JD–30–09
Indianapolis, IN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HARCO ASPHALT PAVING, INC.,

and

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 120, A/W LABORERS INTERNATIONAL UNION OF NORTH AMERICA

Cases 25–CA–30652
25–CA–30354
25–CA–30355

Belinda J. Brown, Esq., for the General Counsel.
J. Michael Cavosie, Esq. (Easter & Cavosie), of Indianapolis, Indiana for the Respondent.
Neil E. Gath, Esq. (Fillenwarth, Dennerline, Groth, & Towe, LLP), of Indianapolis, Indiana, for the Charging Party.

DECISION

Statement of the Case

Mark D. Rubin, Administrative Law Judge. This case was tried in Indianapolis, Indiana, on March 2 and 3, 2009, based on a charge filed in Case 25–CA–30652 by Laborers International Union of North America, Local Union No. 120, a/w Laborers International Union of North America (the Union or Local No. 120) on April 4, 2008, and an amended charge filed on August 28, 2008. [1] Further, counsel for the General Counsel filed with me a pretrial motion to set aside the settlement agreement I approved in Cases 25–CA–30354 and 25–CA–30355 on December 11, 2007.[2] The parties fully litigated all of these cases at the instant trial,[3] and I

[1] Unless otherwise indicated, all dates refer to 2008.

[2] At the hearing, counsel for the General Counsel stated that the substantive paragraphs at issue in the earlier complaint are pars. 5(b), 6(a) and (b), and 8. During the hearing, at my request, counsel for the General Counsel, with the agreement of all parties, agreed to introduce the earlier complaint into the instant record. However, inasmuch as the complaint was inadvertently not subsequently offered, I have taken administrative notice of it.

[3] That is, they litigated the issues presented by the complaint in Case 25–CA–30652, and the issues presented by pars. 5(b), 6(a) and (b), and 8 of the complaint in Cases 25–CA–30354 and 25–CA–30355. Previously, the Regional Director had issued a consolidated complaint in respect to Cases 25–CA–30352, 25–CA–30354, 25–CA–30355, 25–CA–30356, 25–CA–30357, 25–CA–30359, and 25–CA–30370. At trial in those cases, I approved an all-party settlement agreement in respect to Cases 25–CA–30354 and 25–CA–30355, the substantive allegations of which were detailed in pars. 5(b), 6(a) and (b), and 8 of the consolidated complaint. The balance of the consolidated complaint was tried and my decision issued. Exceptions were

Continued

informed the parties I would rule on the General Counsel's motion in the instant decision, that is based on the evidence presented at trial, I would apply Board law to decide whether the settlement agreement should be set aside and, if so, whether the Act had been violated in respect to the allegations in those cases.

The Regional Director's complaint in Case 25–CA–30652, dated December 19, 2008, alleges that on various dates in mid-March 2008, the Respondent refused to hire, or consider for hire, Ward Daniels, Chris Guerrero,[4] Joe Hardwick, Mike Hibbs, Brian Short, and David Williams in violation of Section 8(a) (1) and (3).[5] The Respondent essentially admits that it did not hire any of the named applicants, but denies that it refused to consider the applicants for hire or that its failure to hire the applicants was discriminatory, or otherwise in violation of the Act.

The substantive portions of the complaint in Cases 25–CA–30354 and 25–CA–30355, contained in paragraphs 5(b), 6(a) and (b), and 8, previously settled but subject to the General Counsel's motion to set aside, allege that on May 30, 2007, the Respondent, by Office Manager Cindy Sartain, violated Section 8(a)(1) and (3), by threatening to call the police to have job applicants removed because of their union affiliation and, since the same date, by refusing to consider for hire job applicants Ward Daniels, Chris Guerrero, Joe Hardwick, Mike Hibbs, John O'Haver, Brian Short, and David Williams because of their membership in and activities on behalf of the Union. The Respondent denies these allegations, and opposes the General Counsel's motion to set aside the prior settlement agreement.

At the trial, the parties were afforded a full opportunity to examine witnesses, to adduce competent, relevant, and material evidence, to argue their positions orally, and to file post-trial briefs. Based on the entire record, including my observation of witness demeanor, and after considering the briefs of the Respondent and the General Counsel, I make the following

Findings of Fact

I. Jurisdiction

The Respondent maintains its corporate office and place of business in Indianapolis, Indiana. From that location, the Respondent has been engaged in the construction industry as a provider of asphalt paving, concrete, dirt, and maintenance services. During the 12 months prior to the issuance of the complaint, the Respondent, in the operation of its business, provided services in excess of $50,000 to the State of Indiana, an entity engaged in interstate commerce. I find, and the Respondent admits, that at all material times, the Respondent has been an

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taken, and the Board subsequently issued its decision on December 31, 2008, a decision captioned with all of the earlier case numbers, including the settled cases.

[4] At trial, he appears in the transcript to have spelled his name on the record as "Guerro." But the complaint, briefs, and numerous other documents in the record including job applications, spell the name Guerrero, which I have used throughout.

[5] Daniels has been employed by the Union as an organizer since 2005. Guerrero has been employed as an organizer for the Midwest Region Organizing Committee of the Laborers International Union of North America (Midwest Region) since 2002. Hardwick has been employed as an organizer by the Midwest Region since 2005. Hibbs has been employed by Local 103, Laborers International Union of North America as an organizer since 2001. Short has been employed as a lead organizer by the Midwest Region since 2000. Williams has been employed as field operations coordinator by the Midwest Region since early 2007.

employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Labor Organization

It is admitted, and I find, that Local No. 120, and International Union of Operating Engineers, Local Union No. 103, a/w International Union of Operating Engineers, AFL–CIO (Local No. 103) have been at all material times herein, labor organizations within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

Case 25–CA–30652

The Respondent is engaged in the construction industry as a contractor providing excavating, concrete installation, asphalt paving, sewer construction, and related services in the Indianapolis, Indiana area. None of the Respondent's employees are represented by a union, and the Union has been attempting to organize the Respondent's employees since about 2006.

On December 11, 2007, I approved a settlement agreement in Cases 25–CA–30354 and 25–CA–30355 entered into by the Respondent, the Union, and the General Counsel, the terms of which, among other things, required the Respondent to consider for hire using nondiscriminatory criteria the following individuals who were assisting the Union in organizing the Respondent: Ward Daniels, Chris Guerrero, Joe Hardwick, Mike Hibbs, John O'Haver,[6] Brian Short, and David Williams. On January 9, 2008, the Respondent's then attorney, Michael Einterz, provided the Union with job application forms. All except O'Haver completed the forms and prepared resumes, and on January 24, 2008, Williams and Daniels delivered the completed job application forms and resumes to Harco's office.

While it is undisputed that the Respondent never contacted any of the applicants for interviews or made offers of a job, the complaint in Case 25–CA–30652 asserts that the refusal to hire/consider violations took place on various dates in March 2008, dates consistent with later applications filed by all the organizers, except for O'Haver. Thus, the Respondent's failure to hire or consider for hire the organizers based on the January applications is neither a subject of the complaint's allegations, nor a basis for the General Counsel's motion to set aside the settlement, which is based on the allegations in the complaint. [7]

On January 28, the Union's attorney, Neil Gath, wrote to the Respondent's then-attorney, Einterz, asking the duration for which submitted job applications are retained and considered by the Respondent. Einterz replied on February 5, informing Gath that "typically, during the height of the season, Harco only considers applications during the week within which they are received," and that "in the offseason, they typically consider applications good for up to 30 days. The applications submitted by the Local 120 Laborers would fall into that category." The letter also stated, "The more active the construction season becomes, the more frequently applications should be submitted to allow the applicants to be considered for employment with Harco."

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[6] O'Haver was an intern for the Union.

[7] This is consistent with the evidence, which demonstrated that during January and February, the construction off-season, the Respondent would have been performing no work.

On February 18, Gath sent Einterz a letter asking "that you advise me as to the specific date which is considered the start of the construction season by Harco." In his letter, Gath also asks whether the Respondent would accept applications by fax.

Einterz responded to Gath, by letter on February 22, informing Gath that construction season "will begin once weather permits, and is generally in full swing by the springtime." Einterz's letter added, "This will confirm that Harco does not accept job applications by fax, and does not accept copies of job applications. Job applications must be filled out by the applicant, and unless there are extenuating circumstances, in person, and if possible, by appointment."

On March 10, Williams called the Respondent's office to inquire as to an appointment to complete a job application. He spoke to a woman who identified herself as the Respondent's bookkeeper, and asked her about making an appointment to complete a job application. She responded that an appointment was not necessary. Williams asked if "walk-in" applications were welcome. She responded, "Yes."[8]

Additional Applications

On March 17, Daniels and Williams visited the Respondent's office to apply for a job. They secured applications from the receptionist,[9] completed the applications on site, listing the same qualifications as in their earlier applications, and gave the completed applications to the receptionist. They asked the receptionist for how long the Respondent would keep the applications on file, and she responded that she didn't know. Short and Hardwick did the same on March 18. They completed the applications on site, after the receptionist agreed to their request to do such, handed the completed applications to the receptionist, asked her how long they would be kept on file, and were told by the receptionist that the applications would be kept on file for 1 week. On March 19, Hibbs and Guerrero visited the Respondent's office, obtained applications for the receptionist, completed the applications on site, listing similar experience to their earlier applications, and returned the completed applications to the receptionist.

As Einterz had indicated the possibility that applications would only be active for 1 week, Short and Hardwick returned to the Respondent's office on March 25, and completed and submitted applications as they had the previous week, as did Williams and Daniels. They asked the receptionist if the Respondent was hiring and how long the applications would be kept on file, and she replied that she didn't know the answers to either question. Hibbs and Guerrero returned to the Respondent's office to file applications on March 26, saw a sign posted on the door stating "WE ARE NOT ACCEPTING APPLICATIONS TODAY," and left without filing applications.[10]

On Monday, March 31, Williams and Daniels returned to the Respondent's office to file new job applications, and asked Cindy Sartain, the Respondent's office manager, for job applications. Sartain handed them applications. Williams asked whether they could complete the applications in the office. Sartain responded, "No," and pointed to a sign posted on the wall

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[8] Uncontroverted and credited testimony of Williams.

[9] While witnesses testified to a "receptionist," the parties stipulated that the individual was the Respondent's bookkeeper, Jessica Furstenberg. It's not clear from the record whether Furstenberg is an employee of the Respondent.

[10] Neither the sign nor any change in the Respondent's hiring policy it may have represented are alleged as violations.

which stated that applications would only be accepted Wednesdays, between 2:30 and 3 p.m.[11] Williams and Daniels took the applications and left the office. These applications were never submitted. On these various occasions in March when the union organizers visited the Respondent's office to file job applications, there was no confrontative behavior with the Respondent's employees or bookkeeper. All of the organizers testified that they were polite and used no rude or inappropriate language, and there is no testimony to the contrary. The Respondent never offered any of the organizers jobs, nor contacted them for interviews, or otherwise about their applications. [12]

The Respondent's owner, Paul Harding, testified, in essence, that he personally reviewed all of the organizer's job applications, found all but two lacking the experience with concrete that he would require in order to be hired, but that these considerations were irrelevant because the Respondent was not hiring. Additionally, Harding testified, "I didn't have any objections to any of their applications. We were in our down season. We weren't working and we didn't have any work."

The Respondent's Hiring Policy

The Respondent's business is, essentially, seasonal and at the beginning of each year's construction season the Respondent calls back previous years' employees. The Respondent's owner, Harding, testified that the Respondent has utilized a hierarchal hiring process for years, which resulted in previous employees receiving first priority consideration, and individuals referred by employees receiving second priority. According to Harding, the Respondent only utilizes stranger applications if the first two categories have failed to satisfy its need for workers.

The Respondent treats these categories of job applicants differently in respect to job application policies and procedures. Thus, the Respondent does not require previous employees nor, generally, referred job applicants to complete written job applications, which it requires of applicants who fall into neither of those categories.[13]

As to the applications themselves, the Respondent generally keeps completed ones on file for 1 week during the active construction season, then shreds them. During the off-season, the Respondent maintains the applications as active for 30 days.[14]

The Respondent's 2008 Hiring

My findings here are essentially based on the testimony of Harding and the Respondent's superintendent, Charles McClellen, and certain documents. No payroll records or similar documents were introduced. According to Harding, the Respondent's construction season typically begins in April and continues through mid-December, and the Respondent lays

[11] Neither the sign, nor any change in the Respondent's hiring policy it may have represented, nor the instructions to complete the applications off-premises are alleged as violations.

[12] Described events of March 17, 18, 19, 25, 26, and 31 from the uncontroverted and credited testimony of Daniels, Williams, Short, Hardwick, Hibbs, and Guerrero.

[13] Harding's testimony.

[14] Harding testified that the Respondent shreds applications after 1 week. The Respondent's then counsel reiterated the policy in a February 5, 2008 letter to the Union's counsel, and added that during the off-season the Respondent maintains the applications for 30 days. This evidence was not controverted.

off its construction employees during the off-season. Harding testified that because of the economy, it began selling some of its construction equipment in 2006, and reduced its work force from 80 employees to fewer than 25. Harding further testified that he also laid off "quite a few" employees in 2008, asserting that he laid off "some old employees that were very . . . dissatisfied." The record contains no detail as to when the layoffs occurred, except that Harding testified that "on one week I got rid of seven . . .". The Respondent produced no business records or other documents in support of Harding's testimony.

The Respondent initiated construction work for 2008 about May 26, with a job referred to in the record as "Meadows Drive and Fishers."[15] The Respondent's employees who worked on this job are: Burt Antrin, Ron Belton, Daniel Dennis, Steve Douglas, Shaun Grubbs, Michael Golish, John Lloyd, Ross Nevill, Craig Sweares, Joe Stallworth, David Teague, Allen Venis, and Chad Wright.[16]

According to McClellen's testimony, the Respondent also hired the following individuals during the 2008 construction season:[17] Robert Brown, Fred Finney, Jerry David Hadley, Bobby Leitzman, David Mendenhall, Tommy Stewart, Chris Thompson, and Chris Walker. Nothing in the record establishes an exact date of hire, nor were any documents introduced to evidence the hirings. Further, the Respondent maintains no documents or records which set forth the Respondent's basis for its hiring decisions as to each individual, such as whether they were referred or recommended by other employees.[18]

McClellen, in his testimony, provided a little additional detail as to these hirings, but not the dates of hire. His testimony included: that Brown was hired based on the recommendation of current employee Clayton Brown, a mechanic working in the Respondent's shop; that Finney was hired based on referrals by current employees Shaun Grubb and Bobby Leitzman, both concrete finishers; that Hadley was hired as a mechanic based on a referral by Fred Scott, a loader employed by Harco Sand and Gravel, another company owned by Harding; that

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[15] Based on Harding's testimony on cross-examination by the General Counsel. Initially, Harding testified that the construction season didn't begin until about a month later, but, upon being shown an exhibit that wasn't introduced, Harding admitted that the Respondent's construction season began a month earlier than he had earlier testified to.

[16] Counsel for the General Counsel, apparently reading from a document, asked Harding whether these individuals were employees working on the Meadows Drive job. Harding answered affirmatively. Counsel for the General Counsel, after having the document numbered with the apparent intention of introducing it as an exhibit, stated on the record that she was withdrawing the exhibit or simply not offering it. The sense of the testimony was that these individuals were employees whom the Respondent had recalled for the 2008 construction season, although the testimony does not explicitly state this, and no records were introduced. Counsel for the General Counsel appears to confirm their status as laid-off employees or former employees as she refers to them as having "returned to the Respondent's payroll," in her brief.

[17] Based on the testimony of Harding and the Respondent's superintendent, Charles McClellen. None of the parties introduced any records to document the hirings, nor to identify the dates of hire. In his brief, the Union's counsel asserts that "the Company's certified payroll records further establish that it had numerous employees starting in May." No such documents were introduced at the trial. McClellen did not testify as to the dates of hire. Harding, in answer to counsel for the General Counsel's questions, testified that all of these individuals were hired after it entered into the settlement agreement and, thus, after December 11, 2007.

[18] Harding testified that the Respondent does not keep records as to the basis hiring decisions, such as whether an employee was hired based on recommendation.

Leitzman was a previous employee who was rehired; that Mendenhall, an asphalt worker, was a previous employee who was rehired; that Nevill was hired as a truckdriver and had previously worked for McClellen; that Stewart was hired as a truckdriver based on the referral of current employee "Big Al";[19] that Thompson, employed in the maintenance striping department, was hired based on the referral of current employee Craig Swears; and that Walker, employed as a sanitary pipe installer, was hired based on the referral of current employee Ron Belton. According to the testimony of both McClellen and Harding, all of the individuals hired by the Respondent during the 2008 construction season were either previously employed by the Respondent or recommended. There is no evidence to the contrary.

Harding testified that Brown was hired in the late summer or fall of 2008, that Finney, Hadley,[20] Stewart, and Leitzman were hired sometime during the 2008 construction season, but more than a week after the organizers submitted their March applications, that Mendenhall was rehired sometime in August or September, that Nevill and Thompson were hired within "about a week or two" after the organizers submitted their applications, and that Walker was hired before the construction season began in May, but didn't remember the date of Walker's hire. Harding further testified that both Nevill and Thompson were hired based on recommendations, and that Walker was hired because, "He is a qualified striper. They're hard to come by, they're hard to find, and so what I did was I took Craig Swears' recommendation. So I kind of bit the bullet and hired the guy ahead of time."[21] As to Nevill and Thompson, Harding testified that they were hired as part-time truckdrivers, because all of his regular full-time truckdrivers had been laid off and were drawing unemployment benefits such that it would not make sense for them to give up benefits for part-time work.

In respect to all of these employees, the only business records in evidence are the job application and the Respondent's "New Employee Information Sheet" as to Chris Thompson, which were introduced by the Union. Thompson's job application is dated March 6, and contains the notation that he was referred by "Craig Swears." The New Employee Information Sheet indicates that he started work on April 8 and that he was employed as a laborer earning $15 per hour.

Finally, the record contains a copy of the Respondent's form entitled "Termination Report," as to former employee Tom Combs. The form is dated April 7, and contains McClellen's signature as "supervisor signature."[22] Apparently in McClellen's writing, the form states that Combs' termination date was April 7, and contains the following as the reason: "Called him to return to work. Tom informed me he has taken other employment." The parties stipulated to the admission of the form and, hence, its authenticity, but none of the parties questioned McClellen as to the form. Instead the Union's counsel questioned Harding, who attempted to surmise what McClellen meant by his wording on the Termination Report. Harding testified that he had no direct knowledge of McClellen's phone call to Combs, but that he guessed that McClellen was simply calling Combs to ascertain whether he was available to come back to work for the Respondent during the 2008 construction season, but not to call him back on any specific date.

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[19] No further identification in the record for "Big Al."

[20] But in an affidavit given to the Regional Office during its investigation of the underlying charge (GC Exh. 4), Harding stated that Hadley was hired "on or about May 5, 2008." As is discussed infra, none of the organizers' applications would have been active on Hadley's date of hire, even if the date was May 5.

[21] Harding also testified as to Walker that he didn't "think he was there very long."

[22] CP (Union) Exh. 4.

The Respondent, on at least one prior occasion, hired a member of the Union. According to Harding's unchallenged testimony, he hired Local 120 member Robert Brown during the 2007 construction season. Brown was recommended by current employee Clayton Brown,[23] and the Respondent hired him to work on the concrete crew.[24] Brown only worked for the Respondent a short time because, according to Harding, "Local 120 finally got him a job so he was—he'd say he was obligated to go back."

The Organizers' Applications

As noted, each time the organizers applied for work, they submitted applications to the Respondent with the same information. Based on the credited testimony of all of the organizers,[25] their actual experience and expertise is accurately described in the applications. These applications contained the following information:

James Daniels

Daniels' application stated that he was currently employed by the "Laborers Union" as an organizer, listed three other previous construction employers that he had been employed by for a total of 25 years, stated that he would accept any position at any wage, and could start at any time. It indicated that he had the "special skills" of "pouring and finishing concrete and pipelaying." In addition, the resume attached to his job application states that he was previously employed as a laborer in various jobs which included concrete pouring from 1997–2005, including as a labor foreman at a variety of concrete projects from 2001–2005.

Brian Short

Short's application stated that he was currently employed by the Laborers Union as "Midwest Regional Organizer," listed excavation work as a special skill, and that he had graduated from Indiana State University with a degree in "construction technology." The application stated that he would accept any position at any wage, and could start any time. The application further stated that he had worked from 1996 to 1999 for a trucking company and for Laborers Union from 1999 to the present.

[23] No relation.

[24] All according to Harding. Neither the General Counsel nor the Union produced witnesses or evidence to controvert Harding's testimony as to Brown and his status with the Union. Indeed, the following exchange occurred on the record: "Judge Rubin: Can we have a stipulation he's a member of the Local?" The Union's attorney responded on the record as follows: "I don't think we can at that point in time. I can check and see if we can do that tomorrow." The Union's attorney added, "I don't know if his dues or anything were paid up at the moment." The issue was not revisited during the course of the trial.

[25] Each of the organizers testified in an impressive manner, answering the questions of all counsel in a straightforward, nonargumentative fashion, and otherwise displaying the demeanor of witnesses attempting to honestly answer questions, rather than simply tailoring their testimony to the Union's cause. Most of their testimony is uncontroverted. To the extent the testimony is controverted, it is discussed further herein.

Chris Guerrero

Guerrero's application stated that he was currently employed by the "Laborers Union," that he had the special skills of "concrete finisher, machine operator, and grade setter," and that he would accept any position at any wage, and would start any time. The resume attached to the application stated that he had worked from 1997–1999 as a general laborer and concrete finisher, in 1999 as a "top and bottom pipe laborer," from 1999–2003 as a "bridge and concrete laborer, leadman," and from 2003 to current as "marketing representative Midwest Region Organizing Committee, Laborers Union."

Joe Hardwick

Hardwick's application stated he was currently employed as an organizer by the "Midwest Region Organizing Committee," that his "special skills" included the forming, pouring, and finishing of concrete, and that he would accept any position at any wage, and could start any time. His application further stated that he worked as a labor foreman from 2001 to 2003, and a concrete laborer and finisher from 2003–2004, and that he had undergone training at the Laborers' Training Center, which included "Concrete I and II," and "Asbestos Abatement," among other courses.

James Hibbs

Hibbs' application stated that he was currently employed as an organizer, that his "special skills" included laborer and excavator work and machine operator, and that he would accept any job at any wage, and could start any time. His application further stated that he worked from 1995 to 1998 at an asphalt plant and was paid "union scale," that he worked from 1998 to 2001 as an equipment operator and was paid union scale, and was employed from 2002 to present as a union organizer.

David Williams

Williams' application stated that he was currently employed by the Laborers Union Midwest Region as a field operations coordinator, that general labor was his "special skill," and that he would accept any position at any wage, and could start any time. His application further stated that he worked from 1999 to 2001 as a field examiner for the National Labor Relations Board, from 2001 to 2007 for Indiana University's Division of Labor Studies at Indianapolis, and from 2007 to present for the Laborers Union.

Cases 25–CA–30354 and 25–CA–30355

On May 30, 2007, organizers Daniels, Guerrero, Hardwick, Short, Williams, and O'Haver visited the Respondent's office to apply for work, in furtherance of the Union's attempt to organize the Respondent. While there, they interacted with the Respondent's office manager, Cindy Sartain. Except for O'Haver, all of organizers were called as witnesses by the General Counsel, and testified as to what occurred during their visit. Sartain testified for the Respondent.

The organizers arrived at the Respondent's office at about 9 a.m., all wearing shirts and caps with union logos or insignia and/or "organizer" lettering. One of them asked a man in the

office[26] about getting job applications. The man conveyed the request to the Respondent's office manager, Cindy Sartain, who walked into the office area. Sartain asked if she could help the organizers. Hibbs asked if the Respondent was hiring, and Sartain responded that it was not hiring, that it was off-season, but that she would give them job applications which they could take and leave, complete the applications, and bring the applications back.

At some point while handing out the applications, Sartain remarked that the Respondent was a nonunion company. Hibbs asked if it was a "problem" with the men being organizers. Sartain responded that she had no comment. Williams asked if it was a problem hiring "union people." Sartain said she wasn't going to say anything else. Subsequently, Sartain put her hand on the phone, and asked the men to leave before she called the police.[27] The organizers then left the office. As they left the office, Hibbs asked if they could fill out the applications on

[26] Not otherwise indentified.

[27] Findings based on the testimony of the organizers, all of whom, with minor variances, testified, essentially, to the event as set forth here. As noted above, each of the organizers was an impressive witness. They displayed excellent recollection of the events of May 30, 2007, with sufficient detail, and otherwise displayed the demeanor of witnesses attempting to truthfully answer questions rather than simply providing testimony favorable to their side. The minor variances in their testimony did not detract from their overall credibility. I did not credit Hibbs as to his testimony that at the conclusion of the incident, when the organizers were exiting or had exited the office, Sartain instructed somebody in the office to call the police. This testimony is somewhat at variance with Hibbs' affidavit and without support from any other witness, including the other organizers.

Sartain testified that there were 12–15 men in the Union's group, that one of the group said "We're going to organize you," that when she noticed the union insignia on some of the clothing she "started catching on," that she passed out applications and told the men to take the applications and bring them back when completed, that she became "mad" when some of the men started "wailing" that they were going to organize the Respondent and one of the men said "or put you out of business," that because she was by herself, she became scared when some of the men began speaking in a louder than normal voice, that she put her hand on the telephone and said she was going to call the police if they didn't leave, and that she neither actually called the police nor instructed anyone to.

Where there are differences in testimony between Sartain and the organizers, I credit the organizers, who were more impressive witnesses. Sartain testified that there were 12–15 men in the group of organizers. Yet, all of the organizers testified that there were only six of them. There appears no reason for the organizers to mislead as to their number as any remedy sought would logically apply to all of them. Thus, if there were more organizers present, the sought remedy would likely be greater. Contrariwise, if the numbers of organizers increased, that would lend support to Sartain's claim that she was "scared." Sartain testified that another reason she was frightened was because she was by herself. Yet all of the organizers testified that when they entered the office, they were greeted by a man, who then went to fetch Sartain.

In addition to the improbability of some of Sartain's testimony as described above, I also take note that in the prior decision in Cases 25–CA–30352, et al., I found Sartain's similar testimony that she was frightened on another occasion of confrontation with union organizers to be less than credible. Sartain appeared relatively forceful on the witness stand, and did not appear to be a person likely to be intimidated in such situations. Further, as Sartain, herself, testified, she became "mad" during the organizers May 30, 2007 visit to the Respondent's office, and this is likely the reason she threatened to call the police, not fear over the peaceful visit of the organizers. On balance, I did not credit Sartain when her testimony was in conflict with the testimony of the organizers.

the premises and turn them in. Sartain responded that they should take the applications and leave. The entire incident lasted about 10 minutes. There is no evidence that any of the organizers completed these applications and returned them to the Respondent.

Prior Board Decision

In a decision dated December 31, 2008, and captioned with Cases 25–CA–30352, 25–CA–30354, 25–CA–30355, 25–CA–30356, 25–CA–30357, 25–CA–30359, and 25–CA–30370, the Board found that the Respondent violated Section 8(a)(1) in various manner, including by engaging in photographic surveillance of employees and union representatives, ordering employees to leave a jobsite during their lunchbreak in order to avoid contact with union representatives, and instructing union representatives to leave areas and then calling the police to enforce such instructions, where the Respondent had no property right to exclude trespassers. In the underlying judge's decision, I concluded as to certain confrontations between organizers and Sartain, that Sartain was not credible in respect to her testimony that she was frightened. I make a similar finding here.

Analysis and Conclusions

Case 25–CA–30652

The complaint alleges that the Respondent, with concrete plans to hire at least six employees, refused, in violation of Section 8(a)(3), to hire, or consider for hire, the following job applicants because of their activities on behalf of the Union, on the following dates in 2008: Ward Daniels on March 17 and 25; Chris Guerrero on March 19; Joe Hardwick on March 18 and 25; Mike Hibbs on March 19, Brian Short on March 18 and 25, and David Williams on March 17 and 18.

Refusal to Hire

In a refusal-to-hire case, the General Counsel must establish at the hearing on the merits that (1) the Respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) the applicants had experience and training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer had 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 decision not to hire the applicants. *FES*, 331 NLRB 9, 12 (2000), affd. 301 F.3d 83 (3d Cir. 2002). Further, in respect to the General Counsel's burden to establish that the Respondent was hiring, and apropos of the instant litigation, the General Counsel bears the burden of demonstrating that the job applications filed at the time the alleged discriminatees applied would still be regarded as active when a job opening occurred had the employer's normal nondiscriminatory practices been followed. *Shisler Electrical Contractors,* 349 NLRB 840, 843 fn. 12 (2007).[28]

[28] "Our placement of this burden on the General Counsel is consistent with *FES*, supra, (burden on the General Counsel to 'prove that the discriminatees actually would have been selected for the opening in question, and that entails, at a minimum, showing that applications filed at the time the discriminatees applied would still be regarded as active when the opening occurred, had the respondent's normal nondiscriminatory practices been followed')."

Once the General Counsel has met this burden, the employer must show that it would have made the same hiring decisions even absent the applicants' union affiliation. *FES*, supra; *Jesco, Inc*., 347 NLRB 903, 905 (2006). For the reasons set forth below, I conclude that the General Counsel has not met his burden in respect to the Respondent's hiring, and that even if such burden had been met, the Respondent would have met its resultant burden.

As to the General Counsel's *FES* burden, I first conclude that the burden was, in fact, satisfied in respect to both demonstrating that the Respondent possessed significant animus against the Union, and that the applicants were qualified to perform the Respondent's work. The Respondent's animus[29] is amply demonstrated by the Board's previous findings of the Respondent's recent violations of the Act, including illegal attempts to keep union organizers off jobsites and property where the Respondent enjoyed no property rights which would permit such, and engaging in photographic surveillance of employees and union representatives. I also note that the Respondent's sole shareholder, Harding, initially testified that he was not opposed to "unionization" of the Respondent, but when presented with the Respondent's written policy opposed to unionization, Harding testified "This is Harco company policy. It's not that it's so much that I am opposed to it. It's just that this is our policy."[30]

All of the applicants possessed self-described, but uncontroverted, special skills in either concrete or excavation work, both of which fall within the main work performed by the Respondent. Thus, Daniels, Guerrero, and Hardwick possessed special skills involving the forming, pouring, or finishing of concrete. Hibbs and Short possessed special skills involving excavation work. Williams, in his application, listed "general labor" as a special skill. All stated on their applications that they would accept any job and were ready to start work immediately.

Further, Daniels had been previously employed as a laborer in various jobs which included concrete pouring from 1997–2005, including as a labor foreman at a variety of concrete projects from 2001–2005. Guerrero previously worked from 1997–1999 as a general laborer and concrete finisher, and from 1999–2003 as a "bridge and concrete laborer and leadman." Hardwick worked as a labor foreman from 2001 to 2003, a concrete laborer and finisher from 2003–2004, and had undergone training at the Laborers' Training Center which included completing courses in "Concrete I and II." Hibbs worked from 1998 to 2001 as an equipment operator.[31] Short worked from 1996 to 1999 for a trucking company. Williams' application did not set forth construction industry experience, but he testified that he drove a truck for 6 years and did "lots of laborer work."

The Respondent's work, besides concrete preparation and pouring, also included "small excavating," "pipe work," base preparation and asphalt paving, seal coating, and crack filling.[32] All of the applicants, except Williams, had experience and/or expertise in some or all of these areas. Further, Harding testified that he employs truckdrivers, which Williams had years of experience performing. Harding, in his testimony, quibbled with some of the organizers'

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[29] Even though the Respondent hired at least one union member in a prior year, the record evidence including the commission of other unfair labor practices and a stated policy against union representation for employees demonstrated the Respondent's hostility to the Union.

[30] The Respondent, of course, has the right to oppose union representation of its employees, and while I do not exclusively rely on its policy opposing unions to find animus, I've considered it in combination with the prior unfair labor practices.

[31] Harding testified that the Respondent employs equipment operators.

[32] Harding's credited and uncontroverted testimony.

qualifications, but the Respondent presented no evidence of an existing set of qualifications which the applicants' demonstrated experience and skills would not meet. Thus, I conclude that all of the applicants were qualified to perform the Respondent's work.

However, while the General Counsel has met his burden in respect to the work qualifications of the applicants and proved the Respondent's animus towards the Union, he failed to establish that the Respondent was hiring or had concrete plans to hire at the time of the asserted illegal conduct. The weight of the record evidence demonstrates that none of the organizers' job applications were active pursuant to the Respondent's nondiscriminatory application policy at a time when the Respondent was hiring or had concrete plans to hire, and there is no evidence to suggest, nor does the General Counsel argue, that the Respondent's policy of shredding job applications after 1 week during construction season and 30 days during off-season is discriminatory or that the Respondent manipulated that policy[33] to avoid hiring the organizers.[34]

The Respondent's first job during the 2008 construction season commenced about May 26, and the Respondent employed 13 laborers at the time of that job. During the 2008 construction season, the Respondent hired 8 other employees, but the record contains the exact date of hire of only a single individual among these 21 employees, Chris Thompson, a laborer, who was hired on March 6 and began work on April 8. Thus, while record evidence shows that the Respondent employed at least 21 employees during the 2008 construction season, the only exact date of hire established in the record was March 6, and that for a single employee at a time prior to the organizers' applications.[35]

Because the organizers submitted their applications in March before the construction season began, the Respondent's application policy, set forth in writing by its former attorney, would keep the applications active for 30 days. Thus, Hibbs' and Guerrero's latest applications, submitted on March 19, would have been active through April 18, and Short's, Hardwick's, Daniels', and Williams' latest applications, submitted on March 25, would have been active through April 24.

Inasmuch as there is minimal record evidence establishing that the Respondent hired during the period March 19 through April 24, dates when at least some of the organizers' applications would have been considered active, or that the Respondent had concrete plans to hire during that period,[36] the General Counsel must, apparently, rely on the organizers'

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[33] Unlike cases such as *McBurney Corp*., 351 NLRB 799, 801 (2007).

[34] Nor was any evidence presented that the policy was anything other than that testified to by Harding, and as contained in the letter from the Respondent's former attorney to the Union that was sent prior to the filing of the instant job applications.

[35] Counsel for the General Counsel also argues in her brief that Thomas Combs was "contacted to return to work on April 7." The Respondent disputes that Combs was contacted to return to work, and argues that Combs, employed the prior year by the Respondent, was contacted simply to ascertain whether he planned to return for the 2008 construction season. In either case, Combs was a returning employee, who would have been given priority over stranger applications by the Respondent's existing nondiscriminatory hiring policy.

[36] As to "concrete plans" to hire, there was no evidence that the Respondent placed advertisements or otherwise solicited job applications for new employees. The General Counsel instead relies on testimony that the Respondent historically hires employees for the construction season. But other evidence suggests that the Respondent's historical hiring patterns did not suffice to establish what the Respondent might do in 2008. This evidence

Continued

applications submitted in March as being active throughout the construction season. But this is contrary to the Respondent's established nondiscriminatory policy of keeping applications active for 7 days during the construction season and 30 days during the off-season. Because there is insufficient evidence that the Respondent actually hired, was hiring, or had concrete plans to hire during the relevant period of time when the applications were considered active by application of the Respondent's nondiscriminatory policies, I conclude that the General Counsel has not met its burden under FES.[37]

However, even if I had concluded to the contrary, that the General Counsel had established that the Respondent was hiring or had concrete plans to hire during a time when the organizers' applications were active and had, thus, satisfied his *FES* burden, I would further have concluded that the Respondent met its resultant *FES* burden by demonstrating that it would have made the same hiring decisions even absent the applicants' union affiliation. In this regard, "the Board has repeatedly found that hiring practices 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, 734 (2001)." *Pollock Electric, Inc*., 349 NLRB 708, 710 (2007).

The Respondent established, without contravention, that it has maintained a longstanding practice of utilizing a hierarchal hiring system that gave first priority to former employees and then to individuals recommended by employees,[38] and the General Counsel does not allege, nor assert, that the policy violates the Act. Stranger applications, such as those submitted by the organizers here, were considered only after the first two categories. No evidence was presented that the Respondent has, at any time, acted in contravention to this policy.

Further, the credited, and uncontroverted, testimony of owner Harding and his superintendent, McClellen, established that all of the employees hired by the Respondent during

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includes Harding's testimony as to the impact of the economy's unfortunate state on his business, including the sale of some of the Respondent's equipment, and the fact that much of the Respondent's hiring consisted of recalling employees who had been laid off at the conclusion of the previous year's construction season.

[37] As the Board has repeatedly held, it is the General Counsel's burden to establish that an employer was hiring or had concrete plans to hire. The instant record contains insufficient evidence from which I can determine exact dates on which the Respondent hired employees during the 2008 construction season. While the Respondent may not have maintained records listing the dates of hire for its employees, there are other business records such as certified payroll records, or similar, which theoretically could have been used to establish such dates. While the Respondent did not introduce such records, it is the General Counsel's burden to establish that the Respondent was hiring (or had concrete plans to hire) and, as discussed elsewhere herein, it appeared that counsel for the General Counsel had some such records in her possession when questioning Harding, but chose not to introduce them. But whether or not the General Counsel had such records in its possession at the time of the hearing, it could have utilized the legal process to obtain them.

[38] Counsel for the Union, in his brief, correctly maintains that the Respondent produced no written evidence of such a policy. Indeed, according to Harding, the Respondent's policy is not in writing. In concluding that such a policy exists, I rely on the credible testimony of Harding and McClellen. I further note that the Respondent is a relatively small employer, and the Board has taken such into account in discussing the lack of written documents memorializing a company's decisions or policies. See, for example, *Baptista's Bakery, Inc*. 352 NLRB 547, 551 (2008).

the 2008 construction season were either former employees of the Respondent or referred or recommended individuals, categories consistent with the Respondent's established nondiscriminatory practice. The General Counsel presented no evidence to the contrary. Further, as in *Pollock Electric, Inc.*, supra, on at least one past occasion the Respondent hired a then current member of the Union,[39] thus indicating that the policy did not exclude union applicants. Under these circumstances, I conclude that the Respondent, utilizing its facially neutral hiring policy, would not have hired the union organizers, even absent their affiliation with the Union. See *Brown & Root Power & Mfg*., 351 NLRB 168, 169 (2007).

Counsel for the General Counsel argues, in her brief, that the Respondent failed to hire the organizers simply because they are organizers, and points to paragraph 8 of Harding's affidavit, in evidence, in which he states, "Also, they already have jobs—as organizers." In that paragraph of the affidavit, Harding lists various negatives, to him, of the qualifications of the organizer-applicants, but does not explicitly state that those negatives, including their employment as organizers, were reasons he did not hire them. In his record testimony, on cross-examination, Harding admitted the words of the affidavit, but denied that status as an organizer was a basis of his not hiring the organizers. Harding, on examination by counsel for the General Counsel, testified, "I didn't have any objections to any of their applications. We were in our down seasons. We weren't working and we didn't have any work." There is no evidence disputing Harding's testimony as to available work at a time when any of the applications were active.

I am satisfied, despite the seeming inconsistency between Harding's record testimony and affidavit, that the evidence, as a whole, demonstrates that the organizers were not hired because their applications were not active at a time that the Respondent was hiring or had concrete plans to hire. Further, the Respondent would not have hired them anyway as all those who were eventually hired were the Respondent's employees who had been previously laid off or were referred and, thus, fell into the categories that the Respondent gave preference to over stranger applicants.

Refusal to Consider

In a refusal-to-consider for hire case, the General Counsel bears the burden of demonstrating "(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 will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation." *FES*, supra at 15.

As to the refusal-to-consider allegation, counsel for the General Counsel, in her brief, points to the Respondent's "byzantine" application process, and the Respondent's changes to the process, as precluding the organizers from applying for work. Counsel for the Union, in his brief, points to the apparent failure of one employee, hired by the Respondent based on an employee's recommendation and then discharged as "unreliable," as demonstrating that the

[39] Harding testified that the individual hired was a member of the Union. When the Union's counsel was asked whether he would join in a stipulation to that effect, he said he would check to see whether the individual's dues were paid up, and then respond further. Neither side raised the issue subsequently at trial. Based on Harding's testimony and the Union's failure to subsequently challenge his membership status at trial, I conclude that the individual in question was a member of the Union when hired by the Respondent.

Respondent's policy of giving preference to employee-recommended applicants lacked a logical basis and that, hence, it would have served the Respondent better to have hired simply on the basis of work qualifications. The Union would, thus, argue that the Respondent's policy of giving preference to applicants referred by employees precluded the Respondent from considering the organizers' applications.

Here, I conclude that there is little evidence that the Respondent refused to consider the applications of the organizers. On every occasion that the organizers appeared at the Respondent's offices and requested applications, such were provided to them. On every occasion that the organizers submitted applications, the Respondent accepted them. Harding testified that he personally reviewed each of the applications.

The Respondent is a small business with informal, sometimes unwritten business procedures, including those pertaining to job applications and hiring. On a few days, because of other business demands on the small office staff,[40] the Respondent placed signs either outside or inside its offices limiting the time for accepting applications or not accepting applications at all on particular days. The letter from the Respondent's former counsel to the Union indicated that appointments were necessary to submit job applications, but the organizers were later told they didn't need appointments and they then followed that procedure and their applications were accepted. But there is no evidence that these changes were directed at the organizers or inordinately impacted on them, as opposed to other stranger applicants, nor does the complaint allege that the changes in application policy violated the Act.[41] The Respondent's application procedures were informal, but I cannot conclude they were "byzantine."

As is set forth above, the fact that the organizers were not hired resulted from the Respondent's application of its neutral policy of keeping applications alive for a limited period of time, and giving preference to former (or laid-off) employees and referred applicants. These policies of the Respondent were not challenged in the complaint, nor was evidence presented that they were inconsistently applied or manipulated to prevent union affiliated applicants from being considered. Without question, the General Counsel has established that the Respondent possessed animus against the Union. But this, by itself, is insufficient to prove refusal-to-hire, or consider for hire, allegations.

The General Counsel's Motion to Vacate and Set Aside the Settlement Agreement

Here, the General Counsel asserts that the Respondent's failure to hire the organizers, including O'Haver who was named in the settlement agreement but not in the instant complaint,

[40] Credited testimony of Sartain.

[41] Indeed, the Board has held that changes in an employer's hiring practices designed to restrict the receipt of applications from prounion applicants may violate Sec. 8(a)(1). See, for example, *Brandt Construction Co.*, 336 NLRB 733 (2001). Here, counsel for the General Counsel argues, in her brief, that I should take into account the Respondent's changes in its application procedures. But the General Counsel does not, in fact, allege in the complaint that the Respondent's changes violate the Act and, hence, does not allege that the Respondent's changes were for the purpose of limiting applications from prounion applicants. Inasmuch as the General Counsel does not allege the Respondent's changes to be a violation, and as the record contains credited testimony that sets forth a reasonable basis for the changes, I conclude that the changes provide neither a basis for finding antiunion animus nor that the Respondent failed to consider the organizers' applications.

pursuant to their job applications, or consider them for hire, violated the terms of the settlement agreement in Cases 25–CA–30354 and 25–CA–30355. The motion asserts that the Union filed a charge in Case 25–CA–30652 on April 4, 2008, "and the Region determined that Harco failed to hire and consider for hire Ward Daniels, Chris Guerrero, Joe Hardwick, Mike Hibbs, John O'Haver,[42] Brian Short, and David Williams, in violation of the December 11, 2007, settlement agreement and a complaint issued on December 19, 2008." The motion concludes, "By failing to hire and consider for hire the above-named discriminates, Harco has failed to honor the terms of the December 11, 2007, settlement agreement and therefore it should be set aside."

It is well settled that a settlement agreement may be set aside and unfair labor practices found based on presettlement conduct if there has been a failure to comply with the provisions of the settlement agreement or if postsettlement unfair labor practices are committed. *Nations Rent, Inc.*, 339 NLRB 830, 831 (2003). Further, the issue of whether to rescind a settlement agreement should not be determined by a mechanical application of rigid a priori rules, but sound judgment should be employed based on each case's circumstances. *Deister Concentrator Co*., 253 NLRB 358, 359 (1980).

As I have concluded that the Respondent did not violate the Act as alleged in the complaint in Case 25–CA–30652, and as the General Counsel's motion is based on the allegations in that complaint, the General Counsel's motion to vacate and set aside the settlement agreement in Cases 25–CA–30354 and 25–CA–30355 is denied.

Conclusions of Law

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

2. Local No. 120 and Local No. 103 are labor organizations within the meaning of Section 2(5) of the Act.

3. The allegations of the complaint that the Respondent has engaged in conduct violative of Section 8(a)(1) and (3) of the Act have not been supported by substantial evidence.

4. The Respondent has not violated Section 8(a)(1) and (3) of the Act by refusing to hire, or consider for hire, the following individuals on the dates in 2008 set forth by their names: Ward Daniels--March 12 and 25; Chris Guerrero—March 19; Joe Hardwick—March 18 and 25; Mike Hibbs—March 19; Brian Short—March 18 and 25; and David Williams—March 17 and 25.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[43]

ORDERS

1. The complaint is dismissed in its entirety.

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[42] While O'Haver is mentioned in the General Counsel's motion, he is not alleged as a discriminatee in the complaint in Case 25–CA–30652. Further, on the instant record there is no evidence that he ever submitted a job application to the Respondent.

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

2. The General Counsel's motion to vacate and set aside the settlement agreement in Cases 25–CA–30354 and 25–CA–30355 is denied.

Dated, Washington, D.C. July 7, 2009

Mark D. Rubin
Administrative Law Judge