Custom Top Soil, Inc. *and* International Union of Operating Engineers, Local 17. Case 3–CA–20435

November 16, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On June 22, 1998, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel and Charging Party Union filed answering briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified, and to adopt the recommended Order as modified.

We find merit in the Respondent's exception to the judge's finding that Bookkeeper Michelle Podpura acted as the Respondent's agent and, as such, violated Section 8(a)(1) when she told union members who were applying for work on June 13, 1996, that their union membership would adversely affect their chances of working for the Respondent. The judge erroneously found that Podpura hands out job applications as part of her duties. According to Podpura's uncontradicted testimony, she had no regular role in the job application process. Furthermore, the transcript of a tape recording of her conversation with the applicants on June 13 shows that she clearly indicated that she had no knowledge of, and hence was without authority to speak and act on, matters concerning the Respondent's hiring policies. Under these circumstances, Podpura had neither actual nor apparent authority to speak on behalf of the Respondent concerning the possible impact of the applicants' union affiliation on their employment prospects. We shall therefore reverse and dismiss the 8(a)(1) allegation based on Podpura's statement of personal opinion.

Our reversal of this finding, which the judge cited as evidence of the Respondent's union animus, does not alter his overall analysis of the 8(a)(3) refusal to hire issue. There remains substantial evidence of animus, particularly including the Respondent's unlawful alteration of its application procedure to restrict the submission of applications from union members, its unlawful physical removal of a union representative from its office during union members' attempt to file applications, and its pretextual reasons for not hiring the discriminatees. We agree with the judge, for the reasons fully set forth in his decision, that the Acting General Counsel has shown that union animus motivated the Respondent's discriminatory refusal to hire qualified union member applicants for available jobs, in violation of Section 8(a)(3).

We note, however, that the judge recommended a backpay remedy for the discriminatees starting from the date that they applied for employment. In this case, the jobs for which the discriminatees should have been hired did not become available until sometime after the application dates. Consequently, the correct starting date for the backpay period is the later date on which the discriminatees would have been hired but for the Respondent's unlawful conduct. See *Starcon, Inc.*, 323 NLRB 977 (1997). We leave to compliance proceedings the determination of the specific date on which each discriminatee would have been hired.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders the Respondent, Custom Top Soil, Inc., Cheektowaga and Buffalo, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Refusing to hire job applicants because they are members of International Union of Operating Engineers, Local 17, or any other union."

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

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Member Hurtgen concludes that the better practice is for the General Counsel to establish, in the trial on the merits, the dates on which discrimination occurred, i.e., the dates on which various jobs became available. Notwithstanding this, he would not foreclose the General Counsel from doing so in this case in a supplemental proceeding. However, Member Hurtgen emphasizes that, at whatever stage, the General Counsel bears the burden of proof on the issue.

WE WILL NOT refuse to hire job applicants because they are members of International Union of Operating Engineers, Local 17, or any other union.

WE WILL NOT physically remove union members from our office when they come to file applications for employment.

WE WILL NOT change our hiring practices to restrict the receipt of job applications from union members.

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

WE WILL, within 14 days from the date of the Board's Order, offer Bernard Dowdall, Francine Dole, Dan Racine, Duane Cooper, James Minter 3d, Michael Schwec, and James Erhardt employment to the same or substantially equivalent positions for which they applied, without prejudice to their seniority or any other rights or privileges to which they would have been entitled in the absence of our hiring discrimination.

WE WILL make Bernard Dowdall, Francine Dole, Dan Racine, Duane Cooper, James Minter 3d, Michael Schwec, and James Erhardt whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

CUSTOM TOP SOIL, INC.

Ron Scott, Esq., for the General Counsel.
Jeremy V. Cohen, Esq. (Bond, Schoeneck & King), of Buffalo, New York, for the Respondent.
Michael E. Reilly, Esq. (Morris, Cantor, Barnes, Goodman & Furlong), of Cheektowaga, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative law Judge. This case was tried in Buffalo, New York, on December 8 and 9, 1997. The complaint alleges that Respondent, in violation of Section 8 (a)(1) and (3) of the Act, threatened to refuse to hire job applicants, refused to hire job applicants, physically removed a representative of the Union from its office and changed its hiring practices to restrict the receipt of job applications. Respondent denies that it has engaged in any violations of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent and the Charging Party in February 1998, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office in Cheektowaga, New York, and a facility in Buffalo, New York, is engaged in the construction industry as a site contractor. Annually, Respondent provides services in excess of $50,000 for enterprises which are directly engaged in interstate commerce. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the International Union of Operating Engineers, Local 17, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

On June 13, 1996, Chris Hollfelder, an organizer with Local 17, accompanied four members of the Union to Respondent's office in order that they might file applications for employment. Hollfelder waited in the parking lot with union members Bernard Dowdall, Francine Dole, and Dan Racine, while Duane Cooper entered the office and obtained and completed an application. Having established that Respondent was indeed handing out applications to the public, Hollfelder and the three other union members entered the office and asked for applications. The applicants were told to use a long table in the public area of the office for the purpose of completing their applications. It is undisputed that there is a table in the office which is accessible to those who come in to fill out employment applications including the union members who were at the office on June 13. The table is large enough to accommodate up to three people at one time.

Hollfelder testified that while the three members were filling out their applications, he introduced himself as an organizer for Local 17 to the receptionist sitting behind the sliding glass partition in the entrance area. After a short while, a woman came out of an office located behind the area where the receptionist sat at the glass partition. This woman, who was later identified as Bookkeeper Michelle Podpora, told Hollfelder and the Local 17 members that Respondent was a nonunion company and she asked whether they were from the Operating Engineers. Hollfelder answered her question and then he asked whether the fact that Respondent was nonunion would affect the members' chances for employment. Podpora said, "Yes, it would," Hollfelder asked what kind of season Respondent was having and the two women said it was a "good season." Hollfelder said that all the members with him were qualified to do any kind of work. Hollfelder told the women that he planned to organize Respondent's employees and that he wanted to talk to the workers and explain the benefits of the Union and run an election. Diane Burger, Respondent's office manager, came to the reception area. Hollfelder requested copies of the completed applications, and after some discussion about how much the Union would pay for each copy, Burger furnished Hollfelder with copies of the applications. Hollfelder asked when the employees should return to update their applications and one of the women said that Respondent kept completed job applications on file "for a long, long time."

Hollfelder asked if there were any jobs available and Burger replied that there was a job for a part-time sweeper. The applicants said that they would be interested in this job because it would afford them a chance to work among nonunion employees and try to build common ground with them.

Four applications were filed on June 13.[2] Duane Cooper indicated on his form that he had over 20 years as a qualified journeyman, that he possessed a CDL license with various en-

[1] The record is corrected so that at p. 44, LL 5, 6, and 8, and p. 117, L 17, "softic" is replaced by the word "zaftig". The Respondent's motion to correct the transcript dated January 30, 1998, as amended by the General Counsel's letter of February 5, 1998, is granted.

[2] Hollfelder took a blank application but did not fill it out.

dorsements and that he would accept employment in "anything" to start as soon as possible. Francine Dole indicated 6 years' experience as a journeywoman with a CDL and other licenses, extensive experience on various types of heavy vehicles, and she stated that she would accept work as a truckdriver, laborer, operator, or any other job to start right away. Bernard Dowdall indicated 29 years' experience as an operating engineer and he stated that he would accept a job as an operator or truckdriver as soon as possible. Daniel Racine indicated that he had 25 years' experience as a journeyman operating and repairing all heavy equipment, and he stated that he would accept work as a mechanic, operator, laborer, or driver to begin "now." All of the applicants stated that their salary requirements were "open."

Francine Dole testified that she filled out her job application to show that she would take any job with Respondent. When Dole called Respondent at the end of the week to ask about the sweeper position, she was told that the position had been filled.

Bookkeeper Michelle Podpora, testified that her office is near the reception area. On occasion, Podpora hands out job applications to people who come in to request them and this task is part of her duties. On June 13, Podpora heard male voices saying that they were from the Union.[3] She went to the sliding glass window and stood next to the receptionist while the union members completed their job applications. Podpora admitted that she told the union members that "we are a nonunion company or a merit shop company" but she said that she never told Hollfelder that union membership would make a difference in the hiring prospects of the job applicants. She denied that she told Hollfelder that Respondent keeps applications on file for a long time. Podpora summoned Burger to the front to speak to the union members and she stood there while they arranged with Burger to obtain copies of their applications. When Burger informed the union members that she had a sweeper job open, a woman union member said that she would be interested in this job. On cross-examination by counsel for the General Counsel, Podpora identified a voice on a tape recording as her own voice.[4] After listening to the tape recording, Podpora acknowledged that she was the one replying to a question about when to update application forms by stating that the company keeps them on file forever or a "long, long time." The tape recording also shows, contrary to Podpora's testimony, that she replied, "yes" when Hollfelder asked if the fact that Respondent was a nonunion company would have any bearing on union members coming to work.

Office Manager Diane Burger is the daughter of Company President Henry Fronckowiak and the sister of Company Vice President Michael Fronckowiak. Burger testified that at the request of Respondent's bookkeeper, she went to the reception area on June 13. Burger stated that she made copies of the job applications for Hollfelder. Burger denied that Hollfelder asked how long Respondent keeps applications on file and she denied that there was any discussion about the fact that Respondent was a nonunion shop. Burger testified that no one from the Union asked if there were any jobs available. Burger is responsible for Respondent's payroll and personnel matters. She hires office personnel but she does not hire field personnel. Burger was responsible for filling the sweeper position that was open on June 13. She testified that she did not hire any of the union members for this job because they were all overqualified. I do not credit Burger's testimony that none of the applicants on June 13 asked whether there were any jobs available. Podpora testified that after she called Burger to the front, Burger stated that there was a sweeper job open and this testimony is supported by the tape recording of the June 13 events. Thus, I find that Burger is not a credible witness and that she shaded her testimony to favor Respondent's position.

In July 1996, Hollfelder returned to Respondent's office. He saw a new sign posted outside the glass partition. All the parties herein agree that the sign stated:

WE CURRENTLY HAVE NO JOB OPENINGS,
THEREFORE WE ARE NOT ACCEPTING ANY
APPLICATIONS.
THANK YOU FOR YOUR INTEREST.

Burger testified that after the union members came in to the file their applications on June 13, 1996, she prepared and posted this sign. Burger stated that she made up the sign because she felt "upset" that the union members had been on the premises. Burger told her brother about the sign and informed him that the purpose of the sign was to limit the people coming in. Michael Fronckowiak agreed that she should post the sign. Burger admitted that none of the union members had done anything on June 13 to upset her, and she admitted that they had not threatened or intimidated any of the office staff nor had they made any demands.[5] Burger recalled that in the past the Union had picketed one of Respondent's jobsites, but that it had never picketed the office.

On December 9, 1996, Local 17 member Timothy Heyden went to Respondent's office with three other union members, James Minter 3d, Michael Schwec, and James Erhardt. All four men entered the office and told a woman there that they wanted to put in applications.[6] Heyden was wearing his union jacket. The woman answered that there were no job openings and that Respondent was not taking applications. She pointed to the sign quoted above. Despite this reply, Minter, Schwec, and Erhardt gave the woman their completed job applications. At this point, Henry Fronckowiak, Respondent's president, appeared in the public area of the office and returned the applications to Heyden. Nevertheless, Heyden told Fronckowiak that the members were qualified and wanted to leave their applications. He asked Fronckowiak how long Respondent keeps applications on file and Fronckowiak said, "five years." Fronckowiak told Heyden that if he had any openings he would call the union hall. The union members left without being able to file their job applications. As he was leaving the office, Heyden decided that he ought to have taken a photograph of the sign and he went back through the front door to take a picture while the others continued to the parking lot. While Heyden was taking the photo, Fronckowiak came over to him and grabbed his arm, swinging him around and pushing him out the door. Heyden protested that there was, "no reason for rough stuff." James Minter 3d, one of the union members who accompanied Heyden on December 9, testified that he saw

[3] Podpora is recently married. At the time of the relevant events, her name was Zulawski.

[4] Hollfelder made this tape recording of the June 13, 1996 events in Respondent's office.

[5] Indeed, the tape recording introduced into evidence shows that Hollfelder and the union members were friendly and that they used all the common forms of courtesy.

[6] The complaint does not name Heyden as an alleged discriminatee.

Fronckowiak dragging Heyden out of the door. Minter stated that Fronckowiak is bigger than Heyden.

Henry Fronckowiak testified that he recalled seeing a man taking a picture of the sign. He stated that he did not think he touched the man, nor hold him by the arm and drag him. On cross-examination, Fronckowiak said that if he did touch the man, it was just on the shoulder. However, the man may have said, "There's no need to get violent." Fronckowiak acknowledged that he may have jokingly said that Respondent keeps job applications for 5 years. In fact, according to Henry Fronckowiak, the company never retains applications. Fronckowiak testified that he did not know if he had told the man that he would call the union hall if he needed workers. He acknowledged that it was not probable that he would call the Union in search of new employees.

The record shows that three applications were rejected on December 9. These include the application of James Erhardt who had 2 years of apprenticeship and 4 years as a U.S. Air Force heavy equipment operator in addition to other relevant experience including welding. Erhardt was ready to start work right away at an "open" wage rate. James Minter had 3 years' experience in the trade with various types of heavy equipment and he was willing to work as an operator or in any other position. Michael Schwec had 17 years as a journeyman with various types of equipment and he was ready to start immediately in "any" position.

On December 19, 1996, Hollfelder went to Respondent's office with Michael Eddy, a fourth year apprentice. The sign quoted above was still posted. Eddy, who was out of work, requested an employment application. A man came out front and said that Respondent was not taking applications.

Michael Fronckowiak, Respondent's vice president, testified that he hires all the field personnel. The field employees are equipment operators, truckdrivers, laborers, mechanics, and survey assistants. Fronckowiak testified that almost all such employees are hired through personal referrals from other employees and other employers in the area. However, he admitted that a number of field personnel were hired through newspaper advertisements and that some of them just walked in and applied for jobs. Fronckowiak testified that Respondent's application form is given to anyone who comes in looking for work. If applications are filed while he is seeking to hire new employees, he looks through the applications. According to Fronckowiak, all new employees are hired within a day or two of their submission of a job application. Fronckowiak testified that if he does not need any new employees, he discards any job applications right after they are submitted. Fronckowiak stated that Respondent does not keep applications on file against the time when there might be job openings. However, the applications completed by the union members on June 13, 1996, were not thrown out, instead, they were given to Respondent's counsel.

Contrary to Michael Fronckowiak's testimony, there is evidence that Respondent does indeed retain job applications. For example, Fronckowiak testified that Allen Weierheiser filed a job application in the early spring of 1996 but he was not hired as a mechanic until November 4, 1996. Respondent had run advertisements in the local newspaper on two different occasions in April 1996. While explaining that the ads were placed because Respondent anticipated a surge of work in the spring, Fronckowiak said that he thought "Allen was already on the list" because he had applied prior to the newspaper ads. Fronckowiak could not recall what happened to Weierheirser's application. He said that he might have started a file for Weierheiser and he might have told Weierheiser that he would be put on the payroll as soon as Respondent had an opening. The clear import of this testimony, even though Fronckowiak hedged by failing to recall and by saying what "might" have happened, is that Weierheiser applied for work in early spring, 1996 and that a file was started for him until he was actually hired in November. It follows that Respondent must have kept his application active for about 6 months. Indeed, Henry Fronckowiak, the president of Respondent, admitted that Weierheiser's application was kept for 7 or 8 months. Similarly, Norman Faulkner applied for work on August 22 and he began employment as a truckdriver on October 20, 1996. Explaining why Faulkner's application was held for 2 months, Michael Fronckowiak stated that Faulkner needed a drug test and an endorsement on his driver's license. It is evident that Faulkner's application remained on file for 2 months until he qualified for the job and Respondent hired him; this fact is contrary to Fronckowiak's testimony that Respondent does not keep job applications on file if it does not fill a vacancy immediately. I do not credit Michael Fronckowiak's testimony that he routinely discards all job applications immediately on receipt unless he has an actual job opening. I find that Respondent does keep job applications in a file. I find that Fronckowiak's testimony that he always throws out job applications is a fabrication.

Michael Fronckowiak testified that he looked over the applications received from the union members on June 13, 1996. He stated that their work histories indicated that they would be good operators. Fronckowiak thought that they were overqualified for positions as laborers; he did not think they would have been happy with laborers' pay. Although a few of the union members indicated on their job applications that they possessed a CDL license, Fronckowiak believed that they were overqualified for truckdriver positions.

Michael Fronckowiak testified that on June 13, 1996, Respondent was not seeking to fill any field positions. In December 1996, Respondent was not seeking to fill any positions. However, in July 1996, Respondent hired three field employees, two laborers, and a truckdriver, but Fronckowiak did not consider any of the union applicants because, having given the applications to his attorney, he did not have them in his possession. On September 10, 1996, Respondent ran an advertisement in the local newspaper for a truckdriver. This position was not offered to any of the union applicants.

Henry Fronckowiak testified that about 20 employees were hired after June 1996. During all the period that the new employees were hired, Respondent maintained the sign in its office stating that no hiring was going on. Fronckowiak stated that the sign was there for safety reasons.

General Counsel's Exhibits 10 (c) and (d) reveal that 23 employees were hired between June 13, 1996 and the instant hearing. Of these, four were casual or summer employees.

B. Discussion and Conclusions

The General Counsel contends that Bookkeeper Michelle Podpora is an agent of Respondent. Podpora testified that she hands out job applications to people who walk in off the street to apply for work and that handing out job applications is part of her duties. In the instant case, the evidence shows that Podpora came to talk to the union members while they were filling

out job applications and that she told them that Respondent is a nonunion company. When Hollfelder asked her whether the fact that Respondent was nonunion would affect the members' chances for employment, Podpora answered that it would. In response to Hollfelder's question about when job applications should be updated, Podpora answered that the Company keeps completed job applications on file "forever" or a "long, long time." I find that Podpora, who has the authority to hand out job applications, behaved in a fashion to cause the union members reasonably to believe that she was reflecting company policy and speaking for management. Podpora volunteered the fact that Respondent is nonunion and when questioned further on the subject that she had raised, she affirmed that union status would affect the ability to be hired. She did not hesitate to inform the applicants that Respondent keeps applications on file for a long time. The union members who spoke with Podpora while they were in the process of completing applications could reasonably have concluded that she spoke for management on the subject of Respondent's hiring policies and application procedures. When Burger, a member of management, appeared on the scene she said nothing to correct the impression that the union members had spoken with a person who was competent to deal with them concerning the application process. I find that Podpora had apparent authority to speak for Respondent in matters relating to hiring policy and the application process and that she was an agent of Respondent. *Waste Stream Management,* 315 NLRB 1088, 1121–1122 (1994); *GM Electrics,* 323 NLRB 125 (1997).

Having found that Podpora was an agent of Respondent, I find that Respondent violated Section 8 (a) (1) of the Act when Podpora informed the union members who were applying for jobs on June 13, 1996, that their union membership would adversely affect their chances of coming to work for Respondent.

Respondent's witnesses admitted that before June 13, 1996, the Company had a practice of accepting applications from job seekers who walked in off the street whether or not there were any vacancies at the time of application. The record is clear that Respondent accepted applications from the four union members on June 13, 1996. After the union members sought jobs on June 13 however, Respondent posted a sign stating that it was not accepting any applications and Respondent refused to accept applications from union members on December 9. Although Burger testified that she was upset when the union members appeared at the office and that the purpose of the sign was to limit the people coming in, Burger admitted that none of the June 13 applicants had done anything to upset her. I find that the testimony of Respondent's witnesses that the sign was put up out of concern for security is a pretext. There was no evidence that the union applicants threatened the security of the office in any way. The record shows that Respondent hired 23 employees after June 13, 1996. But Respondent continued to display the sign stating that it had no job openings and was not accepting applications. I conclude that Respondent had changed its policy with respect to job applications so that union members could no longer come in and apply for jobs with the Company. Respondent violated Section 8 (a) (3) of the Act by changing its application and hiring policies to restrict the receipt of job applications from union members.

I credit the testimony of Timothy Heyden that on December 9, 1996, Henry Fronckowiak forcibly removed him from the public area of Respondent's office by grabbing his arm, swinging him around, and pushing him out of the door. I credit the testimony of James Minter 3d, that he saw Fronckowiak dragging Heyden out of Respondent's doorway. Although Fronckowiak at first denied that any physical confrontation had occurred, he later changed his testimony and acknowledged that he might have touched Heyden and that Heyden might have said that there was no need to get violent. Heyden was wearing his union jacket that day and, according to Heyden, Fronckowiak made a reference to calling the union hall if he needed workers. I do not credit Fronckowiak's halfhearted denials of Heyden's version of the events. Manhandling union members who apply for jobs interferes with employees' rights under the Act. By physically ejecting Heyden from Respondent's office when the union members came to file job applications, Respondent violated Section 8(a)(1) of the Act.

The record establishes that Respondent harbored antiunion animus: Respondent's agent unlawfully told applicants that the company was nonunion and that the applicants' union membership would affect their chances of being hired; Henry Fronckowiak physically removed a union member from the public area of the office in violation of the Act; and Respondent posted a notice unlawfully changing its application and hiring practices to restrict the receipt of applications from union members. The record establishes that Respondent was aware that the job applicants on June 13 and December 9, 1996, were members of the Union. In defense of Respondent's position, Burger testified that she did not hire any of the job applicants on June 13 for the sweeper position because they were all overqualified. The testimony of Dole and Podpora establishes that Dole told Burger that she would be interested in this job.[7] Indeed, Dole called asking about the job again after June 13 and she was told that it had been filled. Michael Fronckowiak testified that the applicants on June 13 would have been good operators and he stated that he believed they were overqualified for a laborer or truckdriver position.[8] Yet Fronckowiak did not offer the applicants any of the jobs, including operator jobs, that were filled after June 13 because he gave the applications to his lawyer and thus did not consider them when he had openings. Fronckowiak would have me accept the statement that because his lawyer had the original applications he himself had no applications pending from the union members when he was hiring new employees after June 13, 1996. This position is pure sophistry. Of course, Respondent is deemed to have applications in its possession when it has turned them over to its attorney. Had Fronckowiak been in good faith, he could have obtained the originals or copies of the applications by making one telephone call.[9] Further, it is evident that Respondent did not hire the applicants who attempted to file completed job applications with the company on December 9 because it had unlawfully changed its hiring procedures to restrict the receipt of applications from union members. Although Respondent presented testimony to the effect that unless it had a specific job opening when it received an application that application would be discarded immediately, I do not credit this testimony. As dis-

[7] I do not credit Burger's testimony that no one from the Union asked if there were any jobs available on June 13.

[8] I note that all four of the job applicants noted that their job and wage requirements were flexible.

[9] The evidence shows that the four applicants on June 13 were qualified for the jobs that were filled after that date, and, indeed, more qualified than the people who were actually hired by Respondent. However, an analysis of the data is more appropriate at the compliance stage of the proceedings.

cussed above, it is clear that Allen Weierheiser's application was kept on file for about 6 months and Norman Faulkner's application was kept for 2 months. Podpora told Hollfelder that Respondent keeps applications on file for a long, long time and Henry Fronckowiak told Heyden that Respondent keeps applications on file for 5 years. Although Fronckowiak tried to pass off this statement as a joke, there is absolutely no indication that Fronckowiak viewed his confrontation with Heyden as an occasion for pleasantries. Finally, Michael Fronckowiak testified that Weierheiser's name was on "the list." Thus, Respondent kept some kind of list of applicants and it could have placed the names of the union applicants on that list. I find that Respondent's stated reasons for not hiring those who applied for work on June 13 and December 9, 1996, were pretexts, and that the reason the applicants were not hired was that they were members of the Union. *Wright Line,* 251 NLRB 1083 (1980). Respondent thus violated Section 8(a)(3) of the Act when it failed to hire the union member applicants.

CONCLUSIONS OF LAW

1. By threatening to refuse to hire job applicants because they were members of International Union of Operating Engineers, Local 17, and by physically removing a union member from its office when he and others came to file job applications, Respondent violated Section 8(a)(1) of the Act.

2. By changing its hiring practices to restrict the receipt of job applications and by refusing to hire job applicants because they were members of the Union, Respondent 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.

Having found that Respondent discriminatorily failed and refused to hire seven named job applicants, Respondent must offer them employment to the same or substantially equivalent positions for which they applied, without prejudice to any seniority or any other rights or privileges to which they would have been entitled in the absence of Respondent's hiring discrimination. Respondent must make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination practiced against them from the date that they applied for employment to the date that Respondent makes them a valid offer of employment. Such amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Custom Top Soil, Inc., Cheektowaga and Buffalo, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to refuse to hire job applicants and refusing to hire job applicants because they are members of International Union of Operating Engineers, Local 17, or any other union.

(b) Physically removing union members from its office when they come to file applications for employment.

(c) Changing its hiring practices to restrict the receipt of job applications from union members.

(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.

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

(a) Within 14 days from the date of this Order, offer Bernard Dowdall, Francine Dole, Dan Racine, Duane Cooper, James Minter 3d, Michael Schwec, and James Erhardt employment to the same or substantially equivalent positions for which they applied, without prejudice to any seniority or any other rights or privileges to which they would have been entitled in the absence of respondent's hiring discrimination.

(b) Make the above-named employees 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.

(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.

(d) Within 14 days after service by the Region, post at its facilities in Cheektowaga and Buffalo, New York, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 13, 1996.

(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.

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

[11] 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."