

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

PRECIPITATOR SERVICES GROUP, INC.

and

Case 4-CA-24627

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

Rick Wainstein and Gregon J. Fons, Esqs.

of Philadelphia, PA,
for the General Counsel.

Michael L. Eggert, Esq.,

of State College, PA,
for the Respondent.

DECISION

Statement of the Case

RICHARD H. BEDDOW, Administrative Law Judge. This matter was heard in Philadelphia, Pennsylvania on May 1, 1997. Subsequent to an extension in the filing date briefs were filed by the General Counsel¹ and the Respondent. The proceeding is based upon a charge filed February 9, 1996,² by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO. The Regional Director's complaint dated October 31, 1996, alleges that Respondent Precipitator Services Group, Inc., of Elizabethton, Tennessee, violated Section 8(a)(1) and (3) of the National Labor Relations Act by refusing to consider for hire four applicants because of their union membership or sympathies and by threatening to enforce a broad rule prohibiting Union solicitation.

Upon a review of the entire record in this case and from by observation of the witnesses and their demeanor, I make the following:

¹ The General Counsel unopposed Motion to Correct Transcript is hereby granted and is received into evidence as General Counsel's Exhibit No. 8 and his Motion to receive late filed exhibits also is granted and General Counsel's Exhibits 6(a) and (b) and 7 are hereby received into evidence.

² All following dates will be in 1996 unless otherwise indicated.

Findings of Fact

I. Jurisdiction

5 Respondent is a corporation engaged in the installation and construction of precipitators at various points in the United States including one at the International Paper/Masonite project in Wysox, Pennsylvania. It annually conducts business operations and performs services valued in excess of \$50,000 for customers located outside of Tennessee and it admits that at all times material is has been an employer engaged in operations affecting commerce within the meaning of Sections 2(2)(6) and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

15 The Respondent business makes it a contractor at jobsites owned by other parties, throughout the United States, however, its sole office and the only facility that it owns is located in Elizabethton, Tennessee. At any given time, depending on the number of jobs it has in operation, it employs between 10 and 200 field employees in varied classifications including welders, electricians, iron workers, laborers and carpenters.

20 The Company's normal hiring practice is to hire employees from persons who apply at the main office rather than to hire employees at its various jobsites because it "likes" to hire employees who will be trained and stay with the Company and work at more than one job site over time. Field Superintendent Ken Fortner testified that since October 1994, he had supervised jobs at about 20 locations, and the only jobsite where local applicants were hired were at the Wysox, Pennsylvania job. He was aware of one other job (a job he did not supervise) in Colorado, where local jobsite applicants had been hired.

25 In September 1995 the Respondent (a non-union employer), was subcontracted by another Tennessee company to install a new precipitator at the jobsite in Wysox near Towanda, Pennsylvania. The owner was International Paper, Masonite Division, and Rust Corporation was the general contractor. Fortner was in charge of the job for the Company, and he and about 11 other regular employees of the Company reported to the site on about September 5. Fortner did not have any employment applications at the job site at any time in 1995 because he had no initial plans to do any hiring at Wysox.

30 On December 13, 1995, Union Organizer Millard "J.D." Howell visited the Wysox jobsite along with several other Union members who were applying for jobs with McBurney, another contractor that was building the boiler there. Howell asked a couple of men if they knew anyone else who was hiring and he was told to check at Respondent's trailer. Howell testified that he went by himself to the Respondent's trailer, entered and introduced himself to Fortner. He identified himself as an organizer for the Union, and asked if Fortner was hiring. Fortner replied that he was "kind of full" right then and was not hiring. Howell described his 20-plus years of experience in the trade, including his experience erecting precipitators and added that his organizing efforts among Respondent's employees wouldn't interfere with his productivity or my efficiency on the jobsite if he was hired and that he would give an honest day work for an honest day's wages. Howell asked for an application, and Fortner replied that he did not give out applications, but would take Howell's name and number and Howell wrote the information on a pad from Fortner's desk. At that time nothing was said about the Respondent's future hiring plans. Otherwise, Fortner agreed that he was working at the Wysox jobsite in December 1995, but said that he could not recall talking to Howell prior to January 23, 1996, at which time several employees announced they were Union members and organizers.

The Respondent closed its Wysox job for a Christmas break the last week of December. Meanwhile, the company concluded that it needed more welders to go to Wysox, but found no people in Tennessee who could go. Fortner therefore told general foreman Dale Cordell to place an ad for welders in the local Towanda paper and on January 5, 6 and 7, 1996, the Respondent ran a blind ad in the Towanda Daily Review that read: "TWO Iron Worker/Welders needed immediately. Call 265-5567 anytime." Union Local 13 members David Packer, James Neumane and Richard Dehaut, all of whom live in the jobsite area, applied for jobs at the jobsite, were hired and started working on about Monday, January 15 They did not tell Respondent about their Union affiliation and Fortner did not know that they were Union members when he hired them.

On their first day of work, Respondent sent Neumane and DeHaut to a jobsite orientation meeting that was run by general contractor Rust Corporation and owner International Paper. The employees were given a printed set of rules and safety policies of Rust and International Paper which included the following rule: "Distributing written or printed material and/or solicitation on company premises is not permitted." Fortner himself previously went through the orientation and received a copy of the rules, and he said that he read the rules and believed it was his responsibility to see to it that the rules were followed inasmuch as the rules state that: "As a general rule, all contractors shall be totally familiar with these regulations and provide adequate supervision at all times to insure compliance," and that the rules "must be followed by all employees present on any Masonite Corporation property."

At the beginning of the work day on January 23, Neumane, Dehaut and Packer entered Respondent's jobsite trailer where Fortner and several other employees were gathered. Neumane handed Fortner a letter from Union organizers J.D. Howell and James Bragan which stated that Neumane, Dehaut and Packer "wish to be identified as voluntary union organizers" and that "any organizing activity will not interfere with these employees job duties." Dehaut and Neumane testified that Fortner opened and read the letter, then said (using a harsh tone of voice); to Neumane "You don't want to give me that." When Neumane did not respond, Fortner repeated "I'm telling you, you don't want to give me that." Again Neumane did not reply, and Fortner said it a third time. While Fortner was speaking, the three Union members were taking out Union badges and stickers and placing them on their coveralls, hard hats and dinner pails. Neumane testified that Fortner said "You don't want to put them on there." The men did not respond, and Fortner again repeated two more times." Finally, Neumane said, "Well, you gotta do what you gotta do, and I'm going to do what I'm going to do."

Fortner testified that the employees' presentation of the Union's letter was the first he learned they were Union members or organizers, but said he did not recall making the statements the employees attributed to him. He did admit that he told Neumane, "James, if you give me this letter I'll have to turn it over to [general contractor] Rust Engineering" and that that later that morning he did give a copy of the letter to Rust and International Paper, because he believed he was required to do so by the rules stated in the Rust and International Paper's orientation materials.

Thereafter Neumane and Dehaut wore union insignia on a daily basis at the jobsite. Fortner did not ask them not to and he made no further comments concerning the insignia and no evidence was presented to indicate that the Company made any further effort to enforce any rules against solicitation and distribution at the Wysox jobsite. Neumane and Dehaut also testified that they engaged in handbilling at the jobsite in very late January or early February, and Fortner did not comment on it.

On January 25, before work, Organizer Howell visited Respondent's trailer and told Fortner that the employees had asked him to request recognition of the Union as their bargaining representative. Fortner said he had no authority to grant recognition, but would tell the Company's office. Howell said that if he did not hear from Fortner by noon then he would
5 "know the answer is no." Howell then asked Fortner about going to work for Respondent, said he wanted a job and again said that organizing the employees would not interfere with my work on his job site. He said that Fortner told me that he would keep in mind. Howell gave Fortner his home phone number, as well as the number of his motel room. He was not contacted.

10 Howell also testified that Fortner said, "Well, you're aware that there's a no solicitation policy here at the job site, and that the guys have already been told during their orientation that they couldn't be doing any solicitation. . . at the jobsite or one the premises."

15 Fortner admitted that January 25 visit occurred and the conversation in which Howell identified himself as a Union organizer and asked about a job, that Howell gave him the phone number where he was staying, and "told me to call and we would go out to lunch together." Fortner testified he recalled no further conversation, but did not specifically deny discussing the no-solicitation rule.

20 On February 5, Union members Ernest "Skip" Patterson, Michael John Manculich and John LaPoint visited the jobsite. Patterson was wearing a jacket with the Union's name in large letters on the back, and Manculich and LaPoint were wearing hats with Union insignia. As they approached Respondent's trailer, they spoke with Respondent's employee Gary Hatley and asked "Are they hiring any welders?" Hatley said that they had just hired three that morning,
25 but probably were going to need more and directed them to Respondent's trailer. When the three men entered the trailer, there were a number of men present, and they spoke with a man sitting at a desk who was later identified in testimony by Fortner as employee of SES (the contractor to whom Respondent was a subcontractor) named Jim who regularly used Respondent's trailer. Patterson asked if they were hiring, and Jim said they had just hired three
30 and did not need anyone right then, but they would probably be needing more welders in the future. Patterson asked for applications. Jim said he did not have any, but gave the men a pad and told them to write their names, phone numbers, and qualification on it, and said he would be in touch if he needed more welders. They did so and Patterson indicated they were "ready,
35 willing and able to come to work at any time." Manculich recalled that the man said he would give their names and numbers to "the guy above him" and they would call the men if they needed them. They were not contacted.

40 Fortner denied that he ever heard about the visit from Patterson, Manculich and LaPoint, or that he received anything from anyone showing their names. Company records indicate that it hired three employees (William, Scott and Tipton) as welders in February 1996. Otherwise, the hiring summaries Respondent produced at trial were, according to Respondent's own witness, partly incorrect. The actual weekly payroll records that Respondent produced pursuant to the General Counsel's subpoena contained portions that had been whited out, and
45 Respondent was unable to produce any records showing the individuals whose names and hours had been concealed.

According to the hiring summaries, as corrected by Fortner's testimony, a group of 12 employees (Cordell, Williams, Bruno, Edwards, Ray, White, Grindstaff, Sonny Elliott, Asher, Shell, Lawry and Fortner) started at the jobsite on about September 5, 1995. Employees Randy Taylor and Tim Taylor began working at the jobsite on January 1, 1996, Gary Hatley on

January 8, Fred Thomas on January 17, and Robbie Clouse on February 5. Like the 12 employees who preceded them, the two Taylors, Hatley, Thomas and Clouse had all been working for Respondent for some time before they were assigned to the Wysox jobsite. Though their names were among those whited out on Respondent's payroll records, it is undisputed that new hires Neumane, Dehaut and Packer were hired and began working at the jobsite on January 15. Contrary to Fortner's testimony that Respondent hired no new employees for the job after the Union members were hired, Respondent's documents show that it hired three new welders Williams, Scott and Tipton (hired in Tennessee) who began working on February 5, 13 and 22, respectively. From February onward, 17 out of the 23 employees who appeared at the jobsite were new hires, namely, Williams, Scott, Tipton and Murray, Rogers, West (West's hire date was 3/14/96, see his application) Mason, Buskill, Denton, Baker, McMillian, Goodman, Romero, Allen, Hamm, Carpenter and Collins. Assignments of then-current Company employees from 2/10 were Harney, Lee Taylor, Griffey, Sheele, Titus and Hampton.

Fortner testified that Respondent's usual hiring practice is to conduct its hiring from its office in Tennessee, and that before he hiring Neumane, Packer and Dehaut at the jobsite, Respondent ran an ad in a Tennessee paper but received no response. The General Counsel subpoenaed records of such ads but Respondent produced none and admitted that it checked with local Tennessee papers where such ads were usually placed and learned that it placed none with them during the December 1995/January 1996 time period.

Respondent produced 11 applications it received in the week after the Pennsylvania ad, including those of Neumane, Dehaut and Packer. Neumane testified that, about a week after he presented the organizing letter, (about January 30), Fortner approached him and asked if he knew any welders who could work on precipitators, and when Neumane said he did, Fortner said he was going to be needing more people the next week. Fortner testified that while he could not remember, he "might have" asked Neumane about welders because Neumane, Dehaut and Packer were "good workers and good welders," and "I would surely consider hiring somebody of their caliber."

Fortner testified that when local applicants approached him at the jobsite after January 15, he told them he was not taking applications, and that if Respondent hired anyone it would run an ad in the paper or would hire from Tennessee. According to Howell and Neumane, Fortner never said to them in their discussions about Respondent's hiring that Respondent would not hire from the jobsite or would hire only from its office in Tennessee, or would hire locally only after running an ad. Patterson, Manculich and LaPointe also did not receive any such information when they left their names, on February 5, and there is no evidence of actual ads being run in Tennessee at any time. Otherwise, the Respondent hired a number of new employees for the jobsite after Neumane, Dehaut and Packer but Fortner testified that all were sent up to the jobsite by Respondent's main office in Tennessee.

The Respondent's records show Pennsylvania employees Neumane, Dehaut and Packer listed separately on its employment summaries as "independent contractors." Jobsite payroll records (produced pursuant to the General Counsel's subpoena), show portions whited out including the jobsite payroll sheet for the week ending January 19, where five lines are whited out. Fortner examined the original whited-out copy and testified that three of those lines corresponded to local hires Neumane, Dehaut and Packer who were employed as "independent contractors" and of the two other whited-out names, one was Gene Braddock. Respondent produced no records or testimony about how Braddock came to be hired or employed at the Wysox jobsite and his name does not appear on the summaries. The jobsite

payroll sheet for the week ending January 24 was cut off, and it is impossible to tell how many names were excised, except that it must have included Neumane, Dehaut and Packer. The payroll sheet for the week ending February 2 shows that 6 lines have been covered up, again including the 3 local hires. Four lines are missing from the sheet for the week ending February 9, and for the weeks ending February 16 and 23 (by which time the 3 Union members had quit), there is one line missing. Two lines are whited out on the March 8 sheet, three lines on the March 15 sheet, four lines on the March 23 sheet, and so on. The white-outs were discussed at the hearing, the Respondent was allowed additional time to produce copies of the records without white-outs, and any other records showing the employment of the individuals whose names were whited out, as required by the General Counsel's subpoena. Thereafter, the Respondent's counsel informed the General Counsel that "it is Respondent's position that it does not have any other documents in its actual or constructive possession."

III. Discussion

This proceeding involves the apparent failure of the Respondent to hire local, union-affiliated job applicants for a Pennsylvania construction project which was staffed primarily with non-union workers from Tennessee, the Respondent's home location, and a related alleged that it threatened to impose unspecified reprisals if certain other employees engaged in union solicitation or distribution on company premises.

A. The No Solicitation Threat

The job site rule in question was communicated to both the Respondent and its employee by the general contractor and owner and it concisely states that "Distributing written or printed material and/or solicitation on company premises is not permitted."

This no solicitation/no distribution rule clearly extended to all times anywhere on company premises, including nonworking times and nonworking areas, and it is unlawfully overbroad. See *Ultrasystems Western Constructors*, 310 NLRB 545, 552 (1993). Respondent did not promulgate or maintain the rule, but superintendent Fortner admitted the rules themselves stated that contractors had such a responsibility and he understood it was his responsibility to enforce the rule.

Fortner testified that when he read the Union organizing letter given him by employee Neumane he said: James, if you give me this letter I'll have to give it over to Rust Engineering, and that he would do so because of the jobsite rule against "solicitation on site."

Employee witnesses Neumane and Dehaut both gave credible testimony that Fortner made the remark "you don't want to give me that" a phrase similar to the phrase admitted to in Fortner's testimony, and that he then repeated the phrase twice more, while using a harsh tone of voice. Fortner said that he didn't "remember" saying what Neumane and Dehaut specifically recalled but he did not address the matter of whether he stated any phrase repeatedly.

Under these circumstances and in any evaluation of the demeanor of the witnesses I find that the more detailed recall of witnesses Neumane and Dehaut should be credited over Fortner's failure to recall and I conclude that Fortner said and repeated the phrase attributed to him.

The repetition of a statement to an employee that that employee doesn't want to do

what he already has done (deliver a union organization letter), reasonably communicates an implied threat, a threat that was reinforced by a similarly reported comment to Newman when (as he credibly testified), he began to display union stickers. In the context of Fortner's reference to the jobsite no solicitation rule, the clear nature of the statement that the employee did not want to do what he had already done to apparently break that rule, and the statement that the letter would be turned over to a higher authority, clearly communicated to the employees an implicit threat that they would suffer reprisals if they continued their protested conduct. Accordingly, I find that Fortner's threat of unspecified reprisals violated Section 8(a)(1) of the Act as alleged, see, *Northern Wire Corporation*, 291 NLRB 727, 729-30 (1988).

Failure to Hire

The foundation of Section 8(a)(1) and (3) "failure to hire" allegations rest on the holding of the Supreme Court that an employer may not discriminate against an applicant because of that person's union status, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-87, U.S. Ct. 845 (1941). In this connection, the Board endorses a causation test turning on employer motivation, see *Wright Line*, a Division of Wright Line, Inc., 251 NLRB 1083 (1980), see *NLRB v. Transportation Management Corp.*, 103 S. Ct. 2469 (1983). Otherwise, the Board has established precedent on the issue and I find that the Board's application of the test set forth in *Fluor Daniel, Inc.*, 304 NLRB 970 (1991) and *KRI Constructors*, 290 NLRB 802, 811 (1988) and case cited therein are controlling. Based on this precedent it is found that a prima facie case for an employer's unlawful refusal to hire a job applicant is established by the General Counsel when it is shown that: (1) an individual files an employment application, (2) the employer refused to hire a job applicant, (3) the applicant is or might be expected to be a union supporter, (4) the employer has knowledge of the applicant's union sympathies, (5) the employer maintains animus against union activity, and (6) the employer refuses to hire the applicant because of such animus. In order to rebut the General Counsel's prima facie case, the employer must affirmatively establish that the applicant would not have been hired absent the discriminatory motive.

Here, the records shows that in September 1995 the Respondent started work at the Towanda jobsite with a dozen workers from its Tennessee home area. The subsequent actions by the alleged discriminatees in visiting the Respondent's jobsite office and in submitting job applications (or an equivalent substitute) clearly are protected activities, including the visits and job applications of Union organizer Howell who clearly indicated his desire not only to apply for work but do provide the Company with a full day's work effort apart from his participation in any protected organizing activity, see *NLRB v. Town & Country Electric*, 116 S. Ct. 450 (1995).

Here, I find that witness Howell gave specific, detailed, and believable testimony about the circumstance of his initial visit to the jobsite on December 13 and I credit Howell's testimony concerning a conversation with the Respondent superintendent, Fortner, rather than Fortner's vague testimony that he couldn't "recall" meeting Howell prior to January 25. Fortner did admit that he was at the jobsite in December and his testimony that he did not have job application forms at the jobsite in December is consistent with Howell's testimony that when he asked for an application Fortner said he didn't give out applications.

Howell did give Fortner a verbal request for employment and a verbal account of his experience, including work on precipitators and, with Fortner's acquiescence, gave the Respondent his name and number on a pad provided by the Respondent. Howell again asked Fortner for a job on January 25. He was not told that Fortner then had job application forms at the jobsite but he again left written information with both his home and motel phone contact.

Witnesses Patterson and Manculich, along with applicant LaPoint, visited the jobsite on February 5, went to what was identified as the Respondent's office trailer, spoke to an older man behind a desk and asked if "they" were hiring. "Jim" the person behind the desk said they had just hired three welders but would probably need more. Patterson asked if he had any application but "Jim" said he did not and gave them a legal pad and told them to give their names and phone numbers and that "he" would be in touch if more welders were needed. Each also put down that they were welders. Patterson then added that they were ready to come to work at any time and nothing was said by Jim about any other requirement for being considered as job applicants.

The Respondent argues that Fortner was never made aware of the visit of these three applicant and that the General Counsel cannot establish that the Respondent knew they were seeking jobs. I find, however, that the record is sufficient to show that "Jim" was a supervisor of the principal contractor to which the Respondent was subcontractor and that he held himself out to the applicants as being a senior person with authority to work behind a desk in the Respondent's office trailer. He also presented himself as a person with apparent authority to act on the Respondent's behalf with respect to knowledgeable information about the Respondent's recent and future hiring plans and with apparent authority to accept written information about their identity, how to be contacted, and their seeking jobs as welders.

This information was the equivalent of a job applicant and it was effectively placed in the possession of a person who was the Respondent's agent or a person with apparent authority to act on the Respondent's behalf. Accordingly, I conclude that the General Counsel has shown that Howell, Patterson, Manculich and LaPoint each filed an "application" for employment with the Respondent.

Each applicant was either a Union organizer or a Union member. Howell made his identity as an organizer clear to Fortner, and the other applicant indicated on the written information that stated their desire for work as welders and that they were members of Local 154 of the Union. One also wore a Union jacket and the others wore Union hats in plain view of "Jim" and other employees who were in or near the Respondent's trailer and I conclude that the applicants are shown to have identified themselves as expected Union supports and that the Respondent had actual or constructive knowledge of their sympathies.

None of these applicants were hired nor were they even contacted about their availability or qualifications even though about February 1 Fortner asked local employee Neumane if he knew any welders who had worked on precipitators and said he would be needing people the next week.

In fact, the Respondent told Howell on December 13 that it was "kind of full" and not hiring but it needed employees 3 weeks later, it ran a blind ad in the local paper but did not call Howell. Respondent hired three local employees through the blind ad. In late January, Howell returned and again solicited employment. Fortner told Howell that Respondent was not hiring, even though Respondent's records reveal that at that very time Respondent was in the process of hiring three welders from Tennessee who joined the work crew in February at Fortner's request.

Here, the Respondent displayed animus toward the Union by Fortner's unlawful Section 8(a) threats to voluntary organizers Neumane, Dehaut and Packer on January 23, as discussed above. Further, Fortner lied to Howell on January 25 about the availability of jobs and I agree with the General Counsel that these facts are sufficient to show that the Respondent maintains

animus against union activity and that the Respondent's failure to hire should be considered to be motivated by antiunion animus, see *Industrial Turnaround Corp.*, 321 NLRB 181, 188-89 (1996).

5 The Respondent's principal defense appears to be its claim that it didn't need to hire any
(more) local employees as it had a full complement of employees. It also asserts that Howell
was not hired because he didn't come to the jobsite after the ad was run on January 5-7 until
January 25 when it already had hired 3 local applicant who responded to the ad. It also implies
10 that it hired persons from Tennessee because they had connections with the company or were
known to the company and that it had a legitimate interest in hiring Tennessee people who
would likely work for it on other jobs rather than locals who would not.

 Significantly, the latter argument is refuted by the Respondent's own information that the
one past local (rather than Tennessee) hire that Fortner was familiar with who was hired at a
15 Colorado location but who thereafter continued with the company, including working for a time
at the Waysox jobsite.

 Here, I find that the Respondent's attempted explanation for its conduct fall far short of
persuasively showing that it would not have hired these applicants absent the discriminatory
20 motive.

 As noted by the General Counsel, the winter of 1995-96 was severe in Pennsylvania
with a blizzard on January 7 and, according to Fortner, a lot of snow and rain and tremendously
cold. He agreed that a lot of the Tennessee employees who came to the jobsite in January,
25 February and March left rather quickly. The job was completed about June 1st, however, the
records which could or should have shown specific details of the Respondent's hiring practices
are altered, incomplete or were not made available, even though they are the type of
employment records that should be maintained for other Governmental agencies. The
testimony and to some extent the records, do show, however, that the Respondent continued to
30 seek and did employ welders with the same qualifications held by the four union retailed
applicants that it failed to hire or contact during the first months of 1996.

 The Respondent contends that after hiring only three local employees in response to its
ad, it reverted to its normal practice of hiring workers who came from the area of its home office
35 in Tennessee. No ads from Tennessee were shown to exist even though Fortner initially said
the Respondent had recruited that way in early 1996. As noted above, records which could
show other local hires or show a complete picture of its actual practices were altered,
incomplete or not made available and, accordingly, they do not support the Respondent's claim
that it merely engaged in legitimate normal hiring practices and did not avoid hiring any more
40 local welders after and because it learned of their Union affiliations. In view of Fortner's
February 1 statement to Neumane that it would need more people the next week and the
apparent availability of the local applicants (and other local welders) qualified to do the work, I
find that the Respondent's apparent practice of repeatedly bringing in new Tennessee workers
who often stayed only a short time rather than hiring local workers experienced with local winter
45 conditions, shows that its reason for not using more local employees was pretextual and
indicative of an unlawful motive.

 Matters pertaining to when and the specific number of jobs available are relevant to the
compliance stage of this proceeding and do not affect the basic determination of the illegality of
the Respondent's practice inasmuch as these clearly were some jobs available at the time the
four applications were ignored and, under these circumstances, I find that the Respondent has
failed to persuasively rebut the General Counsel's prima facie showing of unlawful motivation.

Otherwise, I find that the General Counsel has met his overall burden and has shown that the Respondent's failure and refusal to consider and hire the four discriminatees named above violated Section 8(a)(3) and (1) of the Act, as alleged, see *P.S.E. Concrete Forms*, 303 NLRB 890 (1991).

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IV. Conclusions of Law

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

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

3. By engaging in a pattern or practice of refusing to consider applicants for employment based on their suspected union sympathies, Respondent discriminated in regard to hire in order to discourage union membership in violation of Section 8(a)(3) and (1) of the Act.

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4. By repeatedly telling employees that they did not want to engage in protected union activity, the Respondent implicitly threatened employees with unspecified reprisals and has interfered with, restrained and coerced employees in the exercise of their rights guaranteed them by Section 7 of the Act, and thereby has engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act.

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V. Remedy

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Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act.

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It having been found that Respondent unlawfully discriminated against job applicants Millard "JD" Howell, John LaPoint, Michael John Manculich, and Ernest "Skip" Patterson, based on their suspected union sympathies, it will be recommended that Respondent make such employees whole for any loss of earnings they may have suffered by reason of the failure to give them nondiscriminatory consideration for employment, by payment to them of a sum of money equal to that which they normally would have earned in accordance with the method

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set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).³

5 Other considerations regarding the Remedy and the specifics of the relief granted must wait until the compliance stage of the proceeding, see *Fluor Daniel Inc.*, 304 NLRB 970, 981 (1991) and *Dean General Contractors*, 285 NLRB 573-574 (1987). Otherwise, it is not considered necessary that a broad Order be issued.

10 Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act I hereby issue the following recommended⁴

ORDER

15 Respondent, Precipitator Service Group, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

20 (a) Refusing to consider for employment job applicants for the position of welder because they are members or sympathizers of the Union.

25 (b) Implicitly threatening employees with unspecified reprisals by telling them that they do not want to engage in activities that are within their rights guaranteed them by Section 7 of the Act.

(c) 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:

30 (a) Make whole Millard “JD” Howell, John LaPoint, Michael John Manculich, and Ernest “Skip” Patterson for any loss of earnings they may have suffered by reason of the discrimination against them as set forth in the remedy section of the decision.

35 (b) 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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³ Under *New Horizons*, interest is computed at the “short-term Federal rate” for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

⁴ 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.

5 (c) Within 14 days of service by the Region, post at its Elizabethton, Tennessee, facilities and all current jobsites copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

10 (d) 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 the Respondent has taken to comply.

Dated, Washington, D.C. September 5, 1997.

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Richard H. Beddow, Jr.
Administrative Law Judge

⁵ 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

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

10 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.

- 15 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.

20 WE WILL NOT refuse to consider for employment job applicants for the position of welder
because they are members or sympathizers of a union.

25 WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the rights
guaranteed them by Section 7 of the Act by implicitly threatening employees with unspecified
reprisals by telling them that they do not want to engage in activities that are within their Section
7 rights.

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.

30 WE WILL make whole job applicants Millard "JD" Howell, John LaPoint, Michael John
Manculich, and Ernest "Skip" Patterson for all losses they incurred as a result of the
discrimination against them, in the manner specified in the section of the Administrative Law
Judge's Decision entitled "The Remedy."

35 PRECIPITATOR SERVICES GROUP, INC.
(Employer)

40 Dated _____ By _____
(Representative) (Title)

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

45 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, 615 Chestnut
Street, 7th Floor, Philadelphia, PA, 19106-4404, Telephone 215-597-7643.