FINAL BRIEF

No. 09-0368-ag

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, AFL-CIO

Intervenor

v.

FLUOR DANIEL, INC.

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JILL A. GRIFFIN
Supervisory Attorney

RUTH E. BURDICK
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570
(202) 273-2949
(202) 273-7958

JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

TABLE OF CONTENTS

Headings **Page(s)**

Jurisdictional statement 1

Statement of the issue 3

Statement of the case 3

I. Statement of facts 5

A. Background; the Company contracts to work several outage jobs for Big Rivers; the Union renews its campaign to organize the Company's nonunion employees, and assists 43 of its members who are willing to be voluntary union organizers in applying for jobs; none of the union salt-applicants are hired 5

B. At another spring outage, the Union assists 11 workers, who identify themselves as voluntary union organizers on their applications, in applying for company jobs; none are hired; in the fall, the Company again fails to hire the salt-applicants 7

II. The Board's supplemental decision and order 8

A. Pipefitters 9

B. Ironworkers 11

C. Laborers 12

D. Boilermakers 13

Standard of review 15

Summary of argument 16

Argument 17

Headings-Cont'd **Page(s)**

I. The Board reasonably determined that the Company failed to prove its two reasserted affirmative defenses 17

A. Controlling principles 18

B. The Board reasonably rejected the Company's affirmative defenses, which are wholly without merit 20

1. The spring applications were not "stale" for fall positions 20

2. The Company's unlawful refusal to hire salt-applicants cannot be excused by its claimed preference for hiring former employees 23

Conclusion 38

TABLE OF AUTHORITIES

Cases: **Page(s)**

Belfance Electric, Inc.,
319 NLRB 945 (1995) 36

Exxon Chemical Co. v. NLRB,
386 F.3d 1160 (D.C. Cir. 2004) 19

FES, 331 NLRB 9 (2000),
enforced 301 F.3d 83 (3d Cir. 2002) 19

Fluor Daniel, Inc.,
311 NLRB 498 (1993) 4, 21, 24, 29

Fluor Daniel, Inc.,
350 NLRB 702 (2007) 1, 2

Fluor Daniel, Inc.,
351 NLRB No. 14, 2007 WL 2858939 (2007) 4

NLRB v. G&T Terminal Packaging Co.,
246 F.3d 103 (2d Cir. 2001).....15

Hughes v. Bricklayers & Allied Craftworkers Local No. 45,
386 F.3d 101 (2d Cir. 2004).....18

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO v. NLRB,
(Case No. 08-4754-ag).....2, 4, 15

JLL Restaurant, Inc.,
347 NLRB 192 (2006) 37

Kanawha Stone Co.,
334 NLRB 235 (2001) 36

TABLE OF AUTHORITIES

Cases --cont'd: **Page(s)**

NLRB v. Advanced Business Forms Corp.,
474 F.2d 457 (2d Cir. 1973).....15

NLRB v. American Geri-Care, Inc.,
697 F.2d 56 (2d Cir. 1982).....16

NLRB v. Fluor Daniel, Inc.,
161 F.3d 953 (6th Cir. 1998) 4, 5, 8, 17, 19, 21

NLRB v. S.E. Nichols, Inc.,
862 F.2d 952 (2d Cir. 1988).....18

NLRB v. Transportation Management Corp.,
462 U.S. 393 (1983).....19

Newspaper Guild of New York, Local No. 3 v. NLRB,
261 F.3d 291 (2d Cir. 2001).....15

Oil Capitol Sheet Metal, Inc.,
349 NLRB 1348 (2007) 2

Pollock Electric, Inc.,
349 NLRB 708 (2007) 36

Sheet Metal Workers Intern. Association, Local 270 v. NLRB,
___ F.3d ___, 2009 WL. 875445 (D.C. Cir. Apr. 03, 2009) 2

T.E. Briggs Construction Co.,
349 NLRB 671 (2007) 36

Universal Camera Corp. v. NLRB,
340 U.S. 474 (1951).....15

Wright Line,
251 NLRB 1083 (1980),
enforced on other grounds, 662 F.2d 89 (1st Cir. 1981) 19

TABLE OF AUTHORITIES

Statute:

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

Section 7 (29 U.S.C. § 157) 14
Section 8(a)(1) (29 U.S.C. § 158(a)(1)) 3, 16, 18, 19
Section 8(a)(3) (29 U.S.C. § 158(a)(3)) 3, 16, 18, 19
Section 10(a) (29 U.S.C. § 160(a)).....2
Section 10(e) (29 U.S.C. § 160(e)).....2, 15
Section 10(f) (29 U.S.C. § 160(f)).....2

h://Flour Daniel (enfmt) Final Brief JGRB.toa

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 09-0368-ag

NATIONAL LABOR RELATIONS BOARD

Petitioner

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, AFL-CIO

Intervenor

v.

FLUOR DANIEL, INC.

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on an application for enforcement of an Order of the National Labor Relations Board ("the Board") which the Board issued against Fluor Daniel, Inc. ("the Company") in *Fluor Daniel, Inc.*, 350 NLRB 702

(2007). (A 842-81.)[1] The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO ("the Union"), which was the charging party before the Board, has intervened in support of the Board's Order.[2] The Order is final with respect to all parties.

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Court has jurisdiction over this enforcement proceeding under Section 10(e) of the Act (29 U.S.C. § 160(e)).[3] The Board's application for enforcement, which was filed on January 27, 2009, was timely because the Act imposes no time limit on the initiation of such proceedings.

---

[1] "A" references are to the parties' joint appendix. References preceding a semicolon are to the Board's findings; those following a semicolon are to supporting evidence.

[2] In a separate case pending before this Court, the Union petitioned for review of that portion of the Board's Supplemental Decision and Order relating to the Board's determination (A 842 n.5) that *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007), *petition for review dismissed, sub nom., Sheet Metal Workers Intern. Ass'n, Local 270 v. NLRB*, ___ F.3d ___, 2009 WL 875445 (D.C. Cir. Apr. 03, 2009) (holding issue not ripe for review), is to be applied in any future compliance proceeding held to determine the exact amounts of backpay due to the discriminatees. *See International Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO v. NLRB*, Case No. 08-4754-ag.

[3] Previously, this case was consolidated with the Union's review proceeding (Case No. 08-4754-ag) and docketed as a cross-application for enforcement pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). Subsequently, however, the Court vacated the consolidation order and ordered that the case be scheduled for argument and heard in tandem with the review proceeding.

STATEMENT OF THE ISSUE

This case arises from a 1993 decision in which the Board found, in part, that the Company had discriminatorily refused to hire numerous salt-applicants in violation of Section 8(a)(3) and (1) of the Act. The Sixth Circuit enforced portions of the Board's Order, but remanded the case to the Board on the very narrow issue of whether the Board's General Counsel had matched 51 salt-applicants with available positions for which they were qualified. Following a hearing on remand, the Board found that the General Counsel had demonstrated the necessary job matching for 49 salt-applicants. Before this Court, the Company does not contest the Board's findings that qualified salt-applicants were properly matched with available positions. Rather, the sole issue is whether the Board reasonably determined that the Company failed to prove two reasserted affirmative defenses.

STATEMENT OF THE CASE

This case has a long procedural history involving unfair labor practices that were committed in 1990. In 1993, the Board, adopting the decision and recommended order of Administrative Law Judge Martin J. Linsky, issued its original Decision and Order finding that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discriminatorily refusing to hire 53 voluntary union organizers or "salts"—that is, union members or organizers who apply for jobs in furtherance of a union campaign to organize nonunion

employers—and by unlawfully discharging an employee for refusing to cross a union picket line. *Fluor Daniel, Inc.*, 311 NLRB 498, 498 (1993). In the subsequent enforcement proceeding, the United States Court of Appeals for the Sixth Circuit enforced those portions of the Board's Order regarding the Company's unlawful discharge and its failure to hire 2 of the 53 salt-applicants. *NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953, 971-75 (6th Cir. 1998). The Sixth Circuit, however, remanded the issue of whether the Board's General Counsel, as a matter of proof, had sufficiently matched the remaining 51 salt-applicants with available positions for which they were qualified. *Id.* at 964-71.

Adopting the court's decision as the law of the case, the Board remanded the issue to Administrative Law Judge Linsky with instructions to reopen the record and accept additional evidence regarding job matching.[4] (Order, dated 1/18/2000.) After a hearing, Judge Linsky found (A 850-81) that the 51 salt-applicants were sufficiently matched to available positions for which they were qualified, and also rejected (A 881) the Company's affirmative defenses as meritless.

---

[4] On a separate procedural track, those portions of the Board's Order that the Sixth Circuit had enforced—namely, the Company's unlawful discharge of employee David Scott Bolen and its failure to hire 2 of the 53 salt-applicants, Steven and John Coons (*see* 161 F.3d at 971-75)—proceeded to a compliance hearing before a second administrative law judge. *See Fluor Daniel, Inc.*, 351 NLRB No. 14, 2007 WL 2858939 (2007). That decision is under review by this Court in the Union's review proceeding, *International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO v. NLRB*, Case No. 08-4754-ag. *See* p. 2 n.2.

On August 13, 2007, the Board issued its Supplemental Decision and Order (A 842-49) finding, in agreement with Judge Linsky, that 49 of the salt-applicants were sufficiently matched to available positions for which they were qualified and were therefore entitled to make-whole relief, and that the Company's affirmative defenses were meritless. However, in disagreement with Judge Linsky, the Board dismissed (A 842) the complaint allegations regarding two applicants, and found (A 842-43) that eight of the salt-applicants, although adequately matched to fall outage positions, were not sufficiently matched to spring outage positions.

The underlying facts, which serve as background, are detailed below, followed by a summary of the Board's Supplemental Decision and Order. Other relevant facts are discussed in the Argument.

I. STATEMENT OF FACTS

A. Background; the Company Contracts To Work Several Outage Jobs for Big Rivers; the Union Renews Its Campaign To Organize the Company's Nonunion Employees, and Assists 43 of Its Members Who Are Willing To Be Voluntary Union Organizers in Applying for Jobs; None of the Union Salt-Applicants Are Hired

The relevant underlying facts were affirmed by the Sixth Circuit in its decision, *Fluor Daniel, Inc.*, 161 F.3d 953, and are repeated here for the Court's convenience. The Company is a nationwide enterprise engaged in an engineering, construction, and maintenance business. *Id.* at 956. Since about 1983, the Union has conducted an ongoing campaign to organize the Company's nonunion

employees called "Fight Back" or "Strike Back." *Id.* at 959. In 1990, the Company signed a contract for work at various electric power generating facilities for the Big Rivers Electric Corporation ("Big Rivers"). *Id.* at 956. The work was to be performed during "outages," that is, times when generating stations are completely shut down for maintenance purposes during off-peak months in the spring and fall. *Id.* In 1990, the Company performed work for Big Rivers during eight outages. *Id.* at 955-56.

For the outage scheduled for April at the Wilson plant in Centertown, Kentucky, the Company implemented a staffing plan which included accepting applications through the Kentucky Employment Service ("the Service"). *Id.* at 956. The Union obtained job applications from the Service and distributed them to union members who had indicated that they would be willing to work as voluntary union organizers. *Id.* The Union returned a package of 43 applications to the Service which the Company received on March 26. *Id.* at 956-57.

All of the 43 applications that the Union submitted to the Service, except for one,[5] identified the applicants as voluntary union organizers. *Id.* None of the 43 applicants was hired. *Id.* Instead, the Company hired 52 workers who had no connection to organized labor, as well as a few workers whose only connection to a

[5] Richard Bowlds' application did not state that he was a voluntary union organizer, but did list as references two union representatives. (*See* A 844.)

union was simply having participated in a union apprenticeship program or worked at a union shop. *Id.*

On April 13, the Union established a picket line at the Wilson plant to protest the Company's failure to hire the salt-applicants. *Id.* at 958. Over the next 9 days, the Company hired 36 more workers, but none of the salt-applicants. *Id.*

B. At Another Spring Outage, the Union Assists 11 Workers, Who Identify Themselves as Voluntary Union Organizers on Their Applications, in Applying for Company Jobs; None Are Hired; in the Fall, the Company Again Fails To Hire the Salt-Applicants

In May, the Union established a picket line during the spring outage at the Big Rivers' Green plant in Sebree, Kentucky. *Id.* After a clerk at the plant stopped and asked the pickets what they wanted and they replied "jobs," the clerk returned and handed out job applications. *Id.* Subsequently, the Union mailed a package to the Company containing 11 of those applications, all of which identified the applicants as volunteer union organizers. *Id.* at 959. The Company received that batch of applications on May 17. *Id.* None of the 11 salt-applicants was hired. *Id.*

At the end of the spring outages, the Company terminated all employees hired for those outages. *Id.* For the fall outages, the Company did not hire any of the salt-applicants, despite the fact that their applications were still on file with the Company, and despite the Company's staffing plan directive that stated: "All applications will be retained for use in future staffing." *Id.*

II. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER

As shown, the Sixth Circuit enforced that portion of the Board's Order regarding the Company's failure to hire 2 of the 53 salt-applicants, but remanded the case to the Board on the sole issue of whether the remaining 51 salt-applicants had been matched with available positions for which they were qualified. *Fluor Daniel, Inc.*, 161 F.3d at 969-75. After the Board remanded that issue, and Administrative Law Judge Linsky held a hearing to accept additional evidence, the judge found (A 850-81) that the 51 salt-applicants were matched to available positions for which they were qualified and rejected the Company's affirmative defenses as unsupported by the credited evidence.

On August 13, 2007, the Board (Members Liebman, Schaumber, and Kirsanow) issued its Supplemental Decision and Order (A 842-50) finding, in agreement with Judge Linsky, that 49 of the salt-applicants were matched to available positions for which they were qualified and were therefore entitled to a make-whole remedy. Also in agreement with the judge, the Board rejected the Company's affirmative defenses. However, in disagreement with the judge, the Board found that eight of those salt-applicants, although matched to fall positions, were not matched to positions available in the spring. (A 842-48.) The Board also

dismissed complaint allegations regarding two applicants, George Saltsman and Richard Bowlds.[6] (A 842, 844, 846.)

Regarding the matching of salt-applicants to available positions, the Board explained that it was uncontested that the Company's superintendent, Andrew Warner, testified at the original hearing that, "in selecting applicants for hire, the [Company] relied primarily on the information contained in job applications." (A 843.) Accordingly, at the hearing after remand, Judge Linsky accepted the testimony of expert witnesses on the differences in qualifications presented on the job applications of the salt-applicants and nonunion applicants, except with regard to the three laborers, whose qualifications the judge evaluated based on the applications.[7] *See* A 852. Based on that credited evidence, the Board found (A 842-46, 852-81) that the following salt-applicants were matched with available positions for which they were qualified during the 1990 outages:

A. Pipefitters

- Russell W. Bell was a more qualified pipefitter than Ricky Waters, who was hired in the fall. (A 877; A 547-48.)

---

[6] The Board dismissed (A 846) regarding Saltsman because he failed to submit an adequate job application. Regarding Bowlds, the Board dismissed (A 844) because it found that the Company would not have known that he was a salt from his application because the application did not state "voluntary union organizer."

[7] For summary lists of the salt-applicants and the nonunion workers hired, see A 639-40 (pipefitters), A 638 (ironworkers), A 641 (laborers), and A 635-37 (boilermakers).

- Jeffrey Campbell was a more qualified pipefitter than Glenn Titzer, who was hired in the spring, as well as Wesley Harris, who was hired in the fall. (A 874, 876; A 445-49, 518-21.)

- Ernest Carter, Jr., was a more qualified pipefitter than Benjamin Allen, who was hired in the spring, as well as David S. Brodt, who was hired in the fall. (A 874, 876; A 449-54, 514-16.)

- Donald S. Cole was a more qualified pipefitter than James D. Bratcher, who was hired in the spring, as well as Ernie Lee Bratcher, who was hired in the fall. (A 875, 876; A 492-98, 512-14.)

- Wallace H. Cook, Jr., was a more qualified pipefitter than David Cates, who was hired in the spring, as well as Joe Poehlin, who was hired in the fall. (A 874, 876; A 454-58, 537-39.)

- Bobby D. Crabtree was a more qualified pipefitter than Michael D. Hoover, who was hired in the fall. (A 874; A 522-23.)

- Hubert L. Crabtree was a more qualified pipefitter than David L. Elzer, who was hired in the fall. (A 877; A 550-51.)

- George E. Hayes was a more qualified pipefitter than Amos Joe Vaughn, who was hired in the fall. (A 876; A 528-31.)

- Jerry L. Hurm was a more qualified pipefitter than Sheldon D. Matthews, who was hired in the spring, as well as Troy Waters, who was hired in the fall. (A 875, 876; A 498-500, 535-36.)

- Joseph B. Hobbs was a more qualified pipefitter than Steven Wilhelm, who was hired in the spring, as well as Joe N. Wilson, who was hired in the fall. (A 874, 876; A 441-44, 536-37.)

- Patrick R. O'Bryan was a more qualified pipefitter than Gary W. Burton, who was hired in the spring, as well as Michael E. Schwartz, who was hired in the fall. (A 875, 877; A 500-03, 544-46.)

- James G. Phillips was a more qualified pipefitter than Billy Kennedy, who was hired in the spring, as well as James D. Bratcher, who was hired in the fall. (A 875, 877; A 477-86, 543-44.)

- Roger D. Sims was a more qualified pipefitter than Paul T. Darnell, who was hired in the spring, as well as William Barnett, who was hired in the fall. (A 874, 877; A 458-62, 542-43.)

- Anthony O. Taylor was a more qualified pipefitter than Jeffrey W. Howard, who was hired in the fall. (A 877; A 548-49.)

- James L. Trainer was a more qualified pipefitter than James C. Collins, who was hired in the spring, as well as Anthony D. Howard, who was hired in the fall. (A 874, 876; A 464-67, 523-28.)

- Thomas G. Turner was a more qualified pipefitter than Randal Renfrow, who was hired in the fall. (A 876; A 539-40.)

- Mark Wagner was a more qualified pipefitter than James Hilburn, who was hired in the spring, as well as Bruce A. Kennedy, who was hired in the fall. (A 875, 877; A 503-08, 550.)

- Richard A. Wall was a more qualified pipefitter than Troy Hilburn, who was hired in the spring and fall. (A 874-75, 876; A 469-77, 521-22.)

- Charles H. Yeiser was a more qualified pipefitter than William W. Taylor, who was hired in the spring, as well as J. Todd Gardner, who was hired in the fall. (A 874, 876; A 462-64, 516-18.)

- John C. Zaremba was a more qualified pipefitter than Gary W. Harper, who was hired in the spring, as well as Roger D. Stephens, who was hired in the fall. (A 875, 876-77; A 487-92, 541-42.)

B. Ironworkers

- Ralph S. Angel was a more qualified ironworker than Darryl Brown, who was hired in the spring, as well as Phillip Small, who was hired in the fall. (A 878, 879; A 370-74, 399.)

- Willis G. Beasley was a more qualified ironworker than Steven Hilburn, who was hired in the fall. (A 879; A 401-04.)

- Herschel L. Bowlds, Jr., was a more qualified ironworker than Bill Eastridge, who was hired in the spring, as well as Larry J. Dixon, who was hired in the fall. (A 879; A 385-87, 404-06.)

- Ricky Brown was a more qualified ironworker than Daniel Woods, who was hired in the fall. (A 879-80; A 408-09.)

- Willis C. Dean, Jr., was a more qualified ironworker than Rex D. Shelton, who was hired in the spring, as well as David H. McDonald, who was hired in the fall. (A 879, 880; A 387-92, 409.)

- Larry Elliot was a more qualified ironworker than Jerry A. Wallace, Jr., who was hired in the spring, as well as Billy W. Archer, who was hired in the fall. (A 878-79, 880; A 374-78, 409-12.)

- Mark A. Farmer was a more qualified ironworker than Earl Armour, who was hired in the spring, as well as Donald R. McBrayer, who was hired in the fall. (A 878, 880; A 360-63, 412-13.)

- Jimmy Gentry was a more qualified ironworker than Joseph Woods, who was hired in the spring, as well as Dock Sparks, who was hired in the fall. (A 879, 880; A 382-84, 413.)

- Don Gower was a more qualified ironworker than William Vanover, who was hired in the spring, as well as Michael L. West, who was hired in the fall. (A 878, 880; A 364-69, 413-14.)

- Donald L. Hurst was a more qualified ironworker than Daniel Woods, who was hired in the spring, as well as J. L. Cook, who was hired in the fall. (A 880; A 392-98, 414-15.)

- Greg Parks was a more qualified ironworker than Michael L. West, who was hired in the spring, as well as Larry C. Hardison, who was hired in the fall. (A 879, 880; A 378-82, 415-16.)

C. Laborers

- Thomas R. Ball was a more qualified laborer than Gregory K. Gates, who was hired in the fall. (A 881; A 679, 705, 768.)

- Ronnie E. Burk, Sr., was a more qualified laborer than Gregory Bays, who was hired in the spring, as well as Henry G. Donald, who was hired in the fall. (A 880-81; A 683, 686, 697.)

- James M. Jones was a more qualified laborer than Jerry C. Andrews, who was hired in the spring, as well as F. R. Stanke, who was hired in the fall. (A 880; A 677, 735, 779.)

D. Boilermakers

- Thomas Armstrong was a more qualified boilermaker than 14 workers hired as boilermakers in the fall. (A 860-61; A 258-64.) Armstrong also was a more qualified welder than 9 workers hired as welders in the fall. (A 868; A 326-28, 356.)

- Jimmy D. Blandford was a more qualified boilermaker than 11 workers hired as boilermakers in the fall. (A 864-65; A 285-88.) Blandford also was a more qualified welder than 8 workers hired as welders in the fall. (A 871; A 349-57.)

- Steve Boggess was a more qualified boilermaker than 13 workers hired as boilermakers in the fall. (A 861-62; A 264-69.) Boggess also was a more qualified welder than 11 workers hired as welders in the fall. (A 868-69; A 330-34, 357.)

- James Cauley was a more qualified welder than 3 workers hired as welders in the spring. (A 854; A 195-208.)

- Ernest T. Coons was a more qualified boilermaker than 6 workers hired as boilermakers in the spring. (A 853-54; A 190-94.)

- Martin W. Drake was a more qualified boilermaker than 15 workers hired as boilermakers in the fall. (A 856-57; A 231-41.) Drake also was a more qualified welder than 12 workers hired as welders in the fall. (A 865-66; A 303-10.)

- Jeffery Everly was a more qualified boilermaker than 15 workers hired as boilermakers in the fall. (A 857-58; A 241-47.) Everly also was a more qualified welder than 9 workers hired as welders in the fall. (A 866; A 310-16, 357-58.)

- Russell Gregory was a more qualified boilermaker than 13 workers hired as boilermakers in the fall. (A 862; A 269-74.) Gregory also was a more qualified welder than 16 workers hired as welders in the fall. (A 869-70; A 334-39, 385.)

- Michael Hardin was a more qualified boilermaker than 12 workers hired as boilermakers in the fall. (A 855-56; A 215-31.) Hardin also was a more qualified welder than 12 workers hired as welders in the fall. (A 865; A 289-303, 358.)

- David K. James was a more qualified boilermaker than 12 workers hired as boilermakers in the fall. (A 863-64; A 279-85.) James also was a more qualified welder than 15 workers hired as welders in the fall. (A 870-71; A 344-49, 385.)

- G. Dennis Kulmer was a more qualified welder than Johnny Beasley, who was hired as a welder in the spring. (A 845, 854-55; A 208-14, 356.)

- Brett A. Maupin was a more qualified boilermaker than 15 workers hired as boilermakers in the fall. (A 859-60; A 254-57.) Maupin also was a more qualified welder than 15 workers hired as welders in the fall. (A 867-68; A 321-26, 358-59.)

- James D. Pierce was a more qualified boilermaker than 6 workers hired as boilermakers in the spring. (A 853-54; A 158-89.)

- Todd Robinson was a more qualified boilermaker than 15 workers hired as boilermakers in the fall. (A 858-59; A 247-53.) Robinson also was a more qualified welder than 16 workers hired as welders in the fall. (A 866-67; A 316-21, 359.)

- Frank Trovato was a more qualified boilermaker than 15 workers hired as boilermakers in the fall. (A 862-63; A 274-79.) Trovato also was a more qualified welder than 14 workers hired as welders in the fall. (A 870; A 339-44, 359.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Order requires the Company to pay backpay to the 49 discriminatees, to offer instatement to 44 of them (4 had retired and 1 had died while the case was pending), and to make them

whole for losses suffered as the result of the Company's discriminatory refusals to hire them. (A 848.) The Order also requires the Company to remove from its files any reference to its unlawful refusals to hire, and to post a remedial notice to employees at all jobsites within a 75-mile radius of Owensboro, Kentucky. (A 848-49.)[8]

STANDARD OF REVIEW

The Board's findings of fact are "conclusive" "if supported by substantial evidence on the record considered as a whole." Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). As this Court has recognized, it "may not 'displace the Board's choice between two fairly conflicting views, even though [it] would justifiably have made a different choice had the matter been before [it] de novo.'" *Newspaper Guild of New York, Local No. 3 v. NLRB*, 261 F.3d 291, 301 (2d Cir. 2001) (quoting *NLRB v. G&T Terminal Packaging Co.*, 246 F.3d 103, 114 (2d Cir. 2001), internal marks omitted). Therefore, "the findings of the Board 'cannot lightly be overturned,' especially when these findings are based upon the Board's assessment of witness credibility."

[8] The Union filed a motion for reconsideration of the remedy which the Board denied. Issues pertaining to the Union's motion and the Board's denial have been fully briefed in the related case. *See International Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO v. NLRB*, No. 08-4754-ag.

NLRB v. American Geri-Care, Inc., 697 F.2d 56, 60 (2d Cir. 1982) (quoting *NLRB v. Advanced Bus. Forms Corp.*, 474 F.2d 457, 464 (2d Cir. 1973)).

SUMMARY OF ARGUMENT

The Board reasonably rejected the Company's two paper-thin affirmative defenses that it now asserts before the Court in an effort to avoid liability for its unfair labor practices. For example, the Board found that the Company's asserted "staleness" claim—namely, that 19 salt-applicants who were matched to fall positions should not be awarded a make-whole remedy because their spring job applications were "stale" for fall positions—is contrary to the credited testimony and documentary evidence. Further, this issue has received more than a sufficient hearing, given that the Board has now *twice* rejected the defense, and on review, the Sixth Circuit was unmoved by the claim.

The Board also reasonably rejected the Company's second affirmative defense—namely, its stated preference for hiring former employees to ensure a qualified work force—similarly finding it contrary to the credited evidence. Indeed, the Board found that the Company failed to prove that it hired even *one single worker* over a salt-applicant because of the former-employee preference. Moreover, the Board's key findings on job matching, which the Company does not contest, demonstrate that the salt-applicants were generally far superior job candidates to the nonunion workers hired, a fact which runs counter to its claim that

it was applying the preference to obtain qualified employees. Many of the nonunion workers hired were admittedly *un*qualified or had been previously fired by the Company for cause. In contrast to the Company's claim, the Board's uncontested findings of job matching indicate that the Company plainly was hiring *anyone*, no matter how unqualified or less qualified, in order to avoid hiring the union salt-applicants.

Therefore, because the Company does not contest the Board's findings that the General Counsel carried his burden of matching the 49 salt-applicants to available positions for which they were qualified,, and has failed to carry its burden of proof on its affirmative defenses, the Board's Order is entitled to enforcement.

ARGUMENT

THE BOARD REASONABLY DETERMINED THAT THE COMPANY FAILED TO PROVE ITS TWO REASSERTED AFFIRMATIVE DEFENSES

The issues remaining for the Court to decide have been significantly narrowed. Indeed, as the Sixth Circuit explained in remanding this case to the Board, "the issue of job matching . . . is the only issue on which we refuse to enforce the [Board]'s order." *NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953, 964 n.12 (6th Cir. 1998). Moreover, by failing to address them in its opening brief, the Company has waived any challenge to the Board's key findings (A 843-46) that the 49 discriminatees were matched with available positions for which they were

qualified during the 1990 outages and that "the General Counsel has established an initial case of discrimination." (A 846.) *See Hughes v. Bricklayers & Allied Craftworkers Local No. 45*, 386 F.3d 101, 104 n.1 (2d Cir. 2004) (issues not raised in opening brief are considered abandoned).

Having failed to contest the Board's findings that the General Counsel carried his burden of matching the 49 salt-applicants to available positions for which they were qualified, the only remaining issue is whether the Board reasonably rejected two of the Company's reasserted affirmative defenses.[9] (*See* A 846-47.) As we show below, the Board reasonably rejected those defenses in both its original decision and its decision on remand.

A. Controlling Principles

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." *Accord NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 957, 959-60 (2d

[9] The Company also no longer asserts, and has therefore waived, the other affirmative defenses that it argued to the Board. Those defenses included, among others, claimed policies for preferring to hire workers at the gate and workers with connections to existing employees, as well as a claim that the picketing justified its failure to hire the salt-applicants. (*See* A 846-48, 881.)

Cir. 1988). An employer therefore violates Section 8(a)(3) and (1)[10] by refusing to hire, or consider for hire, an employee because of his union activity. *See generally NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983).

The Sixth Circuit stated—and the Board accepted as the law of this case—that part of the General Counsel's burden in showing such unlawful discrimination is to match applicant-discriminatees to available positions for which they were qualified.[11] *See NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953, 967 (6th Cir. 1998). Moreover, once the General Counsel has shown that the employer's opposition to union activity was a motivating factor in its decision to take that adverse action against an employee, the employer will be found to have violated the Act, unless the employer demonstrates, as an affirmative defense, that it would have taken the same action even absent the employee's union activity. *See id.* at 400-04; *Wright Line*, 251 NLRB 1083, 1084, 1089 (1980), *enforced on other grounds*, 662 F.2d 89 (1st Cir. 1981).

---

[10] Employers violate Section 8(a)(1) of the Act if they "interfere with, restrain, or coerce employees in the exercise of [their] rights" under the Act. "[A]n employer who violates [S]ection 8(a)([3]) also, derivatively, violates [S]ection 8(a)(1)." *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

[11] As the Board noted (A 842 n.3), its decision in *FES*, 331 NLRB 9 (2000), *enforced* 301 F.3d 83 (3d Cir. 2002), which pertains to refusal to hire cases, issued after the Sixth Circuit's in this case, and is therefore not addressed by the Board.

B. The Board Reasonably Rejected the Company's Affirmative Defenses, Which Are Wholly Without Merit

1. The spring applications were not "stale" for fall positions

The Company contends (Br 15, 17-20) that 19 discriminatees—all of whom were matched only to fall 1990 positions—should not be awarded a make-whole remedy because their job applications, which were submitted in spring 1990, were "stale" for available fall positions, as it considers job applications invalid after 60 days. Specifically, 11 of those 19 discriminatees are the boilermakers for whom the Union submitted job applications to the Company on May 17, and whom the Board found were qualified for available fall positions that the Company filled with less qualified workers during August and September.[12] *See* pp. 7, 12-13, and A 636-37. The other 8 discriminatees that the Company references are those whom the Board found (A 842 & n.4, 845) were matched to fall positions, but not spring positions.[13]

The Board has *twice* rejected the Company's "staleness" contention based on sound record evidence, and the Sixth Circuit affirmed the Board's prior findings on

---

[12] Those 11 boilermakers are Armstrong, Blandford, Boggess, Drake, Everly, Gregory, Hardin, James, Maupin, Robinson, and Trovato. *See* pp. 12-14.

[13] Those 8 discriminatees include ironworkers, Beasley and Brown, and 6 pipefitters: Bell, Bobby Crabtree, Hubert Crabtree, Hayes, Taylor, and Turner. *See* pp. 11-12, and A 638.

the issue. In the original unfair labor practice proceeding, *Fluor Daniel, Inc.*, 311 NLRB at 499-500, the Board rejected the staleness claim as contrary to the written staffing plan that was created for the April outage, which states: "All applications will be retained for use in future staffing." (A 585.) Consistent with that policy, the Board found that "some applicants for fall outages were contacted about employment opportunities based on applications they filed in the spring." 311 NLRB at 499. Indeed, Supervisor Jan Linscome admitted (A 78-87) that he contacted *at least* seven such spring applicants for fall positions, when confronted at the hearing with documentary evidence of his handwritten notes of those contacts on individual application forms. (*See* A 587-619.)

On review, the Sixth Circuit affirmed the Board's findings relating to the Company's staleness assertion, appropriately treating it with the brevity it deserved. There, the court addressed the claim by simply noting that the Board had found that, for fall hiring, the Company "contacted certain potential workers for the spring outages whose applications were stale," and that the Company's "staffing plan included the following directive: 'All applications will be retained for use in future staffing.'" *Fluor Daniel, Inc.*, 161 F.3d at 959. The court also observed that the Company's "only response to th[e Board's] finding is that its attempts to contact and hire spring applicants were unsuccessful, confirming the wisdom of its general policy to let applications expire after 60 days." *Id.* Plainly, the court enforced the

Board's staleness finding, as the court explained that "the issue of job matching . . . is the only issue on which we refuse to enforce the [Board]'s order." *Id.* at 964 n.12.

Ignoring the Sixth Circuit's disposition of its claim, the Company again raised the staleness contention to the Board on remand. Summarily rejecting the claim, the Board reasonably explained (A 846) that it previously "rejected this argument in its original decision," that the Sixth Circuit "did not disagree," and that the Company "advances no reason for the Board to revisit this issue." Indeed, having had one court dispense with the claim, the Company's pursuit of the issue before this Court is little more than an attempt at getting a second bite at the apple.

In any event, the Company presents no viable basis for disturbing the Board's rejection of its affirmative defense. For instance, the Company misrepresents Supervisor Linscome's testimony when it claims (Br 18) that "the fact that some spring applicants were contacted demonstrates nothing more than that several spring applicants may have inquired about fall opportunities." As previously discussed, Linscome admitted (A 78-87) that he directly contacted at least seven spring applicants about fall positions. Moreover, his handwritten notes of those contacts do not indicate that he was responding to an applicant's inquiry for work. (*See* A 587-619.) For example, on the cover letter submitted by an applicant who applied for work on May 4, Linscome noted: "Left message w/

father 8-14-90" and "called back—not interested now." (A 587.) Similarly Linscome wrote on a post-it note attached to another spring application this notation: "Working—G.F. says not interested, 8-14-90." (A 606.)[14] Moreover, the Company's reliance (Br 19-20) on the self-serving testimony of Manager James Boyd, who drafted the staffing plan, concerning what he subjectively meant by the directive to retain applications for future staffing , is not controlling, particularly given his testimony (A 28) that he "wasn't involved in the fall" hiring and "d[id]n't know" if the spring applications had been used.

2. The Company's unlawful refusal to hire salt-applicants cannot be excused by its claimed preference for hiring former employees

On its second affirmative defense, the Company has similarly failed to carry its burden of proof. The Board reasonably rejected the Company's contention (Br 15, 20-27) that, in not hiring the discriminatees, it was simply exercising its preference for hiring former employees. The Board reasonably concluded (A 846-47) that the Company had "failed to show that it would have hired any of the selectees over the salt-applicants based on its preference for hiring former employees and even in the absence of the salts' protected activity." (A 847.)

---

[14] Linscome's other notes also demonstrate only *his* attempts to initiate contact with the applicants to determine their work availability: "Left message, 8-14-90" (A 591); "8-23-90, no ans[wer]" (A 594); "call after 4 PM" (A 597); "8-23-90, no ans[wer]" (A 600); "Hired" (A 603); "call back at 2:30, No[t] working" (A 610); "8-23-90, working" (A 613); "8-23-90, will call back at __" (A 616).

As with the Company's other affirmative defense, this issue has a long history and has been addressed and rejected by both the Board and Judge Linsky. In Judge Linsky's original decision, when the Company first raised its hiring preference justification and advanced Exhibits 22 and 23 (A 663-70) in defense of its unfair labor practice liability, the judge dismissed that evidence as insufficient to prove the Company's point. *Fluor Daniel, Inc.*, 311 NLRB at 505. As the judge noted, those exhibits, which list employees the Company hired, respectively, for all spring and fall outages, do reflect a large percentage of former employees, but do not *prove* that the individual salt-applicants were not discriminated against. *Id.* Indeed, the judge found it highly significant that "52 of the employees hired for the spring outages out of 172 and 52 of the employees out of the 123 hired for fall outages" had *never* worked for the Company and had *no* connection with organized labor, while "not one single" applicant who "had the words 'voluntary union organizer' on [his] application was hired."[15] *Id.* On review, the Board in its original decision affirmed that the Company's "stated motives for rejecting these applicants were false and that [its] true motive was to discriminate against [them]." *Id.* at 500.

[15] In total, 84 of 172 employees hired in the spring outages, and 70 of 123 employees hired in the fall outages, were not former employees. *See* 311 NLRB at 506; A 663-70.

In his decision after remand, Judge Linsky found (A 853) that the testimony of company managers confirmed that the Company had various policies it applied during hiring to obtain the best qualified employees. As the judge explained (A 853), the Company's own witnesses—Supervisor Linscome, Project Manager Robert Wollard, and Superintendent Andrew Warner (A 76-77, 88, 89-90, 141-42, 571-72, 573)—testified, in collaboration, that among the Company's hiring policies were the preferences that "someone with more experience in a craft is generally preferred over someone with less experience," that there is "a preference for [hiring] employees with a construction background," and that it "prefer[s] seasoned welders over those fresh out of school." (A 853.) On the basis of that criteria, Judge Linsky concluded not only that "each of the discriminatees was qualified and should have been hired over the people who were hired" (A 852), but also that there were "a significant number of jobs where the discriminatees were clearly superior applicants to those hired." (A 853.)

On review, the Board affirmed (A 842) that "the record supports the judge's findings that, based on their applications, the salts were more qualified than the selectees." *See* pp. 7-14. The Board also (A 846-47) rejected the Company's affirmative defense based on its alleged overarching preference for hiring former employees. Specifically, the Board concluded (A 846), in agreement with Judge Linsky, that the defense failed because "there is no record evidence that the

[Company] has a practice of hiring a less qualified over a more qualified applicant merely because he or she was a prior employee." In other words, the Company's stated preference for hiring former employees is simply one preference, among many, and not one that trumps the Company's hiring policies that aim at hiring the best qualified applicants.[16]

The Board further explained (A 846-47) that "the record demonstrates that, even for prior employees, the [Company] considers the individual's application, interview, prior termination codes and skill levels, and references." As the Board stated (A 843, 847), the credited testimony (A 145-46) of Superintendent Warner at the original hearing was that, "in selecting applicants for hire, the [Company] relied primarily on the information contained in job applications." (A 843.) And, as Judge Linsky noted (A 853), and the Company does not dispute, Warner's testimony explained that "most of the time they can tell from the application

[16] The apparent implication of the Company's argument (Br 22-27)—that it *always* prefers former employees—is not supported by the record. Rather, as the Board explained (A 847), the "evidence indicates that an individual with poor work skills or a prior disciplinary record would not necessarily be hired simply because he or she previously had been employed." As support, the Board cited (A 847 n.17), for example, Supervisor Linscome's testimony (A 97-99) that, in hiring for the fall, he would go back through the list of former employees and decide not to send letters to people who had been "discharged . . . for cause" or "because of their work performance." Similarly, Vice President of Field Human Resources, John Schroeder, testified (A 156-57) that for former employees, the hiring managers "go into the data base," "see what kind of work record they've got, what their skill level is, why they were terminated off the last job." (A 847 n.17.)

whether or not an individual is qualified for a particular position," and that "when selecting an applicant they look at the applicant's previous experience and evaluate whether one individual is better qualified than another." (*See* A 147-50.) In agreement, the Board stated (A 846) that the Company's own "witnesses testified that individuals with more experience, particularly in construction, are generally preferred over those who lack such experience."

Before this Court, the Company similarly has failed to carry its burden of proof on this affirmative defense. Indeed, it has failed to produce *any* specific evidence proving that even a single less-qualified selectee was hired over a more-qualified discriminatee based on his status as a former employee. Further, in glossing over the record with a broad brush, the Company misrepresents the relevant evidence. For example, although it acknowledges in a footnote (Br 24 n.3) that not all of the nonunion selectees that the General Counsel matched to salt-discriminatees were former employees, what it does not disclose to the Court is that, in fact, relatively few were former employees.

In that vein, the record evidence shows that *none* of the nonunion selectees that the General Counsel matched to the boilermaker-discriminatees,[17] or to the

---

[17] Regarding the boilermaker jobs, all 7 selectees who were hired in the spring (*see* A 635), and all 48 selectees who were hired in the fall (*see* A 636-37), answered "No" on their job applications to the question, "HAVE YOU EVER BEEN EMPLOYED BY THIS COMPANY?" *See* A 755 (John M. Schrodt), A 759 (Ricky G. Pollard), A 709 (James M. Glick), A 689 (Tony Campbell), A 773 (Mark

laborer-discriminatees,[18] were former employees. Also revealing is the fact that one boilermaker-discriminatee, Michael Hardin, was himself a former employee, yet the Company refused to hire him and instead hired 12 selectees—none of whom, as shown, were former employees. And with respect to 8 of those 12 selectees,[19] the Company's senior manager of recruitment, Jack West, testified (A 574-84) that he would not have hired them as boilermakers on the basis of their

---

A. Smith), A 723 (Steve S. Hilburn), A 737 (Bruce Kennedy), A 781 (David L. Thomas), A 789 (Johnny O. Wilson), A 791 (Timothy A. Wilson), A 727 (Ronnie O. Hutchinson), A 747 (Roland Moore), A 769 (James H. Simmons), A 797 (Tony R. Wood), A 671 (John K. Adams), A 719 (Phillip E. Hedge), A 721 (Steven A. Hedge, II), A 757 (R.F. Pointer), A 691 (J.G. Cobb), A 739 (D.M. Kieffer), A 765 (L.J. Saftsgaver), A 703 (J.T. Gardner), A 717 (W.S. Harris), A 725 (M.D. Hoover), A 729 (A.D. Howard), A 775 (D.B. Sorter), A 785 (T.D. Waters), A 787 (J.N. Wilson), A 681 (W.M. Barnett), A 695 (W.L. Davis), A 707 (R.E. Geary), A 761 (R.L. Renfrow), A 771 (S.D. Small), A 675 W.B. Anderson), A 699 (D.L. Elzer), A 713 (L.W. Harris), A 731 (J.W. Howard), A 741 (R.L. Lyons), A 745 (C.F. Merritt), A 751 (P.L. Nannie), A 783 (P.E. Taylor), A 777 (D.M. Sparks), A 701 (C.R. Fyffe), A 793 (B.E. Wood), A 673 (H.A. Anderson), A 687 (J.K. Burton), A 693 (C.W. Craig), A 711 (R.L. Grimes), A 715 (R.L. Harris), A 733 (J.E. Jackson), A 743 (R.D. Marlow), A 749 (R.L. Moore), A 753 (J.E. Oldendorf), A 763 (K.P. Roy), A 795 (R.A. Wood).

[18] Regarding the laborer jobs, all 6 selectees who were hired in the fall or spring (*see* A 880-81), answered "No" on their job applications to the question, "HAVE YOU EVER BEEN EMPLOYED BY THIS COMPANY?" *See* A 677 (Jerry C. Andrews), A 683 (Gregory Bays), A 767 (A.K. Schroeder), A 779 (F.R. Stanke), A 697 (Henry G. Donald), A 705 (Gregory K. Gates).

[19] Those 8 unqualified applicants who were hired are Steven Hedge II, Ronnie Hutchinson, Ray F. Pointer, James H, Simmons, David L. Thomas, Johnny Wilson, Timothy Wilson, and Tony Wood. (*See* A 855-56.)

applications, which failed to state adequate qualifications. (*See* A 855-56.) Obviously, the force at play here is not a former-employee preference, but rather the union animus that the Company has been found to possess in refusing to hire the salt-applicants who declared their intention to unionize the Company's employees. *See Fluor Daniel, Inc.*, 311 NLRB 498-500.

However, even assuming that the former-employee preference was properly considered in the assessment of an applicant's overall qualifications, the remaining 10 pipefitter and 10 ironworker discriminatees who were matched to former employees were far superior candidates. Indeed, as the Board noted (A 873), *all* 21 pipefitter-discriminatees who applied for work with the Company were experienced journeymen, and their qualifications vastly exceed the qualifications of the selectees to whom they were matched:

- Russell W. Bell had been a journeyman pipefitter since 1971, with almost 20 years of trade experience. In contrast, Ricky Waters, who was hired instead, had no related training or certification. (A 877; A 547-48.)
- Ernest Carter, Jr., became a pipefitter journeyman in 1981, with almost 10 years of experience. In contrast, David S. Brodt, who was instead hired in the fall, had already been fired by the Company on two prior jobs that year,

first for refusing to submit to a search, and second for disregarding safety rules and endangering a fellow employee.[20] (A 873, 876; A 514-16.)

- Donald S. Cole had 30 years of experience as a pipefitter journeyman. In contrast, the Company hired James Bratcher, a former employee who had been fired four times for cause before being hired for spring outages at Big Rivers. Also in contrast, the application of Ernie Lee Bratcher, a former employee hired in the fall, showed only, at best, 3 years of intermittent work as a pipefitter. (A 873, 875, 876; A 492-96, 511-14.)
- Wallace H. Cook, Jr., became a pipefitter apprentice in 1968, and a journeyman pipefitter in 1971, with over 20 years in the trade. In contrast, Joe Poehlin, who was a former employee hired in the fall, had been found by his supervisor to be qualified only to work as a plate welder, not as a pipe or tube welder.[21] (A 873, 876; A 537-39.)
- George E. Hayes became a journeyman pipefitter in 1976, with close to 25 years of experience when he applied. In contrast, Amos Joe Vaughn, a former employee who was hired in the fall, had only plate welding

[20] The Board found that Carter was a more qualified pipefitter than Benjamin Allen, who was a spring hire, but not a former employee. (A 874; A 449-54.)

[21] The Board found that Cook was a more qualified pipefitter than David Cates, who was a spring hire, but not a former employee. (A 874; A 454-58.)

experience, which is insufficient to qualify an applicant to perform journeyman pipe welding in a power plant. (A 876; A 528-33.)

- Patrick R. O'Bryan became an apprentice pipefitter in 1979, and a journeyman pipefitter in 1983, with over 20 years experience in the trade. In contrast, Michael E. Schwartz, a former employee who was hired in the fall, had only 5 months experience as a pipefitter, and failed a company-administered tube welding test.[22] (A 873, 877; A 544-46.)
- James G. Phillips became a steamfitter apprentice in 1967, and a steamfitter journeyman in 1970, with about 25 years of experience in the pipefitter/steamfitter trade. In contrast, as shown, James D. Bratcher is a former employee who was hired in the fall, despite the fact that the Company had previously fired him four times for cause.[23] (A 873, 877; A 543-44.)
- Mark Wagner became a pipefitter apprentice in 1980 and a pipefitter journeyman in 1983, with 10 years of trade experience when he applied, and had worked at TVA and other power plants. In contrast, James Hilburn, a

[22] The Board found that O'Bryan was a more qualified pipefitter than Gary W. Burton, who was a spring hire, but not a former employee. (A 875; A 500-03.)

[23] The Board found that Phillips was a more qualified pipefitter than Billy Kennedy, who was a spring hire, but not a former employee. (A 875; A 477-86.)

former employee who was hired in the spring, had only 2 years of vocational school, and 8 years of construction welding experience, and was later fired for excessive absenteeism or tardiness. Wagner is also in sharp contrast to Bruce A. Kennedy, a former employee who was hired in the fall, who had no related training or certifications, and was later fired for a severe or willful safety violation. (A 873, 875, 877; A 503-09, 550.)

- Richard A. Wall became a pipefitter apprentice in 1978 and a pipefitter journeyman in 1982, with over 12 years of trade experience. In contrast, Troy Hilburn, a former employee, was hired in both the spring and fall. In the spring, the Company fired Hilburn for excessive absenteeism or tardiness, but then rehired him in the fall, despite the fact he failed two tube welding tests, and should have been classified as a noncode welder. (A 873, 874-75, 876; A 469-77, 521-22.)
- John C. Zaremba became an apprentice pipefitter in 1972 and a journeyman pipefitter in 1976, with 18 years in the trade when he applied. In contrast, the Company in the fall hired Roger D. Stephens, a former employee who had failed two drug screen tests while previously employed.[24] (A 873, 875, 876-77; A 487-92, 540-42.)

[24] The Board found that Zaremba was a more qualified pipefitter than Gary W. Harper, who was a spring hire, but not a former employee. (A 875; A 487-92.)

Similarly, the Company's passing over 10 highly skilled salt-applicants who applied for ironworker positions is more indicative of union animus than the operation of any preference for hiring former employees:

- Ralph S. Angel was a long-time ironworker with experience in the craft, who, as a union apprentice, was a certified plate welder, and could do blueprint reading, welding, rigging, and rebar work, and had training in OSHA requirements. In contrast, Phillip Small, a former employee who was hired in the fall, had some minimal experience as an ironworker, but was later fired by the Company for missing more than 3 days of work without an excuse.[25] (A878, 879; A 370-71, 399-401.)
- Willis G. Beasley had experience working in a power plant as a journeyman ironworker. In contrast, Steven Hilburn, a former employee who was hired in the fall, had already been fired by the Company that spring for excessive absenteeism and tardiness, and his application failed to show he had any training or certification in any craft. (A 879; A 401-04.)
- Herschel L. Bowlds, Jr., was a union apprentice, a certified plate welder, and could do blueprint reading, welding, rigging, and rebar work, and had training in OSHA requirements. In contrast, Larry J. Dixon, a former

[25] The Board found that Angel was a more qualified ironworker than Darryl Brown, who was a spring hire, but not a former employee. (A 878; A 370-74.)

employee who was a fall hire, was unqualified, having failed to include any ironwork experience on his application.[26] (A 879; A 385-86, 404-05.)

- Ricky Brown was experienced in the ironworker craft, and had the skills and training commensurate with completion of a union apprenticeship program. While former employee Daniel Woods also had some ironworker experience, he lacked much of the training Brown had received. (A 879-80; A 407-09.)
- Willis C. Dean, Jr., was a journeyman ironworker for 25 years, with relevant power plant work. In contrast, David H. McDonald, a former employee who was hired in the fall, listed his previous employment as "self-employed," with no description, and was later fired for unsatisfactory job performance.[27] (A 880; A 409-10.)
- Larry Elliot had completed the Union's apprenticeship training program, and had listed years of experience with large construction employers, including power plants. In contrast, Billy W. Archer, a former employee who was

[26] The Board found that Bowlds was a more qualified ironworker than Bill Eastridge, who was a spring hire, but not a former employee. (A 879; A 385-87.)

[27] The Board found that Dean was a more qualified ironworker than Rex D. Shelton, who was a spring hire, but not a former employee. (A 879; A 387-92.)

hired in the fall, had been fired five times for cause by the Company, most recently during the spring outages.[28] (A 880; A 409-12.)

- Mark A. Farmer had completed the Union's apprenticeship program, with all of the attendant skills and qualifications. In contrast, Donald R. McBrayer, a former employee who was hired in the fall, had previously been fired twice, once for incapacitation due to alcohol, drugs or other substance, and once for insubordination.[29] (A 880; A 410-12.)
- Don Gower had completed the Union's apprenticeship program, as had Michael L. West, a former employee who was hired in the fall. However, Gower continued to work in the craft while, in contrast, West's immediate past employment had been as a truck loader, and prior to that, a cable splicer.[30] (A 880; A 413-14.)
- Donald L. Hurst had completed the Union's ironworker apprenticeship program, with the attendant skills and qualifications. In contrast, J. L. Cook, a former employee who was hired in the fall, had worked intermittently as a

---

[28] The Board found that Elliot was a more qualified ironworker than Jerry A. Wallace, Jr., who was a spring hire, but not a former employee. (A 878-79; A 374-78.)

[29] The Board found that Farmer was a more qualified ironworker than Earl Armour, who was a spring hire, but not a former employee. (A 878; A 360-64.)

[30] The Board found that Gower was a more qualified ironworker than William Vanover, who was a spring hire, but not a former employee. (A 878; A 364-69.)

rigger and "connector," and his last job consisted of one month as a welder. He was later fired for excessive absenteeism.[31] (A 880; A 414-15.)

- Greg Parks had been a life-long ironworker, skilled in his craft. In contrast, Larry C. Hardison, a former employee who was hired in the fall, had worked as a welder for a coal company and a plate welder, and was fired shortly after he was hired for unsatisfactory work performance.[32] (A 880; A 415-16.)

Finally, the Company does not help its position by citing (Br 22-23, 25) cases that are legally and factually distinct. For example, unlike here, *Pollock Elec., Inc.*, 349 NLRB 708, 710 (2007), and *Kanawha Stone Co.*, 334 NLRB 235, 236-37 (2001), both involved the very different issue of whether an employer's hiring policy *itself* constituted unlawful discrimination. And, unlike here, where the Board found that the discriminatees were matched with available positions, in *Belfance Electric, Inc.*, 319 NLRB 945 (1995), the Board found the employer's refusal to hire a group of union members was lawful because "there is no evidence that [the employer] could have hired th[at] group of electricians at that time." *Id.* at 946. Also dissimilar is *T.E. Briggs Constr. Co.*, 349 NLRB 671 (2007), where

---

[31] The Board found that Hurst was a more qualified ironworker than Daniel Woods, who was a spring hire, but not a former employee. (A 880; A 392-98.)

[32] The Board found that Parks was a more qualified ironworker than Michael L. West, who was a spring hire, but not a former employee. (A 879; A 378-82.)

the Board found that the employer's preference for hiring former employees was "a valid nondiscriminatory means of securing a *qualified* work force." *Id.* at 681 (emphasis added). *See also JLL Restaurant, Inc.*, 347 NLRB 192, 196 (2006) (it was not unlawful for an employer "to hold open a position for a top performing, highly valued employee"). In contrast, to avoid hiring the union salt-applicants, the Company plainly was hiring *anyone*, no matter how unqualified or less qualified, including numerous workers whom the Company itself had fired for cause. Accordingly, the Company has failed to present any basis for disturbing the Board's findings, which are therefore entitled to enforcement.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enforce the Board's Order in full.

s/Jill A. Griffin_____
JILL A. GRIFFIN
Supervisory Attorney

Ruth E. Burdick_____
RUTH E. BURDICK
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2949
(202) 273-7958

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

NATIONAL LABOR RELATIONS BOARD

June 2009

h:\.acb\Fluor Daniel (enfmt)-final brief-jgrb

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD *		
	*	
Petitioner	*	
	*	No. 09-0368-ag
and	*	
	*	
INTERNATIONAL BROTHERHOOD OF	*	Board Case No.
BOILERMAKERS, IRON SHIP BUILDERS,	*	26-CA-13842
BLACKSNITHS, FORGERS & HELPERS,	*	
AFL-CIO	*	
	*	
Intervenor	*	
	*	
v.	*	
	*	
FLUOR DANIEL, INC.	*	
	*	
Respondent	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32, the Board certifies that its proof brief contains 9,513 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 8th day of June 2009

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Interim Local Rule 25(a)6.

CASE NAME: NLRB v. Fluor Daniel

DOCKET NUMBER: 09-0368-ag

I, (please print your name) RUTH E. BURDICK, certify that I have scanned for viruses the PDF version of the attached document that was submitted in this case as an email attachment to

- [✔] <agencycases@ca2.uscourts.gov>.
- [ ] <criminalcases@ca2.uscourts.gov>.
- [ ] <civilcases@ca2.uscourts.gov>.
- [ ] <newcases@ca2.uscourts.gov>.
- [ ] <prosecases@ca2.uscourts.gov>.

and that no viruses were detected.

Please print the **name** and the **version** of the anti-virus detector that you used

Symantec Antivirus Corporate Edition, program version 10.0.2.2000

If you know, please print the version of revision and/or the anti-virus signature files

(05/06/2009 rev. 2)

(Your Signature)_____

Date: 06/08/2009

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner	*	
	*	No. 09-0368-ag
and	*	
	*	
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSNITHS, FORGERS & HELPERS, AFL-CIO	*	Board Case No. 26-CA-13842
	*	
	*	
	*	
Intervenor	*	
	*	
v.	*	
	*	
FLUOR DANIEL, INC.	*	
	*	
Respondent	*	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by e-mail to agencycases@ca2.uscourts.gov, and first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by e-mail and first-class mail upon the following counsel at the addresses listed below:

Kurtis A. Powell Esq.
Hunton & Williams, LLP
Bank of America Plaza,
Suite 4100
600 Peachtree Street, NE
Atlanta, GA 30308-2216
kpowell@hunton.com

Richard Wyatt, Esq.
Hunton & Williams, LLP
1990 K Street NW
Washington, DC 20006
rwyatt@hunton.com

Michael J. Stapp, Esq.
Blake & Uhlig, P.A.
753 State Ave.,
Suite 475
Kansas City, KS 66101
mjs@blake-uhlig.com

s/Linda Dreeben_____

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 8th day of June 2009