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

TITUS ELECTRICAL CONTRACTING, INC.

and **CASES 16−CA−21613**
16−CA−21819

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 520

Jamal Allen, Esq., for the Acting General Counsel.
Vincent T. Norwillo, Esq., of Cleveland, Ohio for the Respondent.
Michael Murphy, Esq. of Austin, Texas, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This supplemental proceeding was tried before me in Austin, Texas, on June 1 and 2, 2011, pursuant to an order of the National Labor Relations Board (Board) issued on September 30, 2010. *Titus Electrical Contracting, Inc*., 355 NLRB No. 222 (2010).

On January 17, 2002, Administrative Law Judge Pargen Robertson issued a decision in the instant matter involving charges filed by the International Brotherhood of Electrical Workers Local 520 (the Union) against Titus Electrical Contracting, Inc. (Respondent.) On September 30, 2010, the Board issued a Decision and Order and Order Remanding. Although the Board affirmed the judge's rulings, findings, and conclusions in part, the Board remanded a portion of the case to the judge for further resolution.[1]

In its decision and order of remand, the Board explained that while the judge found that Respondent unlawfully refused to hire assistant union business Agent Rick Zerr (Zerr),

[1] The original case also involved cases 16-CA-21010-2, 16-CA-21598, 16-CA-21598-2, 16-CA-21694, 16-CA-21701, 16-CA-21732, 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. Only cases 16-CA-21613 and 16-CA-21819 contained the allegations that were remanded to the administrative law judge.

there was contradictory evidence that was not addressed or reconciled in the judge's decision. Accordingly, the Board severed and remanded that portion of the case to the judge for further credibility resolutions in determining the lawfulness of Respondent's failure to hire Zerr. The Board also severed and remanded to the judge the determination as to whether Respondent unlawfully failed to hire applicant John Voight. Finally, the Board remanded to the judge the issue of whether Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by photographing union pickets on March 22, 2002. Because Judge Robertson was no longer with the agency at the time of the Board's remand, I conducted the remanded hearing and issued the following in accordance with the Board's order of remand.

Pursuant to the Board's order of remand, a hearing was held in which the parties were given a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence within the scope directed and permitted by the Board's order of remand. Upon the conclusion of the taking of testimony, the parties were also given the opportunity to file posthearing briefs. The entire record, including my observation of the demeanor of the witnesses, as well as the parties' post hearing briefs[2], has been duly considered.

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[2] After two requests for extensions of time to file posthearing briefs, the final deadline for filing posthearing briefs in this matter was set for August 23, 2011. Counsel for the Acting General Counsel, the Union, and Respondent all filed timely briefs on August 23, 2011. On August 24, 2011, Respondent also filed a corrected posthearing brief. On August 25, 2011, counsel for the Acting General Counsel filed an opposition to the receipt of Respondent's August 24, 2011 corrected posthearing brief. Counsel for the Acting General Counsel asserted that inasmuch as Respondent emailed a copy of its brief to the other parties at 4:16 p.m. CST, Respondent would have had ample opportunity to make any necessary corrections prior to the established deadline of 11:59 p.m. Eastern Standard Time (EST) on August 23, 2011. Counsel for the Acting General Counsel also opposed the receipt of Respondent's corrected brief because Respondent provided no advance notice to the other parties of its intent to file the "corrected" brief. On August 26, 2011, I directed Respondent to explain the basis for the corrected brief and to identify each item that distinguishes the corrected brief from the originally filed brief. In a response submitted on August 29, 2011, Respondent asserts that all "edits" in the corrected brief address formatting issues affecting the presentation of the document or correct inadvertent grammatical and typographical errors. Respondent contends that the corrected brief was filed because of a computer malfunction on August 23, 2011, as well as a miscommunication with the Division of Judges. Counsel for Respondent asserts that he relied upon information that he received in a contact with the Division of Judges in believing that the brief was due by the close of the business day on August 23, 2011, rather than by the end of the calendar day. He asserts that the original brief was therefore filed without the opportunity to correct formatting, typographical, or grammatical errors. On August 30, 2011, counsel for the Acting General Counsel filed a response to the Respondent's response, contending that Respondent's August 29, 2011 response was deficient as Respondent had failed to comply with my earlier instructions concerning clarification for the need for the corrected brief. Counsel for the Acting General Counsel argues that Respondent only provided a sampling of the corrections in the "corrected" brief rather than a listing of each and every correction. Furthermore, counsel for the Acting General Counsel asserts that Respondent's assertion that it relied upon erroneous information about the correct deadline for e-filing its brief is without merit. Counsel argues that Respondent's reliance upon erroneous information was misplaced as the agency's e-filing system advises the parties filing e-documents that the Agency will accept electronic filings up to 11:59 p.m. in the local time zone of the receiving office on the due date. On September 6, 2011, Respondent filed a response to the Acting General Counsel's opposition to the submission of the corrected brief. Respondent asserts that the network computer glitch that interrupted access to the working document as well as the misinstruction from the Division of Judges constitutes good cause for the acceptance of the corrected brief. The Respondent again argues that the nonsubstantive nature of the edits contained in the corrected brief only clarify the communication of Respondent's arguments and add no factual

I. FINDINGS AND CONCLUSIONS

A. Background

1. The significant Employers involved in this matter

a. Guy's Electric

In 2000 and 2001, Eileen and Jean-Guy Fournier were owners of Guy's Electric; an electrical contractor doing business in Austin, Texas. Jean-Guy Fournier was the president of the business and Eileen Fournier served as vice president/secretary. Although Jean-Guy Fournier was the master electrician for Guy's Electric, Eileen Fournier also had experience as a general contractor. As of the remanded hearing in this matter, the Fournier's had owned the business for 40 years.

During the relevant time period for the issues involved in this case, MW Builders was the general contractor for a construction project identified as the Town Lake Community Events Center (Town Lake) in Austin, Texas. In 2000, Guy's Electric became the initial electrical subcontractor for the Town Lake project and Carl Jackson was the project manager for Guy's Electric for the project. Prior to the Town Lake project, Guy's Electric had been a

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premise or legal basis for those arguments. Respondent further included a comprehensive summary of each edit submitted to effect the proper communication of the arguments in its original brief. Respondent submits that each of the grammatical and other edits are nonsubstantive, but still critical to the proper communications of Respondent's arguments and are essential to a fair and judicial assessment of the hearing evidence. I have considered all of the above-referenced responses and opposition. There is no indication, nor does the Union or the Acting General Counsel argue, that Respondent's corrected brief contains substantive changes or that Respondent has deleted, added, or modified any factual premise or legal argument. Furthermore, neither the Acting General Counsel nor the Charging Party has shown that they were prejudiced by my receipt of Respondent's corrected brief. With respect to the issue of whether Respondent's corrected brief is accepted, I note that such acceptance is apparently within my discretion because Rule 102.121 of the Board's Rules and Regulations provides that the rules and regulations "shall be liberally construed to effectuate the purposes and provisions of the Act." See also *Avatar, Inc*., 262 NLRB 1058 (1982); *Otis Elevator Co*., 255 NLRB 235, 240-241 fn. 1 (1981).

Accordingly, I find no basis in this very limited and specific instance to reject Respondent's corrected posthearing brief in its entirety. The 35 proposed corrections appear to simply address misspellings, grammatical errors, or substitutions for words or phrases related to writing style.

By my ruling, however, I do not sanction the filing of a corrected brief for such a purpose. As counsel for the General Counsel points out in his opposition and response, Respondent was given a total of 82 days to submit a brief that Respondent felt worthy of submission. Parties are given specific deadlines to file their briefs in order that all parties can file their briefs at the same time and can operate from a level playing field. Based upon Respondent's assurances and assertions that there are no substantive differences between the two briefs and although I have not rejected Respondent's corrected brief for the reasons discussed above, I have nevertheless relied upon Respondent's originally filed brief in making the findings herein and in determining and evaluating Respondent's legal argument and factual analysis.

nonunion employer and had never been the subject of any unfair labor practice charges. While serving as the electrical contractor on the Town Lake project, Guy's Electric became the focus of the Union's salting[3] campaign. After beginning the Town Lake project, nine unfair labor practice charges were filed against Guy's Electric. In March 2001[4], Guy's Electric recognized the Union and on May 3, 2001, Guy's Electric and the Union entered into a labor agreement. After Guy's Electric recognized the Union, Rick Zerr (Zerr) became the only union steward on the Town Lake project. Ellen Fournier (Fournier) testified that after she signed a collective-bargaining agreement with the Union, the unfair labor practice charges were settled and the Union's picketing and hand-billing ceased. Without hesitation, Fournier testified that the Union intimidated and forced her company to sign the union contract. Guy's Electric ceased to be the electrical contractor on the job in or about November 2001. Shortly after leaving the job as electrical contractor on Town Lake, Guy's Electric filed for bankruptcy.

b. Titus Electrical Contracting, Inc.

Titus Electrical Contracting, Inc. (Respondent) is an electrical contractor in the construction industry performing commercial construction with an office and place of business in Austin, Texas. Stephen Titus (Ty) Runyan (Runyan) is Respondent's president and his wife Shelly is the vice president. They have owned and operated the business for 25 years. There is no dispute that Respondent has operated as a nonunion contractor during its existence. As president, Runyan is active in the operation of all areas of the business; including the hiring of employees. As vice president, Shelly Runyan works at Respondent's offices and is responsible for public relations, marketing, and other administrative duties.

In late October or November 2001, MW Builders contacted Runyan about the possibility of Respondent's taking over the electrical contract for the Town Lake project and in approximately December 2001 or January 2002, Respondent became the electrical contractor for the Town Lake project. In December 2001, Respondent hired Carl Jackson as the project manager for the Town Lake project.

c. Tradesmen International

During the relevant period in 2001 and 2002, Tradesmen International engaged in construction recruitment and worked with construction contractors to provide the necessary manpower needed for construction projects. Brian Kanke was the general manager of the Austin, Texas office in December 2001. Tradesmen International placed construction

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[3] There is no dispute that union salting is a union organizing method of having one or more union members join a nonunionized organization as an employee for the purpose of organizing its membership.

[4] Although the record does not reflect the specific date of recognition in March 2001, the recognition appears to have been granted prior to March 16, 2001. Union Representative Phillip Lawhon credibly testified that Guy's Electric recognized the Union in March 2001. His testimony is supported by the fact that the Union filed an unfair labor practice on April 6, 2001, alleging that since March 16, 2001, Guy's Electric had unilaterally implemented changes and conditions of bargaining unit employees without bargaining with the Union.

employees with the various contractors with whom Tradesmen International had a contractual agreement. Kanke testified that as general manager, he worked with sales, recruiting, clients, field employees, and the hiring of employees. Although the construction employees were employed by Tradesmen International, they were supervised on the job by the respective construction contractors. Prior to applying for work for Respondent, John Voight (Voight) worked for Tradesmen International and was referred by Tradesmen International to a number of different contractors.

B. Respondent's Application Process

Prior to receiving the contract for the Town Lake project, Respondent allowed applicants to come into Respondent's office and fill out applications during those times when Respondent was accepting applications. After Respondent was awarded the Town Lake project and because Respondent expected an influx of applicants; Respondent initiated a sign-up sheet for applicants. The sign-up sheet only required a brief summation of experience, name, and contact information.

Initially, Respondent allowed applicants to personally fill in the information on the sign-in sheets. In or about November or December 2001, Respondent changed the procedure to require the applicants to verbally give the information to the receptionist to complete the sign-in sheet. The information from the sign-in sheets was then transferred to an Excel spreadsheet by either Runyan or the receptionist. Thereafter, Runyan reviewed the spreadsheet for potential employees. He testified that he initially conducted telephone interviews with individuals listed on the spreadsheet before he actually asked individuals to come in and complete an application.

C. IBEW Representatives Visit Respondent's Office

On November 15, 2001, both Zerr and Voight, along with approximately 11 other individuals, visited Respondent's office to apply for work. They were told that only three individuals were allowed in the reception area at one time. Zerr testified that the group of applicants stayed together as a group in the parking lot while smaller groups of three went into the office to submit their application information.

Runyan does not dispute that after Respondent began work on the Town Lake project, a group of union members came to Respondent's office to complete the employment log. Runyan told them that only three individuals could remain in the office at the same time. Zerr, Voight, and Robert Biehle went into the office together to submit their information. After all of the union members completed the employment log, they gathered together in the Respondent's parking lot. Runyan approached the members gathered in the parking lot and asked them to leave the premises. He recalls that the individuals may have left within 4 to 5 minutes.

Zerr returned again to Respondent's office to apply for work on December 12, 2001, January 7, 2002, and February 4, 2002. Voight testified that after going to Respondent's office to apply for work on November 15, 2001, he also returned to the office on November

29 and in mid-December, 2001 to apply for work. Respondent's employment call log for March 8, 2002, also reflects that both Zerr and Voight resubmitted their names for consideration for hire on that date as well[5]. Zerr recalled that when he went to Respondent's offices to apply for work, he always went with other union members and he wore a union pencil clip. When Voight went to Respondent's office to apply for work he usually wore either a union T-shirt or a union baseball hat. Electrician Nolan Richards testified in the original hearing that a majority of the 13 individuals applying for work on November 15, 2001 wore union shirts or clothing identifying the Union.

D. Picketing at Respondent's facility

In his decision, Judge Robertson noted that both Zerr and Voight initially picketed Respondent's facility on January 7, 2002. Zerr carried a sign stating unfair labor practice picketing. A woman came out of the office and told Zerr to leave or she would call the police. The police came to the facility and spoke with the pickets. One of Respondent's supervisors asked what it would take to stop the picketing. Zerr stated that he would stop the picketing if Respondent would allow the pickets to sign Respondent's "looking for work list." Upon Respondent's agreement, Zerr and another picket went into the facility and signed the list.

Zerr and other union members continued to picket the facility after January 7, 2002. Zerr testified that Voight was usually present each time there was picketing; serving as his second in command on the picket line. On February 20, 2002, both Voight and Zerr picketed Respondent's facility. A photograph entered into evidence at the remand hearing reflects Runyan's standing in the vicinity of the pickets and his observation of the pickets. During the picketing on February 20, 2002, Runyan threatened to call the police and this threat was the subject of the original proceeding. Judge Robertson found that Respondent violated Section 8(a)(1) of the Act by calling the police and by threatening to call the police.

E. Applicable Case Authority

A significant portion of this remanded case involves the issue of whether Respondent unlawfully failed to hire Rick Zerr and John Voight because of their union affiliation, membership, or activity. With respect to establishing a refusal-to-hire violation, the Board has set out an analytical framework for determining whether an employer violates the Act by failing or refusing to hire or by failing or refusing to consider hiring a job applicant because of his or her union activities or affiliation. *Allstate Power VAC, Inc*., 354 NLRB No. 111, slip op. at 2–3 (2009); *FES,* 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002). Specifically, the Board has held that in order to prove an unlawful failure to hire, the General Counsel must establish the following: (1) the respondent employer was hiring, or had concrete plans to hire at the time of the alleged unlawful conduct; (2) the applicant had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, 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

[5] Although Respondent included Voight's name on the spreadsheet for the March 8, 2002 inquiry, Respondent omitted Zerr's name.

(3) antiunion animus contributed to the decision not to hire the applicant. Specifically, there must be a showing that the employer maintained animus against such union membership or sympathy, and the employer refused to hire the applicant because of such animus. *Kenmore Electric Co*., 355 NLRB No. 173, slip op. at 5 (2010). Once the General Counsel meets this initial burden, the burden shifts to the respondent to show that it would not have hired the applicant even in the absence of his union activity or affiliation. 354 NLRB at 2; 331 NLRB at 12.

In September 2007, the Board issued its decision in *Toering Electric Co.*, 351 NLRB 225, finding that an applicant for employment must also be genuinely interested in seeking to establish an employment relationship with the employer in order to qualify as a Section 2(3) employee and thus be protected against hiring discrimination based on union affiliation or activity. In simple terms, the Board explained "one cannot be denied what one does not genuinely seek." Id at 227. The Board further held that the General Counsel bears the ultimate burden of proving an individual's genuine interest in seeking to establish an employment relationship with the employer. Id.

Once the General Counsel has shown that an alleged discriminatee applied for employment, the employer may contest the genuineness of the application through various kinds of evidence. The Board suggested that such evidence might include such evidence as: (1) evidence that the individual refused similar employment with the respondent employer in the recent past; (2) the incorporation of belligerent or offensive comments on his or her application; (3) evidence that the alleged discriminatee has engaged in disruptive, insulting, or antagonistic behavior during the application process; or (4) evidence that the alleged discriminatee has engaged in other conduct inconsistent with a genuine interest in employment. Depending upon the circumstances, evidence that the application is stale or incomplete may also indicate that the applicant does not genuinely seek an employment relationship with the employer. If the employer puts forth such evidence, the burden shifts to the General Counsel to rebut that evidence and prove by a preponderance of the evidence that the individual in question is genuinely seeking to establish an employment relationship with the employer. Id at 233.

F. Respondent's Failure to Hire Rick Zerr

1. Whether Respondent knew that Zerr used his cell phone to conduct union business and or knew that Zerr was a union steward

Relying upon the framework set out in the Board's decision in *FES,* Judge Robertson found that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Assistant Union Business Agent Rick Zerr. Judge Robertson found that Respondent decided not to hire Zerr based upon his union activities at Guy's Electric; which came to Respondent's attention through a report that Zerr used his cell phone while working at Guy's Electric to conduct union business. Specifically, Judge Robertson pointed out in his decision 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 employee.

In its remand decision, the Board concluded that the judge's decision that 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 Board noted, however, that the judge did not discredit, or even mention record evidence weighing against that finding. In its remand order, the Board specifically noted that both Runyan and Carl Jackson testified that Jackson did not tell Runyan that Zerr used his cell phone to conduct union business while on his prior job at Guy's Electric. Furthermore, the Board noted that Eileen Fournier testified that in a telephone conversation with Runyan, she had also confirmed that Zerr was a union steward. The Board specifically directed the judge to make reasoned credibility resolutions to determine whether the Respondent, in deciding not to hire Zerr, was aware that Zerr had served as union steward and/or aware that Zerr used his cell phone to conduct union business during his previous employment with Guy's Electric. The Board also directed the judge to determine if Zerr was a bona fide applicant for employment pursuant to the Board's decision in *Toering Electric Co*., 351 NLRB 225 (2007).

2. The relationship between Zerr and Jackson

When Guy's Electric began the Town Lake project, the company was nonunion and Carl Jackson was the project manager. Eileen Fournier (Fournier) testified when Jackson was hired, he assured her and her husband that he had worked in Austin, Texas, long enough to know who had worked for the Union and who had not. Jackson further assured the Fournier's that he would "keep the union out."

Rick Zerr has been a member of the Union since 1991 and he has been a journeymen electrician since 1976. When Carl Jackson hired Zerr for the Town Lake project in February 2001, Zerr did not openly disclose to Jackson that he was a union member. Eventually, Zerr became the onsite campaign organizer for the Union and ultimately became the only union steward on the Town Lake project, once the Union and Guy's Electric entered into a project labor agreement. Zerr continued to work for Guy's Electric until the company ceased operation on the Town Lake project in November 2001.

When Guy's Electric recognized the Union and signed a project labor agreement with the Union, Jackson was present at the meeting of the agreement signing. Fournier testified that while Jackson did not say very much during the meeting, he began slamming things around and cursing after the union officials left the office. Jackson admitted that he had been angry about Guy's Electric's recognition of the Union. He testified that he felt that Guy's Electric should have been able to hire the individuals as they saw fit and not just the individuals delivered by the Union to the jobsite. He explained that what he wanted was for the company to have control over the hiring and terminating of employees. He also admitted that he attempted to prevent Guy's Electric from granting recognition to the Union in 2001. Jackson acknowledged that after Guy's Electric granted recognition to the Union, the Union was supposed to be the first source of referral for applicants to the jobsite. He admitted, however, that despite the contractual obligation to hire employees through the Union, he attempted to hire individuals outside the scope of the union agreement.

Although Zerr became the union steward on the job when Guy's Electric recognized the Union in March 2001, Zerr considered himself to be the Union's representative on the job prior to that time. Zerr testified that as union steward, his primary labor-management contact was Fournier. Although he met with her personally at times, the majority of his contacts were by telephone.

Fournier usually worked from her office in Marble Falls, Texas. Fournier testified that after Zerr became the union steward, he used his cell phone to contact her. Fournier told Zerr that if there was a problem on the jobsite or if an employee had a problem, she wanted Zerr to contact her first before his getting the Union involved. Fournier testified that she found it to be beneficial to her company to discuss labor-management issues directly with Zerr. She explained that normally they could work out the problem in lieu of the company getting written complaints from the Union. She also recalled that after she began to deal with Zerr as the steward, her relationship with the Union improved and the number of grievances and unfair labor practice charges diminished from "a whole lot to nothing." Fournier testified that after Zerr became the steward and he began communicating with her by cell phone, her relations with the Union "became very good." She explained: "We seemed to get along quite well, and we were able to work out any kind of problem that came up."

During the time that Zerr served as union steward at Guy's Electric, there was a company policy that prohibited employees using their cell phones except during their breaks or in emergencies. Fournier explained that Zerr was exempt from that rule and that he had the authority to call her at any time if he needed to do so. Both Zerr and Fournier testified that Jackson was present in the office when Fournier told Zerr that he could call her at any time. Jackson testified that he never heard Fournier tell him that Zerr was exempt from the rule.

In her testimony, Fournier described Jackson's apparent attitude toward Zerr. She recalled that Jackson shared his opinion of Zerr with her many times. She testified that Jackson called Zerr numerous names; however, his favorite reference for Zerr was "the f-ing union steward." Fournier recalled that Jackson wanted Fournier to fire Zerr even before she signed the agreement with the Union. Jackson told her that Zerr was a troublemaker and a union organizer. In her testimony, Fournier opined that Jackson not only disliked the Union; he "hated the f-ing Union." Although Jackson denied that he had referred to Zerr as an "f-ing steward," he admitted that he had referred to him as a 'fucking asshole" several times.

During the original hearing in this matter, Jean-Guy Fournier was asked if he had any problem with Zerr's performance of his duties as union steward. Fournier testified that he did not. He also confirmed that Zerr's duties sometimes required Zerr to make telephone calls or receive telephone calls on his cell phone. Fournier was further asked if Jackson had ever expressed any animosity toward Zerr as he performed his duties as a union representative. Fournier testified that Jackson had expressed animosity; complaining that Zerr was always on the phone and that he didn't "get his job done. "During the original hearing, Eileen Fournier also testified that Jackson complained to her about Zerr's talking on his cell phone during the workday.

In his testimony at the remand hearing, Jackson testified that he had discharged Zerr twice during his employment at Guy's Electric. He asserted that he terminated Zerr for the first time in March 2001 for excessive use of his cell phone and then terminated Zerr again approximately 1 month later for a failure to complete his duties in a timely manner. When Jackson was asked how Zerr was reinstated twice in such a short period of time after being discharged in March and then again a month later, Jackson testified that he did not know. He said that Zerr just reappeared on the job. When Jackson testified in the original hearing in 2002, he never mentioned that he had ever terminated Zerr or admonished him about the use of his cell phone. Zerr testified that while Jackson had been in charge of the entire site, Frank Mario had been his direct supervisor. Zerr denied that Jackson or Mario ever complained about the speed of his work or about his use of his cell phone. Zerr also denied that Jackson ever disciplined him for excessive use of his cell phone.

Almost immediately upon starting the Town Lake project, Respondent hired Carl Jackson as a supervisor. If an individual applying for work had previously worked for Guy's Electric, Runyan solicited a recommendation from Jackson concerning that individual. Jackson also testified that when he was hired by Respondent, he volunteered to give Runyan an assessment of the electricians who were applying for work and who had previously worked on the Town Lake project for Guy's Electric. Jackson recalled that Runyan showed him a list of individuals who had come to the office and submitted application paperwork. Jackson looked over the list of applicants and gave Runyan his recommendations. Jackson testified that Zerr's name had been on the list of applicants and he had recommended that Runyan not hire Zerr. Runyan asserted that after speaking with Jackson, he concluded that there was no need to contact Zerr and that he concluded that Zerr's work performance was "really bad." Runyan recalled that Jackson told him that Zerr "yakked on his phone too much." He denied however, that Jackson told him anything about who Zerr was speaking with on the phone or about any office or position that Zerr held with the Union. Jackson also denied that he ever told Runyan that he had tried to terminate Zerr on two occasions.

When Jackson initially testified in this matter in 2002, he also testified that Zerr's name had been on the list of applicants that he reviewed and that he had recommended against Respondent's hiring Zerr. During the same testimony, Jackson recalled that he had told Runyan that Zerr was "worthless," slow, and always on the phone. Although he denied telling Runyan that Zerr had been on the phone conducting labor management business, he admitted that he had told Runyan that Zerr was the union steward. In the June 2011 hearing, Runyan confirmed that he had not hired Zerr because Jackson told him that Zerr was worthless. Runyan contended, however, that he had not found out that Zerr had been a union steward on the Town Lake project until "some much later time."

During the remand hearing, both Runyan and Jackson asserted that it was not until later in 2002 and several months after Jackson was hired when he first mentioned to Runyan that Zerr had been a union steward. Jackson testified:

> …We were having some problems with some - - with the union. And I asked him who the union steward was, and he just looked at me like he didn't know what I was talking about. And basically I wanted to know who it was, so I

> could go and talk with the person that was the steward. And I said, I know that it's not Rick Zerr, because Rick Zerr's not here.

Although Jackson recalled that it had been in 2002 when he first told Runyan that Zerr had been a steward, he could not recall anything about the issue that prompted him to initiate this conversation with Runyan.

3. The telephone conversation between Fournier and Runyan

Both Runyan and Fournier testified concerning a telephone conversation that occurred in late 2001 and was apparently the only telephone conversation they ever had. Runyan testified that prior to getting the bid for the project, he personally visited the construction site to meet with MW Builders and he also attempted to talk with Guy's Electric. Runyan recalled that he personally telephoned Jean-Guy Fournier; the owner of Guy's Electric. Runyan testified that he did so because he wanted to find out why Guy's Electric was losing the contract and whether the general contractor was withholding money on the project. Runyan testified that after speaking with Jean-Guy Fournier for about 60 seconds, Fournier began crying and hung up the phone. After approximately an hour, he telephoned Fournier again. The conversation was even shorter before Fournier again began crying and hung up the phone. The following day, Runyan telephoned Guy's Electric again. He identified himself to the receptionist and asked to speak with Jean-Guy Fournier. Eileen Fournier, however, came on the line rather than her husband. Runyan recalled that Eileen Fournier "chewed his ass" and told him never to call her husband again.

Fournier's recollection of her telephone conversation with Runyan was considerably different from that of Runyan. She recalled that approximately 2 weeks or a month after her company was no longer on the Town Lake project, she received a telephone call from Runyan. She opined that as of that time, Runyan had probably already begun the project as the electrical contractor. Runyan asked Fournier about some of the employees who had worked for her on the project and he included Zerr in his inquiry. Fournier told Runyan that Zerr had been the union steward, had been a good worker, and had always performed the job very well for her company. She recalled telling Runyan that while Zerr performed two jobs at once, he handled them quite efficiently. When Fournier testified in the original hearing, she was also asked if Runyan inquired about Sherry Passmore, an applicant and an alleged discriminatee in the underlying case. Fournier confirmed that Runyan had asked about Passmore, as well as Zerr, and she gave her opinion of Passmore's work as she did with Zerr.

Runyan denied that he consulted with anyone other than Jackson to determine whether he would bring Zerr in for an application. Upon direct examination, Respondent's counsel asked Runyan about his telephone conversation with Fournier:

> Q: I mean, you sat here and you heard Eileen Fournier testify that you called and asked about Rick Zerr. Remember that testimony?
>
> A: I do.

Q: And that she told you that she had these exemplary things to say about Mr. Zerr. Remember that?
A: I do.

Q: How do you respond to that?

Runyan answered by saying that he would respond in three parts. He continued:

> They were under extreme union coercion, they had nine or ten ULPs filed against them which to me would have been a walk in the park, they also had been sued. Guy Fournier, when I call, broke down and started crying, couldn't even have a conversation with me about MW Builders. The emotional condition in that office was probably traumatic. The NLRB and the Union subsequently retracted those charges. What her motivations were, I cannot say. I would guess that she was willing to do just about anything…..

When counsel for the Acting General Counsel's objection was sustained. Runyan continued:

> Okay. Second part. It's been a long time back. The third part, Eileen Fournier wasn't out on that job. I had the project manager working for me, Carl Jackson, who was there every single day, who was the master electrician that held the permit, he was the guy that was supervising those electricians, and I had Frank Nerio working for me. It would be absurdfor me to call the wife of the owner, particularly given the fact that I had just gotten my butt chewed by her just trying to get information on the contract itself.

Runyan gave no further response concerning whether he asked for information about Zerr from Fournier.

4. Conclusion concerning Respondent's knowledge of Zerr's cell phone usage for union business and/or his status as a union steward

Respondent argues that Runyan has consistently testified that he refused to hire Zerr because of Jackson's assessment that Zerr was "worthless" and talked on his phone too much. Respondent therefore asserts that Jackson's negative recommendation to Runyan fully satisfies Respondent's *FES* rebuttal burden. While Respondent would contend that Jackson told Runyan that Zerr was "worthless" and talked on his cell phone too much, Respondent denies that Jackson ever mentioned that Zerr used the cell phone for union business or even that Zerr was a steward on the job. Based upon Runyan and Jackson's testimony during the remand hearing, Respondent contends that it was months after Jackson had been on the job and in approximately March or April 2002 when he inadvertently mentioned that Zerr had been the steward when he worked for Guy's Electric. I do not find this argument supported by the credible evidence.

When Jackson testified during the 2002 proceeding, he fully admitted that he had told Runyan that Zerr was the union steward. His admission followed his confirmation that he

reviewed Zerr's name as an applicant and had recommended against Runyan's hiring Zerr. Nine years later, however, Jackson contended that it was March or April of 2002 when he just happened to mention that Zerr had been a union steward and he did so when he asked Runyan about the identify of the union steward employed by Runyan on the Town Lake project. He claimed that he had not known that because Respondent had not recognized the Union, there would be no union steward. In contending that he did not understand that Respondent did not have a union steward, Jackson asserted "at that point, I don't know how all that works" and he described his background as merely a "field hand."

Despite Jackson's assertion that he knew nothing about union stewards, he had been required to deal with Zerr as a union steward after Guy's Electric recognized the Union in March 2001 and certainly after Guy's Electric signed a contract with the Union in May 2001. Jackson admitted that as the union steward, Zerr talked with him about labor management issues. Jackson also admitted that there were times that he had to request additional workers from the union hall and he did this through Zerr. Jackson's knowledge of the union process is also revealed in his testimony that he recognized that Zerr had completed the union version of the apprenticeship training program because Zerr identified his position as journeyman inside wireman on his employment application. Thus, Jackson's assertion that he had little knowledge of unions and no understanding of whether there was a steward on the job in March or April 2002 is not credible in light of other record evidence.

Additionally, Jackson's alleged confusion about whether there was a union steward on the job in Mach or April 2002 is especially unbelievable inasmuch as the Union had been picketing Respondent since January 7, 2002. The question of whether Respondent was refusing to allow union applicants to apply for work was a matter of much attention and of such a nature that the police were called to Respondent's facility to deal with picketing issues. Thus, for Jackson to contend that he was not sure in April 2002 whether Respondent's employees were represented by a union is implausible.

Furthermore, Jackson was quite candid about his dislike for having to deal with the Union while he worked at Guy's Electric. Jackson did not have neutral feelings about the Union; he clearly had negative feelings about the Union. He acknowledged that once Guy's Electric had a union contract, he had to go through the union to obtain employees for the jobsite. As reflected by his testimony, this contractual obligation was a point of contention for him. As Respondent's supervisor on the same jobsite, he would certainly have had to know whether Respondent had contractual obligations to hire employees through the Union's referral or follow other contractually-mandated procedures. Thus, his alleged ignorance about union stewards on the job is beyond credibility.

Runyan testified that at the time that Jackson mentioned a union steward to him in 2002, he thought that a steward was someone who took care of your luggage. He testified: "Man, if you had asked me about a steward, I would have told you that was somebody on the Love Boat." While this explanation is a novel analysis, it lacks credibility. At the time that Zerr applied for employment with Respondent, Runyan had operated his business for approximately 15 years. For him to contend that he believed that a steward was someone who carried a passenger's luggage on the "Love Boat." is incredulous. While Runyan may have

operated only a nonunion operation and had no prior contractual relationship with any union does not preclude his having even a minimal familiarity with labor terminology.

Although Runyan asserts that he only consulted Jackson with respect to whether to call in Zerr to complete an application, he does not specifically deny that Zerr was mentioned during his conversation with Fournier. In his testimony, he interposed a rationale as to why he would not have needed to speak with Fourier and he also attempted to explain away her testimony by speculating about her emotional state. Neither his hypothesis for why he would not have needed to speak with her nor his speculation about Fournier's emotional status at the time of the conversation precludes the possibility that Zerr was discussed during the conversation. The overall evidence indicates that at the time of this conversation, Runyan was aware that Zerr had worked for Fournier on the Town Lake project. Runyan admits that when he asked Jackson for his opinion concerning Zerr, he was already aware that Zerr had worked for Guy's on the Town lake project. In his testimony, he opined that he may have known about Zerr's previous work at Guy's Electric because Zerr may have put it on the employment application log. Thus, at the time of Runyan's conversation with Fournier, he would have been aware that Zerr had worked for Fournier and would have had a reason to inquire about Zerr.

While Fournier and Runyan have markedly different recall concerning this one telephone conversation, I find Fournier to be the more credible witness. First and foremost, there is simply no plausible reason for her to have fabricated her description of the conversation. As Respondent points out in its brief, Guy's Electric was the target of the Union's salting campaign in 2001. It was only after Guy's Electric entering into a project agreement with the Union that Guy's Electric was finally relieved of the picketing, hand-billing, unfair labor practice charges, and legal fees generated because of the Union's salting tactics. Fournier testified that the Union harassed and intimidated Guy's Electric and forced her and her husband to sign the union contract. And yet, despite her sense of having been harassed by the Union, she testified in 2002 and again in 2011 that she discussed Zerr and his status as union steward in her telephone conversation with Runyan; essentially testifying in support of the Union's case.

Respondent argues that Fournier's account of her telephone conversation with Runyan is "an extension of the animosity she expressed toward Runyan during their actual conversation." Respondent asserts that Runyan's call to Jean-Guy Fournier, which reduced him to tears, came at a time when the Fournier's 30-year family business had been driven to the brink of pending bankruptcy. Respondent further submits that Jean-Guy Fournier was never called to rebut Runyan's assertions of Guy Fournier's emotional breakdown during the telephone calls. In his brief, counsel for the Respondent speculates that Eileen Fournier may have resented Runyan's calls as demonstrating an obstinate lack of compassion. Certainly, it is logical that at the time of the telephone conversation in issue, both Eileen and Jean-Guy Fournier were experiencing a difficult time. In all likelihood, Jean-Guy Fournier may have had the emotional breakdown during the conversation as Runyan describes. Nevertheless, there is nothing in the record that would support a finding that Eileen Fournier fabricated her testimony concerning her conversation with Runyan. It is reasonable that at that point in time, her animosity would more likely have been directed toward the Union; an entity that she

viewed as harassing and intimidating her into signing a contract shortly before her company was forced out of business, rather than toward Runyan with whom she had no past relationship. Thus, I credit her testimony and find that over the course of her conversation with Runyan, Fournier disclosed Zerr's role as a union steward.

In his posthearing brief, counsel for the Respondent asserts that even if Fournier's account of her conversation with Runyan had actually occurred, such would not cure the Acting General Counsel's "failure of proof on pretext." Respondent submits that the ultimate issue is not whether Runyan simply knew Zerr was a steward while working on the Town Lake project for Guys Electric, but rather whether he knew Zerr had anything to do with his cell phone abuse on working time as reported by Jackson; which was Runyan's asserted reason for refusing to hire Zerr. The remand order, however, does not narrow the scope of Runyan's knowledge to such a finite degree. Specifically, the Board directed:

> 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 used his cell phone to conduct union business during his previous employment.

Thus, in crediting the testimony of Eileen Fournier, I find that Runyan was made aware of Zerr's role as a union steward while he worked for Guy's Electric. Furthermore, as indicated above, I do not credit the testimony of Runyan and Jackson and I find that Jackson also conveyed to Runyan Zerr's use of the cell phone for union business and Zerr's status as a union steward while employed by Guy's Electric. Jackson admits that he attempted to fire Zerr for using his cell phone in March 2001 and yet Fournier retained Zerr. The record reflects that this alleged termination occurred at a time when Guy's Electric was in the process of recognizing the Union. There is no dispute that Zerr continued to use his cell phone while on the job for the remainder of the time that he worked for Guy's Electric. Zerr and Fournier credibly testified that Zerr was given permission to use the phone to contact Fournier concerning labor matters and that Jackson had been present when Fournier gave Zerr the authority to do so. It is apparent from Fournier's testimony that she gave Zerr privileges that were not afforded to other employees. Jackson contends that although he tried to terminate Zerr on two occasions, he was unable to do so. It is reasonable that Zerr's privileged status coupled with Jackson's inability to keep Jean-Guy and Eileen Fournier from recognizing the union created resentment and animosity for Jackson as reflected in his testimony. It is simply not plausible that Jackson's negative recommendation for Zerr did not include the details of Zerr's conduct and the frustration arising from such conduct.

Accordingly, I credit the testimony of Eileen Fournier in finding that she told Runyan about Zerr's status as a union steward when she provided a reference concerning both Zerr and Sherry Passmore. Additionally, I do not credit the testimony of Runyan and Jackson in the remand hearing when they allege that their first conversation about Zerr's union steward status occurred in March or April 2002. I find that the overall credible record evidence reflects that on or about the time that Jackson recommended against hiring Zerr, he also told Runyan about Zerr's activities as union steward when Guy's Electric worked on the Town Lake project.

5. Whether Zerr was a bona fide applicant under the Board's Toering analysis

Respondent asserts that the Acting General Counsel cannot show that Zerr had a genuine interest in seeking to establish an employment relationship with Respondent. In support of this assertion, Respondent cites the fact that Zerr admits that he targeted Respondent as part of a salting campaign initiated by the Union and that he had been trained in the various forms of salting activities that were used by the Union against employers. In his posthearing brief, counsel for Respondent contends that the salting activity included a mandate that included "subjecting contractors to unfair labor practice charges as well as allegations of discrimination with appropriate agencies." Respondent contends that Zerr filed charges with the Texas Civil Rights Commission in addition to subsequent civil lawsuits and additionally engaged in public demonstrations at not only Respondent's facility but also at Respondent's jobsites. Respondent asserts that this comprehensive strategy exacted an economic toll on Respondent and is thus "entirely inconsistent" with a genuine interest in establishing an employment relationship. Respondent further contends that Zerr's lack of genuine interest is demonstrated by the fact that he received compensation from the Union during the relevant time in issue as well as his acknowledgement that he had also engaged in salting activity at another contractor on or about the during the relevant time period.

There is no dispute that Zerr placed his name on the employment list when he first visited Respondent's office on November 15, 2001. Although there is a considerable amount of record testimony devoted to how and when an applicant's employment information was transferred to the applicant spreadsheet, there is no real dispute that Zerr initiated the application process at that time. Runyan testified that he had a rule limiting no more than three people in the office at one time because he only had three chairs in the reception area. Zerr complied with this policy and submitted his name on the list while accompanied by only two of the 13 applicants who initially appeared at Respondent's office. Runyan testified that all of the union applicants, including Zerr, complied with his three person rule when he notified them of its existence.

Zerr testified that he would have accepted employment with Respondent if it had been offered. He testified that if he had been hired, it was his intent to serve in the same role under the employ of Respondent as he had served at Guy's Electric. When asked during the hearing how long he would have continued to work for Respondent, he explained that typically he is the last person laid off from a job. His testimony in this regard is consistent with the record evidence showing that Zerr remained in his job at Guy's Electric until his employer relinquished the contract on the job and filed for bankruptcy.

Zerr further testified that although he had filed charges against Respondent, he had never filed a charge with any government agency that he believed to be frivolous. He also explained that none of his union salting training instructed him to file frivolous charges. Zerr additionally testified that although he received financial subsidies when engaging in salting activities, those subsidies had never caused him to refuse work with other employers and would not have caused him to refuse work with Respondent.

On the basis of the entire record, I find that the Acting General Counsel has met its burden of showing that Zerr was genuinely interested in working for Respondent. I credit Zerr's testimony that he would have accepted work with Respondent if the offer had been made. His testimony is supported by his conduct with his prior employer. Clearly, Zerr was involved, if not instrumental, in the Union's gaining a foothold at Guy's Electric. After taking the job at Guy's Electric, he continued to work for the employer even after the conclusion of his organizational activity and after the employer recognized the Union. Had his intent been only salting and organizational activity, there would have been no need for him to remain with that Employer. He continued to work for Guy's Electric; however, until such time that Guy's Electric withdrew from the work on the Town Lake project. Additionally, there is no evidence that Zerr has refused employment from Respondent or from any other Employer.

In asserting that Zerr was not a bona fide applicant, Respondent points out that Zerr filed charges and lawsuits against Respondent and participated in picketing and demonstrations at Respondent's facility and work sites. Although Zerr may have engaged in such activities, there is nothing to support a finding that he engaged in the kind of conduct that was found to be inconsistent with a genuine interest in employment as identified in the *Toering* decision. Zerr repeatedly contacted Respondent's office to submit his name on the employment list. There is no evidence that he caused any disruption or disturbance in doing so. There was no evidence of any belligerence or offensive comments in any comments or information provided to Respondent. The fact that he later filed charges or lawsuits against Respondent and engaged in picketing does not rise to the level of antagonistic behavior that was found by the Board in *Toering* to constitute a lack of genuine interest in employment.

In essence, the record demonstrates that although Zerr may have visited Respondent's office with other union members in submitting his name for the employment list, he did not engage in disorderly behavior and he submitted his information in a manner consistent with Respondent's established procedures. He had the requisite work experience and there was no evidence that he went to Respondent's facility for any reason other than to apply for work. *Cossentino Contracting Co*., 351 NLRB 495, 496 (2007). Accordingly, I find that Zerr was a bona fide applicant at the time that Respondent refused to hire him or to consider him for hire. *Air Management Services, Inc*., 352 NLRB 1280, 1281 fn. 4 (2008).

G. Whether Respondent Unlawfully Failed to Hire John Voight

1. The Acting General has met its burden under FES

In its remand decision, the Board noted that while Judge Robertson made certain findings of fact regarding John Voight's application for employment, Judge Robertson did not state any conclusions with respect to the refusal-to-hire and refusal-to consider allegations. Specifically, Judge Robertson found that Voight was one of the 13 union members who initially went to Respondent's office on November 15, 2001 to submit an application for work. Voight also visited Respondent' office on November 29, 2001, mid-December 2001 and March 8, 2002. Judge Robertson also stated that each time that Voight applied for work with Respondent, he wore a union T-shirt. In discussing whether Respondent unlawfully

failed to hire Voight and other named discriminatees, and based upon the record evidence, Judge Robertson concluded:

> (1) Respondent was hiring during material times on showing that it hired 51 electricians from November 13, to March 18, 2002; (2) Respondent was aware that 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.

Noting that Voight had also engaged in picketing on January 7, 2002 and thereafter, Judge Robertson concluded that the General Counsel had satisfied its burden under the Board's analysis set forth in *FES*, 331 NLRB 9 (2000), with respect to Voight and other named discriminatees. Although Respondent argued that it did not hire Voight and other alleged discriminatees for reasons other than their union activities or affiliation and that it would have refused to hire them in the absence of union activity and affiliation, Judge Robertson found the evidence to show that Respondent wanted to avoid hiring union organizers. Additionally, he concluded that the Respondent's hiring of some of the union members did not prove that Respondent lacked animus. Although Judge Robertson discussed his findings concerning whether Respondent had proven that it would not have hired other discriminatees in the absence of their union activity, he did not specifically include such finding with respect to Voight.

At the time that he sought employment with Respondent, Voight was a journeymen electrician with an Austin city license and 9 to 10 years of experience. As pointed out by counsel for the Acting General Counsel in his brief, Respondent hired unlicensed electricians with less experience during this same time period. As noted by Judge Robertson, from November 13, 2001 to March 18, 2002, Respondent hired 51 electricians. Counsel for the Acting General Counsel submits that the vast majority of these electricians were hired in December 2001 and January 2002; the time frame in which Voight was seeking work with Respondent. Based upon the total record evidence, I concur with Judge Robertson and find that the Acting General Counsel has sufficiently met its burden under *FES* with respect to Respondent's failure to hire John Voight. The issue remaining, however, is whether Respondent has shown that it would have refused to hire Voight in the absence of his union activity and affiliation. As discussed below, I find that Respondent has met its burden under *FES* and has sufficiently demonstrated that it would not have hired Voight in the absence of his union activity and affiliation.

2. Voight was a bona fide applicant under the Toering analysis

As discussed above, the Acting General Counsel also has the burden of demonstrating that an applicant entitled to protection as a Section 2(3) employee is someone genuinely interested in seeking to establish an employment relationship with the employer. *Toering*

Electric Co., 351 NLRB 225, 228 (2007). In this case, the Board specifically remanded to the judge the issue of whether Zerr was a bona fide applicant under *Toering.* While the Board did not expressly remand the issue of whether Voight was a bona fide applicant, it remanded the issue of whether Respondent unlawfully failed to hire Voight or failed to consider hiring Voight in totality. As found above, I concur with Judge Robertson in finding that the Acting General Counsel met the requisite burden of proof under *FES.* Additionally, I find that the Acting General Counsel has met its burden of proof with respect to the *Toering* analysis.

There is no dispute that Voight first placed his name on the employment list with Respondent on November 15, 2001. He returned to Respondent's office again on November 20, 2001, as well as in mid-December and March 8, 2002. There is no evidence that he submitted anything to Respondent that would be inconsistent with a genuine interest in employment. There is no evidence that he was belligerent or disruptive in the application process or did anything inconsistent with a genuine interest in employment. As I have discussed above with respect to Zerr's application, I do not find Voight's picketing an indication that he would not have accepted a position with Respondent had it been offered.

Voight testified that he would have accepted a position with Respondent if one had been offered. Based upon the entire record evidence, I find nothing to contradict his testimony. Accordingly, there is no evidence to support a finding that Voight was anything other than a bona fide applicant with a genuine interest in seeking employment with Respondent.

3. Respondent's Proof concerning its failure to hire Voight

Runyan does not dispute that Voight completed the sign-in sheet seeking employment at Respondent's facility and he confirms that information submitted by Voight was subsequently transferred to the applicants' spreadsheet. Runyan also contends that he was the individual who wrote the additional information for Voight that is included in the "interview notes" section of the spread sheet.

Voight's name appears 7 times on page 10 of the spreadsheet. The entries reflect that he previously worked for Tradesmen International, his years of experience, his qualifications, and the fact that he made a personal inquiry rather than inquiring by fax or telephone. The interview notes section for the first entry for Voight includes the following statement:

> Bad Ph # TR 12/20. Worthless per Brian Tradesmen (Unreliable)TR 01/02

Runyan testified that"TR" referred to himself; Ty Runyan and he surmised that 01/02 probably represented January 2. He asserted that January 2 had been the date that he input the information and not the date that he received the information from Tradesmen. Runyan testified that he decided not to hire Voight based upon the negative reference that he received from Brian Kanke of International Tradesmen.

At the end of 2001, Brian Kanke had been with Tradesmen International for approximately two years and he worked as the general manager for the Austin, Texas office.

Titus Electrical Contracting, Inc. had been a client of Tradesmen International prior to Kanke's employment with Tradesmen International.

Although Kanke was called as a witness for Respondent for the 2011 remand hearing, he did not testify at the original hearing in 2002. Kanke recalled that a couple of months after he hired Voight in the summer of 2001, he began to have problems with Voight. Kanke described a specific instance when Voight refused a job and then another instance when Voight accepted the job, but failed to show. Finally, Kanke referred Voight to the Austin Traffic Signal (ATS) job; a wastewater treatment plant job, involving high voltage and control electrical work. When Kanke contacted Voight about doing the job, Voight told him that he would not have any problems doing the work. Kanke contended however, that while on the job, Voight damaged some of the client's equipment. Kanke testified that Tradesmen International not only lost the client's business, but also had to deduct the cost of the damaged equipment from the invoice to the client.

On the same day that Voight was released from the job, he came to the office. Kanke testified that at the time, he (Kanke) was angry about the loss of the client and the damage and that Voight was also upset. During the course of the conversation, Voight told Kanke that he was quitting and that he was going to Respondent's office and get a job. Voight also mentioned that he was going to give Tradesmen International as a reference. In describing his response to Voight, Kanke testified:

> I said, you will not use me as a reference to go down there and get the job; we need to talk about the situation that happened at ATS. He refused to talk about it, and he said, No, I'm using you as a reference. I said, If you go down there and you're telling me right now you're going to use me as a reference, I am going to call Titus Electrical and tell them that I am not giving you a reference and that you are an unreliable electrician.

Kanke testified that he did, in fact, call Runyan. He told Runyan that if Voight showed up to fill out an application and if he listed Kanke as a reference, Kanke was not giving Voight a reference. Kanke testified that he told Runyan that Voight was unreliable and Runyan should not hire him.

Runyan testified that he had a good business relationship with Tradesmen International and he decided not to hire Voight based upon the negative work reference from Kanke. Runyan testified that when Kanke called him, Kanke told him that he had tried to place Voight on several jobs and he never showed up. Runyan recalled that Kanke told him that if Voight applied, Runyan would not want to hire him. Runyan asserted that he did not solicit Kanke's assessment; it had been voluntarily given by Kanke. Runyan also contends that the recommendation was made to him even before he had any knowledge of Voight's application. Runyan confirmed that he could not recall other individuals that Kanke recommended against Respondent's hiring. Runyan asserted that he only remembered Voight because "there's been such a hullabaloo made about it."

Voight acknowledged that when he initially applied for work with Tradesmen International, he was open about his union affiliation and provided information about his past employment with union signatory contractors. He recalled that after he was hired, Kanke sent him out on four or five assignments with contractors. On each job he wore union clothing identifying that he was a member of the Union. Voight denied that he turned down jobs offered to him by Kanke. Although Voight recalled that Kanke sent him to the ATS job, he did not recall Kanke's questioning him about his qualifications and experience in dealing with high voltage before he was assigned to the job. Although Voight recalled that he was laid off from the ATS job on December 14, 2001, he asserted that it resulted from downsizing at ATS. Voight acknowledged, however, that he worked on a type of transformer on the ATS job for which he did not have experience. Although Voight asserted that he had hooked up the transformer correctly, he acknowledged that he used the foreman's instructions in doing so. In further questioning, Voight added the following concerning the ATS project manager:

> Q: There came a time when you understood that the transformer that Elliot House[6] believed that you were working on was hooked up incorrectly. Isn't that right?
>
> A: Yes, I believe that he believed that.

Voight contended that although he received conflicting reports concerning his work on the transformer, he didn't receive them from Kanke. Voight acknowledged that in an affidavit given to the Board in another matter, he had stated that another union member went to ATS and was told that the transformer was not hooked up correct. In the affidavit, Voight described what the union member told him about a conversation that the union member had with ATS project manager Elliot House. The union member reported that House told him that Voight was laid off because he hooked up the transformer incorrectly and because he had gotten into an argument with House. Voight admits that he included this reported conversation, as well as House's alleged comments, in his affidavit, however, he denies the substance of the report.

4. Conclusions Concerning Respondent's Failure to hire Voight

Counsel for the Acting General Counsel asserts that it has taken 9 years for Respondent to finally call Kanke as a witness to support its assertion that it would not have hired Voight in the absence of his union activity. I agree that had Kanke testified in the original hearing, there may have been a more complete record sufficient for Judge Robertson to address Respondent's defense; thus preventing the need for remand on this issue. Nevertheless, there is no basis to conclude that Kanke's testimony is fabricated or ingenuous simply because it is given in the remand hearing rather than the original hearing. The fact remains that Respondent's applicant spreadsheet was admitted into evidence in the original hearing in 2002. The first entry relating to Voight contains a reference to the negative reference to Runyan from Kanke. Thus, Kanke's testimony is not newly submitted evidence; but simply supporting testimony for previously submitted evidence.

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[6] Elliot House was the project manager for the ATS job.

Counsel for the Acting General Counsel also contends that Kanke's testimony is diminished by the fact that social security records reflect that Tradesmen International paid $1,973.4 to Voight in 2002. I do not find this significant. First of all, the records do not reflect the specific time when Voight performed this work and generated this payment. Secondly, the social security records would further reflect that even if Voight was referred out for an additional job, the work was brief and limited in nature. Certainly, the records confirm that Tradesmen International appeared to sever its employment relationship with Voight and did not continue to employ him to the extent that it did in the later part of 2001.

Voight testified that Kanke referred him to the Heggen Electric job on December 19, 2001. Voight recalled that after two hours on the job, he observed a picket line at the work site. He and another Tradesmen International referral then joined the picket and remained on the picket for the next 2 days. Counsel for the Acting General Counsel asserts that Respondent's counsel never questioned Kanke to specifically deny Voight's referral to Heggen Electric or Voight's testimony concerning his picketing. Accordingly, inasmuch as Voight's testimony in this regard is undisputed and based upon the social security records, it is likely that Kanke may have given Voight the additional assignment on December 19, 2001, and an additional assignment for limited hours sometime in 2002. Kanke does not assert, however, that he terminated Voight because of the equipment damage on the ATS job. His testimony reflects that he telephoned Runyan in response to the heated conversation with Voight on December 14, 2001 and because he believed that Voight was going to apply to work with Respondent and list Tradesmen International as a reference. Although Voight denies that he told Kanke that he was going to Respondent's office to submit an application, he also acknowledges that he visited Respondent's office to submit an application in mid-December 2001.

The relevant question is not how enduring was Kanke's anger or even how reasonable was his anger. One of the relevant questions is whether it is likely that Kanke made the unsolicited telephone call to Runyan as he claims after the discussion with Voight and based on his belief that Voight was going to apply to work for Respondent. Although Voight denied that he was responsible for any damage to the equipment at ATS, he also admitted that he was aware of the fact that the ATS project manager believed that he had damaged the equipment. Again, it is not a matter of whether Voight damaged the equipment or not, but whether it is likely that ATS credited Voight with this damage and the likelihood that such damage was reported and charged to Tradesmen International. Based upon Voight's own testimony, it is reasonable to conclude that these were the circumstances at the time that Kanke spoke with Voight on December 14.

The most compelling reason to credit the testimony of Kanke is simply the fact that there is no logical basis to discount Kanke's testimony in totality. In the discussion above concerning Respondent's failure to hire Zerr, I have noted that the overall record evidence reflects that Jackson's own union animus was interrelated and significant to his discussions with Runyan about Zerr. With respect to Kanke, however, there is no evidence of his own union animus. There is no dispute that Voight wore union clothing to every job to which he was assigned by Kanke. As illustrated by the Acting General Counsel's argument, it is apparent that Kanke even assigned Voight some brief work in 2002 after he left his assigned

work at Heggen Electric on December 19, 2001 to join the picketing. Thus, there is simply no basis to find that Kanke harbored animus toward Voight because of his union activity and affiliation or any credible evidence to reject Kanke's testimony that he made the unsolicited call to Runyan to discourage his hiring Voight. As I have discussed above, there is not a question of whether Kanke had a legitimate basis for crediting Voight with the damage to the ATS equipment, but whether he contacted Runyan as he contends.

As I have discussed above, the Acting General Counsel met its burden of proof under *FES.* Voight was among the group of 13 union members who initially attempted to apply for work and had a confrontation with Runyan on November 15, 2011. On that date and the other dates that Voight attempted to apply for work, he wore union identifying logos on his clothing. Additionally, on January 7, 2002, Voight began picketing with other union members. As evidenced by the Judge Robertson's findings, there is no doubt that union animus was a factor in Respondent's failure to hire Voight. Despite the fact that Respondent may not have wanted to hire Voight because of his demonstrated union activity, the record also reflects that he would have had a credible basis for not hiring him in the absence of such union activity and affiliation.

As counsel for the Respondent points out, the Board has previously found that an employer does not violate the Act when it fails to hire an active union applicant because of an unfavorable employment reference from another employer. *Stevens Construction Corp*., 350 NLRB 132 (2007); *Gold Fresh Vegetables*, 339 NLRB 785, 795 (2003); *New York Telephone,* 300 NLRB 894, 895 (1990). The overall record evidence reflects that Respondent has met its burden in *FES* and has established that it would not have hired Voight in the absence of his union activity and affiliation.

Thus, I find that Respondent did not violated Section 8(a)(3) and (1) of the Act by its failure to hire or its failure to consider for hire John Voight.

H. Respondent's March 22, 2002 Photograph of the Pickets

1. Testimony and record evidence

In his decision, Judge Robertson found that Respondent engaged in a number of independent violations of Section 8(a)(1), as well as the violations of Section 8(a)(3) and (1) involving Respondent's failure to hire Zerr and the discharge of three other employees. Judge Robertson specifically included in his findings that Respondent violated Section 8(a)(1) by openly photographing the union picket line.

The Union began picketing Respondent's facility on January 7, 2002. Zerr testified that each time the Union picketed Respondent's facility, the picketers remained in front of the building in the bar ditch. He estimated that there were always 15 to 20 pickets each time the Union picketed. Zerr organized the pickets and Voight acted as Zerr's second in organizing the picketing and disseminating information to the pickets. After January 30, 2002, it became routine for the Union to videotape the pickets. Zerr confirmed that the Union did so in order to refute any allegations of wrongdoing by the pickets. Zerr testified that he believed that it

had been prudent to take photographic or videotaped evidence of the picketing because there had been reports to the police that the pickets were fighting or disturbing the peace. He wanted to prove that the pickets were not engaged in such conduct. He also acknowledged that the videotapes may have inadvertently recorded Respondent's employees or customers in the area of the pickets.

There is no dispute that on or about March 22, 2002, Shelley Runyan took photographs of individuals associated with the picketing. At the original hearing, Respondent submitted into evidence two photographs of two individuals who appeared to be on the picket line. At the edge of one of the pictures is the image of another person's hand. The record reflects that one of the individuals in the photographs was Michael Murphy (Murphy). Although Murphy is now legal counsel for the Union, he was a union representative at the time of the 2002 picketing. Picket Robert Biehle was the other individual in the photograph and he appears to be using a video camera mounted on a tripod.

Zerr testified that he first became aware that Shelly Runyan was photographing him on March 22, 2002 when it was pointed out by another picket. Zerr recalled that one of the pickets yelled out: "Look, she's taking our picture" or words to that effect. At that point in time, Zerr observed Shelly Runyan photographing the pickets from inside the office. Although Zerr initially observed her through the glass in the door, the door was later opened revealing her in the open doorway. Zerr estimated that he observed Shelly Runyan engaged in photographing for approximately 5 minutes. Although Voight could not recall the specific date when Shelly Runyan photographed the pickets, he recalled that he was present when the other pickets were talking about Shelly Runyan and the photographing.

Shelly Runyan testified during the initial hearing that she photographed the pickets to support a defamation suit Respondent had regarding a picket sign that showed "Titus sex bigot." Although Judge Roberson credited both the testimony of Zerr and Shelly Runyan concerning her actions on March 22, 2002, he also found that Respondent violated Section 8(a)(1) when Shelley Runyan openly photographed the picketing. Counsel for the Acting General Counsel submits that Shelly Runyan expanded her testimony at the remand hearing as to the reason why she took the photographs. During the remand hearing, Shelley Runyan testified that in addition to the defamation suit that Respondent had filed against the Union, there were a number of suits and legal actions occurring at this same time. She contended that the photographs that she took were in response to a "whole bunch of things" that were occurring at the time. She also contended in her remand testimony that when she testified about the photographs concerning picket signs during the original hearing, she was actually referring to a different photo.

Shelly Runyan testified at the remand hearing that at the time that she took the photographs on March 22, 2002, the individuals she photographed were videotaping people entering and leaving Respondent's offices and parking lot. Although Shelly Runyan identified Murphy as one of the individuals in the photograph, she contended that she did not know the identity of the other individual. She asserted, however, that he was never employed by Respondent. She explained that in taking the photographs, she had found the Union's videotaping to be intimidating, threatening, and harassing.

In his testimony, Zerr confirmed that Robert Biehle is the individual with Murphy in the photograph taken by Shelly Runyan on March 22, 2002. It is undisputed that Biehle accompanied Zerr and Voight and the other 10 individuals when they initially visited Respondent's facility on November 15, 2001 seeking employment. Biehle is also one of the individuals who first began picketing Respondent's facility on January 7, 2002. Additionally, the complaint that initiated the original hearing included Biehle as an alleged discriminatee and Respondent's failure to hire him was an issue before Judge Robertson. Although Judge Robertson found that the General Counsel satisfied its burden under *FES*, Judge Robertson also found that Respondent proved that it would have refused to hire Biehle in the absence of his union affiliation. In reaching this decision, Judge Robertson credited Ty Runyan's testimony that he did not hire Biehle because he had known Biehle for 16 years and did not like Biehle. Thus, although Shelly Runyan testified in the remand hearing that she did not know the individual in the photograph with Murphy, it is certainly realistic that on March 22, 2002 that she was aware of Biehle's identity. Even in the unlikely event that she was not aware that her husband had known Biehle for 16 years and did not like him, she would likely have known that Biehle was an applicant for employment and that he had been picketing Respondent's facility for over 2 months.

2. Conclusions

In the remand order, the Board remanded to the administrative law judge the allegation that Respondent violated Section 8(a)(1) by photographing union picketing on March 22, 2002. The Board noted that the Respondent contends that this allegation must be dismissed because there is no evidence that any picketers were employees under the Act[7], or that the photographing was observed by any employees. The Board also observed that in response, the Charging Party contends that at least one individual on the picket line, Zerr, was an "employee" as he had applied for work and he observed the photographing. Thus, the Board explained that it was remanding to the judge the issue of whether union organizer Zerr was a bona fide applicant under *Toering*. Specifically, the Board noted that such a determination was arguably relevant to, if not necessarily dispositive of the photographing allegation. Furthermore, the Board explained that there was no record evidence indicating who else was on the March 22 picket line or who observed the photographing. Accordingly, the Board remanded this 8(a)(1) allegation to the judge for further analysis once Zerr's status as an employee was resolved.

For the reasons discussed above, I find that Zerr was a bona fide applicant when Respondent refused to hire him or to consider hiring him. I credit his testimony that he observed Shelly Runyan photographing the union pickets on March 22, 2011. He testified that he became aware of Shelly Runyan's doing so because Biehle alerted him to the fact. Inasmuch as Biehle has been identified as the individual in the photograph with Murphy, it is reasonable that he would also have been aware that Shelly Runyan was photographing him. The two photographs that were submitted into evidence by the Respondent at the original hearing show both Murphy and Biehle looking directly toward the photographer.

As discussed briefly above, Biehle accompanied Zerr and Voight to Respondent's office on November 15, 2001, and submitted his name for the employment list. Although Biehle was included as an alleged discriminatee in the original hearing, Judge Robertson found that General Counsel met its burden under *FES* and demonstrated that it would have refused to hire Biehle in the absence of his union affiliation. The Board affirmed Judge Robertson's decision except for certain issues unrelated to Biehle. Thus, it is apparent that because of the judge's finding, Biehle's status as a bona fide applicant under *Toering* was not raised by the Respondent or considered to be an issue before the Board. Accordingly, even though Respondent demonstrated that it would not have hired Biehle for reasons other than his union affiliation or activity, there is nothing in the record to diminish his status as a bona fide applicant; having the same Section 7 rights as any other applicant with respect to an employer's unlawful intimidation or interference.

Consequently, the record reflects that both Biehle, as well as Zerr, who has been found to be a bona fide applicant, were aware that Shelly Runyan was photographing individuals on the picket line. Although Voight could not testify with certainty that he was present when the photographs were taken, he recalled that he was present when other people were talking about her taking the photographs. Shelly Runyan testified that although she did not how many pickets were present at the facility on March 22, 2002; she did not believe that Murphy and Biehle were the only two individuals outside Respondent's facility on March 22. Based upon Shelly Runyan's testimony, as well as other photographs of the picketing that are included in the record, it is likely that other pickets were also present on March 22, 2002. There is, however, no additional record evidence that identifies any of those other individuals.

Absent proper justification, photographing employees engaged in protected concerted activities constitutes unlawful surveillance because it has the tendency to intimidate employees. *F. W. Woolworth Co*., 310 NLRB 1197 (1993). In determining the lawfulness of the employer's actions in photographing, the test is whether the conduct interferes with the free exercise of Section 7 rights. The employer's motive when it surveils employees' protected activities is not an essential element of an 8(a)(1) violation. The test is whether the conduct interferes with the free exercise of Section rights. *American Freightways Co*., 124 NLRB 146, 147 (1959). Furthermore, the violation of Section 8(a)(1) does not depend on the employees' subjective reaction to the unlawful activity. *Sunnyside Home Care Project, Inc*., 308 NLRB 346 fn. 1 (1992). Moreover, the Board has specifically held that an employer violates Section 8(a)(1) of the Act if it photographs picketing in the absence of proper justification. *Waco, Inc.,* 273 NLRB 746 (1984).

I am mindful that in certain circumstances, the Board has also found that an employer's photographing of employees is lawful. Such circumstances have included photographing strikers for use in a State court proceeding and where there is no showing that the employer coupled the picture taking with threats or actual reprisals. *Hilton Mobile Homes*, 155 NLRB, 873, 874 (1965). In a more recent case, an employer's photographing of pickets for the purposes of obtaining evidence for court proceedings was also not found to be unlawful. In reaching this decision, however, the Board took note of the undisputed previous misconduct of the pickets and concluded that the employer had a reasonable basis to

anticipate further misconduct. *Strack and Van Til Supermarkets*, 340 NLRB 1410, 1414 (2004). An employer's photographing pickets has also been found to be lawful in circumstances when the pickets obstructed access to the Respondent's facility and interfered with customers. *Cable Car Advertisers, Inc*., 324 NLRB 732 fn. 2 (1997); *Concord Metal, Inc*., 295 NLRB 912, 921 (1989).

In his decision, Judge Robertson acknowledged Respondent's defense that Shelly Runyan was taking pictures of the Union's videotaping of its customers and activities at its facility. He further observed that there was no evidence to support a finding that the Union was trespassing on Respondent's property on that occasion or that the Union was engaged in unlawful activity. Accordingly, Judge Robertson found that Respondent violated Section 8(a)(1) when Shelly Runyan photographed the picketing.

When Shelly Runyan testified in the remand hearing, she contended that the only pictures that she took were the two pictures of Murphy and his companion (Biehle) when they were videotaping at the facility. She asserted that she did so because she believed the individuals were doing something "that looked harassing and intimidating." She testified that while Respondent had taken other photographs of picket signs, she had not. She testified that when she had previously testified in the original hearing that she had taken the photographs in preparation for a defamation lawsuit against the Union, she had actually been referring to other photographs and not the photographs of Murphy and Biehle.

In his post hearing brief, counsel for Respondent asserts that Shelly Runyan's photographs were taken for the lawful reason of memorializing evidence of harassment and intimidation to support claims previously rejected by the Austin Police Department. Respondent also contends that as neither Zerr nor Voigt had pending applications as of the date in question, they were not "employees" as defined in the Act and that since the challenged photography was not questioned by any employees of Respondent, the surveillance claim fails. The evidence, however, reflects that both Zerr and Voight first visited Respondent's office on November 15, 2001 to submit their application for employment. There is no dispute that they continued to visit Respondent's office during the months thereafter in an attempt to obtain employment. Respondent's employment log also reflects that Voight, Zerr, and Biehle signed the employment list as recently as March 8, 2002. Thus, all three individuals were viable applicants and had pending applications at the time of the March 22, 2002 photographs. Even though Judge Robertson found that the Respondent demonstrated that it would not have hired Biehle even in the absence of his union activity and I have made a similar finding with respect to Voight, such findings do not negate their status as valid applicants who have the protection of the Act against an employer's unlawful intimidation and interference. Even if the Respondent did not violate the Act by failing to hire Biehle and Voight, they still enjoyed the protection of the Act from other violations of the Act.

Having considered Respondent's arguments, as well as the total record evidence, I do not find that Respondent has demonstrated proper justification for Runyan's taking the photographs on March 22. Although Respondent asserts that the photographs were taken to

memorialize evidence of harassment and intimidation, there is no record evidence to demonstrate that the Union was engaging in misconduct at the time of the photographs.

In its decision in *Quality Mechanical Insulation, Inc*., 340 NLRB 798, 814 (2003), the Board affirmed the judge in finding that an employer's photographing of employee applicants would reasonably have a chilling effect on their Section 7 rights and as such violated the Act. Based upon the total record evidence, there is no evidence of proper justification for the photographs taken on March 22, 2002. Shelly Runyan's photographing of Murphy and Biehle were observed by not only Biehle, but also by Zerr. The fact that she was photographing strikers was known to the other pickets as evidenced by Voight's testimony. Thus, I find that the credible evidence adduced during the remand hearing supports Judge Robertson's finding that violated Section 8(a)(1) by openly photographing the union pickets on March 22, 2002.

Upon the foregoing findings of acts, and upon the entire record herein, I make the follow conclusions with respect to the remand instructions in the Board's September 30, 2010 decision and order and order remanding. I make no further conclusions of law concerning jurisdiction, labor organization status or concerning those allegations that were not the subject of the remand. Accordingly, I make the following:

CONCLUSIONS OF LAW

1. By refusing to hire Rick Zerr, Titus Electrical Contracting, Inc. (Respondent) violated Section 8(a)(3) and (1) of the Act.

2. By openly photographing the Union picket line on March 22, 2002, Respondent violated Section 8(a)(1) of the Act.

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

4. Rick Zerr was a bona fide applicant at the time that the Respondent unlawfully refused to hire him or consider him for hire.

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 effective the policies of the Act.

The Respondent having unlawful refused to hire Rick Zerr in violation of the Act, I shall order Respondent to offer 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. I further order Respondent to make Rick Zerr whole for all loss of earnings suffered as a result of the discrimination against him. Back pay shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the*

Retarded, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

On the foregoing findings, conclusions of law and the entire record, I issue the following recommended[8]

ORDER

The Respondent, Titus Electrical Contracting, Inc., Austin, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire job applicants because of their union activities and affiliation.

(b) Openly photographing the union picket line.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guarantee 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 such position no longer exists, 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) 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.

(c) Within 14 days after service by the Region, post at its facility in Austin, Texas, copies of the attached notice marked "Appendix."[9] 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

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[8] 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.

[9] If this Order is enforced by a judgment of a United States court of appeal, 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."

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.

(d) 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., September 29, 2011.

Margaret G. Brakebusch
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An agency of the United State 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 photograph union picketing at our premises.

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, 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 ELECTRICAL CONTRACTING, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the

Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6178
(817) 978-2938, Hours: 9:15 a.m. to 5:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (817) 978-2938.