

National Security Technologies, LLC and William F. Brown. Case 28–CA–22999

June 21, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND HAYES

On December 14, 2010, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Acting General Counsel filed a reply brief. Additionally, the Respondent filed limited exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

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

The Acting General Counsel contends that the judge applied the wrong standard in finding that the Respondent did not unlawfully fail to hire or consider Charging Party William Brown. The judge, correctly in our view,

¹ The Acting General Counsel 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.

The Acting General Counsel contends that the judge erred in citing the Respondent's nondiscriminatory treatment of Teamsters business agent and former employee Wayne King as evidence of the Respondent's lack of animus toward union activity. In support, the Acting General Counsel relies on precedent stating that a discriminatory motive, otherwise established, is not disproved by evidence that the Employer did not weed out all union adherents. See, e.g., *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964). This precedent is inapposite. The judge cited the Respondent's treatment of King to emphasize the Acting General Counsel's failure to meet his initial burden. A discriminatory motive was not otherwise established, and the burden never shifted to the Respondent to disprove animus.

Finally, the Acting General Counsel excepts to two inadvertent errors in the judge's decision. First, the judge mistakenly stated that witness Clay Young used the word "rehire" in his testimony in response to a question on cross-examination. Young actually said "rehire" on direct examination. Second, the judge found that only one document from the files of the Respondent's predecessor, Bechtel Nevada, could arguably link Brown to Young in any way. The Acting General Counsel correctly contends that his Exh. 47, a copy of a fax sent to Young in August 2003 attaching Brown's settlement agreement with Bechtel, arguably provides another documentary link. These errors are not material, as the record, thus corrected, still falls far short of demonstrating that antiunion animus contributed to the Respondent's decision not to hire or consider Brown in March 2010.

analyzed this allegation under *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002). But even assuming, as the Acting General Counsel argues, that the applicable test is that set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), we would reach the same result. Under either standard, the General Counsel must show that antiunion animus was a motivating factor in the Respondent's decision, and we agree with the judge that he did not make this showing.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Melissa M. Olivero, Esq., for the Acting General Counsel.
Gregory J. Kamer, Esq. and *Jen J. Sarafina, Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Las Vegas, Nevada, on October 5, 6, and 7, 2010. The charge was filed by William F. Brown (Brown) on April 12, 2010. Based upon the allegations contained in the charge, the Regional Director for Region 28 of the National Labor Relations Board (the Board), issued a complaint and notice of hearing on May 28, 2010. The complaint alleges that in or about early March 2010, National Security Technologies, LLC (Respondent) unlawfully refused to consider Brown for employment opportunities in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act.)

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a limited liability company with an office and place of business in Las Vegas, Nevada, has been engaged in the management and operation of the Nevada National Security Site¹ (NNSS or site) for the United States Department of Energy. During the 12-month period ending April 12, 2010, the Respondent, in conducting its business operations, provided services to the United States valued in excess of \$50,000. During the same 12-month period, Respondent purchased and received at the Respondent's Nevada facilities, goods valued in excess of \$50,000 directly from points outside the State of Nevada. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7).

¹ Formerly known as the Nevada Test Site.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The primary issue in this case is whether Respondent refused to consider William F. Brown for employment and refused to hire William F. Brown because of his union activity and affiliation.

B. Background

The NNSS is owned by the United States Department of Energy (DOE) and covers an area of more than 1357 square miles. In addition to the DOE, there are also other government agencies and government contractors utilizing the site. The various projects conducted on the site have included not only nuclear testing, but also security training for both national and local entities. It has been the practice of the DOE to hire a prime or general contractor to provide the operational support for the site. The government agencies and government contractors utilizing the site are considered to be the “customers” of the site. It has also been the practice for the DOE to solicit bids for a prime contractor every 10 years. Prior to 2006, Bechtel Nevada (Bechtel) was the prime contractor with the DOE for the NNSS. In 2006, however, Respondent successfully bid for the contract against Bechtel and replaced Bechtel as the prime contractor for the site operation. In accordance with the transition procedure, and in order to provide continuity to NNSS and its customers, Bechtel and the Respondent entered into a transfer agreement providing for the transfer and assignment of all of Bechtel’s “obligations, rights, title, and interest in and to all contractual agreements existing” as of July 1, 2006. In addition to the transfer of contracts, files, and policies, virtually all Bechtel employees were hired by Respondent.

The Project Labor Agreements (PLA’s) that existed between Bechtel and the various craft unions were assumed by the Respondent and the employees covered by the agreements continued to work for Respondent with no changes in the terms and conditions of employment. Currently, there are 16 separate craft unions representing employees at the site and 35 collective-bargaining agreements in place. There are two PLA’s covering the various craft employees; a construction PLA and a maintenance and operation PLA. Local Union No. 631, Teamsters, Chauffeurs, Warehousemen and Helpers, affiliated with International Brotherhood of Teamsters (Teamsters or the Union) represent employees who are covered by both PLA’s. At the time of the hearing, there were approximately 60 employees working at the site who were represented by the Teamsters. In addition to the PLA’s, the Craft Employee Work Rules also regulate the conduct of the employees working on the site.

Clay Wesley Young (Young) began his work with Bechtel Corporation in 1974 as an ironworker. In 1999, Young began working for Bechtel as a labor relations representative. He reported to Labor Relations Manager Sam Lyon. In Lyon’s absence, Young served as Bechtel’s deputy manager for labor relations. In 2003, Young was promoted to labor relations manager for Bechtel. When Respondent became the prime contractor for the site in 2006, Young became Respondent’s labor relations manager.

C. William Brown’s Employment History with Bechtel

1. Brown’s first termination from Bechtel

William F. Brown (Brown) has been a member of Teamsters Local 631 since 1996 and was hired by Bechtel on or about November 10, 1998, as a heavy duty truck driver. In 1999, Brown became a union steward and continued in this capacity until his first termination from Bechtel in 1999.

Bechtel records document a complaint against Brown by a customer in June 1999. The customer complained that Brown made sarcastic comments to her and demonstrated a negative attitude. She also complained that Brown did not like the way that she was keeping track of paperwork and told her that she was a “real pain in the ass.” The customer opined that Brown’s comments and attitude were totally out of line and she stated that she did not want to deal with him in the future. There is no evidence that Bechtel disciplined Brown for the incident.

Two months later, Brown was alleged to have started a confrontation with a security guard who attempted to stop Brown from driving into the Las Vegas auto auction yard. When the guard attempted to explain the policy prohibiting anyone from driving into the compound, Brown was reported to have said that the rules did not apply to him and to have called the guard a “Mother—er.” Brown was also reported to have told the guard “F—k you, I’m not walking in, I’m driving.” Bechtel’s representative apologized to the chief of security on behalf of the company for Brown’s conduct. As with the earlier complaint from a customer, there is no evidence that Brown was disciplined for his conduct toward the security guard.

On August 18, 1999, Brown and two other employees were traveling in a truck while working. Brown and employee Sue Jones argued over the volume of the radio in the vehicle and Brown struck Jones in the arm. Jones reported to the site’s medical facility and was treated for a cut and bruise to her left forearm. After an investigation of the matter, Bechtel terminated Brown on August 24, 1999, for a violation of its workplace violence prevention policy. Bechtel characterized the conduct as violent behavior, unwanted contact, and willful fighting. Brown grieved the discharge and the matter was heard by an arbitrator in 2000. When the arbitrator issued his decision on December 12, 2000, he noted that Brown’s behavior was not only inappropriate, but also unacceptable. He went on to find however, that while the behavior required a substantial penalty, it did not rise to the level that would justify termination and he ordered Brown’s reinstatement. Brown’s termination was converted to a 2-month disciplinary suspension without pay.

2. Brown’s second termination from Bechtel

Following Brown’s reinstatement in early 2001, Brown received a written warning and a 1-day suspension on March 20, 2001, for his involvement in a single vehicle accident resulting in property damage to a government-owned vehicle. On May 23, 2001, Brown entered an active excavation area without the personal protective equipment of hardhat, steel toe shoes, and safety glasses. Although Brown was in the area to conduct interviews on union business, his intrusion into the work area without the requisite personal protective equipment was considered to be a violation of the Craft Employee Work Rule

handbook and he was given a written warning on June 13, 2001. As a result of a grievance meeting with the Union, Bechtel later agreed to convert Brown's written warning to a verbal counseling.

In July 2001, Bechtel initiated an investigation concerning a number of different incidents and complaints involving Brown. Labor Relations Manager Lyon asked Employee Relations Manager John Medina (Medina) to conduct the investigation. Lyon explained in an email to Medina that because Brown had been returned to the job following the earlier arbitration, it was probably a good thing to have an "outside investigator" handle the investigation. At the conclusion of the investigation, Bechtel issued a written warning to Brown on August 13, 2001, based upon multiple incidents occurring since February 2001. The warning noted that on July 25, 2001, management received formal complaints alleging that Brown had engaged in "inappropriate and harassing behavior that was so pervasive as to create a hostile work environment" toward two of Brown's fellow coworkers. The warning further noted that an investigation disclosed inappropriate and unacceptable conduct toward others that included name-calling, vulgar language, slanderous statements, and aggressive and potentially physically violent conduct. Bechtel's records reflect that Medina interviewed 18 employees during the investigation and the discussion with each employee was documented. Medina's synopsis of the investigation included the following observations:

After speaking with all of the aforementioned personnel it seems that we are talking about two different employees. One group of teamsters are very emphatic that Brown is vulgar, hateful, a troublemaker, loud, obnoxious, abusive, rude, foul mouthed, angry, not trustworthy, impossible to work with, etc. Another group of teamsters say that he is the best teamsters steward ever, honest, helpful, non-abusive, non-vulgar, excellent worker, a joy to work with, etc.

Medina's synopsis goes on to include:

More than a few employees interviewed stated that Brown is almost a zealot when it comes to the enforcement of the union contract. More than a few teamsters report that Brown has made some threatening remarks and has created some serious concerns about how he reacts to certain situations. One specific statement made by Brown and heard by at least three people, was something to the effect "You don't know who you are dealing with, I'm so mad I could rip out your f—ing throat." This statement alone has created some serious problems that cannot go uncorrected. It is evident that some of the teamsters feel that they are not properly represented by steward Brown and some report that he has made it quite clear that he does not intend to represent them. It is quite evident that some of the teamsters feel very uncomfortable working with or around Brown, but is also quite clear that other teamsters are very grateful for Brown's support and representation and find him very enjoyable to work with. There is no doubt that there are some serious problems that are affecting the work environment and that Brown is the cause of some of these problems. It is quite evident that there is some very serious tension between some of the teamsters and Brown.

In the synopsis, Medina discussed the various options that could be taken to deal with the situation. One suggestion was to refer Brown for "serious counseling." Medina concluded: "Management clearly has a situation that needs immediate attention because unless some real changes are made these problems will continue and, in my estimation, will get worse." Medina also concluded that there was sufficient evidence to support all of the allegations raised in the two complaints. Included with the synopsis and the interview notes was a very lengthy note concerning an interview with employee Kent B. on July 31, 2001. Kent B. described Brown's behavior toward him and toward Brown's foremen. Kent B. reported that when the foremen went into the hospital, Brown signed her card by stating "Stay there." Kent B. opined that Brown was angry at the foreman because Brown felt that she had caused his previous termination and because she testified against him in the arbitration hearing. Kent B. also described overhearing a remark that Brown made to another employee concerning the foreman. Brown was alleged to have told the employee "Why don't you take her out and f— her so that she will leave us alone." During the interview, Kent B. described various incidents in which Brown took actions against fellow teamsters that he did not like. Kent B. asserted that Brown spread rumors and told other teamsters that he (Kent B.) was a drunk and a felon. Kent B. tried to circulate a petition to have Brown removed as a steward. The Union's business agent, however, refused to consider Brown's removal.

The warning issued to Brown on August 13, 2001, included the conclusion that while other Teamster employees appreciated him as a steward, it was clear that the employees with whom he worked felt intimidated, abused, and subject to a hostile work environment and such harassing conduct was in violation of the employee work rules. Based upon the fact that Brown had received two disciplinary warnings within a 5 month period of time, as well as his failure to comply with the work rules, Bechtel issued Brown a 2-week suspension.

On March 13, 2002, Brown was given another disciplinary warning for behavior that was "intimidating, harassing, bullying, inappropriate and/or unprofessional" toward his coworkers and other employees. Brown was informed that this would be his final written warning and if Brown did not eliminate the inappropriate and unacceptable conduct, he would receive further discipline up to and including termination.

On June 5, 2002, Bechtel issued Brown a second disciplinary warning arising from multiple complaints from employees regarding Brown's inappropriate, unacceptable, unprofessional conduct, and unsatisfactory work performance. The written warning lists five separate incidents in which Brown is alleged to have acted inappropriately, aggressively, rudely, and unprofessionally with respect to a safety representative, a craft supervisor, a female teamster, and customers, as well as his having left the work area without authorization and his interrupting the work of other employees. Brown was given a 1-day suspension in addition to the warning and warned that if he received a third disciplinary action within 6 months, he would be fired.

Bechtel records reflect that a vendor made a complaint against Brown on June 12, 2002, and a customer made a complaint concerning Brown on August 8, 2002. Bechtel records

also document an incident involving Brown during a meeting attended by employees and supervisors on August 12, 2002. The reports describe Brown as screaming in an angry and aggressive voice, pointing his finger at a fellow employee, and threatening the employee. In a management meeting on August 14, 2002, Labor Relations Manager Samuel Lyon recommended Brown's termination. Bechtel records demonstrate that Lyon presented a history of Brown's intimidating, harassing, and inappropriate behavior and pointed out that Brown had three current disciplinary actions in a 6-month period. The decision was made to terminate Brown effective August 20, 2002.

D. The Settlement Agreement Involving Brown

Brown filed both a grievance and a Board charge concerning his August 20, 2002 termination. On June 4, 2003, Brown entered into a waiver and release agreement with Bechtel and the Union. The agreement provided for the payment of \$12,000 to Brown in consideration for Brown's agreement to file appropriate documentation for the dismissal with prejudice of pending grievances and Board charges. The agreement further provides that in the future Brown would not seek or accept employment with Bechtel or its affiliated companies in the Bechtel Group, Inc., controlled group of companies, including projects managed by a Bechtel entity. When Respondent took over as the prime contractor at the site in 2006, Brown's file, along with all other employee files and records were transferred to Respondent.

E. Procedure for Respondent's Hiring Employees

When Respondent needs additional employees for positions represented by the Teamsters, a requisition form is completed and forwarded to Respondent's labor relations department. Upon receipt of the form, the labor relations department sends the form and a packet of information to the Teamsters' dispatch office. Normally, the dispatcher will notify the labor relations department as to which applicants are being sent to the site in order that the applicant can obtain a temporary security badge.

During its operation of the site, Bechtel developed a "Do Not Hire" List. The list was transferred to Respondent when Respondent took over the operation of the site in 2006. Respondent has continued the use of the list and has added additional names to the list since 2006. The list is arranged alphabetically and lists the individual's name, craft, and the reason that the individual was placed on the list. The list currently contains a total of 303 names. Brown's name was included on the "Do Not Hire" list that Bechtel gave to Respondent in 2006.

Labor Relations Manager Young testified that when he took over the position of manager in 2003, he did not conduct any kind of independent investigation concerning Brown's 2002 discharge. He asserted "Why would I go through a thousand files of people that were terminated at Bechtel Nevada or further for no reason? I dealt with current issues that came up. It's not like I've got time to go look at stuff."

F. Brown's Attempt to Work for Respondent

In early March 2010, Brown learned that Respondent was hiring at the site. He went to the Teamster Hall and asked that his name be placed on the referral list. On March 8, 2010, the

Teamsters received a craft employee requisition form from Respondent, seeking a forklift driver. Respondent requested an employee with forklift driving, warehouse, and computer experience. When the dispatcher accessed the "out of work" list for employees who had previously worked in the industry, Brown's name appeared at the top of the list and the dispatcher began the process of Brown's referral in response to Respondent's requisition.

Young testified that if a union refers an individual for a job and that person's name is on the "Do Not Hire" list, his staff will consult with him to determine his position on hiring the individual. Young recalled that he was notified by his staff that the Teamsters were dispatching Brown for a job and also that Brown's name was on the "Do Not Hire" list. His staff asked if Brown were going to be hired. Young acknowledged that there have been some instances in the past when applicants have been hired despite the fact that their names were on the list. He recalled that there have been occasions when an employee's union representative contacted him and presented evidence that the employee had gotten "his act together." Based upon the contact or additional evidence, Young has given the individual a second chance. Young testified that no union official contacted him concerning Brown or requested that he give Brown a chance to work for Respondent.

There is no dispute that Young made the decision that Respondent would not hire Brown. When his staff member asked about Brown, Young simply responded "We are not going to hire² him." Young recalled that he did not go into detail with his staff about his decision to not hire Brown. He testified that he made his decision, however, because of Brown's previous behavior in creating a hostile work environment and his harassment of people on the job. Young testified that Brown's previous discipline at the site involved harassment, creating a hostile work environment, and upsetting customers. Young also explained that there were still employees working at the site who had allegedly been intimidated or harassed by Brown. Young asserted that there was also a security issue concerning Brown. Part of the work at the site involves high security and matters relating to terrorism. Young explained, "You cannot have a person in a secured area or with security people showing aberrant behavior, hostile, harassing, arguing, not doing what's requested when they are doing high tech stuff to protect our country." Young explained that while he had not worked with Brown while Brown was employed by Bechtel, he was aware of the issues between Brown and other employees as well as Brown and Bechtel's customers. He became aware of this because of his having attended routine staff meetings of Bechtel's labor relations department that were conducted by former Labor Relations Manager Samuel Lyon.

When the Union was notified that Respondent would not hire Brown, the Union asked for a confirming letter and the letter was sent to the Union on March 9, 2010. Although Brown requested the Union to file a grievance concerning Respond-

² Young testified at length under direct examination and cross examination concerning his response to Brown's referral to the site. In response to one of the questions on cross examination, he also used the word "rehire" with respect to Brown.

ent's failure to hire him, the Union declined. Brown acknowledged that the Union's business agent told him that the grievance was discussed with the Union's attorneys and the attorneys told him that the grievance was "unwinnable."

G. Brown's Unfair Labor Practice Charge

On April 12, 2010, Brown filed an unfair labor practice charge with the Board concerning Respondent's failure to hire him at the site. When Young received notice of the charge, he notified Respondent's corporate counsel Gerald Lewis Mikesell (Mikesell). In preparation for Mikesell's sending a response to the Board, he and Young reviewed Brown's file that was accessed from Bechtel's personnel records. Because Mikesell was first employed by Respondent in October 2006, he did not know Brown. He testified that he had "no clue" about Brown. As he was reviewing Brown's file, he discovered the waiver and release agreement. He recalled that when he saw the document, a "big light bulb went off." Mikesell testified that he saw Brown's agreement to not seek or accept employment at Bechtel or its affiliated companies as an affirmative defense to Respondent's failure to hire Brown. Mikesell testified that while the waiver and agreement did not contain language referring to successors or assigns of Bechtel, the transition agreement between Bechtel and Respondent provided for Respondent to receive all obligations and benefits for all Bechtel contracts. He concluded that the obligations and benefits under Bechtel's waiver and release agreement would transfer to Respondent.

In his capacity as corporate counsel, Mikesell sent an email to the Board's regional office in response to Brown's charge. In the email, Mikesell stated:

I intend to provide you with National Security Technologies ("NSTec") position statement and supporting documents. However, I believe that the following preliminary issue needs to be addressed before NSTec provides you with a detailed position statement that discusses all of the reasons why Mr. Brown was not hired.

Mikesell then set out the terms of the waiver and release agreement and the transition agreement between Bechtel and Respondent. He concluded the email by stating:

Since NSTec now operates the NTS and has assumed Bechtel's rights under the agreement, how can Brown claim that he has a right to work at the NTS?

Mikesell testified that he asserted his affirmative defense to the Board prior to providing any kind of response to the merits of the case concerning Respondent's failure to hire Brown. He asserted that he had done so because it was his understanding that if there is an affirmative defense that is a bar to recovery and if someone has waived their rights, there is no need to reach the merits of the case.

H. Applicable Law

Wright Line, 251 NLRB 1083 (1980), is the pivotal case containing the analytical framework for determining whether an employer's decision to take adverse action against its employee was motivated by the employee's union activity or affiliation. Under the *Wright Line* framework, the General Counsel must

prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employment action. The elements required to support such a showing are union or protected activity by the employee, employer knowledge of that activity, and union animus on the part of the employer. *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007). If the General Counsel makes the required initial showings, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union activity. *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996).

With respect to establishing a refusal-to-hire violation, the Board has also set out an analytical framework for determining whether an employer violates the Act by failing or refusing to consider or hire a job applicant because of his or her union activities or affiliation. *Allstate Power VAC, Inc.*, 354 NLRB 980, 982-983 (2009); *FES*, 331 NLRB 9 (2000), enf. 301 F.3d 83 (3d Cir. 2002). Specifically, the Board has held that in order to prove an unlawful failure to hire, the General Counsel must establish the following: (1) the respondent employer was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) the applicant had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) antiunion animus contributed to the decision not to hire the applicant. Specifically, there must be a showing that the employer maintained animus against such union membership or sympathy, and the employer refused to hire the applicant because of such animus. *Kenmor Electric Co.*, 355 NLRB 1038, 1989 (2010). Once the General Counsel meets this initial burden, the burden shifts to the respondent to show that it would not have hired the applicant even in the absence of his union activity or affiliation. 354 NLRB at 2; 331 NLRB at 982.

In order to establish a refusal-to-consider violation under *FES*, supra at 15, the General Counsel has the initial burden of showing that (1) the respondent excluded applicants from a hiring process; and (2) antiunion animus contributed to the decision not to consider the applicant for employment. If the General Counsel establishes this, the burden then shifts to the respondent to show that it would not have considered the applicant even in the absence of his or her union activity or affiliation. Thus, for all of the tests described above, once the General Counsel meets the initial burden, the burden shifts to the respondent to show that it would not have hired or considered for hire the applicant in the absence of any union activity or affiliation.

Counsel for the Acting General Counsel submits that the facts of this case should be analyzed under *Wright Line* standard rather than the tests set forth in *FES*. In support of this assertion, counsel asserts that the circumstances of this case are analogous to those in *Mt. Clemens General Hospital*, 344 NLRB 450 (2005). *Mt. Clemens* involved an allegation that the employer failed to rehire a union president because of her union activities. At the time of the failure to rehire, there was a bargaining relationship between the employer and the union. In

his decision, the administrative law judge opined that the facts of the case did not fit neatly into either the *FES* or the *Wright Line* framework. The judge noted that typically *FES* is applied in cases where the employer is not represented by a union and there are several job applicants affiliated with a union that have applied for a job vacancy or vacancies, but were not hired or considered for hire. In contrast, the judge explained that in a typical *Wright Line* case, the alleged discriminatee is generally in the employer's work force and the question centers on why he was removed from the workforce. Ultimately, however, the judge concluded that under the circumstances of the case, the *Wright Line* standard was more appropriate because the single applicant was a former employee of a unionized employer as well as the union president. Although the judge found that the union president was unlawfully refused re-employment, the issue was never decided by the Board. Prior to the Board's decision, that particular portion of the case was settled and the respondent withdrew its exception to the judge's finding. Thus, the Board did not address the allegation of the refusal to hire the former employee or articulate the standard that it would have used to do so.

I note, however, that in *National Steel & Shipbuilding Co.*, 324 NLRB 1114 (1997), the Board affirmed the judge's finding that the employer unlawfully failed to rehire an employee who had been a steward and had retained preferential recall rights to her prior position. The judge relied upon *Wright Line* in doing so. In *Richardson Bros. South*, 312 NLRB 534 (1993), the Board also affirmed the judge in finding that an employer unlawfully refused to rehire a known union activists after he tendered an emotionally inspired resignation on the night of the union election. The Board noted that the judge's analysis was fully consistent with *Wright Line*. Thus, it is apparent that there is authority for using the *Wright Line* analysis for determining the lawfulness of an employer's failure to rehire its employee. In the instant case, the Union represented the employees of the predecessor employer and the Union now represents the Respondent's employees. Brown, however, was never an employee of Respondent and his work for the predecessor employer terminated 4 years before Respondent assumed the operation of the site. Although Bechtel assumed the contract to operate the site, Bechtel and Respondent were competitors and there was no affiliation. I do not find that the instant case is analogous to the facts in *Mt. Clemens* or to other cases where the *Wright Line* analysis was used to analyze a failure to rehire a former employee of an employer. Accordingly, I find the Board's analysis under *FES* as a more appropriate standard to use in analyzing the allegations herein.

I. Analysis Under *FES*

The first prong of the *FES* failure to hire analysis is easily met by the Acting General Counsel. There is no dispute that at the time of Brown's referral to the site, Respondent was hiring. His referral to the site was predicated upon Respondent's requisition or referral request to the Union. Furthermore, Respondent stipulated that Respondent was hiring at the time of the application.

With respect to the second prong of the *FES* test, Respondent argues that the Acting General Counsel has not established that

Brown had the experience or training relevant to the announced or generally known requirements for the position. Respondent contends that in addition to a forklift certificate, an applicant must complete computer-based training and a medical examination. Brown testified that he was certified to drive a forklift and certified for warehouse work. He testified that he was also capable of using a computer. His testimony was un rebutted. Former Union Business Agent Wayne King also testified that in his opinion Brown could have passed the forklift test and Brown was qualified to operate a computer. Respondent asserts that because Brown had not worked at the site for over 8 years and the possibility that he could have experienced health changes, it was not a foregone conclusion that Brown would have passed the medical examination. Respondent presented no evidence, however, to support its supposition that Brown could not have passed the medical examination. More importantly, however, Young testified that Respondent's refusal to hire Brown had nothing to do with Brown's qualifications. Thus, there is no evidence to refute the Acting General Counsel's assertion that Brown was qualified to perform the work for which Respondent was hiring.

The more troubling *FES* factor for the Acting General Counsel is the absence of animus sufficient to establish that Respondent did not hire Brown because of his past union activity and affiliation. There is no evidence that Young or any other agent or representative of Respondent made any statements to Brown or to anyone else concerning Brown to demonstrate animus toward Brown for his prior union activity. Counsel for the Acting General Counsel asserts, however, that Young must have held or retained animus for Brown's prior union and protected concerted activities. In support of her argument that animus can be maintained or held over a long period of time, counsel cites *Kaumagraph Corp.*, 316 NLRB 793 (1995), which references *Marcus Management*, 292 NLRB 251, 262 (1989). *Marcus Management* dealt with a discharge of a union activist 18 months after his union activity. In his decisional rationale, the judge noted that the weakest part of the General Counsel's case was the fact that a considerable amount of time had passed between the employee's union activity and his discharge. The judge opined, however, that "There is such a thing as latent hostility which bides its time and lies in wait, seeking an appropriate occasion to work its will." *Ibid.* at 262. In considering whether evidence of a respondent's presettlement threats could be considered in evaluating the motivation of the respondent in the case before him, the judge in *Kaumagraph Corp.*, cited the judge's language from *Marcus Management* and concluded that evidence of presettlement threats was properly admissible as background evidence in his evaluation of the respondent's motivation for the case before him. The alleged threats of plant closure occurred in early 1990 and prior to an October 1991 announcement of relocation. I do not dispute the opinion of the judges in both the *Marcus Management* case and the *Kaumagraph Corp.* case that previous threats or conduct evidencing animus may properly be utilized as background evidence in certain situations.³ It has long been recognized that conduct occurring more than 6 months prior to the

³ *Joseph's Landscaping Service*, 154 NLRB 1384 fn. 1 (1965).

filing of a charge may be used to shed light on a respondent's motivation even though the Board may not give it independent and controlling weight. *Machinists Local 1424 v. NLRB*, 362 U.S. 411 (1960); *Monongahela Power Co.*, 324 NLRB 214 (1997). For the reasons discussed below, however, I find the facts of the instant case distinguishable from the circumstances of either *Marcus Management* or *Kaunagraph Corp.*

Counsel for the Acting General Counsel cites the Board's decision in *Special Services, Inc.*, 308 NLRB 711 (1992), for the proposition that presettlement conduct may be offered as background evidence to establish that union animus motivated the new and independent postsettlement conduct. This was a case in which the Board affirmed the judge in finding that an employer's July 1990 conduct that was the subject of a settlement agreement could be properly considered as background evidence to establish motive for the employer's postsettlement conduct in April, May, and June of 1991. This case, however, is distinguished from the instant matter in as much as the alleged background evidence relied upon by the Acting General Counsel was conduct of a separate employing entity and conduct occurring approximately 8 to 11 years earlier than the Respondent's failure to hire Brown.

In its 1978 decision in *Barnes & Noble Bookstores*, 237 NLRB 1246 (1978), the judge took official notice of a prior decision by the Board in which the Board found that the same respondent had committed numerous violations of the Act. In taking official notice, the judge accepted the prior Board decision as proof of animus for the case before him. The respondent employer filed exceptions to the judge's reliance on the Board's prior decision as proof of evidence for the complaint allegations. Although the Board affirmed the judge's decision, the Board commented concerning the use of the prior case and added in a footnote: "While we do not rely solely on that case as proof of animus, Respondent's prior unfair labor practices can properly be noted as background." *Barnes & Noble Bookstores*, supra at 1246 fn. 1.

Although Brown previously filed grievances and an unfair labor practice charge against the Respondent, his allegations were resolved with the release and waiver agreement. Brown withdrew all charges and grievances and there was no finding by the Board that Respondent engaged in any unlawful conduct. Accordingly, unlike the circumstances of *Barnes & Noble Bookstores*, there is no prior adjudication or Board decision establishing that Respondent or even Bechtel engaged in unlawful behavior.

In order to establish animus for the current charges, the Acting General Counsel also relies upon a number of references to Brown's status as a union steward in the various personnel records that were compiled by Bechtel during Brown's previous employment. Counsel for the Acting General Counsel submitted into evidence numerous emails, memos, and Bechtel reports concerning Bechtel's discipline of Brown and the conduct upon which it was premised. Based upon the documentation, there is no doubt that Brown was very active as a union steward. Some of his discipline, in fact, resulted from his aggressive behavior toward other crafts, customers, and management relating to his perception of his role as union steward and the disruption in the work process that resulted. When Brown

was last terminated in August 2002, Labor Relations Manager Lyon characterized Brown's conduct as inappropriate and unacceptable conduct that was intimidating, harassing, bullying, and unprofessional toward his coworkers and other employees. (GC Exh. 43.) Based upon the totality of the Bechtel documentation, there is no doubt that some of this conduct occurred in relation to his stewardship activities.

Even a cursory review of the Bechtel documents related to Brown reflects that Brown was a highly visible employee. Former Union Business Agent Wayne King testified that he had observed interactions between Lyon and Brown. When asked to describe Lyon's attitude toward Brown, King opined that Lyon was not fond of Brown. In an email dated July 27, 2001, Lyon wrote to Employee Relations Manager John Medina (Medina), "I would like to thank you for volunteering to head the investigation on the Bill Brown harassment/hostile work environment issue. Seriously, we have already fired this guy once and the arbitrator sent him back, so having an 'outside' investigator is probably a very good thing for an employee with Mr. Brown's history." Lyon then commented on the fact that Bechtel had lost an additional arbitration where the employee was returned to work. He added "It is a bit disheartening." In his investigative summary, Medina mentioned that some of the interviewed employees described Brown as almost a "zealot" when it came to enforcement of the contract. Medina added, however, that other employees described him as creating a hostile work environment that's causing some serious concerns for the employees.

In a fax dated March 8, 2002, Lyon sent a synopsis of Brown's intimidating behavior to legal counsel. In the cover letter of the fax, Lyon explained that Brown had been terminated in August 1999 for hitting a female Teamster in the arm and that pursuant to an arbitrator's decision, Brown returned to work in March 2001. Lyon explained that in August 2001, Brown was suspended for 2 weeks for harassing fellow teamsters and the 6-week date for the expiration of his discipline was February 12, 2001. Lyon further wrote "We know we have to address his behavior, but he is a steward and we want to make sure we do things correctly. It would be better for BN⁴ if he was removed from the work place. Please give me a call to discuss." (GC Exh. 29.)

Based upon the above-referenced documentation and the record as a whole, there is no doubt that Lyon was mindful of Brown's status as a steward. The documentation also indicates that Lyon was frustrated with the fact that the arbitrator allowed Brown to return to work. The documentation further reflects that Lyon viewed Brown as disruptive and unpredictable with respect to his behavior toward customers and fellow employees. Despite the fact that Lyon may have had a negative opinion of Brown prior to Brown's last termination from Bechtel in 2002, this kind of background information alone does not establish an unlawful motivation for Young's decision in 2010.

During the time that Brown worked for Bechtel, Young was not the labor relations representative for the area in which Brown worked. Young testified without contradiction that he

⁴ Although there was no witness to interpret Lyon's fax, it is reasonable that "BN" was an abbreviation for Bechtel Nevada.

was not involved in any of the discipline that Bechtel gave to Brown. When Respondent took over the operations contract from Bechtel, the Bechtel employee files were transferred to Respondent. Bechtel maintained not only a separate personnel file for each employee, but also a discipline file, grievance file, and medical file. In addition to these files for Brown, Bechtel also left behind two large accordion folders with documentation concerning Brown. Despite the fact that Bechtel apparently maintained extensive documentation concerning Brown's discipline and conduct, there is only one document from all of the Bechtel files that could arguably link Brown to Young in any way. Prior to Lyon's discipline of Brown in August 2001, Lyon planned a meeting with Union Business Agent Wayne King and Brown. In an email message dated August 3, 2001, Labor Relations Representative Gayla Dawson advised Lyon, "John [Medina] will get his report to me today (Friday August 3) and I have made arrangements with Wes to get it to him. He will, in turn, get it to you over the weekend so that you have adequate time to review it before the meeting." Counsel for the Acting General Counsel submits that while there is no definitive proof that the "Wes" mentioned in the email is Young, counsel argues that it is reasonable to conclude that it was Wes Young who brought Brown's file to Lyon in August 2001.

Despite the fact that Young did not discipline Brown or work with him, he acknowledged that he was aware of Brown, and aware that Brown had been coached on his inappropriate and unprofessional conduct that included general harassment, sexual harassment, intimidation, and unsatisfactory work. He learned about Brown during labor relations departmental meetings held by Lyon. He testified that during the meetings he learned about issues involving Brown with other employees and with customers. Young also testified that he learned about Brown from his discussions⁵ with Union Business Agent King after Brown left the employment of Bechtel. Young confirmed that he had not needed to review Brown's file to assess whether he would hire Brown. Young confirmed that he had heard enough about Brown's previous employment at Bechtel to cause him to decide not to hire Brown. It is reasonable that as Respondent's manager of labor relations, Young did not want to deal with the same kinds of discipline issues and complaints from customers and fellow employees that Bechtel had faced 8 years earlier. I credit Young's testimony that he did not hire Brown because of Brown's history in creating a hostile work environment and Brown's harassment of others. Because Brown's name appeared on the "Do Not Hire" list, Young's staff consulted with Young prior to accepting Brown for the forklift position. Aware of Brown's work history at Bechtel, Young rejected the referral from the Union.

The Acting General Counsel submits that Respondent's stated reasons for failing to hire Brown were pretextual. Citing *Rood Trucking Co.*, 342 NLRB 895 (2004), and *Golden State Foods*, 340 NLRB 382 (2003), counsel argues that a failure to investigate is strong evidence of pretext. The Acting General

⁵ Young testified that in his job, he has had regular contact with the Union's business agents. He also serves as the cochairman for the Union's training fund in Las Vegas and the cochairman of the Union's health and welfare trust in Las Vegas.

Counsel maintains that Young readily admitted that he did not investigate Brown's placement on the "Do Not Hire" list or look at Brown's personnel file prior to declining to hire Brown. Counsel submits that had Young conducted such an investigation, he would have discovered that Brown's settlement with Bechtel required Bechtel to provide Brown with a neutral reference. Thus, counsel for the Acting General Counsel submits that because Brown had a clean slate with regard to the Respondent, Respondent's willful failure to investigate provides strong evidence of pretext. I do not find merit to this argument. First of all, at the time that Young took over as manager of labor relations for Respondent, Brown was not an employee of Bechtel or the Respondent. As Young explained, there was no reason for him to go back to review the files of thousands of employees who had been terminated by Bechtel. Young added that he had no time to make such a review as he was dealing with current issues. Additionally, there was no apparent reason for Young to go through the "Do Not Hire" list that was inherited from Bechtel to review whether each individual included in the list had been properly added to the list. When the Union referred Brown to the site in March 2010, Young learned that Brown was on the list and Young knew something about Brown's history at Bechtel. I do not find that Young's failure to investigate or re-evaluate Brown's prior discipline as evidence of a pretext. With responsibility for administering 35 collective-bargaining agreements and dealing with referrals from 16 separate craft unions, it would be inconceivable that Young would have taken time to review Brown's personnel file to ascertain that Bechtel had appropriately placed Brown on the "Do Not Hire" list or to review the file for any other purpose.

The Acting General Counsel also submits that animus can be established through circumstantial evidence and that shifting defenses provide evidence of pretext and union animus. Counsel for the Acting General Counsel asserts that Respondent shifted its defenses for its failure to hire Brown during the investigation and the unfair labor practice hearing. In support of this assertion, counsel suggests that when Mikesell responded to the unfair labor practice charge in an April 21, 2010 email to the Board's regional office, his defense was grounded in the waiver and settlement agreement and the transfer agreement between Bechtel and Respondent. I don't find Mikesell's initial response to the Board as evidence of a shifting defense. Mikesell clearly stated in his email that he intended to provide the Board with a position statement and supporting documents. He indicated that he would provide the agency with a detailed position statement that would discuss all of the reasons why Brown was not hired. He pointed out, however, that under the transfer agreement with Bechtel, Respondent assumed all of Bechtel's agreements. This included the agreement between Bechtel and Brown wherein Brown agreed not to seek or accept employment with Bechtel. As Mikesell testified at the hearing, he viewed this agreement to be an affirmative defense and assumed that if the defense constituted a complete bar to recovery, Respondent might not need to address the merits of the charge. I credit Mikesell's testimony concerning the basis for his submitting this information to the Board and I do not find that by doing so, Respondent presented shifting defenses for its conduct.

In response to the charge, Respondent submitted information to the Board in the form of various emails as well as a sworn affidavit by Young. In the course of the emails, Respondent submitted that its failure to hire Brown was supported by the management-rights clause of the labor agreement and also identified other employees who had been terminated from Bechtel and refused employment by Respondent. Respondent even provided the Board with the names of other individuals who had been terminated by Respondent with fewer violations of the Craft Employee Work Rules than Brown's prior violations. In reviewing Respondent's correspondence, it is apparent that Respondent attempted to provide as much information as possible to support its position that its failure to hire Brown was justified. Identifying all of the reasons why the action was justified is not the same as changing or shifting its reason for taking the action that it did. I credit Young's testimony that he failed to hire Brown because of Brown's history of harassment and creating a hostile work environment. The fact that Respondent may have been justified in doing so under the management-rights clause or the fact that its action toward Brown was no different than its treatment of similarly situated applicants was not asserted as the reasons that Respondent took the action that it did. There is nothing in the emails or correspondence to indicate that the specific reason for Young's decision was other than his testimony. The emails reflect that Respondent provided additional information in response to continuing contacts with, and requests from, the Board's Regional Office. The fact that Young may have elaborated on the justification for the decision in his affidavit or that Respondent's emails contained further justification does not equate with a shifting of defenses. Rather, it is apparent that such additional information was provided to the Board to demonstrate that even without Brown's union or protected activity, Respondent would have had a basis to refuse him employment.

As an additional argument that Respondent presented shifting defenses, counsel for the Acting General Counsel submits that the "Do Not Hire" list first came up during the unfair labor practice hearing. The overall evidence, however, does not reflect that Respondent changed its basis for its failure to hire Brown to argue at hearing that it did not hire Brown solely because his name was on the "Do Not Hire" list. The evidence reflects that because Brown's name was included on the list, Young's staff consulted Young when the labor relations department received Brown's referral from the Union and informed him that Brown was on the list. While Brown's name on the list apparently triggered Young's attention, Respondent does not assert that it failed to hire Brown simply because he was on the "Do Not Hire" list.

In summary, the overall evidence does not reflect the necessary animus to establish a prima facie case. The credible evidence reflects that the decision not to hire Brown was made solely by Young and was based upon Brown's prior conduct while employed by Bechtel. During the investigation and during the hearing, Respondent provided additional information that would otherwise justify the decision not to hire Brown. The record, however, does not reflect that Respondent vacillated between defenses or even changed its defense as to why Young made the decision that he would not hire Brown.

In asserting that Respondent's stated reason for not hiring Brown is pretextual, the Acting General Counsel contends that other employees were treated differently by both Bechtel and Respondent. There is no question that the Board has previously explained that under certain circumstances, it will "infer animus in the absence direct evidence" and that evidence of a "blatant disparity is sufficient to support a prima facie case of discrimination." *Fluor Daniel, Inc.*, 340 NLRB 970, 970-971 (1991). See also *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). Specifically, counsel for the Acting General Counsel maintains that there are employees who engaged in serious misconduct whose names were not added to the "Do Not Hire" list by Bechtel or Respondent. As an example, the Acting General Counsel points out that employee Daryl D. (GC Exh. 26) was discharged from Bechtel in March 1999 for having three serious motor vehicle accidents in one year. When he applied to work for Respondent in June 2008, he was hired. His name, however, was not on the "Do Not Hire" list. Another employee identified as Joseph M. (GC Exh. 23) was discharged from Bechtel in May 2002 for an adulterated drug test and then rehired by Bechtel in January 2003. Counsel for the Acting General Counsel asserts that this individual's name was not on the "Do Not Hire" List. While it appears that both of these employees are credited with misconduct while they were employed by Bechtel, it was Bechtel who chose not to add their names to the "Do Not Hire" list. The fact that Bechtel added Brown's name to the list and not these two employees does not provide sufficient evidence of disparate treatment by Respondent.

Another employee alleged by the Acting General Counsel as having received disparate treatment is employee Richard L. The records submitted by the Acting General Counsel reflect that Richard L. received a warning from Bechtel on June 13, 2006, for a motor vehicle collision. When Respondent took over the operational contract for the site, Richard L. was apparently hired by Respondent as were the majority of the other employees. In April 2007, Respondent suspended Richard L. for testing positive for alcohol while on duty. In June 2007, Respondent returned the employee to duty. Although the records may reflect that Richard L. was disciplined by Bechtel in 2006 and again by Respondent in 2007, his treatment by either Bechtel or Respondent is not dispositive of disparity with respect to whether Respondent unlawfully refused to hire Brown.

The Acting General Counsel also points to employee William A. as an employee that was treated differently than Brown. William A. began working for Bechtel sometime before June 22, 2000, when he was discharged by Bechtel for fighting with a coworker. The records reflect that at some point he was reemployed by Bechtel, inasmuch as his file contains a written warning for littering on June 19, 2003. In November 2003, Young became the labor relations manager for Bechtel. On November 20, 2003, Union Business Agent Wayne King sent Young a letter, notifying him that William A. had been appointed as a union steward for Bechtel. Bechtel's records reflect that in July 2004, William A. was involved in an incident in which he threw water in another employee's face and called the employee the "n-word" (GC Exh. 28). William A. was ter-

minated on July 28, 2004, and his name was added to Bechtel's "Do No Hire" list.

Despite the fact that William A. was on the "Do Not Hire" list, the Union dispatched him to work at the site in January 2005. He was apparently hired by Bechtel as there is a record of his having received a disciplinary warning and a 1-day suspension on March 9, 2005, for unsafe vehicle operation practices. Young testified that because William A. was dispatched by the Union for employment in 2005, Business Agent King had probably asked Young to reconsider William A. for employment. Young explained that there had been instances when he hired someone at the Union's request, even though the individual's name appeared on the "Do Not Hire" list. Young confirmed however, that the Union made no such request with respect to Brown.

The overall record evidence does not establish the existence of animus necessary to establish a prima facie case of discrimination. Contrary to the Acting General Counsel's arguments, the record does not reflect that Respondent provided shifting reasons for its failure to hire Brown or to establish a significant difference in the way that Respondent treated Brown in relation to other applicants. There is no dispute that Bechtel not only terminated Brown twice, but also issued numerous disciplinary warnings to him while he was employed by Bechtel. Although Young was employed by Bechtel at the time of Brown's employment, Young administered none of the discipline to Brown. Young, in fact, had no responsibility for the area in which Brown worked. The only arguable link between Young and Brown was a note by someone other than Young that suggests that Young may have delivered a file concerning Brown to Lyon. There are no allegations that Young has ever made any comments concerning Brown at any time that would demonstrate animus for his union activity. As discussed above, the Acting General Counsel maintains that there is such a thing as "latent hostility which bides its time and lies in wait, seeking the appropriate occasion to work its will."⁶ While I do not doubt that hostility can resurface after a period of dormancy, the instant record does not reflect that this was the case in Respondent's failure to hire Brown.

In finding that there is insufficient evidence of animus toward Brown for his union activity, I find Respondent's treatment of other union activists to be significant. As discussed above, Young hired former steward William A. despite the fact that he was on Bechtel's "Do Not Hire" list. While he could not recall with detail, Young opined that he did so at the request of Union Business Agent Wayne King. Even more representative of a lack of animus for union activity, is Respondent's conduct toward King.

King worked for Bechtel from April 1999 through November 2000. During almost the entire time that he was employed with Bechtel, King was a union steward. King left his employment at Bechtel in 2000 to become a business agent for the Union. After serving as a business agent, King served as both secretary/treasurer and president of the Union. King served as president of the Union in 2004 and 2005 and he held the posi-

tion of secretary/treasurer until the end of 2007. As business agent, King appointed Brown as a steward at Bechtel. King also supervised Brown in his duties as steward. King described Brown as an aggressive steward and estimated that during the time that Brown served as a steward, he filed more than 50 grievances. Brown testified, however, that before he filed any grievances, he consulted with King. Brown recalled that he did not file grievances without King's authorization. King's authority and role in the filing of Brown's grievances is documented in Brown's personnel file. When Medina conducted his investigation of Brown's alleged misconduct in 2001, he interviewed King. Medina documented his interview with King including King's confirmation that Brown never filed a grievance without checking first with King. Brown also testified that as a business agent, King was as aggressive in enforcing the union's contract as he was. Brown also testified that as a secretary/treasurer for the Union, King was aggressive and enforced the union contract.

In early 2010, King applied to work at the site and was hired. King worked from February 11 until May 18, 2010. He testified that he was later recalled to work at the site and had worked for Respondent as recently as the week before his testimony. Thus, the record reflects that King served in many capacities for the Union; steward, business agent, president, and secretary/treasurer. Brown admitted that King was as aggressive in enforcing the contract as he was. Nevertheless, when King applied for work at the site, he was hired. He was, in fact, working at the site at the time of Brown's referral. Both Brown and King were active in the Union. The only significant distinction between Brown and King appear to be a documented history of Brown's discipline for harassment and for creating a hostile work environment. Additionally, not only has Respondent hired King at the site, but Respondent has also hired three of King's staff members who had been union business agents.

Overall, there is simply insufficient evidence of animus to establish that Young's decision not to hire Brown was premised upon events occurring 8 years earlier and based upon events in which Young had no involvement. While it is possible that the long arm of animus may extend from earlier events, its reach cannot defy reason. Based upon the overall record, I credit Young's testimony that he declined to hire Brown because of his action's in creating a hostile work environment and his harassment of others on the jobsite.

In summary, I do not find that antiunion animus contributed to the decision not to hire Brown or the decision not to consider Brown's employment sufficient to establish a prima facie case.

CONCLUSIONS OF LAW

1. Respondent National Security Technologies, LLC is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 631, affiliated with International Brotherhood of Teamsters is a labor organization within the meaning of Section 2(5) of the Act.
3. The record does not support a prima facie case that Respondent violated the Act by failing to hire William F. Brown

⁶ *Kaumagraph Corp.*, 316 NLRB 793 (1995), citing *Marcus Management*, 292 NLRB 262 (1989).

or by failing to consider William F. Brown for employment or that Respondent has violated the Act in any other way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended

ORDER

The complaint is dismissed.

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.