JD(ATL)–01–12
Birmingham, MI

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

EFFICIENT DESIGN, INC.

and **CASE 07–CA–60306**

LOCAL 9, INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS (BAC), AFL–CIO

Scott R. Preston, Esq.,
for the Acting General Counsel
John G. Adam, Esq., of Royal Oak, Michigan,
for the Charging Party
Donald E. Conley, Esq., of Birmingham, Michigan
for the Respondent

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on December 12, 2011, in Detroit, Michigan. After the parties rested, I heard oral argument, and on December 13, 2011, issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] The Conclusions of Law, Remedy, Order and Notice provisions are set forth below.

Further Discussion

In *Toering Electric Co.*, 351 NLRB 225 (2008), the Board discussed refusal-to-hire allegations which arose in the context of a union's "salting" campaign, which the Board has described as "the act of a trade union in sending a union member or members to an unorganized

[1] The bench decision appears in uncorrected form at pages 159 through 173 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

jobsite to obtain employment and then organize the employees." *Tualatin Electric*, 312 NLRB 129, 130 fn. 3 (1993), enfd. 84 F.3d 1202, 1203 fn. 1 (9th Cir. 1996).

The Board noted that a "salting campaign's immediate objective may not always be organizational, and the role of an individual 'salt' who applies for work may not always be to obtain employment." Id. In some instances, a "salting" strategy may entail the filing of unfair labor practice charges to "impose on charged nonunion employers the immediate and often substantial expenses of defending themselves in legal proceedings" and to "provide the premise for disruption of the nonunion employer's work force and production through a series of declared unfair labor practice strikes." *Toering Electric Co.*, 351 NLRB at 225.

The Board held that "an applicant for employment entitled to protection as a Section 2(3) employee is someone genuinely interested in seeking to establish an employment relationship with the employer." Id. at 228. However, the Board further stated:

> Although some salts, paid or unpaid, may genuinely desire to work for a nonunion employer and to proselytize coworkers on behalf of a union, other salts clearly have no such interest.

Toering Electric Co., 351 NLRB at 230.

The bench decision in the present case weighs certain statements of Respondent's project manager, Jeffrey Thomas, using the criteria set forth in *Rossmore House*, 269 NLRB 1176 (1984). It could be argued that at least some of the questions which Manager Thomas posed to Jones sought only to determine whether Jones had a genuine desire to work for Respondent or whether he was applying for work with the intention of doing mischief unprotected by the Act. In other words, it might be argued that the questions pertained to whether Jones was an "employee" as described in *Toering Electric Co.*, rather than to Jones' union membership and propensity to engage in protected activity.

However, in considering whether communications from an employer to employees violate the Act, the Board applies an "objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect." *Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006), citing *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001).

In determining whether questioning reasonably tends to restrain or interfere with employees in the exercise of Section 7 rights, the *Rossmore House* test focuses on "all the circumstances." It would not be faithful to this standard to single out certain questions by Thomas which seek to elicit information about Jones' intention to perform assigned job duties and to ignore other questions which, on their face, concern Jones' inclination to engage in union activity.

When Thomas, discussing the prospects of Jones being hired, told him that "I guess it depends on how unionized you are," that statement reasonably would be understood to refer to activities protected by Section 7 of the Act. Shortly after making this statement about "how unionized you are," Thomas said something else to Jones which is somewhat more ambiguous.

He told Jones that if "you've been sent our [sic] here to be a rat, so to speak" then Thomas would have to "say goodbye."

Although the "be a rat" statement might mean a number of things, if considered in isolation, the fact that it closely followed "how unionized you are" places it in a specific context. In these circumstances, I conclude that a listener reasonably would associate "be a rat" with the protected activity of being "unionized."

This objective test—determining, based on the language of the statements, what message they would communicate to a reasonable listener—forms the basis for the bench decision's conclusions that Respondent's questions violated Section 8(a)(1) of the Act. To analyze the 8(a)(3) allegation, I view the Respondent's questions to Jones from a slightly different perspective.

As discussed in the bench decision, the Board analyzes refusal-to-hire allegations using the framework set forth in *FES (A Division of Thermo Power),* 331 NLRB 9, 14 (2000). Under that framework, the General Counsel must prove, among other things, that antiunion animus contributed to the decision not to hire the applicants. Therefore, I revisit Thomas' questions to Jones not to ascertain what message they would convey to a reasonable listener but rather what they actually revealed about the manager's state of mind.

In the present case, it could be argued that Thomas' questions to Jones do not signify hostility to union membership or protected union activity. Although a union did not represent Respondent's employees, this construction contractor hired union members fairly frequently. Moreover, the record does not establish that Thomas harbored a general antagonism to the Union. Rather, he was upset because an employee named Carl, who was a union member, together with a union representative, had complained about the quality of certain construction. Their complaint resulted in a number of tests being performed, presumably at considerable expense. The record indicates that the tests showed their complaint to be unfounded.

From the record, it is not clear whether the complaint by Carl and the union representative enjoyed the protection of the Act. Perhaps it did, but there is a possibility it did not. Do Manager Thomas' questions only indicate that he wished to prevent a repetition of unprotected conduct?

Thomas' remarks to Jones, in the interview Jones recorded, do not draw a clear distinction between actions inconsistent with an employee's duty to his employer and legitimate union activities protected by the Act. I infer that Thomas may not have thought in terms of such a distinction. To the contrary, he seemed to make an unarticulated assumption that the more "unionized" an applicant, the more likely that person would be a "rat." Therefore, I conclude that although Thomas' hostility may have arisen because people associated with the Union engaged in certain conduct, arguably unprotected, the animus extended to all persons identified with the Union. Quite obviously, it is impermissible to discriminate against a member of a legally protected class because of membership in that class.

During oral argument, Respondent noted that it had hired other union members, thereby demonstrating that it harbored no antiunion animus. However, I focus here on the specific decision Respondent made about Jones, namely, not to hire him. Manager Thomas' own words prove that he harbored animus at the time he considered hiring Jones. Additionally, I conclude that Thomas' coercive questioning of Jones establishes that this antiunion animus contributed to the decision not to hire him.

For reasons discussed in the bench decision, I also conclude that the General Counsel has proven the other two initial elements under the *FES* framework. During oral argument, Respondent contended that it had no definite plans to hire employees at the time Thomas interviewed Jones but, as discussed below and in the bench decision, Thomas' own words establish a definite intention to hire employees, indeed, an intention to hire them within the next 14 days, the exact timing depending on the weather. Moreover, both documentary evidence and testimony support a finding that Respondent did hire during this period.

Respondent also argued that Jones did not submit a job application. However, as noted below, the record demonstrates that Respondent sometimes put an individual to work even before that person filled out an application. It is not clear whether Respondent had on file an application which Jones submitted earlier, but in any event, I find that the existence or nonexistence of an application did not figure in Respondent's decision not to hire Jones.

Because the General Counsel has proven the three initial elements required by the *FES* framework, the burden shifts to Respondent to prove that it would not have hired Jones even if Jones had not been a union member or associated with the Union. Respondent has not met this burden. Therefore, as explained more fully in the bench decision, I conclude that Respondent's failure and refusal to hire Jones violated Section 8(a)(3) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached as Appendix B. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring,* 356 NLRB No. 9 (October 22, 2010).

Respondent must remove from the application form it provides to prospective employees all questions pertaining to the applicant's union membership and activities.

The General Counsel seeks a remedy which includes, as stated in the complaint, that Respondent offer "employment to Cory Jones, or if no position exists, to a substantially equivalent position, and make him whole for any loss of earnings or other benefits suffered as a result of Respondent's discrimination against him by payment to him of backpay together with interest calculated in accordance with Board policy."

At the outset, and in view of *Toering Electric Co.*, above, it may bear mention that the record leaves no doubt that Jones was a bonafide job applicant, entitled to the Act's protection. He had been out of work for a considerable time, and was genuinely interested in an employment relationship with Respondent. No evidence suggests that he intended to accept employment for any purpose other than earning a living. Rather, I find that he intended to work indefinitely, if offered employment, and intended to perform his work in a satisfactory manner.

Although Jones tape recorded the job interview at the behest of a union representative, no credited evidence establishes the Union was following a "salting" strategy or sought to use Jones to provoke the Respondent into committing unfair labor practices. I conclude that Jones meets the definition of "employee" in Section 2(3) of the Act and that he is entitled to the Act's protection.

To obtain an instatement and backpay remedy for a refusal-to-hire violation, the General Counsel must prove that an opening existed for each discriminatee for whom he requests that relief. *Construction Products*, 346 NLRB 640, 641–642 (2006), citing *FES*, 331 NLRB 9, 14 (2000), supplemented by 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). I conclude that the General Counsel has met this burden and that, accordingly, Jones is entitled to be made whole, with interest, for the loss of earnings he suffered because of Respondent's unlawful failure and refusal to hire him.

Credible evidence clearly establishes that Respondent filled bricklayer positions not long after its project manager interviewed Jones on April 4, 2011. As noted in the bench decision, it put another bricklayer, Fred Treutle, to work on that same day.

At one point during the testimony of Respondent's project manager, Jeffrey Thomas, Respondent's counsel asked "When you interviewed Cory Jones, did you need any bricklayers at the Cros-Lex project?" Thomas answered "No."

However, Thomas also testified that Respondent hired a bricklayer, Russ Teetzel, who began work on April 18, 2011. (Another employee, Greg LaScott, also began work that same day, but he is a laborer.)

Moreover, during the April 4, 2011 job interview, which Jones recorded, Thomas said that he had "jobs down like in Roseville and East Detroit" which were about to start, and when they did, he would transfer workers from the Cros-Lex jobsite, creating openings there. Thomas told Jones he would "[t]ake two or three of ya, you know." However, because of anticipated rain, he could not say exactly when the job openings would occur: "So, you might, might be next week, might be the week after, it all depends on the weather."

The actual start date of Teetzel, on April 18, shows that Thomas' prediction of "the week after" was correct. Accordingly, I find that, but for Respondent's unlawful discrimination against Jones, he would have been hired and begun work for Respondent on April 18, 2011. Respondent must make Jones whole, with interest, for the loss of pay and benefits he suffered because Respondent failed and refused to hire him on this date.

The make-whole relief 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), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

The record does not establish whether the completion of the Cros-Lex project would have resulted in Jones' layoff or, if so, when such a layoff would have occurred. Therefore, issues concerning the end of the backpay period or the tolling of accrual of backpay remain for the compliance stage of this proceeding.

CONCLUSIONS OF LAW

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

2. The Charging Party, Local 9, International Union of Bricklayers and Allied Craftworkers (BAC), AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by coercively interrogating prospective employees about their union membership and activities, by requiring prospective employees to complete a job application form questioning them about their union membership, and by threatening prospective employees with discharge if they engaged in union activities.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to hire bricklayer Cory Jones for employment at Respondent's Crosswell jobsite because of Jones' union membership, sympathies, and activities, and to discourage employees from engaging in such activities.

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

6. The Respondent did not engage in any unfair labor practices alleged in the complaint not specifically found here.

On the findings of fact and conclusions of law, and on the entire record in this case, I issue the following recommended[2]

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

ORDER

The Respondent, Efficient Design, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Interrogating prospective employees, either orally or through a job application form or other writing, about their union membership and sympathies;

(b) Threatening prospective employees with discharge if they engage in union or other protected, concerted activities.

(c) Failing and refusing to hire a job applicant because of the applicant's union membership, sympathies, or protected, concerted activities.

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

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

(a) Remove all questions pertaining to union membership from application forms which it directs prospective employees to complete.

(b) Offer Cory Jones employment in the bricklayer position for which he applied on about April 4, 2011 or, if that position no longer exists, to a substantially equivalent position.

(c) Make Cory Jones whole, with interest computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and compounded daily as set forth in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir 2011).

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its place of business in Chesterfield, Michigan, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix B."[3] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the

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

Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring,* 356 NLRB No. 9 (October 22, 2010).

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated Washington, D.C., January 13, 2012.

Keltner W. Locke
Administrative Law Judge

APPENDIX A

Bench Decision

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. For the reasons to be discussed, I conclude that Respondent violated Section 8(a)(1) of the Act by unlawfully interrogating and threatening a job applicant, and violated Section 8(a)(3) and (1) of the Act by failing and refusing to hire the applicant because of his association with a labor organization.

Procedural History

This case began on June 13, 2011, when the Union, Local 9, International Union of Bricklayers and Allied Craftworkers, AFL–CIO, filed its initial charge in this proceeding. The Union amended this charge on September 29, 2011.

On September 30, 2011, after investigation of the charge, the Regional Director for Region 7 of the National Labor Relations Board issued a complaint and notice of hearing, which I will call the "Complaint." In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government." Respondent filed a timely answer.

On December 12, 2011, a hearing opened before me in Detroit, Michigan. At the beginning of the hearing, the government amended the Complaint and Respondent amended its answer.

After all parties had rested, counsel for the General Counsel, the Union and the Respondent presented oral argument, which I have carefully considered. Today, December 13, 2011, I am issuing this bench decision.

Admitted Allegations

In its Answer, Respondent stated that it "does not contest" that the original charge in this proceeding was filed by the Union on June 13, 2011, and that a copy was served by regular mail on Respondent on June 17, 2011. It also "does not contest" that the Union filed its amended charge on September 29, 2011, and that Respondent received service of the amended charge on September 30, 2011. In view of Respondent's answer, and noting the presumption of administrative regularity, I so find.

Based on Respondent's admissions, I conclude that the government has proven the allegations raised in complaint paragraphs 2, 3 and 4. Therefore, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that it meets the Board's standards for the assertion of jurisdiction.

APPENDIX A

Further, based upon these admissions, I conclude that Respondent is a masonry contractor and that, at all material times, it maintained a worksite and temporary office at the Croslex High School jobsite in Crosswell, Michigan, where it had been engaged in the installation of masonry block and brick for the school building.

In its answer, Respondent admits that its president, Raymond Salelens, and its project manager, Jeffrey Thomas, are its supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act. I so find.

At hearing, Respondent amended its answer to admit that the Union was a labor organization within the meaning of Section 2(5) of the Act. I so find.

Respondent's answer admits the allegations raised in complaint paragraph 8 which states that at all material times, since at least April 8, 2011, Respondent has maintained and utilized a job application form requesting that applicants disclose if they are union members and of which local they are members. I so find.

Complaint paragraph 9 alleges that since about April 18, 2011, Respondent has failed and refused to hire Bricklayer Cory Jones at and/or for its Crosswell jobsite. Respondent's answer states, "Respondent admits that it did not hire Bricklayer Cory Jones at and/or for its Croswell jobsite for the reason that it did not need any additional bricklayers at and/or for its Croswell jobsite." Based on Respondent's admission, I conclude that the government has proven that Respondent failed and refused to hire Jones, as alleged.

Complaint paragraph 11 alleges that the job applicant, Cory Jones, had the experience and training relevant to the announced or generally known requirements for the position of bricklayer at the Crosswell jobsite. Respondent's answer states "Respondent does not contest the experience and training of applicant Cory Jones and asserts it had no open positions for such applicant." Based on this admission, as well as Jones' testimony during the hearing, I find that Jones had experience or training relevant to the announced or generally known requirements of the bricklayer position for which he applied.

Facts

No labor organization represents Respondent's employees. However, it sometimes has hired bricklayers who were union members. Based on the testimony of Union Field Representative Michael Lynch, which I credit, he gave certain members permission to work on the nonunion project provided that they reported to him concerning wage rates and working conditions.

On the Crosswell school project, Respondent employed a bricklayer, identified as "Carl," who was a union member. Although the record does not establish the exact date, at some point before April 1, 2011, Carl and Union Representative Lynch went to the superintendent of schools to complain that certain portions of the work, such as the rebar, had not been done correctly.

APPENDIX A

The school superintendent, Kevin Miller, credibly testified that, because of this complaint concerning the soundness of the construction, he ordered an x-ray and other tests, which "came out within the scope of what was to be done." In other words, the tests found no problem.

Sometime before April 1, 2011, Bricklayer Cory Jones visited the Respondent's jobsite trailer to seek employment but did not find anyone present at the time. He then went to School Superintendent Miller, who called Respondent's project manager, Jeffrey Thomas. On April 1st, Thomas telephoned Jones.

Jones is a member of the Union and is also its recording secretary. Previously, he served as shop steward on various jobs.

Complaint paragraph 7(a), as amended, refers to this conversation. It alleges that on or about April 1, 2011, in a telephone conversation, Respondent "interrogated prospective employees about their union membership and sympathies." Respondent states, in its answer, that "Respondent admits that its agent Jeffrey Thomas asked prospective employees about their union affiliation but denies he asked about their sympathies."

Jones credibly testified that Thomas "asked me if I was union or not, and I told him I was."

According to Thomas, "I let him know that we were a non-union company" and asked him if he had any problems with it. Thomas also testified that he cautioned Jones that if Jones began causing any kind of problem, "anything disruptive," that "we would have to let him go."

Based upon the testimony of Jones and Thomas and upon the admission in Respondent's answer, I find that Thomas did interrogate a prospective employee, Jones, concerning his union membership. However I do not find that Thomas asked Jones about his "sympathies" during this telephone conversation.

Thomas asked Jones to come to a job interview the following Monday, April 4, 2011. Jones then contacted Union Representative Lynch, who gave Jones a microcassette recorder with which to tape the interview.

On April 4th, Jones, with the recorder in his shirt pocket, met with Thomas. The government introduced both the tape recording itself and a transcript of it into evidence. Based on the testimony of Jones and Lynch, who sometimes had custody of the tape, I conclude that it is complete and unaltered, and rely upon it.

Early in the conversation, Thomas asked Jones "What local you outta?" After Jones replied that it was Local 9, the conversation continued as follows:

Thomas:	Well, am I gonna have problems like, ah. . .other people trying to. . .start shit out here?
Jones:	I don't think so. I. . .

APPENDIX A

Thomas: (laugh) Well, that's the wrong answer. You're supposed to say no.

Later in the conversation, Thomas indicated that he was trying to get other construction projects underway in Roseville and East Detroit, which would entail transferring employees from the Crosswell jobsite. At that point, Thomas said, he would be able to put "guys to work." However, the timing would be affected by the weather, which might affect the Roseville and East Detroit projects. Thomas said: "Take two or three of ya, you know. So you might, might be next week, might be the week after. It all depends on the weather."

Thomas then referred to his conversation with School Superintendent Kevin Miller: "Well, I know I talked to Kevin and he said that you're kind in a bad way and you need a job and my concern right now is, you know. . . bottom line is the union tried to start some shit out here and, you know, but we're fucking, you can even see the fucking job is nice. You got pride."

Thomas added, apparently referring to Jones' prospects for employment, "I guess it depends on how unionized you are." Thomas explained that if he felt that "something's going on or. . . you've been sent our [sic] to be a rat, so to speak, you know, then like I have to. . . say goodbye. . ." What Thomas meant by "be a rat" became clear later in the conversation:

Thomas:	. . .I got to be concerned about it cause of the shit that the union is trying to pull.
Jones:	Well, what are they trying to do?
Thomas:	Well, they're just, shit, not grouting the walls, not putting rebar and shit in and, so. . .
Jones:	Well.
Thomas:	We got a machine and we went out there, and all the places where Carl said that there wasn't. . .
Jones:	Right.
Thomas:	It shows that there is.

Thomas expressed the opinion that the Union had put pressure on Carl to cause problems. Jones replied that "nobody's done that to me. . ." However, Jones also told Thomas that Carl was his friend.

Later in the conversation, Thomas told Jones, "So, I'm definitely looking for good bricklayers and like I said you know when I put you on, it definitely doesn't have to be it. You know, obviously if I think you're trying to Carl me then. . ."

Respondent has admitted that it never offered Jones employment. Thomas testified that another bricklayer, Fred Treutle, began work for Respondent on April 4, 2011, the same day as the interview with Jones. However, Treutle's employment application is dated April 8, 2011. I conclude that an employment application is not a prerequisite to hiring, and that an applicant may complete the application after being offered employment or even after being put to work.

APPENDIX A

Analysis

Respondent has admitted that it asked about a job seeker's union membership on the employment application form. Additionally, the record clearly establishes that during the April 1, 2011 telephone conversation, Project Manager Thomas asked Jones if he belonged to the Union. Under the circumstances, were these questions unlawful?

The test for whether an unlawful interrogation occurred is "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

The Board considers such factors as whether the interrogated employee is an open or active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation.

Here, Respondent asked a job applicant about his union membership on the job application form as well as through a supervisor. Considering all of the *Rossmore House* criteria, and the totality of the circumstances, I conclude that both the question on the job application form and Thomas' question during his April 1, 2011 telephone conversation with Jones were coercive and unlawful. See *Sproule Construction Co.*, 350 NLRB 774 (2007). In the present case, some of the *Rossmore House* factors weigh against finding that the interrogation was coercive. For example, Jones did not try to conceal his union membership. Moreover, the questioning did not occur in the context of existing serious unfair labor practices.

Nonetheless, the fact that Respondent asked the question about union membership in the context of considering an applicant for employment weighs heavily towards finding the question coercive. Moreover, as Thomas himself admitted in his testimony, he "pretty much" hired all the employees on the Crosswell project. He was the decision-maker with authority to hire or reject a job applicant.

In these circumstances, I conclude that both the question on the application form (alleged in complaint paragraph 8) and Thomas' questioning of Jones during the April 1 telephone conversation (alleged in complaint paragraph 7(a)) violated Section 8(a)(1) of the Act.

Complaint paragraph 7(b) alleges that on about April 4, 2011, Respondent coercively interrogated prospective employees about their union membership and sympathies and the union membership, activities, and sympathies of other employees." Respondent's answer admits that Thomas asked about the applicant's union membership, but denied that Thomas inquired about Jones' union sympathies or the about the union membership and activities of other employees.

However, the evidence clearly shows that Thomas not only asked Jones if he were a union member, but also sought information to judge how likely it was that Jones would engage in union activity. Thus, Thomas said, "I guess it depends on how unionized you are."

APPENDIX A

Section 7 of the Act protects more than the right to be a member of a labor organization. It also includes the right to engage in concerted activities "for the purpose of collective bargaining or other mutual aid and protection."

On the other hand, I conclude that the record does not establish that Thomas coercively inquired about the union activities, sympathies and membership of others besides Jones. Although Thomas and Jones discussed an employee, Carl, it does not appear that Thomas was trying to obtain any particular information about him.

However, applying the *Rossmore House* criteria, I conclude that Thomas' interrogation of Jones was coercive and violative.

Complaint paragraph 7(c) alleges that on about April 4, 2011, Respondent threatened prospective employees with discharge if they engaged in union activities. Respondent denies this allegation.

At one point during Thomas' conversation with Jones, he remarked that if felt that Jones had been sent to the job to "be a rat" then he would have to "say goodbye." In the context of the entire conversation, I conclude that "to be a rat" referred to engaging in union activity.

It is arguable that Thomas' "rat" remark only referred to a worker who did poor work or failed to do the work assigned. However, Thomas did not say anything to suggest the meaning was so limited. Applying an objective standard, I conclude that the "rat" comment reasonably would be understood to refer to protected activities as well.

In sum, I find that Respondent unlawfully threatened prospective employees with discharge as alleged in complaint paragraph 7(c).

The Failure to Hire

To prove an unlawful refusal to hire, the General Counsel must establish three elements:

(1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct;
(2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and
(3) that antiunion animus contributed to the decision not to hire the applicants.

Dynasteel Corp., 346 NLRB 86, 88 (2005) citing *FES (A Division of Thermo Power)*, 331 NLRB 9, 12 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).

APPENDIX A

Respondent has admitted that it did not hire Jones. It also has admitted that Jones had the requisite experience and training. Moreover, Thomas' unlawful statements to Jones constitute sufficient evidence that antiunion animus contributed to the decision not to hire him.

Respondent denies that it was hiring at the time of Jones' application. For the following reasons, I reject that argument.

During his conversation with Jones, which Jones recorded, Thomas said "I'm definitely looking for good bricklayers." Even standing alone, that sounds rather emphatic. However, Thomas also indicated that he expected to be hiring the next week or the week after that, depending on the weather.

Moreover, the record establishes that Respondent hired Fred Treutle and put him to work on the very same day, April 4, 2011.

In sum, I conclude that the General Counsel has established all three *FES* elements. The burden therefore shifts to Respondent to establish that it would have made the same decision in any event, regardless of union membership or protected activities.

As already noted, I have concluded that completing a job application was not a prerequisite to being considered or offered employment. In other respects, I conclude that Respondent has not carried its burden. Therefore, I find that Respondent's failure to hire Jones violated Section 8(a)(3) and (1), as alleged.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, Remedy, Order and Notice~. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

I greatly appreciate the civility and professionalism displayed by counsel in this proceeding. Thank you. The hearing is closed.

APPENDIX B

NOTICE TO EMPLOYEES

Posted By Order Of The
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the federal labor law and has ordered us to post and abide by 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 interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT , either orally or in writing, interrogate job applicants about their union membership or activities.

WE WILL NOT refuse to hire or offer employment to any job applicant because of that person's membership in, affiliation with, or activities on behalf of a labor organization, or because of that person's other protected, concerted activities.

WE WILL remove from the application form we provide to prospective employees all questions seeking information about the applicant's membership in, affiliation with or activities on behalf of a labor organization.

WE WILL offer Cory Jones immediate and full employment in the position for which he applied in April 2011, or, if that position no longer exists, in a substantially equivalent position.

WE WILL make Cory Jones whole, with interest, for all losses he suffered because we unlawfully failed and refused to hire him.

EFFICIENT DESIGN, 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.

477 Michigan Avenue, Room 300, Detroit, Michigan 48226-2569

(313) 226-3200, Hours: 8:15 a.m. to 4:45 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, (313) 226-3244.