

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE McBURNEY CORPORATION

and

Cases 26-CA-17564
26-CA-17979
26-CA-18017

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

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for the General Counsel.

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of Kansas City, Kansas,
for the Charging Party.

DECISION

Statement of the Case

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

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

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

On the entire record¹ including my observation of the demeanor of the witnesses and after consideration of the briefs, I make the following

Findings of Fact

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I. Jurisdiction

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

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

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Background and Facts

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

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

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

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

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On October 25, 1995 James Bragen with Greg Portz, a business agent for Local 13 and four union members, Rich DeHaut, Mike Kitchen, James Neumane, and David Packer went to

¹ The Motion to Correct Transcript filed by the General Counsel is hereby granted. The Motion to Admit Joint Exhibits 1, 2, 3 and 4 is hereby granted; the Charging Party's Motion in opposition and its Motion to substitute Charging Party's exhibits are hereby denied.

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

Instead, Pittman hired six employees without union affiliation who had never worked for the Company before and are considered new hires. He hired three pipewelders and fitters² to begin work on October 27, 1995. On October 30, 1995, Pittman hired three men who had experience as pipefitters and millwrights.³

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

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

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

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

² Tim Lester, Danny Chappell and Lawrence Nichols (J. Exh. 1).

³ Glen Lewis, Ed Wilston, and Joe Tomberlin.

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

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

5 On December 13, 1995, James Bragen made another attempt to have members of his union employed at the Towanda jobsite. He came to the jobsite accompanied by J.D. Howell, Lee Namiotka, Chris Monahan, and Nick Simpson. Howell remained in the parking lot as the others went to the trailer. Howell saw Rusty Reid and reminded him that they had worked together before at Ebensburg and that he, Howell, was now an organizer for the Union. Reid told Howell that there was a need for employees but that he would have to consult Jim Clayton about any employment decisions. Bragen and the others in the meantime had spoken to 10 James Austin about employment, initially introducing themselves as members of the Union. They asked whether the Company needed any welders. Austin said, not now, but that he would be hiring soon. The applicants had already registered for employment except Chris Monahan who proceeded to give Malissa, the secretary, his name, phone number, and qualifications.

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

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

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

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

35 The Respondent hired eight additional journeyman welders and pipefitters during the month of January. All had no affiliation with any union.⁷ The Respondent also hired an employee recommended by Barney. Barney had asked Clayton if he needed additional men and mentioned Bruce Kemp. Kemp appeared at the Towanda jobsite on January 22, 1996 and 40 Clayton hired him on January 24.

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

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

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

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

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

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

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

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

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

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

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

smoke. The employees finally complained to Vanderlinden about Reid and Clayton and their activities of watching the two union organizers.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The General Counsel joined by the Charging Party, submit that the Respondent's hiring policy violates Section 8(a)(3) of the Act, and that the Respondent used the policy to discriminate against union members by failing to hire the applicants at the various jobsites
45 because of their union affiliation. The parties also allege that the Respondent violated Section 8(a)(1) of the Act by coercive interrogations, unlawful surveillance, and the application of an overly broad solicitation policy. The Company argues that the General Counsel has failed to carry his burden of proof to show any violations of Section 8(a)(1) and (3) and that even if a prima facie case of discrimination had been established, the Company has shown that the alleged discriminatees would not have been hired for legitimate reasons. According to the Respondent, the discriminatees were not hired because other applicants were selected pursuant to McBurney's hiring priority.

According to that policy the Respondent hires journeymen based in the order of priority beginning with (1) transfers from other McBurney jobs, (2) persons who had previously worked for McBurney, (3) referrals from McBurney employees and (4) call-ins or walk-ins (G.C. Exh. 3).

5 The Respondent's supervisory hierarchy, Clayton, Austin, Jordan, and Pittman testified about the priority hiring system and stated that it was an unwritten policy which is followed with occasional exceptions. The purpose of the policy was to attract quality employees who don't have absenteeism problems or incur safety violations.

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

15 Whether or not an employer intentionally excluded union applicants can often be inferred by its antiunion animus. In the case before me, the Respondent has violated Section 8(a)(1) of the Act. However, with respect to the allegation that the Respondent interrogated Barney in violation of Section 8(a)(1) of the Act, I agree with the Respondent, that the record does not support that allegation. First, Barney's testimony in this regard was contradicted by Clayton. Barney was the only witness to testify that Clayton asked him during the job interview

20 whether he was union and whether he had been on big union jobs. Clayton testified unequivocally that he did not interrogate Barney about the union, nor did Reid who was present for a part of the conversation overhear any talk about the union.⁹ Under these circumstances, I have not credited Barney's testimony about Clayton's interrogation of him concerning the Union. I accordingly dismiss this aspect of the allegations in the complaint.

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

30 financee, Malissa Ball.¹⁰

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

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

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

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

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

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

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

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

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

A priority hiring system of the type applied by the Respondent has the practical effect of screening out union applicants. *D.S.E. Concrete Forms*, 303 NLRB 890, 891 (1991). *M.J. Mechanical Services*, 325 NLRB No. 205 (July 15, 1998). While an employer may develop a hiring policy which is designed to attract applicants who are known to the employer based upon past experience to possess the necessary skills and reliability for the job, the employer cannot go beyond that and draft a policy which is designed to exclude union applicants or one which is inherently destructive of the employees' rights. Here, the General Counsel has shown that the Respondent failed to consider the alleged discriminatees for employment and refused to hire them because of its union animus. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

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

attached list identified the other applicants as union members (Clark, Everetts, Namiotka, Layaou, Jayne, Siglin, Strazdus, and Babcock) (G.C. Exh. 4).

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

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

20 The Respondent admits that it hired several employees at the Towanda jobsite after October 22, 1995 who were “walk-in or call-ins.”¹¹ At least three of these jobs could have been offered to the union applicants. Moreover, the Respondent misrepresented to the union applicants the Company’s intentions to make hiring decisions and led them on to believe that eventually they would be hired. The applicants therefore returned time and again. Pittman testified that he needed only one journeyman when he spoke to Bragen on October 25, 1995 (Tr. 759-60). Yet the record shows that seven journeymen were hired immediately thereafter
25 (J. Exh. 1). And on January 10, 1996, when Bragen and Portz returned to the jobsite to seek employment, Vanderlinden told him that he was not hiring because he was having trouble with ice and snow and material arriving. Yet he hired Les Hamilton on January 10 and Mark Medlock and Nils Floden on January 12. On January 23, Howell and Patterson spoke to Vanderlinden about employment at Towanda. He told them that it would be two weeks before
30 he was ready to hire journeymen. The record shows that the four journeymen were hired on January 23 (Hugh Ball, Roger Benefield, Shawn Hawkins) and another employee (Shawn Neal) on January 26, 1996. When Howell, Patterson, and Manculich made an attempt on February 19, 1996 to obtain employment, Pittman said they were not hiring but winding down and laying people off. But no one was laid off until April 1996. The Respondent also refused to consider
35 Howell, Patterson, and Manculich as possible transfers or at least as former McBurney employees when they applied on January 23rd. They had worked for the Company at Ebsensburg, Pennsylvania before the Towanda project. The Respondent could have hired them under its priority hiring policy, but obviously avoided hiring them and hired instead the four employees who were not former employees.

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

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

qualified as transfers or as former company employees.

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

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

Clayton admitted receiving a call from Barney on April 30th saying that they were packed to go to Montana and needed directions to the jobsite. Clayton, however told them that he needed "pipe people" but that he would get them from the West Coast, and that he did not need them. Clayton, indeed, hired several journeymen who were not former employees and rejected the two Towanda employees who should have received priority consideration under Respondent's policy.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

names of applicants maintained at the Company's headquarters. Clearly, the Respondent intentionally avoided the hiring of any union applicants.

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

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

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

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

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

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

7. By refusing to consider and hire the following employees at the Prescott and Arkadelphia, Arkansas jobsites, Billy Altom, Danny Bielss, Dale Branscum, Mark Branscum, Jerry Burks, Hank Coffey, Tim Coffey, Carl Edds, Bobby Hay, Don Hensley, J.D. Howell, Daniel Neal, Bobby Woodall, David Woodall, Garry Woodall, and J.D. Woodall, because of their affiliation with the Union, the Respondent violated Section 8(a)(1) and (3) of the Act.

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

The Remedy

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

5 Having found that the Respondent unlawfully discriminated against the named job
 applicants, I will order it to offer them reinstatement or employment to the same or substantially
 equivalent positions at other projects as close as possible to the respective jobsite. In addition,
 I shall order the Respondent to make them whole for any loss of earnings and other benefits
 10 they may have suffered as a result of the Respondent's unlawful discrimination against them,
 from the date they applied for employment, to the date that the Respondent makes them a valid
 offer of reinstatement or employment. Such amounts shall be computed in a manner
 prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim
 earnings, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB
 1173 (1987). This Order is subject to resolution at the compliance proceeding of the issues
 15 outlined in *Dean General Contractors*, 285 NLRB 573 (1987) and *Casey Electric*, 313 NLRB
 774 (1994). The complaint alleges that the Respondent failed and refused to consider and hire
 the applicants at the named jobsites. My findings generally support the allegations. More
 specifically, however, the record supports a finding that the Respondent refused to hire the
 20 named applicants at the Towanda jobsite, as well as Dan Barney at the Libby, Montana, site
 and Dale Branscum and J.D. Howell at the Prescott and Arkadelphia jobsites. They were
 considered for employment but rejected because of their union affiliations. The Company had
 sufficient positions available for them but chose to rely on its hiring scheme to employ nonunion
 employees. The other applicants notably Bruce Kemp whose application was submitted by
 Barney for the Libby project, as well as the Local 69 members who accompanied Branscum to
 25 the Prescott project were not considered for hire because of their union membership. There is
 no evidence in the record that they were even considered for employment. The order will
 accordingly reflect a reinstatement provision for those applicants who were not hired and a
 provision to consider for hire those who were not considered for employment.

30 On these findings of fact and conclusions of law and on the entire record, I issue the
 following recommended¹⁶

ORDER

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

1. Cease and desist from

- 40 (a) Engaging in surveillance of employees' union activities.
- (b) Changing work assignments of its employees because of their union
 activities.
- 45 (c) Refusing to consider for employment and refusing to hire qualified
 applicants, because of their union affiliation.

¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

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

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

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

20 (c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

25 (d) Within 14 days after service by the Region, post at its facility in Norcross, Georgia, copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 20, 1996.

30 Dated, Washington, D.C. September 21, 1998.

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¹⁷ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Karl H. Buschmann
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

Section 7 of the Act gives employees these rights.

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

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

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

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

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

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

WE WILL within 14 days of this Order consider for employment and offer these applicants, who would currently be employed but for the Respondent's unlawful refusal to consider them for hire in positions for which they applied, or if such positions no longer exist, to substantially similar positions, Billy Altom, Danny Bielss, Mark Branscum, Jerry Burks, Hank Coffey, Carl Edds, Bobby Hay, Don Hensley, Daniel Neal, Bobby Woodall, David Woodall, Garry Woodall, J.D. Woodall, Tim Coffey and Bruce Kemp and WE WILL make them whole for

any loss of earnings and other benefits that they may have suffered as a result of our discrimination against them, less any net interim earnings, plus interest.

THE MCBURNEY CORPORATION

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(Employer)

Dated _____

By _____

(Representative)

(Title)

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This is an official notice and must not be defaced by anyone.

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This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1407 Union Avenue, Suite 800, Memphis, Tennessee 38104-3627, Telephone 901-544-0011.

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