

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

SPROULE CONSTRUCTION COMPANY

and

Case 33-CA-12381

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL UNIONS 139, 150 AND 234

Judith T. Poltz, Esq.,
for the General Counsel.
Richard Reichstein, Esq.,
of Chicago, Illinois,
for Respondent.
Michael D. Lucas,
of Gainesville, Virginia,
for the Charging Party.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Peoria, Illinois, on October 6 – 9, 1998. The charge was filed September 8, 1997,¹ and the complaint was issued on January 20, 1998.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Charging Party, I make the following

Findings of Fact

I. Jurisdiction

Respondent is a construction contractor, which has an office and place of business in Galena, Illinois. During 1997, it performed services in excess of \$50,000 outside of Illinois. Sproule Construction is therefore an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union, International Union of Operating Engineers,

¹ All dates are in 1997 unless otherwise indicated.

² Respondent's 1997 and 1998 payroll records were received as G.C. Exhibits 34 and 35. Other exhibits had already been received as G.C. Exhibits 34 and 35. Thus the record contains two G.C. Exhibits 34 and two G.C. Exhibits 35. The payroll records are sealed exhibits and the other G.C. Exhibits 34 and 35 are not.

Locals 139, 150 and 234, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

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Sproule Construction contracts to perform such services as site preparation for construction projects, which entails moving and sometimes removing dirt. It also performs concrete work and installs water pipes. Its employees operate bulldozers, front-end loaders and other construction vehicles. They also drive trucks on public roads. Sproule has performed work recently in Illinois, Iowa and Wisconsin, the states in which Local Unions 139, 150 and 234 represent employees doing the type of work performed by Respondent.

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Representatives of Local 234 in Iowa had a meeting with Daniel and Michael Sproule, President and Vice-President of Respondent, in 1996.³ The Union broached the subject of a collective bargaining agreement to the Sproule brothers at that time. Respondent did not act on the suggestion.

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In the spring of 1997, Respondent was awarded a contract by the city of Dubuque, Iowa, to clear farmland for a industrial park. The contract entailed moving approximately one million yards of earth and installing sewer lines. The project was scheduled to last over one year.

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On May 12, 1997, Ed Crawford, a business representative of Local 234 in Dubuque, drove to Respondent's office at the Sproule's farm outside of Galena, and left his business card. He did not receive a telephone call from anyone at Sproule Construction. Starting about May 17, Crawford began seeing classified advertisements placed by Respondent in the Dubuque and Galena newspapers. For example, one which ran on May 21, in the Dubuque Telegraph-Herald, proclaimed "Operators Wanted" and directed potential applicants with experience in running heavy construction equipment to apply in person at Respondent's office at the Sproule's farm. Crawford and his business manager decided to embark upon a "salting" campaign at Sproule.

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On May 20, Crawford called Local 234 journeyman Donald Duehr, and asked him to apply for a job with Respondent. Duehr arrived at the Sproule farm at 7:00 a.m. on May 21, and applied for a job. His employment application listed a number of prior employers, generally known to be union contractors. When looking at Duehr's application, Dan Sproule told him that Respondent was non-union and intended to remain so. Nevertheless, Respondent offered Duehr a job at \$8 per hour, which he accepted. Duehr began working for Sproule Construction the same day.

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Duehr told Dan Sproule that he had four friends from Waterloo, Iowa, who were leaving a job and were looking for work. At about 11:00 a.m. on May 22, Ed Crawford, Scott Saylor, Dick Petersmith and Ron Downing arrived at Respondent's Galena office wearing union hats and jackets. All four are Local 234 journeymen and all, except Downing, are full-time employees of the Union. Saylor is vice-president of the Local and Petersmith is a member of the Union's executive board.

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The four entered the office and told Robin Morgan, one of Respondent's secretaries, that they wanted to apply for work. Scott Saylor began running a concealed tape recorder. Morgan noticed that Petersmith had a video camera and told him that he could not use it in the

³ The Sproule brothers each own 50% of Respondent.

office. He then lowered it, but attempted to use it later in the conversation. Morgan gave the four employment applications, which they filled out and on which they indicated that they were union organizers. Morgan told them that Respondent hires union employees but does not pay union wages; instead it would pay \$8 per hour. The four said they would be willing to work for \$8 per hour.

While the four were still in the office, Morgan contacted Michael Sproule. She told the four that the company needed two equipment operators in Dubuque immediately and that Michael Sproule was on his way back to the office to talk to them. When Sproule returned, he asked the four what kind of equipment they could run. Satisfied with their answers, Sproule told the four to come to work the next day. Then Scott Saylor told Mike Sproule that they intended to try to organize Respondent's employees before and after work and on their breaks. Mike Sproule said, "then you're not going to work here." Saylor reiterated that the four were willing to work for Respondent but were going to try to organize the company. Sproule responded, "it ain't never gonna happen." When Saylor asked if that meant that Respondent was not going to hire them, Mike Sproule said "Let me think about it and I'll get back to you."⁴ None of the four was ever contacted by Respondent.

A few hours later, Tom Hines, another Union journeyman, arrived at Respondent's office to apply for a job. He had also been recruited by Ed Crawford to be a covert salt. Hines was given an employment application by Robin Morgan. While he was filling out the application, Morgan asked him if he was a Union member.⁵ Hines did not respond. That evening Hines found a message from Daniel Sproule on his answering machine. He was instructed to call Respondent's office the next morning. He did so and was told to report for work on Tuesday morning, May 27.

On Friday morning, May 23, Mark McCaffrey, an organizer for Local 150 in Rockford, Illinois, went to the Sproule offices to apply for a job. McCaffrey was interviewed by Daniel Sproule. McCaffrey told Sproule that he had been working in a family business but was in the process of relocating because his wife was starting school in Dubuque. Sproule asked McCaffrey if his family business was unionized and McCaffrey said it was not. Dan Sproule hired McCaffrey and told him to report on Tuesday, May 27, the day after Memorial Day.

On May 27, McCaffrey was assigned for work with John Lyden and spent the day digging up septic tanks. Tom Hines and Donald Duehr worked at a project on Garfield street in Dubuque under the direction of foreman Brian Jacobson.

The next morning McCaffrey arrived at work at about 6:40, twenty minutes before work began. He handed out Union authorization cards to the ten or so employees congregating in the mechanics' shop. Shortly thereafter, Daniel Sproule summoned McCaffrey into his office. Sproule asked McCaffrey if he was a union organizer. McCaffrey responded affirmatively. Sproule told him that he had lied in the employment interview and that therefore Respondent was going to lay him off.

⁴ Respondent strongly objected to my receipt of the tape made by Scott Saylor and a transcript made from the tape. Both are admissible. Indeed, it may be reversible error to exclude such evidence, *Plasters' Local 90*, 236 NLRB 329 (1978), *enfd.* 606 F. 2d 189, 192 (7th Cir. 1979); *Fontaine Truck Equipment Co.*, 193 NLRB 190 (1971).

⁵ I credit Hines' testimony to this effect. Respondent did not call Morgan as a witness to contradict him and it is not implausible that Morgan would ask about Hines' union affiliation a few hours after Michael Sproule's encounter with Saylor, Crawford, Petersmith and Downing.

Daniel Sproule then reiterated that McCaffrey was being laid off, not fired. McCaffrey asked when Respondent would need him. Sproule told him to call the office. McCaffrey called the next Thursday, June 5, and also on June 10, June 12 and June 16. Each time he spoke to Robin Morgan. During the first call, Morgan put McCaffrey on hold. When she returned, Morgan said that she had spoken to Daniel Sproule and that Respondent did not have any work for McCaffrey. She gave him essentially the same message in the other phone calls. On June 10, McCaffrey gave Morgan his telephone numbers at home and at work and his pager numbers and told her to have Daniel Sproule call him. He was never contacted.⁶ Respondent's payroll records indicate that it hired at least five employees in the first half of June 1997.

On May 28, a few hours after McCaffrey left work, a caravan of 25 Union members, many of whom wore Union paraphernalia, arrived at the Sproule offices. They included at least nine full-time Union employees; Ed Crawford, Local 234 business representative, Richard Otto, a Local 139 organizer/business agent from Green Bay, Wisconsin, Scott Dahl, a Local 150 business representative, Mike Milliken, business representative, Terry Waldron, business representative, Jay Pierce, a Local 150 business representative, Charlie Bowen, a Local 150 business representative, Willie Ellis, a Local 139 business representative and DeWitt Wegner, vice-president of Local 139.

The other operating engineer members of the caravan were journeymen Gary Kriesher, Brian Halder, Jeffrey Miller, John Ruddish, Carl Buss, Robin Landwer, Steve Sulley, Wayne Mau, Lenore Liebeau, Dennis Luciani, Tony Rossi, Dennis Zuleger and Richard Carrell. Also present were Gary Larrow, a teamster, Don Vallance, who was either an journeyman or apprentice operating engineer and Ron Vinning, a truck driver. Business representative Jay Pierce went into the office and asked for employment applications. The group was told that Respondent was not taking applications and to get off the Sproule property.

Later the same afternoon, Ed Crawford called Pat Hines, a Local 234 journeyman, and asked him to apply for work at Sproule as a covert salt. Hines went to Respondent's offices the next day and was told Sproule was not taking applications, but that he would be contacted if the company needed him. A week later, on June 4, Pat Hines called Respondent's office again and was hired on the spot. He reported for work Monday, June 9. Another new employee started the same day.

⁶ I credit McCaffrey's testimony with regard to what transpired on May 28, and with respect to his telephone calls to Respondent afterwards, despite his less than convincing testimony about why he taped recorded conversations with Daniel Sproule. Sproule's contrary testimony is not credible.

Sproule testified that McCaffrey was sent home on May 28 because it was raining. His account is as follows: John Lyden came into the office and asked what to do with the employees. Sproule told Lyden to send them home. While Respondent didn't bother to call Lyden as a witness to corroborate Sproule's account, both Tom Hines and Donald Duehr testified that they went to work on the Garfield street project that day and were sent home at 8:30 a.m. because it was raining harder. Thus, I am convinced that, contrary to Sproule's testimony, all the employees in the shop were not sent home at the beginning of the workday.

Moreover, Sproule confirms that he asked McCaffrey if his family firm was unionized on May 27, and that he called McCaffrey a liar on May 28. I also credit McCaffrey with regard to his repeated telephone calls to Respondent after May 28. In this regard, I note that Respondent did not call Robin Morgan as a witness to contradict McCaffrey and offered no reason for its failure to do so.

On the evening of June 10, Ed Crawford called Tom Hines and suggested that the Hines brothers go on strike the next day, which they did. On June 12, the Hines brothers sent Dan Sproule a letter, which had been drafted for them, stating that they were striking to protest the firing of Mark McCaffrey and Respondent's refusal to hire Crawford, Saylor, Petersmith and Downing.

The Hines brothers returned to the Sproule office on June 19, with a letter informing Respondent that they were unconditionally ending their strike. They gave the letter to Wendy Greene, Respondent's office manager. Greene handed the letter to Robin Morgan, who called Mike Sproule. When she got off the phone, Morgan told the Hines brothers that they would have to bring the letter back and she refused to accept it. Tom and Pat Hines were never recalled to work.

Between July 5 and 15, Respondent placed newspaper advertisements for experienced heavy equipment operators. Respondent's payroll records indicate that it hired at least 10 new employees between June 27 and July 18, and over 20 employees in July and August. While Respondent was looking for new employees, Donald Duehr, acting upon the suggestion of Ed Crawford, went on strike on July 11. He informed Michael Sproule that he was striking to protest Respondent's failure to recall the Hines brothers. On July 28, Duehr hand carried a letter to Respondent's office informing it that he was prepared to return to work that day, unconditionally. Mike Sproule was made aware of this letter shortly after it was delivered. Duehr was never recalled to work by Respondent.⁷ Sproule's payroll records indicate that it hired many new employees after July 28, including 8 in the month of August.

Analysis

On May 22, 1997, Respondent violated section 8(a)(1) and (3) in refusing to hire Scott Saylor, Ed Crawford, Dick Petersmith and Ron Downing.

In *NLRB v. Town & Country Electric, Inc.*, 116 S. Ct. 450 (1995), the U. S. Supreme Court held that paid union organizers are employees within the meaning of the Act. It is therefore a violation of section 8(a)(1) and (3) to refuse to hire such a person because they are a paid union organizer and/or because they intend to organize, *M. J. Mechanical Services*, 324 NLRB No. 130 (October 24, 1997); *Sunland Construction Co.*, 309 NLRB 1224 (1992).

⁷ Duehr's letter of July 28 states that he went on strike to protest the firing of McCaffrey and the refusal to hire Crawford, Saylor, Petersmith, Downing and others. It does not specifically mention the Hines brothers. While Michael Sproule testified that Duehr did not give him a reason for going on strike, I credit Duehr's testimony that he told Sproule that he was striking for Respondent's failure to recall the Hines brothers. It may be that, as in the case of the Hines' brothers, the letter of July 28, was written for Duehr by someone else.

Respondent offered jobs to Saylor, Crawford, Petersmith and Downing. Mike Sproule then withdrew those offers when informed that the four men intended to organize his workers. There is no question that the refusal to hire these individuals was motivated by their announced intention to engage in activities protected by the Act. Respondent's refusal to hire these employees violates section 8(a)(1) and (3).

Sproule argues that at least some of these employees were not bona fide job applicants because, as in the case of Crawford and Saylor, they were paid an annual salary of \$60,000 by the Union. Therefore, contends Respondent, they really didn't want to work for Sproule at \$8 per hour. This argument overlooks the fact that organizing Sproule, or least pressuring the company into a pre-hire agreement was a very important objective for the Union. When it obtains large contracts such as the one for the Dubuque industrial park, Respondent poses a direct threat to the standard of living of the Union employees in its locality. It is therefore quite possible that the Union decided that Sproule warranted the undivided attention of one or more of its organizers, to the extent that it wanted them to work for Sproule full-time.⁸

Respondent violated section 8(a)(1) and (3) in discharging Mark McCaffrey on May 28, 1997. Respondent also violated section 8(a)(1) in inquiring into McCaffrey's union background in the employment interview of May 23.

I have concluded that Daniel Sproule discharged Mark McCaffrey on May 28, because he discovered he was a Union organizer and that he had been handing out Union authorization cards before work. Assuming arguendo that McCaffrey was sent home due to the rain, Respondent violated the Act in not recalling him to work at a time when it was hiring other employees.⁹

Respondent also violated the Act in inquiring as to whether McCaffrey's family business was a union firm. Questioning a job applicant about any union affiliation is a coercive interrogation prohibited by the Act, *M. J. Mechanical Services, supra*, (slip opinion at page 6).

Respondent violated section 8(a)(1) and (3) in refusing to consider for employment the twenty-five Union salts who came to its office on the afternoon of May 28.

Twenty-five Union members arrived at Respondent's office on the afternoon of May 28, and through Jay Pierce, requested employment applications. Respondent refused to give them applications or consider them for employment because of their obvious connection to the Union and its organization efforts. All twenty-five were capable of performing work for which Respondent was seeking help.

⁸ Mark McCaffrey insisted that his motive in seeking work at Sproule was primarily to augment his \$60,000 a year salary by moonlighting. However, I conclude that his primary motive was to protect the Union's wages and benefits. Even if, a subsidiary motive was to goad Sproule into the commission of unfair labor practices, if organization efforts failed, his activities and those of the other Union members in this case are protected by the Act, *M. J. Mechanical Services, supra*, slip opinion page 3.

⁹ Respondent did not contend at hearing that it fired McCaffrey for lying in his employment interview. Dan Sproule testified that he sent McCaffrey home because it was raining on May 28, and that Respondent never heard from McCaffrey again. Thus, McCaffrey's misrepresentations in the employment interview do not provide Respondent with a defense to his discharge.

Respondent contends these applicants were not bona fide applicants. However, the record establishes that all were seeking employment with Respondent. The fact that they may have been doing so primarily to further the Union's efforts to organize Sproule does not negate their status as bona fide employees, *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), *M. J. Mechanical Services, supra*. Indeed, the salts who were hired by Respondent (McCaffrey, Donald Duehr, Thomas and Patrick Hines) performed their tasks in a completely satisfactory manner, despite the fact that each one was having his salary augmented by the Union.

At first blush, one might doubt the sincerity of applicants such as Richard Otto, who traveled to Sproule's Galena office from Green Bay, Wisconsin, more than 200 miles away. However, there is no basis on which to reject Otto's testimony that, if hired, he would stay in a motel near the jobsite, and work for Sproule. In this regard, I note that witness Patrick Hines, who lives in Guttenburg, Iowa, was working in Ishpeming, Michigan, 444 miles from his home, at the time of the hearing (apparently not as a salt). I therefore credit Otto's testimony and find that construction workers may work far from home either to earn a living or, as in Otto's case, to further the organizational efforts of the Union.

Respondent has violated section 8(a)(1) and (3) since June 19, in failing to recall Thomas and Patrick Hines to their former positions of employment at Sproule Construction.

Thomas and Patrick Hines went on strike to protest Respondent's unfair labor practices in discharging Mark McCaffrey and in refusing to hire Ed Crawford, Scott Saylor, Dick Petersmith and Ron Downing. On June 19, the Hines brothers informed Respondent of their willingness to return to work unconditionally. Thereafter Respondent was required to reinstate them, even if it hired permanent replacements, *Child Development Council of Northeastern Pennsylvania*, 316 NLRB 1145 (1995). Not only did Sproule not reinstate the Hines brothers, it hired new employees to perform the same type of work. In failing to reinstate the Hines brothers, Respondent violated section 8(a)(1) and (3).

Respondent has violated section 8(a)(1) and (3) in failing to reinstate Donald Duehr to his former position of employment.

Donald Duehr went on strike on July 11, to protest Respondent's failure to reinstate the Hines brothers. On July 28, he informed Sproule of his willingness to return to work unconditionally. Respondent concedes that Duehr performed his job well during the seven weeks he worked for it. However, it has failed to reinstate Duehr and has hired new employees to perform the same type of work. This also is a clear violation of the Act.

Respondent, by Robin Morgan, violated section 8(a)(1) in asking Thomas Hines about his union affiliation while he was applying for employment on May 22.

Whether questions concerning an employee's union membership are lawful depends on whether they tend to restrain or interfere with the employee's exercise of rights guaranteed by the Act, *Rossmore House*, 269 NLRB 1176 (1984). Such inquiries made during a job interview, however, are inherently coercive, *Gilbertson Coal Co.*, 291 NLRB 344 (1988). Tom Hines had reasonable cause to believe that the question posed to him by Robin Morgan on May 22, was posed on behalf of Sproule Construction, not merely to satisfy her curiosity. Therefore, I conclude that in making this inquiry, Morgan was an agent of Respondent and violated section 8(a)(1), *Community Cash Stores*, 238 NLRB 265, 266 (1978).

Complaint paragraphs 5(a), 5(d) and 5(e) are dismissed.

Paragraph 5(a) of the Complaint alleges that Respondent, by Michael Sproule, told job applicants on May 22, that if they were going to try to organize, they were not going to work for Respondent. This allegation refers to Sproule's statement to Crawford, Saylor, Petersmith and Downing as he effectively withdrew his offer of employment. I dismiss this subparagraph as being duplicative of Paragraph 6(a). I found a violation of section 8(a)(1) and (3) for Respondent's refusal to hire four Union members with regard to this incident. Sproule's articulation of the reason for his refusal to hire is not a separate violation.

Paragraph 5(d) alleges that Respondent, by Jay Kearney, told an employee that another employee had been fired for passing out union cards. This allegation rests on the testimony of Donald Duehr, that after his crew went to the Garfield street project, Kearney told him an employee was just fired for passing out union cards. Kearney's statement may have been no more than passing on shop scuttlebutt. The General Counsel has not shown that Duehr had reason to believe that Kearney was speaking and acting for management. Therefore, it has not been established that Kearney was Respondent's agent.

The General Counsel also bears the burden of proving that Kearney was a supervisor. It has not shown that he exercised independent judgment in doing any of the functions in enumerated in section 2(11) of the Act, or that he possessed supervisory authority other than during a sporadic and insignificant portion of his working time, *Gaines Electric, Co.*, 309 NLRB 1077, 1078 (1992).

The Complaint alleges in paragraph 5(e) that Daniel Sproule violated section 8(a)(1) on or about June 11, in asking employees if they were union. This subparagraph refers to his conversation with the Hines brothers after they informed him they were going on strike to protest the firing of McCaffrey and the refusal to hire the four salts of May 22. At this point it was obvious to Sproule that the Hines brothers were at least union sympathizers and I conclude his question or statement confirming their sympathies did not tend to be coercive, particularly when they had just announced their intention to commence an unfair labor practice strike.

Conclusions of Law

1. By asking a job applicant, Tom Hines, if he was union on May 22, Respondent violated section 8(a)(1) of the Act.

2. By asking Mark McCaffrey if his family business was a union company on May 23, Respondent violated section 8(a)(1).

3. By refusing to hire Scott Saylor, Ed Crawford, Dick Petersmith and Ron Downing on May 22, Respondent violated section 8(a)(1) and (3).

4. By refusing to consider for employment the following applicants since May 28, Respondent violated section 8(a)(1) and (3):

Ed Crawford, Jay Pierce, Don Vallance, Terry Waldron, Dennis Zuleger, Lenore Liebau, Willie Ellis, Richard Otto, Brian Halder, John Ruddish, Steve Sulley, Scott Dahl, Garry Larrow, Richard Carrell, Ronald Vining, Dennis Luciani, Gary Kriesher, Carl Buss, Robin Landwer, Mike Milliken, DeWitt Wegner, Charlie Bowen, Wayne Mau, Anthony Rossi and Jeffrey Miller.

5. By discharging Mark McCaffrey on May 28, Respondent violated section 8(a)(1) and (3).

6. By failing to reinstate Thomas Hines and Patrick Hines since June 19, Respondent has violated section 8(a)(1) and (3).

7. By failing to reinstate Donald Duehr since July 28, Respondent has violated section 8(a)(1) and (3).

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(1) and (3) of the Act by refusing to consider twenty-five applicants for employment, I shall order Respondent to consider them for hire and to provide backpay to those whom it would have hired but for its unlawful conduct.¹⁰ In addition, if at the compliance stage of this proceeding it is determined that the Respondent would have hired any of these 25 employee-applicants, the inquiry as to the amount of backpay due these individuals will include any amounts they would have received on other jobs to which the Respondent would later have assigned them. Finally, if at the compliance stage it is established that the Respondent would have assigned any of these discriminatees to current jobs, Respondent shall hire those individuals and place them in positions substantially equivalent to those which they would have been hired for initially.

Having found that Respondent unlawfully refused to hire Ed Crawford, Scott Saylor, Dick Petersmith and Ron Downing, because of their stated intention to organize, I shall order that the Respondent offer them immediate and full employment in positions for which they applied or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. I shall further order the Respondent to make these four employees whole for any loss of earnings and benefits suffered as a result of the discrimination against them with backpay extending from May 22, 1997, the date of the unlawful refusal to hire them, until the Respondent offers them employment. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as

¹⁰ The current state of the record is insufficient to determine whether Respondent would or would not have hired any of these 25 applicants, if it had considered them on a non-discriminatory basis, except for Ed Crawford, who was offered employment on May 22. In compliance Respondent will bear the burden of proving that employees hired after May 28, had superior qualifications to the other 24 applicants, *H. B. Zachry Co.*, 319 NLRB 967, 968 (1995). If it is determined that Respondent would have hired Robin Landwer, the remedy fashioned at the compliance stage will have to take into account the fact that he passed away between May 28, 1997, and the date of the hearing.

computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹¹

5 Having found that the Respondent unlawfully discharged Mark McCaffrey because of his union activities, I shall order the Respondent to offer McCaffrey immediate and full reinstatement to his former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings and other benefits suffered as a result of the Respondent's discrimination against him. Backpay shall be computed as described in the preceding paragraph.

10 Having found that Respondent unlawfully refused to reinstate unfair labor practice strikers Thomas Hines, Patrick Hines and Donald Duehr after they unconditionally offered to return to work, I shall order Respondent to offer them immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, discharging, if necessary, any replacements, together with backpay from June 19, (in the case of the Hines brothers) and from July 28, (in the case of Duehr). Backpay shall be computed as described above.

20 The Respondent shall also be ordered to expunge from its files any and all references to the unlawful employment actions, and to notify the discriminatees, in writing, that this has been done.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

25 The Respondent, Sproule Construction Co., Galena, Illinois, its officers, agents, successors, and assigns, shall

30 1. Cease and desist from

(a) Failing and refusing to consider for hire applicants on the basis of their union affiliation or based on Respondent's belief or suspicion that they may engage in organizing activity or other protected activities once they are hired.

35 (b) Refusing to hire applicants on the basis of their union affiliation or Respondent's belief that they may engage in protected activity, such as organizing.

(c) Discharging employees because of their union affiliation or because they have engaged in protected activity, such as organizing.

40 (d) Failing to reinstate unfair labor practice strikers following an unconditional offer to return to work.

45 ¹¹ Reinstatement and backpay issues in the construction industry will ordinarily be resolved during the compliance process rather than by resorting to presumptions as to how long the discriminatee would have remained employed by the Respondent, *Dean General Contractors*, 285 NLRB 573 (1987).

¹² 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.

(e) Coercively interrogating job applicants or employees concerning their union membership, activities and sympathies.

5 (f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

10 (a) Make whole any of the following job applicants for any losses they may have suffered by reason of Respondent's discriminatory refusal to consider them for hire as determined in the compliance stage of this proceeding. Offer those applicants, who would currently be employed but for Respondent's unlawful refusal to consider them for hire, employment in positions for which they applied. If those positions no longer exist, Respondent
15 must offer these applicants substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against by Respondent:

20 Jay Pierce, Don Vallance, Terry Waldron, Dennis Zuleger, Lenore Liebau, Willie Ellis, Richard Otto, Brian Halder, John Ruddish, Steve Sulley, Scott Dahl, Garry Larrow, Richard Carrell, Ronald Vining, Dennis Luciani, Gary Kriesher, Carl Buss, Robin Landwer, Mike Milliken, DeWitt Wegner, Charlie Bowen, Wayne Mau, Anthony Rossi and Jeffrey Miller.

25 (b) Offer each of the following employees immediate employment in the positions they would have received absent Respondent's discrimination against them, or if those positions are no longer available, to a substantially equivalent positions, without prejudice to their seniority or any other rights and privileges, and make them whole for any loss in pay and benefits resulting from the discrimination, in accordance with the remedy provision of this decision:

30 Ed Crawford, Scott Saylor, Dick Petersmith and Ron Downing.

35 (c) Offer each of the following employees immediate reinstatement to the positions they held, or if those positions are no longer available, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges, and make them whole for any loss in pay and benefits resulting from the discrimination, in accordance with the remedy provision of this decision:

40 Mark McCaffrey, Thomas Hines, Patrick Hines and Donald Duehr.

45 (d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful employment actions against Mark McCaffrey, Thomas Hines, Patrick Hines and Donald Duehr or any of the Union job applicants mentioned above, and within 3 days thereafter notify them in writing that this has been done, and the action will not be used against them in any way.

(e) 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.

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(f) Within 14 days after service by the Region, post at its Galena Illinois facility, copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 33, 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 May 22, 1997.

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

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Dated, Washington, D.C. December 30, 1998.

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ARTHUR J. AMCHAN
Administrative Law Judge

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¹³ 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."

APPENDIX

NOTICE TO EMPLOYEES

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

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

WE WILL NOT refuse to hire, discharge or otherwise discriminate against any of you for supporting the International Union of Operating Engineers, or any other union.

WE WILL NOT refuse to reinstate any employees who make an unconditional offer to return to work after participating in an unfair labor practice strike.

WE WILL NOT coercively question you about your union support or activities.

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

WE WILL, within 14 days from the date of the Board's Order, offer Mark McCaffrey, Thomas Hines, Patrick Hines and Donald Duehr full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Mark McCaffrey, Thomas Hines, Patrick Hines and Donald Duehr whole for any loss of earnings and other benefits resulting from their discharge (in the case of McCaffrey) or from our failure to reinstate them (in the case of Thomas Hines, Patrick Hines and Donald Duehr), less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Mark McCaffrey, and unlawful termination of the employment of Thomas Hines, Patrick Hines and Donald Duehr and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharge/terminations will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer Ed Crawford, Scott Saylor, Dick Petersmith and Ron Downing full employment in positions for which they applied or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

WE WILL make Ed Crawford, Scott Saylor, Dick Petersmith and Ron Downing whole for any

