contributed to the Respondent's decision not to consider these applicants for employment. The General Counsel's showing regarding antiunion animus is especially strong and is highlighted by the tape-recorded conversation of carpenter Jay Bramlett (who, using an alias, was covertly acting the role of a merit shop contractor who was interested in dealing with the Respondent and in doing business in the Indian-

apolis area) who was speaking with Respondent's field representative Paulen on May 10, 1995.

Paulen answered Bramlett's question if there would be problems with the unions with the following relevant comments:

Um, well we do I mean in some ways, they try to organize us sometimes but basically what we deal with is non-union contractors only. We deal with merit shop people only. And basically, so basically what we're doing is running a union hall for nonunion people. I mean what it's like. They don't like it very well because we get a lot of good guys because we run ads all the time and we get a lot of good guys. They'll send a union guy in here every once and a while trying to make us hire him and send him out on a certain job you know so they can try to organize the company. But we ah, yeah we have our ways of definitely screening them out. We don't send those guys out if we can help it. They usually stick their foot in their mouth some way so we don't have to send them out. Because legally you know they can come in and just apply just like anybody else and if we hire one guy and not them then they can you can try to legally sue us or whatever.

Like I said if you were a union contractor of course you probably wouldn't be calling me. But yeah we deal with non-union only. Our company president just can't stand the union whatsoever.

Yeah. I mean that's basically one of the reasons he started this up. Because I mean he knew that he could work it, you know get some real good guys, get a good labor pool of guys, send them out to the contractors that needed them and basically you know kind of undercut the union's prices and you know still have some real quality work.

Shannon Park served as the Respondent's recruiter in May 1995, however, he was terminated and replaced by Paulen in July 1995. After July, Paulen continued to act in a manner consistent with his earlier statement to Bramlett and he continued to engage in recruiting duties and he often spoke with or interviewed the applicants discussed above, including the last noted phone interview with applicant Rogers in November 1997. Rogers was being considered for an electrician's position but when Paulen discovered Rogers was with the sheet metal workers Union, he laughed and terminated the interview. There is no showing that the Respondent refuted Paulen's words or opinions at any time and, to the contrary, is had effectively endorsed his comment by its actions in retaining Paulen in his sensitive recruiting position throughout the period covered in this proceeding. Otherwise, the actions of Paulen and other supervisors who have dealt with the various applicants discussed herein tend to be consistent with Paulen's quoted explanation of the Respondent's method of operation. Some of these actions, including the statement to an applicant by manager Denkelbarger, that the company was "happy being nonunion" and the union applicant was "wasting his time," are discussed further in the following section and they reinforce the antiunion animus demonstrated in Paulen's remarks. Under these circumstances I find that the General Counsel clearly has shown that antiunion animus contributed to the Respondent's decision not to consider the applicants named in Table B.

C. Refusal to Hire

The framework of the *Thermo Power* criteria, supra, impliedly presupposes that the General Counsel must develop the record to show that an individual files or attempts to file a valid employment application, that the applicant somehow disclosed his union affiliation in a manner that demonstrates actual or probable knowledge of the applicants' union sympathies by the employer and that the employer refused to hire or consider the individual for hire.

Here, except for the Youth to Youth organizers who covertly applied for jobs and intentionally did not disclose their union affiliation, all of the other applicants for employment revealed their union membership and status as union organizers either on the face of their applications, by introduction when they contacted Respondent by telephone, or when a few of them were interviewed. I find that the Respondent, through its agents and supervisors, clearly had knowledge of their union status and in several cases raised this status as a specific reason for not considering or hiring these applicants because of a claimed conflict with its asserted "dual employment" policy.

Clearly, the record shows that the Respondent placed newspaper ads and interviewed applicants (see Table A) for sheet metal positions, that it told applicants it had clients or anticipated jobs, and that it hired and assigned numerous applicant (see Table C) at the same time "overt" union applicants were not hired. The record also shows that the Respondent was in business during 1995 through 1998, that it recruited workers and, after interviews and selection, it maintained a listing of available workers in various trades. It periodically advertised for workers including those experienced in the HVAC skills and it hired approximately 20 individuals who had no apparent union affiliation for HVAC related positions as reflected in the following table:

HVAC positions filled March 1995 through (j) journeyman, (H) helper, (A) apprentices, (SM) service mechanic and (L) laborer:

TABLE C

<i>SENT OUT</i>	<i>NAME</i>	<i>POSITION LISTED</i>	<i>ASSIGNMENT</i>
03/17/95	Ted Kasprowski	J	Initially as L, Metal Masters
03/17/95	Aaron Johnon	H	
03/24/95	Troy Radcliffe	H	
04/21/95	Cristopher Smelcer	A	H Metal Masters
06/30/95	Gerry Clubs	L	HVAC Jobs Metal Masters 6-30-95 & Post Road 6-15-95.
07/07/95	Joseph Glenn	J	SM
07/21/95	Stephen Misner	A	J & A Metal Masters
08/04/95	Joseph Polsgrove Jr.	H	A, Post Road
07/14/95	Aaron Young	H	SM, Metal Masters
07/21/95	Devin Tice	A	Post Road
11/10/95	Brady Piercefield	H, A	Metal Masters
03/15/96	Kevin Hilliard	A	Metal Masters
03/29/96	Chad Johnson	J	J&A Metal Masters

03/05/96	Earl Nation	J	Some as A
04/05/96	Kyle Johnson	H, A	Metal Masters
04/26/96	Arvil Russell	J	Worked Only Briefly
06/21/96	Philip Kelly	H, A	
07/19/96	Miles Craig	H, A	Sent Out a Plumber, HVAC in August
08/16/96	Randall Franklin	J	Out as Plumber, SM Thereafter
07/26/96	James Bartlett	J	Out as Plumber, SM Thereafter
08/18/97	Tim Williamson	Welder	Welder

The Respondent's activities are those of employment agent and thus employees are first hired by the Respondent and placed on the list as being available for assignment. Second, they are sent to one of the Respondent's clients for an actual work assignment. Thus, as indicated on the record, the Respondent sometimes interviewed and hired applicants and placed them on its "available" list as HVAC journeyman or helpers (or in other trades), and then sent them out to fill spots for clients not only in their listed available position but also as laborers or in other trades, including welders.

As indicated by the General Counsel, two independent companies can be joint employers where one employer "while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer," citing *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1123 (3d Cir. 1982). Here, the Respondent initially hires employees but they are not working or paid until they are assigned to a labor-leasing client, such as Metal Masters, and Post Road Mechanical, who supervise and direct their work. However, they remain employees of Respondent, and are paid exclusively by Respondent who also established their rate of pay. Accordingly, because Respondent "shared" with Metal Masters and Post Road Mechanical the essential terms and conditions of employment of its employees, Respondent formed a joint employer relationship and the Respondent should be held jointly and severally liable with the other employers to remedy the unfair labor practices found herein,⁴ see the Board's recent decision in *Skill Staff of Colorado*, 331 NLRB 815 (2000).

Here, the record shows that the Respondent was hiring employees for its available list and that it had numerous clients (using persons in various trades), to whom it regularly leased employees to perform work in a joint employer relationship. This occur continuously during the timeframe when it also refused to hire the alleged discriminatees and I find that the General Counsel has satisfied the Board's first refusal to hire criteria.

Consistent with the second *Thermo Power* criteria the General Counsel has demonstrated that the alleged discriminatees had "experience or training relevant to the announced or gener-

⁴ As noted above, the cases involving Metal Masters, Inc. and Post Road Mechanical, Inc. were settled prior to hearing, and the Complaint allegations against them were severed from the Consolidated Complaint by motion of the General Counsel.

ally known requirements of the positions for hire. . . ." Four of the applicants (Pierson, Patrick, Reese, and Van Gordon), are shown to be experienced journeymen sheet metal workers who would be able to match the requirements apparently established for the Respondent's same classification and would match up with several of the positions for journeymen on the Respondent's availability list or the higher level of experience at times required by some of the Respondent's clients. Moreover, manager Dunkelbarger also specifically told Pierson and Van Gordon that he considered them to be very experienced for the position. The other applicants were apprentices with at least 2 and often 3 years of experience and apprenticeship training and often had specific skills in welding or in architectural or "pole building" type work that clearly would qualify them for hiring, listing and assignment as helpers, apprentices or other related HVAC positions. Otherwise, the suitability of these apprentices for successful assignment to the Respondent's clients is proven by the actual assignment and positive work experience of the several union apprentices who were covert applicants and who went on job assignments and met the requirement of Respondent's clients. See *Fred K Wallace & Son, Inc.*, 331 NLRB 914 (2000). In contrast, the record shows, among other examples, that one nonunion applicant was hired, listed as a HVAC journeyman and set to client Led Mechanical as a HV service mechanic but was let go because he repeatedly showed up drunk on the job. Other nonunion applicants also worked only briefly despite the Respondent's recruiter's evaluations and expectations.

As noted in the previous section the General Counsel clearly has shown antiunion animus that is applicable to both refusal to hire and refusal to consider and, accordingly, I conclude that the General Counsel has met its initial burden for both refusal to consider and refusal to hire and the burden now shifts to the Respondent.

D. The Respondent's Qualification Defense

Once the General Counsel affirmative has met the newly codified *Thermo Power* criteria and met its initial burden, the burden then shifts to the Respondent to show that it would not have hired (or considered for hire), the applicants even in the absence of their union activity or affiliation. If the Respondent asserts that the applicants were not qualified for the positions it was filling, it is the Respondent's burden to rebut the General Counsel's initial showing in this regard and to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity. The issue of whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits. This subject was addressed extensively on the existing record and the Respondent's supplemental brief does not directly address this defense in detail, however, it otherwise was argued directly in its initial brief.

The Respondent does argue that it presented evidence concerning the specific qualifications it required for journeyman sheet metal/HVAC and welder openings and that it has specific

qualifications for HVAC installers and HVAC service techs in the helper, apprentice and journeyman classifications. It contends, however, that it did not fully develop the factual record “concerning the general and specific qualifications for the various jobs at issue and, more importantly, concerning each alleged discriminatee’s general and specific qualifications at the time of application.” Consequently, it requests that the record be reopened to permit additional evidence on the issue of applicant qualifications, both general and specific.

The employment records of persons who were hired (see Chart C above) reflect printout listing of their asserted skills and employment history. Thus, its records for one individual who was listed as a journeyman and was assigned to Led Mechanical as a HVAC service machine for the pay weekend history of July 7, 1995 show that he had field experience but “had no special training.” It also shows that this individual was released on July 26 by the client “for repeatedly showing up on the job drunk.” Another person hired for the March 24, 1995 pay period as a helper and sent to Crossroads is described as attending a trade school in the evening. Respondent’s notes shown that thereafter he frequently left the jobsites where he was supposed to be working, was involved in apparently falsifying timecards, was called by the Respondent and threatened with legal action and was terminated. This sample of the Respondent’s records shows that the existing record has information touching on the subject of the qualifications of those it actually hired, and it does not seek further hearing for amplification of the qualification of those that it did hire.

Turning to the qualification of the alleged discriminatees at the time of their applications, the Respondent wants reopening to permit “both general and specific” additional evidence but it does not hint at what this evidence would be or how it would supplement the testimony given at the hearing on both direct and cross examination. The record shows how the Respondent’s interviewers often elicited some specific objective informalizing on qualifications (especially as they related to welding), but it also shows that interviewers sometimes relied on generalized subjective information and there is no indication that the Respondent had a clearly demonstrated practice that would somehow show that the Respondent would have relied upon some uniformly adhered to practices in differentiating between the qualifications of HVAC position applicants, especially helpers or apprentices with 2 or 3 years experience. Here there is no showing that the reopening of the record would lead to the introduction of meaningful, relevant information. Clearly, the Respondent’s recruiter would not have had more information than that which he acquired for the covert applicant it did hire. Thus, subsequently developed qualification information developed by counsel’s in depth interrogation would not develop relevant information that would relate to on applicant’s qualifications as actually evaluated in practice and it would merely be a vehicle for “a fishing expedition” that would burden the record with speculative, useless information.

The Board’s decision in *Thermo Power* does not significantly alter years of precedent in cases of this nature. It does not grant a Respondent a license to insist on the admission of irrelevant information. Mere argument about minutia of qualifications in the face of the Respondent’s history or assigning

nonunion applicants on the basis of generalized job requirements would not assist the record. Here, I conclude that reopening of the record would engender argument, not relevant information and it would needlessly burden an already cumbersome record and, accordingly, the Respondent request is denied.

This ruling leads to a related issue and the subject of welding positions and qualifications and evidence related to this subject. The principal events on which this proceeding is based concern sheet metal/HVAC positions. It also is based on actions which occurred primarily in 1995 when the first, timely change was filed, however, the Respondent engaged in subsequent conduct, including events that stretched into late 1997, which generated further charges but no active trial in these matters was started until the fall of 1999, after a final consolidated complaint was issued in April 1999. At the hearing, I attempted to limit the scope of the proceeding by ruling that the production of certain subpoenaed materials pertaining to welding positions would not be relevant. Otherwise, however, some evidence came out of during testimony, especially that of covert applicant Williamson, which indicated that the Respondent sometimes had clients who needed welders and that welding is one of the skills included in the training and experience of sheet metal workers.

Williamson first attempted to apply overtly for sheet metal work but did not give his name. He gave his name in a second call but did not disclose his union affiliation. When he referred to an “ad” the Respondent’s agent said “oh, the ad for laborer,” and, when questions brought out that he had welding-experience he was interviewed more extensively, hired and assigned out as a welder. He thereafter disclosed his union affiliation and was terminated, as discussed below. I find that under these circumstances, the limited welding related evidence of record is sufficient to rule on matters pertinent to the legality of Williamson’s discharge, however, it should not be used as a vehicle to needlessly open a can of worms and tangentially follow a new course of action well beyond the basic charge involving the refusal to consider or to hire for sheet metal/HVAC positions. This would only detract from and delay consideration of the main issue.

The record also shows that in April 1995, McKinney applied covertly for sheet metal work, was interviewed and told no sheet metal jobs were available but that he could be put to work as a laborer. The Union thereafter instructed him to not accept that assignment and it otherwise appears that the Union’s interest is in having members in jobs in the mainstream sheet metal field, to organize such workers and not to work or organize in other crafts.

The fact remains that the Respondent was willing to consider nonunion and covert applicants for placement in positions outside of the sheet metal field at the same time that it was denying this same consideration to overt union applicants (in contrast to Williamson, overt applicant Carmon asked for a sheet metal or welding position but was told no such positions were available), and this is an element of the record that contributes to the General Counsel’s showing of antiunion animus. It also contributes to an evaluation of the pretextual nature of the Respondent’s defense but it does not require findings or determination relative to the *Thermo Power* criteria or to the backpack, in-

stallment, hiring or consideration of applicant in welding positions. Accordingly, the record need not and will not be developed further in this area and otherwise, my prior evidentiary rulings are reaffirmed.

E. Dual Employment

The Respondent's Field Employee Policy Manual contains a rule which assertedly prohibits employees from being employed by any other organization while they are employed by Respondent. The policy states that employees are "not to engage, directly or indirectly either on or off the job, in any conduct which is disloyal, disruptive, competitive, or damaging to the Company," conduct which specifically includes, but is not limited to "employment with another employer or organization while employed by Tradesmen." General Manager Cox testified that under this policy no paid union organizer would be allowed to be employed by Respondent unless the organizer first quit his position with the Union. This dual employment policy was the only specific reason offered by Respondent for its discharge of discriminatees Young and Tice.

Cox gave three reasons for the Respondent's policy. The first was that Respondent employees needed to be available to its customers at all times, second, Respondent believes that safety problems will increase if an individual works more than one shift, and lastly, Respondent attempts to maintain good customer relations by following through on its commitments to send an employee to a customer which could be difficult if the employee in question has a second job. He also testified that a "paid" union organizer would have to quit their union position before he could be employed by the Respondent; regardless of any assurances that the position would not conflict with his job duties for the Respondent or a client. When first questioned at the October hearing, Cox was not familiar with the Respondent's policy regarding paid members of the military reserves but expressed the belief that the Respondent would consider any other job for compensation to be dual employment. In the January hearing Operations Manager Sara (who was hired by owner Joe Wesley in 1993 and subsequently helped put together the policies and procedures manual in his position of quality assurance manager), agreed that the policy made no difference what kind of job or who the second employment was with but noted that the Respondent's policy was amended sometime after 1994 to acknowledge its asserted compliance with the Uniformed Employment and Re-Employment Rights Act of 1994 (USERRA) 38 U.S.C. § 4311.

Under this law employers may not deny employment, re-employment, retention in employment, promotion or any other benefit of employment because of past or present membership in the armed forces or intent to join the military. This applies to active and reserve service, whether voluntary or involuntary.

Despite its self serving policy acknowledgement of the USERRA it is apparent that Respondent's supervisors were unaware of its ramifications and legal requirements and it does not appear that employees or prospective employees were given any explanation of its applicability. It also appears that its staff supervisors were not inclined to be familiar with or to accept its requirements and it appears that a similar approach was taken to employee rights under the National Labor Relations Act.

Otherwise, the evidence does show that the Respondent sometimes advised employees of its dual employment policy during the orientation phase of its hiring process, however, several witnesses credibly testified that no mention was made of any dual employment policy. It appears that this policy began to be mentioned only after the Respondent experienced the initial round of Youth to Youth applications and it further appears that the policy was applied in response to and as a way of dealing with unwanted union affiliated job applicants.

As noted by the General Counsel, in 1996 the Respondent conducted training for the recruiters in all of its field offices nationwide. The recruiters were given a document entitled "Lawful Strategies for Detecting and Diffusing Union Salting Campaigns," a 23 page document which contains a variety of advice as to what an employer should do in order to prevent its employees from becoming unionized. This including union salting efforts and, after stating that neutral hiring policies should be adopted it proceed to comment under "Policies Against Simultaneous Employment And "Moonlighting", that, "The Associated Builders and Contractors has recommended its members adopt a uniform policy against outside employment."

The General Counsel also presented the testimony of two of the Respondent's nonunion employee in other construction trades that shows that when employees other than union organizers were involved, the Respondent selectively applied its policy only to moonlighting situations where it would conflict with the businesses of its customers. Thus, it is shown that Norman Ellis, was an electrician employed by Respondent between August 1997 and February 1998. Respondent knew that Ellis had another job wiring a house but told him that as long as the work he was doing did not take work away from Respondent's customers, there would be no problem. Also, Christopher Robison was an electrician who worked for Respondent for 2 or 3 months in 1997. Robison told Paulen that he had a Master's License and occasionally did side electrical jobs and Paulen told him that as long as the jobs he was performing did not take work away from Respondent's customers, there would not be a problem.

Conversely, the record shows that after alleged discriminatees Tice and Young disclosed they were union organizers, they were discharged pursuant to Respondent's dual employment policy, without any claim that their work was affected or that work could be taken away from their clients. At that time the Respondent did not know any specific union duties youth to youth organizers had to perform (other than the announced plan to exercise their section 7 rights, activity which is the right of any employee unpaid or paid), however, at the hearing it was disclosed that organizers were expected to fill out and turn in daily log or report sheets, activities that required only a few minutes time, after work.

Here, I find that after the apprentice Youth to Youth union organizers in this proceeding (as distinguished from full time paid staff organizers or business agents), sought and obtained jobs with nonunion contractors and began to receive wages from the Respondent, they then had their nonunion wage rates subsidized to make up for any loss in pay. I also find that their status as paid, union "salts" does not create some type of improper conflict of interest or any true dual employment situa-

tion and it also does not vitiate their entitlement to protection from discrimination as found by the Supreme Court in *NLRB v. Town & Country Electric*, 116 S. Ct. 450 (1995), see *M.J. Mechanical Services*, 324 NLRB 812 (1997).

Here, the Respondent has substituted its own preferred and most convenient interpretation of what could be dual employment, regardless of any actual or meaningful real conflict with other employment, it has done so specifically in its dealings with union affiliated applicants and I find that it has not shown that it had a legitimate reason for this decision or that it would have utilized a moonlighting rule if not faced with a union organizing drive.

Organizer Van Gordon was a full time regular staff union organizer and applicants Pierson, Patrick, and Reese were full time union business agents as well as experienced journeyman sheet metal workers. Pierson was interviewed jointly by Parks and Dunklebarger on May 10, 1995 after responding to an ad. He disclosed his current employment but nothing was said by the Respondent about dual employment policy. The next day Van Gordon was interviewed by Dunklebarger. Both Van Gordon and Pierson stated that they worked hard on company time but would attempt to organize before and after work. Shortly thereafter Patrick and Reese called and identified themselves and were told the position was filled or that HVAC applications were no longer being accepted and were not told dual employment was a policy or problem.

Although the dual employment situation involving the regular, full time union employee organizers is arguably different than that of the Youth to Youth organizers, these four persons applied before the Respondent began to assert this policy as a reason for its refusal to consider or hire, union organizers. None of these four journeymen were appraised of its dual employment rational at the time they sought employment, and, in fact they were given different or no meaningful reasons for not being considered or hired, accordingly, it is inferred that its subsequent reliance on dual employment as a justification for its action is pretextual.

The record also shows that the Respondent has used its dual employment policy inconsistently and it can be inferred from the admissions of Paulen, the background of its policy and the timing of its reliance upon this rational (after Youth to Youth organizer applications became an annoyance), that its broad and strict application of the policy to union affiliated applicant was motivated by the Union's activities and not by any legitimate business concerns. The net effect of its reliance upon this policy leads to the conclusion that it is a practice designed to preclude consideration of an entire class of applicants. Accordingly, it shows discriminatory conduct that is inherently destructive of important employee rights, see *Great Dane Trailers*, 388 U.S. 26, 34 (1967).

As pointed out by the Court in *Transportation Management Corp.*, supra:

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

Here, the General Counsel's strong showing is not overcome by the Respondent's perfunctory reliance on a paper policy against dual employment. The policy was motivated by the recommendation of a nonunion contractors association, which specifically suggested a no-moonlighting policy as an antiunion tactic. This policy was not enforced as a regular, practical matter, even when the Respondent was faced with a direct moonlighting situation, as with nonunion employees Ellis and Robison. Although manager Sara asserts that the Respondent terminated employee Joseph Lloyd because of this policy, Lloyd's employment record with the Respondent, (noted by Sara and Paulen), contain the following entries:

07.05.95-11:54-LDP-SPOKE TO JOE ON FRIDAY 7/14/95 AND HE RELATED TO ME THAT HE NEEDS 2 TO 3 WEEKS OFF TO FINISH SIDE WORK IN REDKEY AREA. IS VERY INTERESTED, HOWEVER, IF WE GET SOMETHING SOONER IN THE ANDERSON OR MUNCIE AREAS. POSSIBILITY WITH T W CORP.

07.12.95-17:49-TDS-NEEDS A FEW DAYS OFF TO TIE UP SIDE JOBS, HE WILL CALL US ON FRIDAY 07.14.95 TO LET US KNOW ABOUT WORK ON MONDAY.

The Respondent's records show his status as "inactive" rather than "terminated," a classification noted on records of some other employees. This document clearly shows a tolerance of moonlighting or dual employment even when the Respondent is fully aware of it. Otherwise, the employer appears to apply the policy on a "don't ask, don't tell" basis and I find that it is pretextually used to automatically disqualify union applicants.

An employer has no legal right to require that, as part of his or her service to or employment with the company, a worker refrain from engaging in protected activity see *Ferguson Electric Co.*, 330 NLRB 514 (2000), citing *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995).

While an employer may promulgate and enforce a valid dual employment policy for legitimate, nondiscriminatory reasons, it cannot have an overly broad policy that is designed to or results in the prohibition of an employee from, for example, service in the National Guard or Reserve forces of the United States or prohibits membership in a union apprenticeship program which requires participant to spend some time in organizational type activities. Here, the job related activities of paid organizers would be no different than those of any other prounion applicant/employee who (as asserted by each alleged discriminatee), would have performed the job duties assigned and controlled by the employer during working time and in work areas but who were unlawfully attempted to organize fellow employees during nonworking time in nonworking areas.

Here, the Respondent has shown no persuasive reason for the existence of an unqualified, broad dual employment rule and, under these circumstances I find that the application of its dual operations policy in based upon arbitrary and invidious considerations. I further find that the Respondent has shown no legitimate basis for an over broad dual employment policy and I conclude that its reasons are pretextual and fail to persuasively rebut the General Counsel's showing, see *Tualatin Electric*,

Inc., 319 NLRB 1237 (1995). Accordingly, I find that its dual employment policy violates Section 8(a)(1) of the Act, as alleged.

F. Summary, Refusal to Hire/Consider

The Respondent points out that it did not interview for HVAC positions after September 3, 1996, and that prior thereto there also were time frames when it denied interviews to both convert and overt applicants and it contends that this somehow rebuts the General Counsel's showing of animus. As noted above, other factors and the totality of the record overwhelmingly support the conclusion that the General Counsel made a strong showing of antiunion animus and I find that the Respondent has failed to persuasively rebut the General Counsel's showing in this regard. The Respondent's program of employee recruitment and resulting hiring decisions are not based on a misunderstanding of the law but on a calculated plan to circumvent the law to the greatest extent possible, in order to provide a clientele of nonunion contractors with employees who will work without the benefit of union negotiated wages, benefits and conditions of employment. As noted by the Court in *Town & Country Electric v. NLRB*, 106 F.3d 816 (8th Cir. 1997), an Administrative Law Judge properly may use an employer's attitudes about unions as one factor in evaluating the record and drawing inferences regarding the employer's motivation. Here, the unrefuted record shows that the company's supervisors operated with the belief that the company's highest official "just can't stand" unions. Here, it is clear that antiunion consideration motivated its employment policy and practices that provide for and result in an embargo against the employment of union labor.

The Respondent has described itself as a hiring hall for non-union employees, however, this concept does not allow it to operate in a manner based upon arbitrary or invidious considerations. Clearly, an exclusive union hiring hall cannot discriminate against individuals who *are not* members of a particular local union, see for example, *Electrical Workers Local 3 (Fairfield Electric, Inc.)*, 331 NLRB 1498 (2000), and, in a similar vein, an employer may not arbitrarily and discriminatorily engage in exculpatory hiring policies against individuals who *are* members of a local union.

I also find that the Respondent has failed to rebut the General Counsel's clear showing that it failed to hire overt union applicants for placement on its listing of workers available or for assignment to a client or to show that it would not have considered overt union applicant for interview and listing event in the absence of their union status. In many instances, overt applicants were not considered and were not hired during the same general time period when it was hiring or interviewing other individuals for positions for which it anticipated a client demand. It also advertised its needs at various times and it also told various applicants about its asserted needs for employees in various trades. As noted by the Charging Party, the Respondent did not have a consistent 90 day valid application policy or a consistent policy of not calling applicants and it called one inactive carpenter after 2 years. Also, despite an admitted practice by manager Sara of sometimes reviewing past applications to fill a vacancy, the Respondent incurred the cost and time of

placing newspaper ads and did not attempt to call, consider or hire union related applicants.

I infer that after September 1996, when several union organizers resumed efforts to contact the Respondent seeking employment, it made a decision to avoid pursuing clients who needed HVAC workers and it refrained from advertising for sheet metal workers. It did, however, have existing clients, including Metal Masters, and prospective clients who needed workers with some of the skills possessed by the overt applicants (in September, 1997 Paulen told a covert applicant who said he was referred to Respondent by an instructor at a technical school, that the Respondent did some HVAC hiring). These skills included welding and metal building erection and it specifically ran an ad for the latter position.

The Respondent also treated union applicants disparately and told them the company wasn't hiring and did not interview them (except for Eldridge who responded to the ad, was told he couldn't be hired because of the dual employment rule, but was told there might be welding work if he quit the Union). In October 1996, despite the fact that it was not advertising, Paulen told covert metal building erector applicant Hale that there might be some sheet metal work coming up and it assigned him to both sheet metal demolition work and laborers work. In July 1997, one overt applicant was referred to the Respondent by Metal Masters (being told Metal Masters did its hiring through the Respondent), but was told in effect that he could only be considered in response to a newspaper ad. The Respondent's adoption of this practice would appear to be a response to the Union's organizing efforts, and, when considered along with the other various demonstrated instances of disparate treatment (especially its blatant and continuous examples when the situations of overt and covert compared), it support a conclusion that the Respondent's reasons for its actions are pretextual.

The record does show that the Respondent engaged in policies and practices that are contrary to basic prohibitions against discrimination in regard to hire, accordingly, I find that the General Counsel has met its overall burden and shown that the Respondent's failure and refusal to consider and hire the discriminatees named below violated Section 8(a)(3) and (1) of the Act, as alleged. Certain other related matters pertaining to the *Thermo King* criteria will be discussed in the remedy section of the decision.

G. Independent 8(a)(1) Allegations

When Union Organizer Pauley contacted Respondent on March 8, 1995 a woman answered the phone and questioned Pauley about the type of position in which he was interested, his experience, and where he was currently employed. After Pauley informed her that he was then currently employed as a union organizer, she questioned him about what that involved. Pauley told her that he attempted to organize nonunion shops into union shops. She then said that if that was what Pauley intended to do, then Respondent was not interested, however, she did arrange an interview for the next day. Although this employer was not a supervisor, she conducted a preliminary interview and screening on behalf of the Respondent's hiring officials and I find that she acted with apparent authority on behalf of management when she stated to Pauley that the Re-

spondent would not be interested in his services if he intended to act as a union organizer, see *Zimmerman Electric Co.*, 325 NLRB 106 (1997). Her remark to Pauley, attributable to management, disparages the applicant's involvement with the union and it discourages or implies the futility of further pursuing his application, and I find that this conduct is coercive and a violation of Section 8(a)(1) of the Act, as alleged.

This conclusion is reinforced by Pauley's subsequent experience when he went forward with his interview the next day and was told by general manager Dunkelbarger that he was wasting his time because Respondent was happy being nonunion, but that if he ever left the Union, Respondent would be happy to do something with him. Thus, the Respondent made it clear to an overt union supporter who was responding to a current ad for HVAC personnel, that he could be considered or hired only if he gave up his union apprenticeship status. It is inherently coercive and unlawful to inform a job applicant that he will not be hired unless he leaves the union (because the employer perceives that if hired the applicant might engage in union activity), and I find that the conduct of this nature constitutes a well established violation of Section 8(a)(1) of the Act, as alleged, see *Electro-Tec, Inc.*, 310 NLRB 131, 134 (1993).

The standard for determining whether interrogation is coercive is "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). It also is well established that questioning a job applicant regarding his union membership or sympathies is inherently coercive and thus interferes with Section 7 rights, see *Electro-Tec*, supra. When Young applied for employment with Respondent on July 7, 1995 (in response to an ad), he did not wear any union insignia and omitted all reference to the Union on his application. He was interviewed by Parks. Young listed a fictitious company as a prior employer on his application and Parks asked Young during the interview if that company was a union company. Young's covert attempt occurred shortly after eight apprentice and four journeymen organizers had contacted the Respondent during the preceding 6 months for similar HVAC positions. It also occurred shortly after May 11 when the Respondent's receptionist complained to overt organizer Brooking that they had received a lot of calls on sheet metal and explained that they were not accepting applications. Young had responded covertly to a July ad and was hired after he indicated his former (fictitious) employer was a nonunion company. I find that this interrogation, at least under these circumstances, can be inferred to be in response to the Union's recent organizational activities and I find that this interrogation was intended to determine if Young had ever worked for a union employer and had been a member of a union. Accordingly, I find that it was coercive, and I conclude that it is shown to be a violation of Section 8(a)(1) of the Act, as alleged, see *Electro-Tec*, supra.

A similar pattern of dealing with overt union applicants continued in the fall of 1995 when Piercefield applied covertly several weeks after two overt organizers were told the Respondent would not accept applications as no work was available. Piercefield was interviewed by Paulen who asked Piercefield if one of the past employers listed on his application was a merit

shop (Piercefield asked what that meant and Paulen said nonunion). I infer that the purpose of such a question was to determine if Piercefield had ever worked for a union employer and had been a member of a union. Again, under the circumstances, the question constitutes unlawful interrogation, see *Thriftway Supermarket*, 276 NLRB 1450, 1459-1460 (1985), and *Adco Electric*, 307 NLRB 1113, 1117 (1992), and I find that the Respondent is shown to have violated Section 8(a)(1) of the Act in this respect, as alleged.

In May, 1995 carpenter organizer Bramlett applied at the Respondent in response to an ad and filled out an application that did not disclose his union affiliation. He then declined to sign a portion of the application dealing with the Fair Credit Reporting Act (which permits the employer to gather other information). Later that same day Bramlett's wife answered the phone and was asked if her husband was home. She said no but asked if she could take a message. The person then asked if Bramlett was in Indianapolis, and she responded that she did not know. The individual then asked her if he was in the union, and she said no. The person said okay, thank you and the conversation ended. The Bramlett's telephone has caller ID and when Bramlett called the number displayed a female answered the phone as "Tradesmen International."

Here, the record supports the inference that one of the Respondent's agents, with apparent authority to act on its behalf (see the *Zimmerman* case, supra), had called Bramlett in connection with the application filed earlier that day. The Board has found that an employee can be restrained and coerced in the exercise of his Section 7 rights through actions an employer takes against a relative of that employee, see *Yukon Mfg. Co.*, 310 NLRB 324 (1993). Moreover, an employer would be expected to presume that in the normal course of events someone answering the home phone on behalf of job applicant and asked to take a message, would forward the contents of that conversation to that person. Accordingly, it must be considered that the Respondent knowingly made inquiries that, if made directly, clearly would be an improper interrogation about union membership. The fact that the inquiry was made indirectly does not absolve the Respondent from responsibility for its action and, as noted in the discussion above, a question to a job application about his union membership is inherently coercive. Accordingly, I find that the same question to the receptor of an applicant's home phone is likewise objectionable and it is an illegal interference with Section 7 rights and a violation of Section 8(a)(1) of the Act as alleged.

H. The 8(a)(3) Allegations

The record shows that the Respondent hired four covert union organizers: Tice and Young in July, Piercefield in November 1995 and, subsequently, Williamson in August 1997. Tice was assigned to client Post Road Mechanical while Young and Piercefield, were assigned to client Metal Masters. These three were classified as sheet metal helpers or apprentices while in 1997 Williamson was sent to a client as a welder. Each was terminated after their union status was disclosed.

The Respondent's antiunion animus has been discussed above and, under these circumstances, I find that the General Counsel has made a showing sufficient to support an inference

that these employees' union activities and those of the other union organizers were a motivating factor in Respondent's decision to terminate them. Accordingly, the testimony will be discussed and the record evaluated in keeping the criteria set forth in *Wright Line*, and *Transportation Management Corp.*, supra, to consider Respondent's defense and whether the General Counsel has carried his overall burden.

Both Tice and Young worked for Respondent without incident until July 18, 1995 when organizer Van Gordon sent two letters to Respondent identifying them as union organizers who would attempt to organize Respondent and any client company they were sent to as an employee of the Respondent. Thereafter, on July 21, representatives from the Respondent went to the two jobsites where Young and Tice were working and delivered identically worded letters to each man. The letters stated that Young and Tice were in violation of Respondent's dual employment policy and that if they did not terminate their other employment, then their employment with Respondent would be terminated. Both Young and Tice were required to come to a meeting at Respondent's facility on July 24. Both were then asked if they intended to terminate their employment with the Union, both replied in the negative and both were given letters by Respondent informing them that they had been discharged for violating Respondent's dual employment policy. Although Piercefield had been hired after he portrayed himself to Paulen as being a former apprentice, disgruntled with the Union, within 2 days after he began his employment at the Metal Masters project, he was released from his employment by Metal Masters because Metal Masters had discovered he was actually a union member and did not want him on its jobsite. Piercefield was sent back to Respondent, and was not given any further assignments.

The formerly consolidated cases involving Metal Masters and Post Road Mechanical were settled and several (see fn. 3), as discussed above, the record otherwise supports the General Counsel's contention that the Respondent shared essential terms and conditions of employment with its client employers. Clearly, these clients and Respondent formed a joint employer relationship and the Respondent must be held jointly and severally liable with the other employers for the unfair labor practices found herein, see the decision in *Skill Staff of Colorado*, supra.

The Respondent's defense regarding the discharges of Young and Tice is that the two employees were in violation of Respondent's dual employment policy because they were simultaneously employed by Respondent and the Union. As discussed in part E, this defense is pretextual and otherwise improper and I find that Respondent has failed to meet its burden to prove that it would have taken the same action absent the protected activity.

The Respondent's records on Piercefield state: "11/10/95 Metal masters called today and stated that they were sending him back because of his union affiliation." The notation further adds that it would redispach him when work was available. As noted by the General Counsel, after learning that Piercefield was a union organizer, the Respondent did not attempt to enforce its dual employment policy against him but, at the same time, it did not give him any further assignments. Paulen as-

serts that Piercefield was not given any further assignments because he informed Respondent that he was unavailable to work, I conclude, however, the overall record does not support this claim.

First, I credit Piercefield's forthright testimony that Paulen told him that he was released by Metal Masters because work was slow. Not only was the reason given knowingly false, it contradicted the fact that the employees had just been told they were going to go to 10 hour days to catch up on work (on a 6 to 8 story building) that was about one third finished. In accordance with Paulen's instructions, Piercefield made "a couple of attempts" to get back with Paulen but was told they "did not have nothing" for him at the time. Although he made no further contact with the Respondent after November 1995, and did not inform them of a subsequent change of address, there is no evidence that the company tried to contact him at any time, and its last notation in its records is dated 12/1/95 and states that Piercefield had not called in on or after November 20 when he assertedly was told to check in for work. Piercefield had no specific recall of anything else but it appears from the Respondent's records that he might have said he would do a side job when told there was nothing available. Significantly, the Respondent acquiesced in this plan even though it would violate its strict dual employment policy, and I infer that this indicates it had no serious intention of attempting to assign Piercefield to any client.

Under these circumstances, I find that the record shows that the Respondent acquiesced in Metal Masters decision to illegally terminate Piercefield, that it made no apparent effort to place him with another client and that it changed his listing from "active" status to "terminate" with no attempt to contact him or to rectify the illegal termination. Otherwise, the record shows no persuasive, legitimate reason for its actions and it does not show that it would have made the same response absent the protectual activity.

I find that the Respondent has failed to meet its burden with respect to Piercefield and, accordingly, in each of the above situations, I further conclude the General Counsel otherwise has met its overall burden of proof and I find that the termination of these three employees is shown to be in violation of Section 8(a)(3) and (1) of the Act, as alleged.

Covert applicant/organizer Williamson was hired by Respondent on about August 18, 1997 after it was assumed that he was calling about an ad for laborers and it was learned that he had welding skills that were needed by a client. Williamson worked for the client for approximately 4 days and then on August 22, 1997, he revealed his union affiliation to his supervisor. That same day he went to Respondent's facility and revealed his union affiliation to Paulen, who promptly discharged him for falsifying his employment application (by omitting the fact that he was a union organizer). A week later Williamson received a letter dated August 29 from manager Cox stating that he should not have been discharged. The letter gave him until September 5, to ask for reinstatement. Williamson called and set up a meeting with Cox for Monday, September 8. When he arrived Cox told him that the offer already had

expired,⁵ on Friday. Nothing was said about this by Cox at the time the appointment was arranged, however Cox went on to tell Williamson that all he had to do is pick up the phone, give “us” a called and “we will put you through the process again.” He also told Williamson he probably couldn’t get his former job back.

Cox’s letter did not offer reinstatement with the client but it did offer to reinstate Williamson on “the active roster of welders.” It said “should you wish to accept this offer, please contact me directly by next Friday, September 5.” The offer then stated the following condition: “your continued employment and eligibility for available work will remain subject to all relevant Company work rules, policies and procedures.” It did not mention its dual employment policy.

Cox’s statement to Williamson indicated that the Respondent tolled its offer because Williamson did not accept the offer by September 5. The actual date that Williamson called to arrange his appointment with Cox was not established on the record, however, I infer that it must have been on or prior to September 5 which was a Friday, in order to have the appointment for the next working day, Monday the 8th. On brief, the Respondent noted that Paulen, as a recruiter, did not have the authority to unilaterally terminate field employees but it argues that the company had the right to do so under its rule that deliberate falsification of application information can lead to discharge. Cox, the person with authority to discharge did not endorse Paulen’s reason but, in his letter of August 29, stated:

I have reviewed your application with Paulen. While it did contain exaggerated prior employment dates, I detected no material misrepresentations of fact on your application that would disqualify you from employment with Tradesmen.

Under these circumstances, I find that although the letter refutes Paulen’s asserted reason for the termination, Cox’s own actions tend to refute the Respondent’s arguments that this was a legitimate reason for its actions and I further find that Williamson was discharged for the reason asserted by Paulen and because of Williamson’s union membership. Accordingly, the Respondent has not persuasively met its burden to overcome the General Counsel showing and I conclude that the reason for its actions was antiunion animus and Williamsons’ newly disclosed status as a union organizer.

This conclusion is reinforced by the pretextual nature of manager Cox’s reinstatement offer. First, it does not reinstate him to his former position. Secondly, it does not appear to meet generally acceptable standard for a valid recall offer. Cox’s statements on September 8 imply that its offer lapsed because Williamson had not accepted its conditional offer by September 5 (when he apparently merely called Cox for an appointment.). The terms of the letter require that Williamson “contact me directly” and it appears that the weekend between the date of the letter Friday, August 29 and the September 5 compliance date, was Labor day weekend. Accordingly, the

⁵ I credit Williamson’s explanation that he was repeating Cox’s phrase when he asked the question: “the offer has expired?” and I find that on September 8, Cox in fact first made that statement to Williamson.

totality of the circumstances demonstrate that Williamson was given an unreasonably short time in which to respond, see *Toledo (5) Auto/Truck Plaza*, 300 NLRB 676, 650 (1990).

The “reinstatement” letter and Cox’s meeting with Williamson are not a cure nor a legitimate reason for its de facto endorsement of recruiter Paulen’s internally invalid action in terminating Williamson and it does not establish a legitimate reason for either the termination or for the Respondent’s subsequent failure to unconditionally reinstate Williamson to its available for work list. Otherwise, there is no persuasive showing that the Respondent would have taken the same action in the absence of Williamson’s protected activity and I conclude that the General Counsel has met his overall burden and I find that Williamson’s termination is shown to be a violation of Section 8(a)(3) and (1) of the Act, as alleged.

I. The Carpenter Position Application

Carpenter’s union organizer Bramlett initially applied for employment with Respondent on May 22, 1995. That afternoon, Bramlett’s wife received a telephone call from Respondent in which the caller illegally asked her whether Bramlett was in the Union. Bramlett returned to Respondent’s offices on May 25, and completed his application by signing the Respondent’s credit report authorization. Despite repeated follow up phone calls to the Respondent, Bramlett was not sent to work by Respondent. Respondent’s records indicate that it ran at least 15 classified advertisements for carpenters or carpenters’ helpers from May 21, through July 31.

The record shows that shortly after Bramlett substantially filled out his applicant (even though he did not reveal his union affiliation), someone from Respondent called Bramlett’s home phone and asked if Bramlett was a union member. The question was asked spontaneously, without any legitimate purpose, and indicates that the Respondent had a suspicion of union sympathies, a suspicion that could have been triggered by Bramlett’s initial reluctance to sign a credit report authorization. That this suspicion was real is highlighted by the Respondent’s contemporaneous remarks (tape recorded), in which the Respondent said it had “ways of definitely screening them (a union guy), out” and that “they (the union guys), usually stick their foot in their mouth.” Accordingly, I agree with the General Counsel’s contention that these remarks, the Respondent’s attempt to find out if Bramlett was a union member and its failure to hire or assign Bramlett to a client, despite its numerous ads for carpenters, all warrant an inference that Respondent either learned of Bramlett’s union status or suspected it. Accordingly, I conclude that the General Counsel has met his burden regarding the Respondent’s alleged refusal to hire Bramlett or consider him for hire because of his union attention.

The Respondent’s contends that it did, in fact, hire Bramlett because after his May 25 meeting with the recruiter, Bramlett’s name was placed on active or available status; however, there is no showing that he went through its orientation program and the Respondent’s record for Bramlett show no comment or other entries except a 8/7/95 reference to his filing an NLRB charge and a 2/3/96 entry, transferring his status to “terminated.”

Otherwise, the Respondent denies that it had any knowledge of Bramlett's union affiliation, because Mrs. Bramlett denied that her husband was in the Union. I find that the Respondent's denial of any knowledge of Bramlett's union affiliation is not inherently believable and I conclude that its subsequent actions in denying any work assignment to Bramlett, while referring others and continuing to run ads for carpenters, supports the initial inferences that it do so because of its "screening" and strong suspicion that Bramlett was a union supporter.

Here, the Respondent may have given token consideration to Bramlett's application but it did not "hire" him in any meaningful way inasmuch as it never put him through orientation or referred or assigned him to a client despite the fact that the Respondent's hiring records show indicate that between May 22, 1995 and June 29, 1995, it hired and referred approximately 18 applicants for employment for the positions of carpenter, apprentice carpenter, and carpenter's helper. These records also show that during this same time period, some carpenters assigned to clients called off or did not go to their assigned work. Bramlett's experience (10-15 years), as reflected on his application, is generally superior to that disclosed in some comments on the records of other carpenter employees and under these circumstances, I find that the Respondent had failed to show that it had any legitimate reason for its failure to consider Bramlett for assignment to a client or to hire him both by placing him on its active list and by assigning him to a client and I find that it has not persuasively shown that it would have ignored him in this manner even in the absence of his suspected union affiliation. Accordingly, I conclude that the General Counsel has met its overall burden and shown that the Respondent's actions in connection with Bramlett's application for employment as a carpenter violated Section 8(a)(3) and (1) of the Act, as alleged.

IV. CONCLUSIONS OF LAW

1. Respondent is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent and Metal Masters, Inc., and Post Road Mechanical, Inc., respectively, are joint employers and the Respondent is jointly liable and responsible for the relief ordered herein to remedy violations of the Act.

3. Both Sheet Metal Workers' International Association Local Union No. 20, A/W Sheet Metal Workers' International Association, AFL-CIO and Central Indiana District Council of Carpenters are labor organizations within the meaning of Section 2(5) of the Act.

4. By interrogating job applicants or their relatives about their union membership and activity and by informing job applicants that they would not be hired or considered for hire because of their union membership or activities, Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act, and thereby has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

5. By maintaining a dual employment policy that prohibits employees from simultaneously being union organizers, Respondent has violated Section 8(a)(1) of the Act.

6. By discharging or refusing to assign employees Jay Bramlett, Brady Piercefield, Devin Tice, Tim Williamson, and Aaron Young because of their know or suspected union membership or activity, the Respondent has violated Section 8(a)(3) and (1) of the Act.

7. By refusing to consider for employment or refusing to employ job applicants for the position of Sheet Metal (HVAC) worker or carpenter because they are members of the Union or because of their union sympathies, Respondent discriminated in regard to hire in order to discourage union membership in violation of Section 8(a)(3) and (1) of the Act.

V. REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act. Because of the Board's recent decision in *Thermo Power*, supra, certain other matters must be considered related to the Respondent's unlawful refusal to hire and backpay and the traditional make whole remedies for specific discriminatees.

The basic facts show that hiring of apparent nonunion applicants occurred at various times after specific discriminatees applied and were discriminatorily refused hiring. It also is noted that the Respondent's application form states that it is good for 90 days before it must be renewed. Also, the Respondent sent a letter dated April 17, 1996 to Van Gordon offering to "reinstatement" and other named applicants who had sought employment on or prior to May 11, 1995, to the Respondent's "active employee roster." The letter required anyone accepting the offer to contact the Respondent. No individuals contacted the Respondent as a result of this letter however, by the Respondent's own form it would appear that their reinstated "application" would be good for 90 days and these jobs available for 90 days after the date of the letter and/or the date of a discriminatee's application should be sufficient to determine that the Respondent would be expected to have hired these discriminatees. Otherwise, however, the letter would not excuse or affect the Respondent's obligation to hire in the 90 days after their original applications.

Here, the Respondent considered and offered HVAC positions to covert applicants and youth to youth union organizers Piercefield, Tice and Young, persons with the same general experience and training as the other youth to youth organizers applicants who applied overtly. This alone establishes that the Respondent was hiring and that the latter applicants qualified for the jobs for which it was advertising, see the *Fred K Wallace and Sons* case, supra.

Also, as shown on the record and as charted in Table C, there is a basic coordination between the application dates of the first 12 named discriminatees in Table B, above, which shows the approximate dates when others were hired and sent to work for clients. The record shows openings and hiring at numerous and various times throughout the periods when youth to youth organizers attempted to obtain employment with the Respondent and its clients. There is no requirement that the General Counsel exactly match the precise time when an application is filed and a job filled, especially under the fact of this proceeding

where the Respondent, acting as an employment service, “hires” at two different levels by placing an applicant on its “active” list and by assigning an applicant to a client. Accordingly, I first find that each of the named applicant (numbers 5-14), in Table B, above, (10 HVAC helper/apprentice type positions filed in 1995), are entitled to backpay and reinstatement remedies. One journeyman was hired in 95 and five were hired in 1996, and I find that the four journeymen discriminatees should have been hired for these positions and, accordingly, they are entitled to backpay and reinstatement remedies. In 1996, four new hires were assigned to HVAC helper/apprentice positions with clients, however, this occurred prior to the series of youth to youth application, which did not occur until the fall of 1996. The Respondent did seek applicants for its anticipated metal building client and it did hire for its active list and sent two covert applicants (Beatty and Hale), to their assignments, while waiting for the anticipated business. Youth to youth discriminatees Wilson and Eldridge had qualifying experience and were entitled to the same consideration and were damaged by the Respondent’s refusal and applicants Cornwell, Hill, Carmon, Wilson and K. Miller had viable applications and also are entitled to be considered for backpay and reinstatement remedy. On July 28, 1997, the Respondent hired one covert applicant as a welder, at a time when it said it had four welder openings, but in late July it brushed off overt applicants Meyers, Holton (who specifically asked about welding), and Shoulders and these three are entitled to a backpay and remedy inasmuch as they had basic welding qualifications, however, I do not recommend reinstatement in nonsheet metal positions. Walker and C. Miller also are entitled to be considered as alternates for such backpay. William Rogers was denied employment as an electrician on November 12, 1997, after Respondent learned he also was a member of the sheet metal workers Union even though it has asserted that it had openings and he is entitled to a backpay and reinstatement remedy in that position.

In accordance with *Thermo Power* and *Dean General Contractors*, 285 NLRB 573 (1987), this refusal to hire discriminatees are entitled to a make whole remedy, leaving to compliance the determination of limits on the reinstatement remedy and the extent or tolling of the Respondent’s liability where the Respondent will have the opportunity to show that contracts with specific clients expired or to show other limiting factors, see *Ferguson Electric Co.*, 330 NLRB 514 (2000), and *Serrano Painting*, 331 NLRB 928 (2000).

Otherwise, the Respondent also is shown to have discriminatorily discharged or refusal to assign employees Jay Bramlett (as a carpenter), Brady Piercefield, Devin Tice, Tim Williamson and Aaron Young and, accordingly, it is recommended that the Respondent be ordered to instate or reinstate the above identified employees and make them whole for any loss of earnings they may have suffered by reason of their discharge or the failure to give them nondiscriminatory consideration for employment, by payment to them of a sum of money equal to that which they normally would have earned in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), computed on a quarterly basis with interest as com-

puted in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁶

The Respondent also refused to consider for employment the discriminatees listed in Table B and it therefore will be ordered that they be considered for hire in HVAC/Sheet Metal workers positions or substantially equivalent positions and that it be determined in the compliance proceeding whether there was actual job loss (other than that found in the refusal to hire portion of this proceeding) as a result of that refusal to consider.

Both the General Counsel and Charging Party request, pursuant to the Board’s authority under Section 10(c), that a broad corporate-wide order be issued.

I find that a broad Order is warranted because the Respondent has shown a proclivity to violate the Act and has engaged in such egregious, flagrant and widespread misconduct as to demonstrate a general disregard for employees’ statutory rights, see *Hickman Foods*, 242 NLRB 1357 (1979). I further conclude that a granting of the relief requested is consistent with the Board’s decision in *Beverly Enterprises*, 310 NLRB 222, 228 (1993) enf. denied 17 F.3d 580 (2d Cir. 1994). Here, the Respondent is shown to conduct operations at numerous, nationwide locations. It has been found that it has engaged in numerous unfair labor practices and that it has persisted in both its failure to consider and failure to hire practices over a period of years and it has engaging in similar practices with other trades at its Indianapolis facility, see *Dilling Mechanical Contractors, Inc.*, JD-106-00 and at other locations, most specifically, Lithicum, Maryland, see *Tradesmen International*, JD-159-99. The record clearly shows that the Respondent exercises centralized corporate control over its manuals, policies and labor relations practices at its separate facilities and that its corporate leaders “just can’t stand the union whatsoever” and maintain virulent antiunion animus. The corporation provides training to all locations on how to maintain union free status, training which includes ways to “screen out union applicants” and provide its clients with nonunion people. The Respondent clearly is aware of its legal obligation to practice nondiscriminatory hiring practices yet its operations are specifically designed to flaunt these obligation by every available means. While disingenuously asserting its adherence to the law, and showing a complete disregard of employees fundamental rights against discriminations and the fundamental right of employees to organize under the Act under these circumstances, the General Counsel and Charging Party have shown good cause for a granting of the requested broad remedy, as modified.

Accordingly, it is also recommended that for a period of 2 years from the effective date of the Board’s Order, the Respondent include in a prominent manner at the beginning of all its contracts to supply employees to employers and all its applications for employment, whether for its own lists of available employees or for specific requests for employees from any of its client employers, the following language:

“Tradesmen International, Inc., is committed to full compliance with the laws of the United States of America, including

⁶ Under *New Horizons*, interest is computed at the “short term Federal rate” for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

the National Labor Relations Act. Therefore, we will recruit and refer any and all applicants without regard to their involvement with or membership in, or allegiance to any labor organization. We recognize and support the right of employees

to form, join or assist labor organizations of their own choosing, or to refrain from such activities.”

[Recommended Order omitted from publication.]