Cobb Mechanical Contractors, Inc. *and* Sheet Metal Workers Local Union 67, a/w Sheet Metal Workers International Union. Cases 16–CA–26488, 16–CA–26574, 16–CA–26598, 16–CA–26629, 16–CA–26668, and 16–CA–26744

February 15, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE AND HAYES

On December 28, 2009, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief,[1] the General Counsel and the Charging Party filed answering briefs, and the Respondent filed reply briefs to each of the answering briefs. The General Counsel filed cross-exceptions and a supporting brief, the Charging Party filed a joinder in the General Counsel's cross-exceptions and supporting brief, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] as modified herein, to modify his remedy, and to adopt the recommended Order as modified.[4]

We affirm the judge's disposition of all unfair labor practice issues except for his recommended dismissal of the allegation that the Respondent engaged in unlawful surveillance by photographing union job applicants who were engaged in a "salting campaign" at its Round Rock, Texas office on March 4, 2009. The applicants gathered on the sidewalk outside the office after they attempted to apply for jobs. An unidentified individual came out of the building and held to his face a device which witnesses said appeared to be a small camera or cellular phone. The judge found that the evidence was insufficient to prove that this individual was photographing the applicants, as opposed to texting or speaking on a cellular phone. He therefore recommended dismissal of the unlawful surveillance allegation.

Although the judge mentioned the testimony of job applicant David Martin with respect to the activity of the unidentified individual, he ignored Martin's undisputed testimony about what happened a few seconds later. According to Martin, the Respondent's Operations Manager Don Graski appeared, then "went to a truck and came back and looked like he had a regular camera and was taking pictures of us." We find that Martin's undisputed testimony concerning Graski's photographing the applicants supports a finding that the Respondent engaged in unlawful surveillance of the applicants' union and/or protected concerted activity.[5] The Board has long held that "absent proper justification, the photographing of employees engaged in protected concerted activities

[1] The General Counsel asserts that the Board should disregard the Respondent's exceptions and supporting brief because they fail to comply with Sec. 102.46 of the Board's Rules and Regulations. We find that the Respondent's exceptions and brief are in substantial compliance with the Board's Rules, and thus we have considered them. See *Postal Service*, 351 NLRB 1226 (2007).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard 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.

[3] There are no exceptions to the judge's dismissal of the complaint allegations that Superintendent Eloy Subia unlawfully (a) threatened an employee by his statement that he usually did not hire union members because they "quit on me" and (b) interrogated employees about their union activities.

In affirming the dismissal of the allegation that the Respondent unlawfully refused to hire Frank Ortega, we assume that the General Counsel established that union animus was a motivating factor in the Respondent's decision. We find that the Respondent met its rebuttal burden of proving that it would not have hired Ortega regardless of his union affiliation because it twice tried in good faith to phone him about employment but received a message that Ortega's phone was disconnected. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

In affirming the judge's finding that the Respondent unlawfully refused to hire Eric Davis, we find it unnecessary to rely on the judge's speculation that Operation Manager Don Graski's perception of Davis as "goofy" was related to Davis' intent to speak favorably about the Union.

[4] In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the judge's recommended remedy by requiring that backpay and any monetary awards shall be paid with interest compounded on a daily basis. We shall also modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

[5] The Respondent contends that "walking from a building is not union activity." Under the circumstances here, we disagree. The applicants congregated just outside an employer's office immediately after concertedly applying for work in an attempt to organize the employer's work force. This conduct was at least a continuation of and a part of the res gestae of the organizing attempt and is therefore protected. In any event, Graski's photographing (or apparent photographing) was obviously triggered by the applicants' union activity and thus would reasonably have tended to coerce employees in the exercise of their Sec. 7 rights, regardless of what the applicants were actually discussing outside the Respondent's office.

violates the Act because it has a tendency to intimidate." *F. W. Woolworth*, 310 NLRB 1197 (1993). Accordingly, we find that the Respondent violated Section 8(a)(1) by Graski's actions of photographing or at least appearing to photograph the job applicants engaged in protected union organizational activity at Round Rock.[6]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Cobb Mechanical Contractors, Inc., Round Rock, Texas, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Insert the following paragraph as paragraph 1(h), relettering paragraphs 1(h) and (i) accordingly.

"(h) Engaging in surveillance of employees by photographing union job applicants engaged in union and/or protected concerted activities."

2. Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its office in Round Rock, Texas, and at its jobsites in central 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 facilities 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 September 22, 2008.

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. February 15, 2011

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

Brian E. Hayes, 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 tell you that we will not hire journeymen sheet metal workers because of the Union.

WE WILL NOT tell you that we will not consider for hire employees who seek employment with the assistance of the Union.

WE WILL NOT direct you to report upon the protected activities of other employees.

WE WILL NOT threaten to evict employees who distribute union literature on the jobsite.

WE WILL NOT threaten not to hire union members who wish to exercise their right to engage in organizational activity.

WE WILL NOT coercively interrogate any of you regarding your union activities or the union activities of other employees.

WE WILL NOT engage in surveillance by photographing union job applicants engaged in union and/or protected concerted activity.

WE WILL NOT fail and refuse to hire you on the basis of your union activities or your membership in Sheet Metal

[6] Graski's unlawful surveillance is additional evidence of his union animus supporting the judge's finding that the Respondent violated Sec. 8(a)(3) by refusing to hire four union job applicants. Still more evidence of animus comes from Graski's approval of job advertisements appearing in the local newspaper only 2 days after he told the union applicants at the Round Rock office that the Respondent was not hiring.

[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."

Workers Local Union 67, a/w Sheet Metal Workers International Union, or any other labor organization.

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

WE WILL, within 14 days of the Board's Order, offer immediate employment to Eric Davis, Leroy Franklin, Ray Roth, and Alfredo Camacho in the positions for which they applied, or, if such positions no longer exist, to substantially equivalent positions.

WE WILL make Eric Davis, Leroy Franklin, Ray Roth, and Alfredo Camacho whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the Board's decision.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful refusal to hire Eric Davis, Leroy Franklin, Ray Roth, and Alfredo Camacho and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

COBB MECHANICAL CONTRACTORS, INC.

Roberto Perez and *Erica Berencsi, Esqs.,* for the General Counsel.
W. V. Bernie Seibert, Esq., for the Respondent.
Glenda L. Pittman, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Austin, Texas, on October 13, 14, and 15, 2009, pursuant to an amended consolidated complaint that issued on September 25, 2009.[1] The complaint, as amended at the hearing, alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) in various respects including threats of refusal to hire employees affiliated with a union, and violated Section 8(a)(3) of the Act by refusing to consider for hire or to hire six applicants for employment. The Respondent's answer denies any violation of the Act. I find that certain statements of the Respondent did violate Section 8(a)(1) of the Act and that the Respondent refused to hire four of the applicants in violation of Section 8(a)(3) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Cobb Mechanical Contractors, Inc. (Cobb or the Company) is a Colorado corporation engaged in the business of fabricating and installing plumbing and heating and air-conditioning in commercial construction at various locations in the United States. It annually derives gross revenues in excess of $500,000 from its operations and, at its Texas jobsites, receives goods and materials valued in excess of $50,000 directly from points located outside the State of Texas. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits and I find and conclude that Sheet Metal Workers Local Union 67, a/w Sheet Metal Workers International Union (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

This is a "salting" case. In September and October 2008, the Union sought to have Cobb hire employees affiliated with the Union at its Seaton Hayes Medical Center jobsite in Kyle, Texas (the Kyle jobsite). In February, March, and April 2009. the Union sought to have Cobb hire employees affiliated with the Union at its Austonian condominium jobsite in Austin, Texas, the Austonian jobsite, and at its Fort Sam Houston jobsite in San Antonio, Texas (the Fort Sam Houston jobsite).[2]

Operations Manager Donald Graski works out of the Cobb office located in Round Rock, Texas, a suburb of Austin. He is the immediate supervisor of the superintendents at the Cobb jobsites in central Texas, including Kyle, Austin, and San Antonio. The Company's unwritten staffing process gives first priority to current employees who are available or who are willing to accept a transfer from the job upon which they are presently working. Second priority is given to former employees and employees referred by a current employee. If sufficient staffing cannot be accomplished from current employees, former employees, or referrals, the Company places advertisements in newspapers.

[1] All dates are in 2008, unless otherwise indicated. The charge in Case 16–CA–26488 was filed on November 14 and was amended on December 17 and February 26, 2009. The charge in Case 16–CA–26574 was filed on January 30, 2009, and amended on March 30, 2009. The charge in Case 16–CA–26598 was filed on February 6, 2009. The charge in Case 16–CA–26629 was filed on March 4, 2009. The charge in Case 16–CA–26668 was filed on March 30, 2009. The charge in Case 16–CA–26744 was filed on April 24, 2009.

[2] Pursuant to my order at the hearing, the Respondent produced records reflecting hires at the Austonian jobsite from March 10 through October 14, 2009, and at the Fort Sam Houston jobsite from March 11 through October 14, 2009, marking them as CP Exhs. 3 and 4, respectively. In a conference call held on December 2, 2009, counsel for the General Counsel moved for their admission. Notwithstanding that the Charging Party had not offered the documents, counsel for the Charging Party, in the interest of judicial efficiency regarding remarking the exhibits, stated that she had no objection to their receipt. Counsel for the Respondent, consistent with his objection to my ordering the production of the documents, objected to their receipt. CP Exhs. 3 and 4 are hereby received.

Graski explained that, typically, individuals responding to an advertisement will call the telephone number given in the advertisement, and the appropriate craft superintendent will speak with them regarding their level of experience. If an individual appears to be qualified, the individual will be asked to come to an interview and, "based on the interview," asked to fill out an application and new hire packet. Before actually being hired, applicants must present their social security number, which the Company validates, and pass a drug test.

Hiring occurs both at the jobsites and at the Cobb office in Round Rock. Graski regularly interviews applicants for employment at Round Rock. The applicable craft superintendents interview applicants at the jobsites. Graski was unsure whether any initial hiring occurred at the Fort Sam Houston jobsite, which is on that military installation. Hiring did occur at the Austonian jobsite, but, in December 2008, access to the facility was restricted and, thereafter, there was no hiring at the jobsite. Insofar as relevant to this proceeding, the hiring for the Fort Sam Houston and Austonian jobsites occurred at the Cobb office in Round Rock, and Graski conducted the interviews of applicants.

Hiring for work at the Seaton Hayes Medical Center occurred at the Kyle jobsite. General Superintendent David Valentine oversaw the plumbing and sheet metal work performed at the Kyle jobsite. Sheet Metal Superintendent Eloy Subia was responsible for hiring sheet metal workers. Subia did not have applicants fill out the applications for employment until they passed the drug test because, if they failed the drug test, he had "wasted all that time."

B. Facts

1. The Kyle, Texas jobsite

In 2008, the Company was installing plumbing and heating and air-conditioning during construction of the medical center at the Kyle jobsite. In mid-August and early September, the Respondent placed newspaper advertisements for sheet metal workers. Union Organizer Jon Burress began sending sheet metal workers to the Kyle jobsite seeking work.

Between August 1 and October 4, 10 journeymen were hired, 7 prior to September 9 and 3 thereafter. Of the seven hired before September 9, two were affiliated with the Union; however, only one of those employees, Oscar Hernandez Sr., acknowledged his affiliation, and he made no statement relating to engaging in organizational activity.

The first union affiliated applicant sent to seek work was John Grouette. In mid-August, Grouette went to the jobsite and walked up to the Company's construction trailer located on the jobsite. The trailer is approximately 12-feet wide and 60-feet long with offices at each end and a large open area in the center. Grouette knocked on the door and was invited in. Grouette, a third-year apprentice, had been directed not to reveal his affiliation with the Union. Grouette complied with that direction. Sheet Metal Superintendent Subia questioned him regarding his ability to read blueprints and his knowledge of the "symbols on a blueprint" as well as prior companies for which he had worked. Subia told him that that he would hire him but that it would be "a couple of weeks." He wrote Grouette's name and telephone number on a yellow tablet. Notwithstanding that estimate, Grouette received a call from Subia in only a couple of days telling him to report on the following Monday. He was hired as a journeyman on August 15.

Oscar Hernandez Sr., a union member and journeyman since 1985, applied with Cobb in late August. He was informed by Burress that Cobb was hiring, but was not instructed not to reveal his affiliation with the Union. He went to the jobsite, entered the construction trailer with two of his children, and said that he came to apply for a job. An individual, who he later learned was Subia, asked what he did, and Hernandez replied that he was a sheet metal worker. Subia asked Hernandez about his level of experience, and Hernandez began stating the various companies with which he had worked over the last 25 years. Subia commented that "those are union companies." Hernandez answered, "Yes." Subia asked, "[W]hat happened to your Union?" Hernandez responded that the Union "was slow right now." Subia stated that he "usually" did not hire union members "because they quit on me when Samsung was coming up," referring to a situation where union members had left Cobb to work on a construction project at a Samsung facility that was being performed by a union contractor. Hernandez noncommittally replied, "Okay." Hernandez provided a urine sample for his drug test. He was called the following day and was told to report for work on the following Monday. Company records reflect that he was hired on August 25.

Counsel for the General Counsel, on redirect examination, asked Hernandez how Subia learned that he was a union member. Hernandez answered, "I told him I was," and repeated his previous testimony relating to Subia's commenting upon "union companies" and concern about union members quitting. Counsel persisted, asking whether Hernandez told Subia that he was "current union" or whether Subia "ask[ed] you that." Hernandez answered that Subia did ask, "Are you Union?" Subia denied asking any employee about union affiliation, and no other witness testified to any such inquiry. In view of the content of the conversation to which Hernandez twice testified, and in which he was not asked whether he "was Union," there was no need for Subia to make any such inquiry. I do not credit the testimony of Hernandez that Subia asked whether he "was Union." I credit Subia's testimony that he made no such inquiry.

Jose Majano testified through an interpreter. Majano, a journeyman who is no longer a member of the Union but who was a member at that time, was sent by Burress. The record does not reflect whether he was given instructions regarding applying covertly. Majano walked onto the jobsite and was directed to the Cobb construction trailer where he met with and was interviewed by Subia. Their interview was conducted in Spanish. In the course of his interview, Majano identified several former employers that were union contractors. He told Subia that he was "formerly a union member." Following the interview, Subia informed Majano that he would place his name on a list and "if those people did not show up," he would call him. He received a call about a week later and reported to work on September 4.

None of the foregoing employees were told that their walking onto the jobsite to apply for work was improper. None were shown a waiting list of people who were ahead of them.

On September 9, Union Organizer Burress, accompanied by a group of journeymen wearing shirts bearing emblems of the Union, went to the jobsite. Prior to approaching the Company's construction trailer, Burress informed the group that he would do all of the talking. He instructed them that, if they were asked, they would be willing to start work "tomorrow." He stated that if they were offered a job they should accept it, that they would "talk about it when we leave here," but that he believed that any job offer would be a "bluff." He noted that, if any job offer was declined, there could be no charge of discrimination. Burress explained that the comment regarding talking about it when they left was made because two of the applicants, neither of whom is alleged as a discriminatee, "had never salted," and that if a job were offered he wanted to allay any concerns they might have regarding working for a nonunion contractor.

When the group entered the office trailer, Burress asked if the Company was taking applications for sheet metal workers. An unidentified individual asked if they were all "union," and Burress answered that they were. General Superintendent Valentine, who had responded to the entry of the group, pointed out that it was a nonunion job. He did not state that the Company was not hiring. Burress stated that they were there to apply for work. Subia came into the open area with a yellow legal pad that appeared to contain a list of names. Subia stated that the list was the names of people wanting to go to work that were "ahead of you." Valentine asked Subia how many were on the list, and Subia responded, "about 50." Burress asked if they could submit applications. Valentine responded that to fill out an application they had to come back, that "right now it was a waiting list," and that they needed to "put their name on the list." The group went outside, and six of the journeymen individually wrote down their names, years of experience, and telephone numbers. Burress reentered the trailer and gave the list to Valentine who confirmed that he was able to read the information provided. Valentine testified that Subia added the names to his list. Subia did not testify that he added the names.

The list bears the date "9/4." Both Burress and applicant Eric Davis testified that the visit occurred on September 9, and no witness for the Respondent contradicted that testimony. The erroneous date on the list is immaterial. Davis testified that six journeymen accompanied Burress. Subia testified that Burress referred to having 10 or 11 journeymen with him, but he only saw 5 or 6. He testified that Burress stated that "not all the guys wanted to sign their names" to the list which is signed by six applicants including the three alleged discriminates.

General Counsel's Exhibit 6(a) reveals that three journeymen were hired by the Company within a month after September 9: Ricky Olivio on September 25, Osorio Urizar on September 30, and Emiliano Baldonado on October 4.

Employee Ricky Olivio, a journeyman with 10 years experience, was sent by the Union as a covert applicant. On September 18, he called the jobsite number and spoke with Superintendent Subia who asked him to "come in right away."

Union Organizer Burress spoke with Olivio prior to his going to the jobsite and advised him that he and two apprentices would be coming onto the site after Olivio arrived. After Olivia had arrived at the jobsite on the morning of September 18, Burress arrived, bringing with him Aflredo Camacho and Mike Bialewzewski. Subia and Olivio were looking at blueprints on a table and speaking with each other when Burress and the two apprentices entered the construction trailer. Burress told Subia that he had "two more job applicants." General Superintendent Valentine, who had appeared, asked Burress to step outside. Camacho and Bialewzewski remained inside the trailer with Subia.

Outside of the trailer, Valentine requested that Burress assure the Company, in writing, that applicants affiliated with the Union had permission to work for Cobb. Valentine had requested that Burress do so on September 9. Burress "apologized for letting it slip my mind." He thereafter sent an e-mail confirming that the members did have the permission of the Union and stating the Union's organizational objective.

Camacho and Bialewzewski spoke briefly with Subia who asked about their experience. Camacho handed Subia a resume. Subia asked whether he was a journeyman. Camacho replied that he was not, that he was a third-year apprentice "with the Sheet Metal Workers." Subia asked Camacho and Bialewzewski to write their names and telephone numbers on a piece of paper. Camacho did so. Subia stated that he was "going to contact you in a week," but did not do so. Camacho, after not receiving a call from Subia, acknowledged that he did not call or otherwise attempt to contact him. He credibly testified that, if offered a job, he would have accepted it because he did not "have a job at that time."

After his brief conversation with Camacho and Bialewzewski, Subia continued his interview with Olivio. Subia then wrote Olivio's name and telephone number on a "sticky note" that he placed on the wall of his office. Olivio does not recall his name being placed on a list. Several days later, after hearing that Cobb was trying to contact him, Olivio called Subia who had him come and fill out an application. Olivio was hired on September 25.

Thereafter, the Company hired Osorio Urizar on September 30 and Emiliano Baldonado on October 4 as journeymen. Union Organizer Burress requested Baldonado, who is now a former union member, to apply. He reported "soon after" that he had been hired. Urizar's application, dated September 29, reflects "sheet metal 8 months helping installing" and one prior employer. Baldonado's application, dated October 3, reflects that he was a "journeyman installer HAVC [sic] system" and lists three prior jobs with no dates of employment given.

When asked whether all of the journeymen hired as shown on General Counsel's Exhibit 6(a) "were on the list before them," referring to the union applicants, Subia answered, "Yes. All these—most of these guys were a [sic] list." I do not credit the foregoing response. Subia admitted that he threw away the list of names on the legal pad to which he referred on September 9 that Valentine described as a "waiting list." The separate page signed by the union members was placed into evidence. With regard to the list on the legal pad, Subia was asked, "How many people had you gone through on that list?" He answered, "I can't say." Subia, prior to the testimony of Majano and Hernandez, asserted that their names were on his list. Hernandez and Majano credibly testified that they walked onto the jobsite and spoke with Subia. Both were hired. Olivio called on Sep-

tember 18, was asked to come in, and was interviewed on that day. His name was not placed upon any waiting list. Subia had no recollection of Osorio Urizar, testifying, "I can't remember too well." He did not testify regarding how Baldonado came to be hired.

The Company hired four helpers shortly after September 18. Kevin Duncan, whose application shows no sheet metal experience, completed his application on September 18 and was hired on September 19. Three helpers were hired on September 25: Victor Gomez whose application dated September 23 reflects no sheet metal experience; John Ruiz, whose application dated September 25 reflects no sheet metal experience; and Jose Trujillo, whose application dated September 23 reflects no sheet metal experience.

At some point, Oscar Hernandez Sr. spoke with a friend about applying for work at the Kyle jobsite and then spoke with Subia on behalf of his friend. Subia responded that he could not be "hiring journeymen because the Union's on my ass, only helpers." Hernandez did not testify to a date of this conversation. Subia did not deny the foregoing conversation.

On October 18, after speaking with Union Organizer Burress, journeyman Joe Charlez, who has 11 years experience in the sheet metal trade, went to the Kyle jobsite without revealing his union affiliation. He spoke with Sheet Metal Superintendent Subia who informed him that he was not hiring at the Kyle jobsite, but believed that the Company was hiring at the Austonian jobsite. Subia called the jobsite and then provided Charlez with the name and telephone number of the sheet metal superintendent at that site, David Saldivar. Charlez went to the Austonian jobsite, access to which had not been restricted in October, and was interviewed by Saldivar. He called back and was hired on October 23.

Of the six journeymen who accompanied Burress to the Kyle jobsite and signed the list that was returned to Valentine, three are named as alleged discriminatees in the complaint herein: Eric Davis, a journeyman with 17 years experience in the trade; Leroy Franklin, a journeyman with over 27 years experience, and Raymond Roth, a journeyman with over 27 years experience. All three testified that they were unemployed at the time they went to the Kyle jobsite and that they would have accepted employment if it had been offered.

After accompanying Burress to the jobsite and signing the list, all three journeymen called Subia regarding the availability of a position. Although Roth recalled calling back once, "a couple of weeks later," Subia testified that Roth "kept calling," but that he was not hiring journeymen at that point. He mentioned no dates. Franklin recalls that he called back about 3 weeks later and was informed by Subia that he was hiring three journeymen but that if one did not show up, he would call him. Franklin reminded Subia that he was affiliated with the Union, and Subia responded that he "didn't care . . . just so long as you can do the work." Franklin was not called back. Subia recalled that Franklin stated that he "wanted to come to work and organize us," and that he told him that he was not hiring journeymen at that point. Davis called back on October 7 and spoke with Subia who informed him that the Company was not hiring at that time.

The Company conducts a safety meeting every Monday morning. On the morning of September 22, General Superintendent Valentine, near the conclusion of the meeting, made remarks regarding the Union. Employee John Grouette, who was carrying a tape recorder, recorded his remarks.

After stating that he was an "open shop guy," Valentine informed the employees that the union affiliated employees who had come to the jobsite "want your job." He stated that the "Union approached these jobs in a way that just makes you hate them," explaining that the organizer "plays like he's one guy poking his head in the door . . . and he's got ten or twelve guys behind him, and they flood my whole trailer here all wanting work, demanding work. And I run their ass out of the trailer."

Valentine then referred to fliers that had been distributed on the jobsite. Valentine admitted having been told that the fliers were distributed by "union personnel," with no further identification being given. Regarding the fliers, he stated:

> I want to know who's handing this out. I want to know if these guys are on my job. . . . If y'all are approached by a union member, I want to know about it. They're not supposed to be on our job, period. . . . We're an open shop; we will remain an open shop. . . . I want to know if somebody starts passing this shit out on my job. I want to know immediately, because I would love to throw their ass right off the job. . . .

In January 2009, John Grouette was injured on the job. General Superintendent Valentine drove him to a clinic in Austin where he received treatment. They stopped for lunch on the way back to the jobsite. Grouette, who had ceased to conceal his union affiliation, was wearing a shirt that identified the Union. Valentine stated that he did not like "some of the stuff" that Union Organizer Burress had done and specifically referred to the Union's use of an inflatable rat near the Kyle jobsite. He stated that he "would not hire a union member to organize but to work only." Valentine did not deny the foregoing statement.

2. Applications in 2009

On February 4, 2009, Burress, accompanied by six journeymen and a representative of the International Union, went to the Austonian jobsite seeking work. Access to the site was restricted and the security person summoned General Superintendent Donnie Burnett to the gate. He told Burress that all hiring was being "done through the Round Rock office." Burnett gave Burress the name of Operations Manager Graski and wrote Graski's telephone number on the back of one of his business cards which he handed to Burress.

Brian Anderson, a foreman, was eating lunch on the ninth floor of the building and observed the group. Shortly thereafter he received a call from Sheet Metal Superintendent David Saldivar who told him to tell "the guys that there was union guys outside" and to "let the guys know that they were asking specifics about the jobs as far as like pay and other things, and not to talk to them." Foreman Anderson compiled with the directive. Employee Joe Charlez testified that Anderson, after stating that the employees should not talk to union members, said that, if they did so, they would be "automatically fired." I find that the

"automatically fired" comment reflected Charlez' assumption regarding the consequence of disobedience.

Sometime thereafter, Sheet Metal Superintendent Saldivar called Foreman Anderson, journeyman Joe Patino, and George Munoz, a lead person, to the office. He asked whether they had "heard anybody talking about the Union or that information was getting leaked out to the Union about our jobsite." All three replied that they had not heard anything.

The complaint alleges that Anderson, who held the position of foreman, was a supervisor or agent. I need not address the supervisory allegation insofar as the record is clear that he was an agent when, on February 4, 2009, he complied with the instructions of admitted Supervisor Saldivar when directing employees not to talk to "union guys." *Powellton Coal Co., LLC*, 354 NLRB No. 60 at fn. 2 (2009).

Sheet Metal Superintend Saldivar summarily denied giving Anderson any instructions regarding union members being on the jobsite or questioning him and employees regarding leaks. I do not credit that denial. The record is replete with testimony establishing that foremen relay to employees instructions that they receive from superintendents. Anderson's testimony regarding the instructions that he received from Saldivar on February 4 immediately following the visit of Burress with members of the Union had no hint of fabrication. His testimony regarding the meeting in which he, Patino, and Munoz were interrogated regarding their knowledge of union talk or leaks to the Union "about our jobsite" was clear and convincing. I credit Anderson.

Following the conversation between Burress and Burnett, the group went to the Cobb office in Round Rock. A secretary located Operations Manager Graski who explained that the Company was not hiring at that point. Burress asked whether the journeymen could sign a list. Burress stated that they could not, that they needed to drive out to check on job availability. Burress asked whether they could call, and Graski agreed that they could. He provided business cards that contained his telephone number.

On March 3, 2009, Burress and six sheet metal workers went to Fort Sam Houston in San Antonio to apply for work. Sheet Metal Superintendent Bob Zoller informed the group that all hiring was being done through the Round Rock office. The following day, March 4, 2009, Burress and five of the six journeymen who had gone to San Antonio went to Round Rock.

The meeting on March 4, 2009, was not cordial. Burress stated that Superintendent Zoller had told the group to apply at Round Rock. Gaskin responded that Zoller was "mistaken, we're not hiring." Burress asked when the Company might be hiring, and Graski, referring to advertisements for positions, replied, "Buy a newspaper and find out." At one point, Graski referred to a sign on the desk stating that the Company was not hiring, picked it up and held it in front of Burress. As the group was departing, Graski refused to shake hands with Burress.

After leaving the building, Burress and the group stopped and spoke together on the sidewalk. Burress observed an unidentified individual come out of the building and "photograph us." Frank Ortega recalled that the individual was holding "a small hand held camera." David Martin recalled that the individual was using "a camera phone." Clinton Martin observed that the individual had "a phone held sideways" that was "pointed directly at us." He acknowledged that the individual could have been talking on the phone and did not know whether he was checking e-mail. Dowdy, whose back was to the building, did not observe any photographing. His failure to turn around suggests that no contemporaneous comment about photographing was made.

Following the group visit to the Round Rock office on February 4, 2009, Eric Davis began calling Graski once each week. On March 10, 2009, he received a voice mail message from Graski, and they met for an interview on March 13. Graski asked Davis a series of questions relating to duct work and air-conditioning systems. He gave no indication that the answers Davis gave were incorrect. Graski mentioned that the Company was nonunion and "would prefer it stay that way." Davis replied, "honestly," that if he were employed he would "discuss the benefits and principles of union membership with employees" when he had the opportunity. Graski replied that he "would be free to do so" except on paid working time. Davis stated that he had "no problem with that." Graski did not permit Davis to fill out an application. He told him that he was going to interview other applicants and would "give [him] a call." On March 20, 2009, Graski called stating that he had interviewed other applicants that "they [the Company] felt were more qualified," and the Company had decided not to hire him. Graski gave Davis no specifics regarding the manner in which the other applicants were "more qualified."

Graski testified that he did not hire Davis because he was a "little bit goofy, and it didn't seem like he was the kind of employee I was looking for." He further testified that Davis "didn't seem qualified." He did not address what deficiencies he perceived in Davis' qualifications. He did not identify any individual whom he decided to hire who had superior qualifications nor testify to how their qualifications were superior. He acknowledged that Davis stated his intention "to organize" for the Union, stating that he "brought it up every moment that he could."

The Respondent produced no evidence in support of Graski's assertion that other applicants were better qualified than Davis. Pursuant to my order relating to compliance with the subpoena of the General Counsel, the Respondent submitted documents that I have received as posthearing exhibits which reflect the hiring of journeymen at the Austonian and at Fort Sam Houston. The lists, unaccompanied by applications showing their experience, reflect that Jorge Ytuarte was hired at the Austonian jobsite on March 25, 2009, which was after Graski informed Davis on March 20 that other applicants were more qualified. At Fort Sam Houston, three journeymen, Richard Cortez, Brian Fondanova, and Frederick Vredenburgh, were hired after Graski's March 15, 2009 interview with Davis but before he informed him that other applicants were more qualified. The record does not reflect their qualifications, whether any or all of those three employees were interviewed before Davis, or whether they were notified that they would be hired prior to Graski's interview with Davis. On April 2, 2009, Juan Rodriguez was hired at Fort Sam Houston. The record does not reflect his qualifications.

Following the visit of the group that accompanied Burress on March 4, 2009, journeyman Robert Dowdy, who has over 30 years in the trade, began calling the Company for an interview. On March 23, 2009, Graski called him and asked him to come in. He did so. Graski questioned Dowdy regarding sheet metal work and then gave him an application. He also gave him a medical questionnaire. On that document Dowdy honestly reported that he had diabetes, high blood pressure, dizziness, carpal tunnel syndrome, depression, and loss of memory. He acknowledges discussing several of the foregoing conditions with Graski, as well as short-term memory loss. Dowdy admitted telling Graski that he became dizzy "anytime he got up," and that he once had gotten dizzy when on a ladder. His application omits employment between 2002 and 2008. Dowdy testified that he put down "what I remembered." Dowdy recalled that he informed Graski that his "heart was in the Union" and that Graski, referring to working time, stated that, if he hired him, he did not want him to say anything about the Union for "four hours in the morning and four hours in the evening." As Dowdy was leaving he recalled that Graski said he would call him on Thursday or Monday and "let you know where I'm going to put you." When Dowdy did not receive a call on Thursday, he called Graski on Friday. Graski informed him that he did not have anything for him.

Operations Manager Graski denied offering Dowdy a job or telling him that he was going to start work. He recalls telling Dowdy that he was going to review his application. He acknowledges speaking to Dowdy on Friday, stating that he told him that, "after review of his application," he had decided not to offer him a position. Graski explained that, when interviewing Dowdy, he had concerns regarding his inability to remember his employers during the gap between 2002 and 2008 reflected on his application and that, upon reviewing the medical questionnaire "there was just a host of things." He states that he did not hire Dowdy because he did not feel that "he could safely work" and that he would need "continuous supervision." Graski admitted that, when informing Dowdy that he was not offering him a position, he did not tell him that he was concerned about safety or his mental illness because he did not want "to hurt his feelings."

My assessment of the foregoing conflicting versions of what was said with regard to hiring Dowdy is complicated by Dowdy's admission that he has filed a disability discrimination complaint with the Equal Employment Opportunity Commission (EEOC). A note written by Dowdy states that he met with "Jon," presumably Jon Burress, "to file a grievance with EEOC about Cobb Mechanical not hiring me because they said I was a safety risk [b]ecause I have diabetes and arthritis." Dowdy, in his testimony, did not mention anything about being told that he was a safety risk. The safety risk rationale is consistent with the testimony of Graski, although he testified that he did not state that reason to Dowdy.

Frank Ortega was in the group that accompanied Burress on March 4. Thereafter, he began making weekly calls to the Company. On April 13, 2009, he received a call from Graski and was asked to come to an interview on April 15. Union Organizer Burress drove Ortega to the interview and waited in his vehicle for Ortega. Ortega had 8 years experience in the sheet metal trade. Although Ortega had worked as a "classified" employee, a position he described as being "under a journeyman," when he joined the Union in 2006, he received the classification of "Pre-Apprentice Training." Thereafter he enrolled in the apprenticeship program of the Union. He recalled that there was "discussion about possibly [enrolling as] a second or third [year apprentice], but it wasn't done." Ortega was placed as a first year apprentice. Ortega, as reflected on his application, applied for a journeyman position. Ortega wore a shirt bearing a union emblem to the interview, and after giving his work history recalled that Graski stated that the companies he listed were "union shops." Ortega pointed out that he had also worked at nonunion shops. At some point, Graski asked whether Ortega was with "that bunch that came in last time," and Ortega acknowledged that he was. Ortega made no statement regarding intent to engage in organizational activity. Graski asked a series of questions regarding sheet metal work. Ortega acknowledges that, after he answered the questions, Graski commented that he "needed some more experience in the trade." Ortega agreed, stating that was why he was there; he was "looking for work and an opportunity." Ortega did not fully complete the application process in that he did not fill out the medical questionnaire, take a drug test, or provide Graski with a copy of his social security card. Neither Ortega's classification nor his pay rate was mentioned.

Ortega recalls that Graski gave him a card, asked him to call on Friday, and stated that "possibly I could start on Monday." Graski denied asking Ortega to call, stating that he told him that he had not completed the application process and that he would contact him "in the next couple of days." I am inclined to credit Graski regarding who had the obligation to call in view of his normal protocol. Graski told both Davis and Dowdy that he would call them. Regardless of what he actually was told, Ortega understood that he was supposed to contact Graski.

Graski attempted to call Ortega on Thursday, April 16, 2009, but received a recording stating that his telephone had been disconnected. Ortega became aware on April 17, 2009, that his telephone had been disconnected. On April 17, at the San Antonio union hall, Burress learned that Ortega's telephone had been disconnected. He told Ortega that he needed to give the Company a telephone number so that they could contact him. Ortega did not inform Burress that he was supposed to call Graski. Burress dialed Graski's number on his cellular telephone and then gave the telephone to Ortega. Ortega reached an answering machine and left an alternate number, the telephone number of his brother-in-law. Ortega recalled making a second call from a pay telephone on the afternoon of April 17, 2009. He did not testify that he left the alternate number during that call.

Graski denied receiving any alternate number, and I credit that testimony. After having the company receptionist attempt to contact Ortega on April 17, 2009, only to receive the same message Graski had received on April 16, that the telephone had been disconnected, Graski made no further effort to contact Ortega. Ortega, after making the two telephone calls on April 17, made no further effort to contact Graski.

C. Analysis and Concluding Findings

1. The 8(a)(1) allegations

Subparagraph 7(a) of the complaint alleges that Sheet Metal Superintendent Subia, in August, informed employees that the Respondent would not hire former employees who had joined the Union and/or informed employees that the Respondent could not hire any more journeymen because of the Union. Subparagraph 7(b) alleges that Subia interrogated applicants about their union activities.

With regard to the threat not to hire alleged in subparagraph 7(a), the General Counsel argues that Subia's informing applicant Oscar Hernandez Sr. that he usually did not hire union members because they "quit on me" violated the Act insofar as an employer has "no right to require that a worker refrain from engaging in protected activity." An individual quitting severs the employment relationship and, absent circumstances such as a constructive discharge, does not relate to protected activity. Subia's statement regarding quitting did not relate to protected activity. Hernandez, who was hired, stated no intention to engage in protected activity, and Subia stated no requirement that Hernandez refrain from engaging in such activity. I shall recommend that this portion of the allegation be dismissed.

Subia did not deny the testimony of Hernandez regarding his conversation with Subia concerning hiring a friend of Hernandez. Subia responded that he could not be "hiring journeymen because the Union's on my ass, only helpers." Subia did not deny the foregoing threat of refusal to hire that was specifically alleged, albeit in the alternative, in subparagraph 7(a). Although Hernandez placed no date upon the conversation, it would appear that the conversation occurred after early October, after which journeymen ceased being hired. Nevertheless, the allegation is clear and the testimony of Hernandez, undenied by Subia, tracks the allegation of the complaint. "[A] discrepancy in dates, without more, [is] insufficient to find that a respondent has been prejudiced." *Onyx Waste Services*, 343 NLRB 23, 29 (2004). By informing an employee that journeymen would not be hired because of the Union, the Respondent violated Section 8(a)(1) of the Act.

I have credited Subia's denial that he interrogated any employee regarding the employee's union activities, and I shall recommend that subparagraph 7(b) be dismissed.

The complaint, in paragraph 8 alleges that General Superintendent Valentine, in September, stated that the Respondent would "have nothing to do with the Union and/or that Union workers are not welcome on the jobsite" and threatened the discharge or ejection of employees from the jobsite because of their Union affiliations."

The foregoing allegations relate directly to statements recorded as Valentine made the alleged remarks. After stating that he was an "open shop guy," Valentine commented upon the conduct of the Union, with an organizer "poking his head in the door," but being followed by a group wanting work. His reaction, clearly stated, was to "run their ass out of the trailer." The foregoing statement to employees informed them that the efforts of union affiliated employees who sought employment with the assistance of the Union would be deprived of consideration because General Superintend Valentine would "run their ass out of the trailer." *Quality Mechanical Insulation, Inc.*, 340 NLRB 798, 814 (2003).

Valentine then referred to the fliers that had been distributed on the jobsite. He told the employees, "I want to know who's handing this out. I want to know if these guys are on my job. . . . If y'all are approached by a union member, I want to know about it. . . . I want to know if somebody starts passing this shit out on my job. I want to know immediately, because I would love to throw their ass right off the job." As pointed out in the briefs of the Charging Party and the General Counsel, Cobb, a subcontractor, established no property interest in the jobsite of the general contractor, Lott Brothers. Although Valentine testified to access requirements of Lott Brothers, there is no evidence that the Respondent enforced those requirements insofar as it interviewed applicants who came directly to its construction trailer. Valentine did not refer to Lott Brothers on September 22 when he spoke about "my job" and somebody "passing out this shit on my job." See *Zarcon, Inc.*, 340 NLRB 1222, 1227 (2003). Valentine understood that union personnel had passed out the fliers, but he was unaware of their identity. His telling employees, several of whom were union members, that if they were "approached by a union member, I want to know about it," unlawfully directed that employees report upon the protected activities of their fellow employees. His threat to throw whoever was passing out fliers "right off the job" made no allowance for distribution in nonworking areas on nonworking time and unlawfully threatened eviction for engaging in protected activity. The Respondent, by the remarks of General Superintendent Valentine on September 22, violated Section 8(a)(1) of the Act.

Paragraph 9 of the complaint alleges that General Superintendent Valentine, on January 28, 2009, informed employees that the Respondent would "not hire Union workers or allow them on the jobsite" if they wanted to organize. The foregoing allegation is predicated upon the uncontradicted testimony of employee Grouette that Valentine, at the restaurant where they ate lunch, stated that he "would not hire a union member to organize but to work only." An "interest in organizing . . . is not incompatible with a genuine interest in employment, and certainly does not, in and of itself, render an applicant unfit for employment." *Tradesmen International*, 351 NLRB 579, 582 (2007). Valentine's statement that he would not hire a union member who wished to exercise the right to organize violated Section 8(a)(1) of the Act.

Paragraph 10 of the complaint alleges that Sheet Metal Superintendent David Saldivar and/or Brian Anderson threatened to discharge employees if they communicated with the Union. I have credited Anderson's testimony that, on February 4, 2009, he was directed by Saldivar to inform employees that they should not "talk to" union members and that he carried out that directive. The foregoing prohibition violated Section 8(a)(1) of the Act.

Paragraph 11 alleges that Saldivar interrogated employees about their union activities and the union activities of other employees. I have credited Anderson's testimony regarding the meeting in which he, Patino, and Munoz, were interrogated by Saldivar. The interrogation was consistent with the prohibition regarding speaking with union members. I find that the interro-

gation was coercive. It was conducted in an office by the second highest ranking supervisor on the jobsite. Saldivar sought information regarding their knowledge of union talk or leaks to the union, thus, interrogating them about their union activities as well as the union activities of other employees. In so doing, the Respondent violated Section 8(a)(1) of the Act.

Paragraph 12 of the complaint alleges that the Respondent engaged in surveillance by photographing employees engaged in union activities. The evidence establishes that an unidentified individual, in front of the Cobb offices on March 4, 2009, was holding a device that appeared to be a small camera or a cellular telephone. Robert Dowdy, who did not turn around, did not see the individual which suggests that no one commented upon the presence of the individual at the time. Although the individual was holding the device in front of his face, not to his ear, I note that the foregoing position would be consistent with either sending or reading a text message on a cellular telephone. I shall recommend that this allegation be dismissed.

2. Refusals to consider and/or hire

As hereinafter discussed, the Respondent was hiring or had concrete plans to hire at the relevant times herein. There is no evidence that the Respondent excluded the alleged discriminatees from its hiring process insofar as, at the Kyle jobsite, it took their names and telephone numbers and, at Round Rock, granted them interviews. Thus, I shall consider this case under the criteria relating to discriminatory refusals to hire.

Pursuant to the Board decision in *FES*, 331 NLRB 9, 12 (2000), the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), 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. The recent decision of the Board in *Toering Electric Co.*, 351 NLRB 225, 233 (2007), requires that, if an employer adduces evidence that calls into question "the genuineness of an application" for employment, the General Counsel must establish that the individual "was genuinely interested in seeking to establish an employment relationship."

An employer's exclusion of union affiliated applicants who give notice of a "present intent to organize" establishes a "hostile motive." *Flour Daniel, Inc.*, 333 NLRB 427, 440 (2001). As already noted, "An "interest in organizing . . . is not incompatible with a genuine interest in employment, and certainly does not, in and of itself, render an applicant unfit for employment." *Tradesmen International*, 351 NLRB at 582.

a. The Kyle, Texas jobsite

The complaint alleges that the Respondent, on September 9, unlawfully refused to hire journeymen Eric Davis, Leroy Franklin, and Ray Roth and, on September 18, refused to hire apprentice Alfredo Camacho.

The Respondent had placed newspaper advertisements for sheet metal workers in early September. After September 9, the day that the applicants affiliated with the Union left their names, telephone numbers, and years of experience, the Respondent hired Ricky Olivio on September 25, Osorio Urizar on September 30, and Emiliano Baldonado on October 4.

The three journeymen were fully qualified. Davis had 17 years experience, 14 as a journeyman. Both Franklin and Roth both had more than 27 years experience. Camacho was a third-year apprentice.

General Superintendent Valentine's remarks to the work force on September 22 confirm the Respondent's animus towards union organizational activity. As already noted, employee Hernandez, although admitting his union affiliation, made no statement regarding any intent to engage in organizational activity when he was interviewed by Subia.

The Respondent, in its brief, argues that the applicants were not "genuinely interested" in obtaining employment. The Respondent cites the comment of Union Organizer Burress that, if the journeymen were offered jobs they should accept and "talk about it later," but the brief ignores the explanation given by Burress that he sought to allay any concerns regarding working for a nonunion contractor of two of the group who had never previously "salted." The Respondent, relying upon the testimony of Subia, argues that the failure of all members of the group to sign the list that Burress returned to Valentine "is evidence of a lack of genuine interest in employment by the entire group." I disagree. I view the signing of the list as affirmative evidence of a genuine desire to obtain employment on the part of each journeyman who signed.

Citing the testimony of covert applicant Hernandez, that he quit Cobb "when the Union called me back to work," the Respondent argues that alleged discriminatee Davis, who specifically acknowledged having permission from the Union to work for a nonunion contractor, would also have quit. Pursuant to Valentine's request, Burress assured the Respondent in writing that the applicants had permission to work nonunion. Hernandez had not quit when Davis and the other alleged discriminatees sought work in September. I also note that Graski did not cite concern about Davis quitting as a factor in his refusal to hire him in March 2009.

Subia confirms that both Roth and Franklin called with regard to work after September 9. Davis called on October 6. All three were out of work, and each credibly testified that, if offered a position, they would have accepted it. I find that the three alleged journeyman discriminatees were legitimate applicants and were genuinely interested in obtaining a position with the Respondent.

I also find that apprentice Alfredo Camacho was genuinely interested in obtaining a position with the Respondent. The Respondent argues that Camacho's failure to attempt to contact the Respondent establishes that he was not genuinely interested in establishing an employment relationship. I would agree if the record established that Camacho understood that he needed to contact the Respondent. His uncontradicted testimony, however, establishes that Subia took his name and told him that the Respondent would contact him. He was not told that he needed to do anything more. He did was he was told to do. See *Har-*

mony Corp., 349 NLRB 781, 783 (2007). Camacho's failure to take further action does not contradict his credible testimony that he was out of work and would have accepted a position if one had been offered.

I find that the General Counsel established a prima facie case with regard to these four alleged discriminatees. Having established a prima facie case, pursuant to *FES*, supra at 12, the burden shifts "to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation."

The Respondent, in its brief, argues that the "alleged discriminatees were not hired because there were other persons who earlier had expressed an interest in a position or the person hired was referred or recommended by a current employee." There is no probative evidence in support of that argument.

Subia was called as a witness by the General Counsel and testified pursuant to Rule 611(c) of the Federal Rules of Evidence. He was not called as a witness by the Respondent. There is no evidence that any journeyman hired after September 9 had qualifications superior to the alleged discriminatees. Olivio had only 10 years experience. The application of Urizar, who was hired as a journeyman, reflects "sheet metal 8 months helping installing." Subia made no claim that any employee he hired after September 9 had qualifications superior to the alleged discriminatees who had accompanied Burress and signed the list on September 9.

Assuming that the Respondent did have a waiting list on September 9, that list, with the exception of the applicants affiliated with the Union, had been exhausted by September 18 when Olivia was interviewed. Subia placed the paper bearing Olivio's name on the wall, not on a list. Subia had no recollection of the circumstances surrounding the hiring of Urizar or Baldonado. Burress had sent Baldonado to apply and "soon after" learned that he had been hired. When questioned by counsel for the General Counsel as to how many of the names on the list he had gone through, Subia answered, "I can't say."

The Respondent presented no evidence regarding its failure to hire apprentice Alfredo Camacho, a third-year apprentice whose qualifications far exceeded the helpers hired within a week of his accompanying Burress to the jobsite on September 18.

The Respondent has not established that it would not have hired Eric Davis, Leroy Franklin, Ray Roth, and Alfredo Camacho in the absence of their union affiliation and activities. By refusing to hire them because of their union affiliation and activities, the Respondent violated Section 8(a)(3) of the Act.

b. Applications in 2009

The complaint alleges that the Respondent unlawfully refused to hire Eric Davis on March 16, 2009; Robert Dowdy on March 23, 2009; and Frank Ortega on April 15, 2009.

There is no contention that positions were not available. Operations Manager Graski would not have taken the time to interview the applicants if the Respondent had not been hiring. He had turned away Burress and the applicants who accompanied him to the Round Rock office on February 4, 2009, and March 4, 2009, because the Respondent was not hiring.

Davis and Dowdy were fully qualified for the positions of journeyman for which they applied. Ortega was not qualified for the position of journeyman, the position for which he applied, but Graski testified that he sought to offer him some unspecified position.

Although no antiunion statements are attributed to Graski, as already discussed, the record establishes the animus of the Respondent towards union organizational activity.

Each of the three discriminatees sought and went to interviews for employment at Round Rock. Consistent with their testimony, I find that Davis and Dowdy, both of whom were out of work and credibly testified that they would have accepted a position if offered, were legitimate applicants seeking to establish an employment relationship with the Respondent.

I need not determine whether Ortega was a legitimate applicant at the time he applied insofar as his subsequent actions belie a genuine desire to establish an employment relationship. At his interview on April 15. 2009, Ortega, unlike Davis and Dowdy, made no statement relating to an intent to organize or that his "heart was in the Union." When Graski noted that some of Ortega's experience was with "union shops," Ortega pointed out that he had also worked at nonunion shops. Notwithstanding Ortega's lack of journeyman skills, Graski decided to offer him some position. I need not determine Graski's motivation for attempting to offer a position to Ortega, but note that Ortega made no statement reflecting a desire to engage in organizational activity. Graski sought to contact Ortega only to learn that his telephone had been disconnected. The Respondent, after 2 days, ceased trying to contact Ortega. Whether Respondent was obligated to take any further action is immaterial in view of Ortega's understanding that it was he who was obligated to contact the Respondent.

Unlike the situation regarding apprentice Camacho, who was told that the Respondent would contact him, Ortega, either correctly or incorrectly, understood that he was to contact Graski. I find it incomprehensible that Ortega, prior to his conversation with Burress on April 17, 2009, and knowing that his telephone was inoperative, would not have called the Respondent and provided an alternate number. His failure to do so until prompted to do so by Burress speaks volumes. Graski credibly denied receiving the alternate number. Ortega gave no explanation regarding his failure to make any further attempt to contact Graski after having left an alternate number but receiving no response. Ortega's failure to make any further attempt to contact Graski reflects that, for whatever reason, he ceased to desire employment with the Respondent. In these circumstances, I find that the General Counsel did not establish a prima facie case with regard to Ortega, and I shall recommend that this allegation be dismissed.

I find that the General Counsel did establish a prima facie case with regard to the failure of the Respondent to hire Davis and Dowdy. Thus, it was incumbent upon the Respondent to show that it would not have hired them even in the absence of their union activities or affiliation.

Eric Davis had more than 17 years experience as a sheet metal worker, 14 as a journeyman. Graski testified that he did not offer a position to Davis because he was a "little bit goofy, and it didn't seem like he was the kind of employee I was look-

ing for." He further testified that Davis "didn't seem qualified." He did not elaborate upon his definition of "goofy," nor did he address any deficiencies that he perceived in Davis' qualifications. He did not identify any individual whom he decided to hire who had superior qualifications. He acknowledged that Davis stated his intention "to organize" for the Union, stating that he "brought it up every moment that he could." Although Graski may have perceived the stated intention of Davis to speak favorably with regard to the Union to have been "goofy," it is protected activity.

The posthearing exhibits submitted by the Respondent reflect that three applicants were hired after Davis was interviewed but before he was informed that the Respondent felt that other applicants were "more qualified." No records were provided reflecting the dates of the interviews of those three applicants. Two more journeymen were hired after March 20, 2009. No evidence of the qualifications of any of the five was presented. The Respondent produced no evidence that other applicants than Davis were "more qualified" than he was.

The Respondent, in its brief at footnote 11, notes that the General Counsel offered "no testimony or evidence" relating to the qualifications of anyone hired after Davis' interview. The foregoing observation misallocates the responsibility for adducing evidence. Whether other applicants were better qualified than Davis is not established on this record. The Respondent's records, records that were not presented at the hearing, would reflect the qualifications of the employees who were hired. The Respondent presented no evidence "that those who were hired had superior qualification[s] and would have been hired over the union applicants even in the absence of union affiliation . . . . These were the Respondent's burdens to shoulder." *Air Management Services*, 352 NLRB 1280, 1289 (2008). The Respondent has not established that it would not have hired Eric Davis in the absence of his union affiliation and stated intention to engage in protected organizational activity. By refusing to hire Eric Davis, the Respondent violated Section 8(a)(3) of the Act.

Robert Dowdy, although fully qualified as a journeyman sheet metal worker, acknowledged various significant medical conditions, including carpal tunnel syndrome and dizziness. I credit Graski's testimony that he felt that Dowdy would constitute a safety risk and would require constant supervision. I find that the Respondent established that it would not have offered employment to Dowdy even in the absence of his union activities and affiliation, and I shall recommend that the refusal to hire allegation relating to Dowdy be dismissed.

Conclusions of Law

1. By informing employees that the Company would no longer hire journeymen because of the Union, informing employees that the Company would not consider for hire employees who sought employment with the assistance of the Union, directing employees to report upon the protected activities of other employees, threatening to evict employees who distributed union literature from the jobsite, threatening not to hire union members who wished to exercise their right to engage in organizational activity, directing employees not to talk to union members, and coercively interrogating employees regarding their union activities and the union activities of other employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By refusing to hire Eric Davis, Leroy Franklin, Ray Roth, and Alfredo Camacho because of their union affiliation or to discourage union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

Remedy

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

The Respondent having unlawfully refused to hire Eric Davis, Leroy Franklin, Ray Roth, and Alfredo Camacho, it must offer them instatement and make them whole for any loss of earnings and other benefits.

None of the three journeymen who were hired at the Kyle jobsite within a month of September 9, 2008, were shown to have greater experience than journeymen Eric Davis, Leroy Franklin, and Ray Roth, who signed the list given to the Respondent in that order. Absent the discrimination against them, I find that they would have been offered employment in the order in which they signed the list. Thus, the backpay period of Davis begins on September 25, 2008, the day Ricky Olivio was hired; the backpay period of Franklin begins on September 30, 2008, the day that Osorio Urizar was hired, and that the backpay period of Roth begins on October 4, 2008, the day that Emiliano Baldonado was hired. I find that the backpay period of apprentice Alfredo Camacho begins on September 25, the day that three helpers whose applications reflect no sheet metal experience were hired. If the duration of the backpay period of Davis be found to have ended before April 20, 2009, the day he was denied employment with the Respondent following his interview with Operations Manager Graski, I find that he is entitled to a second backpay period beginning on that date insofar as three journeymen were hired between the date of his interview and the date he was denied employment.

Because the foregoing discriminatees are union salts, the duration of their backpay periods and continuing entitlement to an offer of instatement shall be determined in accordance with *Oil Capitol Sheet Metal*, 349 NLRB 1348 (2007). Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In view of the decision in *National Fabco Mfg.*, 352 NLRB No. 37 at fn. 4 (2008) (not reported in Board volumes), I need not address the request of the General Counsel regarding compound interest.

The Respondent will also be ordered to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended

ORDER

The Respondent, Cobb Mechanical Contractors, Inc., Round Rock, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees that the Company would no longer hire journeymen sheet metal workers because of the Union.

(b) Informing employees that the Company would not consider for hire employees who sought employment with the assistance of the Union.

(c) Directing employees to report upon the protected activities of other employees.

(d) Threatening to evict from the jobsite employees who distributed union literature.

(e) Threatening not to hire union members who wished to exercise their right to engage in organizational activity.

(f) Directing employees not to talk to union members.

(g) Coercively interrogating employees regarding their union activities and the union activities of other employees.

(h) Failing and refusing to hire job applicants on the basis of their union activities or membership in Sheet Metal Workers Local Union 67, a/w Sheet Metal Workers International Union, or any other labor organization.

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

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

(a) Within 14 days from the date of this Order, offer immediate employment to Eric Davis, Leroy Franklin, Ray Roth, and Alfredo Camacho in the positions for which they applied or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(b) Make Eric Davis, Leroy Franklin, Ray Roth, and Alfredo Camacho whole for any loss of earnings and benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire Eric Davis, Leroy Franklin, Ray Roth, and Alfredo Camacho, and within 3 days thereafter notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

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

(e) Within 14 days after service by the Region, post at its office in Round Rock, Texas, and at its jobsites in central Texas, copies of the attached notice marked "Appendix."[4] 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 September 22, 2008.

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

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

Dated, Washington, D.C. December 28, 2009.

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 tell you that the Company will not hire journeymen sheet metal workers because of the Union.

WE WILL NOT tell you that the Company will not consider for hire employees who seek employment with the assistance of the Union.

WE WILL NOT direct you to report upon the protected activities of other employees.

WE WILL NOT threaten to evict employees who distribute union literature on the jobsite.

WE WILL NOT threaten not to hire union members who wish to exercise their right to engage in organizational activity.

WE WILL NOT coercively interrogate any of you regarding your union activities or the union activities of other employees.

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.

[4] 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."

WE WILL NOT fail and refuse to hire you on the basis of your union activities or your membership in Sheet Metal Workers Local Union 67, a/w Sheet Metal Workers International Union, or any other labor organization.

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

WE WILL, within 14 days from of the Board's Order, offer immediate employment to Eric Davis, Leroy Franklin, Ray Roth, and Alfredo Camacho in the positions for which they applied, or, if such positions no longer exist, to substantially equivalent positions.

WE WILL make Eric Davis, Leroy Franklin, Ray Roth, and Alfredo Camacho whole for any loss of earnings and benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

WE WILL, within 14 days from of the Board's Order, remove from our files any reference to the unlawful refusal to hire Eric Davis, Leroy Franklin, Ray Roth, and Alfredo Camacho and, WE WILL, within 3 days thereafter notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

COBB MECHANICAL CONTRACTORS, INC