

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

D&S ELECTRICAL CONTRACTORS, INC.

and

Case No. 19-CA-088609

INTERNATIONAL BROTHERHOOD OF ELECTRICAL  
WORKERS, LOCAL 46

*Rachel Cherem, Esq.*, for the General  
Counsel

*Selena C. Smith, Esq.*, and *Brian P.  
Lundgren, Esq.*, for the Respondent

*David A. Hannah, Esq.*, for the Charging  
Party

**DECISION**

**Statement of the Case**

**Gerald A. Wacknov, Administrative Law Judge:** Pursuant to notice a hearing in this matter was held before me in Seattle, Washington on April 30, May 1 and 2, 2013. The charge was filed by International Brotherhood of Electrical Workers, Local 46 (Union) on September 4, 2012, and an amended charge was filed by the Union on October 29, 2012. Thereafter, on December 19, 2012 the Regional Director for Region 19 of the National Labor Relations Board (Board) issued a complaint and notice of hearing alleging a violation by D&S Electrical Contractors, Inc. (Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (Act). The Respondent, in its answers to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (General Counsel), counsel for the Respondent, and counsel for the Union. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

## Findings of Fact

### I. Jurisdiction

5           The Respondent, a Washington state corporation, maintains an office and place of  
 business in Clarkston, Washington, where it is engaged in the business of performing  
 commercial electrical work in the construction industry. In the course and conduct of its  
 business operations the Respondent annually purchases and receives at its Clarkston  
 10           Washington facility goods, products, and materials valued in excess of \$50,000 directly from  
 points outside the state of Washington. It is admitted and I find that the Respondent is, and at all  
 material times has been, an employer engaged in commerce within the meaning of Section 2(2),  
 (6) and (7) of the Act.

### II. The Labor Organization Involved

15           It is admitted, and I find, that the Union is and at all times material herein has been, a  
 labor organization within the meaning of Section 2(5) of the Act.

### III. Alleged Unfair Labor Practices

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#### A. Issues

25           The principal issues in this proceeding are whether the Respondent has violated and is  
 violating Section 8(a)(1) of the Act by coercively interrogating employees regarding their union  
 activity and by telling them that they will not be hired because of their union affiliation or activity,  
 and whether the Respondent has violated section 8(a)(1) and (3) of the Act by refusing to hire or  
 consider for employment four employees because of their union affiliation or activity.

#### B. Facts

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The Respondent is a nonunion electrical contractor engaged in prevailing wage hospital  
 and school installations. It customarily has between two and four projects ongoing  
 simultaneously, and employs between 20 to 60 or more electricians according to the size of the  
 various projects.

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Richard Flerchinger is the Respondent's president, Forrest Rudolph is the Respondent's  
 field coordination officer, Patricia Abel is the Respondent's administrative assistant, and John  
 Stranberg is the site superintendent for the Respondent's Bellevue High School project.

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Rudolph oversees all of the Respondent's projects and does the hiring of electricians on  
 all the projects. Each project is under the day-to-day supervision of a site superintendent. Site  
 superintendents do no hiring. Rudolph is in contact with the site superintendents and tries to  
 visit each job site once a week. Rudolph, with the input of the site superintendent, assesses the  
 manpower needs of each job, and decides how many electricians are initially needed on each  
 45           project and whether the size of the crew should be augmented by additional employees as the  
 job progresses. The hiring process is explained below.

Abel works in the Respondent's office and is the Respondent's administrative assistant.  
 Among her other duties, Abel has responsibility for processing job applications. She sends  
 employment applications to those who request them, checks their references, and, after  
 50           Rudolph has authorized her to send them for drug screenings, sends them the requisite drug

screening documentation, including the location of the drug screening services in their locales. She communicates with applicants by phone, fax, or email, receives their phone calls, answers their inquiries, informs them of their status, and advises them whether or not they have been hired and where and when to report for work. She makes no hiring decisions, and simply follows the instructions of Rudolph with regard to all hiring matters. If Rudolph determines that there is a need for employees on any particular job he so advises Abel who, in turn, contacts the employees who have not yet been hired but, after their employment applications and references have been checked and after having passed the drug test, are in effect on standby status for immediate employment.

Rudolph testified that drug screening is the final step of the hiring process, and because drug screening is costly he advises Abel to send any given applicant out for drug screening only after their references check out and they are being considered for employment. After passing the drug screening the applicant is considered to be immediately available for work when notified.

Rudolph testified that the Respondent first became involved in the Bellevue High School project in May 2012.<sup>1</sup> This was an ongoing project; the general contractor retained the Respondent to take over the electrical work from a defunct electrical contractor. It was an unusual situation according to Rudolph because, "we had to hit the ground running and there was so much work to be done immediately...it was an unusually difficult time for us." Prior to beginning work, it was initially determined that the manpower needs for this project were between 18 and 20 electricians. This created immediate staffing issues, as the electricians comprising Respondent's core group of employees were busy working at other job sites. This required that Rudolph look at his secondary source for electricians, namely referrals and rehires. However, he "pretty much hit a dead end" and therefore went to the applicant pool for electricians "to help us through this project during the summer months, up until we could start cutting back." Having to hit the ground running created administrative pressure for the Respondent. According to Rudolph, "It kept Patti [Abel] busy in the office almost constantly processing and checking references and job applications to the point where they had to bring in somebody to assist her."<sup>2</sup>

John Stranberg has been a site superintendent for the Respondent for 11 years, and has worked on many projects. He supervises the jobsite, deals with the general contractor, and coordinates subcontractors and his crew. Because of the exigencies of the situation he was taken from another project and assigned as the site superintendent for the Bellevue High School project on short notice. On June 18, he and a foreman began working at the site. He brought on a second foreman the second day, June 19. The initial crew of electricians began working on June 25.

Stranberg testified that he tells Abel and Rudolph when he has manpower needs. They, in turn, go to work and do what they can to fulfill the needs. Thus, Stranberg testified:

Well, when I figure out what I need for crews for certain areas, I just communicate with the office that we are working in certain areas. I have a

<sup>1</sup> All dates or time periods hereinafter are within 2012 unless otherwise stated.

<sup>2</sup> Jt. Exh. 1 is a 205-page exhibit containing the employment applications and accompanying documents from applicants who were applying for either the Woodinville High School Project or the Bellevue High School project from about May through August. From a partial examination of this exhibit, I estimate the number of applicants to be between 60 to 75.

certain amount of manpower that is required to perform the work in that area, and these are the timelines I have to get that work complete (sic), and then they orchestrate getting the manpower on the site so I can fulfill my duties.

5 Stranberg believes that on June 25 he started off with a crew of about 12 journeymen electricians. Half were current employees and half were new hires who had never worked for the Respondent. After June 25, according to Stranberg, “that job just kind of took off on us and we were adding a lot of bodies to the project.” During the 2-week period from June 25 to July 9 the number of electricians on the job, obtained through the foregoing hiring process, was  
10 increased to a complement of about 18.<sup>3</sup> Stranberg was in daily contract with the general contractor on the site and was closest to assessing the needs of the workforce. As of July 9, Stranberg believed that more electricians were needed. Further, Stranberg testified that the general contractor was “biting my ear off” because of the “time crunch” to get the work  
15 completed, and a significant amount of overtime was being worked by the electricians at the site at the request of the general contractor and the owner.<sup>4</sup> Accordingly Stranberg, who also believed that more employees were needed and, in addition, was feeling pressure to accommodate the general contractor, advised Rudolph and Abel that he wanted to continue bringing on additional electricians.

20 On July 9, however, Rudolph, contrary to Stranberg’s assessment of the situation, decided to put an abrupt halt to hiring, *infra*. Stranberg testified that Rudolph “had a different perception on the project than I did,” and that “[Rudolph] wanted to put a halt to additional staffing until things could kind of work itself out...see how our new crew members  
25 ...performed...we always want to create a flow on the project and run lean, and so he put a halt to the hiring.” The hiring hiatus, however, was short-lived, *infra*.<sup>5</sup>

The complaint alleges that beginning on July 9 the Respondent failed to hire four individuals because of their union affiliation

30 Mark Anderson, Steven Begley, David Tompkins and Margaret Ely are journeymen electricians with EL01 electrical licenses issued by the State of Washington. This license

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<sup>3</sup> This is the number of electricians, according to Rudolph, that he, with Stranberg’s input, initially estimated would be needed. This initial assessment was made prior to commencing work.

<sup>4</sup> The Respondent’s records show that on this prevailing wage project, journeyman electricians were earning \$57.74 per hour for regular time work and \$86.61 per hour for overtime work. During the week ending July 7 the overtime hours worked by the Respondent’s journeyman and apprentice electricians totaled 216.5 hours for the week; during the week ending July 14, the Respondent’s overtime hours totaled 217.5 hours for the week; during the week ending July 21, the Respondent overtime hours totaled 153 hours for the week; during the week of July 28 the Respondent’s overtime hours totaled 161 hours for the week; during the week ending August 4, the Respondent’s overtime hours totaled 230 hours for the week; during the week ending August 11, the Respondent’s overtime hours totaled 238 hours for the week.

<sup>5</sup> Stranberg apparently believes that the hiatus lasted a few weeks instead of a few days. Thus, he testified that after the hiring was halted and “after we let things play out for a few weeks, I don’t really remember the timeline...I do remember that we had another area open up to us that wasn’t available when we were doing our initial hiring...and then at that point, we brought on additional help to help staff that area.”

5 qualifies them for any type of electrical work. The four named individuals have had experience with school electrical installations of the type being performed by the Respondent on the Bellevue High School project. Each is a union member of either IBEW Local 46 or IBEW Local 191. When they submitted their respective employment applications each was an out-of-work electrician registered in his or her respective local unions' hiring hall. Each anticipated from his or her high number on the hiring hall roster that work would not be available from 3 to 6 months; each was able and anxious to immediately begin working for the Respondent; and each resided within easy commute distances to the Respondent's Bellevue High School jobsite or other ongoing jobsites. Moreover, their union commitments and policies did not require that they get advance permission to apply for work or work for a nonunion contractor, and there were no limitations imposed by either local union on the duration of their employment with a nonunion contractor.

15 Mark Anderson has been a union member of IBEW Local 46 for 4½ years. He phoned Stranberg on June 20, having learned from his brother in law that the Respondent was hiring electricians. Stranberg told him the Respondent was looking for electricians for the Bellevue school job, and would be ramping up and would soon need help. Within a few days he again called Stranberg about the job. Stranberg told him to call Abel at the shop for an application as they were getting ready to put a crew together. He did so. Thereafter he received an application form and submitted it back to Abel. Not hearing back from Abel he phoned her and asked if she had received his application. She said she had lost it, and faxed him another one. He sent it to Abel on July 6. Several days later he again called Stranberg, who again told him to call Abel. He did so. Abel told him they were looking over his application, that everything looked good, and that she would be getting back to him. On July 9 Abel faxed him a form to take a drug test. He took the test the same day.

30 Michelle Anderson is Mark Anderson's wife. Michelle testified that in the early afternoon of July 9 she received a phone call from Abel, who was attempting to contact Mark. Abel introduced herself and said, according to Michelle, "his application looked great and we would love for Mark to get over to take a urinalysis." She added that "if he could do it that day that would be great, the sooner, the better." Abel said that she was faxing an authorization form for Mark to pick up so that he could take the drug test. Michelle said she would call Mark on his cell phone. Michelle then phoned Mark, who came home and picked up the authorization form that Abel had faxed, and left for the clinic to take the drug test.

35 Michelle testified that Abel called back about 2½ hours later. She told Michelle that the urinalysis "looked great" and asked when Mark would be ready to start work. Michelle jokingly said he could start work that night, and Abel said that wouldn't happen but she needed to talk to the "general foreman" and possibly Mark could start work the next day. Michelle said that would be great, and would "actually give Mark some time to check in with the union on how to go about salting a job," because Mark had never worked for a nonunion company while with the union. Abel asked, "Oh, Mark belongs to the union?" Michelle said yes he does, and Abel said "that they do not hire union hands and they really want—and have nothing to do with the union." Michelle said she would call Mark and let him know what Abel had said, and would have Mark get back to her. Despite Michelle's foregoing testimony, Michelle acknowledged, pursuant to questioning by Respondent's counsel, that Abel never directly told her that Mark was not being hired or that he was not being considered for employment, or that he was being denied employment. Accordingly, it is clear that the conversation ended with the understanding by Michelle that whether or not Mark would be hired was problematical.

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Mark Anderson testified that as he was headed home after taking the drug test, he received a call from Michelle, who told him about her conversation with Abel. Michelle told him she may have “screwed up” by telling Abel that Mark was in the union because Abel said they did not hire people who are in the union. Mark called Abel within 20 minutes, at about 2:30 p.m., and said, “I understand that we have a problem with my employment.” Abel replied, “Yes we do, we don’t normally hire union people or union hands.” Then she asked Mark, “What is salting?” Mark, who had not taken the union’s salting course but had looked up “salting” on the internet, told her, “I believe it’s keeping track of how many journeymen and how many apprentices you have on the job, and basically trying to get D&S [the Respondent] to join the union, unionize.” He also told her that he had “paperwork” he would have to fill out and turn in to the union.<sup>6</sup> Abel responded, “I’m going to have to talk to the GF [general foreman] about it.” Mark did not reply, and Abel said she would call him “right back.” Mark said thank you and that he was looking forward to her call. Mark did not hear back for several hours. At 5 p.m. he called Abel and asked, “do I have a job or not?” Abel said, “We do not hire union people.” She said his application was on file and, “as of right now, they had no openings.”<sup>7</sup>

Steven Begley is a member of IBEW Local 191. He submitted his employment application to the Respondent on Friday, July 6. He too received a phone call from Abel on Monday, July 9. Abel introduced herself, and Begley said he was hoping she would call, adding that he had received a phone call from one of his references on his application who had been contacted by the Respondent. Abel said it was common practice to contact personal references. Begley asked, “Does this mean...welcome aboard?” Abel said yes. Begley thanked her. Abel asked if he would be able to take a drug screening that afternoon. Begley, who had a dentist appointment that afternoon, asked if it would be possible to take the drug test the following day. Abel said that would not be a problem. Begley gave her his email address. Within minutes he received an email with attachments, including a drug test authorization form and directions to various testing locations in his area. It was his understanding that he would be going to work on July 11, the day after passing the July 10 drug screening.

Later that day, however, at approximately 4 p.m., Begley received another phone call from Abel. Abel again identified herself and said, “Listen, I forgot to ask you when I talked to you last time if you were a member of the union.” Begley said, “Yes, I am.” Abel said, “Oh,” and Begley asked, “Is that a problem?” Abel said “it could be,” and told him not to take the drug screening test until he heard back from her. Begley said something along the lines that he didn’t want any troubles and that he just wanted to work. Abel said, “I’ll get back with you.” He has not heard from the Respondent since then.<sup>8</sup>

David Tompkins is a member of Local 191. He learned about the job from an acquaintance, Terry Conrad. In addition, his wife found it posted on an internet site, Craigslist,

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<sup>6</sup> Anderson testified that in fact he did not have the paperwork at the time of this conversation, and was simply attempting to advise Abel that he would have to fill out paperwork and submit it to the union. His Board affidavit states, “Patti asked me if I was going to salt. I said yes, that I had paperwork to fill out and turn in to the union.” While it was his understanding that he needed permission from the union in order to work for a nonunion contractor, he did not testify that he needed prior permission to do so. Other evidence, namely the testimony of Margret Ely, a Local 46 executive board member and trustee and an alleged discriminatee, *infra*, shows that he needed no permission whatsoever. I credit Ely’s testimony in this regard.

<sup>7</sup> Abel testified that she did not recall any conversations with Mark Anderson. However she did recall conversations with Michelle Anderson, *infra*.

<sup>8</sup> Abel testified she did not recall any conversations with Begley.

and showed it to him. It stated, according to Tompkins, that positions were available for EL01 cardholders for prevailing wage electrical work. On July 2 he called the Respondent, said that he saw the ad on Craigslist, and asked for an application. He was transferred to Abel. He told Abel he was interested in the job he saw on Craigslist. She said, “We’re gearing up; we are hiring.” She mentioned three school jobsites, and said, “We’re gearing up for the Clearview job.” Tompkins said, “Great, that’s real close to my home.”<sup>9</sup> She said she would email him an application. He filled it out and faxed it to Abel on July 6. He called within a day, spoke with Abel, and told her he was very interested in the job. She said everything in his application looked good, and said the next step was that he had to pass the drug test. She said she would email him the authorization for the drug test, “and they’re in a crunch to hire a couple more people and I need to hurry.” He received the application for the drug test on July 9. The email from Abel, to which the application was attached, states, “If you could go in as soon as possible it would be greatly appreciated.” He took the drug test the same day.<sup>10</sup> He called Abel “within a day” and asked if they got the results of the drug test. She indicated that he had passed the test. He asked, “When can I go to work?” She asked if he was a union member. He said, “I’ve done both, I’ve been nonunion and union.” Her response was, “We’re not hiring.” On cross examination, asked whether Abel told him why they were not hiring, he testified, “Well, you know she did, I didn’t put it in my [affidavit], but she flat out said, “We do not hire union members...we do not hire—we’re not interested in hiring a union person.” He called back the following day, told Abel he really wanted the job, and advised her that, “Discrimination against a union member is illegal, it’s against the law.” Abel said, “We’re not hiring.”<sup>11</sup>

Margaret Ely is a Local 46 member. She is on the executive board of the local and is a labor trustee on the Union’s pension fund. She is paid for attending executive board meetings and for attending trustee meetings or annual training meetings. As of November she started as a part time Local 46 employee helping with organizing, but is not a paid organizer. Ely testified that there are no restrictions regarding performing work on nonunion jobsites. The only requirement is that members are to report this to the local and give the organizing department a weekly report indicating their wages and job benefits. As far as Ely understands, the same requirement is applicable to Local 191 members.<sup>12</sup>

Ely, who was out of work, was told about the job by one of the organizers. She called on July 13 and spoke to Abel. She said she heard their company was doing work at Bellevue and Issaquah High Schools, and she was interested in applying. Abel said they were looking for electricians and would send her an application. She received the application within the next half-hour, immediately filled it out and faxed it back that day with a cover letter. On Monday, July 16, at 7:13 a.m. she sent the following fax to Abel:

Please let me know, either via email or phone..., when you have had a chance to look over my application so that we can set up an interview. In addition to the skills listed on the application, I have had extensive experience doing school work, both new construction and remodels. I would really enjoy working on either your Bellevue High School or Woodinville High School job.

<sup>9</sup> In fact, the Respondent had no “Clearview” job. It is apparent that Tompkins stated he was interested in the “Bellevue” job, as this is what Abel noted on his application.

<sup>10</sup> Abel’s email to Tompkins is dated July 9 at 11:25 a.m., and his drug test “Chain of Custody Form” shows that he took the drug test at 1:23 p.m. the same day.

<sup>11</sup> Abel variously testified that she did not recall any such conversation with Tompkins, and also that the conversation “never happened.”

<sup>12</sup> As noted, I credit Ely’s testimony in this regard.

She received a fax from Abel at 7:51 a.m., as follows: I received your application and we are still in the process of determining what our needs are. For the moment we have filled the positions, but that may change at any time. I will keep your application on file.

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Ely left a message 2 days later. She reiterated that she was interested in the position at either high school, and would like for the Respondent to reconsider her application because she was anxious to go to work. The application requires the applicant to list the 5 most recent employers. As the second employer on the list, Ely listed IBEW Local 46, and under title and duties, she put “Organize the unrepresented.” Under references on the application, she listed a number of union business representatives. Ely testified that she entered this information on her application knowing that her employment by the Union would be apparent to the Respondent if the Respondent did a job record search; and rather than include her titles and duties as a union trustee and executive board member, she simply “put kind of the mission of the IBEW” on her application.

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Administrative Assistant Abel has worked for the Respondent since October 2008. She reports to Richard Flerchinger, president, and Corey Flerchinger, controller. She described her current job duties as follows:

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I do accounts payable and responsible (sic) for receiving invoices, processing them for payment, reconciling with statements. I do the financial reports, maintain the check register. I do leases for subcontractors, the purchase order purchases. I’m involved in payroll. I track the daily timesheets, track OJT hours to submit OJT reports, keep lists of apprentice hours in the IEC. I process job applications...and their references, and send them out for drug screens. Anything else that’s outstanding.

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Abel testified that while she did not recall conversations with Mark Anderson, Begley, and Tompkins, she did not care whether applicants for employment were union members. She does not “generally” ask applicants if they are union members or question applicants regarding their union affiliation. Abel recalled that two employees who were hired by the Respondent, Joe Dugger and Terrance Conrad, volunteered that information, stating that they were union members when they called in to request an application. She recalled telling them that she didn’t care, it wasn’t an issue, and that, with regard to Dugger, “all we cared about was that he had come highly recommended by another employee.” According to Abel, “There could have possibly been others [who volunteered their union affiliation]. It wasn’t important.” She specifically remembers her conversations with Dugger and Conrad “because it was recent, within the last year.” She testified her conversation with Dugger “stuck out in my mind,” and that she was familiar with Conrad because “he called in all the time.”<sup>13</sup>

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Abel testified that “Bellevue was unique in that we were taking over the job and we had to hit the ground running and we just needed to get that job staffed quickly.” Abel testified, “I do not remember actually speaking to Mark Anderson,<sup>14</sup> but I do recall having a couple of conversations with his wife.”

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<sup>13</sup> Further, Abel testified that the applications of four other employees who were hired by the Respondent on other jobs in 2010 and 2011 indicated their union affiliation.

<sup>14</sup> She also testified that she does not use the letters “GF” to refer to the general foreman and does not know what a “GF” is. Thus, contrary to Mark Anderson’s testimony, she would not have used these initials in any conversation.



Abel testified that Anderson first requested an application on about June 22. She received it on June 25 and received another one on July 6. Again she answered, “Not that I recall,” when asked if she had any conversations with Anderson after receiving his application. She “put him out” for a drug screen on July 9. She did not say how she notified him of the drug screen.<sup>15</sup> Then, according to Abel, she received a phone call from Michelle Anderson, Mark’s wife, who inquired as to the status of Mark’s application and when he would be starting. Abel asked when he would be available, and Michelle replied, “that he had to complete some salting paperwork with his union boss.” Abel asked, “Well, what is salting?” Michelle explained to her that “it’s reporting back to the union how many employees we have and what capacity they’re working.” Abel said, “Well I need to talk to Dick [Richard Flerchinger] because I’m not sure if there’s anything I need to do on my end for the union before he can show up on the jobsite.”<sup>16</sup> She told Michelle that she would call her back after talking to Flerchinger. She never told Michelle that there “might be a problem” with Anderson being a salt or a union member, or that the Respondent does not usually hire union applicants or did not have a need for union hands. She would not have said anything like that because union membership was not an issue for the company--she didn’t care and the company didn’t care.

Immediately after this conversation she spoke with Richard Flerchinger at the shop, and asked, him, “Is there anything I need to do get (sic) Mark Anderson ready? He has to fill out salting paperwork. What do I need to do?” Flerchinger simply replied, according to Abel, “there’s not anything I needed to do.” That brief exchange is the entire extent of Abel’s conversation with Flerchinger.<sup>17</sup>

Then, believing that Mark Anderson was in effect hired, she called Stranberg to find out when he wanted Anderson to start.<sup>18</sup> Abel testified, “At that point, [Stranberg] had told me that Mark’s name had come up on a lunch break and several of the employees said that they didn’t want to work with Mark, that he was not a productive employee.”<sup>19</sup> However, in her Board affidavit, taken on October 12, Abel states: “I am personally not aware of anything about Mark that disqualified him for employment at the Employer.” Explaining her contradictory statements,

<sup>15</sup> Accordingly, I credit the testimony of Michelle Anderson regarding the first conversation she had with Abel that day regarding the drug screening.

<sup>16</sup> However, in her Board affidavit, taken on October 12, 3 months after the conversation, Abel states: “I do not remember what I said in response to Mrs. Anderson’s comments about salting.” Abel testified, however, that after thinking about it she did recall what she said.

<sup>17</sup> Flerchinger, who testified in this proceeding, *infra*, did not mention the conversation during the course of his testimony.

<sup>18</sup> In fact, two employees were in effect hired at the time of her conversation with Stranberg, namely, Mark Anderson, and David Tompkins. Abel did not testify why she did not ask Stranberg when he wanted Tompkins to start.

<sup>19</sup> Stranberg did not corroborate Abel’s testimony that he even had a conversation with her on July 9. And with regard to Anderson, Stranberg testified that early in the hiring process, prior to the time Anderson had even applied, he received a phone call from Anderson who told him he personally knew some of the people who were working on the jobsite and felt he would probably be a good fit for the job. Stranberg told him to call Abel at the office and get the paperwork filled out. Stranberg testified, “It was only natural” for him to mention Anderson’s name and let them know “that we were in the process of trying to hire Mark Anderson,” and when he did so some of his electricians told him they weren’t impressed with his work. At that point he called Abel and let her know “That we wish to not have Mark Anderson come to our jobsite.” This scenario is entirely different from the testimony of Abel and I credit neither Abel nor Stranberg.

Abel testified that the complaints regarding Anderson would not have necessarily disqualified him, and further, that at the time of her affidavit she did not remember this conversation with Stranberg. Rather, she remembered it later, when Stranberg reminded her of the conversation. Then she found an undated handwritten note to this effect, stating:

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Mark Anderson—get him ready.  
Guys on site say we don't want.

Upon learning that Stranberg did not want Anderson to work on his jobsite, she testified that she phoned Rudolph and asked him, "What's going on here? Are we putting Mark on?" Rudolph then advised Abel, "that they were putting a pause on hiring. They wanted to evaluate what was going onsite (sic), we were going to hold off putting anyone on." This is the first she knew about the hiring pause; she did not know when the decision was made as, "I wasn't in the loop clearly as to what was going on."

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On Anderson's application, she wrote, "Have enough employees." On cross examination Abel testified that the foregoing conversation with Rudolph also would have included the status of Tompkins, as both individuals were ready to start work: "Yes, I had them both ready. They had gone through the application process and both of them were –my part of it was done at that point, and I was checking to see what he was wanting to do." Accordingly, as Rudolph had put a blanket pause on hiring, the pause affected all applicants, and she wrote on the applications of each of the four individuals, Anderson, Begley, Tompkins, and Ely, "Have enough employees." Abel testified that Anderson was not removed from the applicant pool as she was never told to remove him from the pool; thus Anderson and the other three applicants remained in the applicant pool during the hiatus in hiring until, according to Abel, "they decided what it was they were going to do at Bellevue." Moreover, in accordance with what was stated on the application form, the applicants would remain in the pool 30 days from the date their applications were submitted.<sup>20</sup> Abel did not write "Okay per Buddy [Rudolph]"<sup>21</sup> on Ely's application because, "We already had three applicants in the pipeline, so we never went any further on even checking past employment or personal references. We just kind of put a pause on hers and never went into her application. So no, 'Okay per Buddy,' she didn't get sent out for a drug screen. She hadn't made it through the process yet."

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Abel testified that after her foregoing respective conversations with Flerchinger, Stranberg, and Rudolph, she had another conversation with Michelle Anderson. She believes Michelle called her back, but she may have called Michelle. Abel told Michelle "that after review with [Rudolph] that they were pausing putting anybody on until they could reevaluate the conditions on the jobsite." Michelle, according to Abel, became "pretty emotional by that point." She was concerned that her mentioning salting was the reason Mark wasn't being hired; she spoke about some personal health matters, and mentioned that Mark was low on the union's hiring roster and would not be called up for employment for a long time. Abel tried to reassure her that his union affiliation had nothing to do with it, and that "we were just taking a pause in the hiring process to reevaluate."

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<sup>20</sup> Outlined in a box at the top of the application is the following: "This application is current only for thirty (30) days, at the conclusion of which time if you have not heard from us and still wish to be considered for employment it will be necessary for you to fill out a new application."

<sup>21</sup> "Okay per Buddy" was placed on all the applications of applicants who were sent out for drug screens; this signifies that Rudolph had authorized the drug screen.

As noted, Abel testified that she recalls no conversations with Anderson, Tompkins, or Ely. With regard to Begley, she testified, “I probably spoke to him at some point to let him know we were pausing in the hiring process and to not go out and take his drug screen just yet.” After sending Begley the drug test authorization form, “He just went back into the general application pool until they decided what, you know, they were going to do at Bellevue.” Abel testified that she would have had no conversations with any of the applicants asking about their union affiliation or telling them that the Respondent did not hire and would not consider union members for employment, as their union affiliation simply made no difference, and there would have been no reason to ask such questions or make such statements. In addition, with regard to Tompkins, she said she would not have asked him about his union affiliation as she already knew this from the job dispatch history on IBEW Local 191 letterhead that he included with his application.<sup>22</sup> Regarding the alleged conversation with Anderson, she would not have used the initials “GF” to refer to the general foreman.<sup>23</sup> And regarding Begley, who testified he saw an ad for the job posted on Craigslist, Abel testified that the Respondent never advertised for electricians, and she is not aware of any Craigslist ads for electricians.<sup>24</sup>

Abel testified that she received a phone call from Rudolph who told her that Joe Dugger was a referral from Cody Herman, a core employee who was working at Bellevue, and instructed Abel to send him an application and “start the process.” Dugger applied on July 11, took his drug screen on July 12, and began work on July 16. Joshua Felix, a referral, applied on July 22, took his drug test on July 24, and was hired on July 26; Bruce Fahber, a rehire, applied on August 1, took his drug test on August 2, and was hired on August 3; and Michael Hughes, a referral, applied on August 20, took his drug test on August 23, and began working on August 24.

Rudolph testified that site superintendents usually want more labor on their sites. He testified that that most of the site superintendents are “very competent in what they do. But if you are in the trenches all day long and you get that added pressure, then they would like more labor, but at times, I do overrule it, yes.”

With regard to manpower, Rudolph testified that he has his core group of employees, including superintendents and foremen and a group of journeymen electricians who have worked for the Respondent for years. This is common in the industry. The core group, comprised of approximately 14 electricians in the Seattle area on the west side of Washington State, tends to stay with the Respondent and are very seldom laid off. If manpower is needed he will look at his list of electricians who have previously worked for the Respondent. If no one is available he will ask the on-site electricians if they know of anyone who is available. If not, he will go to the applicant pool. He hires apprentices from the IEC program of Washington, a state approved apprenticeship school. He likes to hire former employees because “They are a known commodity,” and he knows what they can and cannot do, Referrals are also “somewhat of a

<sup>22</sup> However, Abel acknowledged that at the time she sent him the drug test authorization form she had not yet had the conversation with Michelle Anderson and had never heard the word “salting.”

<sup>23</sup> However, Abel did not testify that she would not have used the words “general foreman,” and according to the testimony of Michelle Anderson, Abel did use the words “general foreman” during their conversation. Moreover, Mark Anderson was not asked whether Abel actually used the initials “GF” or whether this was just his own shorthand reference.

<sup>24</sup> Also, Cory Flerschinger, Respondent’s comptroller, testified that he is the “resident tech guy” and he would have been the only person to place internet ads on behalf of the Respondent. He never placed an ad on Craigslist for electricians.

known commodity,” as the referring electrician has his “reputation on the line, so most of the time we do not get a bad referral from anybody.”<sup>25</sup> They also do a reference check on referrals. Abel sends people for drug testing after their references check out.

5           Regarding the manpower for the Belleview job, he and Stranberg did a “take-off” and prior to commencing work determined the manpower needs in terms of hours of work to complete the job and the “labor budget” available to the Respondent. It was estimated that between 18 and 20 electricians would be needed. The number of estimated electricians included journeymen and apprentices. It could be all journeymen or journeymen and  
10           apprentices combined, as the estimate is based on “man hours” and is adjusted during the course of the project. Rudolf testified, “we like to hire journeymen with apprentices because that... keeps our labor costs down.” Thus, prior to the beginning of work, Rudolf’s calculations were not based on journeymen alone. Rudolf testified that the employees comprising his core group were busy at other projects, and he had to look at possible rehires and referrals “which I  
15           pretty much hit a dead end, so at that point we went to the applicant pool.” New hires from the applicant pool, according to Rudolf, were hired “to help us through this project during the summer months, up until we could start cutting back.”

20           Rudolph testified that on about July 9 there were 15 journeymen and four apprentices on the site. This was the initial forecast amount prior to the commencement of work on the site. He testified, “I needed to step back and do a jobsite assessment to see where we were at on manpower and see if we had enough. I don’t want to over-burden these jobs with unneeded labor on it...Labor is the biggest variable...it is the biggest liability...because... it is money out the window if they are not needed.” He told Abel “that we were halting all future hiring for the  
25           time being.” Following the hiatus Rudolph hired six more journeymen electricians—five referrals and one rehire. Hiring ceased entirely on August 24, and the Respondent started cutting back in September. Currently there are three electricians on the job.

30           The Respondent’s records show that one employee, Jacob Jensen, a rehire, applied on June 21, took his drug test on July 6 and began working at the site on July 9. Another employee, Derek Olson, applied on July 9, but had taken a drug test on June 26, and began working on July 9.<sup>26</sup> Following the hiring of Jensen and Olson on July 9, no general pool applicants were hired. Rather, according to Rudolph, only referrals and former employees (rehires) were hired because they had applied during the hiatus; and, when work picked up they  
35           were given preference over the other applicants. This, according to Rudolph, was in accordance with the Respondent’s customary but unwritten practice of giving priority to referrals and rehires.

40           According to Rudolph, it was not unusual for the Respondent to employ journeymen electricians who have been involved in unions or are currently in unions. Thus, Joe Dugger, who applied on July 11 and began working on July 16, was a referral, and the person who referred him, Cody Herman, said he was a union member.

45           Rudolf acknowledged that overtime wages on a prevailing wage job can be high and in certain circumstances the additional cost might justify bringing on additional employees; according to Rudolph, determining whether or not to hire additional employees to cut down on the number of overtime hours requires “a case by case evaluation.” Moreover, Rudolph

<sup>25</sup> According to Stranberg, referrals are referred by the Respondent’s core electricians.

<sup>26</sup> The record does not show why Olson’s drug test preceded his application date.

acknowledged that pressure from a general contractor might very well be justification to bring on additional electricians, as it is good business policy to keep the general contractor happy.

5 Gwynda Edgar performed temp work for the Respondent from the “end of June,  
beginning of July” until October. She is no longer working for the Respondent. She did office  
work: filing, answering the phone, doing some payroll things. She worked 40 hours per week, 5  
days a week, through July. In June and July her role was basically to call and verify the  
10 references of applicants in order to help Abel; she worked at a desk in Abel’s office, only four  
feet away from Abel. She spent about 80 percent of her time in Abel’s office, and the other 20  
percent performing other work outside of Abel’s office, some 20 feet away. Accordingly, even  
when she was not in Abel’s office she could hear Abel on the phone. She overheard Abel  
speaking with some 25 applicants in the June and July timeframe. According to Edgar, Abel  
never asked applicants if they were union members; nor did she tell applicants that the  
Respondent did not hire union members or did not want union hands. Edgar also  
15 acknowledged, however, that there were “plenty of times” that Abel was on the phone when she  
was not present to listen to Abel’s conversations.

Lindsay Caldwell was an administrative assistant for the Respondent from June until  
20 September, and is no longer working for the Respondent. She worked 2 to 3 days a week, and  
was “constantly moving around the office” and helping everybody in the office: answering the  
phone, putting together O&M manuals, and helping with submittals and timecards. From where  
she was sitting in the reception area she could hear Abel talking on the phone. She never  
heard Abel say anything to the effect that the Respondent did not want to hire union hands, or  
did not hire union workers; nor has she ever heard anyone else say that.

25 Richard Flerchinger is Respondent’s president. Flerchinger testified that he is “working  
the tiller on the ship” and “try[s] to stay at the 10,000 foot level and to oversee the operations  
and how things work and give guidance where needed.” Sometimes, however, if people are  
indecisive, he has the final say. Flerchinger testified that he is familiar with the Bellevue project.  
30 In May, when Flerchinger was discussing the Respondent’s take-over of the project with the on-  
site project manager of the former electrical contractor, Nelson Electric, a union contractor,  
Nelson’s site superintendent came into the office. Flerchinger asked him if it would be possible  
to retain “some of his lead people so that we would have some continuity...” The  
superintendent said it was not possible for his electricians to work for the Respondent because,  
35 according to Flerchinger, “we were a non-signatory shop, it would not be possible for them to  
work for us.” Accordingly, the Respondent put its own crew together, including its own lead  
men, even though Flerchinger “certainly want[ed] some lead men” from Nelson to help with the  
continuity.

40 The foregoing constitutes Flerchinger’s entire testimony. He was asked no questions  
regarding the hiatus in hiring, and did not acknowledge that he even knew about it. Nor did he  
corroborate Abel’s testimony that Abel had a July 9 conversation with him regarding Mark  
Anderson’s salting activity.

### 45 **C. Analysis and Conclusions**

As noted, the complaint alleges that the Respondent advised applicants that they could  
not be hired because of their union membership, and beginning on July 9 the Respondent failed  
to hire four individuals because of their union affiliation. In support of the complaint allegations  
50 the General counsel and Union maintain that on July 9 the Respondent imposed a short lived  
hiatus in hiring that was contrived by the Respondent to give it an opportunity to seek out and

hire four additional electricians, who were either referrals or former employees, in order to avoid having to hire the four alleged discriminates.

5 I credit the foregoing testimony of Michelle Anderson, Mark Anderson, Tompkins,<sup>27</sup> and  
 Begley. Each appeared to be a credible witness with a clear memory of his or her various  
 conversations with Abel. There is no showing that in applying for work the three out-of-work  
 electricians were acting other than independently of each other, and there is no evidence of  
 collusion or union involvement that caused them to seek work with the Respondent. Indeed,  
 10 there is no evidence that they were even acquainted with each other, or that either of the three  
 were acquainted with Ely. The Respondent has advanced no rationale for doubting the  
 credibility of these individuals.<sup>28</sup>

15 Abel had no recollection of her conversations with any of the electricians, and repeatedly  
 testified that she would not have told any of the individuals that the Respondent did not hire  
 union electricians and did not want to have anything to do with a union, or that their union  
 affiliation could be a problem, or anything to that effect; she would not have said these things  
 because union affiliation simply made no difference to her or the Respondent.<sup>29</sup>

20 While the Respondent may have had no general reluctance to occasionally hire  
 electricians who happened to be union members, the instant situation was quite different and,  
 as the credible record evidence shows, presented the Respondent with an immediate matter of  
 concern.

25 Abel admits that on July 9 she was directly told by Michelle Anderson that Mark  
 Anderson “had to complete some salting paperwork with his union boss.” Abel asked what

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<sup>27</sup> The Respondent maintains that Tompkins’ credibility is tainted by evidence indicating that, contrary to Tompkins’ testimony, the Respondent has never placed a posting for electricians on Craigslist. Whether or not Tompkins responded to a Craigslist ad or contacted the Respondent after learning of the job from an acquaintance, as he also testified, he clearly applied and had been in effect hired at the time of his conversation with Abel. Assuming arguendo that Tompkins was mistaken regarding the Craigslist ad, I find this makes no difference in terms of his overall credibility. He was subject to cross examination and favorably impressed me as a credible witness, and his testimony regarding his conversation with Abel was consistent with the testimony of other applicants.

<sup>28</sup> The testimony of Respondent’s office workers, Gwynda Edgar and Lindsay Caldwell, that they did not overhear Abel make such statements is insufficient to establish that Abel did not make the July 9 statements attributed to her by Michelle Anderson and the applicants. The two office workers were not tasked with the duty of listening to Abel’s phone conversations or other conversations around the office: rather, were performing other tasks and, it may be presumed, were focused on these other tasks. While they may have been able to hear Abel’s voice, this does not establish that they were attuned to what Abel was saying. Moreover, Edgar testified that there were “plenty of times” that Abel was on the phone when she was not present to listen to Abel’s conversations; and it has not been shown that Caldwell, who only worked two to three days each week, was even in the office on July 9.

<sup>29</sup> Abel, during her testimony, emphasized this point, as did other witnesses called by the Respondent, by specifically naming some five or six electricians over several years who were known to be union members either before or after they were hired. And Richard Flerchinger testified that he had unsuccessfully attempted to hire several leadmen from Nelson, who were union electricians.

5 salting was, and Michelle told her that “it’s reporting back to the union how many employees we have and what capacity they’re working.” I do not credit Abel’s testimony that upon learning about Mark Anderson’s salting activities and the involvement of his “union boss” she was simply unsure about what she would need to do to accommodate Anderson and the union in  
10 preparation for Anderson’s employment the following day. It seems clear that while union affiliation was normally not a reason for concern, Abel understood that the Respondent was a non-union employer and would not welcome union members engaged in salting activities and potential union involvement in the Respondent’s operations; and she told Michelle as much, as this, in fact, was what she believed. Thus, upon being confronted with this revelation by  
15 Michelle, I find, Abel directly advised her that the Respondent wanted to have nothing to do with the union, and that the conversation ended with the understanding by Michelle that whether or not Mark would be hired was problematical.

15 Abel immediately reported this to Richard Flerchinger. It seems to be the Respondent’s position that only Abel and Flerchinger were aware of salting activity by Mark Anderson, and that when Abel so advised Flerchinger of this following her conversation with Michelle Anderson, Flerchinger simply, in effect, advised her it was not a problem. It is critical to the Respondent’s position-- that the hiring freeze was imposed by Rudolph for legitimate business reasons-- to show that the salting matter got no further than that brief conversation between  
20 Abel and Flerchinger. Accordingly, it was essential that Flerchinger testify that the salting activity was of no concern or significance to him and that he did not initiate a hiring freeze or confer with Rudolph about the salting activity of Anderson because it made no difference. The fact that Flerchinger did testify about other matters, but was not asked about this important element of the Respondent’s case, warrants the adverse inference, which I make, that if  
25 Flerchinger had testified about such matters his testimony would not have supported the Respondent’s position. *Champion Rivet Co.*, 314 NLRB 1097, 1098 fn. 8 (1994); *Martin Luther King, Sr. Nursing Ctr.*, 231 NLRB 15, 15 fn. 1 (1977).

30 Abel did not know what “salting” was. She had to have salting explained to her by Michelle and Mark Anderson. It is probable that her general knowledge of other union matters was also rather limited. There is no evidence that the Respondent had ever been involved in a union campaign or that Abel knew about such matters. Significantly, while Abel abundantly testified that union affiliation made no difference in the hiring process and that she would never ask applicants about union membership because it simply didn’t matter, she did not testify that  
35 she had ever received instruction or was otherwise aware that questioning applicants regarding their union affiliation or telling them that the Respondent did not hire union hands was unlawful and something she should not do. Accordingly, it is likely that Abel simply told Anderson, Tompkins, and Begley that the Respondent was not interested in hiring union people because she believed it was permissible and legitimate for a nonunion employer to hire only nonunion  
40 employees.

In any event, regardless of motivation, I find that in fact Abel made such statements to Michelle Anderson and the applicants during her conversations with them. I do not credit her assertions that she did not recall her conversations with Mark Anderson, Tompkins, and Begley.  
45 While it is understandable that Abel would not have been able to recall various conversations that she may have had with numerous applicants in the June and July timeframe due to the number of applicants being processed, the conversations with Mark Anderson, Tompkins, and Begley were extraordinary and not readily forgettable as she was advising applicants to whom she had earlier that day said “welcome aboard” and who had, in effect, been hired, that the  
50 Respondent had abruptly changed its mind.

Nor do I credit her testimony regarding her July 9 conversation with Stranberg. Thus, according to Abel, on July 9 two applicants who had passed their drug test, Anderson and Tompkins, were ready to report to work. Prior to knowing anything about the hiatus in hiring, Abel phoned Stranberg to find out when he wanted these two electricians to report. According to Abel, Stranberg simply said that he had consulted with some of his crew who advised him Anderson was not a productive employee and they didn't want to work with him. As noted above, Abel's Board affidavit states that she was not personally aware of anything about Mark that would disqualify him for employment,<sup>30</sup> and Abel attempted to justify this by testifying that at the time of her affidavit she had forgotten what Stranberg had allegedly told her. Moreover, although there was no objection to Tompkins employment, Abel did not explain why she did not also ask Stranberg when he wanted Tompkins to report to work. It is highly unlikely that Abel would not have done so, because the very purpose of calling Stranberg in the first place was to find out when he wanted the two employees to start work. Thus, as noted, Stranberg not only himself believed more electricians were immediately needed on the job but was also receiving pressure from the general contractor to bring on more electricians; and at this point in time, insofar as the Respondent's evidence shows, Stranberg obviously knew of no hiatus in hiring because if he had known about it he would have so informed Abel during that alleged phone conversation.<sup>31</sup> The fact that both Anderson and Tompkins were simultaneously denied employment establishes that the Respondent linked them together, and the Respondent has not explained the reason for the linkage. Accordingly, I do not find this testimony of Abel to be credible. Obviously, assuming the conversation occurred at all, there was more to the conversation than Abel revealed.

On the basis of the foregoing I find the General Counsel has presented a strong prima facie case in support of the complaint allegations. Accordingly, the General Counsel's *Wright Line*<sup>32</sup> burden of proof has been abundantly satisfied. It is therefore incumbent on the Respondent to show that the hiatus in hiring occurred for legitimate business reasons and that none of the applicants would have been hired in any event.

Clearly the Respondent has not met its *Wright Line* burden of proof. Insofar as the record evidence shows, Rudolph suddenly, within hours and perhaps within minutes of Abel's "salting" conversation with Michelle Anderson, which she immediately reported to Flerchinger, imposed a hiring hiatus. This was at a time when there was a significant and immediate need for more electricians on the job. Stranberg was an experienced and long time site superintendent who had been entrusted to take over a difficult project on short notice. Stranberg believed that the requisite work warranted additional electricians, and indeed was receiving pressure from the general contract to hire more electricians. Yet, insofar as the record evidenced shows, Rudolph, without visiting the site and without prior consultation and discussions with either the general contractor, Stranberg or Flerchinger, decided otherwise; indeed, he told Abel about the hiatus before he advised anyone else. Such an abrupt, untimely, unforeseen, unannounced, and improbable unilateral decision on the part of Rudolph defies logic, and constitutes strong evidence of an ulterior motive.

<sup>30</sup> Abel had checked his prior employment record and references and all of the responses were highly favorable.

<sup>31</sup> I discredit Stranberg's testimony that he and Rudolph had a conversation about the matter. Stranberg was not certain when the alleged conversation occurred; and when asked, answered, "Oh, umm, it seems like just a couple of weeks into it [the project]. Umm, I don't know, everything was happening so fast for me." Nor did Stranberg testify he knew about the hiatus during his aforementioned conversation with Abel.

<sup>32</sup> 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).



Rudolph claims he does not recall just how he happened to determine that a July 9 hiring freeze was appropriate. I posited the following question to Rudolph:

5 Q. Okay, and when you decided...on or about July 9<sup>th</sup>, that you didn't need any more people, did you go to the site to check out whether you needed people, or did you just talk to John [Stranberg] on the phone...

10 A. You know, I don't recall exactly what happened. Typically, I would go out to the site ...in a situation like that, and a lot of times, they do tell me over the phone. And John is competent enough to where he can tell me over the phone exactly how the condition is.

15 Rudolph summarily testified that although his site superintendents are quite capable of evaluating the need for more electricians and "very competent in what they do," he will "at times" overrule their request for more electricians. Yet Rudolph cited no specific examples of having ever done so, and, moreover, did not testify that he had ever overruled the evaluation of Stranberg. Rudolph acknowledged that overtime wages on a prevailing wage job can be high, that in certain circumstances the additional cost might justify bringing on additional employees,  
20 and that the determination of whether or not to hire additional employees to cut down on the number of overtime hours requires "a case by case evaluation." However Rudolph provided no evidence that he made such an evaluation in this case; nor did he otherwise specifically explain why the considerable and costly overtime hours being worked by the crew did not warrant the hiring of additional employees. Rudolph acknowledged that pressure from a general contractor  
25 might very well be justification to bring on additional electricians, as it is good business policy to keep the general contractor happy; yet he did not testify that he had any conversation with the general contractor about the matter, nor did he explain why he determined, in this particular instance, that a hiatus in hiring was more important than keeping the general contractor happy.

30 Accordingly, from the foregoing, I find that the Respondent has not sustained its burden of proof by showing that the hiatus or hiring freeze was imposed for legitimate business reasons. Rather, as maintained and abundantly demonstrated by the General Counsel and the Union, I find the hiatus was imposed because the Respondent was concerned that it was being targeted by the Union with possible organizational activities, and believed that Anderson,  
35 Tompkins, and Begley, and perhaps Ely,<sup>33</sup> were union adherents who would engage in salting activities and become potentially disruptive influences within the Respondent's workforce.

40 Moreover, Ely submitted her employment application on July 13 but, according to Abel's testimony, her application was simply not processed during the hiring freeze. Having found that the hiring freeze was imposed for discriminatory reasons, it follows that had there been no unlawful hiring freeze her application would have been expeditiously processed within a matter of a few days. The Respondent has presented no evidence showing that in the absence of the hiatus Ely would not have passed the application process and would not have been hired. Thus,  
45 I find that Ely would have been hired prior to the time the Respondent hired the "referrals" who applied on July 18, 22, and August 20, and prior to the time the Respondent hired a "rehire" who applied on August 1.

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<sup>33</sup> I have found that Abel was not a credible witness in many respects. Her testimony that she did not know about Ely's union membership and involvement because, due to the hiring freeze she simply did not begin processing Ely's application, seems unlikely.

On the basis of the foregoing, I find that the Respondent, by coercively interrogating employees regarding their union membership, by telling them that their hiring status is affected by their union membership, and by advising them that they are not being hired because of their union membership, has violated and is violating Section 8(a)(1) of the Act as alleged. *C. P. Associates, Inc.*, 336 NLRB 167, 168 (2001); 323 NLRB 238 (1997).

Further, I find that the Respondent, by failing and refusing to hire Mark Anderson, Steven Begley, David Tompkins and Margaret Ely because of their union membership or because of a discriminatorily instituted hiring hiatus, has violated Section 8(a)(3) of the Act as alleged. *FES*, 331 NLRB 9 (2000); *Caruso Electric Corp.*, 332 NLRB 519, 523 (2000); *Aim Royal Insulation*, 358 NLRB No. 91 (2012); *C.P. Associates, Inc.*, supra; *Quality Control Electric, Inc.*, supra.

### Conclusions of Law and Recommendations

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a) (1) and (3) of the Act as alleged.

### The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. I shall also recommend the posting and mailing of an appropriate notice,<sup>34</sup> attached hereto as “Appendix.”

The Respondent, having discriminatorily refused to hire Mark Anderson, Steven Begley, David Tompkins, and Margaret Ely, shall be required to offer them employment and make them whole for any loss of earnings and other benefits, with interest computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). All reinstatement and backpay recommendations are subject to the procedures discussed in *Dean General Contractors*, 285 NLRB 573 (1987), and *Haberman Construction Co.*, 236 NLRB 79 (1978).

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<sup>34</sup> I find that mailing is necessary in this case as the Respondent’s principal office is not in the vicinity of many of its projects, its employees work at sites throughout the State of Washington, and the projects are temporary in nature.

## ORDER

The Respondent, D&S Electrical Contractors, Inc., its officers, agents, successors, and assigns, shall

5

1. Cease and desist from:

- 10 (a) Coercively interrogating job applicants and telling them that their union membership may affect their hiring status and that they are being denied employment because of their union membership or activity.
- (b) Discriminatorily refusing to hire applicants for employment because of their union membership or suspected union involvement.
- 15 (c) Discriminatorily refusing to consider applicants for employment by instituting a hiring freeze in order to avoid having to hire applicants with suspected union involvement.
- (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

20

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

- 25 (a) Within 14 days from the date of this Order, offer Mark Anderson, Steven Begley, David Tompkins, and Margaret Ely employment in the manner set forth in the remedy section of this decision.
- (b) Make Mark Anderson, Steven Begley, David Tompkins, and Margaret Ely whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.
- 30 (c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- 35 (d) Within 14 days after service by the Region, post at its facility and at all construction projects where it is performing work copies of the attached notice marked "Appendix,"<sup>35</sup> and duplicate and mail a copy of the notice, at its own expense, to all current employees and former employees employed by the Respondent at any time since July 9, 2012. Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered
- 40 by any other material.
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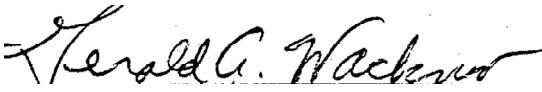
<sup>35</sup> If the Order is enforced by the judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

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Dated, Washington, D.C. September 6, 2013

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Gerald A. Wacknov  
Administrative Law Judge

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**APPENDIX**

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
AN AGENCY OF THE UNITED STATES GOVERNMENT**

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

**FEDERAL LAW GIVES YOU THE RIGHT TO:**

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

**WE WILL NOT** interrogate applicants for employment regarding their union membership or union activities.

**WE WILL NOT** tell applicants for employment that they are not being considered for employment or will not be hired because of their union membership or activities.

**WE WILL NOT** discriminatorily refuse to hire applicants for employment because of their union membership or activities or impose a hiring freeze in order to avoid hiring union members.

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

**WE WILL** offer employment to Mark Anderson, Steven Begley, David Tompkins, and Margaret Ely, and make them whole for any loss of earnings and other benefits as a result of the discrimination against them, less any net interim earnings, plus interest.

D&S ELECTRICAL CONTRACTORS, INC

\_\_\_\_\_  
(Employer)

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
(Representative) (Title)

**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 with any other material. Any questions concerning this notice or compliance with its provisions may be referred to the Board's office, 915 2<sup>ND</sup> Avenue, Room 2948, Seattle, WA 98174-1078, Phone 206-220-6300