Titus Electric Contracting, Inc. *and* International Brotherhood of Electrical Workers Local 520.* Cases 16–CA–21010–2, 16–CA–21598, 16–CA–21598–2, 16–CA–21613, 16–CA–21694, 16–CA–21701, 16–CA–21732, 16–CA–21819, 16–CA–21840, 16–CA–21852, 16–CA–21951, 16–CA–21951–2, 16–CA–21973, 16–CA–21978, 16–CA–21978–2, 16–CA–21978–3, and 16–CA–22035

September 30, 2010

DECISION AND ORDER AND ORDER REMANDING

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND PEARCE

On January 17, 2003, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondent, the General Counsel, and the Charging Party filed exceptions and supporting briefs. The Respondent filed an answering brief to the General Counsel's exceptions and the Charging Party's exceptions, and the Charging Party filed an answering brief to the Respondent's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified below, and to adopt the recommended Order as modified and set forth in full below.[2] In order to expedite the issuance of this decision, we have decided to sever the allegation pertaining to the Respondent's discharge of employees Phillip Lawhon and John Blair and to reserve that issue for separate resolution.

A. The Respondent's Enforcement of Its Appearance Policy

For the reasons set forth by the judge, we adopt the judge's finding that the Respondent violated Section 8(a)(1) by promulgating, and on several occasions enforcing, an appearance policy that essentially prohibited employees from displaying or wearing any clothing that contained logos, writing, or advertising, other than a Titus logo.

We also find that the Respondent violated Section 8(a)(1) by directing employee Michael Nolan to go home to change out of a union shirt that he had worn to work. The judge credited Nolan's testimony that he had observed other employees wearing shirts displaying non-Titus logos and advertisements and that the Respondent did not send those employees home to change their shirts. Despite finding that the Respondent had sent Nolan home to remove his union shirt, the judge failed to make a specific finding whether this conduct violated the Act. It is well established that, absent special circumstances, it is unlawful for employers to prohibit employees from wearing union insignia. *See Republic Aviation Corp.*, 324 U.S. 793, 801–803 (1945). Because no special circumstances have been established here, we find that the Respondent's conduct violated Section 8(a)(1).[3]

Finally, and contrary to the judge, we find that the Respondent constructively discharged employee Eddie Edwards by informing him that he could not work unless he removed his union shirt.

On April 19, 2002, Superintendent Kip Powell told Edwards, who was wearing a union shirt, that he could not wear the shirt at work and directed Edwards to go home to change. Edwards responded that, because he was not allowed to wear the union shirt, he quit.

In finding that the Respondent did not constructively discharge Edwards, the judge found that Edwards was not presented with a "Hobson's Choice" of either abandoning his Section 7 rights or quitting his job. The judge's analysis centered on his view that "Edwards was never threatened with discharge."

Under the Hobson's Choice theory of constructive discharge, "an employee's voluntary quit will be considered a constructive discharge when an employer conditions an employee's continued employment on the employee's

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* We have amended the caption to reflect the correct name of the Union.

[1] The parties have 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.

No exceptions were filed to the judge's findings that the Respondent did not violate Sec. 8(a)(3) and (1) of the Act by refusing to hire union applicants Jack Wayne King and Keith Richards. We therefore adopt those findings.

Having adopted the judge's finding that the Respondent violated Sec. 8(a)(1) by interrogating employees about their union sympathies and activities, we find it unnecessary to pass on the General Counsel's exceptions regarding alleged additional incidents of unlawful interrogations not found by the judge. Such violations would be cumulative and would not materially affect the remedy or Order.

[2] We have modified the judge's recommended Order and notice to employees to more closely conform to the violations found and to the Board's standard remedial language.

[3] We shall provide a make-whole remedy for Nolan and leave to the compliance stage the determination of whether he suffered any loss of earnings or other benefits as a result of this violation.

abandonment of his or her Section 7 rights and the employee quits rather than comply with the condition." *Intercon I (Zercom),* 333 NLRB 223, 223 fn. 4 (2001) (citing *Hoerner Waldorf Corp.,* 227 NLRB 612, 613 (1976)).

Applying those principles, we find that, by telling Edwards that he was not allowed to work until he went home to change his shirt, the Respondent conditioned Edwards's employment on his abandonment of his Section 7 right to wear clothing bearing union insignia in the workplace. Although, as the judge found, the Respondent did not explicitly threaten Edwards with discharge if he continued to wear the union shirt, the Respondent's message was clear: Edwards would not be allowed to work if he was wearing a union shirt. *See Mayrath Co.,* 132 NLRB 1628, 1630 (1961), enfd. in pertinent part 319 F.2d 424 (7th Cir. 1963) (finding that, when an employer instructed employees to take off their union buttons or "leave," it "conveyed to the employees the idea that they had no right to wear the buttons at work and gave them a Hobson's Choice of either foregoing the protected right or being discharged"(footnote omitted)); see also *Intercon I,* supra*; Hoerner Waldorf,* supra.

Accordingly, we find that the Respondent constructively discharged Edwards in violation of Section 8(a)(3) and (1) of the Act.

B. The Refusal to Hire Allegations

Relying on the framework set forth in *FES*, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002),[4] the judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Assistant Union Business Agent Rick Zerr.[5]

The judge found that the Respondent decided not to hire Zerr based on his union activities at a prior job, which the judge found came to the Respondent's attention through a report that Zerr had used his cell phone while working on that job to conduct union business. Specifically, the judge explained that he was "not persuaded that an employer may legally refuse to hire anyone associated with a union on showing that it did so because he was permitted to engage in union steward business while working for a prior employer."

Thus, the judge's decision that the Respondent unlawfully refused to hire Zerr implicitly centered on his finding that the Respondent knew that Zerr had been using his cell phone to conduct *union business* at his prior job. The judge, however, did not discredit, or even mention, record evidence weighing against that finding.

Specifically, Respondent Part-Owner Ty Runyan's testimony indicates that Supervisor Carl Jackson, who had worked with Zerr at his prior job at Guy's Electric, did not tell Runyan that Zerr had used his cell phone to conduct union business on the job. According to Runyan, Jackson told him that Zerr was "worthless" and that he spent too much time talking on his cell phone while on the job. Also, Jackson denied that he told Runyan that Zerr had conducted union business on his cell phone. This evidence, if credited, would support the Respondent's assertion that its decision not to hire Zerr was based, not on his protected activity, but rather on reports that Zerr had engaged in excessive cell phone usage at his prior place of employment.

The record also contains evidence supporting the judge's finding of a violation, however. For example, Eileen Fournier, who was a part-owner of Guy's Electric, testified that Runyan had asked her about Zerr and whether he was a union steward, and she told him that he was. She also told Runyan that Zerr "was performing two jobs at once there, but he handled them quite efficiently." This evidence, if credited, would show that the Respondent actually was aware of Zerr's union activities at Guy's Electric.

Because the record contains contradictory evidence that was not addressed or reconciled in the judge's deci-

[4] Under *FES,* supra at 12, in order to meet his initial burden, the General Counsel must show:

> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that 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) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. [Internal footnotes omitted.]

[5] In its exceptions, the Respondent contends that the General Counsel did not properly plead refusal-to-hire and refusal-to-consider allegations as to Zerr or, for that matter, any of the alleged discriminatees. The Respondent points out that par. 16 of the eighth consolidated complaint states that Zerr and other union applicants applied for work with the Respondent; par. 17, however, which alleges that the Respondent refused to hire and consider union applicants, refers to par. 15, which concerns a different allegation. The General Counsel did not later amend that complaint. In response to the Respondent's Motion to Strike the Briefs of the General Counsel and Charging Party, however, the General Counsel submitted a reply brief to the judge explaining that the reference to par. 15 instead of 16 was an inadvertent error.

It seems sufficiently clear, in these circumstances, that the General Counsel intended to plead refusal-to-hire and refusal-to-consider allegations as to Zerr and the other alleged discriminatees. The General Counsel presented evidence at the hearing concerning those allegations, and the Respondent presented rebuttal evidence. In short, we agree with the judge that the issues were fully and fairly litigated. See fn. 33 of the judge's decision. Accordingly, we reject the Respondent's argument that the General Counsel's inadvertent pleading error deprived it of due process.

sion, we are severing and remanding to an administrative law judge the issue of whether the Respondent violated the Act by refusing to hire Zerr. On remand, the judge should make reasoned credibility resolutions to determine whether the Respondent, in deciding not to hire Zerr, was aware that Zerr had served as a union steward and/or that he had used his cell phone to conduct union business during his previous employment. Such resolutions are necessary to assess whether Judge Robertson properly found that the Respondent, pursuant to its *FES* rebuttal burden, failed to show that it would not have hired Zerr even in the absence of his union activities or affiliation.[6]

We also direct an administrative law judge, on remand, to consider whether the Respondent violated Section 8(a)(3) and (1) by refusing to consider for hire and refusing to hire applicant John Voight. Although Judge Robertson made findings of fact regarding Voight's application for employment, he did not state any conclusions with respect to the refusal-to-consider and refusal-to-hire allegations. Therefore, we shall sever and remand those allegations to an administrative law judge for further consideration.

AMENDED REMEDY

The Respondent shall pay backpay to discriminatees Eddie Edwards and Tommy Means in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

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

1. Cease and desist from

(a) Promulgating and enforcing an overly broad appearance policy prohibiting employees from displaying or wearing any logos, writing, or advertising other than "Titus shirts" or other articles issued and/or authorized by the Respondent.

(b) Discriminatorily enforcing the overly broad appearance policy against employees displaying or wearing insignia of the International Brotherhood of Electrical Workers Local 520 (the Union), or any other labor organization.

(c) Sending employees home for wearing union insignia.

(d) Constructively discharging employees by prohibiting them from working unless they remove union insignia.

(e) Threatening to telephone and/or telephoning the police because of union picketing in a public area where the Respondent does not have a property interest.

(f) Creating the impression that employees' union activities are under surveillance.

(g) Coercively interrogating employees about the Union or union activities.

(h) Unlawfully promulgating an overly broad oral no-solicitation policy prohibiting employees from soliciting while "on the job."

(i) Discharging or disciplining employees because of their union activities.

(j) Threatening employees with layoffs if the Union continues to file unfair labor practice charges against the Respondent.

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

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

(a) Rescind the unlawful appearance policy prohibiting employees from displaying or wearing any logos, writing, or advertising other than "Titus shirts" or other articles issued and/or authorized by the Respondent.

(b) Rescind the unlawful oral no-solicitation policy prohibiting employees from soliciting while "on the job."

[6] The Respondent has also excepted to the fact that the judge's analysis of its failure to hire Zerr does not include an analysis of whether Zerr was a bona fide applicant, as required by the Board's decision in *Toering Electric Co.*, 351 NLRB 225 (2007). Although *Toering* issued after the judge's decision issued, the rules set forth in *Toering* apply to all cases that were pending at the time of its issuance. *See id.* at 234 fn. 56. Accordingly, we direct an administrative law judge, on remand, to determine whether Zerr was a bona fide applicant under *Toering*. Because this issue was not previously presented to the judge, the parties shall have the opportunity to file briefs on the issue and to request that the record be reopened for the purpose of presenting evidence relevant to the *Toering* analysis.

We similarly remand to an administrative law judge the allegation that the Respondent violated Sec. 8(a)(1) by photographing union picketing on March 22, 2002. The Respondent contends that this allegation must be dismissed because there is no evidence that any picketers were employees under the Act, or that the photographing was observed by any employees. In response, the Charging Party asserts that at least one individual on the picket line, Zerr, was an "employee" (because he had applied for work with the Respondent), and that he observed the photographing. However, the Board is remanding to an administrative law judge the issue of whether union organizer Zerr was a bona fide applicant under *Toering,* supra, a determination arguably relevant to, if not necessarily dispositive of, the photographing allegation. Further, there is apparently no record evidence indicating who else was on the March 22 picket line or who observed the photographing. In these circumstances, we remand this 8(a)(1) allegation to an administrative law judge for further analysis once Zerr's status as an applicant has been resolved.

(c) Make Michael Nolan whole for any loss of earnings and other benefits he may have suffered as a result of the Respondent's unlawful act of sending him home for wearing union insignia on or about April 2, 2001, with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

(d) Within 14 days from the date of this Order, remove from its files any reference to the Respondent's unlawful act of sending Nolan home for wearing union insignia and, within 3 days thereafter notify Nolan in writing that this has been done and that this act will not be used against him in any way.

(e) Within 14 days from the date of this Order, offer Eddie Edwards and Tommy Means full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(f) Make Eddie Edwards and Tommy Means whole for any loss of earnings and other benefits they have suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this decision.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Edwards and Means, and within 3 days thereafter notify Edwards and Means in writing that this has been done and that the discharges will not be used against them in any way.

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

(i) Within 14 days after service by the Region, post at it facility in Austin, Texas, copies of the attached notice marked "Appendix."[7] 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 March 23, 2001.

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

IT IS FURTHER ORDERED that the allegation that the Respondent unlawfully discharged employees Lawhon and Blair is severed from this case and reserved for separate resolution.

IT IS FURTHER ORDERED that the allegations that the Respondent unlawfully refused to hire Rick Zerr and that the Respondent unlawfully refused to consider and hire John Voight are severed from this case and remanded to an administrative law judge for appropriate action as described above.

IT IS FURTHER ORDERED that the allegation that the Respondent unlawfully photographed union picketing is remanded to an administrative law judge for appropriate action as described above.

IT IS FURTHER ORDERED, because the Board has been advised that Judge Pargen Robertson is retired, the issue is remanded to Chief Administrative Law Judge Robert A. Giannasi, who may designate another administrative law judge in accordance with Section 102.36 of the Board's Rules and Regulations.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision containing credibility resolutions, findings of fact, conclusions of law, and a recommended Order concerning the severed allegations pertaining to employees Zerr and Voight, and to the photographing of union picketing, as appropriate on remand. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

[7] 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."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found or severed.

Dated, Washington, D.C. September 30, 2010

Wilma B. Liebman, Chairman

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unlawfully promulgate and enforce an overly broad appearance policy prohibiting employees from displaying or wearing any logos, writing, or advertising other than "Titus shirts" or other articles issued and/or authorized by the Respondent.

WE WILL NOT discriminatorily enforce the overly broad appearance policy against employees displaying or wearing insignia of the International Brotherhood of Electrical Workers Local 520 (the Union), or any other labor organization.

WE WILL NOT send employees home for wearing union insignia.

WE WILL NOT constructively discharge employees by prohibiting them from working unless they remove union insignia.

WE WILL NOT threaten to telephone and actually telephone the police because of union picketing in a public area where we do not have a property interest.

WE WILL NOT create the impression that our employees' union activities are under surveillance.

WE WILL NOT coercively interrogate employees about the Union or union activities.

WE WILL NOT unlawfully promulgate an overly broad oral no-solicitation policy prohibiting employees from soliciting while "on the job."

WE WILL NOT discharge or discipline employees because of their union activities.

WE WILL NOT threaten employees with layoffs if the Union continues to file unfair labor practice charges against us.

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

WE WILL rescind our unlawful appearance policy prohibiting employees from displaying or wearing any logos, writing, or advertising other than "Titus shirts" or other articles issued and/or authorized by the Respondent.

WE WILL rescind our unlawful oral no-solicitation policy prohibiting employees from soliciting while "on the job."

WE WILL make Michael Nolan whole for any loss of earnings and other benefits he may have suffered as a result of our unlawful act of sending him home for wearing union insignia.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful act of sending Nolan home for wearing union insignia, and WE WILL, within 3 days thereafter, notify Nolan in writing that this has been done and that this act will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, offer Eddie Edwards and Tommy Means full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Eddie Edwards and Tommy Means whole for any loss of earnings and other benefits they have suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Edwards and Means, and WE WILL, within 3 days thereafter, notify Edwards and Means in writing that this has been done and that the discharges will not be used against them in any way.

TITUS ELECTRIC CONTRACTING, INC.

Edward B. Valverde, Esq. and *Jamal Allen, Esq.,* for General Counsel.
Brian Greig, Esq. and *Tom Nesbitt, Esq.,* of Austin, Texas, and *Vincent T. Norwillo, Esq.,* of Solon, Ohio, for the Respondent.
David Van Os, Esq. and *Matt Holder, Esq.,* of San Antonio, Texas, for the Charging Party.

DECISION

PARGEN ROBERTSON, Administrative Law Judge. This matter was heard in Austin, Texas, from September 23 through 27, 2002. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Respondent, the Charging Party, and the General Counsel, I make the following findings

I. JURISDICTION

Respondent admitted that it is a Texas corporation, with an office and place of business in Austin, Texas, where it is engaged as an electrical contractor in the construction industry performing commercial construction. Respondent admitted that in the conduct of its business during the past 12 months, it performed services valued in excess of $50,000 for enterprises such as the Omni Hotel and Hard Rock Café, located in Texas. It did not admit that those enterprises are directly engaged in interstate commerce. Respondent did admit that it has been an employer at material times engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act).

II. LABOR ORGANIZATION

Respondent stipulated that the charging party (the Union) has been a labor organization within the meaning of Section 2(5) of the Act at material times.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The Record Evidence

February 15, 2001

Michael Nolan sought employment with Respondent around February 15 and he started work with Respondent on February 15.[1] Greg Taylor gave Nolan a new employee orientation. Taylor explained the no advertising provision of the dress code to mean no alcohol, no tobacco, or no lewd or anything like that.

March 21

Michael Nolan filed internal union charges against another Respondent employee on March 21. Nolan claimed that the employee was an IBEW member working on a nonunion job. Before driving away from work on March 21, Nolan told that employee about filing the charge.

March 22:

When Nolan arrived at work on March 22 Supervisor Joe Lawrence told him to go to the shop. Lawrence said there had been union business going on the job yesterday and it would not happen on his job. At the shop, Ty Runyan[2] then told Nolan to go home for an hour so they could find another job for him. Nolan went home and changed into an IBEW shirt. Nolan was assigned to another job and the supervisor looked at his shirt and asked if Ty had gone union.

March 23

When Nolan reported for work on March 23, his supervisor told him that he could no longer wear his union shirt and that he could wear a shirt advertising Titus or nothing. A notice (GC Exh. 8) was attached to his paycheck on March 23.

Nolan's supervisor held a meeting before work on March 23. He told the employees they could no longer wear any advertisement on any shirts whatsoever. It had to be a blank shirt or a Titus shirt. When Nolan received his paycheck that day the following memo was attached (GC Exh. 8):

> To: All Titus Personnel
>
> Message:
>
> EFFECTIVE IMMEDIATELY, No advertising of ANY type whatsoever is allowed by any Titus personnel on any of our projects or company property or any company function. This includes any type of clothing or other article with any type of advertisement whatsoever, including logos, writing, or any other form of advertising. The only exception to this is an unaltered Titus shirt or other article issued and/or authorized by the management of Titus Electric.
>
> Other than Titus shirts, you may wear a blank shirt that meets all other company requirements.

April 23[3]

Michael Nolan noticed several employees wearing advertising shirts and he elected to wear his union shirt. Supervisor Steve Borrego came to Nolan after lunch and told him to go home and change his shirt.

November 15

Nolan Keith Richards has been a journeyman electrician for over 20 years and a member of Local 520 for over 12 years. He worked for Respondent's predecessor employer, Guy's Electric, on the Town Lake Community Event Center. His employment with Guy's Electric ceased when Guy's Electric went out of business on November 8, 2001. Richards as well as John Voight, Robert Biehle, Rick Zerr, Gordon Monk, and Lewis Grimsley applied for work with Respondent on November 15. All together there were 13 applicants that applied at the same time with Richards. The majority of the 13 applicants wore union T-shirts or other matter that identified them as being affiliated with Local 520. Richards was wearing a black IBEW shirt.

As the 13 approached Respondent's office, Ty Runyan stopped them and asked where they were going. Rick Zerr[4] and Robert Biehle told him everyone wanted to apply for work. Runyan said they could not submit applications but they should

[1] Respondent furnished Nolan with a copy of its general regulations (GC Exh. 9). Included was a provision regarding advertising on clothing: "No lewd slogans nor advertising is allowed on any garments. Plain T-shirts are acceptable."

[2] Respondent's president and co-owner.

[3] Nolan testified the date of this incident was April 23, 2001.

[4] Ty Runyan testified that he elected not to offer a job to Rick Zerr because he received a negative recommendation from Carl Jackson.

put their names on a list. Runyan limited the applicants in the office at one time to groups of three. Richards was in the first group of three, which also included Rick Zerr[5] and Robert Biehle. Richards gave Respondent his name and phone number but he has never heard from Respondent.

John Voight testified that he is a journeyman electrician, licensed in Austin, Texas, for 3 years and he is a member of Local 520. He applied for work with Respondent on several occasions and the first of those occasions occurred on November 15, 2001. Approximately 12 others from the Union accompanied him including Robert Biehle.[6] On each occasion that Voight applied for work with Respondent, he wore a union Local 520 T-shirt.

Gordon Monk recalled applying for work with Respondent around the middle or end of November. Monk had been in the Union since 1997 and was classified as JIW.[7] He had an Austin license. Monk went to Respondent's office to get on its hiring list along with Mike Latterman, Nolan Keith Richards,[8] Rick Zerr, Robert Biehle, and a couple of others. Ty Runyan told them to leave the office but after talking with Zerr, Runyan permitted them to go inside, in groups of three. The hiring list included each applicants name, experience, and phone number.

Rick Zerr is the union assistant business manager and organizer. He is a journeyman electrician insider wireman (JIW). He went to Respondent's office to seek employment on November 15. Zerr was wearing an IBEW pencil clip. He recalled that several others went with him including John Voight and Robert Bowie. Zerr testified that he either wrote his name, address, phone number, and years of experience on Respondent's write-in register or Respondent's receptionist wrote it on the register. He recalled that the group was allowed in the office three at a time. Zerr also went to Respondent's facility to apply for work on later occasions.

Union organizer and business assistant, Robert Biehle,[9] testified that he is a licensed master journeyman electrician. He first sought employment with Respondent along with a group, on November 15. Biehle was wearing a union cap on that occasion.

November 29

John Voight along with a smaller group of people including Robert Biehle applied with Respondent again on November 29, 2001. On both the occasions in November Voight and others were permitted to write in the application register. The woman that helped them in Respondent's office said those write-ins were good for 30 days. Voight[10] and a couple more applicants including Robert Biehle returned and applied again in mid-December.

Around December 4

Jesse Gonzalez is a licensed journeyman electrician that first applied for work with Respondent about 3 weeks before Christmas 2001. Gonzalez has been a member of Local 520 since early October 2001. He accompanied his brother to Respondent's office to apply. Neither Gonzalez nor his brother wore anything to identify themselves with the Union. He signed his name, phone number, and listed his experience on Respondent's register. He returned to Respondent's office to reapply for work on several occasions. He never wore or did anything to identify himself with the Union.

Greg Taylor phoned Jesse Gonzalez around December 21 and told Gonzalez to come in and fill out some paperwork. Gonzalez was tested and interviewed by Greg Taylor and Ty Runyan. The Union did not come up during those interviews and Gonzalez did nothing to show that he was affiliated with the Union. The previous employers that Gonzalez listed among his experience for Respondent were not union employers.[11]

First week in December

Around the first week of December, Alan Stockton applied with Respondent. At that time, Stockton was not in the Union and he did not identify himself as being with the Union. He went to Respondent's office along with several people from the union hall. He was allowed in the office in a group of three and left his name, address, and phone number. Ty Runyan then phoned him and an interview was arranged for the following day. Stockton wore an IBEW pencil clip to the interview. Nothing was said about the Union during Stockton's interview with Runyan other than Runyan told him he would not be allowed to

[5] Carl Jackson testified that he recommended against hiring Rick Zerr because Zerr was too slow and he talked too much on his cell phone while operating machinery.

[6] Ty Runyan testified there were two reasons why he never offered work to Robert Biehle. He had worked with Biehle in the past and he considered Biehle to be an arrogant individual that he did not like. Secondly, he did ask Carl Jackson about Biehle's work and Jackson gave him a bad recommendation. Insufficient experience was noted as to Biehle because Biehle did not have sufficient commercial experience.

[7] Journeyman Inside Wireman.

[8] Ty Runyan testified that he did not know Nolan Keith Richards but he knew of him. Another applicant that was in the office when Richards came in was Nick Lyons. When Runyan interviewed Lyons, Lyons told him that Richards liked to fight. He said that Richards had gotten into it with another employee on the Town Lake Event Center job. Runyan checked with Carl Jackson and Jackson confirmed that Richards had gotten into it with at least two employees.

[9] Respondent supervisor, Carl Jackson, testified that he recommended against hiring Biehle because Biehle had made a promise to Guy's Electric in order to persuade Guy's to sign a union agreement. Biehle and Mike Murphy promised the Union would send Guy's all the manpower it needed but the Union failed to follow through on that promise. Instead, the Union was able to supply needed manpower only occasionally. He never saw Biehle perform electrical services and was unaware of Biehle's ability as an electrician.

Mike Murphy testified that the Union never had an agreement with Guy's Electric to be the sole source of Guy's electricians. Instead, that contract called for the Union to be the first source of electricians knowing it would sometimes be necessary for Guy's to go to other sources to find a sufficient number of electricians. The Union never refused to supply electricians to Guy's to the extent it had electricians seeking work.

[10] Ty Runyan testified that Brian Kenke, who is the general manager of Tradesmen's office in Austin, told him that he shouldn't hire John Voight if he received Voight's application because Voight was extremely unreliable.

[11] Former Foreman Frank Nerio testified that Jesse Gonzalez had worked for Guy's Electric but he did not know that Gonzalez was with the Union.

wear anything to show his union affiliation and that he should remove his IBEW pencil clip. Runyan told Stockton that Frank Nerio[12] and Carl Jackson had recommended him.[13]

Ty Runyan testified that he knew Stockton was a union member when he hired him. He denied that he told Stockton he would be sent to another Respondent job after Town Lake Event Center job.

December 6

About 3 weeks after he was hired Gordon Monk wore an IBEW shirt to work but the shirt was covered. During that day, the IBEW logo became visible and Superintendent Kip Powell[14] told Monk that he had to cover the logo.

Vice President Shelly Runyan testified about Respondent's policy regarding appearance. She said Respondent started out with a no-tank tops rule. Then, because some guys wore rude and vulgar T-shirts, the rule evolved into one prohibiting the wearing of anything offensive to anybody. Then it evolved into nothing offensive, no advertising, and finally Titus or blank shirt. She testified that the current policy of Titus or blank shirt originated in the mid-1990s. That policy does permit manufactures labels on clothing.

December 7

Ty Runyan phoned Kevin Gustin on December 7 and asked if Gustin wanted to help him finish the Town Lake Event Center job. Runyan said that he was taking over the job at Town Lake Event Center and that Frank Nerio had recommended Gustin.[15] Runyan told Gustin that Frank Nerio and Carl Jackson were working for him. He also testified that Frank Nerio had told him Gustin was a union member. He asked Gustin to come in the following Monday, December 10, and submit a job application. Gustin has been a journeyman electrician since 1983. He is a member of the IBEW and is licensed in Austin.

Ty Runyan testified that he hired Gustin on recommendation from Jackson and Nerio. He testified that he knew Gustin was Union before he hired him.

After completing his application on December 10, Gustin was interviewed by Runyan. Gustin was offered work at $21.50 an hour. Gustin accepted the job and attended a safety lecture by Greg Taylor. Taylor told him that he couldn't wear union stickers or anything on shirts, clothing, or hardhat except maybe a safety sticker. Gustin started work on December 11.

December 12

Kevin Gustin's foreman, Kip Powell, held a meeting among his employees on December 12. Both Powell and Ty Runyan were present and Runyan spoke[16] to the employees. He said that someone that worked for him came to him and complained the Union had told him that if he did not fight Ty, the employee could not stay there any longer. Runyan asked each of the employees if that employee was going to stick with him or if the employee was going to do what the Union told him.

As mentioned above, Rick Zerr also went to Respondent's facilities to apply for work on occasion after November 15. One such occasion was on December 12. Sherry Passmore, Raul Garcia, and Alan Cantrell were with Zerr. Zerr walked in with Passmore and pointed out that the receptionist would take Passmore's information. Greg Taylor told Zerr to get the hell out of there; he had already done what he came to do. Zerr said he wanted to wait while Sherry Passmore went through the application process. Taylor said just get the hell out and get off the property. Zerr waited out in the parking lot until Passmore came out.

Greg Taylor denied that he told Rick Zerr to get the hell out of the office. He admitted questioning Zerr as to why he was in Respondent's office and that he asked Zerr to leave the office. He and Zerr argued about Zerr leaving and Taylor opened the door and asked Zerr to please leave. Zerr had already signed the register.

Sherry Passmore is a journeyman electrician. Passmore applied for work with Respondent on December 12. She came to Respondent along with a number of applicants from the Union including Union Representative Rick Zerr and she wore things to identify her as being with the Union. Passmore recalled she may have had on a union shirt and she definitely wore a union pencil clip sticking out of her pocket. She left her name with a woman at Respondent's office to be included in a log of applicants for employment.[17] While she was in the office, a man came into the office from the back and told Rick Zerr to leave the property. The man introduced himself as Greg Taylor. Passmore shook hands with Taylor and said that she just needed a job. Taylor gave her his business card.

The day after December 12, Passmore phoned Respondent's office and left her phone number.

[12] Carl Jackson and Frank Nerio went to work for Respondent after having worked for Guy's Electric. Jackson and Nerio recommended Stockton for work with Respondent. Jackson and Nerio testified to knowing Stockton was a union member when he recommended to Respondent.

[13] Frank Nerio and Jackson were Stockton's supervisors when he worked for Guy's Electric.

[14] Ty Runyan testified that Kip Powell worked for him for a number of years and he hired Powell knowing that Powell had a record of DWI convictions.

[15] Supervisor Carl Jackson and former Foreman Frank Nerio admitted that each of them recommended Gustin. Jackson and Nerio worked for Guy's Electric on the Town Lake Community Events Center job before Guy's went out of business. Both Jackson and Nerio testified they knew that Gustin had picketed Guy's Electric.

[16] Ty Runyan testified that he spoke to employees about problems Guy's Electric had on the Town Lake Event Center job. He said that the IBEW wanted to organize our Company (see R. Exh. 23) and he did not want to encounter the type problem found at Guy's. He spoke to employees at Town Lake Event Center job on another occasion because employee Eric Mates said the IBEW had told him to sign on to salt the Town Lake Event Center job or leave the job. Runyan denied that he ever threatened to lay off people because of the Union.

[17] Former Foreman Frank Nerio testified that he was asked about Passmore and he rated her work as "average, pretty mediocre work." He said that she talked too much during work. Nerio also reported to Respondent that Passmore was involved in an incident while working at Guy's Electric where she did not report back from lunch on time while working on Saturday. One of the Guy's Electric employees told Nerio that he and Passmore had been drinking during lunch and were leaving for the day.

Early in Kevin Gustin's employment with Respondent, Ty Runyan asked him if he recommended Bobby LaSoya and Sherry Passmore. Carl Jackson and Frank Nerio agreed that Sherry Passmore was a good hand.

Both Carl Jackson and Frank Nerio testified they recommended against hiring Sherry Passmore. Both Nerio and Jackson understood that Passmore had alcohol during lunch on one occasion while working for Guy's Electric.

Ty Runyan testified about Sherry Passmore. Respondent had hired a number of former Guy's Electric people that had worked on the Town Lake Event Center job including Carl Jackson and Frank Nerio. They considered Passmore because she had submitted her name and told Respondent's receptionist that she worked for Guy's on the Town Lake Event Center job. Runyan phoned Carl Jackson. Jackson said that if Passmore had submitted an application, Brad Doucette had probably submitted an application as well and that we shouldn't hire either one of them. Jackson said that both Passmore and Doucette had been drinking on the job during working hours. Runyan testified that he was unaware of Passmore being involved with the Union.

Guy's Electric president, Jean-Guy Fournier, testified that he talked with Brad Doucette after the lunch incident between Doucette and Sherry Passmore. The two arrived back late from lunch and Doucette told Fournier that they decided they should not go back on the job because they had a couple of beers too many. They offered to return on Sunday if Fournier wanted or on Monday. Fournier told them that was fine and they should return on Monday. That conversation occurred outside Guy's Electric trailer. Frank Nerio was inside the trailer.[18] According to Jean-Guy Fournier, Nerio probably told Fournier that he wanted to see Doucette and Passmore fired[19] but Fournier replied that he would take care of the matter. He denied saying anything to Nerio to the effect that he was going to fire either Doucette or Passmore. Fournier testified that he did not believe that Carl Jackson was on the job on the day of the Doucette–Passmore incident. He denied that he ever said anything to Jackson to the effect that he had discharged Passmore. Guy's Electric never discharged Passmore.

Jean-Guy Fournier testified that his experience was that Carl Jackson was very weak regarding truthfulness. Jackson was Fournier's project manager for 9 months.

Fournier testified that Rick Zerr worked for Guy's Electric and he found Zerr to be a valuable employee. He had no problems with Zerr's performance. However, while Zerr worked for Guy's, Carl Jackson frequently complained about Zerr. Jackson said things like Zerr was always on the phone; and Zerr didn't get his job done.

Jean-Guy Fournier testified that Nolan Keith Richards played a big part in installing electrical gears on the second floor of the Town Lake Event Center job and Richards was a good employee.

December 20

John (Jack) Wayne King applied for work with Respondent on December 20. King has been a Local 520 member as well as a journeyman inside lineman, licensed in Austin, for 8 years. John Kearn applied along with King. King did not recall wearing any union paraphernalia when he applied for work. The receptionist told King he needed to fill out a sign-in sheet.[20] He did that and handed the receptionist his resume[21] (GC Exh. 14). She went to the back, returned and told King that he could fill out an application. He submitted the application, took a test and left. Ty Runyan[22] phoned King that same afternoon and asked him to return for an interview. King told Runyan that he could not come in that afternoon but that he would come in the following morning. He met with Runyan in the office the next morning, talked and took another test. Runyan asked King if he was ready to go to work. Runyan asked King how long he had been on the books.[23] King replied that he had been on the books for about 3 months. Runyan said that he would be contacting King. However, King was never contacted.

Ty Runyan testified that he had worked with John Wayne King some 18 years before. He saw King after King completed his application and smelled alcohol on King's breath. He denied that King's involvement with the Union played any part in his decision against hiring him.

December 25

Jesse Gonzalez testified that he is a licensed journeyman electrician that worked for Respondent from around Christmas 2001 until February 14, 2002. As shown above, he first applied for work about 3 weeks before Christmas 2001.[24] Gonzalez has been a member of Local 520 since early October 2001. He was hired as an unlicensed journeyman electrician. Gonzalez was assigned to the Town Lake Event Center job under the supervision of Kip Powell.

December 27

About a month to a month and a half after Gordon Monk first went in and included his name on the hire list, Ty Runyan phoned Monk. Monk believed that it was December 27 when

[18] Eileen Fournier testified that Frank Nerio was in the trailer talking with her while her husband, Jean-Guy Fournier, was outside dealing with Doucette and Passmore.

[19] However, Eileen Fournier testified that Frank Nerio did not say that Passmore should be fired. When Jean-Guy Fournier came back into the trailer, Nerio asked what was happening to Doucette and Passmore and Jean-Guy said they were going home and that he had taken care of the matter.

[20] Ty Runyan testified that Respondent decided to use a sign-in sheet in anticipation of a large number of applicants for the Town Center job. The use of the sign-in sheet eliminated the need to have all applicants complete a long application.

[21] Some of the employers listed on the resume were union contactors.

[22] King was acquainted with Runyan. They had worked on a job together back in 1986.

[23] King testified that Runyan was talking about the union sign-in books.

[24] As shown above, Gonzalez is a licensed journeyman electrician that first applied for work with Respondent about 3 weeks before Christmas 2001. Gonzalez has been a member of Local 520 since early October 2001. When he applied he accompanied his brother to Respondent's office. Neither Gonzalez nor his brother wore anything to identify themselves with the Union. He returned to Respondent's office to reapply for work on several occasions. Gonzalez never wore or did anything to identify himself with the Union.

Runyan called and told him to come in and fill out a job application. Monk completed his application and left. Ty Runyan phoned Monk again on January 2 and asked if he wanted a job. Runyan and Monk arranged for Monk to come in the next day.

Early 2002

Sam Ramirez testified that he was a supervisor for Respondent on its Austin Center job at the Omni Hotel. His crew at one time included Phillip Lawhon and John Blair. Ramirez testified that he enforced Respondent's appearance and professionalism rule (GC Exh. 6) against a number of employees including Sam Gresham, John Blair, and Phillip Lawhon. On one occasion, Ramirez told Lawhon that he could not wear an ESPN pullover and Lawhon asked if he could wear an IBEW shirt the next day. Ramirez told him that he could not. On another occasion, he told Lawhon that he could not have an IBEW sticker on his tape measure. The sticker was similar to the one identified as General Counsel's Exhibit 7. Ramirez recalled that Lawhon removed the sticker but he could not recall whether there was a brand under the sticker that identified the product name.

January 3

Ty Runyan interviewed Gordon Monk on January 3. During the interview Monk and Runyan discussed Monk losing his home. Monk was assigned to the Town Lake Event Center job.

January 7

Rick Zerr testified that he picketed Respondent's facility on January 7. He carried signs stating unfair labor practice picketing. A woman came out of Respondent's office and told Zerr to leave or she would call the police. The police arrived and after talking with Zerr one officer went into the building. Then the officer returned from the building with two other people and the police met with Zerr and the people from Respondent's building. Then Greg Taylor came out and asked what it would take to stop the picketing. Zerr replied that he would stop the picketing if they would allow the people present to sign their looking for work list. All agreed to that proposal. Zerr recalled that he and Neil Johnson went in and signed Respondent's job register.

The police officers also told Zerr that Respondent claimed to own the land up to 4 feet from the street and they felt it was unsafe to picket that close to the street. Zerr testified the picketing was moved to the north side of Yeager Lane and where there was a big dirt area where the picketers parked. Zerr later saw a plat showing a public use dedicated easement giving sufficient room to picket on the same side of the street as Respondent's shop and the picketing resumed on that side of the street.

John Voight's first occasion to picket was January 7, 2002. Voight recalled about a week later, while he was again picketing Respondent's facility, the police arrived. After looking at a plat the police said the pickets had a right to picket.

John Blair who is an unlicensed journeymen electrician started working for Respondent around January 7 or 8. He was not a member of the Union. However, he signed a union authorization card on January 16. After working at the Town Lake Event Center job for about 3 weeks, he was transferred to Respondent's job at the Omni Hotel. Sam Ramirez was his supervisor at the Omni.

Phillip Lawhon first applied for work with Respondent on January 7. Lawhon had been a journeyman electrician for about a year. Ty Runyan phoned Lawhon and left a message on January 14. Lawhon went in and filled out his application on January 15. He listed two union contractors—Guy's Electric and Hill Electric—on his application as previous employers. Greg Taylor interviewed Lawhon that day. He asked Lawhon if he had any plans of taking a call from the Union and if Lawhon was going to stay with 520 or seek permanent employment with Titus.

Greg Taylor testified that he did interview Lawhon. He was questioned during the hearing as to whether he asked Lawhon if he would take a call from the Union. He replied that would not be out of the ordinary. "We are looking for long-term people, so that does happen on occasion."

Respondent's project administrator, Delores Overstreet, went out and told the picketers not to come on Respondent's property. Some of the men "charged across the street towards our building, . . . and I felt threatened, so I called the police."

January 10

Sherry Passmore returned alone to Respondent's office on January 10, 2002, wearing the same union identification she wore on December 12. She asked to be allowed to submit an application for work. The woman in the office took Passmore's name, phone number, and years of experience.

Eddie Edwards applied for work with Respondent around the second week of January. Edwards has been a union member for about a year. He has held a license as journeyman electrician in Austin for 2 or 3 years. When he applied, he told the receptionist that he formerly worked under Kip Powell. Powell had been his supervisor on a job with Anchor Electric. Anchor Electric is not a union shop. Greg Taylor interviewed Edwards. During that interview, Taylor commented that the desired pay listed on Edward's application was $21.90 and that sounded like a scale[25] wage. Edwards replied that was a scale wage. Edwards was hired and assigned to the Town Lake Event Center job.

January 15

Kevin Gustin wore a concealed tape recorder to work around January 15. Ty Runyan spoke to the employees. Runyan said soliciting for the Union on the job would not be tolerated. He said the employees could discuss the Union off the job and at home. Runyan also referred to Amway and Girl Scout cookies. He said that he did not want any nasty messages on his answering machine from Mike Murphy of Local 520. After the meeting, Runyan talked privately with Gustin. He asked Gustin to talk to the guys about soliciting and he named Michael (Red) Merker. Runyan said that Eric Mates told him that Gustin said to Robert Biehle at the union hall that he was in the Union and was going to stick with them. Gustin denied to Runyan that he had said that to Biehle.

Tommy Means signed Respondent's sign-in register seeking employment on January 16. Greg Taylor phoned Means but

[25] Greg Taylor testified that scale wage is a set dollar amount that is set by the general contractor.

Means was unable to start the application process until January 22. He finished his application and test at Respondent's office and was introduced to Ty Runyan. One of the employers listed on Means's application was Guy's Electric on its Randall's Store job. Runyan asked him if he had any dealings with the organization that was going on at Guy's. Means told Runyan that he had not had any dealings with that organization. Runyan looked over Means's test results and said everything was alright except the wiring of the three phase wide Delta. Means told Runyan that he had no experience with motors and that his entire experience had been with branch circuitry.

Runyan told Means the employees were required to wear either Titus or plain apparel. Ty Runyan said that employees had to work for 90 days before qualifying for fringe benefits and he said that he would contact Means if they wanted him to come in for the safety test.

January 17

Greg Taylor gave Phillip Lawhon his orientation on January 17. During that orientation Taylor discussed Respondent's policies. Taylor said that employees were not allowed to wear any type of advertisement. He said there would be no union shirts and no Longhorn shirts. Ty Runyan called Lawhon aside and talked with him in Runyan's office. Runyan said that Lawhon's references came back from Guy's Electric and Hill Electric. He said that he been dealing with 520 for quite a while and that if Lawhon wanted to be employed with them he would have to just come to work and do his job. Lawhon went to work for Respondent. He eventually worked on three jobsites. Those were the Omni Hotel, Hard Rock Café, and Rollingwood.

As shown above, the police officers also told Rick Zerr earlier in January that Respondent claimed to own the land up to 4 feet from the street and they felt it was unsafe to picket that close to the street. Zerr later saw a plat showing a public use dedicated easement giving sufficient room to picket on the same side of the street as Respondent's shop and the picketing resumed on that side of the street. He showed that plat to the police when they came out to the picketing site on January 17 and the police did not remove the pickets from Respondent's side of Yeager Lane.

Respondent's project administrator, Delores Overstreet, was asked about January 17. She testified that she did not recall the specific date but she admitted that she called the police every time she saw pickets. Overstreet testified it was not her intent to have the pickets removed. Instead she intended to have the picketing controlled.

Shelly Runyan is Respondent's vice president. She handles primarily PR, marketing, and administrative duties. She recalled afternoon picketing on January 17. She went out and told Rick Zerr that the picketers needed to stay off Respondent's property. Zerr replied that Ty Runyan had told them they could be there. She then left to pick up her children at school.

January 20

Respondent's project administrator, Delores Overstreet, was asked about January 20. She did not recall the date but she did recall there was a death threat made to Runyan. Overstreet denied that anyone with Respondent ever told her to call the police to have the pickets removed from the property.

January 22

Greg Taylor phoned Tommy Means the evening of January 22 and they agreed that Means would return on Thursday. After taking the safety test and urinalysis Means met with Greg Taylor. Taylor went over some safety issues and Taylor mentioned that Means must wear clothing marked with Titus or nothing. Means asked about the "Oceans 11" shirt that he was wearing. Taylor replied no that it would have to be "Titus or plain, because we're having certain problems with the Union." Means was hired on Friday, January 25.

Greg Taylor denied telling Tommy Means he would have to wear a Titus or plain shirt because we're having problems with the Union. He did admit discussing the appearance policy with Means.

January 25

Ty Runyan talked with Tommy Means after he was hired on January 25. Runyan said that he had done a background check and found out through Sam Gresham[26] that Means was union. Ty Runyan said that his lawyer had told him to generate a computer list and "I have all of you on this list by the highlighted names that on the screen. And as you can see, your name is right here." Runyan mentioned other names including Gordon Monk. Runyan said that "well, just like you, Trey Monk's having his problems. He's losing his house, having problems with his family, a do as well as him (phon.), they need a job, and at least with me, you're not sitting on the bench."

Runyan confirmed that he had a computer screen out while talking with Tommy Means. He had a list of employees that were Union that he had pulled up at his lawyer's request. It was for the purpose of responding to an unfair labor practice charge.

January 26

Phillip Lawhon wore an ESPN shirt to work on January 26. Supervisor Sam Ramirez told him he would have to remove the shirt. It was cold outside and Lawhon asked to keep on the shirt. Ramirez allowed Lawhon to keep on the shirt until the crew went into the building.

Late January

About 3 weeks after he was hired, Gordon Monk wore an IBEW shirt that was covered. During that day the IBEW logo became visible and Superintendent Kip Powell told Monk that he had to cover the logo.

Sherry Passmore picketed in front of Respondent's office on more than one occasion beginning in late January 2002. She was one of several pickets. Passmore first carried a sign saying something to the effect of "Titus Unfair." On later occasions, she carried a sign protesting sex discrimination. She recalled police arriving while she was picketing in the first part of February. Passmore overheard a police officer say that someone had phoned and said there was fighting in front of the business. She testified there had been no fighting.

Scott Smith was Tommy Means's foreman. Smith testified that he talked to Ty Runyan about Means's job performance. Two or 3 days into his employment Smith told Runyan that

[26] Before working for Respondent, Sam Gresham was the project manager for Guy's Electric on the Randall's Store job.

Means wasn't performing quite up to Smith's standards. He was not what Respondent expected for journeyman skill level. Smith talked to Runyan on several subsequent occasions. He continued to tell Runyan that Means was not performing really well.

January or February

Kevin Gustin recalled that he and others wore union stickers and union pencil clips. Kip Powell told them they would have to remove the union material or leave the job. The employees removed the union clips. Gordon Monk testified that he along with Kevin Gustin and Allen Hughes wore union shirts and union logos on their hardhats in February.

Alan Stockton testified about a meeting Ty Runyan had with him and Kevin Gustin about 2 months after Stockton was hired. Runyan told the two of them that he did not want any talk about union or anything. Ty Runyan said that it doesn't matter if Gustin and Stockton are union or nonunion, or Black or Hispanic, or what that he believed in equality like that. Runyan also said that he wished all his employees would produce like Gustin and Stockton.

Stockton wore an IBEW sticker on his hardhat beginning some time in February. Several other employees also wore IBEW stickers. Foreman Kip Powell came to the employees and asked them to remove the IBEW stickers or they would have to leave the job. Stockton and others including Kevin Gustin removed the IBEW stickers. Stockton also passed out flyers regarding the prevailing wages in May 2002.

Ty Runyan testified that employee Mike McCord was discharged in January or February. McCord was not discharged for discussing the Union on the job. Instead, McCord was terminated for talking and not working. Runyan actually saw McCord talking to another employee that was working. Runyan called to McCord and asked if he was enjoying himself. Runyan notified McCord's supervisor of the incident and the supervisor, Kip Powell, confirmed that was typical of McCord. Runyan talked with McCord the following week after receiving a report that McCord was again talking on the job instead of working. After Runyan told McCord to go into conference room one, McCord said that no one was going to talk to him like that and McCord walked out the door. Runyan admitted that he then talked to his employees about McCord's termination. He also admitted that he had listened to a tape recording of that talk to employees.

Runyan recalled that supervisors reported that employees were wearing union stickers on hardhats and tape measures.

February 7

In February, Gordon Monk along with Kevin Gustin and Allen Hughes wore union shirts and union logos on their hardhats. It was a cold day and their shirts were covered. Kip Powell asked Monk what was with all the union stickers. Monk replied it was their right to wear them and Powell said that its company policy to remove them. Monk removed his IBEW sticker. Kevin Gustin and Alan Stockton also removed their union stickers.

Tommy Means wore a union T-shirt and union insignia on his hardhat at work on February 7. Even though Means arrived at work on time Supervisor Scott Smith said that he was late. Means replied that if Smith were going to go there, he would have to start by saying that he was wearing his union shirt and an insignia on his hardhat. Smith said that he was going to have to send Means home. Means said that he was going to see Ty Runyan.

Scott Smith testified that Means came in wearing a union shirt and he asked Means to take the shirt off. Means replied that it was his right to wear the shirt. Smith sent Means to the office and he phoned Ty Runyan to tell him that Means was on the way up to the office. A couple of hours later Runyan phoned Smith and told him that Means was coming back to the job wearing a Titus shirt. Smith told Runyan that he wasn't expecting that and he really did not want Means back. Smith said that Means's performance was pretty poor, he's pretty rude, and he's made some comment about suing the Company. Ty told Smith to call him on the phone line.

After stopping by the union hall, Means went to Respondent's office. Runyan talked with Means in his office. He asked Means if he had recording devices. Means denied having a recording device and Runyan asked if his cell phone was on. Means replied that his cell phone was on. Runyan questioned Means about why he wore that shirt and he said that he would give Means one more chance by giving him a Titus shirt. Means said that he would buy two Titus shirts. Means said that he wore the union shirt because that was his right.

Means went out of Runyan's office to purchase two Titus shirts. Runyan called him back into the office and asked if he had threatened to sue the Company. Means admitted that he had. Means had been complaining to Smith about how the Company was putting wear and tear on his knees because of the nature of his work assignments. Tommy Means told Runyan that it was just an in-passing conversation between he and Scott Smith regarding damage to his knees.

Runyan testified that Scott Smith sent Means to the office because of a dress code violation and that Means agreed to purchase two Titus shirts. Runyan phoned Scott Smith that he was sending Means back to the job and Smith said that he really did not want Means back on the job. Smith said that Means was slow, he didn't have the skills of a journeyman electrician, and he had a smart mouth. He said that Means had commented in front of other employees that he ought to sue the Company. During a subsequent speakerphone conversation involving Means, Smith, and Runyan, Means explained why he had threatened to sue the Company. Runyan told him that he would get back to him later.

Smith testified to a slightly different version of the speakerphone conversation. After Runyan asked Means if he threatened to sue the Company, Means admitted he had because Smith left him on a roof without a means of egress. Smith explained that he had actually asked Means if he could take his lift for a while and that Means could have phoned him on his cell phone if he needed the lift at any time. Actually, something else came up and Smith never actually borrowed Means's lift. While on the speakerphone, Runyan told Means to go home and call in the following morning.

Runyan phoned Smith later that day and Smith explained that he was unhappy with Means's job performance. He pointed out to Runyan a situation where he expected Means to complete

work on at least four units per day and Means had actually completed only one unit each day. On another occasion, Means was given a job on a scissor lift and he under performed that work. Smith explained to Runyan that Means came back from lunch just a little late each day even though everybody else would be back on time. Means drug his feet and did not seem motivated to perform plus he made comments as shown above, about suing the Company.

Ty Runyan told Means that from that point on Means was no longer authorized on any of Titus's jobs and that Means was to phone him the next morning regarding his status with the Company. The next morning Runyan told Means that Respondent really did not need him and they were paying him too much. He said that he was letting Means go.

February 13

Jesse Gonzalez received an evaluation on February 13. He reported to Respondent's office for the evaluation interview before 2:30 p.m. Gonzalez noticed some 10 to 15 picketers in front of Respondent's office. He was not blocked at the entrance and drove into the parking area. Gonzalez observed the picketing from inside the lobby while he was waiting for his evaluation. He observed Ty Runyan moving from the lobby and his office and he overheard Runyan say, "Call the police. Tell them they're—they've got guns. Tell them we've got threats to our lives. Tell them, you know, they're—they've got profanity on their signs, and things of this nature." Gonzalez testified that he did not see any guns. He did not hear any threats and he did not see any profanity on the picket signs. Gonzalez told Runyan that he did not believe it was fair for him to be evaluated at that time due to Runyan being distracted by the picketing. Runyan told him he had not been there long enough, that the evaluation was just a yearly thing and Gonzalez received an average evaluation. Runyan did not say anything about Gonzalez' work.

At the end of the evaluation, Gonzalez asked to be paid the prevailing wage of $21.20. In explaining why he felt he deserved a raise, Gonzalez showed Runyan a union ticket in which he was classified as JIW[27] (GC Exh. 5). Runyan threw the ticket back and said it did not mean anything to him but that he would check with Kip Powell and see if he could give Gonzalez another dollar. Runyan escorted Gonzalez out of the office and as they were in the lobby Runyan said, "You know, those are your union brothers out there."

Respondent's general manager, Robin Escobedo, testified that he never heard Ty Runyan walk through the building and say call the police that the picketers have guns or anything to that effect and he denied that he ever heard Ty Runyan say tell the police that the picketers are threatening employees.

Ty Runyan denied that he ran up front and yelled about calling the police about pickets out front. Runyan testified that he did not make any statement regarding threats on our lives or to tell that the pickets had guns and the police needed to be called. He did not deny that he evaluated Gonzalez.

February 2002

Sherry Passmore returned to Respondent's office and again signed the sign-in roster. She then started picketing with others from the Union at Respondent's office. She also signed the sign-in roster on March 8, 2002 (GC Exh. 2).

Robin Escobedo is Respondent's general manager. Escobedo testified that a person he later identified as Johnny Sanders was picketing in front of Respondent's office some time in February with a picket sign that said "Sex" and some other things that Escobedo could not read. Sanders was holding the sign in such a manner as to make it clearly visible to Respondent's office workers including the receptionist, Giovanna Sedillo. Sanders trusted his hips while he showed the sign to Respondent's office personnel.

Shelly Runyan testified she was not present at the office while Johnny Sanders was on the picket line. However, she was called back to the office where an employee was upset. Consequently, a meeting was called for February 13 with Austin Police Commander Williams. Commander Williams said to page him whenever the pickets arrived and they would come out to make sure everything was under control.

February 14

Jesse Gonzalez reported for work on the Town Lake Event Center job. Around 8:30 a.m., Frank Nerio told him to gather his tools and report to Kip Powell. Powell told Gonzalez that he was asking for more money and he could not afford that. Powell told Gonzalez to go see Ty Runyan. Gonzalez drove to the office and reported to Runyan. Runyan told him that he was fired. Gonzalez asked why and Runyan said, "[T]his is an at-will state, and I don't have to give you a reason for firing you." That was the first indication Respondent had given Gonzalez that it was not happy with his work. Runyan then said to Gonzalez, "Go out there and join your union brothers, so."

Ty Runyan testified that Gonzalez asked for a raise during his evaluation and Runyan promised to call Kip Powell. When he phoned Powell said not only does the guy not deserve a raise but also he should be fired. Powell told Runyan that Gonzalez had failed to finish a job in a stairwell even though it was only about 2 hours of work. Powell said that Gonzalez was unmotivated, slow, and didn't know enough about the electrical trade. Runyan explained that the information he received from Powell was not reflected on Gonzalez' evaluation (R. Exh. 22), which was completed before Runyan talked to Powell.

Runyan said that after he told Jesse Gonzalez he was fired, Gonzalez said that his discharge was because he asked for a raise. Then as he left Gonzalez yelled back that he was fired because he was in the Union. He denied saying to Gonzalez that he could go out and join his union brothers and Runyan denied that he knew anything about Gonzalez' union activities before Gonzalez yelled that he was fired because he was in the Union.

Frank Nerio testified that he did not know Gonzalez was discharged but there was an incident where Gonzalez was slow in performing work before a stairwell was covered in sheetrock. Kip Powell asked him about that incident because the general contractor complained to Powell that the job was not completed before the sheetrock installers came in. Nerio told Powell that Gonzalez should have finished the job in time. Frank Nerio had to complete the job of installing conduits and boxes after the sheetrock was installed.

[27] Journeyman wireman.

February 15

Howard Williams, a commander with the Austin police department, testified that he held a meeting with Ty Runyan on Saturday morning around the middle of February regarding picketing activity. Williams told Runyan that he would like to know whenever picketers showed up. He explained that he wanted that information because there had been some complaints about the way his officers were handling matters regarding the picketing.

Ty Runyan testified that he contacted Commander Williams because they had a death threat and Williams asked Runyan about the boundary of his property. Using a plat of the property, Williams and Runyan measured 15 feet from the center of the street but Commander Williams said that would leave the pickets too little room from the edge of the street. He suggested the pickets should be able to use up to the middle of the ditch. Initially, when the line was 15 feet from the street center, Respondent marked that line but that was before deciding to give the pickets to the middle of the ditch. Runyan testified that he permitted to the middle of the ditch from that time forward.

Howard Williams also discussed with Ty Runyan areas that were off Runyan's property and areas that were not available for picketing. Williams testified that Runyan had a copy of a plat but both he and Runyan had some difficulty determining the location of the road easement. One interpretation appeared to place the easement line too close to the road to permit safe picketing. Williams felt it would be unsafe to require picketing too close to the road and he and Runyan agreed that the police would not arrest any of the pickets "unless they came farther, really on to the property; but if they stayed out, say about halfway between the road and where there's a concrete wall, basically, separating the parking lot from a drainage ditch, if they kind of stayed in that area, we were going to be okay with that, but if they came up into the parking lot and things, then we would make arrests for criminal trespassing, ..."

February 20

Rick Zerr was on the picket line around February 20. Orange lines were painted about 4 feet off the road at the entrance to the parking lot. Ty Runyan told Zerr to get on the other side of those lines or he was going to call the police. Runyan pulled out his cell phone and the police came but the picketing continued without interruption.

March 8

Rick Zerr was on the picket line around March 8. Although Zerr parked off the road a wrecker came and asked that the picketers move their vehicles. There were no parking signs posted for the first time all along the road. Zerr called 911 and asked for a police officer. Several officers arrived and an officer told Zerr that the picketers's cars would be towed if they did not move them. The picketers got in their cars and left.

Shelly Runyan testified that she arranged to lease (CP Exh. 11) the property across from Respondent's facility because neighbors were showing agitation with the picketing, and Respondent needed the lot for their annual party between May and June and they occasionally needed the lot to keep 18 wheelers from blocking the street. There was other parking available for the people on the picket line including the triangle where the city parks vehicles. That is right across the road (see R. Exh. 18). Runyan also arranged with About-Town Towing to set up no parking signs and handle towing.

Runyan explained how Respondent was engaged in extensive marketing practices including clothing for its employees and using signs and displays on company vehicles.

March 22

Rick Zerr was on the picket line around March 22. He testified that Shelly Runyan was taking photographs of the picketing. Robert Biehle testified that Zerr yelled to him that someone was taking his picture and Biehle aimed a video camera at Shelly Runyan who was standing in Respondent's doorway. Runyan appeared to be photographing the picketing.

Shelly Runyan testified that she took photographs of picketing solely to support a defamation suit Respondent has regarding a picket sign that showed "Titus sex bigot." She denied that she has ever taken pictures of a current Titus employee on the picket line.

March 28

Union organizer and business assistant, Robert Biehle, testified that he went out to picket Respondent's facility on March 28. He saw a no parking, tow away sign at the place where he normally parked. After parking in his normal area a tow truck pulled up and the driver told Biehle that his car would be towed if he left it there.

April 4

Phillip Lawhon attended classes while working. On April 4, Ty Runyan came in the class and said he need to speak to them about what the Union did to its contractors. Runyan held up and read a handbill he said had been found on the Town Lake Event Center job. Ty Runyan asked the 28 employees in the class if any of them were with the union stuff that's going on there. Runyan said that since the Union was tying them up with charges and withdrawing charges, he was not going to be able to go on bidding at as fast a pace as he had before the union stuff and that he was going to have to start laying people off. Ty Runyan said there were union people working at the Company and that he knew one that he had given a raise and promoted that was going back and telling the Union what was going on at the Company.

April 10

Gordon Monk asked Kip Powell about the NLRB thing that the employees could wear union stuff on the job. Powell replied that Monk could wear his union shirt anywhere he liked but not on the job. Powell asked Monk what crawled up his ass that morning.

April 19

Eddie Edwards testified that he wore a shirt with IBEW logos on the front and back. When he came to work Kip Powell said to him, "[Y]ou know you can't wear that shirt." Edwards replied that he believed it was against his rights, Powell telling him he couldn't wear that shirt. Powell told Edwards to go home and change his shirt. Edwards replied the since he couldn't wear his shirt he quit.

The following Monday, Edwards phoned Greg Taylor. Edwards asked Taylor if he knew what had happened Friday and Taylor said no. Edwards told Taylor what happened regarding his leaving the Company. Taylor replied it is nothing against the Union, it is company policy.

May 28

Phillip Lawhon wore a union sticker on his tape measure to work (GC Exh. 7). The sticker covered a Craftsman label.[28] Sam Ramirez told him that he would need to take the sticker off his tape measure. Lawhon pulled the union sticker off and Ramirez told him not to be starting this shit on his job.

May 30

Kevin Gustin testified that Kip Powell called a meeting of employees for after work. Powell gave papers to Gustin, Alan Stockton, and Richard Rivera among others, and told them to call the shop the next morning. Gustin phoned and talked with Greg Taylor the next morning. Taylor told him Respondent had no work for him. Gustin asked Taylor if he was laying them off and Taylor said yes.

Alan Stockton and several other employees including Kevin Gustin wore an IBEW sticker on hardhats beginning some time in February. Foreman Kip Powell came to the employees and asked them to remove the IBEW stickers or they would have to leave the job. Stockton and others including Kevin Gustin removed the IBEW stickers. Stockton also passed out flyers regarding prevailing wages in May 2002. Near the end of the month, Kip Powell told Stockton and others to sign out their time because they would be sent elsewhere the following morning. Stockton, Kevin Gustin, Richard Rivera, and three or four others were told to fill out their time on that day. Greg Taylor told Stockton he was laid off when Stockton phoned in the following morning.

June 4

Phillip Lawhon and John Blair were assigned to work at the Omni Hotel job under Sam Ramirez. Lawhon testified that Ramirez questioned him on June 4 as to whether John Blair had joined the Union. Lawhon replied that he did not know and Ramirez said that Chris Tanner had told him that Blair did join the Union. Ramirez said that Lawhon would be the first to know if Blair had joined the Union. Ramirez asked a number of times if Blair had joined the Union and finally Lawhon replied yes, he did. Ramirez asked if Lawhon had gotten Blair into the Union and Lawhon replied that John Blair makes his own decisions.

The next day, Ramirez asked Lawhon if he was serious, did John really join the Union. Lawhon said that he did and Ramirez asked if Blair was a journeyman electrician. Lawhon said that Blair was a journeyman electrician. Ramirez asked if Blair had taken any kind of test and Lawhon replied that Blair had to take a test or two to evaluate where he stood. Ramirez asked how much money he was making and Lawhon replied $22.60 an hour. Sam Ramirez replied, "John's not worth that much money, and they shouldn't be paying him that much."

[28] The tape measure was a Craftsman product.

As mentioned above, John Blair who is an unlicensed journeymen electrician started working for Respondent around January 7 or 8. At that time he was not a member of the Union. However, Blair signed a union authorization card on January 16. After working at the Town Lake Event Center job for about 3 weeks he was transferred to Respondent's job at the Omni Hotel. Sam Ramirez was his supervisor at the Omni. When Blair came to work on June 4 Ramirez asked him if he was a union member. Blair said that he was and when asked by Ramirez how long he had been a member he replied 2 weeks. Two other employees, Philip Lawhon and Chris Tanner, witnessed that conversation between Ramirez and Blair.

June 10

On the last day, Phillip Lawhon and John Blair worked on the Austin Center job,[29] Lawhon and Blair were handbilling (GC Exh. 27) at the jobsite during their lunchbreak. The handbill read:

> The owners of this establishment are undermining Health Care Standards in the community by employing an electrical contractor, **Titus Electrical Contracting**, that does not pay for full family health care coverage. There are many local electrical contractors in Austin that **do** pay for full family health care coverage. Please tell the management of this establishment that you support high community standards for health care and wish that they would too. The employees of **Titus Electrical Contracting** appreciate your support in this matter.

The lease site manager, Williams, phoned Sam Ramirez. She complained that Blair and Lawhon were handing out leaflets in the building. Ramirez was at lunch and he returned to the Omni where he came upon Williams, Kim Thompson, and Gaylord Pearson. Pearson was Respondent's project manager. Subsequently, Williams told a police officer that she wanted Lawhon and Blair ticketed for trespassing or something and Lawhon and Blair were told to leave the jobsite. Lawhon and Blair left. The two of them were not permitted on the job after that incident.

Supervisor Sam Ramirez testified that employee Chris Tanner told Ramirez that John Blair was a union member. Ramirez confronted Blair and Blair apologized for not telling Ramirez that he was in the Union. Blair told Ramirez that he did not want to have anything to do with handing out leaflets and that he did not have anything against Ty and wanted to stay employed with Titus.

Blair[30] testified that after he handbilled around 10 minutes during his lunchbreak at the Austin Center jobsite, the Omni Hotel manager and one other person came up to him and Phillip Lawhon. The manager told Lawhon that he had to leave because there was soliciting going on with the handbills. Lawhon

[29] The Austin Center job is oftentimes referred to as the Omni Hotel job.

[30] Supervisor Sam Ramirez testified that employee Chris Tanner told Ramirez that John Blair was a union member. Ramirez confronted Blair and Blair apologized for not telling Ramirez that he was in the Union. Blair told Ramirez that he did not want to have anything to do with handing out leaflets and that he did not have anything against Ty and wanted to stay employed with Titus.

replied that was his work area and he wasn't trespassing or soliciting. Nevertheless, he was again told to leave. Lawhon phoned Sam Ramirez on his cell phone and he and Blair walked out of the building. They met Ramirez in the parking garage and Ramirez said that he was going in and straighten out the matter. Ramirez told Blair and Lawhon to go to the gang box and wait. Ramirez asked Blair if he had distributed any literature and Blair said that he had. Ramirez asked Blair if he had been put up to it and Blair said no.

A policeman came to Blair and Lawhon at the gang box and told them they had trespassed and were still trespassing. Sam Ramirez and Gaylord Pierson[31] showed up with management from the Golden Crescent.[32] The policeman took Lawhon and Blair's wallets and patted them down. He asked if he should escort them form the building or were Blair and Lawhon going to receive a trespass warning. Ramirez and Pierson told the policeman that Blair and Lawhon were no longer allowed on the property. Ramirez told Lawhon and Blair they would be escorted to get their tools and they should go to the shop. Blair went to the shop where Greg Taylor told him that he had no other place to send him.

Phillip Lawhon identified General Counsel's Exhibit 27 as the leaflet he passed out on June 10 at the Omni Hotel. Levi Lambert asked Lawhon to step over to the office side of the building to pass out leaflets because his hotel guests were paying $200 a night and were not aware of what was going on. Later, Levi Lambert and Gene McManaman approached Lawhon. Lambert and McManaman told Lambert they worked for Omni Hotel. McManaman told Lawhon that he was trespassing and needed to leave the building. Lawhon told him that he worked in the building and McManaman replied that he needed to leave the building.

Lawhon phoned Sam Ramirez and told Ramirez that he was outside the building; that he had been kicked out and told he was trespassing. Ramirez asked and Lawhon told Ramirez he had been passing out handbills. Sam Ramirez told Lawhon that he knew better than that shit that he knew the consequences and now he was going to have to deal with them.

Phillip Lawhon went to his work area in the Omni garage and met Sam Ramirez. Ramirez told Lawhon that he needed to quit these childish games and he was an idiot and needed to grow up. Lawhon waited with John Blair for Ramirez to return. Later, Ramirez and Gaylord Pierson returned and a police office, a security officer, and a property person came over. The police officer told Lawhon that he was trespassing, that he had been told to leave the building and he had not left. Lawhon replied that he came back at the direction of his foreman. The police office asked Lawhon and Blair for identification. He searched Lawhon and Blair and asked Kim Williams of property management, what he needed to do. Kim Williams asked Gaylord Pierson what he wanted to do. Pierson replied that it was her building and Williams told the police officer to go ahead and file a complaint. Lawhon was escorted to get his tools and Gaylord Pierson told him to go to the Titus office.

[31] Pierson was Respondent's project manager.

[32] Blair testified the Golden Crescent was the ones in charge of the Omni Hotel building.

Gaylord Pierson testified. At the beginning of the Omni Hotel project the owners told the employees to wear Titus shirts for security reasons. Pierson testified about the lunchtime handbilling incident. The Crescent managers came to Pierson and said that some of his employees were handbilling in the Omni lobby and the restaurant. Kim Williams asked him to immediately get rid of the people. Pierson replied that he could not do that because the employees were on their lunchbreak. Williams then phoned the police. Pierson told Sam Ramirez about what had occurred.

Greg Taylor is Respondent's service coordinator. He oversees operation of the warehouse for tools and logistics and also helps oversee personnel. Taylor denied that he ever called or had someone else call the police to have picketers removed. Taylor cooperated in the decision to discharge Lawhon and Blair. He testified that Lawhon and Blair were not allowed back on their job at the request of the customer and he had no other place to send them. Although Respondent had ongoing jobs at that time, there was no need for additional personnel on any of their jobs. Since June 10, 2002, Titus has not employed any tradesmen temporary workers on any jobsites in the Austin area.

Conclusions

Counsel for the General Counsel alleged that Respondent unlawfully contested its employees' union activities from January 2001. Included in the complaint were allegations that Respondent unlawfully prohibited employees from wearing prounion clothing; it restrained, coerced, and interrogated employees; it interfered with union picketing; it discharged and laid off employees because of the Union; it refused to hire several job applicants because of the Union;[33] and it threatened to lay off employees because the Union was filing unfair labor practice charges.

Section 8(a)(1)

Telling an employee to hide his union shirt; threatening to send an employee to the office if he wore a union shirt; telling an employee to remove union sticker and threatening to remove employees from job; threatening to send employee home for wearing a union shirt; by Ty Runyan telling an employee he can wear only Titus or plain shirt; by telling employees it is against company policy to wear union stickers; and by telling an employee on the Omni Hotel job to remove a union sticker.

When Michael Nolan was hired on February 15, 2001, he was given a copy of Respondent's general regulations. Those regulations included a prohibition against wearing clothing, which contained lewd slogans or advertising. Greg Taylor explained to Nolan and other new employees that prohibition meant "no alcohol, no tobacco, or no lewd or anything like that."

On March 21, Nolan filed internal union charges against another employee. He waited in the parking area after work and

[33] The refusal-to-hire allegations are set forth in par. 16 of the complaint. That paragraph was not included in the conclusionary allegations in pars. 21 and 22. Nevertheless, that matter was fully litigated and I have considered the matter as though par. 16 was included in the conclusionary allegations of the complaint.

told that employee he had filed the union charges. The next day, Nolan was transferred off the job and his foreman told him there would be no union business on his job.

Nolan changed to a union shirt and wore the shirt to the next job. The foreman on that job asked Nolan if Ty[34] has gone union. On March 23, Nolan's supervisor met with the employees and explained the employees were no longer permitted to wear advertisements on their clothing. That prohibition included any logos, or any type of writing except Titus.[35] When Nolan received his check that day the following was attached:

> To: All Titus Personnel
>
> Message:
>
> EFFECTIVE IMMEDIATELY, No advertising of ANY type whatsoever is allowed by any Titus personnel on any of our projects or company property or any company function. This includes any type of clothing or other article with any type of advertisement whatsoever, including logos, writing, or any other form of advertising. The only exception to this is an unaltered Titus shirt or other article issued and/or authorized by the management of Titus Electric.
>
> Other than Titus shirts, you may wear a blank shirt that meets all other company requirements.

Around December 2001, Gordon Monk wore an IBEW shirt that was covered. When the IBEW logo became visible during the day, Monk's superintendent, Kip Powell, told him to cover the logo. On December 11, Greg Taylor told Kevin Gustin that he couldn't wear union stickers or anything on shirts, clothing, or hardhats.

Sam Ramirez told Phillip Lawhon that he could not wear an ESPN pullover. Lawhon asked if he could wear an IBEW shirt the next day and Ramirez told him he could not. On another occasion, Ramirez told Lawhon to remove an IBEW sticker from his tape measure. On January 17, during a new employee orientation, Greg Taylor told Phillip Lawhon there would be no union shirts and no Longhorn shirts.

Around January 22, 2002, Greg Taylor told Tommy Means that he would have to wear a Titus shirt or a plain shirt, because "we're having problems with the Union." Taylor denied that he made that statement to Means.

On January 26, Sam Ramirez permitted Phillip Lawhon to keep on an ESPN shirt until the crew went inside. Lawhon had protested against having to remove the shirt because of the cold.

In February, Gordon Monk along with Kevin Gustin and Allen Hughes wore union shirts and union logos on their hardhats. It was a cold day and their shirts were covered. Kip Powell asked Monk what was with all the union stickers. Monk replied it was their right to wear them and Powell said that it is company policy to remove them. Monk, Kevin Gustin, and Alan Stockton removed their union stickers.

As shown above, Tommy Means was sent to the office on February 7, because he wore to work a union shirt as well as a union logo on his hardhat. Means agreed to buy Titus shirts after Ty Runyan told him he would give him one more chance. While Means was out of Runyan's office buying Titus shirts, Runyan called him back in and asked him if he had threatened to sue the Company. Runyan told him to go home and phone in the next morning. When Means phoned Runyan said that he was letting him go.

Credibility

In consideration of the full record and the demeanor of witnesses, I make the following credibility findings. I credit the testimony of Michael Nolan, Gordon Monk, Phillip Lawhon, and Tommy Means. Their testimony and a substantial part of the record dealing with this issue, shows that Respondent took extraordinary steps to enforce its policy against union logos.

Findings

Absent a showing by the employer of special circumstances, employees have the right to wear union insignia (*Republic Aviation,* 324 U.S. 793, 801–803 (1945)). It is the employer's burden to prove special circumstances (*Meijer, Inc*., 318 NLRB 50 (1995); *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999); *Raleys, Inc*., 311 NLRB 1244 (1993). Here, Respondent failed to show special circumstances, which justified its rule against wearing union logos. Moreover, as shown above, the evidence established that Respondent discriminatorily imposed its rule immediately after Michael Nolan wore a union shirt on the job on March 22, 2001.

Respondent argued that it has uniformly enforced its appearance and professionalism policy and that the record supports that argument. It pointed to its branding campaign as an effort to promote business through a Titus image which is projected through such things as uniquely painted trucks, logos on employees' clothing, newsletters, and "Titus Bucks." In that regard, it pointed to cases showing that even though employees sometimes have a right to wear union logos on their clothing, that right must be balanced against an employer's right to operate its business by among other things, limiting or even prohibiting the wearing of union clothing if special circumstances exist. A special circumstances exists here it argued, because the display of union insignia may "unreasonably interfere with a public image which the employer has established as part of its business plan (*Produce Warehouse of Coram, Inc*., 329 NLRB 915 (1999); *Meijer, Inc*., 318 NLRB 50 (1995), enfd. 130 F.3d 1209 (6th Cir. 1997); *Burger King Corp. v. NLRB*, 725 F.2d 1053 (6th Cir. 1984)).

However, there are several factors worth considering in regard to Respondent's argument.

It is apparent that Respondent changed its policy as a direct result of union activity. Respondent had a broad policy against wearing any lewd slogans or advertising when Michael Nolan was hired on February 15, 2001. On February 21, after work in

[34] As shown herein, Ty Runyan is one of Respondent's owners.

[35] Respondent contended that the allegations that it formulated and implemented an appearance and professionalism policy in March 2001 and enforced that policy in April 2001 were included in a settlement and should not be considered in this matter. It argued that it complied with the terms of that settlement and the Regional Director has not set aside that settlement. The General Counsel contended that settlement was properly set aside because of Respondent's action in following a rule prohibiting union shirts during worktime. I find that matter should be considered in light of the evidence herein and I reject Respondent's argument.

Respondent's parking area Nolan advised another employee that he had filed internal union charges against that employee. The following morning Nolan's supervisor told him there would be no union business on his job and Nolan was transferred to another of Respondent's jobs. Nolan wore a union shirt to that next job, on February 22. Two days after Nolan was first involved in a union affair in Respondent's parking area after work, and 1 day after he wore a union shirt, Respondent's appearance and professional policy was changed to one that prohibited all union slogans or advertising as well anything other than a Titus slogan or advertisement.

Moreover, despite Respondent's policy of "branding" its logo, it never required its employees to wear uniforms or any type of standard clothing. Employees were free to wear plain clothing including shirts. Respondent did not create a public image of its employees by dressing them in some distinctive attire. Therefore, the instant situation must be distinguished from those cases cited by Respondent including (*United Parcel Service v. NLRB*, 41 F.3d 1068 (6th Cir. 1994)). Respondent failed to prove how the wearing of a union logo may "unreasonably interfere with a public image which the employer has established as part of its business plan, through appearance rules for its employees" (*Produce Warehouse of Coram, Inc*., supra). Additionally, unlike the situation in *Burger King Corp. v. NLRB*, supra, Respondent's policy was created in response to union activities and in consideration of its action before February 22, 2001, its policy was enforced in a discriminatory manner.

I find that Respondent coerced and threatened its employees to refrain from wearing union logos, in violation of Section 8(a)(1) of the Act.

By threatening to tow vehicles; by Shelly Runyan engaging in surveillance; by Anne Overstreet threatening to call and twice calling police, because of union picketing; by Ty Runyan threatening employees and union picketers with arrest; and by calling police to stop union activities.

The Union picketed Respondent's facility from January 2002. Rick Zerr testified about picketing Respondent's Yeager Lane facility on January 7 protesting unfair labor practices. A woman[36] came out of Respondent's office and told Zerr to leave or she would call the police. The police then came out. Greg Taylor came out and asked the union people what it would take to stop the picketing. Zerr replied Respondent would have to permit all the people on the picket line to sign the work register. That was agreed to and Zerr and Neil Johnson signed the work register and the picketing was stopped.

John Voight picketed on January 7 and also about a week later. On that second occasion police came out and, after looking at a plat, said the people had a right to picket. Rick Zerr testified that police told him Respondent claimed to own the land up to 4 feet from the street and it was unsafe to picket that close to the street. When the police came out again on January 17, Zerr showed them a plat showing an easement giving sufficient room to picket on the same side of the street as Respondent's property. The police did not remove the picketers on January 17.

Respondent's project administrator, Delores Overstreet, was asked about calling the police. She admitted that she called the police every time she saw pickets. Overstreet testified it was not her intent to have the pickets removed. Instead, she intended to have the picketing controlled. Ty Runyan denied that he phoned the police to have pickets removed from areas where they could legally picket. However, in other areas Runyan admitted that he did phone the police about the pickets. Respondent argued that Overstreet was never shown to be a supervisor. However, it is apparent that Delores Overstreet demonstrated apparent authority in regard to the picketing. She admittedly told the pickets they were free to picket but that they could not come on Respondent's property. As to whether the General Counsel proved that Overstreet called the police on January 7 and 17, she was asked and replied that she did not recall the dates but that she called the police every time she saw picketing.

Rick Zerr was on the picket line around March 8. Although Zerr parked off the road a wrecker came and asked that the picketers move their vehicles. There were no parking signs posted for the first time all along the road. Zerr called 911 and asked for a police officer. Several officers arrived and an officer told Zerr that the picketers's cars would be towed if they did not move them. The picketers got in their cars and left.

Shelly Runyan testified that she arranged to lease (CP Exh. 11) the property across from Respondent's facility because neighbors were showing agitation with the picketing, and Respondent needed the lot for their annual party between May and June and they occasionally needed the lot to keep 18 wheelers from blocking the street. There was other parking available for the people on the picket line including the triangle where the city parks vehicles. That is right across the road (see R. Exh. 18). Runyan also arranged with About-Town Towing setting up no parking signs and towing. Runyan explained how Respondent was engaged in extensive marketing practices including clothing for its employees and using signs and displays on company vehicles.

Union organizer and business assistant, Robert Biehle, testified that he went out to picket Respondent's facility on March 28. He saw a no parking, tow away sign at the place where he normally parked. After parking in his normal area a tow truck pulled up and the driver told Biehle that his car would be towed if he left it there.

Rick Zerr was on the picket line around March 22. He testified that Shelly Runyan was taking photographs of the picketing. Robert Biehle testified that Zerr yelled to him that someone was taking his picture and Biehle aimed a video camera at Shelly Runyan who was standing in Respondent's doorway. Runyan appeared to be photographing the picketing.

Shelly Runyan testified that she took photographs of picketing solely to support a defamation suit Respondent has regarding a picket sign that showed "Titus sex bigot." She denied that she has ever taken pictures of a current Titus employee on the picket line.

[36] Delores Overstreet testified that she called the police after some of the men on the picket line charged across the street toward Respondent's building. Overstreet also testified that she phoned the police every time she saw pickets.

Credibility

Most of the evidence here is not in dispute. To the extent there may be conflicts I have considered the full record and the demeanor of witnesses. I credit John Voight, Rick Zerr, and Delores Overstreet's testimony that the Union engaged in picketing Respondent's facility from January 7, 2002, and some of the picketing protesting Respondent's alleged unfair labor practices. I credit testimony that a woman came out and threatened to phone the police and that Greg Taylor asked what it would take for the Union to stop picketing. I credit Overstreet's testimony that she phoned the police every time she saw the pickets. I credit testimony showing that Ty Runyan also called the police.

I credit the testimony of Shelly Runyan to the extent it shows that she arranged for Respondent to lease the property across the street where picketers frequently parked their cars. I credit the testimony of Rick Zerr, Robert Biehle regarding the tow trucks and what was said about towing the picketers' cars and the no parking signs.

I credit the testimony of Rick Zerr and Shelly Runyan regarding her taking photos of the pickets around March 22.

Findings

A union may picket an employer with whom it has a labor dispute (*Golden Stevedoring Co.,* 335 NLRB 410 (2001)), and if the employer claims a property interest in the picketing site, it is the employer's burden to prove that property right (*Wild Oats Markets, Inc*., 336 NLRB 179 (2001); *Gary E. Caulkins*, 323 NLRB 1138 (1997), enfd. 187 F.3d 1080 (9th Cir. 1999), cert. denied 529 U.S. 1098 (2000); *Bristol Farms, Inc*., 311 NLRB 437, 438–439 (1993)). That burden on the employer includes a requirement that it show the union activity is on its property and outside a public easement (*Snyder's of Hanover Inc*., 334 NLRB 437 (2001)).

Counsel for the General Counsel argued that the picketing occurred in a bar ditch in front of Respondent's property and both the city of Austin legal department and a 1996 survey conducted by Respondent, show that Respondent did not have a property interest unencumbered by a public easement, over the location of the picketing. In that regard see Charging Party's Exhibit 23. Therefore, counsel argued that Respondent's threats to call and actual calls to the police constitute violations of Section 8(a)(1) (*Great Scot, Inc*., 309 NLRB 548 (1992); In re *Glendale Associates, Ltd*., 335 NLRB 548 (2001); *Valeo Sylvania, L.L.C*., 334 NLRB 133 (2001)).

In view of the full record, I agree with the General Counsel and find that Respondent's actions in threatening to call and actually calling the police because of employees' picketing violates Section 8(a)(1).

As to the threats to tow vehicles from the other side of the street after Respondent leased the vacant lot, Respondent argued that to be a simple case of property right. In that regard, it appears the inconvenience to the picketers was limited to parking. After Respondent leased that lot the picketers could no longer part there or along the street adjoining the leased lot. Shelly Runyan testified that she arranged to lease the lot because of concern that the picketing was having on some neighbors, that Titus occasionally needed the property for overflow and she wanted to insure that Titus had the lot available for its annual picnic. Although the picketers were prevented from parking in the leased lot, there was ample room for them to park in another lot across the street from the lot leased by Titus.

I find in agreement with Respondent as to the no parking and threats to tow vehicles from the leased lot. Despite that being the area where picketers had normally parked there was no showing that the Union was precluded from access to the Titus employees, after Titus leased the lot.

As to the allegations regarding Shelly Runyan photographing picketing, Respondent contended that she was taking pictures of the Union's videotaping of its customers and activities at its facility. However, the record does not support a finding that the Union was engaged in unlawful activity. There was no showing that the Union was trespassing on Respondent's property on that occasion. Therefore, I find in agreement with the Charging Party and the General Counsel, that Respondent violated Section 8(a)(1) when Shelly Runyan openly photographed the picketing (cf. *Spencer Industries*, 279 NLRB 565 (1986)).

Threatening discharge for solicitation; threatening to discipline employees for union activity; by creating an impression of surveillance of employees' union activities; By Ty Runyan created the impressions of surveillance by telling an employee he knows where this union matter is coming from and that he knew who one union member was.

As shown above, on January 25, Ty Runyan told Tommy Means that he had learned that Means was a union member and he showed Means a list of names on his computer screen. Runyan told Means that his lawyer had told him to keep a record of all those who were union. On April 4, Runyan told a class of his employees that he knew one employee was giving information regarding the Company to the Union.

Credibility

In view of the full record and his demeanor, I credit the above testimony of Tommy Means. I also credit the evidence that Ty Runyan told one of Respondent's classes that he knew one of his employees was giving information to the Union.

Findings

An employer unlawfully creates the impression of surveillance of employees' union activities by telling an employee that his or her union activities are under surveillance (*Fred'k Wallace & Son*, 331 NLRB 914 (2000); *Tres Estrellas de Oro*, 329 NLRB 50 (1999)). The Board has found such comments constitute impressions of surveillance in violation of Section 8(a)(1) (*Ichikoh Mfg*., 312 NLRB 1022, 1023 (1993); *Peter Vitale Co*., 310 NLRB 865, 874 (1993)).

Respondent argued that the above evidence does not constitute an impression of surveillance. However, Runyan told Means in effect, that he had discovered Means was union because he had checked up on him and that he was keeping up with employees that were union and listing them on his computer. It is somewhat difficult to imagine how an employer could do more to impress on an employee that he is watching over the employees' union activities. I find that Respondent engaged in unlawful conduct in violation of Section 8(a)(1) by creating an impression of surveillance.

By interrogating employees about union activities.

Kevin Gustin's supervisor, Kip Powell, held a meeting among his employees on December 12. Both Powell and Ty Runyan were present and Runyan spoke[37] to the employees. He said that someone that worked for him came to him and complained the Union had told him that if he did not stay there and fight Ty, the employee would have to leave the job. Runyan asked each employee if the employee was going to stick with him or if the employee was going to do what the Union told him. Ty Runyan admitted that he questioned the Town Lake Event Center job employees about whether they would remain with Respondent.

Ty Runyan told Gustin that he had heard Gustin would stick with the Union. Runyan said that Eric Mates told him that Gustin said to Robert Biehle at the union hall that he was in the Union and was going to stick with them. Gustin denied to Runyan that he had said that to Biehle.

Phillip Lawhon testified that when he was interviewed for work with Respondent on January 7, 2002, Greg Taylor asked him if he had any plans of taking a call from the Union and if Lawhon was going to stay with 520[38] or seek permanent employment with Titus. Taylor did not deny that he made that comment to Lawhon. Instead, Taylor testified that such a question would not be out of the ordinary.

Lawhon attended classes while working. On April 4, Ty Runyan came in the class and said he need to speak to those employees about what the Union did to its contractors. Runyan held up and read from a sheet he said was found on the Town Lake Event Center job. Ty Runyan asked the 28 employees in the class if any of them were with the union stuff that's going on there.

Credibility

In view of the full record and the demeanor of the witnesses, I credit the testimony of Kevin Gustin and Phillip Lawhon as shown above. Respondent argued that Lawhon was not a credible witness and pointed to his destruction of notes he prepared immediately after Ty Runyan spoke to employees on April 4. However, the record shows that while Lawhon still had those notes he gave an affidavit to the General Counsel and that affidavit was available to Respondent. I am not convinced that information should cause me to discredit Lawhon.

Findings

The test frequently applied in allegations of illegal interrogation is the one that was applied in *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964) (see *Dorn's Transportation Co.,* 168 NLRB 457 (1967)). The criteria applied there included (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; (4) the place and method of interrogation; and (5) the truthfulness of the reply. Here, the person that frequently interrogated employees was Respondent's highest ranking supervisor. Ty Runyan is Respondent's co-owner. Greg Taylor, while not as high ranking as Ty Runyan, was also a high-ranking official. Respondent sought information as to whether the employees would support Respondent instead of the Union including questioning whether the employees would leave his job if the Union asked. The questioning occurred both in the office and on Respondent's job. There was no showing of Respondent's background beyond what was alleged in the instant matter. However, that shows that Respondent engaged in unfair labor practices from as early as March 2001, which continued until the summer of 2002.

The Board has determined that an examination of the above criteria need not involve a strict evaluation of each factor. Instead, the "flexibility and deliberately broad focus of this test make clear that the *Bourne* criteria are not prerequisites to a finding of coercive questioning, but rather useful indicia that serve as a starting point for assessing the 'totality of the circumstances.'" *Westwood Health Care Center*, 330 NLRB 935 (2000), citing *Perdue Farms Inc. v. NLRB*, 144 F.3d 830 (D.C. Cir. 1998); *Timsco, Inc. v. NLRB*, 819 F.2d 1173 (D.C. Cir. 1987).

Respondent argued that Runyan was simply trying to determine whether he was going to have a manning problem. However, the test of an unfair labor practice allegation under Section 8(a)(1) rest of a query as to the reasonable impact the statement(s) may have on the employees rather than on what good it will do the employer. Here, the employees were given no assurances and a logical conclusion to draw from Runyan's questions could be "I want people that will chose Titus over the Union and if you favor the Union, I want to know about it." Therefore, I find Runyan's comments were coercisive when considered against the *Bourne* criteria. I find that Respondent engaged in conduct in violation of Section 8(a)(1) by interrogating its employees about the Union.

By promulgating a no-solicitation policy.

Kevin Gustin wore a concealed tape recorder to work around January 15. Ty Runyan spoke to the employees. Runyan said soliciting for the Union on the job would not be tolerated. He said the employees could discuss the Union off the job and at home. Runyan also referred to Amway and Girl Scout cookies. He said that he did not want any nasty messages on his answering machine from Mike Murphy of Local 520. After the meeting Runyan talked privately with Gustin. He asked Gustin to talk to the guys about soliciting and he named Michael (Red) Merker.

Alan Stockton testified about a meeting Ty Runyan had with him and Kevin Gustin about 2 months after Stockton was hired. Runyan told the two of them that he did not want any talk about union or anything. Ty Runyan said that it doesn't matter if Gustin and Stockton are union or nonunion, or Black or Hispanic, or what that he believed in equality like that. Runyan also said that he wished all his employees would produce like Gustin and Stockton.

[37] Ty Runyan testified that he spoke to employees about problems Guy's Electric had on the Town Lake Event Center job. He said that the IBEW wanted to organize our Company (see R. Exh. 23) and he did not want to encounter the type problem found at Guy's. He spoke to employees at Town Lake Event Center job on another occasion because employee Eric Mates said the IBEW had told him to sign on to salt the Town Lake Event Center job or leave the job. Runyan denied that he ever threatened to lay off people because of the Union.

[38] As shown herein, 520 is oftentimes used to refer to Local Union 520.

Credibility

As shown above, I credit the testimony of Kevin Gustin.

Findings

An employer may not lawfully prohibit talking about or soliciting for, a union during working hours because that term connotes periods of time, such as breaks and lunch, which are employees' own time (*Our Way, Inc*., 268 NLRB 394, 395 (1983); *Teksid Aluminum Foundry*, 311 NLRB 711, 714 (1993); *ACME Tile*, 318 NLRB 425, 428 fn. 8 (1995)). Moreover, an employer may not lawfully prohibit employees from discussing a union during working time when other subjects of discussion are not prohibited (*Sea Ray Boats, Inc*., 336 NLRB 779 (2001); *Grosvenor Resort,* 336 NLRB 613 (2001)).

Respondent argued that Runyan's comments constitute nothing more than a misstatement of its no-solicitation rule and that he later clarified his comments to show that its valid no-solicitation rule[39] remained in effect. Respondent pointed out that Ty Runyan clarified the policy when he told employees that everybody "signed that agreement when they signed on." It also pointed out that Runyan told Kevin Gustin to "tell the guys, if you want to solicit, just—just do it after we hit the lot."

However, even if I should agree that Runyan's subsequent clarification was effective, I disagree with Respondent's argument. If anything, Runyan's comment to tell the guys to do it after we hit the lot strengthens General Counsel's argument that Runyan conveyed to the employees that they could not talk about the Union while at work and instead they should wait until they reached the parking lot before engaging in any union solicitation.

Moreover, the record shows this was not the first occasion for Respondent to prohibit union activity while employees were on its premises but off work and out of working areas. As shown above, Michael Nolan was told there would be no union business on the job and transferred to another job on March 22, 2001, because he told another employee about his filing internal union charges. That conversation occurred after work in the parking area.

I find that Respondent implemented an unlawful no-solicitation policy in violation of Section 8(a)(1).

By maintaining a website and blocking comment by the Union.

Shelly Runyan testified that Respondent maintains a website solely as a marketing tool. On one occasion there was a glitch and the overrides that prevent other people from contributing into the website were down. As soon as that problem was noted it was corrected.

Credibility

I credit the above testimony of Shelly Runyan.

Findings

Counsel for the General Counsel argued that the Union's March 20 attempt to include a message on Respondent's webpage was protected activity and that Respondent violated Section 8(a)(1) by blocking the showing of that message (*Emarco, Inc.*, 284 NLRB 832, 833 (1987)). Respondent argued that its website was not used to communicate with employees and there is no reason in law to require it to provide the Union access to the website. I agree with Respondent. There was no evidence that Respondent treated the website like a bulletin board and there was no evidence that Respondent ever permitted the Union to use its website or bulletin boards.

By prohibiting logos; by enforcing its logo prohibition policy; and by discriminatorily enforcing a policy against union logos.

As shown above, Respondent formerly published a rule regarding what employees could wear at work. Employees were prohibited from wearing anything advertising alcohol, tobacco, or lewd material. That was the rule when Michael Nolan was hired on February 15, 2001.

Michael Nolan filed internal union charges against another respondent employee on March 21. Nolan claimed that the employee was an IBEW member working on a nonunion job. He told the employee about filing the charge, after work on March 21. On March 22, Nolan's foreman said he would not have union business going on his job. Nolan was sent to the shop where Ty Runyan told him to go home for an hour and he would be assigned another job. While he was at home, Nolan changed to a union shirt, which he wore to his next job with Respondent. When Nolan arrived on the job, the supervisor looked at his shirt and asked if "Ty had went union."

When Nolan reported on March 23, his supervisor told him that he could no longer wear his union shirt. Respondent published a new rule on March 23. It wrote its employees that its rules had been changed to prohibit advertising of any type with the exception that employees could wear Titus shirts (GC Exh. 8).

On January 22, 2002, Greg Taylor told Tommy Means that he would have to wear a Titus or plain shirt to work "because we're having certain problems with the Union." Taylor admitted that he discussed Respondent's appearance policy with Means but he denied that he told Means he would have to wear a plain or a Titus shirt because we're having problems with the Union. On April 10, 2002, Gordon Monk asked Kip Powell about the NLRB thing that the employees could wear union stuff on the job. Powell replied that Monk could wear his union shirt anywhere he liked but not on the job. Powell asked Monk what crawled up his ass that morning.

Credibility

I credit the testimony of Michael Nolan and Tommy Means. Nolan's testimony is supported by Respondent records regarding its appearance policy.

Findings

As shown above, absent a showing by the employer of special circumstances, employees have the right to wear union insignia (*Republic Aviation*, 324 U.S. 793, 801–803 (1945)). It is the employer's burden to prove special circumstances (*Meijer, Inc.*, 318 NLRB 50 (1995); *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999); *Raleys, Inc.,* 311 NLRB 1244 (1993)). Here, Respondent failed to show special circumstances, which justified its rule against wearing union logos. Moreover, as shown above, the evidence established that Respondent discriminatorily imposed its rule to union logos, immediately after

[39] Cited as R. Exh.4, p. 12.

Michael Nolan wore a union shirt on the job on March 22, 2001.

Section 8(a)(3)

Discharging Tommy Means, Jesse Gonzalez, Phillip Lawhon, and John Blair; constructively discharging Eddie Edwards; and laying off Kevin Gustin and Alan Stockton.

It is well established that the General Counsel has the burden of proving that Respondent was motivated to discharge alleged discriminatees because of union animus. If the General Counsel meets that burden, Respondent may defend by showing it would have discharged the alleged discriminatees in the absence of union activity (*Manno Electric*, 321 NLRB 1 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983)).

In consideration of the above decisions, Respondent argued that it was without union animus. It argued, among other things, that it hired several applicants knowing those people were affiliated with the Union. In support of that argument it cited the hiring of Gordon (Trey) Monk, Kevin Gustin, Alan Stockton, Eddie Edwards, and Phillip Lawhon.

Gordon Monk applied for work with Respondent in a group of 13 that appeared at Respondent's office on November 15, 2001. That group included union employees Robert Biehle and Rick Zerr and most of the 13 wore union shirts or other matter that identified them with Local 520. Ty Runyan stopped the group and talked with Biehle and Zerr before permitting the 13 to enter the office area in groups of three. Monk was interview by Ty Runyan on January 3. About 3 weeks after he was hired Monk wore an IBEW shirt, which was covered. When the shirt became visible during the day, Superintendent Powell told Monk that he had to cover the logo.

Ty Runyan phoned Kevin Gustin on December 7 and asked Gustin to come to work for him at the Town Lake Event Center. Runyan testified that Frank Nerio had recommended Gustin and that Carl Jackson and Nerio had told him that Gustin was a union member.

Alan Stockton applied around the first week of December 2001 but did nothing to identify himself with the Union. He was called for an interview and wore an IBEW pencil clip. Ty Runyan talked to him during the interview and told Stockton that he could not wear anything to work that showed union affiliation and that he would have to remove his pencil clip. Ty Runyan testified that he knew Stockton was a union member when he hired him.

Eddie Edwards applied for work with Respondent around the second week of January. Edwards has been a union member for about a year. When he applied he told the receptionist that he formerly worked under Kip Powell. Powell had been his supervisor on a job with Anchor Electric. Anchor Electric is not a union shop. Greg Taylor interviewed Edwards. During that interview, Taylor commented that the desired pay listed on Edward's application was $21.90 and that sounded like a scale[40] wage. Edwards replied that was a scale wage. Edwards was hired and assigned to the Town Lake Event Center job. Edwards wore an IBEW shirt to work on April 19. That was the last day he worked for Respondent.

Phillip Lawhon first applied for work with Respondent on January 7 and completed an application on January 15. He listed two union contractors—(Guy's Electric and Hill Electric)—on his application as previous employers.[41] Greg Taylor interviewed Lawhon that day. He asked Lawhon if he had any plans of taking a call from the Union and if Lawhon was going to stay with 520 or seek permanent employment with Titus. Greg Taylor testified that he did interview Lawhon. He was questioned during the hearing as to whether he asked Lawhon if he would take a call from the Union. He replied that would not be out of the ordinary. "We are looking for long-term people, so that does happen on occasion."

The above evidence does support Respondent's argument especially that it knew of their union preferences before it hired Monk, Gustin, Stockton, and Lawhon. Eddie Edwards only commented that he had requested scale wage for the Town Lake Event Center job. None of those five, with the possible exception of Gordon Monk, did anything before being hired to show interest in organizing Respondent.

The alleged refusal to hire applicants included two paid union organizers and two others, like Gordon Monk, that appeared at Respondent's facility seeking work in a group of 13 that included the two paid union organizers and a majority of the 13 wearing union clothing. Those two others were Keith Richards and John Voight. All those applicants except possibly Sherry Passmore and Wayne King were more involved in union organizing that Gordon Monk or any other known union affiliated employees. Animus may be shown by evidence that an employer refuses to hire employees that it feels may engage in union organizing activity even though it is willing to hire union members that show no tendency to organize. Therefore, I am not convinced on the basis of the full record that Respondent failed to demonstrate union animus. In view of the full record including my findings herein of unfair labor practices and other evidence showing Respondent's hostility to union organization, I am convinced that the opposite is true.

I shall consider each of the alleged discriminatees beginning with the alleged unlawful terminations:

Means

Tommy Means had a number of incidents regarding his union activity. Ty Runyan told Tommy Means that he had learned that Means was union and Runyan showed him a computer screen and said that his lawyer had told him to make that list of employees that were union. On February 7, Means wore a union shirt to work and his foreman, Scott Smith, sent him to the office.

After agreeing with Ty Runyan to buy Titus shirts, Runyan sent Means home when his foreman said that he did not want Means back on the job and, among other things that Means had threatened to sue the Company. As to how Respondent took Means's alleged threat to sue, Ty Runyan was asked during the hearing:

[40] Greg Taylor testified that scale wage is a set dollar amount that is set by the general contractor.

[41] Ty Runyan admitted that Guy's Electric was a union contractor.

Q. So did you think that was a joke? You said it was a lot of nonsense.

A. Not necessarily a joke, it was just a statement that was made that, you know, I wasn't scared that he was going to sue me, no. (Tr. 795.)

Nevertheless, Runyan told him to go home and phone in the next morning. When Means phoned Runyan said that he was letting him go.

Credibility

I credit the testimony of Tommy Means. Other evidence corroborated a great deal of his testimony.

Findings

That chain of events shows that Respondent was motivated to discipline Means because he violated Respondent's unlawful rule prohibiting the wearing of union logos. The initial disciplinary action included sending Means to talk to Ty Runyan about Means wearing a union shirt. In view of my finding above that Respondent's rule against wearing any including union logos, constituted an unfair labor practice, I must conclude that Respondent initiated disciplinary action against Means in violation of Section 8(a)(1) and (3). That also shows that Respondent was motivated to discipline Means because of its union animus. However, I shall consider whether Respondent, by showing that he was sent home because of his comment that he may sue the Company and discharged the next day because of additional problems on the job, proved it would have discharged Means in the absence of his union activities.

Respondent argued that Means was not discharged because he wore union logos. Instead, he was discharged after his foreman, Scott Smith, complained that he had threatened to sue the Company.[42] However, as shown above, Ty Runyan admitted at the hearing that he did not believe Means actually planned to sue the Company.

Instead, the facts show that after their confrontation over Means wearing union insignia, Scott Smith sent Means to the office and subsequently told Ty Runyan that he did not want Means back on the job. Nothing occurred after Smith sent Means to the office that constituted an alleged basis for Means discharge. Instead, Respondent claimed that Means' threat to sue, which had occurred some time before February 7, was a reason it discharged Means. However, I am convinced that was a mere pretext. If, as Respondent now contends, it fired Means because of the threat to sue, why was he not disciplined at the time he made the threat. Instead Respondent did nothing because of that event.

It is true that the record supports Respondent's argument that Ty Runyan planned to send Means back to the job after Means agreed to buy and wear Titus shirts. However, the same supervisor that sent Means to the office because of his union insignia told Runyan that he didn't want Means back on the job. Scott Smith with the full knowledge of Ty Runyan then used an action by Means before any consideration was given to disciplinary action, to justify keeping Means off the job. Runyan then adopted that reasoning as justification to discharge Means.[43] I find the contention that it discharged Means because he threatened to sue was a pretext and Means was actually discharged because he confronted Foreman Scott Smith wearing union insignia. I also find that Respondent failed to prove it would have discharged Means in the absence of his union activity.

Gonzalez

Jesse Gonzalez testified that he showed Ty Runyan his union classification on February 13. Gonzales was being evaluated and had requested a pay raise. He showed the union classification to support his request for higher wages. That document was received in evidence as General Counsel's Exhibit 5 and shows a heading of "INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS OFFICIAL RECEIPT." The document shows that Jesse Gonzalez has a trade classification of "JIW."

Runyan had marked Gonzalez' evaluation before being shown the union classification. Gonzalez received seven 3s and two 4s on his evaluation (R. Exh. 3).[44] At the conclusion of the evaluation according to Gonzalez, Runyan remarked to Gonzalez that "those are your Union brothers out . . ." (there on the picket line).

Ty Runyan denied that he saw Gonzalez' union classification and he denied knowing that Gonzalez was affiliated with the Union until after Gonzalez was discharged.

The next day after his evaluation Gonzalez' foreman sent him to Kip Powell and Powell told him that he was asking for more money and Powell could not afford that. Powell sent Gonzalez to Runyan where he was told he was fired. Gonzalez asked why he was fired and Runyan said this is an at-will state and I don't have to give you're a reason. Runyan then referred to the picket line a second time and told Gonzalez that he could now go out and join his union brothers.

Credibility

There was a conflict in the testimony of Jesse Gonzalez and Ty Runyan. Among other things Gonzalez testified that he showed Runyan his union classification during a February 13 evaluation in order to support his request for a wage increase. Ty Runyan denied that he saw Gonzalez' union classification and he denied knowing that Gonzalez was affiliated with the Union until after Gonzalez was discharged.

Runyan disputed Gonzalez testimony that while Gonzalez was waiting in the office for his evaluation, he saw Runyan

[42] Smith and Runyan testified that Scott Smith told Runyan over the speaker phone with Means listening that Means had threatened to sue because Smith had allegedly taken his scissor lift away while Means was on the roof. Means testified that he threatened to sue because of pain to his knees caused by working condition. I find it unnecessary to determine which version is credible in view of my determination that Runyan did not believe Means was seriously threatening to sue the Company.

[43] Runyan testified that he investigated Smith's allegations about Means after their three-way phone conversation. Scott Smith allegedly told him that Means' work performance was not good and he was given examples of how Means had failed to perform adequately. However, there was no showing that anything discovered by Runyan that afternoon, would have resulted in Means being discharged in the absence of his wearing union insignia to work.

[44] The grade of three indicates average on an evaluation and four indicates above average.

moving from the lobby and his office and he overheard Runyan say, "Call the police. Tell them they're—they've got guns. Tell them we've got threats to our lives. Tell them, you know, they're—they've got profanity on their signs, and things of this nature." In addition to Runyan, Robin Escobedo disputed Gonzalez's testimony in that regard. Moreover, there was no evidence that anyone with Respondent phoned the police that day and complained about guns, threats to lives or profanity of the picket signs. I am convinced that Gonzalez exaggerated his testimony as to Runyan's action while Gonzalez was waiting for his evaluation.

However, I also have some problems with Ty Runyan's testimony regarding Jesse Gonzalez. I am especially concerned about Runyan rating Gonzalez average to above average on his evaluation and then discharging Gonzalez the following day. According to Runyan he phoned Gonzalez' supervisor, Kip Powell, because Gonzalez asked for a raise at the conclusion of his evaluation. Powell replied to the effect that not only would he not recommend a raise but also he would recommend Gonzalez' discharge. However, despite that unlikely coincidence of Gonzalez being discharged on the day after an average to above-average evaluation, the evidence does show that Gonzalez was assigned the job of running conduit in a stairwell and was told the sheetrock installers wanted the job done quickly because the stairwell was in line for sheet rocking. Gonzalez did not complete the job before the stairwell was sheetrocked and the general contractor criticized Respondent's people.

Findings

That evidence illustrates that Gonzalez' discharge was mysterious. However, in the absence of knowledge, I cannot find that Gonzalez' union affiliation played a part in his discharge. Therefore, I find that Respondent was not shown to have discharged Gonzalez out of union animus and I find that Respondent did not engage in unfair labor practices in the discharge of Jesse Gonzalez.

Gustin and Stockton

Kevin Gustin and *Alan Stockton* were laid off on May 30. Respondent knew of Gustin's union affiliation when he was hired.[45] Although Stockton was not a union member, he wore an IBEW pencil clip to his job interview and Ty Runyan told him that he would have to remove his IBEW pencil clip. Runyan testified that he knew that both Gustin and Stockton were union members when he hired them.

Gustin testified that he was one of several employees that were told by Kip Powell in January or February 2002 to remove union logos or leave the job. In addition to logos on their hardhats, Gustin and Allen Hughes wore union shirts. Stockton testified that Ty Runyan talked to him and Gustin about 2 months after he was hired. Runyan told them that he didn't want any union talk on the job. Stockton testified that Kip Powell told him and other employees in February, they would have to remove IBEW stickers or they would have to leave the job.

[45] As shown above, Gustin testified that Ty Runyan told him before he was hired on December 10, that Frank Nerio had recommended him and that Nerio had said that Gustin was a union member.

Kevin Gustin and Alan Stockton testified they passed out a flyer at work.[46] Gustin recalled passing out the flyer during the week before he was let go on May 31. Stockton testified that he passed out the flyer during the last month he worked with Respondent. That flyer (CP Exh. 6) was entitled *"Team Titus Organizer"* and it stated in the second sentence that certain Titus and/or tradesmen employees may be entitled to backpay awards. The third sentence states that "IBEW" is prepared to help. Among other things, the leaflet states that union members filed a complaint with the city; that employees have an absolute right to discuss their wages; and don't "let Ty or Kip fool you into thinking that you have to keep it a secret from your coworkers."

Credibility

As shown above, I credit the testimony of Kevin Gustin. I also credit Alan Stockton. However, there was no testimony or other evidence that Respondent was aware of Gustin and Stockton passing out flyers.

Findings

Counsel for the General Counsel argued that Respondent was either directly aware of Gustin and Stockton's handbilling or could reasonably infer that activity because the two were the last union employees left on the Town Lake Event Center job at the time of the handbilling.[47] Moreover, the evidence shows that Respondent valued the work of Gustin and Stockton and Ty Runyan openly praised their work.[48] Early in May Kip Powell told Gustin that he intended to keep Gustin and Stockton until the end of the project and he would lay off less productive workers.

Ty Runyan talked to Kevin Gustin. He said that Eric Mates told him that Gustin said to Robert Biehle at the union hall that he was in the Union and was going to stick with them. Gustin denied to Runyan that he had said that to Biehle.

I found that Respondent engaged in an 8(a)(1) violation when Ty Runyan's said to Stockton and Gustin in January or February that he did not want any union talk on the job. The evidence regarding events proximate to their layoffs shows that Gustin and Stockton did engage in handbilling the week before the layoff. However, Respondent pointed out that no evidence supported a finding that it knew of that handbilling activity.

In that regard, I must first consider whether the record supported a finding that Respondent knew of that activity at the time of their layoff. Counsel for the General Counsel agreed there is no direct evidence that Respondent knew of Gustin and Stockton's handbilling. However, The General Counsel argued that direct evidence of knowledge is not needed citing *E. Mishan & Sons, Inc.,* 242 NLRB 1344 (1979); *Hospital San Pablo, Inc.,* 327 NLRB 300 (1998).

[46] Stockton testified they usually passed out the flyers between the parking lot and the jobsite.

[47] Before Gustin and Stockton passed out leaflets within a week of their termination, Respondent had terminated three of the five union employees that Gustin recalled worked that job. Those three terminations included Jesse Gonzales on February 14, Gordon Monk on April 10, and Eddie Edwards on April 22, 2002.

[48] Both Gustin and Stockton received high evaluations (GC Exh. 10–11).

The Board in *E. Mishan & Sons, Inc*., supra, overruled the administrative law judge in finding an unlawful discharge in the case of Jose Vasquez even though there was no evidence of actual knowledge of Vasquez' union sentiments. However, in that case, the employer's president approached Vasquez and employee Willie Vega immediately after he had refused the union's demand for recognition. A union representative had made the demand for recognition in person. The president asked Vega if he had joined the union. Up until that moment Vega had told the president when asked, that he knew nothing about the union. However on that occasion Vega responded that he had joined the union. The employer's president called Vega a liar and turned to Vasquez and told him to "get out of here."

The Board noted that Vasquez' discharge immediately followed the union's demand and accompanied respondent's unlawful interrogation of Willie Vega. Moreover, the Board found the reason given by the employer for Vasquez' discharge lacked substance.

In *San Pablo, Inc.,* supra, the Board found that the alleged discriminatee engaged in extensive and prolonged union activities, that the employer knew the employees were engaged in union activities, the employer knew those activities had originated in the alleged discriminatee's department, the employer kept a list of employees involved in the organizing effort and the employer treated the alleged discriminatee in a disparate manner. As to the disparate treatment the employer discharged the alleged discriminatee for leaving work early while it failed to even discipline another employee that also left work early.

Here, unlike *E. Mishan & Sons, Inc*., supra, there was no contemporaneous unlawful acts at the time of Gustin and Stockton's layoffs and there was no showing of proximate action such as rejection by the employer of the union's demand for recognition. Moreover, there was evidence that supported Respondent's basis for the layoffs.

Unlike the situation in *San Pablo, Inc*., there was no showing that Gustin and Stockton were treated in a disparate manner. In fact other employees not affiliated with the Union were also laid off at the time of Gustin and Stockton's layoffs.

In view of the above, I cannot infer knowledge of Gustin and Stockton's handbilling. The record does show that Respondent knew of Gustin and Stockton's union activities for a number of months before they were laid off. In fact, the record shows that Respondent knew of Gustin's union membership before he was hired. Despite that knowledge Respondent sought out Gustin and asked him to go to work on its Town Lake Events Center job.

Nevertheless, I shall consider whether Respondent would have terminated Stockton and Gustin in the absence of union activities. Respondent argued that Respondent terminated eight employees[49] during the week of May 30, 2002 (R. Exh. 25), including Gustin and Stockton and there was no evidence that any of those other than Gustin and Stockton were union members. Respondent has not hired another electrician[50] and has not had any tradesmen or other temporary employee assigned to any job in the Austin area, since Gustin was laid off. It also pointed to the testimony of Alan Stockton that the employees were anticipating layoffs at the time of his layoff because the project was near completion.

I find that the General Counsel failed to prove that Respondent laid off Gustin and Stockton because of its union animus and I find that Respondent proved that Gustin and Stockton would have been laid off in the absence of union activity.

Lawhon and Blair

On June 10 Respondent terminated *Phillip Lawhon* and *John Blair* after Lawhon and Blair passed out handbills critical of Respondent's failure to provide its employees with health care insurance. Lawhon applied for work on January 7. He listed two union contractors on his application. During his job interview, Greg Taylor asked Lawhon if he intended to take a call from the Union or if he was going to seek permanent employment with Respondent.[51] Ty Runyan told Lawhon that he had been dealing with the Union for quite a while and if Lawhon wanted to work for Respondent he would have to just come in and do his job. On May 28, Lawhon was working with a union sticker on his tape measure. Sam Ramirez told him to remove the union sticker.

John Blair who is an unlicensed journeymen electrician started working for Respondent around January 7 or 8. He was not a member of the Union. However, he signed a union authorization card on January 16. After working at the Town Lake Event Center job for about 3 weeks he was transferred to Respondent's job at the Omni Hotel. Sam Ramirez was his supervisor at the Omni. In June, Ramirez asked Blair if he was a union member. Blair said that he was and when asked by Ramirez how long he had been a member he replied 2 weeks.

On June 4, Sam Ramirez asked Lawhon whether John Blair had joined the Union. Lawhon eventually admitted that Blair had joined the Union. Ramirez asked if Lawhon had gotten Blair in the Union and Lawhon replied that Blair made his own decisions. The next day Ramirez asked Lawhon if he was serious, did John Blair really join the Union. Lawhon said that Blair had joined the Union. Ramirez questioned Lawhon regarding Blair's classification, his tests and his pay rate.

Ramirez then asked Blair if he was in the Union and when, Blair said he was, Ramirez asked him how long he had been in the Union.

The evidence showed that Blair and Lawhon were taken off the Austin Center job at the Omni Hotel because they each passed out leaflets[52] during their lunchbreak around June 10.

[49] R. Exh. 25 shows that Randolph Buffington was terminated on May 28, 2002; Dixie R. Ploughman was terminated on May 29, 2002; Randall Brown, Kevin Gustin, Richard Rivera, Alan Stockton, and William Westerman were terminated on May 30, 2002; and Steve Glenn was terminated on June 3, 2002.

[50] Ty Runyan testified that he has not hired an electrician since the end of May 2002.

[51] Greg Taylor admitted it would not have been out of the ordinary for him to question Lawhon about his long-term employment plans.

[52] *The owners of this establishment are undermining Health Care Standards in the community by employing an electrical contractor,* ***Titus Electrical Contracting****, that does not pay for full family health care coverage. There are many local electrical contractors in Austin that* ***do*** pay *for full family health care coverage. Please tell the management of this establishment that you support high community stan-*

Subsequently, Greg Taylor told them that Respondent had no other work. Blair and Lawhon were laid off. Taylor testified at the hearing that he made the decision in cooperation with a customer.

On the last day, Phillip Lawhon and John Blair worked on the Austin Center job Lawhon and Blair were handbilling (GC Exh. 27)[53] at the jobsite during their lunchbreak. The jobsite was Austin Center, which includes the Omni Hotel on one side and offices on the other.

Blair testified that he passed out handbills at the jobsite. After about 10 minutes of passing out handbills, the hotel manager and one other person came up to him and Phillip Lawhon. The manager told Lawhon that he had to leave because there was soliciting going on with the handbills. Lawhon replied that was his work area and he wasn't trespassing or soliciting. Lawhon phoned Sam Ramirez on his cell phone and he and Blair walked out of the building. They met Ramirez in the parking garage and Ramirez said that he was going in and straighten out the matter. Ramirez told Blair and Lawhon to go to the gang box and wait. Ramirez asked Blair if he had distributed any literature and Blair said that he had. Ramirez asked Blair if he had been put up to it and Blair said no.

A policeman came to Blair and Lawhon at the gang box and told them they had trespassed and were still trespassing. Then Sam Ramirez and Gaylord Pierson showed up with management from the Golden Crescent. Ramirez and Pierson told the policeman that Blair and Lawhon were no longer allowed on the property. Ramirez told Lawhon and Blair they would be escorted to get their tools and they should go to the shop. Greg Taylor told Lawhon and Blair that Respondent had no other place to send them.

Credibility

I credit the testimony Phillip Lawhon and John Blair. The record included testimony by several witnesses to the events at the Austin Center. There is no dispute but that Lawhon and Blair were handbilling on the Austin Center premises during their lunchbreak. I especially credit their testimony regarding conversations with supervisors including those on June 10. I also credit Gaylord Pierson to the extent his testimony agrees with the memorandum he wrote Ty Runyan on June 10 (GC Exh. 24).

Findings

The Charging Party cited *Gayfer's Department Store*, 324 NLRB 1246, 1249 (1997); *NLRB v. PNEU Electric, Inc.*, 309 F.3d 843, (5th Cir. 2002), in support of its argument that Respondent illegally discharged Blair and Lawhon. Respondent argued that Lawhon and Blair were terminated because the owner of the jobsite would not allow them back on the premises and Titus had no other work.

In consideration of Respondent's argument I note that Phillip Lawhon testified that he told Sam Ramirez over the phone that he had been kicked out of the building and told he was trespassing. Ramirez asked if he had been handbilling and Lawhon said that he had. Ramirez then told Lawhon that he knew better than that shit that he knew the consequences and now he was going to have to deal with them. Then, when they met, Ramirez told Lawhon he needed to quit these childish games and he was an idiot and needed to grow up. Gaylord Pierson told Lawhon to go to the Titus office.

Blair testified that Ramirez and Pierson told the policeman present that Blair and Lawhon were no longer allowed on the Austin Center property. Ramirez told Blair and Lawhon they would be escorted to get their tools and they should then go to Respondent's shop.

Gaylord Pierson testified in some accord with Blair and Lawhon. Pierson also prepared a contemporaneous memo to Ty Runyan concerning the June 10 incident (GC Exh. 24). In that memo Pierson stated that he told Kim Williams, the manager of Crescent Realty, that he could not stop Blair and Lawhon from handbilling since they were on their lunch hour but that she should call the police. Crescent told Pierson they wanted Blair and Lawhon terminated on the spot and Pierson replied that he "needed more reason than the handing out the fliers." Pierson wrote in the June 10 memo that the police came and asked Kim Williams if "she wanted to go ahead with the *Trespassing Warning;* she turned to me and asked if she did, and I told her if she did not want them back here again she should say yes."

Blair and Lawhon went to Respondent's office as directed where Greg Taylor told them that he had no other place to send them.

In the case cited by the Charging Party (*PNEU Electric, Inc*., supra), the court considered whether both the direct employer and the contracting party engaged in unfair labor practices by discharge due to union activity. Here, there is no contention that the contracting party engaged in unfair labor practices. Instead, the only issue is did Respondent engage in unfair labor practices by terminating Blair and Lawhon.

While Respondent argued to the effect that it was the contracting party, Crescent Realty, that took action, which resulted in the layoff of Blair and Lawhon, the record shows that Respondent was very involved in having Blair and Lawhon removed from the Austin Center job.

When Lawhon phoned Sam Ramirez and told him that he had been kicked out of the building and he had been handbilling, Ramirez replied that Lawhon "knew better than that shit and he knew the consequences and now he was going to have to deal with them." As shown above, Gaylord Pierson took and active role in suggesting to Crescent Realty that it call the police and that Crescent press trespassing charges against Blair and Lawhon if it wanted them off the Austin Center job.

Employees of a subcontractor who regularly and exclusively work on someone else's property, are rightfully on that property pursuant to the employment relationship, and those employees have a right to engage in Section 7 activity during

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dards for health care and wish that they would too. The employees of ***Titus Electrical Contracting*** *appreciate your support in this matter.*

[53] The handbill read: "The owners of this establishment are undermining Health Care standards in this community by employing an electrical subcontractor, ***Titus Electrical Contracting***, that does not pay for full family health care coverage. There are many local electrical contractors in Austin that **do** pay for full family health care coverage. Please tell the management of this establishment that you support high community standards for health care and wish that they would too. The employees of ***Titus Electrical Contracting*** appreciate **your support in this matter**.

nonworking time in nonwork areas (*Gayfers Department Store,* 324 NLRB at 1249–1250; *Dunes Hotel*, 284 NLRB 871, 876–878 (1987)). The Board has held in situations similar to those here where the hand billing occurred in hotel and offices lobbies and common areas,[54] that such activity is protected (*New York Hotel & Casino*, 334 NLRB 772 (2001)).

I find that Blair and Lawhon's handbilling activity was protected and that Respondent took action to terminate their employment. I find that Respondent failed to prove that Blair or Lawhon would have been terminated in the absence of their protected activity and I find that Respondent terminated the employment of Lawhon and Blair in violation of Section 8(a)(1) and (3).

Edwards

Eddie Edwards had previously worked under Kip Powell when he applied for work with Respondent in January 2002. On April 19, Edwards wore an IBEW shirt to work and his supervisor, Kip Powell, told him that he couldn't wear that shirt. Powell told Edwards to go home and change his shirt. Edwards replied that since he couldn't wear his shirt he quit.

Credibility

I credit the testimony of Eddie Edwards. There was little dispute as to the events leading to his quitting.

Findings

The Board has found that employees are protected from retaliation by refusing to obey a rule promulgated and enforced in violation of the Act's prohibitions against unfair labor practices (*Earthgrains Co., Inc*., 334 NLRB 1131 (2001); *Intercom I (Zercom)*, 333 NLRB No. 223 (2001); *Control Services*, 303 NLRB 481, 485 (1991); *Mayrath Co.,* 132 NLRB 1628 (1961)).

Counsel for the General Counsel and the Charging Party argued that by telling Edwards that he could not wear an IBEW shirt at work, Respondent was giving Edwards a *Hobson's Choice* of obeying an unlawful rule or quitting.

Edwards was told he had to remove his IBEW shirt. Edwards had several choices as to how he treated Powell's directive. He could have simply obeyed Respondent's unlawful rule; or he could have protested the rule by simply refusing to remove the shirt; or he could have quit. By electing the third option Edwards joined the issue and raised the question of whether an employee is protected under the Act if he or she quits work rather than obey an unlawful rule. As shown above, I have found herein that Respondent engaged in conduct in violation of Section 8(a)(1) by promulgating and enforcing its rule against wearing advertising including union logos, to work.[55]

Respondent argued that Eddie Edwards was never threatened with discharge and, in accord with Board law, that is a necessary element to proving a "Hobson's Choice" allegation (*Intercon I (Zercom*), supra; *Masdon Industries, Inc*., 212 NLRB 505 (1974)).

The Board found in *Intercon I (Zercom)*, supra, that where an employee was told in effect, if she did not improve her attitude regarding the union within 4 days, the next action would be termination. The administrative law judge's finding of no violation because the employer's words did not expressly convey that the employee would be discharged if she did not abandon the union, was overturned. The Board found instead that the employer told the employee that she had 4 days to abandon the union if she wanted her job. Therefore, the employee was faced with a *Hobson's Choice* of relinquishing her statutory rights or facing termination. The Board found the employer's threat referred to the employee's "negative attitude" and even though the employee was given 4 days to change her attitude, the threat was imminent and constituted a violation.

Here, Edwards was never threatened with discharge. Instead, Kip Powell told him he couldn't wear the shirt with the IBEW logo and to go home and change his shirt. Edwards replied that since he couldn't wear the shirt he quit.

I agree with Respondent. The General Counsel failed to prove that Eddie Edwards was threatened with discharge. For that reason, I find that Respondent did not engage in unfair labor practices through a constructive discharge of Eddie Edwards.

Refusing to hire John King after an interview[56]; and refusing to hire Rick Zerr, Robert Biehle, Keith Richards, John Voight, and Sherry Passmore after they applied for work.

As shown above, approximately 13 people went to Respondent's office on November 15 seeking electrical work. Many of the 13 were wearing logos that identified them with the IBEW. Those 13 included *John Voight, Robert Biehle, Keith Richards, Rick Zerr,* Gordon Monk, Lewis Grimsley, and Mike Latterman. Several of those people returned to Respondent's office and applied on one or more occasions after November 15.

Sherry Passmore came in on December 12 along with a number of other people. Several of those identified themselves with the Union. Rick Zerr was also in that group.

Jack Wayne King applied for work on December 20. Unlike the other alleged refusal-to-hire discriminatees, King progressed through the application stage and was granted an interview. King showed his past experience included union contractors. During his job interview, Ty Runyan asked King how long he had been on the books. King said that he had been on the books about 3 months.

Although Respondent did hire some of those that identified themselves as being with the Union, the General Counsel alleged that it unlawfully refused to hire Zerr, Biehle, Richards, Voight, and Passmore after they tried to apply for work; and Respondent unlawfully refused to hire King after his union affiliation was revealed in his job interview with Respondent.

King, Zerr, *Biehle*, *Richards*, *Voight,* and *Passmore* all informed Respondent of their experience as journeymen electricians.[57] Three of those, Zerr, Richards, and Passmore, had previously worked on the same job Respondent was seeking to man at the time of their applications. That was the Town Lake Event Center job, which had been manned by Guy's Electric

[54] See CP Exh.13.

[55] Obviously, there would be no violation in the case of Edward's alleged "constructive discharge" if my determination is overturned and the rule is found to be a legal rule.

[56] The complaint alleged that Respondent also refused to hire Thomas M. Smith following an interview. However, there is no evidence supporting that allegation.

[57] Robert Biehle is a licensed master journeyman electrician.

until November 8, 2001. The president of Guy's Electric, Jean–Guy Fournier, testified that all three of those applicants were good employees when they worked for him on the Town Lake Event Center job.

Zerr, *Biehle*, *Richards*, *Voight,* and *Passmore* supplied Respondent with the information it requested on its register. Although none of those five gave detailed information regarding their experience each of them supplied the information Respondent permitted on its register. King, who submitted an application, supplied a more detailed list of his work experience, which included the listing of some prior employers that were union contractors.

As to whether the applicants had the required experience, Respondent knew from its register that three of the applicants had over 20 years' experience. Those were *Zerr*, *Biehle,* and *Richards*. *Sherry Passmore* had been a journeyman for 10 years; *Jack Wayne King* had been a journeyman electrician for 8 years; and *John Voight* had been a journeyman electrician for 4 years.

The landmark case in refusal to hire or consider for hire is *FES,* 331 NLRB 9 (2000). As to the requirements set out in *FES* which are material to the instant allegations, I must inquire (1) whether Respondent was hiring at material times; (2) whether the applicants had the required experience or, alternatively, that the employer had not adhered uniformly to the requirements, or the requirements were pretextual or were applied as a pretext for discrimination; and (3) the employer was motivated not to hire the applicants by union animus.

The record evidence did show (1) that Respondent was hiring during material times on showing that it hired 51 electricians from November 13 to March 18, 2002 (CP Exh. 8); (2) Respondent was aware all the alleged discriminatees had the relevant experience because each one listed his or her experience to Respondent; and (3) Respondent through the unfair labor practices found herein as well as other evidence shown herein demonstrating hostility toward the union organizing efforts, illustrated its union animus. In view of that evidence and the testimony at the hearing, I find that all of the alleged failure to hire discriminatees possessed the experience required for the jobs filled by Respondent during relevant times.

Moreover, several of the alleged failure to hire discriminatees engaged in picketing at Respondent's facility from January 2002. *Rick Zerr* and *John Voight* testified without dispute they picketed at Respondent's facility from January 7, 2002. *Sherry Passmore* testified that she picketed on more than one occasion beginning in late January. There is evidence showing that Robert Biehle engaged in picketing and was on the picket line on March 22 as well as on other occasions. I find that the General Counsel has satisfied its burden under *FES*.

Nevertheless, Respondent contended that it did not hire the alleged discriminatees for reasons other than their union activity or affiliation and that it would have refused to hire them in the absence of union activity and affiliation.

In its brief, Respondent argued that the General Counsel failed to prove the elements necessary to a finding of refusal to hire. In regard to *Richards*, *Voight*, and *Passmore*, it argued there was no evidence of its knowledge of any union activities or affiliation of the part of any of those three. It argued that even though Richards testified that he was wearing an IBEW shirt when he signed the Titus call-in log, there was no evidence that Ty Runyan knew Richards name at that time and that Richards's name became just another name on the computer screen to Runyan. I reject that argument. During a union campaign as heated as this campaign it would be naïve to think an employer failed to note an applicant wearing a union shirt. Moreover, as shown above, Ty Runyan maintained a computer list of all union people on his job. Obviously, he had to take steps to discover the information necessary to list those union employees.

Respondent pointed out that it hired applicants known to be union members and that shows that it did not refused to hire anyone because of their union membership. However, of all its union applicants, only a few openly showed their union support.[58] Those that openly supported the Union included all the alleged discriminatees. Zerr and Biehle were union employees. Zerr, Biehle, Richards, and Voight applied in a group of 13 and several of those wore union identifying logos. That group had a confrontation with Ty Runyan at Respondent's facility. Sherry Passmore applied later on December 12 along with several others including Rick Zerr who identified themselves with the Union. On that occasion, Greg Taylor told Zerr to get the hell out of the office. All that evidence contributes to a finding that Respondent wanted to avoid hiring union organizers. Therefore, I not persuaded by Respondent's argument that it's hiring of some union members proved that it lacked union animus.

However, one issue regarding refusal to hire was not disputed. Greg Taylor testified that to his knowledge, Respondent has not used any tradesmen temporary workers on any job in the Austin Center area since May 30, 2002.

I shall consider whether Respondent proved it would not have hired the alleged discriminatees in the absence of union activity.

King

Jack Wayne King was interviewed by Ty Runyan. King listed some union contractors in his initial efforts to go to work for Respondent. During their subsequent interview, Ty Runyan asked how long he had been on the books.

Respondent argued that the Union had nothing to do with its refusal to hire King. Moreover, after reviewing King's resume, which showed he had worked for union contractors, King was permitted to fill out an application[59] and was asked to appear for an interview. Ty Runyan testified that King smelled of alcohol at his interview and it was that which led Runyan to reject King's application. Respondent argued that while King

[58] The record does show that Respondent hired Alan Stockton even though he went to Respondent to apply along with a group from the union hall and he wore an IBEW pencil clip during his prehire interview with Ty Runyan. Additionally, Respondent hired Kevin Gustin and Phillip Lawhon even though it knew Gustin and Lawhon were in the Union.

[59] The evidence showed that applicants were not routinely permitted to submit an application. Instead, the routine involved those that appeared at Respondent's facility seeking employment, were put on an employment register and only upon review of the register, did Respondent ask some of those listed to complete an application.

testified he had not had any alcohol on the morning of his interview, he did not deny that he consumed alcohol the night before.

Credibility

I credit the undisputed testimony of Ty Runyan regarding King. He testified that King smelled of alcohol during his job interview. When asked about alcohol during cross-examination, King testified that he was not sure whether he had been drinking the night before.

Findings

In view of my credibility determinations, I find in agreement with Respondent that King smelled of alcohol at the time of his job interview. The Board in *FES* made it clear that it would not find a violation where an employer would not have hired the alleged discriminatee in the absence of protected activities. Here, there was no showing that Respondent hired anyone that smelled of alcohol during his or her employment interviews. There was evidence through King, that Respondent had a reputation of seeking clean-cut applicants. Therefore, I find Respondent showed it would have refused to hire King in the absence of his union activity.

Richards

As to *Keith Richards*, Ty Runyan testified that he was told that Richards liked to fight. A person named Nick Lyons saw Richards at Titus and told Ty Runyan to be careful of Richards because he liked to fight. Lyon mentioned an incident on a job he worked with Richards. Runyan checked with Carl Jackson[60] and Jackson confirmed what Nick Lyons had told Runyan and Jackson also told Runyan about another incident where Richards had "gotten into it" with the superintendent.

Credibility

I credit the testimony of Ty Runyan as to the reason why he decided against offering work to Richards. Runyan testified as to specifics regarding how he learned that Richards like to fight and that evidence was not rebutted.

Findings

Here again, as in the case of King, Respondent proved that factors other than protected activity, was involved in the decision to reject Richards. The evidence Respondent offered to the effect that it learned Richards liked o fight was not rebutted and there was no showing that Richards was treated with disparity in that regard. There was no showing that Respondent did not normally reject applicants that like to fight. Therefore, I find in agreement with Respondent that it proved it would not have hired Richards in the absence of his union affiliation.

Passmore

As to *Sherry Passmore*, Carl Jackson and Frank Nerio told Runyan that she had been fired at Guy's Electric. Jackson and Nerio said that Passmore had too much to drink during lunch and could not return to work on one occasion. She and a coworker told Guy's owner they had too much to drink during lunch and had decided against going back to work.[61]

Credibility

I credit the testimony of Sherry Passmore and Jean-Guy Fournier.

Findings

Despite my credibility findings it is correct that Sherry Passmore and another employee came back late from lunch and told Guy's Electric they had too much to drink and decided against returning to work that day. Even though I credit the testimony that Guy's Electric did not discharge Passmore, I agree with Respondent that it would not have hired Passmore in the absence of her union activities. Respondent knew that Passmore had consumed so much alcohol during her lunchbreak that she and another employee felt they should not return to work. I find that Respondent acted on the basis of that information and refused to offer a job to Passmore. Therefore, I find that Respondent did not engage in unfair labor practices by failing to hire Sherry Passmore.

Zerr

Respondent argued that it refused to hire *Rick Zerr* because of negative references from Carl Jackson and Frank Nerio.[62] Both recommended that Respondent not hire Zerr. Jackson testified that Zerr spent too much time talking on his cell phone during his employment with Guy's Electric[63] even to the point of using the cell phone while operating heavy machinery. Nerio testified that he did not remember making a recommendation to Respondent regarding Zerr. Respondent pointed out that it hired known union supporters including Kevin Gustin and Allan Stockton and that it did not demonstrate union animus.

Credibility

I credit the testimony of Rick Zerr and Jean-Guy Fournier. Zerr's testimony shows that he applied for work with Respondent on several occasions beginning on November 15. The testimony of Zerr and Fournier shows that Respondent recognized Zerr as being affiliated with the Union; that Zerr was a union steward when he worked for Guy's Electric; and that Guy's owner, Jean-Guy Fournier, permitted Zerr to use his cell phone to conduct union business during work.

Findings

As shown herein, all the *FES* criteria were satisfied in the case of Rick Zerr. Respondent argued that it refused to hire Zerr because of negative references from Carl Jackson and Frank Nerio. However, Nerio testified that he did not recall

[60] Jackson had worked for Guy's Electric as project manager on the Town Center job and Ty Runyan testified that he frequently checked with Jackson regarding applicants that were former employees of Guy's Electric on that job.

[61] There was no dispute but that Passmore failed to return to work because she and a coworker had too much to drink at lunch. There was a dispute as to whether Passmore was fired for that incident. Guy's Electric owner, Jean-Guy Fournier testified that she was not fired.

[62] As shown herein, before being hired by Respondent after Guy's Electric went out of business, both Jackson and Nerio worked for Guy's Electric. Jackson was a project manager and Nerio was an area foreman, with Guy's Electric.

[63] The evidence was not rebutted that Zerr was union steward on the Guy's Electric job and that he used his cell phone while at work with the consent of Guy's Electric, to conduct union business.

making a recommendation regarding Zerr. As to Jackson's recommendation, he was critical of only one thing in Zerr's work and that was Zerr using his cell phone to conduct union business. I am not persuaded that an employer may legally refuse to hire anyone associated with a union on showing that it did so because he was permitted to engage in union steward business while working for a prior employer. Therefore, I find that Respondent did violate Section 8(a)(1) and (3) by refusing to hire Rick Zerr.

Biehle

Respondent argued that Robert Biehle has given inconsistent reasons why Respondent refused to hire him during these and civil defamation proceedings. In the civil defamation proceedings Biehle contended that he was denied employment because Carl Jackson recommended him as "worthless." Whereas in these proceedings, Biehle is contended that he was denied employment because of the Union.

Respondent also argued that Ty Runyan credibly testified that he has known Biehle for 16 years; he does not like Biehle and would not have hired him under any circumstances. Additionally, Carl Jackson recommended that Respondent not hire Biehle.

Credibility

I credit the testimony of Robert Biehle and that of Jean-Guy Fournier. I disagree with Respondent's argument that Biehle was inconsistent by claiming in a civil defamation suit that he was prevented from work by Carl Jackson saying he was worthless on the one hand and by claiming he was denied employment because of his union affiliation in these proceedings. Both could be correct.

However, I also credit Ty Runyan's testimony that he did not hire Biehle because he had known him for 16 years and did not like Biehle.

Findings

Despite my credibility findings there was no showing that Ty Runyan was untruthful when he testified that he would not have hired Biehle because he did not like Biehle. Runyan testified that he knew Biehle for 16 years and did not like Biehle personally. It is not unreasonable to believe that employers sometimes refuse to hire people they dislike. Moreover, there was no showing that Runyan's dislike for Biehle was based on Biehle's exercise of protected activities. I also note there was no rebuttal to Runyan's testimony.

Therefore, I am convinced that Respondent proved it would have refused to hire Biehle in the absence of his union affiliation.

Section 8(a)(4)

By Ty Runyan threatening to lay off employees because of unfair labor practice charges.

Phillip Lawhon attended classes while working. On April 4, Ty Runyan came in the class and said he need to speak to those employees about what the union did to its contractors. Runyan held up and read a handbill he said had been found on the Town Lake Event Center job. Ty Runyan asked the 28 employees in the class if any of them were with the union stuff that's going on there.[64] Runyan said that since the Union was tying them up with charges and withdrawing charges, he was not going to be able to go on bidding at as fast a pace as he had before the union stuff and that he was going to have to start laying people off. Ty Runyan said there were union people working at the Company and that he knew one that he had given a raise and promoted that was going back and telling the Union what was going on at the Company.

Credibility

In view of my findings herein, the full record and the demeanor of the witnesses, I credit the testimony of Phillip Lawhon regarding Ty Runyan's April 4 talk to employees. As shown above, Lawhon made notes of the talk immediately upon its conclusion and used those notes in an affidavit to the Regional Office.

Findings

An employer engages in unlawful activity in violation of Section 8(a)(4) when it threatens employees that layoffs may occur because of the filing of unfair labor practice charges (*National Association of Government Employees (International Brotherhood of Police Officers*)**,** 327 NLRB 676 (1999); *Larry Blake's Restaurant,* 230 NLRB 27 (1977); ***S.E. Nichols Marcy Corp.,*** 229 NLRB 75 (1977); *Portsmith Ambulance Service,* 323 NLRB 311 (1997)). Ty Runyan held out to his employees on April 4, 2002, that he would start laying people off if the Union continued filing unfair labor practice charges. That constitutes a violation of Section 8(a)(1) and (4).

CONCLUSIONS OF LAW

1. Titus Electric Contracting, 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 520 is a labor organization within the meaning of Section 2(5) of the Act.

3. By promulgating and enforcing an appearance policy that discriminatorily prohibited wearing union logos; by threatening to phone and actually phoning the police because of the Union picketing Respondent's facility; by openly photographing the union picket line; by creating the impression of surveillance of its employees' union activities; by engaging in coercisive interrogation of its employees about their union activities; and by promulgating an unlawful no solicitation policy, the Respondent violated Section 8(a)(1).

4. By discharging its employees Tommy Means, Phillip Lawhon, and John Blair, and by refusing to hire Rick Zerr, the Respondent violated of Section 8(a)(1) and (3).

5. By threatening layoffs if the Union continued to file unfair labor practice charges, Respondent violated Section 8(a)(1) and (4).

[64] There is a question of whether Respondent, through Ty Runyan, engaged in unlawful interrogation by asking the employees on this occasion whether they were involved in the union stuff. That matter was considered above under the heading "By Interrogating employees about union activities."

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

THE REMEDY

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

The Respondent having engaged in unlawful conduct by discriminatorily discharging employees Tommy Means, Phillip Lawhon, and John Blair, it must offer them reinstatement to each of their former jobs or, if one or more of those jobs no longer exists, to a substantially equivalent position; and Respondent must make Means, Lawhon, and Blair, whole for all loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

As I have found that Respondent has illegally refused to hire Rick Zerr in violation of sections of the Act, I shall order Respondent to offer Zerr immediate and full instatement to a position for which he is qualified or, if those positions no longer exist, to a substantially equivalent position. I further order Respondent to make Zerr whole for all loss of earnings suffered as a result of the discrimination against him. Back pay shall be computed as described in *F. W. Woolworth Co.,* supra, with interest as described in *New Horizons for the Retarded*, supra.

On the foregoing findings, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended[65]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is hereby ordered that Respondent, Titus Electric Contracting, Inc., Austin, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and enforcing an appearance policy that discriminatorily prohibits wearing union logos.

(b) Threatening to phone and actually phoning the police because of union picketing its facility.

(c) Openly photographing the union picket line.

(d) Creating the impression of surveillance of its employees union activities.

(e) Coercisively interrogating its employees about the Union.

(f) Unlawfully promulgating no solicitation policy because of its employees' union activities.

(g) Discharging its employees because of their union activities.

(h) Refusing to hire job applicants because of their union activities.

(i) Threatening layoffs if the Union continues to file unfair labor practice charges.

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

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

(a) Within 14 days of this Order, offer Rick Zerr immediate and full instatement to a position for which he is qualified or, if those positions no longer exist, to a substantially equivalent position without prejudice and make Zerr whole for all loss of earnings and other benefits suffered as a result of the discrimination against him plus interest, in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, offer full and immediate reinstatement, make whole for lost wages and benefits and remove from its files any reference to the unlawful discharges of Tommy Means, Phillip Lawhon, and John Blair, and within 3 days thereafter notify Means, Lawhon, and Blair in writing that this has been done and that the disciplinary actions will not be used against them in any way.

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

(d) Within 14 days after service by the Region, post at its facility in Austin, Texas, copies of the attached notice marked "Appendix."[66] 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 immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director, Region 16, 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.

Dated at Washington, D.C. January 17, 2003

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

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unlawfully promulgate and enforce an appearance policy that discriminatorily prohibits employees from wearing logos of International Brotherhood of Electrical Workers Local 520, or any other labor organization.

WE WILL NOT threaten to phone or actually phone the police because of legal picketing by the Union.

WE WILL NOT photograph union picketing at our premises.

WE WILL NOT create the impression that we are engaged in surveillance of our employees union activities.

WE WILL NOT unlawfully interrogate our employees about employees' union activities.

WE WILL NOT promulgate an unlawful no solicitation policy because of our employees' union activities.

WE WILL NOT discharge our employees because of their union activities.

WE WILL NOT refuse to hire job applicants because of their union activity or affiliation.

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

WE WILL offer Tommy Means, Phillip Lawhon, and John Blair immediate and full reinstatement at their former jobs or, if those jobs no longer exists, to substantially equivalent jobs.

WE WILL make Tommy Means, Phillip Lawhon, and John Blair whole for all lost wages and other benefits they suffered because of our unlawful action against them.

WE WILL, within 14 days of this Order, offer Rick Zerr immediate and full instatement to a position for which he is qualified or, if that position no longer exists, to a substantially equivalent position without prejudice.

WE WILL make Rick Zerr whole for all lost wages and other benefits he suffered because of our unlawful action against him.

TITUS ELECTRIC CONTRACTING, INC.