Pollock Electric, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 716 a/w International Brotherhood of Electrical Workers, AFL–CIO. Cases 16–CA–18629 and 16–CA–18629–2

April 6, 2007

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On July 7, 1998, Administrative Law Judge Howard I. Grossman issued the attached decision and, on August 7, 1998, an Erratum revising his recommended Order. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

On June 14, 2000, the Board remanded this proceeding to the judge and instructed him to reconsider his findings and conclusions in light of the Board's decision in *FES*.[1] On February 22, 2001, the judge issued the attached supplemental decision affirming the findings, conclusions, and recommended order in the original decision. The Respondent filed exceptions and a supporting brief.[2]

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

The Board has considered the decision, the supplemental decision on remand, and the record in light of the exceptions and briefs, and has decided to affirm the administrative law judge's rulings,[3] findings,[4] and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order and notice as modified and set forth in full below.[5]

For the limited reasons explained below, we adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging union member John Rogers on May 12, 1997.[6] We reverse the judge, however, and find that the Respondent did not implement and maintain discriminatory hiring practices on and after March 21. In addition, we reverse the judge and find that the Respondent did not refuse to hire or to consider hiring five union applicants on and after March 21.

Background

The Respondent is a contractor performing electrical work in Houston, Texas, among other places. John Pollock is the company chairman, and Mike Wheeler is the field superintendent. Since 1984, the Respondent has been a member of the Independent Contractors of Houston, Inc. (IEC), an employer association that accepts applications and provides training for its members and their employees.

The Respondent requires all interested applicants first to fill out an application with the IEC. The IEC forwards applications to the Respondent only when the Respondent specifically requests them. If the Respondent is interested in a particular applicant, e.g., because of a recommendation or because the applicant contacted the Respondent directly, Wheeler calls IEC and asks it to forward the application to him. If the Respondent is interested in hiring the applicant, Wheeler calls him or her in for an interview and a drug test. Applicants who are interviewed are also required to fill out a separate Pollock Electric application.

The Respondent has maintained a written hiring policy since at least 1995.[7] According to the policy, the Respondent prioritizes applicants as follows: (1) current employees; (2) past employees with proven safety, attendance, and work records; (3) applicants recommended by current supervisors; (4) applicants recommended by current employees; (5) applicants recommended by IEC members; (6) applicants listed on the IEC listing of applicants; and (7) unknowns. In addition, the Respondent's witnesses testified that, when evaluating an applicant for hire, the Respondent considers an applicant's recent job experience, and specifically his or her recent experience working with his or her tools.

[1] 331 NLRB 9 (2000).

[2] In addition to its initial exceptions, the Respondent filed a motion to reopen the record to admit R. Exh. 29 and, if necessary, to take additional evidence on the proposed exhibit. The General Counsel opposed the motion. In its remand order, the Board instructed the judge to rule on the Respondent's motion, but the judge did not do so. For the reasons explained below, we deny the Respondent's motion.

[3] The Respondent requested, both at the hearing and in its exceptions, that the judge recuse himself because of bias and prejudice against the Respondent's position. The judge denied the Respondent's request at the hearing. On careful examination of the record, we are satisfied that the Respondent's contentions are without merit.

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

[5] We shall amend the judge's conclusions of law and remedy to conform to our findings. We shall modify the judge's recommended Order to so conform, and in accordance with *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Ferguson Electric Co.*, 335 NLRB 142 (2001). We shall also substitute a new notice to conform to the Order as modified.

[6] All dates are 1997, unless otherwise indicated.

[7] At the hearing, the General Counsel introduced a copy of the Respondent's hiring policy dated July 18, 1995. Although it appears that the policy existed prior to that date, there was no evidence as to when it originated. In any event, it is undisputed that the policy existed before the alleged discriminatees applied for journeymen positions.

Discussion

I. ALLEGED DISCRIMINATORY DISCHARGE

Sometime in March 1997, union member John Rogers filled out an application at the IEC. In early April, he called Wheeler and asked if the Respondent was hiring journeymen. Wheeler obtained Rogers' application from IEC, called Rogers in for an interview and drug test, and hired him as a journeyman electrician.

On April 15, Rogers wore a union insignia to work and picketed the jobsite during his lunch hour with Ray Rath, who was not the Respondent's employee. On the same day, Rogers faxed a letter to the Respondent recommending five union electricians (alleged discriminatees Daniel Lord, John Gafford, Ray Rath, Jack Smith, and Troy Lockwood) for employment with Pollock Electric.[8]

The next day, Wheeler called Rogers to inform him that he was being transferred to another jobsite. Wheeler also asked Rogers about his letter of recommendation and how he knew the five men. Rogers stated that he was "confused" by the conversation, and he was unable to remember where he worked with the five men. On April 18, Rogers sent the Respondent another letter to clarify his work experience with the alleged discriminatees, stating that he worked with Smith at Kelly Roche in 1995 and that he worked with the other men at various times on union volunteer projects. He again recommended them for hire.

On April 29, the Respondent sent Rogers a letter that, among other things, responded to Rogers' April 18 letter. The Respondent's letter noted that Rogers did not list Kelly Roche on his employment application, and the Respondent therefore requested that Rogers submit a complete record of his employment history, including payroll stubs and income tax returns to verify his employment. The letter stated that Rogers was suspended pending an investigation of his work history, and if he failed to submit this information by May 9, the Respondent would conclude that he "deliberately falsified" his employment application, and it would take further action "in accordance with [its] standard employment policies."

Rogers responded by letter on May 8, stating that he had forgotten about his work at Kelly Roche because he had worked there for a short time.[9] He claimed that the Respondent was harassing him because of his union support and that the request for his payroll records indicated the Respondent's desire to fire him. He stated that he was willing to return to work, but he did not provide any of the information requested. On May 12, after receiving Rogers' letter, the Respondent fired him, consistent with its April 29 letter, for refusing to provide the requested information regarding his employment history and for falsifying his application.

At the hearing, the Respondent's chairman, Pollock, testified that, in September, a recently hired employee named Robert Baker was suspected of theft at a jobsite. During the investigation of the theft, the Respondent learned that Baker had a criminal record, a fact that Baker apparently omitted from his job application. Baker was suspended, and Pollock sent him a letter requesting information about his alleged criminal record. Although Baker did not respond, he remained on suspension pending further investigation.[10]

The complaint alleges that the Respondent discharged Rogers because of his union activity in violation of Section 8(a)(3). For the following reasons, we agree.

Under the Board's decision in *Wright Line,*[11] the General Counsel has the burden of proving by a preponderance of the evidence that animus against union activity or protected conduct was a motivating factor in an adverse employment action. Once the General Counsel establishes a prima facie case of discriminatory motivation by showing union or protected activity, employer knowledge of the activity, and antiunion animus, the burden of persuasion shifts to the employer to prove that it would have taken the same action even in the absence of the union or protected activity.

It is undisputed that Rogers engaged in union activity and that the Respondent knew about it. As to antiunion animus, we agree with the judge that the Respondent's disparate treatment of Rogers and Baker for effectively the same conduct supports an inference that Rogers' dis-

[8] The alleged discriminatees filled out applications with IEC during March and April. They continued to file numerous applications with the IEC through September (Lord, 13 applications; Gafford, 106; Rath, 103; Smith, 38; and Lockwood, 65).

[9] Rogers testified, however, that he deliberately left the reference off his application. See fn. 14 below.

[10] Pollock testified that the police informed him about Baker's criminal record, including some unspecified time in jail. He did not explain, however, what further investigation was necessary to confirm the police information. On January 16, 1998, 1 month after the hearing closed, the Respondent purportedly sent Baker R. Exh. 29, a letter stating that the police investigation was "positive" and that Baker was therefore discharged. In September 1998, 2 months after the judge issued his decision in this case and 8 months after Baker's discharge, the Respondent filed a motion requesting that the judge reopen the record and admit R. Exh. 29. The Respondent argued that the letter showed that both Rogers and Baker were terminated for falsifying their employment applications, and thus Rogers was not treated disparately because of his union affiliation. As explained below, we find that the General Counsel established that Rogers was treated disparately at the time of the events at issue, regardless of whether Baker was eventually fired. Thus, R. Exh. 29 has no bearing on whether Rogers was treated disparately, and we therefore deny the Respondent's motion to reopen the record and admit that exhibit.

[11] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

charge was motivated by his union activity.[12] Specifically, Pollock admitted that he asked Baker for information about his alleged criminal record, but when Baker did not respond, he remained on suspension pending further investigation. In contrast, when Rogers refused to provide Pollock with pay stubs and tax returns to substantiate his employment history, he was immediately discharged. For these reasons, we find that the General Counsel established a prima facie case of discrimination.[13]

The burden shifts to the Respondent to show, by a preponderance of the evidence, that it would have fired Rogers even absent his union activity. We find that the Respondent did not present evidence sufficient to meet this burden and rebut the General Counsel's prima facie case.

The Respondent claimed that, because Rogers refused to produce evidence of his employment record, he was fired for falsifying his application. But Baker refused to provide information about his alleged criminal record, and he was only suspended pending further investigation. In addition, the Respondent produced no evidence that it similarly scrutinized other employees' applications or that it required other employees to document their employment experience. Finally, the timing of the Respondent's actions, within days of learning about Rogers' union affiliations, supports an inference that the Respondent would not have taken the same actions if Rogers had not recently revealed his union membership. In sum, the Respondent failed to establish that it would have fired Rogers even absent his union activity. We therefore find, on this limited basis, that the Respondent violated Section 8(a)(3) by discharging Rogers.[14]

II. ALLEGED DISCRIMINATORY HIRING POLICY

As stated above, the Respondent's hiring policy gives priority to applicants as follows: (1) current employees; (2) past employees with proven safety, attendance, and work records; (3) applicants recommended by current supervisors; (4) applicants recommended by current employees; (5) applicants recommended by IEC members; (6) applicants listed on the IEC listing of applicants; and (7) unknowns. The judge found, without explanation, that union applicants would not fall into any of the first five categories, and thus the Respondent's policy was inherently destructive of employees' Section 7 rights. We disagree.[15]

The Board has repeatedly found that hiring policies that give priority to former employees and recommended employees are not unlawful, even if the effect of such policies is to limit or exclude union applicants. See, e.g., *Brandt Construction Co*., 336 NLRB 733, 733–734 (2001) (affirming judge's finding that hiring policy that gives preference to former employees and referrals not unlawful), review denied sub nom. *Operating Engineers Local 150 v. NLRB,* 325 F.3d 818 (7th Cir. 2003); *Zurn/N.E.P.C.O.*, 329 NLRB 484, 484 (1999) (same). In addition, the evidence shows that the Respondent hired both former and current union members, thus indicating that the policy did not exclude union applicants.[16] Consistent with current Board precedent, we find that the Respondent's hiring policy did not unlawfully discriminate against union members.[17] Thus, we reverse the judge and dismiss this allegation.[18]

[12] See, e.g., *Watkins Engineers & Constructors, Inc.,* 333 NLRB 818, 819 (2001) (disparate treatment of union and nonunion applicants is evidence of antiunion animus).

[13] The judge found additional evidence of antiunion animus based on Pollock's statement to a former employer, in 1983, that he was going to start his own nonunion shop. We find that the timing of this remark—14 years before the events at issue—and the context in which it was made—assuring Pollock's former employer that he would not solicit his employees—do not support an inference of animus in this case, and thus we reject the judge's reliance on this statement to show animus.

The Respondent excepted to the judge's ruling at the hearing, over its objection, to admit evidence regarding certain articles allegedly written by Pollock and/or published by the IEC. The articles addressed, among other things, strategies to combat union organizing campaigns. Because the judge specifically stated in his decision that he did not rely on the articles, we do not reach the issue of their relevance or admissibility.

[14] Although we find that the Respondent's purported justification for firing Rogers—falsifying his application—was not sufficiently supported by the evidence, we note that Rogers admitted at the hearing that he deliberately omitted an employer reference from his application and that he deliberately stated on his application that he had a journeyman license even though he had only an apprentice license. The judge erred by making findings contrary to Rogers' admissions. Although these admissions do not alter our 8(a)(3) finding, they may affect Rogers' remedy as determined at compliance.

[15] In light of our finding that the Respondent's policy is not unlawful, Member Schaumber does not address current Board law regarding "inherently destructive" conduct.

[16] The judge acknowledged that the Respondent hired union employees, but discounted this fact because none of the union members hired were union organizers. In *Kanawha Stone Co.*, 334 NLRB 235, 237 (2001), the Board found that the employer's policy, which limited hiring to former employees, relatives of employees, and employee referrals, was not inherently destructive where the record showed that several hires were affiliated with a union. The Board found that, even though the union employees were not interested in organizing, that fact was not sufficient to show that the policy was inherently destructive. We reach the same conclusion here.

[17] We note that the Respondent's hiring-policy criteria afforded applicants priority for having their applications reviewed, but such priority did not ensure that the applicant would be hired. At the point of review, each applicant was expected to meet additional requirements before being hired. The Respondent's witnesses testified that recent hands-on experience was such a requirement.

[18] Member Walsh notes that there was insufficient evidence that the Respondent's preferential hiring policy was implemented for the purpose of discouraging Sec. 7 activity.

III. ALLEGED DISCRIMINATORY REFUSAL TO CONSIDER FOR HIRE

Under *FES*, supra, to show discriminatory refusal to consider for hire, the General Counsel must show that the Respondent excluded applicants from the hiring process, and that antiunion animus contributed to the decision not to consider the applicants. *FES*, supra at 15. In his supplemental decision, although the judge did not separately address the refusal-to-consider allegation under the *FES* standard, he affirmed his initial finding of the violation. We find, however, that the evidence shows that the alleged discriminatees were not excluded from the hiring process. Rather, they were considered in the same way that other applicants were considered, and thus we reverse the judge and dismiss the allegation.

The Respondent's witnesses stated that the Respondent received applications from IEC only when it requested them. Field Superintendent Wheeler testified that he saw at least two or three of the alleged discriminatees' applications in 1996 and rejected them because the applicants did not have recent experience with their tools. Similarly, Pollock testified that he reviewed the alleged discriminatees' applications in May 1997 and concluded that the applicants did not have recent hands-on experience. The alleged discriminatees' applications support this conclusion.[19] Wheeler further testified that on three or four occasions in 1997, he called IEC and requested applications of journeymen applicants with recent experience. The IEC did not forward the alleged discriminatees' applications, which was consistent with the fact that the alleged discriminatees did not meet Wheeler's recent-experience requirement.

The Respondent's witnesses also testified that, consistent with its hiring policy and hiring needs, it might review the applications of applicants who were recommended by an employee or supervisor. Following Rogers' recommendation of the alleged discriminatees in April,[20] Pollock reviewed the discriminatees' applications in May and rejected them. In sum, we find that the evidence shows that the alleged discriminatees' applications were not excluded from the Respondent's usual hiring process. Thus, we reverse the judge and dismiss the allegation.

IV. ALLEGED DISCRIMINATORY REFUSAL TO HIRE

To show discriminatory refusal to hire under *FES,* supra, the General Counsel must show that (1) the Respondent was hiring or had concrete plans to hire; (2) the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) antiunion animus contributed to the Respondent's refusal to hire them. *FES*, supra at 12. The burden then shifts to the Respondent to show that it would not have hired the applicants even absent their union activity.

Assuming arguendo that the General Counsel established a prima facie case of discriminatory refusal to hire, we find that the Respondent met its burden by showing that it would not have hired the alleged discriminatees regardless of their union activity. As stated above, the Respondent reviewed the alleged discriminatees' applications and rejected them because they lacked recent hands-on experience. More specifically, we find that the Respondent established that it would have rejected the applicants based on this legitimate criterion even in the absence of their union activity, and that the antiunion animus demonstrated by the Respondent's disparate treatment of Rogers does not cast doubt on this defense.

The judge found that the Respondent's hiring criterion, recent hands-on experience, was not supported by credible evidence. We disagree. The judge relied on alleged discriminatee Lockwood's testimony that his electrician's skills had not diminished although he had done little recent work with his tools. But Lockwood's personal opinion of his own skills is not relevant to assessing the lawfulness of the Respondent's hiring decisions. In addition, the judge compared the experience of the alleged discriminatees to the experience of those electricians hired instead and concluded that the discriminatees were more qualified.[21] In so doing, the judge improperly

[19] The applications show the following: Lord: no work with tools since 1993; Smith: from 11 to 90 days working with tools since 1996; Gafford: 5-1/2 days working with tools since 1995; Lockwood: 2 to 62 days working with tools since 1995; and Rath: 4 to120 days working with tools since 1996.

[20] The Respondent argued that Rogers withdrew his recommendation of the alleged discriminatees because he could not remember where he had worked with them. The General Counsel argued, however, that Rogers was confused by the conversation and renewed his recommendation in his April 18 letter to the Respondent. We do not reach this dispute because we find that, in any event, Pollock reviewed the applications in May and found that the discriminatees lacked recent experience.

[21] For example, the judge noted that the Respondent hired Michael Roesch with 3 months' experience while the discriminatees' experience ranged from 18 to 28 years. The record shows, however, that Roesch worked continuously as an electrician for 5-1/2 years prior to applying to the Respondent. In contrast, the discriminatees' hands–on experience for the prior 2 years ranged from zero to at most 4 months (see fn. 18 above). In addition, the judge noted that the discriminatees had such experience as work at nuclear power plants and NASA mission control, but the record shows that this information was not on the discriminatees' applications and thus was not known to the Respondent when it made its hiring decisions. More importantly, the evidence showed that

substituted his own judgment for the employer's. See, e.g., *Ryder Distribution Resources*, 311 NLRB 814, 816 (1993) ("[T]he Board does not substitute its own business judgment for that of the employer in evaluating whether conduct was unlawfully motivated."). Accordingly, we find that the Respondent applied its hiring criteria in a nondiscriminatory manner and that the Respondent established that it would have rejected the applicants based on their lack of recent hands-on experience even in the absence of their union activity. We therefore reverse the judge and dismiss the allegation.

AMENDED CONCLUSIONS OF LAW

Delete the judge's Conclusions of Law 4 and 5, and renumber the subsequent paragraph.

REMEDY

Having found that on May 12, 1997, the Respondent discharged John Rogers because he joined or assisted the Union and engaged in concerted activities, we shall order the Respondent to offer John Rogers reinstatement to his former position or, if such position does not exist, to a substantially equivalent position. We shall further order the Respondent to make Rogers whole for any loss of earnings and other benefits he may have suffered in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Pollock Electric, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or discriminating against employees for supporting International Brotherhood of Electrical Workers, Local Union No. 716 a/w International Brotherhood of Electrical Workers, AFL–CIO, or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under 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 John Rogers reinstatement to his former position or, if such position does not exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make John Rogers whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to its unlawful discharge of John Rogers, and, within 3 days thereafter, notify him in writing that this has been done, and that the discharge will not be used against him in any way.

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

(e) Within 14 days after service by the Region, post at its Houston, Texas facility copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 12, 1997.

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

the Respondent sought recent experience, not overall experience (however dated) or specific types of experience. Finally, the judge noted that the Respondent hired Robert Mayfield, who may not have worked at all for 1 year prior to applying to the Respondent, and Albert Griswold, whose application listed no work experience. As to Mayfield, the evidence was inconclusive, and we simply cannot determine what he did in the year prior to being hired by the Respondent. In addition, Mayfield was hired in 1992, and there was no evidence as to the specific hiring circumstances at that time. As to Griswold, Wheeler testified that he knew Griswold personally, that he worked with him previously, and that Griswold told him he had been working for another company up to the time he applied.

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

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONSBOARD
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 or otherwise discriminate against you for supporting International Brotherhood of Electrical Workers, Local Union No. 716 a/w International Brotherhood of Electrical Workers, AFL–CIO, or any other union.

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

WE WILL, within 14 days from the date of the Board's Order, offer John Rogers reinstatement to his former position or, if such position does not exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make John Rogers whole for any loss of earnings and other benefits he may have suffered because of our discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful discharge of John Rogers, and WE WILL, within 3 days thereafter, inform him in writing that this has been done and that the discharge will not be used against him in any way.

POLLOCK ELECTRIC, INC.

Nadine Littles, Esq., for the General Counsel.
Frank L. Carrabba, Esq., of Houston, Texas, for the Respondent.
Patrick Flynn, Esq., of Houston, Texas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The original charge in Case 16–CA–18629 was filed on April 23, 1997,[1] and the original charge in Case 16–CA–18629–2 on May 27, by International Brotherhood of Electrical Workers, Local Union No. 716 a/w International Brotherhood of Electrical Workers, AFL–CIO (the Union). Complaint issued on October 17, and alleges that Pollock Electric, Inc. (Respondent or the Company) discharged John Rogers on May 12, because he joined or assisted the Union and engaged in concerted activities, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

The complaint also alleges that, since March 21, Respondent has maintained a discriminatory hiring practice for the purpose of discouraging employees from joining or assisting the Union, in violation of Section 8(a)(1) and (3) of the Act.

The complaint further alleges that, since March 21, Respondent utilized the referral system of the Independent Electrical Contractors of Houston, Inc. (the IEC). It also refused to consider for employment or to hire John Gafford, Dan Lord, Troy Lockwood, Ray Rath, and Jack Smith because they assisted the Union and engaged in concerted activities, in violation of Section 8(a)(1) and (3) of the Act.

This case was heard before me in Houston, Texas, on December 15–18, 1997. Thereafter, the General Counsel and the Respondent filed briefs. Based on my observation of the demeanor of the witnesses and the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Texas corporation with an office and place of business at Houston, Texas, where it is engaged in business as a commercial electrical contractor. During the 12 months preceding issuance of the complaint, Respondent purchased and received at its Houston facility goods and materials valued in excess of $50,000 directly from points outside the State of Texas. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

Summary of the Facts

A. The Hiring and Discharge of John Rogers

John Rogers filed an application for employment with the IEC in mid-March. He was hired by L.L. Electric Co. While so employed, he called Michael Wheeler, Respondent's field superintendent, and asked for a job. Wheeler told him to file an application with the IEC. Rogers replied that he had already done so. Wheeler later called Rogers and asked him to report for an interview. Rogers did so on about April 1. Rogers had an apprentice license, but did not have a journeyman license. He told Wheeler that he had a "license."

Respondent hired Rogers on about April 1, and assigned him to a job at "Car-Max." He was later transferred to a job at the Capital Grill because he did not want to work the overtime required at Car-Max. On April 15, he wore union insignia to the Capital Grill job, and told employees that the Union provided water and cups at its jobs, which were not present at the

[1] All dates are in 1997, unless otherwise stated.

Capital Grill job. He also picketed during his lunch hour with one of the alleged discriminatees in this proceeding (Ray Rath), and sent a letter to Respondent's president, John Pollock, recommending Rath and the other alleged discriminatees for employment.[2]

On April 16, Rogers picketed again, and asked a foreman to call Pollock and see whether he would sign a contract with the Union. Pollock came to the jobsite with the foreman, and Rogers made his request. Pollock declined signing an agreement.

Wheeler called Rogers that day and told him that he was being transferred to another job at Huntsville, about 100 miles away. He also asked Rogers where it was that he had worked with the individuals whom he had recommended. Rogers was confused by the transfer, and did not answer. Pollock testified that he recorded this conversation, the first time that he had recorded a conversation of this nature. Rogers went to the union hall, and discussed the matter with alleged discriminatee Troy Lockwood. He then called Wheeler for the purpose of telling him where he had worked with the individuals he had recommended. According to Rogers, Wheeler hung up on him. Wheeler denied this. He asserted that Rath tried to give him Rath's references, but that he refused, because he wanted them from Rogers. On April 18, Rogers wrote Wheeler a letter stating that he worked with Jack Smith at Kelly Roche Electric in 1995, and with the other recommended individuals at various charity projects.[3]

On about April 23, Rogers went on strike, apparently based on the original charge in this proceeding which was filed on April 23. On April 29, Rogers wrote Pollock that the strike had ended, and that he was ready to return to work immediately.[4]

On April 29, Pollock wrote Rogers a letter stating that his employment application did not contain any reference about having worked at Kelly Roche Electric. The letter directed Rogers to furnish, by May 9, "a complete record of all employment" together with copies of payroll stubs and income tax returns. The letter further informed Rogers that he was suspended pending completion of the "investigation." If he failed to provide the requested documents, Respondent would conclude that he had "deliberately falsified" his application, and would "take further action in accordance with its standard employment policies."[5]

On May 8, Rogers wrote Pollock that he had worked for Kelly Roche only a short time, and had forgotten about it. His letter concludes as follows:

> Mr. Pollock, I am a loyal Pollock Electric Employee who also wishes to be union. I believe that there is nothing wrong with being a Pollock Electric employee, and also being union. But as soon as I came out as a union supporter, our company had me transferred, wrote me up, and harassed me for no reason other than I am Union.
>
> I feel that your desire for my payroll records and income tax returns further demonstrates that your only desire is to eliminate me from your employment. I gave you my best recollection, you had a chance to review it, your hired me and I did a good job for you. I am prepared to return to work immediately.[6]

Pollock terminated Rogers by letter dated May 12. He stated that he could "accept forgetting one brief work situation." However, he did not understand Rogers' refusal to give him the requested information. Respondent's policies state that "falsification or omission of information on any document may result in disqualification from further consideration for employment or, if hired, termination from employment." Accordingly, Rogers was terminated immediately.[7]

B. The Suspension of Robert Baker

Pollock testified that an employee named Robert Baker was hired in September 1977, a few months before the hearing in this case. A theft occurred at the job where Baker was working, and Baker was a suspect. The police informed Pollock that Baker had a prior criminal record. This fact was not listed in his application. A question on the application asked whether the applicant had been convicted of a felony within the past 7 years. This question was not answered, or was answered with a "No." Pollock sent Baker a letter asking about his criminal record. Baker did not respond. Pollock suspended Baker but did not discharge him. His reason was that the police had not sent him any "confirmation."

C. The Alleged Refusal to Consider and/or Refusal to Hire

1. Pollock and the IEC

Pollock previously worked for another employer, but left in 1983 to form his own business. He testified that he told his prior employer that he was starting "nonunion." The parties stipulated that Troy Lockwood, if called as a witness on rebuttal, would testify that the individuals originally hired by Pollock came from nonunion companies.

In 1984, Pollock joined the IEC, which by the time of the hearing had about 120 members throughout the country. By 1984, Pollock had become the national first vice president. He wrote and published several articles with this title. Thus, in the second quarter of 1994, he wrote an article in an IEC publication on the "latest union effort to recapture the construction market." "Salts" were becoming "deep cover 'moles'" and their goal was to drive employers out of business if they would not sign a contract, to "convert you or kill you."[8] Various methods of avoiding this are suggested so that employers can "avoid some of the problems of hiring off the street," and remain "independent." The "shared man program" allows members to loan employees to one another and "minimize their exposure to risk." Pollock testified that one of the purposes of the IEC was to "eliminate strangers." He wrote another IEC article on the IBEW's "COMET" program, which includes

[2] GC Exh. 8.
[3] GC Exh. 14.
[4] GC Exh. 13.
[5] GC Exh. 9.
[6] GC Exh. 10.
[7] GC Exh. 11.
[8] GC Exh. 1. Union Assistant Business Manager Troy Lockwood testified that it was not the Union's policy to drive employers out of business.

"lying on job applications, faxing unsolicited resumes to unsuspecting companies, and stalking employees of non member firms." When these individuals apply for employment, they are wearing the uniforms of the employer's "arch rival" (unidentified) and are being paid by the "rival" to work against the employer. "Would you hire these people?" the article asks rhetorically. If the employer does not do so, the applicants file charges.[9] Pollock wrote other articles on the methods to defeat union organizational efforts.[10]

Pollock identified a document giving Respondent's "policy on hiring." After outlining general rules on applications, the document states that applications will be "prioritized" as follows:

> A. Current employees of the company.
> B. Past employees with proven safety, attendance and work records.
> C. Applicants recommended by current supervisors.
> D. Applicants recommended by current employees.
> E. Applicants recommended by other IEC members.
> F. Applicants listed on the IEC listing of applicants.
> G. Unknown applicants.[11]

Under IEC's shared men program, an IEC member with more employees than needed loans an employee for a specified period to another IEC employer.[12]

2. Respondent's hiring in 1997

Respondent's records show that it hired 20 journeymen electricians between March 21 and December 8. Sixteen were referred by current or former employees or by an IEC member, and four, including John Rogers, were unknown.[13] In addition, it hired 10 employees through the shared man program. Of the latter, three were journeymen electricians from Summit Electric, according to Superintendent Wheeler. He was uncertain of the classifications of the remaining borrowed employees, but was "desperate for warm bodies."

IEC provided an application service to its members. Applicants for employment filed applications with IEC which then transmitted them to members who requested them. Respondent required applicants to file applications with the IEC.

The alleged discriminatees filed numerous applications with the IEC. Each of these applications showed that the applicant was a union organizer.[14]

John Pollock testified that he reviewed the alleged discriminatees' applications on a visit to the IEC in May 1997, and determined that the applicants had no continuity of employment with any employer except the IBEW. Accordingly, he instructed Superintendent Wheeler not to request the applications.

Wheeler denied that Pollock gave him any such instructions. He did not request the discriminatees' applications because John Rogers had failed to tell Respondent where he had worked with them. Despite this lack of receipt of the applications, Wheeler contended that they failed to show recent work experience. He had seen their applications in 1996, and would not have hired them then because they had worked at as many as four different jobs in 4 months. Wheeler called it "job hopping." He averred that he knew they were union organizers. Nonetheless, Lockwood had previously worked for Respondent, and Wheeler said that he was a good employee.

3. The alleged discriminatees' qualifications

Daniel Lord had been a journeyman for 28 years, and had supervised 63 journeymen and apprentices. He did high voltage cable splicing at the Johnson Space Center for 13 years. Lord holds a City of Houston journeyman's license, and has completed all the courses required for a certified journeyman electrician. He instructed apprentices at the JACT for 7 years, where he taught grounding, motor controls, blueprint reading, and basic electronics, in a course accredited by the Houston Community College.

Lockwood has been a journeyman for 18 years, and is current in all his educational requirements. He has worked for the Pasadena School District, and for various electrical contractors, including Pollock. He is a member of the International Association of Electrical Inspectors, and speaks before the Houston City Council on issues pertaining to the electrical industry.

Rath has 15 years' experience as an electrician, a city license, and is current in all his educational requirements.

Gafford has been a journeyman electrician for 23 years, and holds licenses in Houston, Texas, and Shreveport, Louisiana. His educational requirements have been met. He has worked on the South Texas Nuclear Project, the Mission Control Center at NASA, at several chemical plants and a sewage plant, and as a traffic signal installer for Houston.

Jack Smith has been a journeyman electrician for 20 years, holds a City of Houston license, and is current with all his educational requirements. He is experienced in running conduit, cable tray, pulling wire, terminating, hooking up equipment, welding and instrumentation, troubleshooting, and load calculations when prints are not complete.

Respondent nonetheless argues that the alleged discriminatees' *recent* work experience is inadequate, and that this is the relevant criterion. Lord agreed that he last worked for wages in 1993, but since has done charitable work on weekends for the Union. Gafford showed 5-1/2 days of work with his tools since 1995. Lockwood worked continuously from 1988 to 1992, and from December 1995 to May 1997. Jack Smith worked from July to December 1996, and from December 1996 to February 1997.

Respondent presented evidence on the significance of recency of work as a criterion of current ability. Robert Wilkinson, director of the IEC, testified that an individual loses proficiency if he has not worked recently with the tools of the trade. He stated that there were changes in the Houston electrical code

[9] CP Exh. 4.
[10] CP Exhs. 1, 2, 3.
[11] GC Exh. 6.
[12] CP Exh. 6.
[13] GC Exh. 17.
[14] Daniel Lord, union business manager, 13 applications from March 11 to July 21 (GC Exh. 16(b); John Gafford, 106 applications from March 3, 1997, to September 8, 1998 (GC Exhs. 16(f), (g); Ray Rath, 103 applications between March 3 and October 10 (GC Exhs. 15(a), (b); Jack Smith, 38 applications from April 9 to September 19 (GC Exh. 16(c); and Troy Lockwood, assistant business manager, 65 applications from March 21 to September 8 (GC Exhs. 16(d), (e).

every 3 years. Houston instituted a requirement in 1997 that continuing educational courses had to be taken by journeymen. Wilkinson agreed that any journeyman taking the course could renew his license and work without further training. Wilkinson himself had not worked with the tools of trade for 15 years, according to his testimony.

Roy Rath testified that he had successfully completed an update course 4 months before the hearing, and had renewed his license. John Gafford, Jack Smith, and Daniel Lord gave similar testimony. Troy Lockwood took the course in August and renewed his license. He was asked on cross-examination about the possibility of deterioration of skills if an individual journeyman had not used them for a few years. He replied that he had never heard of any such case. Although he had not worked with his tools for 4 years, he felt at the time of the hearing that he would be just as good as he was then. "Adequate functioning depends upon an employee's knowledge of his work."

4. The qualifications of the employees hired by Respondent

Respondent submitted employment applications of the individuals whom it did employ,[15] and a purported summary.[16] Each application had a question asking for applicant to state the number of years in the position for which he was applying. The answers to these questions reveal a significantly lesser number of years in the industry compared to the experience of the alleged discriminatees.

The application signed by Luis Sanchez shows 2 years of experience in answer to the indicated questions.[17] However the summary submitted by Respondent claims more than 6 years.[18] Michael Roesch's signed application declares that he had only 3 months of experience in the position for which he was applying.[19] However, Respondent's summary claimed that Roesch had 5 years and 5 months of experience.[20]

Other applications indicate less than 10 years of experience. The application signed by Frankie Strain shows 7 years.[21] However, the summary submitted by Respondent claims 9 years and 8 months of experience.[22]

Clay Fowler answered the relevant question on his signed application by stating that he had 7 years of experience in the position for which he was applying.[23] Respondent's summary claims a total of 10 years.[24]

It is unclear whether the discrepancies between the applicants' answers to the question about their experience and their claimed jobs are attributable to the applicants erroneously answering the question, or to a misinterpretation of their listed jobs.

In addition to the lesser number of years of experience, the applications show a lower level of work than that listed by the alleged discriminatees. Most of the applicants named routine "electrical" or "journeyman" experience. None of them demonstrated the advanced work, including teaching, set forth in the alleged discriminatees' applications.

There are documents covering the period prior to the 1997 evidence set forth above. John Grace was hired in August 1995, according to Wheeler. His application is unsigned.[25] Robert Mayfield was hired in 1992, without having performed any work for about a year.[26] Albert Griswold was employed in June 1994, without any enumeration on his application of the dates of employment or work performed.[27] Mayfield's and Griswold's applications show that they had worked for the Union. Neither shows work as a union organizer.

Factual and Legal Conclusions

A. The Discharge of John Rogers

The General Counsel has the burden of establishing a prima facie case that is sufficient to support an inference that protected conduct was a motivating factor in an employer's decision to discipline an employee. Once this is established, the burden shifts to the Respondent to demonstrate that the discipline would have been administered even in the absence of the protected conduct. The General Counsel must supply persuasive evidence that the employer acted because of antiunion animus.[28]

Rogers was hired on April 2. Shortly thereafter, he started wearing union insignia, talked to employees about union benefits, engaged in picketing during his lunch hour, and asked the Company president to sign a union contract. He also recommended for hiring the other alleged discriminatees in this proceeding

The Company responded by demanding that Rogers state where he had worked with the other individuals. He was unable to answer immediately, but later informed Respondent that he had worked briefly with one of the recommended individuals at a firm called Kelly Roche Electric. This firm was not listed in Rogers' employment application. Respondent immediately suspended Rogers pending an investigation as to whether he has "deliberately falsified" his application and directed him to submit a "complete record of employment" and all of his payroll stubs and tax returns. Rogers replied that he had worked at Kelly Roche only briefly, and had forgotten about it when preparing his application. He declined to produce the payroll stubs and income tax returns, and Respondent discharged him, relying on its policy that falsification or omission of any information on a document could result in termination.

Subsequent to Rogers' discharge, another employee was suspected of theft at a job. The police informed Respondent that he had a previous criminal record. This did not appear on

[15] GC Exhs 17(a)–(r).
[16] GC Exh. 17.
[17] GC Exh. 17(t).
[18] GC Exh. 17—He had 6 years with named employers, plus an unknown period with another.
[19] The exhibit is in the file without a number. Roesch's name appears on Respondent's summary.
[20] GC Exh. 17.
[21] The exhibit number is unclear, but appears to be GC Exh. 17(t), a probable duplicate of another exhibit number.
[22] GC Exh. 17.
[23] The exhibit appears to be GC Exh. 17(b).
[24] GC Exh. 17.
[25] R. Exh. 20.
[26] R. Exh. 23.
[27] GC Exh. 24.
[28] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Manno Electric, Inc.*, 321 NLRB 278 fn. 12 (1996).

his application, although there was a question pertaining to it. The employee did not answer Respondent's letter asking him about his criminal record. Nonetheless, Respondent refrained from discharging him, assertedly because the police had not provided it with "confirmation."

I conclude that concealment of a criminal record on an application is more significant than forgetting to list an employer. Indeed, Respondent stated that it could understand the latter omission. I do not credit Pollock's explanation that the police did not provide him with confirmation of the second employee's prior criminal record. How else did he know about it? And, when he demanded that the other employee give him a complete accounting of this record, there was no response. In the case at bar, Rogers did explain his failure to list the omitted employer, but refused to supply all his payroll stubs and income tax returns. Respondent's demand for this information was excessive and unjustifiable, and Rogers' refusal to supply these documents was far less important than the other employee's refusal to supply information about his criminal record. I conclude that Respondent engaged in blatantly disparate treatment of these two employees.

The Board has long held that disparate treatment of employees for similar offenses constitutes evidence of discriminatory motivation. In one case, it reached this result because the employee had been discharged for falsifying records, despite the fact that other employees committing the same offense were not discharged. *Pony Express Courier Corp.*, 267 NLRB 733, 737 (1983). In *Overnite Transportation Co.*, 254 NLRB 132 (1981), the employee omitted a record of employment with one employer, Rogers' asserted misconduct in the case at bar. In *Overnite*, the employee omitted the information deliberately, unlike Rogers' inadvertent omission. When the employee in *Overnite* complained about a condition of work, the employer "incongruously" began checking his employment record. (Id. at 146). The Board concluded that the employer's reason was pretextual. I make the same conclusion herein. I conclude that the unjustifiable nature of the information requested from Rogers the severity of the discipline, and the disparate treatment of another employee establish a prima facie case of Rogers' unlawful discharge.

The General Counsel argues that Pollock's articles against union organization constitute background evidence of animus, relying on *BE & K Construction Co.*, 321 NLRB 561 (1996), enf. denied 133 F.3d 1372 (11th Cir. 1997). The evidence of animus in that case consisted of a foreman's manual advocating merit shop principles, and the employer's letters to unions, in response to employment applications, expressing the same views. There is no explicit statement that union members or sympathizers would not be hired. The Court of Appeals concluded that this evidence "consisted of nothing more than the lawful, noncoercive statements by *BE & K* of *BE & K's* merit shop policy" (133 F.3d at 1376). This, the court concluded, was protected under the provisions of Section 8(c) of the Act.[29]

With respect to Section 8(c), the Supreme Court has stated that it "merely implements the First Amendment" and "[a]ny assessment of the precise scope of employer expression must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in Sec. 7 and protected by Sec. 8(a)(1) and the proviso to Section 8(c)." *NLRB v. Gissel Packing Co.*, 395 U.S. 757, 617 (1969).

As noted, the Court of Appeals for the 11th Circuit found no evidence of animus in *BE & K* other than the statements by the employer, which were deemed to be protected. In the case at bar, there *is* evidence of animus other than Pollock's statements, as set forth above. This difference raises the issue of whether Section 8(c) applies only to evidence of an "unfair labor practice," or also to evidence of antiunion animus, i.e., "background evidence," as the General Counsel puts it. A learned commentator has stated that antiunion statements that do not contain threats of reprisal force, or promise of benefit may be admissible to show background or union animus.[30]

As I have concluded that other evidence establishes Respondent's animus, I need not rule on the General Counsel's contention that Pollock's articles in this case also constitute such evidence.

Finally, Pollock explicitly stated to his prior employer that he was going to open a nonunion shop. A statement of this nature made to employees constitutes a violation of Section 8(a)(1). *Cascade Painting Co.*, 277 NLRB 926, 930 (1985). There is no evidence that employees heard this statement, nor is there any allegation based upon it. However, it seems elemental that an employer who states that he is going to open a nonunion shop manifests his intention not to hire union adherents. I conclude that Pollock's statement to his prior employer constitutes additional evidence of antiunion animus.

It is obvious that Respondent has not rebutted the General Counsel's prima facie case. I find that Respondent violated Section 8(a)(3) and (1) of the Act by discharging John Rogers on May 12, 1997, because he joined or assisted the Union and engaged in protected concerted activities.

B. The Alleged Discriminatory Refusal to Hire

In order to establish an unlawful refusal to consider for hiring or to hire an individual, the General Counsel must show an employment application by each individual, a refusal to hire him, a showing that the applicant was or might be expected to be a union supporter or sympathizer, that the employer knew this, that he maintained animus against such membership or sympathy, and refused to hire the applicant because of such animus. *Big E's Foodland, Inc.*, 242 NLRB 963, 968 (1979).

As for the first requirement, the record shows numerous applications filed with the IEC by each alleged discriminatee during the relevant period. Respondent required applicants to file with the IEC. This requirement created a reasonable belief by applicants that IEC had authority to receive applications on

[29] Sec. 8(c) reads: The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not substitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

[30] Charles J. Morris, The Developing Labor Law, Second edition, Vol. I, p. 193, fn. 68 (The Bureau of National Affairs, Washington, D.C. 1983).

behalf of Respondent, and was its agent for this purpose. I so find.

In addition, Pollock testified that he reviewed the applications and directed Superintendent Wheeler not to request them from the IEC. Wheeler denied that Pollock gave him any such instructions. He did not request the applications because John Rogers, who had recommended the applicants refused to tell him where Rogers had worked with them. Wheeler claimed he saw their applications in 1996, although the evidence is inconclusive as to whether all the applicants had applications on file at whatever time in 1996 that Wheeler went there. The 1996 applications, according to Wheeler, showed lack of recent experience and "job hopping." It is unclear how lack of recent experience in 1996 proved lack of such experience in 1997. And "job hopping" was an apparently new reason for rejecting the applicants.

I do not credit Wheeler's testimony, which is implausible and partially contradicted by Pollock. Based on IEC's status as Respondent's agent for the filing of applications, and Pollock's examination of the applications, I find that the alleged discriminatees did file applications for employment. They were recommended by John Rogers, a current employee—one of the categories under Respondent's hiring policy.

It is obvious that Respondent knew that the applicants were union organizers, as this fact appeared on their applications and Wheeler admitted that he knew that. It is also obvious that Respondent refused to hire them at a time when it was hiring. As set forth above, Respondent had animus against the Union.

The reason given by Respondent—lack of recent work experience—is not supported by credible evidence. Although IEC Director Wilkinson asserted a deterioration of skills if an employee had not utilized them for a few years, he was contradicted by Lockwood. Wilkinson himself last worked with tools 15 years before the hearing. The alleged discriminatees' experience was far more recent than this, and better qualifies them to testify on the subject of recency of experience. They had taken the 1997 educational courses and had current licenses. Wilkinson testified that a journeyman who did this could work without further training. There is no evidence that Wilkinson himself had done this.

Respondent's actual hiring record further belies the reason it advanced for not hiring the alleged discriminatees. The Company hired Michael Roesch, who had 3 months of experience, and rejected the alleged discriminatees, who had wide and varied work histories ranging from 18 to 28 years. The Company hired Robert Mayfield, who had not worked at all for a year, and Albert Griswold, who did not specify any dates or nature of work on his application. These are only a few examples of the paucity of experience of the individuals Respondent hired. For the Company to claim that employees with only a few months or years of low level experience were more valuable to it than individuals who had worked on a nuclear project, or a mission control center at NASA, or who had taught college accredited courses in electronics, is simply ludicrous. I conclude that Respondent's asserted reason for not hiring the applicants was pretextual.

Respondent attempted to offset the General Counsel's evidence by showing that it had hired some individuals who had worked for union firms, or who had previously been union members, or had in fact worked for the Union. None of these individuals had been union organizers, and their relationship with the Union in 1997 was tenuous to nonexistent. This is insufficient to offset the General Counsel's evidence. *Fluor Daniel, Inc.*, 311 NLRB 498, 505 (1993).

I find, as alleged in the complaint, that, since March 21, 1997, Respondent has refused to consider for employment or hire the applicants named in the complaint because of their assistance to the Union and other protected activities, in violation of Section 8(a)(3) and (1) of the Act.

C. The Alleged Discriminatory Hiring Practice

Respondent's hiring practice utilized sources in an ordered sequence (1) current employees; (2) past employees with good records; recommendations from (3) current supervisors; (4) current employees; or (5) other IEC members; (6) applicants on IEC listings; and (7) unknown applicants. Respondent itself was a nonunion shop, according to Pollock. All the IEC members were nonunion.

Since Respondent was a nonunion shop, all union members were excluded from the first four categories. None of the current or past employees could be union members, and, the supervisors reflected the policy of their employer. Since all of the IEC members were nonunion, none of the employees recommended by them, or borrowed under the "shared man" program, would be union members. There could be union members in the applications listed by the IEC, or among the "unknown" applicants. However, Respondent interviewed them, and as in the case of the discriminatees, unlawfully refused to hire them if they were union adherents.

The Board recently concluded that similar hiring categories, including "hiring from unknown applicants only as a last resource," operated "to ensure the hiring of nonunion applicants and to screen out prounion applicants." *M & M Electric Co.*, 323 NLRB 361, 370 (1997). In *D.S.E. Concrete Forms*, 303 NLRB 890 (1991), the employer hired according to a sequence of categories of applicants. None of the categories contained union members, and the Board agreed that, because of this fact, the employer had unlawfully failed to consider the alleged discriminatees for employment. (Id. at 890 fn. 2, 897–898). In *Eldeco, Inc.*, 321 NLRB 857 (1996), enfd. in part and denied in part 132 F.3d 1007 (4th Cir. 1997), the Board followed the same reasoning as in *D.S.E. Concrete Forms.* (Id. at 858, 870). Although the Court of Appeals did not enforce the decision in its entirety, it agreed with that part of the Board's decision set forth above.[31]

Based on the decisions cited above, it may be stated as a general principle that a hiring procedure based on a sequence of categories of applicants is discriminatory where none of the categories contains union members, or where they first appear at or near the end of the sequence.

[31] The relevant portion of the Board's decision considered the applicants at the North Charleston jobsite, and found the violation based upon the principles in *D.S.E. Concrete Forms*. The Court of Appeals affirmed this conclusion (132 F.3d at 1014). The Court lists the employer's hiring priorities. (Id. at fn. 3).

The first four categories of Respondent's hiring policy herein were current employees, past employees with good records, applicants recommended by current supervisors, and applicants recommended by current employees. None of these categories contained union members—Respondent was a nonunion shop. The fifth category consisted of applicants recommended by other IEC members—but they were also nonunion shops, and, perforce, would not be recommending any union members. The same result follows from the "shared man" program—the other IEC members would not have any union members to "share."

The first opportunity for union members to be hired could be found in the 6th and 7th categories—applicants listed by the IEC, or unknown applicants. However, they faced interviews by Respondent and, as shown by the experience of the discriminatees in this case, were unlikely to be hired. I conclude that Respondent's hiring policy was discriminatorily motivated and designed to exclude union members and sympathizers. The hiring procedure was inherently destructive of employee rights, and Respondent has not submitted any legitimate business objective which justified the maintenance of such a policy. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). The Board has concluded on similar facts that the employer's maintenance of such a policy violated Section 8(a)(3) and (1) of the Act. *Honeywell, Inc.*, 318 NLRB 637 (1995), and cases cited therein. I reach the same conclusion in the case at bar.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

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

2. International Brotherhood of Electrical Workers, Local Union No. 716 a/w International Brotherhood of Electrical Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent discharged John Rogers on May 12, 1997, because he joined or assisted the Union and engaged in concerted, protected activities, in violation of Section 8(a)(3) and (1) of the Act.

4. On March 21, 1997, and on various dates thereafter, Respondent refused to consider for employment and/or hire John Gafford, Dan Lord, Troy Lockwood, Ray Rath, and Jack Smith because they joined or assisted the Union, in violation of Section 8(a)(3) and (1) of the Act.

5. Since about March 21, 1997, and at all times thereafter, Respondent has maintained and used a discriminatory hiring policy which excludes union members or sympathizers from employment, and thus violated Section 8(a)(3) and (1) of the Act.

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

THE REMEDY

It having been found that Respondent has committed unfair labor practices, I shall recommend that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent, on March 21, 1997, refused to consider for employment or to hire John Gafford, Dan Lord, Troy Lockwood, Ray Rath, and Jack Smith because they joined or assisted the Union and engaged in concerted activities, and, on May 12, 1997, discharged John Rogers for the same reason, I shall recommend that Respondent be ordered to offer John Rogers reinstatement to his former position, and the other discriminatees to the positions for which they applied, or, if such positions do not exist, to substantially equivalent positions. It is further recommended that each of the discriminatees be made whole by Respondent for any loss of earnings and other benefits he may have suffered from the date of the discrimination against him to the date of Respondent's offer of reinstatement or employment, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[32]

In *Honeywell*, supra, the Board required the employer to send notices to all members of a collective-bargaining unit represented by a union. The notices contained a rescission of specific exclusionary provisions barring employees from applying for certain jobs. There is no recognized collective-bargaining agent herein. However, the same principles are applicable. The only access to the names and addresses of applicants may be found at the IEC. Although it maintained the applications for only a limited period of time, it had new applications being filed regularly. The IEC was Respondent's agent for the filing of applications. It is appropriate to require Respondent to request from the IEC the names and addresses of all applicants, and to send to them its own applications for employment and notices that Respondent will consider their applications on Respondent's forms in a nondiscriminatory manner. Respondent should be required to continue his practice until the remedial provisions of this decision have been implemented.

[Recommended Order omitted from publication.]

[32] 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. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 281 NLRB 651 (1977).