The McBurney Corporation *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO. Cases 26–CA–17564, 26–CA–17979, and 26–CA–18017

September 29, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On September 21, 1998, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions[1] and a supporting brief, to which the General Counsel and the Charging Party each filed an answering brief. The General Counsel and the Charging Party each filed cross-exceptions and a supporting brief, to which the Respondent filed answering briefs.

On June 7, 2000, the National Labor Relations Board remanded the case to the judge for further consideration in light of the Board's decision in *FES*, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002), which sets forth the analytical framework for refusal-to-hire and refusal-to-consider allegations. After inviting and receiving briefs from the General Counsel, the Charging Party, and the Respondent, the judge, on March 30, 2001, issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, to which the General Counsel and the Charging Party each filed an answering brief. The General Counsel and the Charging Party each filed cross-exceptions and a supporting brief, to which the Respondent 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, the supplemental decision, and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[3]

In his initial decision, the judge found that the Respondent engaged in unlawful surveillance of employees' union activity, unlawfully transferred employee Daniel Barney to a more onerous job, and unlawfully refused to hire union-affiliated applicants at its jobsites located in Towanda, Pennsylvania; Libby, Montana; and Prescott and Arkadelphia, Arkansas. In his supplemental decision, the judge revisited his refusal-to-hire findings under *FES*, supra, as directed by the Board, and reaffirmed those findings. We now affirm all of the judge's unfair labor practice findings for the reasons given in his decisions.

In its exceptions to the judge's refusal-to-hire findings,[4] the Respondent argues, among other things, that the General Counsel failed to establish that antiunion animus affected its hiring decisions and, alternatively, that the Respondent would not have hired the union-affiliated applicants in any event, all because its hiring decisions were based on a neutral application of its preferential hiring policy. We find no merit in that argument.[5]

So far as the record shows, the Respondent historically maintained a hiring policy that gave preference to current and former employees and to known applicants. The order of priority was: (1) current employees transferring from another jobsite; (2) former employees; (3) applicants known to an employee;[6] and (4) unknown applicants. The record shows that the Respondent advised the Union of this policy, and, as stated, the Respondent ar-

[1] No exceptions were filed to the judge's dismissal of allegations that the Respondent violated the Act by interrogating employee Daniel Barney and telling Barney to remove a union button.

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

[3] As explained in the amended remedy section of this decision, we shall modify the judge's recommended Order in accordance with *Oil Capitol Sheet Metal, Inc.,* 349 NLRB 1348 (2007). We shall also modify the judge's Conclusions of Law, recommended Order, and notice to conform to his specific unfair labor practice findings, which, as clarified in the judge's supplemental decision, do not include refusal-to-consider violations. We shall further modify the Order to correct the inadvertent omission of discriminatee Dale (Skip) Branscum, and we shall include the revised records-preservation provision set forth in *Ferguson Electric Co.,* 335 NLRB 142 (2001). Finally, we shall substitute a new notice in accordance with *Ishikawa Gasket America, Inc.,* 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

[4] The term "exceptions" shall refer to the Respondent's exceptions to the judge's initial and supplemental decisions collectively.

[5] We also reject the Respondent's argument that the General Counsel failed to carry his *FES* burden to show that the applicants had experience or training relevant to the announced or generally known requirements of the available positions. As the judge found in his supplemental decision, the record amply demonstrates that this *FES* requirement is satisfied.

The General Counsel and the Charging Party except to the judge's failure to rely on certain antiunion statements allegedly made by the Respondent in 1990 as evidence of animus. In light of the other substantial evidence of antiunion animus found by the judge, we find it unnecessary to rely on those alleged 1990 statements.

[6] The record clearly indicates whether applicants fell into the first two preferential categories of transfers and former employees, but it is not at all clear who fell into the third category, those applicants known by employees. Consequently, the numbers of preferred candidates discussed below are limited to transfers and former employees.

gues that its asserted adherence to that policy is a complete defense to the refusal-to-hire allegations.

Certainly, the Respondent is correct that an employer may lawfully implement a preferential hiring policy of this kind.[7] And, as the Respondent contends, the Board has found in certain cases that an employer's neutral application of a lawful preferential hiring policy is a defense to refusal-to-hire allegations. See, e.g., *Brandt Construction Co*., 336 NLRB 733, 733–734 (2001), review denied sub nom. *Operating Engineers Local 150 v. NLRB,* 325 F.3d 818 (7th Cir. 2003). But this is not one of those cases.

Here, the Respondent's reliance on its hiring policy is fatally undermined by the fact that, as the judge found, it "used the priority hiring system selectively and systematically to avoid the hiring of union applicants." The Board recently addressed the potential consequences of that kind of manipulation of an otherwise lawful hiring policy in two *FES* cases: *Zurn/N.E.P.C.O.*, supra, and *Jesco*, *Inc.*, 347 NLRB 903 (2006).

In *Zurn*, the Board expressly recognized that a preferential hiring policy is not a valid defense to an allegation of antiunion discrimination where the employer's deviations from the policy are so substantial as to warrant an inference that the entire hiring process was tainted by antiunion animus. 345 NLRB at 12, 19–20. The Board observed that it had drawn that inference in *Fluor Daniel, Inc.,* 333 NLRB 427 (2001), enfd. 332 F.3d 961 (6th Cir. 2003), cert. denied 543 U.S. 1089 (2005), where the employer substantially ignored its asserted hiring policy, "always to the benefit of nonunion applicants." 345 NLRB at 12, 19. To be sure, the Board found that the same inference was not warranted in the particular circumstances presented in *Zurn*, because the employer had adhered to its hiring policy "in the great majority of instances." Id. The record showed only 23 instances out of 169 hiring decisions, a rate of 13.6 percent, in which the employer deviated from its policy by failing to hire qualified union applicants and, instead, hiring nonunion, nonpriority applicants. Id. at slip op. 7. The record also showed that the employer actually hired 17 known union supporters through application of its hiring policy. In those circumstances, the Board concluded that there was insufficient evidence that the employer's entire hiring process was infected with antiunion animus. Accordingly, the Board took an applicant-by-applicant approach, finding violations only where a particular hiring decision deviated from the employer's policy.

In contrast, in *Jesco* the Board completely rejected the employer's priority hiring policy as a defense to allegations that it unlawfully refused to hire union-affiliated applicants at its jobsite in Jackson, Mississippi. The Board found that, from the date the union applicants first attempted to apply through the date of the employer's last hire at the jobsite, at least 40 percent of the nonunion applicants hired did not come within a priority hiring category. *Jesco*, supra, slip op. at 2–3. In addition, the Board relied on the employer's subterfuge of informing union-affiliated individuals that it was not hiring when, in fact, it was. Id. The Board concluded that the employer's "substantial disregard" of its hiring policy, coupled with its manipulation of the hiring process to frustrate applications from union supporters, "strongly implie[d] animus," with the result that the employer could not assert its policy as a defense. Id. Significantly, the Board expressly distinguished *Zurn*, supra, noting both that the deviations in *Zurn* were comparatively fewer and that the employer there had not deceived union-affiliated applicants to keep them out of the hiring process. Id. at 3 fn. 8.

The present case resembles *Jesco*, not *Zurn*.[8] The record fully supports the judge's finding that the Respondent "systematically" manipulated and disregarded its hiring policy to avoid hiring union applicants. At the Towanda jobsite, for example, the Respondent hired a total of 58 applicants after the first of the 20 union applicants applied. On 37 of those occasions, the Respondent hired nonunion applicants lacking any preferential status under the Respondent's policy, thereby passing over prior, qualified union applicants—4 of whom actually had a preferential status. At the Libby jobsite, the Respondent hired a total of 16 applicants, 10 of whom were nonunion, nonpriority applicants who were hired instead of union-affiliated employees Daniel Barney and Bruce Kemp[9] who, as transfers from Towanda, held the highest priority under the Respondent's stated policy. Finally, at Prescott and Arkadelphia,[10] after the first of 16 union

[7] We find no merit to the General Counsel's and the Charging Party's exceptions alleging that the judge erred by failing to find the Respondent's preferential hiring policy unlawful and by failing to order its rescission. The Board has held that such policies are not inherently destructive of employees' Sec. 7 rights, see *Zurn/N.E.P.C.O.*, 345 NLRB 12 (2005), petition for review denied sub nom. *Northern Michigan Building & Construction Trades Council v. NLRB*, 182 LRRM 2241 (6th Cir. 2007), and there is insufficient evidence that the policy was adopted for discriminatory reasons.

[8] Member Liebman dissented in *Zurn*, but agrees that the present case is distinguishable.

[9] At the time of their hire, Barney and Kemp had no union affiliation. But while working at the Towanda site, they became affiliated with the Union and engaged in union organizing.

[10] The Respondent's hiring decisions at Prescott and Arkadelphia are appropriately analyzed together because the judge credited Dale Branscum's testimony that the Respondent's field superintendent in Arkansas, Tommy Cooper, specifically informed Branscum and his

applicants applied, one of whom was in a priority category, the Respondent hired a total of 31 employees, 10 of whom were nonunion, nonpriority applicants. In sum, out of 105 total hiring decisions, on 57 occasions the Respondent bypassed prior, qualified union applicants, including 7 priority applicants, in favor of nonunion applicants lacking any priority under its policy. In other words, more than 54 percent of the Respondent's hiring decisions were either inconsistent with or not explained by its hiring policy.

Further, just as the employer in *Jesco* falsely told union-affiliated applicants that it was not hiring at various times, the Respondent in this case, as the judge specifically found, "frequently misrepresented and misled the union applicants about the Company's hiring plans." Additionally, the Board's observation in *Zurn*, that the employer in *Fluor Daniel* deviated from its hiring policy invariably to the disadvantage of union-affiliated applicants, is equally applicable here: the Respondent's substantial disregard of its hiring policy similarly resulted in no union applicants being hired at the jobsites at issue.

Taking all of those circumstances together, we find that the Respondent's manipulation of its hiring policy strongly implies antiunion animus. Consequently, under *Jesco*, that policy "necessarily fails as a defense to the Section 8(a)(3) allegation[s]." 347 NLRB 903, 905 (2006).

Our dissenting colleague attempts to distinguish *Jesco*, asserting that, "in *Jesco*, the employer did not prove that it had a preferential hiring policy, and, consequently, the Board found that the employer could not rely at all upon the nonexistent policy." We respectfully disagree with that reading of *Jesco*. As discussed, in *Jesco*, the Board rejected the employer's priority hiring defense to the 8(a)(3) allegations at the Jackson jobsite because the policy was substantially disregarded, not because it did not exist. Supra at 905. Similarly, as to the other jobsites at issue in *Jesco*, Holly Springs and Yazoo, Mississippi, the Board did not find that the employer's asserted policy never existed. Rather, the Board found that the employer's assertion of the policy was "pretextual" because the employer either did not rely on the policy or deviated from it. Id. at 906–908. Accordingly, the Board's decision in *Jesco* fully supports our analysis in the present case.

AMENDED CONCLUSIONS OF LAW

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. By surveilling the union organizing activities of its employees, the Respondent violated Section 8(a)(1) of the Act.

4. By changing the work assignment of its employee Daniel Barney because of his union organizing activity, the Respondent violated Section 8(a)(3) and (1) of the Act.

5. By failing and refusing to hire the following applicants at the Towanda, Pennsylvania jobsite because of their union affiliation, the Respondent violated Section 8(a)(3) and (1) of the Act: Millard J. D. Howell, Nick Simpson, James Bragan, Mike Kitchen, James Neumane, Rich DeHaut, David Packer, Brad Everetts, Thomas Clark, Roger Jayne, Al Layaou, Lee Namiotka, Kurt Babcock, Dave Gotowski, Greg Strazdus, Durland Siglin, Christopher Monahan, Ernest (Skip) Patterson, John LaPointe, and John Manculich.

6. By failing and refusing to hire Daniel Barney and Bruce Kemp at the Libby, Montana jobsite because of their union affiliation, the Respondent violated Section 8(a)(3) and (1) of the Act.

7. By failing and refusing to hire the following employees at the Prescott and Arkadelphia, Arkansas jobsites because of their union affiliation, the Respondent violated Section 8(a)(3) and (1) of the Act: Billy Altom, Danny Bielss, Dale (Skip) Branscum, Mark Branscum, Jerry Burks, Henry (Hank) Coffey, Tim Coffey, Carl Edds, Bobbie Hay, Donald Hensley, Millard J. D. Howell, Daniel Neal, Bobby Woodall, Devin Woodall, Garry Woodall, and J. D. Woodall.

8. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

AMENDED REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (3) of the Act, the Respondent must cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

Having found that the Respondent discriminatorily refused to hire union-affiliated applicants, the Respondent must make them whole for its unlawful conduct against them. In *Oil Capitol Sheet Metal, Inc.,* 349 NLRB 1348 (2007), the Board recently modified the evidentiary requirements to be applied in determining instatement and backpay-period-duration issues where discriminatees are union salts. The record shows that James Bragan and Dale (Skip) Branscum were salts, and thus *Oil Capitol* applies to them.[11] The Respondent will have the oppor-

fellow union applicants that, if the Respondent could not use them at Prescott, it would employ them at Arkadelphia.

[11] Members Liebman and Walsh dissented in relevant part in *Oil Capitol*, supra, slip op. at 10, et seq. Regarding the present proceeding,

tunity in compliance proceedings to show that additional discriminatees were salts. Backpay shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth below and orders that the Respondent, The McBurney Corporation, Norcross, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in surveillance of employees' union activities.

(b) Changing work assignments of its employees because of their union activities.

(c) Failing and refusing to hire applicants because of their union affiliation.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under 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 Millard J. D. Howell, Nick Simpson, James Bragan, Mike Kitchen, James Neumane, Rich DeHaut, David Packer, Bradley Everetts, Thomas Clark, Roger Jayne, Al Layaou, Lee Namiotka, Kurt Babcock, Dave Gotowski, Greg Strazdus, Durland Siglin, Christopher Monahan, Ernest (Skip) Patterson, John LaPointe, John Manculich, Daniel Barney, Billy Altom, Danny Bielss, Dale (Skip) Branscum, Mark Branscum, Jerry Burks, Henry (Hank) Coffey, Carl Edds, Bobbie Hay, Donald Hensley, Daniel Neal, Bobby Woodall, Devin Woodall, Garry Woodall, J. D. Woodall, Tim Coffey, and Bruce Kemp employment in positions for which they applied or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them.

(b) Make the above-named individuals whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's discrimination against them, in the manner set forth in the amended remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to hire Millard J. D. Howell, Nick Simpson, James Bragan, Mike Kitchen, James Neumane, Rich DeHaut, David Packer, Bradley Everetts, Thomas Clark, Roger Jayne, Al Layaou, Lee Namiotka, Kurt Babcock, Dave Gotowski, Greg Strazdus, Durland Siglin, Christopher Monahan, Ernest (Skip) Patterson, John LaPointe, John Manculich, Daniel Barney, Billy Altom, Danny Bielss, Dale (Skip) Branscum, Mark Branscum, Jerry Burks, Henry (Hank) Coffey, Carl Edds, Bobbie Hay, Donald Hensley, Daniel Neal, Bobby Woodall, Devin Woodall, Garry Woodall, J. D. Woodall, Tim Coffey, and Bruce Kemp, and within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

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

(e) Within 14 days after service by the Region, post at its facility in Norcross, Georgia, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 30, 1995.

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

they recognize that the majority view in *Oil Capitol* is current Board law, and accordingly, for institutional reasons only, they approve its application in compliance.

[12] 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."

CHAIRMAN BATTISTA, dissenting in part.

I join my colleagues' opinion with the exception of their analysis and findings regarding the Respondent's reliance on its preferential hiring policy as an affirmative defense to the 8(a)(3) refusal-to-hire allegations.

The Respondent here maintained a preferential hiring policy whereby it gave preference to current employees, to prior employees, and to applicants who were recommended by current or prior employees. As the majority recognizes, such a policy is lawful. See *Zurn/N.E.P.C.O.*, 345 NLRB 12 (2005), petition for review denied sub nom. *Northern Michigan Building & Construction Trades Council v. NLRB*, 182 LRRM 2241 (6th Cir. 2007). As the majority also recognizes, where the General Counsel establishes a prima facie refusal-to-hire case, such a policy may meet the respondent's rebuttal burden of proving that, in any event, the respondent would have hired the nonunion applicants. *Zurn*, supra. Here, the Respondent rebutted the General Counsel's prima facie refusal-to-hire case to the extent that the nonunion applicants who were hired enjoyed a higher preference under the Respondent's preferential hiring policy than the rejected union applicants.

My colleagues find that the Respondent may not rely at all on its preferential hiring policy. In reaching this conclusion, they find that the instant case more closely resembles *Jesco, Inc.*, 347 NLRB 903 (2006), where the Board totally rejected the respondent's preferential-hiring-policy defense, than *Zurn*, supra, where the Board accepted the respondent's preferential-hiring-policy defense with regard to some of the nonunion hires. I agree that the instant case resembles *Jesco* in several respects—i.e., the Respondent hired no union applicants and falsely told some union applicants that it was not hiring. However, the instant case resembles *Zurn* in the more important respect that, like the evidence in *Zurn* but unlike the evidence in *Jesco*, the evidence here shows that the Respondent did, in fact, have a lawful preferential hiring policy. That is, here it is clear that the Respondent had established and applied its preferential hiring policy well in advance of the alleged unfair labor practices. In *Jesco*, by contrast, the employer did not prove that it actually had a preferential hiring policy, and if there was such a policy, there was no evidence that it predated the alleged unfair labor practices. The Board and the administrative law judge recited but did not credit the employer's testimony regarding the policy, and the judge noted that there was no documentary evidence supporting that testimony. Referring to the policy as the "professed" policy, the judge noted that "the very existence of the [policy] is suspect." The Board agreed that the policy is a "pretextual explanation."

In other words, in *Jesco*, the employer did not prove that it had a preferential-hiring policy, and, consequently, the Board found that the employer could not rely at all upon the nonexistent policy. Here, the Respondent proved that it did, indeed, have and use a preferential hiring policy. It can, therefore, rely on that policy to show that, notwithstanding the General Counsel's prima facie case, it would have hired those nonunion applicants who enjoyed a higher preference than the rejected union applicants. Accordingly, I find that the Respondent rebutted the General Counsel's prima facie case with regard to those nonunion applicants who enjoyed a higher preference than the rejected union applicants. Conversely, I find that the Respondent did not rebut the General Counsel's prima facie case with regard to those nonunion applicants whose preference was the same as or lower than that of the rejected union applicants.

At the Towanda jobsite, there were 20 rejected union applicants and 58 nonunion hires. Two of the rejected union applicants were prior employees. The remaining 18 rejected union applicants enjoyed no preference. Of the 58 nonunion hires, 13 were current employees, 8 were prior employees, and 37 enjoyed no preference. Accordingly, the Respondent hired more nonunion applicants (37) whose preference was the same as or beneath that of the rejected union applicants than the number of rejected union applicants. Because the Respondent hired at least one such relatively nonpreferred, nonunion applicant for each of the 20 rejected union applicants, I find that the Respondent violated Section 8(a)(3) by refusing to hire each of the 20 rejected union applicants.

At the Libby jobsite, there were 2 rejected union applicants and 16 nonunion hires. The two rejected union applicants were current employees. Of the 16 nonunion hires, 6 were current employees and 10 enjoyed no preference. Accordingly, the Respondent hired many more nonunion applicants (16) whose preference was the same as or beneath that of the rejected union applicants than the number of rejected union applicants. Because the Respondent hired at least one such relatively nonpreferred, nonunion applicant for each of the two rejected union applicants, I find that the Respondent violated Section 8(a)(3) by refusing to hire to each of the two rejected union applicants.

At the Prescott/Arkadelphia jobsites, there were 16 rejected union applicants and 31 nonunion hires. One of the rejected union applicants was a prior employee. The other 15 rejected union applicants enjoyed no preference. Of the 31 nonunion hires, 17 were current employees, 2 were prior employees, 2 were either current or prior employees, and 10 enjoyed no preference. Accordingly, the Respondent hired 11 nonunion applicants whose prefer-

ence was the same as or lower than that of the rejected union applicants. Thus, the Respondent hired at least 1 such relatively nonpreferred, nonunion applicant for each of 11 of the 16 rejected union applicants. Therefore, I find that the Respondent violated Section 8(a)(3) by refusing to hire 11 of the rejected union applicants.[1] As to the remaining five rejected union applicants, I find that the Respondent did not violate Section 8(a)(3) by refusing to hire them, but that it did violate Section 8(a)(3) by refusing to consider them.

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 engage in surveillance of employees' union activities.

WE WILL NOT change work assignments of our employees because of their union activities.

WE WILL NOT refuse to hire applicants because of their union affiliation.

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

WE WILL, within 14 days from the date of the Board's Order, offer Millard J. D. Howell, Nick Simpson, James Bragan, Mike Kitchen, James Neumane, Rich DeHaut, David Packer, Bradley Everetts, Thomas Clark, Roger Jayne, Al Layaou, Lee Namiotka, Kurt Babcock, Dave Gotowski, Greg Strazdus, Durland Siglin, Christopher Monahan, Ernest (Skip) Patterson, John LaPointe, John Manculich, Daniel Barney, Billy Altom, Danny Bielss, Dale (Skip) Branscum, Mark Branscum, Jerry Burks, Henry (Hank) Coffey, Carl Edds, Bobbie Hay, Donald Hensley, Daniel Neal, Bobby Woodall, Devin Woodall, Garry Woodall, J. D. Woodall, Tim Coffey, and Bruce Kemp employment in positions for which they applied or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them.

WE WILL make the above-named individuals whole for any loss of earnings and other benefits they may have suffered as a result of our discrimination against them, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful refusals to hire the above-named individuals and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that our unlawful conduct will not be used against them in any way.

THE MCBURNEY CORPORATION

Bruce E. Buchanan, Esq., for the General Counsel.
Dian Y. Kohler and *Mark Crawford, Esqs. (Jackson, Lewis, Schnitzler & Krupman),* of Atlanta, Georgia, for the Respondent.
Michael J. Stapp, Esq. (Blake & Uhlig, P.A.), of Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried on August 25–27, 1997, in Scranton, Pennsylvania, and on October 6–8, 1997, in Atlanta, Georgia, upon a consolidated complaint issued on April 25, 1997, alleging that the Respondent, the McBurney Corporation (McBurney), violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The underlying charges were filed by the Union, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO, on February 20, 1996, in Cases 26–CA–18017; on July 17, 1996, in Case 26–CA–17564; and on October 21, 1996, in Case 26–CA–17979.

The Respondent's answer filed on May 12, 1997, admitted the jurisdictional aspects of the complaint and denied the substantive allegations.

At issue are whether the Respondent violated (a) Section 8(a)(1) of the Act by interrogating an employee about his union membership; engaging in surveillance of union organizing; prohibiting solicitation and the wearing of union insignia; and informing an employee that applicants affiliated with a union would not be hired, and (b) Section 8(a)(1) and (3) of the Act by refusing to hire a number of applicants at certain jobsites and by refusing to transfer employees to certain jobs because of their union affiliation.

On the entire record[1] including my observation of the demeanor of the witnesses and after consideration of the briefs, I make the following

[1] These 11 rejected union applicants consist of the 1 rejected union applicant who had preference as a prior employee, and 10 who enjoyed no preference.

[1] The motion to correct transcript filed by the General Counsel is granted. The motion to admit Jt. Exhs. 1, 2, 3, and 4 is granted; the

FINDINGS OF FACT

I. JURISDICTION

The McBurney Corporation, a Georgia corporation, with its office and principal place of business located in Norcross, Georgia, has been engaged in the design and construction of industrial stream plants, power plants, and related heavy construction at locations throughout the United States, including Towanda, Pennsylvania, Prescott and Arkadelphia, Arkansas, and Libby, Montana. With purchases of goods received at its Towanda, Pennsylvania, Prescott and Arkadelphia, Arkansas, and Libby, Montana jobsites valued in excess of $50,000 directly from points located outside the States of Pennsylvania, Arkansas, and Montana and services valued in excess of $50,000 in States other than Pennsylvania, Arkansas, and Montana, the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Background and Facts

The Respondent, The McBurney Corporation, builds power plants and steam plants in various locations of the United States. Prior to the construction activities relevant to this case. McBurney had a project in 1990 at Ebensburg, Pennsylvania, where supervisory personnel included James Austin, Jake Vanderlinden, Jim (Jumbo) Clayton, and Freeman (Rusty) Reid.

James (Jay) Bragen, International organizer for the Boilermaker union, was unsuccessful in Ebensburg in his attempt to organize the employees. J. D. Howell, Ernest Patterson, and John Manculich, who were employed by McBurney at Ebensburg assisted Bragen in this union organizing effort.

In 1995 and 1996, the Company worked on a boiler construction project in Towanda, Pennsylvania, Jake Vanderlinden was the site manager and the highest McBurney official, James Austin was the boiler superintendent, and George Pittman, the mechanical and piping superintendent. James Clayton and Rusty Reid were general foremen.

The first hiring of boilermakers occurred in late July and August 1995. Thereafter, numerous applicants with union backgrounds applied for jobs. But they were not hired. For example, on August 28, 1995, Millard J. D. Howell called the Company's offices in Atlanta which informed him to contact the Towanda site. He called the Respondent's Towanda office on August 30, 1995, he left his name including his qualifications and his telephone number and was placed on the Company's call-in list (GC Exh. 6).

On October 25, 1995, James Bragen with Greg Portz, a business agent for Local 13, and four union members, Rich DeHaut, Mike Kitchen, James Neumane, and David Packer went to the local job research service to find the location of the McBurney jobsite. On their way, they stopped at a local diner. Bragen noticed a man with a McBurney marked jacket. The individual, identified as George Pittman invited Bragen to apply for work at the jobsite because he needed someone with Bragen's qualifications. Bragen was unable to go to the Towanda jobsite at the appointed time and instead called the Company's local office. Speaking with Malissa Ball, the secretary, he informed the office that he would come to the jobsite to submit an application on the following day. Bragen, accompanied by the four boilermakers went to the jobsite to apply for work and spoke with Ball, stating their names and emphasizing their experience in welding, rigging, and pipefitting. Bragen also identified Greg Portz as a business manager for the Local 13 Boilermaker union. Malissa Ball took down the information. The Respondent did not hire any of the union applicants.

Instead, Pittman hired six employees without union affiliation who had never worked for the Company before and are considered new hires. He hired three pipewelders and fitters[2] to begin work on October 27, 1995. On October 30, 1995, Pittman hired three men who had experience as pipefitters and millwrights.[3]

By letter of October 26, 1995, the Union reconfirmed with the Respondent's superintendent, Austin, that the six union applicants who had left their names with the secretary were interested in employment. The letter also listed the names of 30 other qualified individuals who were interested in working for the Respondent (GC Exh. 4). The letter emphasized the expertise of the applicants in pipefitting, welding, rigging, ironmaking, and tube rolling.

On the same day, October 26, 1995, three groups of union members applied for work. Thomas Clark, Roger Jayne, Bradley Everetts, Lee Namiotka, Kurt Babcock, Allan Layaou, Greg Strazdus, and Dave Gotowski went to the Towanda jobsite in person to apply for work. They were qualified journeymen and boilermakers who left their names and qualifications with the secretary. They also informed the Company that they were members of Boilermaker Local 13. They were informed that they would be called once the Respondent started to hire.

The Respondent did not hire any of these applicants. Instead in October and November 1995, the Company hired 10 individuals who had no union affiliation and several were new hires.[4]

On November 16, 1995, Durland Siglin, a boilermaker and iron worker and a member of Local 13, went to the Towanda jobsite to apply for a job. Siglin who had revealed his union affiliation was asked to leave his name, phone number, and qualifications. Siglin returned to the jobsite 2 weeks later and again on December 1995 to get hired but he was never contacted about a job.

In December, the Respondent continued to hire nonunion employees.[5]

On December 13, 1995, James Bragen made another attempt to have members of his union employed at the Towanda jobsite. He came to the jobsite accompanied by J. D. Howell, Lee Namiotka, Chris Monahan, and Nick Simpson. Howell remained in the parking lot as the others went to the trailer.

Charging Party's motion in opposition and its motion to substitute the Charging Party's exhibits are denied.

[2] Tim Lester, Danny Chappell, and Lawrence Nichols (Jt. Exh. 1).

[3] Glen Lewis, Ed Wilston, and Joe Tomberlin.

[4] Joseph Meehan, Randy Brown, John Dragon, George White, Cary Locklear, Thomas Marston, Kenneth Denmark, William Douglas, and Dan Little.

[5] Claude Gouge, Dale Carter, Ronald Vick, Tommy Fennell, Johnny Fennell, Wayne Cunningham, and Robert Argraves.

Howell saw Rusty Reid and reminded him that they had worked together before at Ebensburg and that he, Howell, was now an organizer for the Union. Reid told Howell that there was a need for employees but that he would have to consult Jim Clayton about any employment decisions. Bragen and the others in the meantime had spoken to James Austin about employment, initially introducing themselves as members of the Union. They asked whether the Company needed any welders. Austin said, not now, but that he would be hiring soon. The applicants had already registered for employment except Chris Monahan who proceeded to give Malissa, the secretary, his name, phone number, and qualifications.

The Respondent commenced boiler work in November and in December and a significant portion of boiler work and duct work had been completed. That work continued in December 1995, and January through April 1996.

In early January, the Company hired seven tube welders, none of whom had any union affiliation.[6] At least two of those hired were new and had not worked for the Company before.

On January 10, 1996, James Bragen and Greg Portz visited the jobsite again. They spoke to Jake Vanderlinden. He remembered Bragen and said that hiring was delayed because of the cold weather.

On January 16, 1996, Dan Barney was hired as a welder. Barney who was not affiliated with a union, first visited the Towanda jobsite of January 15, 1996, and spoke to Jim Clayton. He told Barney to return on the following day. When Barney returned on the next day, Clayton asked him how he knew about the job and whether he knew anyone already employed by McBurney. Barney named an employee, Bill Parsons, whom he had met a few days prior to the interview. Barney's testimony was that Clayton then asked whether Barney was affiliated with any union or worked on a union project in the past and said, "[W]e just kind of gotta watch what we do, you know, around here" (Tr. 237). Clayton denied in his testimony any questions about the Union. In any case, Barney was hired on January 16, 1996.

The Respondent hired eight additional journeyman welders and pipefitters during the month of January. All had no affiliation with any union.[7] The Respondent also hired an employee recommended by Barney. Barney had asked Clayton if he needed additional men and mentioned Bruce Kemp. Kemp appeared at the Towanda jobsite on January 22, 1996, and Clayton hired him on January 24.

On January 23, 1996, J. D. Howell and Skip Patterson went to the Towanda jobsite to seek employment. Jake Vanderlinden interviewed them at the Company's trailer. Vanderlinden recognized them from their prior employment at the Company's Ebensburg jobsite and regarded them as good employees. Vanderlinden stated that he had no need for them but that he might contact them in a couple of weeks. They left their names and addresses in the hope of being employed as welders, riggers, or pipefitters.

On January 30, 1996, Allen Layaou and Kirk Babcock applied at Respondent's Towanda jobsite. They disclosed their union membership. They left their names and telephone numbers with the secretaries who told them that they would be notified of any jobs as they became available.

On February 5, 1996, Howell, Patterson, and Manculich returned to Towanda. With them was another union member, John LaPointe. Dressed in work clothes showing their union affiliation, they initially spoke with Jim Clayton who expressed remembering them as good employees at Ebensburg. The applicants assured Clayton that any organizing efforts on their part would not interrupt their work, and also informed him that they had their tools with them so that they could begin work at once. They then entered the job trailer, spoke with Jake Vanderlinden, and told him that they were ready to go to work. Vanderlinden said that it would be another couple of weeks before work was available. Vanderlinden denied in his testimony that he had actually promised them a job after 2 weeks. Clayton recalled in his testimony that Howell, Patterson, and Manculich had spoken with him on two occasions and that he told them that he already had a crew and that he did not need any tube welders.

The four applicants returned 2 weeks later on February 19, with their tools ready to report for work. They told George Pittman, the piping superintendent—Vanderlinden was not available—that they were reporting for work, because Vanderlinden had told them to return in 2 weeks. Pittman said that the work was ahead of schedule and that layoffs were imminent. The applicants were able to observe that the building site contained many boilerparts which were unassembled. Pittman insisted, however, that the Company was not hiring anyone and that the applicants could leave their names and phone numbers with Malissa Brown, the secretary. She, however, tried to signal to Pittman that it would be futile.

Pittman recalled in his testimony that several boilermakers had come to the jobsite in search of work, but he denied saying to them that the Company was laying off employees. Pittman's testimony was uncertain and confusing and not as reliable as that of the applicants.

Dan Barney who had no prior union affiliation had been hired on January 16, 1995. He was initially assigned to run a forklift under the supervision of Rusty Reid and Jim Clayton. He had also operated a cherry picker and worked as a pipefitter where, according to Vanderlinden, Barney had done a good job. Barney was then assigned to be a welder under the supervision of Darren King.

On February 7, 1996, Barney and Bruce Kemp delivered a letter signed by Bragen to Vanderlinden notifying the Company that the two employees were union organizers who would engage in organizing activities. The letter assured the Employer that these activities would not interfere with their work (GC Exh. 11). Thereafter, Barney and Kemp began their organizing activity in the breakrooms and during the breaks.

Kemp and Barney testified that supervision, namely Clayton and Reid, began to observe their union activities. Clayton and Reid disputed in their testimony any accusations of surveillance. They testified that they frequented the breakrooms to warm their hands or to smoke. The employees finally com-

[6] Victor Saenz, Krandle Pylant, Henry Bonsal, Michael Brandon, Curtis Berry, Leslie Hamilton, and Nils Floden.

[7] Robert Weaver, William Denny, Mike Flynn, Jamie Pate, Jeff Vogrin, Hush Ball, Roger Benefield, and Shawn Hawkins.

plained to Vanderlinden about Reid and Clayton and their activities of watching the two union organizers.

On February 8, 1996, 1 day after the letter relating to the union activities was given to management, Barney was transferred to the iron worker crew to perform grating work. That work was more difficult and onerous because it involved heavy lifting of steel grating weighing more than a 100 pounds and transporting it across narrow iron beams covered with ice and snow at high altitudes.

The Respondent's version of the transfer differs. According to the Respondent, Kemp complained about Barney saying that Barney's welds were deficient. He was therefore assigned to grating. Because Barney had a fear of heights, he was ultimately assigned to performing grating work at ground level.

The Respondent's scenario is inconsistent with documents which reveal that Barney's job performance had been rated by the Company as "good." Contrary to the Respondent's testimony, Kemp denied in his testimony voicing any complaints about Barney's welding skills or having to repair his welding work. Under these circumstances, I have credited Barney's testimony about his transfers.

Barney also testified about an incident where Brent Smith spoke to Barney about his union button. Smith requested Barney to remove his button because of the Company's prohibition against the wearing of jewelry. Barney protested and claimed that he had a right to wear the union button. Smith relented, saying that he, Barney, knew the law better than he.

Barney made an attempt to transfer to a new jobsite where McBurney was building a wood burning boiler for a client company. Barney first mentioned his intentions to transfer to the Libby, Montana site already in January 1996 when he spoke with Clayton. Clayton appeared receptive to the idea that Barney could transfer to the new jobsite once he was no longer needed at Towanda.

Clayton transferred to Libby, Montana, on April 18, 1996. On April 25, 1996, Barney spoke with Austin at Towanda whether he and Kemp could transfer to Montana. Austin told Barney to check with Clayton. Barney was laid off on April 27, 1996, and he called Clayton on April 29 or 30 in Montana stating that he and Kemp were now ready to come to Libby to work for McBurney. Clayton, however, said that he did not need anybody. Barney was persistent reminding Clayton about his prior statement that he needed help. Clayton was firm saying that he had no need for their work. Barney called a week later and received the same message.

The Respondent hired at least 19 journeymen after April 29 including transfers and new hires.[8] However, approximately 50 percent of the journeymen hired were new hires.

The Respondent also had two jobsites in 1996 in Arkansas, one at Prescott and the other in Arkadelphia. The project in Prescott was the construction of a lumber mill starting in March 1996. Bob McKuen was the project manager and Tommy Cooper, the superintendent.

On April 16, 1996, Dale Branscum, business manager for the Boilermaker Union Local 69, visited the Prescott job to apply for work. Branscum without identifying his union affiliation, spoke with Cooper who told him that he needed six boilermakers and several helpers. Branscum filled out an application form. Cooper indicated that the jobs might be available in 2 or 3 weeks.

On April 23, 1996, Branscum called Cooper about the availability of a job. Cooper confirmed that he had a job for Branscum. He indicated to Cooper that he had some friends who were also interested in a job. Branscum arrived with 14 Local 69 members. Branscum then revealed to Cooper that he was the Union's business manager and that the applicants were members of Local 69. Cooper passed out the application forms and told the applicants that in a week or so he would need boilermakers. Cooper also said that McBurney had a project in Arkadelphia which needed staffing. Cooper was willing to employ two "connectors" or iron workers, but none of the applicants expressed an interest.

By letter of April 25, 1996, addressed to Donald Usher in Georgia, Branscum informed the Company of his interest in having 15 members of Local 69 employed in either of the two building sites in Arkansas and assured the Company that any organizing activity would not interfere with their work (GC Exh. 2). Usher responded by letter of May 2, 1996, setting forth the Company's priority hiring practice and stating that the applicants would be considered "walk-ins" and considered for employment in accordance with the company policy (GC Exh. 3). Yet none of those applicants was hired.

The Company hired a number of employees in lieu of the applicants.

Another union applicant was J. D. Howell. On May 14, 1996, he called the Prescott jobsite and left a message inquiring about employment. Cooper called Howell's home and spoke to Marjorie Howell, Howell's wife, stating that he had a job for "J. D." at Prescott or at other sites. Howell went to Prescott and introduced himself to Cooper as a union representative and organizer for Local 69. Cooper spoke with Howell but did not offer him a job. Howell wrote a letter, dated May 31, 1996, to the Respondent's home office identifying himself as a former McBurney employee and recommending for employment the 15 applicants whose names had previously been submitted by Branscum (GC Exh. 8).

The Respondent hired numerous employees at Prescott and Arkadelphia. Their names and employment status are identified in the record. Neither Branscum nor Howell, nor any of the fifteen journeymen identified in the letters, were ever hired by the Respondent at the two jobsites in Arkansas.

Analysis

The General Counsel joined by the Charging Party, submit that the Respondent's hiring policy violates Section 8(a)(3) of the Act, and that the Respondent used the policy to discriminate against union members by failing to hire the applicants at the various jobsites because of their union affiliation. The parties also allege that the Respondent violated Section 8(a)(1) of the

[8] Ray Knight, Shawn Rich, Joe Meehan, Henry Locklear, Emmett Reeves, Mark Sweat, Robert Portnell, Kenneth Dodgion, Mike Cazenave, Ruben Kava, Larry Dinningham, Victor Saenz, Edmond Ouellette, Ignacio Esparza, Henry Pickett, Jason Davis, James Byrd, Kevin Harrell, and Richard Vinson.

Act by coercive interrogations, unlawful surveillance, and the application if an overly broad solicitation policy. The Company argues that the General Counsel has failed to carry his burden of proof to show any violations of Section 8(a)(1) and (3) and that even if a prima facie case of discrimination had been established, the Company has shown that the alleged discriminatees would not have been hired for legitimate reasons. According to the Respondent, the discriminatees were not hired because other applicants were selected pursuant to McBurney's hiring priority.

According to that policy the Respondent hires journeymen based in the order of priority beginning with (1) transfers from other McBurney jobs; (2) persons who had previously worked for McBurney; (3) referrals from McBurney employees; and (4) call-ins or walk-ins (GC Exh. 3). The Respondent's supervisory hiarchery, Clayton, Austin, Jordan, and Pittman testified about the priority hiring system and stated that it was an unwritten policy which is followed with occasional exceptions. The purpose of the policy was to attract quality employees who don't have absenteeism problems or incur safety violations.

The Respondent has admitted that the Respondent's hiring agents did not strictly adhere to the policy and argues that even though they departed from the criteria no systematic effort was made by the Company to exclude known union members.

Whether or not an employer intentionally excluded union applicants can often be inferred by its antiunion animus. In the case before me, the Respondent has violated Section 8(a)(1) of the Act. However, with respect to the allegation that the Respondent interrogated Barney in violation of Section 8(a)(1) of the Act, I agree with the Respondent, that the record does not support that allegation. First, Barney's testimony in this regard was contradicted by Clayton. Barney was the only witness to testify that Clayton asked him during the job interview whether he was union and whether he had been on big union jobs. Clayton testified unequivocally that he did not interrogate Barney about the Union, nor did Reid who was present for a part of the conversation overhear any talk about the Union.[9] Under these circumstances, I have not credited Barney's testimony about Clayton's interrogation of him concerning the Union. I accordingly dismiss this aspect of the allegations in the complaint.

The allegation in the complaint relating to unlawful surveillance is supported by the record. Kemp and Barney testified that after February 7, 1996, they began to solicit employees for the Union in the breakroom. Barney began wearing a union button on February 7, 1996, after he had informed Vanderlinden of his union activity. According to Barney, Clayton and Reid suddenly began to take their breaks in the breakroom and get close to them and observe them as they were talking to follow employees about the Union or as employees signed union cards. Clayton or Reid would enter the breakroom every day and noticeably stare at them. Barney testified that prior to February 7, he had never seen Clayton or Reed in the breakroom. Clayton admitted that Reid had usually taken his breaks in the trailer with his fiancee, Malissa Ball.[10]

It is well settled that management's observation of employees' union activity for a significant period of time and for discriminatory reasons has a chilling and coercive effect on the employees. When supervisors begin to increasingly use the employees' breakroom to observe their union activity, the employer violates Section 8(a)(1) of the Act. *Hertz Corp.*, 316 NLRB 672, 685 (1995).

On February 9, 1996, when Barney was wearing his union button, Safety Manager Brent Smith approached Barney and requested that he remove his union button because it was considered jewelry.

He testified that his instructions from Rust Engineering, the company which controlled the safety requirements for McBurney at the Towanda jobsite, including a prohibition against the wearing of jewelry, such as watches, rings, and chains. This rule was strictly enforced; the only exceptions were wedding bands. Smith asked Barney one day in the tool trailer to take the union button off because he considered it jewelry like a ring or a watch. Barney responded by asking whether it had anything to do with the Union. Smith said no and added that he had worked for union companies before. When Barney went on to say that the law permitted the wearing of union buttons, Smith conceded that Barney was better informed about the law. Barney continued to wear the union button and was never again told to remove it.

Although the General Counsel argues that this episode violated Section 8(a)(1) of the Act, I regard this brief conversation as noncoercive, particularly where, as here, the employee prevailed and continued to wear the union button. The evidence does not show that the policy interfered with union solicitation. I accordingly dismiss this allegation.

However, the record shows that once Barney engaged in his union activity, he was transferred to perform iron work. This change of work assignment because of an employee's union activity violates Section 8(a)(3) and (1) of the Act.

The General Counsel's next argument, supported by the Charging Party, is that the Respondent's failure to hire the applicants at the Towanda jobsite violated Section 8(a)(3) of the Act.

Relying upon its priority hiring policy, the Respondent argues that it hired its employees without knowledge of anyone's union affiliation and without any intent to discriminate against the union applicants.

A priority hiring system of the type applied by the Respondent has the practical effect of screening out union applicants. *D.S.E. Concrete Forms*, 303 NLRB 890, 891 (1991). *M. J. Mechanical Services,* 325 NLRB 1098 (1998). While an employer may develop a hiring policy which is designed to attract applicants who are known to the employer based upon past experience to possess the necessary skills and reliability for the job, the employer cannot go beyond that and draft a policy which is designed to exclude union applicants or one which is

[9] The Union instructed Barney to take written notes of the Company's unlawful behavior concerning the Union. Barney testified that he did not have any notes about this incident.

[10] Clayton and Reid denied that they used the breakroom to observe the employees' union activities. I credit the consistent and credible testimony of Kemp and Barney.

inherently destructive of the employees' rights. Here, the General Counsel has shown that the Respondent failed to consider the alleged discriminatees for employment and refused to hire them because of its union animus. *Fluor Daniel, Inc.,* 304 NLRB 970 (1991).

The Respondent conceded that it failed to hire any of the union applicants who applied at various dates in October and November 1995. On October 25, 1995, Bragen, DeHaut, Kitchen, Neumane, and Packer applied. Jayne, Everetts, Clark, Layaou, Namiotka, Babcock, Strazdus, and Gutowski applied on October 26, 1995, in three separate groups. On November 16, 1995, Siglin applied for employment. Union organizers Bragen or Portz usually accompanied the applicants. Others had introduced themselves as members of the Local or disclosed on their applications that they had worked for companies which were known as union contractors. In addition, the letter sent on October 26, 1995, from Local 13 identified the applicants (Packer, Neumane, Kitchen, DeHaut, and Bragen) as union members. The attached list identified the other applicants as union members (Clark, Everetts, Namiotka, Layaou, Jayne, Siglin, Strazdus, and Babcock) (GC Exh. 4).

On December 13, 1995, additional members of the Union, accompanied by Bragen made another attempt to seek employment (Howell, Namiotka, Monahan, and Simpson). Several of them were dressed in clothing which showed their union affiliation. At various dates in January and February 1996, Bragen returned to the Towanda site as well as Portz, Howell, Patterson, Layaou, and Babcock. Manculich and LaPointe applied on February 5, 1996, wearing union insignia on their clothing.

The record accordingly shows—contrary to the Respondent's argument—that the Respondent was well aware of the affiliations of these applicants as union members. It is also clear that none of these applicants were hired or considered for employment. The Respondent could have made exceptions to its priority hiring system, particularly here, where many of the applicants returned to the jobsite on several occasions in the hope of being hired after they were told that jobs might be available in 2 weeks or so.

The Respondent admits that it hired several employees at the Towanda jobsite after October 22, 1995, who were "walk-in or call-ins."[11] At least three of these jobs could have been offered to the union applicants. Moreover, the Respondent misrepresented to the union applicants the Company's intentions to make hiring decisions and led them on to believe that eventually they would be hired. The applicants therefore returned time and again. Pittman testified that he needed only one journeyman when he spoke to Bragen on October 25, 1995 (Tr. 759–760). Yet the record shows that seven journeymen were hired immediately thereafter (Jt. Exh. 1). And on January 10, 1996, when Bragen and Portz returned to the jobsite to seek employment, Vanderlinden told him that he was not hiring because he was having trouble with ice and snow and material arriving. Yet he hired Les Hamilton on January 10 and Mark Medlock and Nils Floden on January 12. On January 23, Howell and Patterson spoke to Vanderlinden about employment at Towanda. He told them that it would be 2 weeks before he was ready to hire journeymen. The record shows that the four journeymen were hired on January 23 (Hugh Ball, Roger Benefield, and Shawn Hawkins) and another employee (Shawn Neal) on January 26, 1996. When Howell, Patterson, and Manculich made an attempt on February 19, 1996, to obtain employment, Pittman said they were not hiring but winding down and laying people off. But no one was laid off until April 1996. The Respondent also refused to consider Howell, Patterson, and Manculich as possible transfers or at least as former McBurney employees when they applied on January 23. They had worked for the Company at Ebensburg, Pennsylvania, before the Towanda project. The Respondent could have hired them under its priority hiring policy, but obviously avoided hiring them and hired instead the four employees who were not former employees.

Finally, the priority hiring system on which the Respondent has relied to avoid union applicants was not consistently enforced nor consistently understood by management entrusted with the staffing at Towanda. Initially it is uncontested that the priority hiring system is not a rigid or a written policy. The policy is more or less communicated by word of mouth. Accordingly the supervisors who testified about it gave different versions of it and stated that the policy was flexible and applied with exceptions. It is clear that the policy was used selectively and in a disparate manner in order to hire a work force without union affiliation and it failed to extend priority to those who were union applicants even though they would have qualified as transfers or as former company employees.

I accordingly find, in agreement with the General Counsel and the Charging Party that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to hire and consider for employment the union applicants at the Towanda jobsite.

The Respondent also violated the Act when it refused to permit the transfer of Barney and Kemp to the Libby, Montana jobsite. The record shows that Barney and Kemp were laid off in late April 1996 at the Towanda jobsite. Barney called the Libby project on April 29 and spoke to Clayton asking for employment on behalf of himself and Kemp. Clayton rejected the request saying that he did not need any help. Yet the Company hired 19 journeymen after April 29, 1996, some of whom were transfers from Towanda. The Respondent argues that Barney's work was unsatisfactory and that Kemp did not apply on his own behalf. The Company's records however rated the performance of both employees as "good." Although critical of Barney's work, Clayton testified that Barney was doing a very good job laying pipe. Supervisor Darren King thought that Barney was a good employee. Clayton testified that he recalled a conversation with Barney in January 1996 about a job in Montana where he had said "that we had a job in Montana" for people who do good jobs, show up on time and are safety conscious. Barney's recollection is that Clayton assured them of a job if they were willing to go all the way there.[12]

Clayton admitted receiving a call from Barney on April 30 saying that they were packed to go to Montana and needed

[11] Glen Lewis and Lawrence Nichols were hired on October 30, 1995, and Leslie Hamilton on January 10, 1996.

[12] I have credited Barney's recollection of the conversation.

directions to the jobsite. Clayton, however, told them that he needed "pipe people" but that he would get them from the West Coast, and that he did not need them. Clayton, indeed, hired several journeymen who were not former employees and rejected the two Towanda employees who should have received priority consideration under Respondent's policy.

The motive for the Company's conduct fit the Respondent's antiunion pattern. When Barney spoke to Clayton in January, they had not yet become union supporters. While in April 1996, they had openly engaged in union organizing. The Company's conduct clearly violated Section 8(a)(3) and (1) of the Act.

The General Counsel and the Charging Party next argue that the Respondent similarly violated the Act by its employment practices in Prescott and Arkadelphia, Arkansas.

On April 16, Dale Branscum went to the Prescott jobsite and spoke with Tommy Cooper, the superintendent, about a job. Cooper said that he needed six boilermakers and helpers. Cooper handed Branscum an application form and said that he would be considered for employment in about a week after a drug test.

On April 23, Branscum called Cooper who said that he had a job for him. Branscum said he had friends who were also interested in a job. When Branscum, accompanied by 14 members of Local 69 arrived, he introduced himself as the business manager of Local 69. The applicants wore union insignia, showing they were members of the Local. Cooper handed out job applications to the applicants and said that it would be 2 weeks before he would need any boilermakers. Cooper also mentioned that the Arkadelphia jobsite would need employees, especially welders. The record shows that Cooper hired two journeymen already on May 1, 1996 (Jt. Exh. 3).

By letter of April 25, 1995 addressed to Respondent's main offices in Norcross, Georgia, Branscum reiterated the wish of the applicants to be employed at the Company's projects in Arkansas, including those in Arkadelphia and Prescott. The letter enclosed a list of the 15 applicants,[13] including their telephone numbers and job skills (GC Exh. 2). The Respondent responded by letter of May 2, 1996, setting forth the Company's priority hiring policy.

After April 23, 1996, the Respondent hired nine journeymen at Prescott, all of whom were—according to the Respondent—transfers or prior employees. The record shows that the Respondent hired as a new hire Levester Gillard initially as a laborer and then as a helper. Also hired as new hires in helper positions were Jerry Hicks and Stephen Williams. They had no union affiliation. Not one of the union applicants were hired even though Cooper had committed himself to hiring Branscum before he had revealed his union affiliation. Cooper could have made available a number of helper positions. Tim Coffey and Billy Altom, listed as apprentices, could have qualified as helpers and been hired.

J. D. Howell had called the Prescott jobsite several times. He called again on May 14, 1996, and left a message. His wife, Marjorie Howell, received a telephone call from Cooper who, referring to Howell's telephone message, told M. Howell that he was interested in employing her husband in some capacity. In his testimony, Cooper stated that he told M. Howell that if he could not use her husband in Prescott, then he might get him on at another jobsite.

Later in the day, on May 14, Howell, totally unaware of his wife's conversation with Cooper, visited the Prescott jobsite. He spoke to Cooper, introduced himself as an organizer for the Union and reminded Cooper that he had worked for the Company at Ebensburg and that Vanderlinden, Austin, and Clayton would recommend him as a good employee. Cooper replied that he had no objections to hiring union applicants but that the front office did not share his opinion.[14] Howell was not hired even though he should have been considered a priority candidate under the Respondent's hiring policy.

Howell wrote a letter dated May 31, 1996, in which he recommended the hiring of the 15 job applicants who had filled out applications. He referred in his letter to his prior employment with the Respondent (GC Exh. 8). Yet none of those applicants were hired.

The Arkadelphia project required a number of qualified journeymen. Several of the journeymen hired were transfers, and others hired between May 31 and August 1996 were new hires (Jt. Exh. 4). However, none of the 16 union applicants, including Howell, were hired or considered even though the Respondent's main office was made aware of their interest to be employed.[15] Indeed, the site manager, Hayward Murphy, testified that he had consulted the names of applicants maintained at the Company's headquarters. Clearly, the Respondent intentionally avoided the hiring of any union applicants.

As alleged, I find that the Respondent unlawfully discriminated in its refusal to consider and hire any of the 16 union applicants at its two Prescott and Arkadelphia jobsites. Branscum and Howell were virtually assured of jobs until they disclosed their union organizing intentions. The Company ignored its own preferential hiring policy for former employees to employ nonunion applicants. Considering the Respondent's entire conduct, including the antiunion animus exhibited by the unlawful surveillance of employees' union activity, management's repeated misrepresentations to the union applicants, as well as its disparate and selective application of its hiring policy, the General Counsel has clearly shown repeated violations of Section 8(a)(1) and (3) of the Act. In this regard, I have rejected the Respondent's argument that the applicants would not have been hired, even in the absence of any union considerations. The high level of skills of the applicants were not

[13] In addition to Branscum, they are Don Hensley, Carl Edds, Billy Altom, Bobbie Hay, Bobby Woodall, Tim Coffey, Garry Woodall, Mark Branscum, Danny Bielss, J. D. Woodall, Daniel Neal, David Woodall, Hank Coffey, and Jerry Burks. Patterson was not one of the applicants. He attempted to make an application but was turned away by a guard to the jobsite. His name was not included on the list of applicants (GC Exh. 8).

[14] Based on demeanor, I do not credit the testimony of Cooper and Murphy who said that Howell's attitude was hostile at the job interview. Their scenario of the conversation was also implausible and inconsistent.

[15] That office was aware of Branscum's letter, requesting consideration for Prescott and Arkadelphia projects.

contested. The Respondent was not expected to accord the applicants preferential treatment, because they were union members, the Company was merely expected not to use its hiring policy to discriminate against them.

CONCLUSIONS OF LAW

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. By surveilling the union organizing activities of its employees, the Respondent violated Section 8(a)(1) of the Act.
4. By changing the work assignment of its employee Daniel Barney because of his union organizing activity, the Respondent violated Section 8(a)(1) and (3) of the Act.
5. By failing and refusing to consider and hire the following applicants at the Towanda jobsite: Millard (J. D.) Howell, James Bragen, Mike Kitchen, James Neumane, Rich DeHaut, David Packer, Brad Everetts, Thomas Clark, Roger Jayne, Al Layaou, Lee Namiotka, Kurt Babcock, Dave Gotowski, Greg Strazduz, Durland Siglin, Christopher Monahan, Ernest (Skip) Patterson, John LaPointe, and John Manculich because of their union affiliation, the Respondent violated Section 8(a)(1) and (3) of the Act.
6. By failing to consider and hire Dan Barney and Bruce Kemp at the Libby, Montana jobsite because of their union activities, the Respondent violated Section 8(a)(1) and (3) of the Act.
7. By refusing to consider and hire the following employees at the Prescott and Arkadelphia, Arkansas jobsites, Billy Altom, Danny Bielss, Dale Branscum, Mark Branscum, Jerry Burks, Hank Coffey, Tim Coffey, Carl Edds, Bobby Hay, Don Hensley, J.D. Howell, Daniel Neal, Bobby Woodall, David Woodall, Garry Woodall, and J. D. Woodall, because of their affiliation with the Union, the Respondent violated Section 8(a)(1) and (3) of the Act.
8. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (3) of the Act, I shall order the Respondent to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discriminated against the named job applicants, I will order it to offer them reinstatement or employment to the same or substantially equivalent positions at other projects as close as possible to the respective jobsite. In addition, I shall order the Respondent to make them whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful discrimination against them, from the date they applied for employment, to the date that the Respondent makes them a valid offer of reinstatement or employment. Such amounts shall be computed in a 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). This order is subject to resolution at the compliance proceeding of the issues outlined in *Dean General Contractors*, 285 NLRB 573 (1987), and *Casey Electric*, 313 NLRB 774 (1994). The complaint alleges that the Respondent failed and refused to consider and hire the applicants at the named jobsites. My findings generally support the allegations. More specifically, however, the record supports a finding that the Respondent refused to hire the named applicants at the Towanda jobsite, as well as Dan Barney at the Libby, Montana site and Dale Branscum and J. D. Howell at the Prescott and Arkadelphia jobsites. They were considered for employment but rejected because of their union affiliations. The Company had sufficient positions available for them but chose to rely on its hiring scheme to employ nonunion employees. The other applicants notably Bruce Kemp whose application was submitted by Barney for the Libby project, as well as the Local 69 members who accompanied Branscum to the Prescott project were not *considered* for hire because of their union membership. There is no evidence in the record that they were even considered for employment. The order will accordingly reflect a reinstatement provision for those applicants who were not hired and a provision to consider for hire those who were not considered for employment.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, The McBurney Corporation, Norcross, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in surveillance of employees' union activities.

(b) Changing work assignments of its employees because of their union activities.

(c) Refusing to consider for employment and refusing to hire qualified applicants, because of their union affiliation.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

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

(a) Within 14 days from the date of this Order offer Millard (J.D.) Howell, James Bragen, Mike Kitchen, James Neumane, Rich DeHaut, David Packer, Brad Everetts, Thomas Clark, Roger Jayne, Al Layaou, Lee Namiotka, Kurt Babcock, Dave Gotowski, Greg Strazdus, Durland Siglin, Christopher Monahan, Ernest (Skip) Patterson, John LaPointe, John Manculich, Daniel Barney, and Dale Branscum employment in positions for which they applied or, if such positions no longer exist to substantially equivalent positions, and make them whole for any loss of earnings and other benefits that they may have suffered as a result of Respondent's discrimination against them, as set forth in the remedy section of this decision.

(b) Within 14 days of this Order consider for employment and offer those applicants, who would currently be employed

[16] 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.

but for the Respondent's unlawful refusal to consider them for hire in positions for which they applied, or if such positions no longer exist, to substantially similar positions, Billy Altom, Danny Bielss, Mark Branscum, Jerry Burks, Hank Coffey, Carl Edds, Bobby Hay, Don Hensley, Daniel Neal, Bobby Woodall, David Woodall, Garry Woodall, J.D. Woodall, Tim Coffey, and Bruce Kemp and make them whole for any loss of earnings and other benefits that they may have suffered as a result of our discrimination against them, as 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 facility in Norcross, Georgia, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 26, 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 February 20, 1996.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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.

WE WILL NOT engage in surveillance of employees' union activities.

WE WILL NOT change work assignments of our employees because of their union activities.

WE WILL NOT refuse to consider for employment and refuse to hire qualified applicants, because of their union affiliation.

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

WE WILL within 14 days from the date of this Order offer Millard (J. D.) Howell, James Bragen, Mike Kitchen, James Neumane, Rich DeHaut, David Packer, Brad Everetts, Thomas Clark, Roger Jayne, Al Layaou, Lee Namiotka, Kurt Babcock, Dave Gotowski, Greg Strazdus, Durland Siglin, Christopher Monahan, Ernest (Skip) Patterson, John LaPointe, John Mancuilich, Daniel Barney, and Dale Branscum employment in positions for which they applied or, if such positions no longer exist to substantially equivalent positions, and WE WILL make them whole for any loss of earnings and other benefits that they may have suffered as a result of our discrimination against them, less any interim earnings, plus interest.

WE WILL within 14 days of this Order consider for employment and offer these applicants, who would currently be employed but for the Respondent's unlawful refusal to consider them for hire in positions for which they applied, or if such positions no longer exist, to substantially similar positions, Billy Altom, Danny Bielss, Mark Branscum, Jerry Burks, Hank Coffey, Carl Edds, Bobby Hay, Don Hensley, Daniel Neal, Bobby Woodall, David Woodall, Garry Woodall, J. D. Woodall, Tim Coffey, and Bruce Kemp and WE WILL make them whole for any loss of earnings and other benefits that they may have suffered as a result of our discrimination against them, less any net interim earnings, plus interest.

THE MCBURNEY CORPORATION

Bruce E. Buchanan, Esq., for the General Counsel.
Dion Y. Kohler and *Mark Crawford, Esqs. (Jackson, Lewis, Schnitzler & Krupman),* of Atlanta, Georgia, for the Respondent.
Michael J. Stapp, Esq. (Blake & Uhlig, P.A.), of Kansas City, Kansas, for the Charging Party.

SUPPLEMENTAL DECISION

KARL H. BUSCHMANN, Administrative Law Judge. On June 7, 2000, the Board issued an Order Remanding Proceeding to Administrative Law Judge for further consideration in light of *FES,* 331 NLRB 9 (2000). My decision in this case issued on September 21, 1998, finding that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by, inter alia, refusing to consider and hire job applicants because of their union affiliations. The parties filed exceptions and cross-exceptions to the decision. On May 11, 2000, while the decision was pending before the Board, it issued its decision in *FES,* setting forth the framework for analysis of refusal-to-hire and refusal-to-consider violations.

On August 18, 2000, I issued an order to the respective parties to show cause why my decision, dated September 21, 1998, is not in accord with the Board's holding in *FES* and to show what changes, if any are necessary.

The General Counsel filed a supplemental brief containing a thorough analysis of the decision in this case under the guidelines of *FES.* The General Counsel concluded:

[17] 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."

> Accordingly, Counsel for the General Counsel respectfully submits the Board's analysis under *FES* fully supports a finding that Respondent violated Section 8(a)(3) of the Act when it refused to hire the named discriminatees. [GC Br. 18.]

The Charging Party similarly submitted a Response to the Order to Show Cause, stating inter alia:

> In the present case, the Administrative Law Judge made findings that read almost as if he anticipated the decision in *Thermo Power*. [CP Br. 5.]

The Respondent's response to my decision concluded, after a detailed analysis, that the decision does not satisfy the *FES* standard, that the record is insufficient to establish a prima facie case of a refusal-to-hire violation and, in any case, that a revised remedy is required for a refusal-to-consider for hire discriminatees.

In accordance with the Board's order, I have considered my decision in the light of *FES*, particularly as to whether the discriminatees had the requisite experience for the positions and whether the requirements were uniformly applied or pretextual or pretextually applied. In this regard, I have considered the responses submitted by the parties to the Order to Show Cause and I have reconsidered my decision as urged by the Respondent.

The *FES* requirements for a refusal-to-hire case are:

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

Once this has been established, the Respondent has the burden of showing that it would not have hired the applicants even in the absence of the union activity.

According to my decision in this case, the Respondent refused to hire applicants affiliated with the Union at several construction sites, including Towanda, Pennsylvania; Libby, Montana; and Prescott and Arkadelphia, Arkansas. I found that the Respondent refused to hire 19 job applicants at the Towanda project.[1] As required in *FES*, I made a finding that the Respondent was hiring at the time of its refusal to hire the 20 union applicants. In this regard, I found that during the relevant times in November and December 1995, the Respondent employed 22 pipewelders, pipefitters, welders, and millwrights at the Towanda construction site. They are identified in a joint exhibit (Jt. Exh. 1), which was submitted and admitted into the record following the hearings in this case.[2] It is also uncontested that none of these employees were affiliated with the Union. Moreover, the record is clear that in January and February 1996, the Respondent continued to hire nonunion employees at the Towanda jobsite, at a time when several of the discriminatees who had already applied previously and also several new applicants with a union background visited the jobsite in search of work. Again, approximately 20 nonunion employees, as identified in my decision, became employees at Towanda in January and February 1996. The record, accordingly, shows that the Respondent hired a total of more than 40 pipefitters, pipewelders, and journeyman welders at Towanda, often within days after the date of the applications by the discriminatees, as properly observed by the General Counsel and the Charging Party. Considering that this scenario is not contested, and that the Respondent, filled at least two positions for each one union application, I cannot accept Respondent's argument that "no finding was made as to whether there was a sufficient number of openings for the applicants/alleged discriminatees."

The second element in *FES*, namely the applicants' experience and training relevant to these positions, is equally substantiated. In this regard the record shows that all 20 applicants at the Towanda jobsite were highly skilled as welders, boilermakers, pipe or tube welders, or riggers (GC Exh. 6). Their experience in the trade ranged from 6 to 28 years of experience. For example, a letter dated October 26, 1995, from the Union to James Austin, Respondent's field superintendent at the Towanda project, states in reference to the five boilermaker applicants who first applied for jobs on October 25, 1995 (David Packer, James Neumane, Michael Kitchen, Richard DeHaut, and James (Jay) Bragan):

> I would like to point out that all of these men possess a myriad of qualifications, including, but not limited to, pipe fitting, all facets and types of welding, burning, arc and flame gauging, lay-out, rigging, blueprint reading, tube rolling, tank building, hydro blasting, iron working, etc.

The Respondent's answer to the letter did not dispute the applicants' skills, which were obviously listed in greater detail in their applications. Instead, the Respondent's reply of May 2, 1996, emphasized its reliance upon a priority hiring policy for the refusal to hire the union applicants (GC Exh. 3):

> Thank you for you letter dated April 25, 1996. I am sure that you recognize in today's highly competitive business climate companies such as McBurney must do all we can to assure

[1] The number of job applicants was actually 20. Nick Simpson who applied for work on November 1 and on December 8 and 14, 1995, should have been included, as now reflected in the modified order (GC Exh. 6). James Clayton, a foreman at Towanda, was also referred to as "Jimbo" Clayton. James Bragan was sometimes referred to as (Jay) Bragan.

[2] On October 27, 1995, the Respondent employed Tim Lester, pipewelder; Danny Chappell, pipewelder; and Joseph Meehan, journeyman [Lawrence Nichols was employed on October 30 and not on October 27, as stated in my decision]. On October 30, 1995, the Respondent employed Glen Lewis, pipefitter; Ed Wilston, pipefitter; Joe Tomberlin, pipefitter; and Lawrence Nichols, pipefitter. In November 1995, the Respondent hired the following eight journeymen: Randy Brown, John Dragon, George White, Cary Locklear, Thomas Marston, Kenneth Denmark, William Douglas, and Don Little. In December, the Respondent placed the following seven journeymen on its payroll: Claude Gouge, Dale Carter, Ronald Vick, Tommy Fennell, Johnny Fennell, Wayne Cunningham, and Robert Argraves.

> the best personnel are hired on our projects. To that end, The McBurney Corporation has developed the following standard hiring practice followed by all our projects. In priority the hiring steps are listed below:
>
> 1. Personnel transferred from other McBurney jobs.
> 2. Personnel who have previously worked for McBurney.
> 3. Personnel who are known by a McBurney employee.
> 4. Call-ins and walk-ons.
>
> The list of personnel attached to your letter are considered "walk-ons" per McBurney standard hiring practice. We will gladly consider the list within the guidelines of our hiring practice.

The Company's position document, which is also part of the record, reflects the same, namely the Company's reliance upon its priority hiring policy to the applicants' efforts to be employed (GC Exh. 5). The caliber of the applicants and their high degree of skills were clearly reflected in their applications. Moreover, Millard J. D. Howell, John Manculich, and Ernest Patterson had worked previously for the Company and were considered to be good employees. Several of the applicants testified in this case and summarized their qualifications as follows: [J. D. Howell (Tr. 87)]: A welder, stig, tig, fitter, pipe, duct work, various parts of the boiler work, and a rigger. Including heavy lift rigging.

[Allen Layaou (Tr. 404)]: Welding, fitting, just about anything that's required within the boilermakers union. Tube welding, stainless welding, make welding, stick welding, plate, and pipe welding.

[Greg Strazdus (Tr. 418)]: I'm a welder, rigging, work in confined spaces, work high altitudes. Heliarc welding, stick welding, mig welding, and Fluxcore welding, that's about it.

[Roger Jayne (Tr. 429)]: I'm a certified welder, I graduated apprenticeship. I went to a four year apprenticeship. Rigging, I have rigging qualifications, blue print reading and I've done a pretty lot as far as boilermakers skills concern. I'm a plate welder and a Heliarc welder, which is pressure welder.

[Lee Namiotka (Tr. 438–439)]: My particular skill is in welding and rigging. As a boilermaker, we do a lot of other layout work, blueprint reading, mostly industrial work. Mostly what our welding pertains to is tube welding, duct work, the types are stig, mig, and tig, such as the Heliarc process of stick rod or automatic process with the mig and the automatic machines is what they use.

[James Bragan (Tr. 456)]: Welding, rigging, fitting, iron working, blueprint reading, laying out different types of welding, mig, tig, stack, and orbital welding.

[Durland Siglin (Tr. 485)]: I covered all the welding procedures for the SAME code and AWS codes. I do mig welding, tig welding, stick welding, and automatic.

[John Manculich (Tr. 193)]: We rig—we weld, I fit. I have specialty cards in welding, there's plate welding, tig welding as in tube welding, mig gun, and other specialty rods also.

[Christopher Andrew Monohan (Tr. 221)]: As a boilermaker I've done numerous skills such as mechanics work, welding, rigging, and high connection of steel. I've done various processes of mig, stick, and tig welding.

[Dan Barney (Tr. 234)]: Structural welding, stick welding, and rigging. Ten years, off and on.

[Ernest Skip Patterson (Tr. 301)]: I've got 18 different certifications with 18 different contractors. I do heavy rigging, specialty welding, and fitting, all phases of boilermaker work . . . Plate welding, tube welding, stainless, and nickel. . . .

[Bruce Kemp (Tr. 334)]: Structural welder . . . 25 years or over.

[Dale Branscum (Tr. 359)]: I've performed work as a rigger, a fitter, I have moved up and learned to weld and obtained several welding certifications, different types of metal composure . . . . Yes, I have performed stick welding structural or plate welding, I have certifications or had certifications in those areas. Also limited experience with Mig welding my area when I got out of field construction work was in the tube welding or tig process.

Even though the other applicants did not testify, their experience and skill are reflected in the record as follows (GC Exh. 6):

> Richard DeHaut—18 years as welder; Mike Kitchen—18 years as pipe or tube welder; James Neumane—17 years as pipe or tube or plate welder; David Packer—20 years as pipe or tube welder; Thomas Clark—12 years as welder; Bradley Everetts—13 years as welder; Dave Gotowski—12 years as welder or boilermaker; and John LaPointe—20 years as tube welder.

The qualifications of these applicants clearly corresponds to the line of work and the trades of the more than 40 nonunion employees who were hired at Towanda. Having failed to contest the caliber of the applicants, the Respondent's argument that the qualifications of some of the applicants have not been established is clearly without merit.

The record is clear that the Respondent discriminated against the union applicants because they were affiliated with the Union. As found in my decision, the Respondent has shown its antiunion animus in various ways.

The Respondent engaged in unlawful surveillance of the two most recently hired employees after they had announced their intentions to organize Respondent's work force. Dan Barney and Bruce Kemp, who had no union affiliation, were hired on January 16 and 24, 1996, respectively. After they notified management by letter of February 7, 1996, of their intentions to organize the work force, Supervisors James Clayton and Rusty Reid made a determined effort to stare at and observe the employees in the breakroom with the chilling and coercive effect on their rights to engage in union activities. In addition, Barney was wrongfully reassigned to more difficult and more onerous working conditions because of his union activities. Significantly, management frequently misrepresented and misled the union applicants about the Company's hiring plans and repeatedly lied to the applicants about the Company's intentions to hire, as described in greater detail in my decision.

The Respondent never argued that the union applicants were unqualified for the available jobs, but it defended its failure to hire union applicants by relying on the Company's priority hiring policy. However, by all accounts, this policy was not uniformly enforced, nor consistently applied, nor universally

understood. Instead, management used the priority hiring system selectively and systematically to avoid the hiring of union applicants. For example, while professing to hire transfers, previous employees and individuals known by supervisors or employees on a preferential basis, before hiring "call-ins" or "walk-ins," the Respondent hired three walk-ins at Towanda but managed to avoid hiring any of the 20 union applicants. The Respondent rejected from the hiring process J. D. Howell, Ernest (Skip) Patterson, and John Manculich who were previous employees in violation of its own policy which would have required their employment in preference to the three walk-ins.

For the foregoing reasons and as more fully stated in my decision and as fully supported in the record, the Board's standards in *FES* have been met to establish Respondent's violation of the Act as alleged.

The Respondent has certainly failed to carry its burden of showing that the union applicants would not have been hired even in the absence of any union considerations. As already stated, the Respondent's reliance on its priority hiring policy was misplaced, particularly, where as here, every single union applicant was rejected despite their high level of expertise in the trade, and where none of the employees hired had any union affiliation.

Dan Barney and Bruce Kemp, who were working at the Towanda construction site in April 1996, were refused a transfer to a new construction project in Libby, Montana.[3] Jim Clayton became the field superintendent at the Libby project and had promised Barney a job if he was willing to travel to Montana. However, on April 29 or 30, 1996, when Barney notified Clayton that he was ready to come to Libby, Montana, because he had been laid off from the Towanda project, Clayton rejected Barney's efforts to seek employment. Yet the Respondent hired approximately 19 journeymen after April 29, 1996, including walk-ins or new hires, as identified in my decision. Barney was highly regarded for his skills and job performance and, as previous employees, he and Kemp should have been employed at the Libby project in preference to any of the newly hired employees. Clearly, the motivating factors in Respondent's refusal to hire Barney and Kemp were their union activities. Again, the Respondent has completely failed to show that these men would not have been hired even in the absence of their union activity.

The Respondent continued its discriminatory hiring process at two other projects, one in Prescott and one in Arkadelphia, Arkansas. The record clearly shows that the Respondent commenced the hiring process in Prescott in late March and early April 1996. Initially, Tommy Cooper, field superintendent, hired two helpers and after April 23, 1996, he hired nine journeymen and additional helpers (Jt. Exh. 3).[4] The Respondent also began to hire journeymen at its Arkadelphia project, beginning May 1, 1996. At least eight journeymen were hired, as well as four helpers (Jt. Exh. 4).[5] The General Counsel has clearly shown that the Respondent was hiring and had concrete plans to hire.

On April 16, 1996, Dale (Skip) Branscum, a boilermaker, visited the jobsite at Prescott and inquired about a job. Cooper told him that he needed six boilermakers and a few helpers. On April 23, 1996, when Branscum called Cooper about his application, Cooper said that he had a job for him, and that he would consider additional applicants. Until that point Branscum had not disclosed his union affiliation. On April 23, 1996, Branscum, accompanied by 14 union members, visited the jobsite and spoke to Cooper. Branscum identified himself as a union representative for Local 69 and introduced the applicants as union members. The applicants filled out applications. Timothy Coffey, one of the applicants, testified about his brief conversation with Cooper and recalled that Cooper told him that he needed helpers and welders. The following 15 union members filled out applications (GC Exh. 2):

Dale (Skip) Branscum	boilermaker, welder, 19 years
Donald Hensley	journeyman welder (boilermaker)
Carl Edds	journeyman welder (boilermaker)
Billy Altom	apprentice
Bobbie Hay	journeyman welder (boilermaker)
Bobby Woodall	journeyman welder (boilermaker)
Tim Coffey	apprentice
Garry Woodall	journeyman welder (boilermaker)
Mark Branscum	journeyman welder, fitter, rigger
Danny Bielss	welder, rigger, fitter (30 yrs. experience)
J. D. Woodall	boilermaker, rigger (37 years)
Daniel Neal	journeyman fitter, rigger
Devin Woodall	journeyman fitter, rigger
Henry (Hank) Coffey	journeyman welder (boilermaker)
Jerry Burks	journeyman welder, rigger

The high level of skills of the applicants was not disputed. Indeed, according to the credible testimony of Dale Branscum, one of the journeymen boilermakers, Cooper, looked through the applications and said that they were highly skilled. According to the same testimony, Cooper said that if he could not put all the applicants to work at the Prescott site, he would be able to employ them at Arkadelphia, because he needed a lot of people, especially welders and pipewelders. Another witness, Marjorie Howell, wife of one of the applicants, J. D. Howell, similarly testified that Cooper told her in a telephone conversation of May 14, 1996, that if he could not use J. D. Howell at Prescott, he might be able to use him elsewhere. Howell, subsequently sent a letter, dated May 31, 1996, to Respondent's vice president, Donald Usher, recommending for employment the 15 applicants. Howell identified himself as a former McBurney employee and referred to the Company's priority hiring policy calling for preferential treatment of individuals recommended by McBurney employees (GC Exh. 8).

[3] Bruce Kemp will appear in the revised order as one of the discriminatees who was refused employment.

[4] The Respondent hired as journeymen: Bobby Bush, Christopher Bush, Joe Stanton, Marshall McGee, Wade Crawford, Ray Thurber, Randy Brown, Carla Sowell, and Wayne Sowell. Hired as helpers were Levester Gillard, Jerry Hicks, Stephen Williams, Waylon Cooper, and Dale Nagasawa.

[5] The following journeymen were hired: Ronald Matkin, Paul Mims, Ellis Tidwell, Marty Kirkpatrick, Gary Presnell, Kyle Wilds, Donald Foreman, and James Mears; the following helpers were hired: Chris Cranford, Henry Wilson, Anthony Deville, and Matthew Thrower.

Contrary to the representatives made to Branscum, Howell, and Coffey, the Respondent refused and failed to hire any of the applicants who were identified as union members. Accordingly, the General Counsel has demonstrated, as required in *FES* that the Respondent was hiring at the Arkansas construction sites, that the applicants were amply qualified for the positions, and that the Company refused to employ them because of their union affiliations. The Respondent made conflicting and misleading statements to several of the applicants, notably the promises to hire the applicants until they had disclosed their union affiliations. The record is replete with evidence that antiunion animus was the motivating factor in the Respondent's decision to avoid the employment of any union members. Examples are 8(a)(1) violations already discussed, as well as the calculated manipulation of the priority hiring practice, as well as the Respondent's consistent practice of excluding union applicants in any of its several construction sites. The Respondent has failed to show that its hiring decisions were based on legitimate business considerations and that it would have refused to hire these individuals even in the absence of union considerations.

In my reconsideration of this case in the light of *FES*, supra, 331 NLRB 9, I must emphasize that the Local 69 members who applied at the Prescott and Arkadelphia construction sites were refused employment, as opposed to a failure to be considered for hire.[6] The record contains abundant evidence that the Respondent harbored antiunion animus and acted upon it by refusing to hire any of the applicants. Accordingly, I find that the General Counsel has established a prima facie case and that the Respondent failed to show that it would have made the same hiring decision even in the absence of any union considerations.

CONCLUSIONS OF LAW

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. By surveilling the union organizing activities of its employees, the Respondent violated Section 8(a)(1) of the Act.
4. By changing the work assignment of its employee Daniel Barney because of his union organizing activity, the Respondent violated Section 8(a)(1) and (3) of the Act.
5. By failing and refusing to consider and hire the following applicants at the Towanda jobsite: Millard J. D. Howell, Nick Simpson, James Bragan, Mike Kitchen, James Neumane, Rich DeHaut, David Packer, Brad Everetts, Thomas Clark, Roger Jayne, Al Layaou, Lee Namiotka, Kurt Babcock, Dave Gotowski, Greg Strazduz, Durland Siglin, Christopher Monahan, Ernest (Skip) Patterson, John LaPointe, and John Manculich because of their union affiliation, the Respondent violated Section 8(a)(1) and (3) of the Act.
6. By failing to consider and hire Dan Barney and Bruce Kemp at the Libby, Montana jobsite because of their union activities, the Respondent violated Section 8(a)(1) and (3) of the Act.
7. By refusing to consider and hire the following employees at the Prescott and Arkadelphia, Arkansas jobsites, Billy Altom, Danny Bielss, Dale (Skip) Branscum, Mark Branscum, Jerry Burks, Henry (Hank) Coffey, Tim Coffey, Carl Edds, Bobbie Hay, Donald Hensley, J. D. Howell, Daniel Neal, Bobby Woodall, Devin Woodall, Garry Woodall, and J. D. Woodall, because of their affiliation with the Union, the Respondent violated Section 8(a)(1) and (3) of the Act.
8. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (3) of the Act, I shall order the Respondent to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discriminated against the named job applicants, I will order it to offer them reinstatement or employment to the same or substantially equivalent positions at other projects as close as possible to the respective jobsite. In addition, I shall order the Respondent to make them whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful discrimination against them, from the date they applied for employment, to the date that the Respondent makes them a valid offer of reinstatement or employment. Such amounts shall be computed in a 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).

[Recommended Order omitted from publication.]

[6] I correct my finding in the remedy section of my decision of September 21, 1998, that these applicants were not considered for hire or that there is no evidence of the Respondent's consideration of these applicants for hire.