Aerotek, Inc. *and* International Brotherhood of Electrical Workers, Local 22, affiliated with the International Brotherhood of Electrical Workers, AFL–CIO. Cases 17–CA–071193, 17–CA–075605, and 17–CA–078720

December 15, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On March 11, 2013, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions, the General Counsel filed cross-exceptions, both parties filed supporting and answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as modified below, to modify the remedy, and to adopt the judge's recommended Order as modified and set forth in full below.[1]

We adopt the judge's finding, for the reasons he stated, that the Respondent, through its recruiters, unlawfully told employees that wages were confidential and were not to be discussed with other employees. As explained below, we also agree with the judge that the Respondent unlawfully refused to hire union salts Brett Johnson, Tim Hendershot, Alan Winge, and Tom Jankowski. But, contrary to the judge, we find that Johnson's attempt to solicit one of the Respondent's client employers to hire electricians referred from the Union's hiring hall, after the Respondent had discriminated against Johnson, does not disqualify him from instatement and full backpay. We will also modify the judge's notice-posting requirement in order to ensure that applicants for hire, along with the Respondent's employees, learn of their statutory right to protection from discrimination. We reject, however, the General Counsel's request for additional remedies.[2]

[1] We shall modify the Order and substitute a new notice to conform with our findings here, our standard remedial language, and our decisions in *AdvoServ New Jersey*, 363 NLRB No. 143 (2016), and *Durham School Services*, 360 NLRB No. 85 (2014).

[2] The General Counsel requested that the Respondent be required to take certain affirmative steps in processing the four discriminatees' applications and to notify them and the Region in writing of "all job openings" for which they are qualified during the 60-day notice posting period. We find those provisions unnecessary in view of the Order's other requirements to make the discriminatees whole and not to discriminate unlawfully.

I. THE FAILURE TO HIRE JOHNSON, HENDERSHOT, WINGE, AND JANKOWSKI

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to hire Johnson, Hendershot, Winge, and Jankowski. As the judge found, the General Counsel met his initial burden under FES[3] by showing that the Respondent was hiring at the time of the alleged unlawful conduct; that the discriminatees had experience and training relevant to the jobs for which the Respondent was hiring; and that animus against union activity was a motivating factor in the Respondent's failure to hire the discriminatees. The judge also found, as required by *Toering Electric*,[4] that the General Counsel showed that the discriminatees applied for employment and that their applications reflected a genuine interest in becoming employed by the Respondent. For the reasons stated by the judge, and as further discussed below, we conclude that the General Counsel carried his burden of proof in all respects and that the Respondent failed to establish a defense to the refusal-to-hire allegations.

A. Genuine Interest in Employment

The Respondent contends that the discriminatees were not genuinely interested in being hired. We reject each of the Respondent's arguments on this point.

First, the Respondent relies on the "generic" similarity of format among the resumes for three of the discriminatees, the fact that those resumes were submitted together by Johnson, and Hendershot's name appearing at the top of Winge's resume. Contrary to the Respondent's contentions, none of those facts indicates a lack of interest in employment. As the judge noted, "[t]he fact that applications may be submitted in a batch is not, in and of itself, sufficient to destroy genuine applicant status, provided that the submitter of the batched applications has the requisite authorization from the individual applicants."[5] As the credited testimony shows, Johnson was authorized by the other three discriminatees to submit their resumes to the Respondent. The Respondent also treated the discriminatees' resumes as valid, as shown by the fact that one of its recruiters later attempted to contact Hendershot for a job (mistakenly, as the judge found, and not reflecting the Respondent's intent). Moreover, Johnson's resume was not "generic" and clearly stated his extensive industrial experience, yet he was not hired. In contrast, even without receiving a resume, the Respondent hired Joe Stock, a salt who con-

[3] *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).

[4] *Toering Electric Co.*, 351 NLRB 225, 233 (2007).

[5] *Toering*, 351 NLRB at 233 fn. 51.

cealed his current union affiliation. The Respondent thus demonstrated that it did not consider even the absence of a resume to indicate lack of interest in employment.

Second, the Respondent points to Johnson's failure to follow up on a telephone suggestion by one of its recruiters that he apply for a foreman position with one of the Respondent's clients. Johnson had called the recruiter under a false name for the purpose of providing a reference for another salt applicant. He could not very well have applied for the foreman position under the false name, and he had already submitted his own resume (which he later updated) to the Respondent. In these circumstances, we find that Johnson's failure to take additional steps in pursuit of the foreman position does not indicate a lack of interest in employment.[6]

Third, the Respondent relies on the Union's salting agreement with its members, under which the Union can direct a member to leave a nonunion employer if the Union determines that the employer is not a viable organizing prospect. We do not agree that the salting agreement is evidence that the discriminatees were not genuinely interested in working for the Respondent. There are many reasons why an employee might choose to leave any particular job—e.g., better job prospects elsewhere, starting a business, injury, or illness. No one would seriously contend that the possibility of an employee's quitting employment at some future time for any of those reasons indicates a lack of interest in employment at the time of application. Further, as noted by the judge, the Respondent was hiring for projects of short duration and in, fact, hired some employees who informed it that they intended to work elsewhere within a few months. We reject the suggestion that the mere possibility of quitting under the terms of the salting agreement indicates a lack of interest on the part of any of the discriminatees.[7]

In sum, as the judge found, the Respondent presented no credited evidence that "creates a reasonable question as to the [discriminatees'] actual interest in going to work for the [Respondent]."[8] Accordingly, the discriminatees' applications alone were sufficient to establish their genuine interest.[9] In any case, we also agree with the judge that the credited evidence confirms the discriminatees' genuine interest in being hired by the Respondent.[10]

B. Animus

We agree, for the reasons stated by the judge, that the Respondent had a discriminatory motive for failing to hire the discriminatees. We find no merit in the Respondent's further assertion that it could not have been motivated by unlawful animus because it hired other applicants who were union members during the relevant timeframe. The Respondent was unaware of any of those other applicants' current union affiliations when it hired them.[11] And even if the Respondent had shown that it did not discriminate against some known union supporters, this would not preclude our finding a violation with respect to the discriminatees.[12]

C. Respondent's Defense

Finally, the Respondent has failed to show, under FES, that it would not have hired the discriminatees even if they had not been union supporters. As the judge found, "Respondent has not offered any credible nondiscriminatory explanation for failing to place the four discriminatees in the many jobs that were available to them." Accordingly, we agree with the judge that the Respondent's refusal to hire the discriminatees violated Section 8(a)(3).[13]

II. JOHNSON'S ENTITLEMENT TO A FULL REMEDY

On February 29, 2012, Johnson visited the manager of Interstates Electric, one of the Respondent's major cli-

[6] As the General Counsel notes, the Respondent's willingness to discuss job openings with (as it thought) a complete stranger who had not submitted an application or even indicated an interest in employment, contrasted with its failure ever to contact Johnson, is evidence of unlawful motive.

[7] The Respondent cites several additional factors without explaining why, in its view, any of them indicates lack of interest on the discriminatees' part. Those factors, taken either singly or together, do not support the Respondent's contention. Some are factually unsupported, such as the claim that the Union's salting campaign was intended to drive the Respondent out of business. Most lack any apparent relevance to the discriminatees' interest in employment with the Respondent, e.g., the Union's attempt to obtain the Respondent's internal billing and rate structure by making surreptitious recordings. And none finds support in the cases cited in the Respondent's brief.

[8] *Toering*, 351 NLRB at 233.

[9] Id. at 233–234.

[10] Unlike the judge, however, we do not rely on the fact that the Respondent entered Winge's name into its internal database, or on the fact that at least eight other Respondent employees were secretly Union members during the relevant period. Neither of these circumstances was indicative of the discriminatees' intentions.

[11] By contrast, in *E & I Specialists*, 349 NLRB 446 (2007), and *Shell Electric*, 325 NLRB 839 (1998), cited by the Respondent, the employers knew of (or assumed) the applicants' current union affiliation.

[12] *Fresh & Green's of Washington, D.C.*, 361 NLRB No. 35, slip op. at 1 fn. 1 (2014); *Fluor Daniel, Inc.*, 333 NLRB 427, 440 (2001), enfd. in relevant part 332 F.3d 961 (6th Cir. 2003), cert. denied 543 U.S. 1089 (2005); *KRI Constructors*, 290 NLRB 802, 812 (1988).

[13] The judge found that the Respondent also unlawfully refused to consider for hire the discriminatees (as the General Counsel had alleged), and we adopt that finding. We need not order an affirmative remedy for that violation, however, because the remedy for an unlawful refusal to consider is subsumed within the broader remedy for an unlawful refusal to hire where the latter violation is found for the same discriminatee. E.g., *Jobsite Staffing & Jobsite Personnel*, 340 NLRB 332, 333 (2003).

ents. Johnson offered to "cut out the middleman" by having electricians referred from the Union's hiring hall directly to Interstates.[14] The manager refused. About a week later, Johnson called the owner of Interstates and made the same offer.[15] At that time, more than 6 months had passed—with no response from the Respondent—since Johnson had submitted his resume to the Respondent and indicated that he was interested in "any electrical position."

The judge found that Johnson's conduct in attempting to supplant the Respondent in providing employees to Interstates was "obviously inconsistent with the duties of an employee." Based on this finding, the judge concluded that Johnson's solicitation disqualified him from remedial instatement, and he tolled Johnson's remedial backpay as of the date he first approached Interstates. We disagree with the judge's analysis and conclusion, for the reasons that follow. As we will explain, it matters here that Johnson was not an employee when he engaged in the solicitation and that Johnson's conduct came after the Respondent unlawfully refused to hire him.

It is well established that *current* employees have a duty of loyalty to their employer, and that a violation of this duty may constitute unprotected activity.[16] Thus, the Board has found that employee actions that interfered with the employer's business contracts, or that otherwise deprived the employer of business, were not protected by the Act, and that a discharge for such unprotected activity does not violate the Act.[17] The Board has also held that publicly disparaging the employer may violate a duty of loyalty and thus permit an employer to lawfully refuse to hire an *applicant* for employment.[18]

More to the point, where an employee has been unlawfully discharged, the Board has held that it may deny remedial reinstatement if the employer can prove that the employee engaged in "misconduct so flagrant as to render the employee *unfit for further service*, or a threat to efficiency in the [workplace]."[19] The burden placed on the employer under this test in the remedial context is "heavier . . . than when [the employer] is merely seeking to justify the original discrimination," because the employer is "seeking to be excused from his obligation to reinstate or to pay backpay to a discriminatee because of misconduct which was not a factor in the discriminatory action."[20]

The Board's "unfit for further service" standard distinguishes between misconduct that occurred before the unlawful discrimination and misconduct that occurred afterwards. This is necessary because:

[A]n "evaluation of postdischarge employee misconduct requires sympathetic recognition of the fact that it is wholly natural for an employee to react with some vehemence to an unlawful discharge." Employers who break the law should not be permitted to escape fully remedying the effects of their unlawful actions based on the victims' natural human reactions to the unlawful acts.

Hawaii Tribune-Herald, id. (quoting *Trustees of Boston University*, 224 NLRB 1385, 1409 (1976), enfd. 548 F.2d 391 (1st Cir. 1977)).[21]

This case does not fit squarely into any category established by Board precedent. No prior decision has addressed a situation where an *applicant* for employment engaged in arguably disloyal conduct, but only *after* the prospective employer had unlawfully refused to hire him.[22] But absent on-point precedent, we take a different approach—and reach a different result—from the judge's. We assume, without deciding, that at the time of his conduct, Johnson had some duty of loyalty to the Respondent, although he was merely an applicant for

[14] The Respondent, a staffing company for multiple industries, hires and refers electricians to other companies engaged in construction.

[15] These facts are established by an activity log Johnson prepared for himself, which provides the only evidence in the record pertaining to his solicitation of Interstates' work.

[16] *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).

[17] See *ATC/Forsythe & Associates*, 341 NLRB 501, 503-504 (2004); *Kenai Helicopters*, 235 NLRB 931, 936 (1978); *Associated Advertising Specialists*, 232 NLRB 50, 54 (1977).

[18] *Five Star Transportation, Inc.*, 349 NLRB 42, 46 (2007). In *Five Star*, school bus drivers who worked for the incumbent contractor wrote letters to the school district urging that its upcoming contract be awarded again to their employer, not to a competing company. The letters sharply criticized the competitor. When the competitor (the respondent) won the contract, it refused to hire the drivers who had applied for positions. A divided Board panel found that certain of the drivers' letters were disparaging and unprotected, and so found lawful the refusal to hire those drivers. The majority "disagree[d] with the dissent's suggestion that there is no duty of loyalty owed to a prospective employer by . . . applicants." Id. at 46.

The *Five Star* majority did not address the tension between its holding and an earlier decision, *American Steel Erectors, Inc.*, 339 NLRB 1315 (2003). In *American Steel Erectors*, a Board majority held that an employer lawfully refused to hire a union representative whose "offensive statements" about the employer lost the protection of the Act and "rendered him unfit for future employment," but also observed (in agreement with the dissent) that the representative "owed the [employer] no duty of loyalty at the time." Id. at 1317.

[19] *Hawaii Tribune-Herald*, 356 NLRB 661, 662 (2011) (emphasis added) (quoting *O'Daniel Oldsmobile*, 179 NLRB 398, 405 (1969)), enfd. 677 F.3d 1241 (D.C. Cir. 2012).

[20] Id.

[21] See also *The Fund for the Public Interest*, 360 NLRB No. 110, slip op. at 13 (2014) (same); *CF Taffe Plumbing Co.*, 357 NLRB 2034, 2034 (2011) (same).

[22] *Five Star*, supra, and *American Steel Erectors*, supra, are fundamentally distinguishable, of course, inasmuch as the applicant's conduct in each of those cases occurred before—not after—the prospective employer's unlawful discrimination.

employment, rather than an employee.[23] We further assume, again without deciding, that Johnson's conduct, in seeking to persuade one of the Respondent's clients to hire through the Union's hiring hall, was disloyal.[24] Subject to these assumptions, we conclude that the proper test for deciding whether instatement is an appropriate remedy here is the heightened "unfit for further service" test that the Board applies when an unlawfully discharged employee has engaged in postdiscrimination misconduct.[25] In applying that test, as noted above, we place a "heavier" burden on the Respondent to make that showing in the remedial phase of the case.

Under that heightened test, we cannot conclude that Johnson was "unfit for further service" —or, rather, unfit for *future* service, because of his conduct after the Respondent's unlawful refusal to hire him. We are guided by two independent considerations. First, it is a reasonable inference that, at the time of his conduct, more than 6 months after he had applied for work with the Respondent, Johnson knew, or at least reasonably suspected, that the Respondent had unlawfully refused to hire him and his fellow discriminatees. In such circumstances, that he might have had a "natural human reaction to the unlawful acts"—seeking to persuade the Respondent's client to turn to the Union for employees—would hardly be so disproportionate or indefensible as to be disqualifying. *Hawaii Tribune-Herald*, supra.

Second, nothing about Johnson's conduct reasonably tends to suggest that, if he were instated to employment, that conduct would continue or that his affiliation with the Union would somehow preclude him from serving as a loyal employee. (Indeed, it would seem rather that, if instated, Johnson would have a strong incentive to honor his duty of loyalty—which, as a current employee, he would clearly owe—in order to retain his position and to be able to pursue his organizing activity.) To presume that Johnson would be disloyal, based on his prior conduct on behalf of the Union, and to deny him a complete remedy on that basis would run contrary to the principles underlying the Supreme Court's decision that union salts cannot be assumed to have disloyal intentions and are properly treated as statutory employees by the Board. *NLRB v. Town & Country Electric, Inc*., 516 U.S. 85, 96–98 (1995).[26]

Accordingly, we conclude that Johnson is not disqualified from instatement and full backpay.[27]

III. REMEDIAL NOTICE

The judge's recommended Order includes the standard requirement that the Respondent post a remedial notice in "all places where notices to employees are customarily posted," including via email or any other electronic means by which the Respondent communicates with its current employees. The Respondent's unlawful discrimination, however, affected primarily job applicants—not necessarily limited to the applicant discriminatees in this case—rather than its current employees. In addition, the record shows that applicants sometimes do not even visit the Respondent's facility or meet in person with a Respondent recruiter in the course of processing their applications. Nor can we assume that applicants have access to any of the internal electronic media through which the

[23] In this respect, then, we treat *Five Star*, supra, as valid law, despite its troubling inconsistency with *American Steel Erectors*, supra, on the issue of whether applicants owe a duty of loyalty to their prospective employers.

[24] We question, however, whether a union's business representative seeking employment engages in misconduct in these circumstances merely by simultaneously soliciting work for employees who seek it through the union's hiring hall. Cf. *Tradesmen International*, 332 NLRB 1158, 1159–1161 (2000), enf. denied 275 F.3d 1137 (D.C. Cir. 2002), in which the Board found that a union organizer's attempt to have the nonunion respondent subjected to municipal bonding obligations imposed on subcontractors was protected because it was intended to "assist the union and its constituents" by protecting employees' job opportunities. The court, in reviewing *Tradesmen*, found no nexus between the organizer's statement that the respondent was subject to bonding requirements and the employees' terms and conditions of employment. See 275 F.3d at 1142. In contrast, Johnson's effort in this case to directly obtain work for the Union's hiring hall registrants has a clear nexus to employees' terms and conditions. "[A]ctivity that is otherwise proper does not lose its protected status simply because [it is] prejudicial to the employer." *Tradesmen International*, supra, 332 NLRB at 1160, quoting *NLRB v. Circle Bindery, Inc.*, 536 F.2d 447, 452 fn. 7 (1st Cir. 1976).

[25] *Sahara Datsun*, 278 NLRB 1044 (1986), and *Firehouse Restaurant*, 220 NLRB 818 (1975), cited by our dissenting colleague, were overruled in this connection by *Hawaii Tribune-Herald*, supra. Our colleague is correct that the Board did not hold that the outcome of those cases would have been different under the new standard, but neither did the Board hold that the outcome would have been the same. Thus, the cases have limited, if any, precedential value. *North American Dismantling Corp.*, 341 NLRB 665 (2004), which our colleague also cites, is inapposite because the employer had not acted unlawfully toward the employee before he solicited business from one of the employer's customers.

[26] The *Five Star* Board acknowledged the Supreme Court's *Town & Country* decision, but found that did not compel a different result there. The Board majority observed that although an "intention to organize [is] not an act of disloyalty to the prospective employer," the conduct of the *Five Star* applicants "did not simply indicate an adherence to the Union" but "reflected an effort to undermine the [prospective employer's] standing." 349 NLRB at 46. Johnson's conduct in this case is distinguishable from the conduct at issue in *Five Star*. Even apart from the critical fact that it occurred *after* he was unlawfully discriminated against, the conduct did not involve public disparagement of the Respondent, but rather indicated an "adherence to the Union" and an effort to obtain work for its hiring hall.

[27] Because we have found that Johnson is entitled to full backpay, we need not pass on the General Counsel's cross-exception that the judge erred in tolling his backpay as of the date of his solicitation, rather than as of the later date when the Respondent became aware of his solicitation.

Respondent may communicate with its employees.[28] Moreover, most, if not all, of the electricians hired by the Respondent are referred to other employers' worksites and consequently might never see the notice posted at the Respondent's own facility. Additional mailing and posting requirements are therefore warranted here for two related purposes: first, to ensure that both the Respondent's applicants and its employees receive notice of their Section 7 right to protection from discrimination in hiring; and, second, to ensure that those applicants' and employees' full knowledge of that right will reduce the possibility of further unlawful hiring discrimination by the Respondent.[29]

Accordingly, we will require the Respondent to mail copies of the remedial notice to all individuals who applied on or after July 29, 2011,[30] for electricians' positions advertised by the Respondent that were located in the region serviced by its Omaha facility. In addition, we will require the notice to be mailed to all of the Respondent's current electricians who were hired for such positions but do not work at the Respondent's Omaha facility. "The Board provides for the mailing of individual notices when posting will not adequately inform the employees of the violations that have occurred and their rights under the Act."[31] For the benefit of applicants, and as a logical application of *J. Picini Flooring*, supra, we will also require the notice to be sent by email to all applicants for electricians' positions in Omaha who communicated with the Respondent by email in the course of submitting their applications.[32]

Further, as we have done in other cases, we will require the Respondent to include, for a period of 6 months,[33] a prominent statement at the beginning of its job applications for electricians' positions located in the region serviced by its Omaha facility, and on all of its advertisements for such positions, including the applications and advertisements it posts on Career Builder, Thingamajob, and other electronic websites and media.[34] The statement is to read as follows:

> Aerotek is required to comply with the National Labor Relations Act. Therefore, we will recruit and refer any and all applicants without regard to their involvement with, membership in, or allegiance to any union. We acknowledge the right of employees to form, join, or assist unions of their own choosing, or to refrain from such activities.

These requirements will ensure that applicants are made aware of their right to protection from discrimination under the Act from the time they submit their applications.[35]

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[28] In characterizing the remedial measures we adopt for applicants as "extraordinary," our dissenting colleague overlooks the failure of conventional notice to account for these circumstances. "The Board . . . tailors its posting requirement to adapt to varying circumstances on a case-by-case basis." *Technology Service Solutions*, 334 NLRB 116, 117 (2001) (granting motion to expand notice posting).

[29] See *J. Picini Flooring*, 356 NLRB 11, 12 (2010) (remedial notices "serve to deter future violations"); *Ramada Inn*, 175 NLRB 474, 474 (1969) (remedial notice "serve[s] a preventive as well as a remedial purpose"). Our dissenting colleague wrongly implies that only those employees who were already unquestionably aware of the Respondent's misconduct—in this case the four discriminatees—are entitled to remedial notice. Cf. *Fresh & Easy Neighborhood Market*, 356 NLRB 1175, 1175 (2011) (corporatewide remedy is permissible and necessary "to ensure that all affected employees will be informed of the respondent's violation and the nature of their rights under the Act"), enfd. 468 Fed.Appx. 1 (D.C. Cir. 2012).

[30] We normally fix the starting date for the period defining the recipients of a remedial notice as the date of the respondent's initial violation of the Act. See, e.g., *A.W. Farrell & Son*, 361 NLRB No. 162, slip op. at 2 (2014) (notice mailed to all employees respondent employed "at any time from the onset of the unfair labor practices"); *Sommerville Construction Co.*, 327 NLRB 514, 514 fn. 2 (1999), enfd. 206 F.3d 752 (7th Cir. 2000) (same). Because we cannot fix the precise date on which the Respondent made its continuing decision not to hire the discriminatees, we use the date 1 day after Johnson applied to the Respondent for a job, identified himself as a union organizer, and expressed his intent to organize the Respondent's employees. See *Ferguson Electric Co.*, 330 NLRB 514, 515–516 (2000) (ambiguities in compliance created by misconduct should be resolved against the wrongdoer), enfd. 242 F.3d 426 (2d Cir. 2001).

[31] *Bill's Electric*, 350 NLRB 292, 297 (2007). See also Abramson, LLC, 345 NLRB 171, 171 fn. 3 (2005) (notice mailing "particularly appropriate" where unit employees work on "individual construction jobsites" across a two-state region). For additional cases supporting notice mailing based on the likelihood that employees would not see a notice posted in the workplace due to their physical isolation or other circumstances, see *A.W. Farrell & Son*, 361 NLRB No. 162, slip op. at 1–2; *Newman Livestock*-11, 361 NLRB No. 32, slip op. at 2–3 (2014); *California Gas Transport*, 347 NLRB 1314, 1362 fn. 64 (2006), enfd. 507 F.3d 847 (5th Cir. 2007); *Parkview Hospital*, 343 NLRB 76, 76 fn. 3 (2004); *Technology Service Solutions*, 334 NLRB 116, 116–118 (2001); *Radio-Electronics Officers Union*, 306 NLRB 43, 43 fn. 3 (1992), enf. denied on other grounds 16 F.3d 1280 (D.C. Cir. 1994), cert. denied 513 U.S. 866 (1994).

[32] Our dissenting colleague incorrectly suggests that the notice measures we order here extend beyond electrician positions located in the region serviced by the Respondent's Omaha facility.

[33] We find that a longer posting period is appropriate for applicants than our normal 60-day posting period for employees at a respondent's worksite, because future applicants will clearly not have as frequent contact with the Respondent as the employees at the worksite would have.

[34] See, e.g., *Tradesmen International*, 351 NLRB 399, 406 (2007) (respondent with similar business required to post a similar statement to applicants); *Kenmor Electric*, 355 NLRB 1024, 1035–1036 (2010) (remedial notice posted at "all places where notices to the public, including applicants for employment with [the respondent employer association's] members, are customarily posted"), enf. denied on other grounds 720 F.3d 543 (5th Cir. 2013).

[35] Our order of the additional notice requirements set forth above will not preclude the Respondent from showing in compliance that specific limitations or "peculiarities" in its electronic media systems "affect its ability to post remedial notices by these means." *J. Picini Flooring*, supra, 356 NLRB at 14.

ORDER

The Respondent, Aerotek, Inc., located at 310 Regency Parkway, Omaha, Nebraska, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire or consider for hire any job applicant because the applicant is a union organizer or seeks union representation.

(b) Telling any employee that wages are confidential and are not to be discussed with others.

(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 National Labor Relations Act.

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

(a) Within 14 days of the date of this Order, offer employment to Brett Johnson, Tim Hendershot, Tom Jankowski, and Alan Winge in the positions for which they applied, or, if such positions no longer exist, to substantially equivalent positions.

(b) Make Brett Johnson, Tim Hendershot, Tom Jankowski, and Alan Winge whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision, as amended in this decision.

(c) Compensate Brett Johnson, Tim Hendershot, Tom Jankowski, and Alan Winge for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each discriminatee.

(d) Within 14 days of the date of this Order, remove from Respondent's files any reference to the unlawful refusal to hire Brett Johnson, Tim Hendershot, Tom Jankowski, and Alan Winge and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

(e) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Omaha, Nebraska facility copies of the attached notice marked "Appendix."[36] Copies of the notice, on forms provided by the Regional Director for Region 17, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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 through that facility at any time since July 29, 2011.

(g) Within 14 days after service by the Region, duplicate and mail, at its own expense, copies of the attached notice marked "Appendix" to each of the named discriminatees herein, to each applicant who submitted an application for an electrician's position located in the region serviced by the Respondent's Omaha facility on or after July 29, 2011, and to each of its current electrician employees whose normal work location in the region serviced by the Respondent's Omaha facility is not the Respondent's own premises, at each applicant's and employee's last known address. The Respondent shall also send the notice by email to all such electrician applicants who communicated with the Respondent by email in the course of submitting such applications.

(h) Within 14 days after the date of this Order, prominently include, for 6 months, the following language at the beginning of its job applications for positions as electricians located in the region serviced by its Omaha facility, and in all places where the Respondent advertises or accepts such applications for employment, including on the notices it posts on Thingamajob, Career Builder, or other electronic websites and media: "Aerotek is required to comply with the National Labor Relations Act. Therefore, we will recruit and refer any and all applicants without regard to their involvement with, membership in, or allegiance to any labor organization. We acknowledge the right of employees to form, join, or assist labor or-

[36] If this Order is enforced by a judgment of a 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."

ganizations of their own choosing, or to refrain from such activities."

(i) Within 21 days after service by the Region, file with the Regional Director of Region 14 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.

Dated, Washington, D.C. December 15, 2016

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

For the reasons stated by the judge and my colleagues, I agree that the Respondent (Aerotek) violated Section 8(a)(3) and (1) of the National Labor Relations Act (NLRA or Act) by failing to hire and consider for hire Brett Johnson, Tim Hendershot, Alan Winge, and Tim Jankowski.[1] I part ways with my colleagues, however, regarding two aspects of this case. First, like the judge, I would find that Johnson's efforts to interfere with Aerotek's business interests disqualified him from instatement[2] and full backpay. Second, I would adopt the judge's recommended Order, which reflects the Board's standard remedies for refusal-to-hire violations. I would not order the extraordinary remedies my colleagues add on top of those standard remedies.

1. Aerotek should not be required to employ Johnson, who sought to injure Aerotek's business interests

Aerotek is a staffing agency based in Omaha, Nebraska, where it places workers—including electricians—in construction jobs. The Charging Party Union also refers electricians to construction jobs in the Omaha area through its hiring hall. Thus, Aerotek and the Union are direct competitors. Under a contract with Interstates Electric (Interstates), Aerotek provided Interstates with electricians for a construction project at a Tyson Foods plant in Council Bluffs, Iowa. On February 29, 2012[3]—after he applied for employment with Aerotek and while the Tyson Foods project was underway—Johnson approached the manager of Interstates. Johnson told the manager that members of the Union were working on the Tyson Foods project, and he offered to "cut out the middleman"—namely, Aerotek—by referring electricians to Interstates from the Union's hiring hall. The manager declined the offer. One week later, Johnson telephoned the owner of Interstates and repeated the offer.[4]

The judge found, and the parties do not dispute, that Johnson offered Interstates "the [U]nion's direct assistance in furnishing manpower to the Tyson[] Foods job" and thus attempted to "exclude Aerotek from Interstates work." The judge found that Johnson's conduct was "so obviously inconsistent with the duties of an employee" that Johnson should be denied instatement, and the running of the backpay period as to Johnson should be tolled as of February 29, the date he first contacted Interstates. Ample Board precedent supports the judge's determinations, which I would adopt.

"It is well settled that Section 7 of the Act does not protect employee overtures to contractual interference." *North American Dismantling Corp.*, 341 NLRB 665, 666 (2004). In *North American Dismantling*, an unlawfully discharged employee repeatedly told one of his employer's clients that he could put together his own work crew and perform work assigned to the employer for a lesser rate. Id. at 666. The Board found that "[t]o the extent that [the employee] sought to replace the [employer] with a crew he would provide and thereby interfere with its business relationship with [the client], [the employee] was clearly engaged in unprotected conduct." Id. The Board further held that the employee's "effort to steal work" from the employer made him ineligible for reinstatement and warranted terminating the backpay period

[1] Applying *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002), I agree that the General Counsel met his burden of showing that (1) the Respondent was hiring or had concrete plans to hire; (2) Johnson, Hendershot, Winge and Jankowski had experience and training relevant to the jobs for which the Respondent was hiring; and (3) antiunion animus contributed to the Respondent's decision not to hire or consider for hire the four applicants. See 331 NLRB at 12. Pursuant to *Toering Electric Co.*, 351 NLRB 225 (2007), I also agree that the General Counsel met his burden of showing that each of the four applicants had a genuine interest in securing employment. Finally, I agree that the Respondent failed to sustain its defense burden under *FES*, supra, of showing that it would have refused to consider and/or hire the four applicants even in the absence of their union activity or affiliation.

The Respondent does not maintain a rule or policy that prohibits employees from discussing their wages. However, Aerotek recruiters Kristin Breon and Linsey Rohman told or asked several employees not to discuss their wages with other employees. I agree with the judge and my colleagues that these directives or requests interfered with the exercise of Sec. 7 rights in violation of Sec. 8(a)(1) of the Act.

[2] Although most people are familiar with the remedy of "reinstatement" when an employee has been unlawfully discharged in violation of Sec. 8(a)(3) or (1), the standard remedy when an *applicant* has been unlawfully *denied* employment is called "instatement."

[3] All subsequent dates are in 2012.

[4] It appears that the owner of Interstates also declined Johnson's offer.

on the date the employer learned of his unprotected conduct. Id. at 666–667.[5] In a number of other cases, the Board has similarly held that employers are not required to employ individuals who attempt to interfere with their business interests.[6]

The Board has applied these principles to job applicants in a refusal-to-hire case. See *Five Star Transportation, Inc.*, 349 NLRB 42 (2007), enfd. 522 F.3d 46 (1st Cir. 2008). In *Five Star Transportation*, school bus drivers employed by First Student, the school district's incumbent transportation provider, sent letters to the school district urging it to continue to contract with First Student rather than Five Star Transportation. 349 NLRB at 45. The Board found that the drivers' letters disparaged and criticized Five Star and were outside the protection of Section 7 of the Act. Id. Five Star was awarded the contract, and the drivers who had written letters applied for positions with Five Star. The Board found that Five Star did not violate the Act when it refused to hire or consider for hire the letter-writing drivers. Id. at 46. Notably, in finding the drivers' conduct unprotected, the Board did not simply rely on the disparaging nature of their letters. The Board emphasized that "the letters reflected an effort to undermine [Five Star's] standing in order to secure the school bus contract for First Student, the contract provider preferred by [the drivers]." Id.[7]

The Board has also denied reinstatement to unlawfully discharged employees who engaged in postdischarge efforts to undermine their employers' business interests. See *Sahara Datsun*, 278 NLRB 1044, 1045–1046 (1986) (discharged employee not entitled to reinstatement, where he "attempt[ed] to undermine the [r]espondent's business" by falsely telling bank that provided financing to respondent's customers that loan applications submitted to bank had been falsified), enfd. 811 F.2d 1317 (9th Cir. 1987); *Firehouse Restaurant*, 220 NLRB 818, 824–825 (1975) (following restaurant's unlawful failure to return waiter to work following a vacation, waiter lawfully discharged for publicly disparaging the restaurant's food "for the avowed purpose of causing harm to [r]espondent's business").

Johnson engaged in the very type of unprotected conduct identified by the Board in these many cases. His repeated solicitations of high-level officials at Interstates were a blatant effort to interfere with and undermine the Respondent's contractual relationship with Interstates, who my colleagues acknowledge was one of the Respondent's major clients. Johnson sought to replace Aerotek's employees with employees referred by the Union. Indeed, my colleagues concede that Johnson's goal was "to divert business from the Respondent." Moreover, Johnson's efforts were more egregious than those of the applicant bus drivers in *Five Star Transportation*. Johnson attempted to interfere with the Respondent's *ongoing* business relationship with Interstates, whereas the letter-writing drivers were supporting their current employer, First Student, in competing with Five Star for the school district contract.

The Board has not been entirely consistent regarding whether an applicant for employment owes a duty of loyalty to a prospective employer,[8] but my colleagues assume that applicants owe at least "some duty of loyalty" to their prospective employers, and my colleagues further assume that Johnson's conduct was disloyal. Nonetheless, they find that Johnson is entitled to instatement and full backpay under the standard set forth in *Hawaii Tribune-Herald*, 356 NLRB 661 (2011), which

[5] For the reasons explained below, I agree with the judge that the backpay period should terminate on the date of the misconduct, not the date the employer learned of the misconduct. See fn. 11, infra.

[6] See *ATC/Forsythe & Associates*, 341 NLRB 501, 503 (2004) (company providing bus service to the city of Tempe, Arizona, lawfully discharged an employee because, among other reasons, the employee engaged in "contractual interference" by offering his dissident union group to city officials as an alternative service provider); *Kenai Helicopters*, 235 NLRB 931, 936 (1978) (employer lawfully discharged pilots after they told the employer's dispatcher that they planned to go on strike and operate a competing tourist helicopter service); *Associated Advertising Specialists, Inc.*, 232 NLRB 50, 53–54 (1977) (employer lawfully discharged employee after employee underbid the employer as a direct competitor, resulting in the employer's loss of business from a principal customer); *Marshall Maintenance Corp.*, 145 NLRB 538, 539–540 (1963) (stating that it would be "manifestly improper to require [r]espondent to employ anyone whose loyalty and efforts as an employee might be affected by his own self-interest as an entrepreneur and business competitor"). See also *Rex Printing Co.*, 227 NLRB 1144, 1144–1145 (1977) (Board permitted employer to condition reinstatement of unlawfully discharged employee on his "divesting himself of all ownership interests" in competing business enterprises and "ceasing to solicit business" for one of those enterprises); *Crystal Linen Service*, 274 NLRB 946, 948–949 (1985) (employer lawfully disciplined employees after they solicited the employer's customers to switch to a competitor).

[7] The Board has also denied applicants instatement and full backpay when they engaged in other types of unprotected conduct. See *Smucker Co.*, 341 NLRB 35, 35–36 (2004) (applicants not entitled to instatement, and the backpay period ended on the date Smucker learned that they cheated on a preemployment exam), enfd. 130 Fed.Appx. 596 (3d Cir. 2005); *American Steel Erectors, Inc.*, 339 NLRB 1315, 1316–1317 (2003) (finding that prospective employer was privileged not to consider applicant for hire where the applicant, "through use of deliberate and outrageous exaggerations, . . . accused the [employer] of unsafe practices" at meetings of a state apprenticeship council).

[8] In *American Steel Erectors*, the Board stated that applicants for employment do not owe a duty of loyalty to a prospective employer. 339 NLRB at 1316–1317. But in *Five Star Transportation*, the Board held to the contrary. 349 NLRB at 46 ("Just as an employer legitimately wants extant employees to be loyal, so a prospective employer legitimately wants prospective employees to be loyal. In both cases, the goal is the same—not to have disloyal employees on the payroll.").

the Board applies to determine what remedial consequences, if any, flow from a discriminatee's postdischarge misconduct. Under this standard, to be excused from its duty to reinstate a discriminatee, and to toll the running of the discriminatee's backpay period, the employer must prove "misconduct so flagrant as to render the employee unfit for further service, or a threat to efficiency in the plant." 356 NLRB at 662.[9]

I believe Johnson's unprotected conduct disqualified him from instatement, and it stopped the running of his backpay period as of the date that Johnson made his overtures to Interstates, regardless of whether one applies the "unfit for further service" standard.[10] The Board has consistently disapproved of employees and applicants who interfere with an employer's business interests, and in line with these cases, I agree that the individuals should be denied reinstatement (or instatement) and any further accrual of backpay.[11]

2. Other remedial issues

In the affirmative provisions of his Order, the judge recommended requiring the Respondent to (1) offer employment to Hendershot, Jankowski and Winge; (2) make them (and Johnson, subject to the limitation discussed above) whole for any loss of earnings and other benefits resulting from its unlawful conduct; (3) remove from its files any references to its unlawful conduct; and (4) for 60 days, post a notice in its Omaha, Nebraska facility in all places where notices to employees are customarily posted, and distribute the notice electronically if the Respondent customarily communicates with its employees by such means. These are the Board's standard remedies for an unlawful refusal to hire, and I agree they are appropriate here.

I disagree with my colleagues' remedy—not recommended by the judge—requiring the mailing of a notice to all electricians placed by Aerotek who work away from its Omaha, Nebraska facility. The Board's standard remedy is to require notice mailing if the respondent has gone out of business or closed the facility where the unfair labor practice or practices occurred. Although Aerotek places employees to work at other locations, I do not believe this presents the kind of unusual circumstances under which I have approved notice mailing. See *Bud Antle, Inc.*, 361 NLRB No. 87, slip op. at 2 (2014) (Member Miscimarra, concurring) (notice mailing appropriate where migratory work force "move[d] from place to place harvesting crops throughout the year").

I also disagree with the extraordinary remedy of requiring the Respondent to prominently post a statement of employee rights at the beginning of its job applications and on all its job advertisements.[12] The Board has ordered comparable remedies in only two cases, both of which are plainly distinguishable from the instant case.[13] Neither would I order the extraordinary and unprecedented remedy of requiring the Respondent to mail and email the notice to all individuals who applied for electricians' positions on or after July 29, 2011, which was the day after Johnson applied at Aerotek. The Board's remedial notices are "a means of dispelling and dissipating the unwholesome effects of a respondent's unfair labor practices." *Chet Monez Ford*, 241 NLRB 349, 351 (1979), enfd. mem. 624 F.2d 193 (9th Cir. 1980).[14] There is no

[9] Although the Board in *Hawaii Tribune-Herald* overruled *Sahara Datsun* and *Firehouse Restaurant* to the extent that the Board in those cases did not apply the "unfit for further service" standard, the outcome of those cases was left undisturbed. See 356 NLRB at 663 fn. 10 ("[W]e do not pass on the question of whether any of the conduct at issue in those cases would have been grounds for denying reinstatement or backpay under the correct standard.").

[10] I need not reach or determine whether the correct standard to apply here is the "unfit for further service" standard or some other test, nor do I pass on the precise extent of the duty of loyalty that applicants owe to a prospective employer.

[11] I agree with the judge that the accrual of backpay terminates as of the date that Johnson first contacted Interstates. Although in some cases the Board has stopped the running of the backpay period on the date the employer *learned* of such misconduct, I believe the appropriate cutoff is the date the individual chose to pursue interests incompatible with employment by the employer. In my view, if the Board stops the accrual of Johnson's backpay only when the Respondent learned of his misconduct, this would improperly reward Johnson for concealing his activities from the Respondent, to whom I believe Johnson owed a duty of loyalty. Under these circumstances, I believe it is incongruous to find that Johnson's actions render him ineligible for employment, while awarding him backpay for periods subsequent to when those actions occurred.

[12] The required statement reads: "Aerotek is required to comply with the National Labor Relations Act. Therefore, we will recruit and refer any and all applicants without regard to their involvement with, membership in, or allegiance to any union. We acknowledge the right of employees to form, join, or assist unions of their own choosing, or to refrain from such activities."

[13] In *Tradesmen International*, 351 NLRB 399 (2007), the Board ordered a virtually identical remedy where the employer committed "serious violations of the Act . . . on other occasions at another of its facilities," it admitted that "screening out union adherents [was] practically the . . . corporate raison d'être," and it "actively suggested to its field offices that they engage in unlawful conduct in order to remain union-free." Id. at 404, 407. In *KenMor Electric Co.*, 355 NLRB 1024 (2010), enf. denied 720 F.2d 543 (5th Cir. 2013), the Board ordered notice posting to include "all places where notices to the public, including applicants . . . , are customarily posted" where an employer "explicitly advertised" its referral system "as an effective means to avoid hiring union members," "hindered the efforts of applicants who were salts and union members to be hired," and otherwise engaged in conduct that "reasonably tended to interfere with union applicants' attempts to gain employment on equal terms with other applicants." Id. at 1027–1028, 1035-1036. There is no evidence in this case remotely comparable to *Tradesmen International* or *KenMor Electric*.

[14] See also *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953) (the purpose of the Board's remedies is "to undo the effects of

reason to believe that any other applicants besides the four discriminatees have ever been aware of the Respondent's unlawful conduct. Thus, it is unnecessary to mail them the notice because, as to them, there is no chilling effect to dissipate.

Accordingly, I join the majority as to some issues in the instant case, and I respectfully dissent as to other issues, as described above.

Dated, Washington, D.C. December 15, 2016

Philip A. Miscimarra Member

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire or consider for hire any job applicant because the applicant is a union organizer or seeks union representation.

WE WILL NOT tell employees that they are not to discuss wages with others.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer employment to Brett Johnson, Tim Hendershot, Tom Jankowski, and Alan Winge in the positions for which they applied, or, if such positions no longer exist, to substantially equivalent positions.

WE WILL make Brett Johnson, Tim Hendershot, Tom Jankowski, and Alan Winge whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the Board's decision.

WE WILL compensate Brett Johnson, Tim Hendershot, Tom Jankowski, and Alan Winge for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each of them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire Brett Johnson, Tim Hendershot, Tom Jankowski, and Alan Winge and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, include, for 6 months, the following language on our job applications for electricians and in all places where we advertise or accept applications for electrician jobs in the Omaha region, including online:

> Aerotek is required to comply with the National Labor Relations Act. Therefore, we will recruit and refer any and all applicants without regard to their involvement with, membership in, or allegiance to any union or labor organization. We acknowledge the right of employees to form, join, or assist unions of their own choosing, or to refrain from such activities.
>
> AEROTEK, INC.

The Board's decision can be found at www.nlrb.gov/case/17–CA–071193 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

violations of the Act"); *Frank Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944) ("One of the chief responsibilities of the Board is to direct such action as will dissipate the unwholesome effects of violations of the Act.").

Michael E. Werner, Esq., for the General Counsel.
William A. Harding and *Kelly M. Ekeler, Esqs. (Harding* and *Shultz, P.C., L.L.O.),* of Lincoln, Nebraska, and *Mark Freeman, Freeman* and *Freeman, P.C.),* of Rockville, Maryland, for the Respondent.
Lori Elrod, Esq. (Blake & Uhlig, P.A.), of Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Omaha, Nebraska, on October 29 and 30, 2012 and January 3, 2013. Local 22 of the International Brotherhood of Electrical Workers (IBEW) filed the charges in these matters on December 21, 2011, March 1, and April 12, 2012. The General Counsel issued the consolidated complaint which is before me on August 28, 2012.

The General Counsel alleges that Respondent violated Section 8(a)(1) on several occasions by telling employees that their wages and other terms and conditions of employment were confidential and that they were prohibited from discussing wages and other terms and conditions of employment with other employees. He also alleges that Respondent violated Section 8(a)(3) and (1) in refusing to consider for hire and refusing to hire Brett Johnson since about August 1, 2011, and refusing to consider for hire and refusing to hire Tim Hendershot, Tom Jankowski, and Alan Winge since about September 1, 2011.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent, Aerotek, Inc., a corporation, with headquarters in Hanover, Maryland, near Baltimore, provides temporary personnel and job screening services in various locations in a number of states, including its facility in Omaha, Nebraska. At its Omaha facility it annually performs services valued in excess of $50,000 in States other than Nebraska. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, IBEW Local 22, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent has 6 or 7 different divisions operating from the Omaha office. Only one of these, the Environmental and Engineering Division places employees in the construction industry. The Union and Aerotek are competitors with regard to placement of journeymen and apprentice electricians. The Union provides labor to employers, as does Aerotek and other employee staffing companies. At least with regard to some employers, companies such as Aerotek provide a convenient employee staffing alternative to establishing relationships with labor organizations. Indeed, when testifying in the instant hearing, Brett Johnson a full-time organizer with IBEW Local 22, stated the number of newspaper advertisements for electricians has been steadily diminishing over the past 10 years. Johnson believes that, "the result is that more and more contractors are not advertising themselves, but using staffing companies, in my opinion, to screen out union members," Tr. 219.

On July 27, 2011, Kacie Woodley, an intern working as a recruiter for Aerotek, called Brett Johnson. Woodley asked Johnson if he was interested in employment. Woodley made the following entry into Brett Johnson's profile in Aerotek's Recruiter Work Space (RWS) system:

> Brett is looking to make at least 30/hour. He is the membership coordinator with local 22 union. He is sending me his updated résumé is always open to hearing about new opps.

(GC Exh. 34.)[1]

RWS is a database containing information on essentially any individual who has had contact with Aerotek relating to potential employment. Johnson had a profile in this system prior to July 2011. His profile was created in October 2009,. The profile may be related to the fact that in September 2007 Aerotek settled an unfair labor practice charge filed by IBEW Local 22 which alleged that it had refused to consider Johnson for hire and had refused to hire him because of his union activity. Aerotek paid Johnson $4,445.20 as part of this settlement.

Woodley emailed Johnson, asking for his résumé and telling him that she would "keep an eye out for higher-level electrical positions." Johnson replied on the morning of July 28, 2011, stating, "I like working worth (sic) the tools and any electrical position will do apprentice or journeyman anything I can do to get in to organize electrical contractors in the union." He also submitted his résumé.

Johnson then contacted Local 22 member Joe Stock and asked him to apply to Aerotek. Stock contacted Aerotek recruiter Daniel Mehmen on July 28. Mehmen interviewed Stock and then emailed Les Shallberg, the owner of Fremont Electric Company that evening, informing Shallberg that Stock was available to start work the following Monday. Mehmen informed Shallberg that:

> For the last 4 months Joe was working for a residential and commercial contractor in Blair NE but before that worked for Centaur Electric. Joe's foreman from Centaur said he was very reliable and very knowledgeable. If they had more work he would have been glad to keep Joe working for them. Prior to that Joe was a Journeymen electrician for the IBEW for 4 years and left to go to Centaur . . .

(GC Exh. 6.)

The reference from Centaur that Stock gave Mehmen was phony. He provided Mehmen with Brett Johnson's telephone number. Johnson provided the favorable reference posing as "Larry," Stock's foreman at Centaur. There was no indication from Stock's employment application (GC Exh. 3, p. 127) or

[1] Johnson testified that he did not tell Woodley that he was looking to make at least $30 per hour. I credit his testimony as it is consistent with the email he sent to Aerotek on August 8, 2011 (GC Exh. 38), and his uncontradicted account of his conversation with Aerotek account manager Jacob Shank the same day. Assuming that Woodley, who did not testify, simply made a mistake, Johnson corrected any misunderstanding of what he would accept on August 8.

communicated by Stock during his interview that he had any relationship with the IBEW in August 2011. I discredit Mehmen's testimony that he knew Stock was a union supporter when he placed Stock with Freemont Electric. Mehmen's email to Fremont's owner, quoted above, indicates that Mehmen understood that Stock had a relationship with the IBEW in the past but was no longer associated with the Union. Mehmen did contact Stock regarding a non-bargaining unit, non-electrical job in December 2011, after Stock had identified himself as an IBEW member (Tr. 388).

Stock began work at Freemont as a general laborer on August 1 at $21 per hour. He worked for Freemont until October 17, 2011. Stock's foreman told Mehmen that Stock did a great job while working for him (GC Exh. 8).

On August 1, 2011, Respondent placed Brandon Strine with Fremont Electric at a wage rate of $16 per hour. Although Strine had worked for a union contractor from May to September 2008 as a temporary member of Local 22, he has had no relationship with the Union since September 2008.

On August 5, Aerotek posted a notice for an electrician with 3 years or more of experience in electrical and commercial buildings for a client in Blair, Nebraska. Among the required skills in this announcement was the possession of a journeyman's license (GC Exh. 2, p. 2).

On August 8, Johnson sent the following email to Aerotek recruiter Daniel Mehmen, in response to this and other postings:

> I have sent my resume to Kacie Woodley with Aerotek on 7/27/2011 and informed her that I would take any position, apprentice or journeyman and have had no offer of a position yet. I couldn't help but notice the multiple job postings available with Aerotek and thought that the one with your client in Blair would be a good fit as I have industrial experience. I like the idea of working with larger contractors allowing me time to expose more electricians to the IBEW. . .

(GC Exh. 38.)

Aerotek account manager Jacob Shank called Johnson the same day, after Johnson sent this email. Shank told Johnson that Woodley no longer worked for Aerotek and had not passed on Johnson's information to him.[2] Shank said Respondent was looking only to place apprentices. Johnson replied that he would accept any position, as a journeyman or apprentice. Shank said he would consider Johnson for eligible jobs in the future.[3]

On August 12, 2011, Johnson uploaded the résumés of union members Tim Hendershot, Tom Jankowski, and Alan Winge into the database for Career Builder. As a result Respondent's RWS system automatically entered them as employment applicants with Aerotek (GC Exh. 34). On the résumés of all three, the fact that there were volunteer union organizers, as well as licensed journeymen electricians, was prominently noted (GC Exh. 39).

Jankowski is the vice-president of Local 22, an elected position and is a member of the Union's Executive Board. He regularly works as an electrician. Hendershot and Winge also work regularly as electricians. Neither holds any position with the Local. As of August 12, Jankowski was working reduced hours at Omaha Electric, a unionized employer. Winge was unemployed as was Hendershot. Their résumés did not indicate whether or not they were currently employed.

All three had volunteered to participate in the Union's salting campaigns at nonunion contractors. On August 5, 2011, Winge and Brett Johnson submitted Winge's resume to Sentry Engineering in Mecina, Iowa. At that time, Winge authorized Johnson to submit his resume to other nonunion contractors for salting purposes. Winge did not know specifically that it would be submitted to Aerotek (Tr. 330–331). However, Johnson specifically asked Hendershot and Jankowski if he could submit their resumes to Aerotek. They specifically authorized Johnson to do so (Tr. 314, 338). All three understood that the Union could order them to quit their nonunion employment if it did not serve the Union's organizing interests.[4]

As of the October 30, 2012 hearing session, Winge had been employed with a union contractor since April 2012; Hendershot had been employed by a union contractor for 3 months. Jankowski was laid by Omaha Electric and has worked several jobs of short duration since his layoff. With the exception of one voice mail message left by Aerotek recruiter Curtis Coatman for Hendershot on February 24, 2012, neither Johnson, Hendershot, Jankowski, nor Winge ever heard from Aerotek.

Little over 3 weeks from the conversation between Shank and Johnson, on August 30, 2011, Respondent placed journeymen electricians, David Myhr and Jeffrey Thomsen with Fremont Electric at a wage rate of $20 per hour. So far as this record demonstrates neither Myhr nor Thomsen has ever had any relationship with Local 22 or any other union. Respondent has not offered any specific evidence as to why it placed Myhr and Thomsen, as opposed to any of the alleged discriminatees. As Joint Exhibits 4 and 6 and Exhibit R-16 demonstrate, Aerotek placed many other employees; journeymen and apprentice electricians, with contractors after August 8.

Johnson emailed Aerotek recruiter Daniel Mehmen on November 30, 2011, reiterating his interest in "any electrical construction position available" (GC Exh. 40). Aerotek did not respond to this email. On December 6, 2011, Aerotek placed four apprentices with IES Commercial at wage rates of either

[2] This was a bit disingenuous since Woodley had entered her notes of the July 27 conversation into Respondent's RWS system.

[3] Johnson's account of this telephone conversation was not contradicted by Shank. I therefore credit it. Johnson and Shank met in February 2011, after recruiter Daniel Mehmen initiated contact with IBEW Local 22 through Johnson. Shank and Mehmen met with Johnson for about 30 minutes at the Union Hall at that time.

[4] Johnson testified that salting agreements with Local 22 members have on one or more occasions been cancelled because the member decided to stay at the nonunion contractor and drop his membership with the Local. Thus, salting can be a two-edge sword if a member decides he or she would be likely to be employed more consistently if he or she terminated his union membership.

I find that Respondent cannot legitimately rely on this fact as a defense for not hiring or considering the discriminatees for hire. Respondent was hiring primarily for projects of short duration and in fact hired employees such as Kyle Modlin and Jason Darnold, who informed Aerotek that they intended to work elsewhere within a few months.

$16 or $17 per hour. On December 16, 2011, Aerotek placed Brandon Strine at Weston Solutions at a rate of $23.39 per hour.

Between January 16, 2012, and February 17, 2012, Aerotek placed a number of journeymen and apprentices with Interstates Construction Company. Interstates was performing work at a Tyson Foods' plant in Council Bluffs, Iowa. Among the journeymen hired for Interstates[5] during this period are the following individuals, with their date of hire and wage rate:

Warren Kennedy	January 16	$14
Mark Mesenback	February 6	23
Carlos Ramos	February 6	23
Jimmy Coats	February 20	23
Julio Juarez	February 20	25
Duane North	February 20	23
Jack Shelly	February 20	23
Aaron Flores	February 23	17
Jesus Flores	February 23	17
David Erwin	February 27	25
Jason Perry	February 27	23
Kelly Jansen	March 5	24
Steven Meling	March 5	24
Adrian Sterns	March 5	24

While the employment of most of these individuals with Interstates ended by mid-April 2012, Julio Juarez continued working for Interstates through August 20.

Between January 9, 2012, and February 27, 2012, Aerotek placed 10 apprentices with Interstates at a wage rate of between $14 and $18.50 per hour. While most of these assignments ended in March and April, Rodgina Miller worked for Interstates through Aerotek from January 9, to July 9, 2012 (Jt. Exh. 4). On July 9, Miller went on the Interstates payroll (Exh. R-16).

Some other employees placed by Aerotek became permanent employees of Interstates after a period of time on the Aerotek payroll. These include Carter Kemp, placed by Aerotek on August 30, 2011, who went on the Interstates payroll on February 10, 2012; Mark Meisenbach who became an Interstates employee on March 24, 2012; and Mike Miodowski who became an Interstates employee on April 14, 2012.

None of the four alleged discriminatees in this case was ever contacted by Aerotek with a view to offering them employment with one possible exception. On February 24, 2012, Aerotek recruiter Curtis Coatman was assigned for one day to find candidates for the Interstates job. He left a telephone voice mail message for Tim Hendershot informing him of an open journeyman position and sent Hendershot an email. The message and email instructed Hendershot to call Coatman if he was interested in the position (GC Exh. 48 and R. Exh. 27). Hendershot's testimony that he called twice and left messages for Coatman is uncontradicted. I therefore credit it. Coatman did not work on the Interstates account on any day other than February 24.

One reason given by Respondent for failing to hire the 4 alleged discriminatees or follow-up on their applications is that their prior work history indicated that they made been paid too much in the past for them to "fit" the positions Aerotek was seeking to fill. In fact Aerotek hired a number of employees who had made $30 or more on prior jobs.

Examples of employees placed by Respondent at wage rates considerably below what the employee had earned in the past are as follows: Julio Juarez, placed with Interstates on February 20, 2012, at a wage rate of $25 per hour, had been paid $30 an hour with two prior employers. Duane North, who Aerotek attempted to place, also earned $30 per hour with a prior employer. John Tonn, who was placed by Aerotek with Concrete Equipment at $13 per hour, apparently left the Union in September 2010. With the Union he had been paid over $30 per hour when employed (Jt. Exh. 4, GC Exh. 3, p. 137). These past wage rates were reflected on their résumés or applications.

Aerotek also placed journeymen in apprentice positions. Jason Darnold, who was placed at Interstates at $16 per hour, had earned $23 per hour in prior employment as a journeyman. Similarly, Respondent placed Charles Christman, who also represented himself as a journeyman electrician, as an apprentice with Interstates at $16 per hour.

On March 9, 2012, Brett Johnson sent Aerotek recruiter Dan Mehmen a letter informing him that eight of the Aerotek employees on the Interstates project were volunteer organizers for Local 22. These employees are Adrian Sterns, Carlos Ramos, Steve Meling, Kelly Jansen, Jimmy Coats, David Erwin, Jack Shelly, and Jason Perry (GC Exh. 43).[6] Brett Johnson testified that there may have been other Local 22 members or sympathizers on the project whose relationship to the Union was never disclosed. On March 30, Johnson filed a petition with the Board to represent all journeymen and apprentice electricians working in the construction field employed out of Aerotek's Omaha, Nebraska office, excluding supervisors and low-voltage technicians (GC Exh. 44).

At trial Jacob Shank testified that he was aware that a number of the employees placed at Interstates had a relationship with Local 22 when they were hired. I discredit that testimony. In an affidavit given to the Board on May 8, 2012, during the investigation of the Local 22 charges, Shank stated that he first learned that there were employees at Interstate affiliated with the Union when Aerotek recruiter Kristin Breon[7] told him that Brent Burnham was complaining of harassment at the Interstate project by union supporters (Tr. 113). In recanting from this statement, Shank did not adequately explain what led him to make it in the first place.[8]

Breon testified that she was not aware of the union affiliation of any employee she placed until April 2012 (Tr. 525–526).

[5] All these individuals apparently were assigned to Interstates' Tyson Foods project (Exh. R-16).

[6] GC Exh. 43 bears a date of February 9, 2012. I credit Brett Johnson's testimony that this is a typographical error and the letter should have been dated March 9. Seven of the eight salts, all except Ramos, had not been hired as of February 9.

[7] Breon's name is now Kristen Kruse. I will refer to her as Kristin Breon, the name by which the job applicants knew her.

[8] Burnham did not work at the Interstates project until February 23. I find that Shank was not aware that any of the employees placed at Interstates had a relationship with Local 22 at the time they were placed with Interstates.

One of the employees she placed on the Interstates job was union salt David Erwin on February 27 (Tr. 524–525, Jt. Exh. 4).

Breon also testified that her account manager, Jacob Shank, reviewed and approved the candidates she selected before they were submitted to Interstates or other employer (Tr. 528). However, she did not specify what that review entailed. There is no evidence that Shank examined any of the résumés or written applications of any applicants who were selected for placement by Respondent's recruiters, prior to their placement.

In preparation for the instant trial, Jacob Shank prepared Exhibit R-16, which with his testimony, constitutes Respondent's evidence that it knowingly placed Local 22 members or supporters with Interstates.[9] I find that this is not so. In any event, no applicant placed by Respondent indicated that they were a volunteer union organizer, as did the alleged discriminatees.[10]

The alleged 8(a)(1) violations: alleged prohibition against employees discussing wages

It is undisputed that Aerotek recruiters Kristin Breon and Linsey Rohman told or asked several employees not to discuss their wages with other employees (GC Exh.- 49, Tr. 522, 542). Respondent contends that it did not violate the Act because these recruiters were not acting as agents of Aerotek when they made these statements, that these statements are not rules or policies of Aerotek and the employees were not disciplined or threatened with discipline.

Respondent's employee handbook (R. Exh. 29 at pp. 7–8), states that an employee may be disciplined or terminated for a number of offenses, including "Disclosing business "secrets" or confidential information." Breon, in her March 5, 2012 conversation with employee David Erwin, told Erwin that "Pay is confidential." Rohman asked employees Carlos Ramos, Mike Miodowski and Adrian Sterns to keep their wages confidential. When account manager Jacob Shank was asked at trial whether Aerotek treats employees' salaries as confidential, he replied, "No, not necessarily." Shank testified further that he was not aware whether or not Aerotek had a rule against employees talking about their wages with other employees and that he recommends that recruiters not say that to employees (Tr. 142–43). Thus, it is clear that neither Breon nor Rohman violated any company rule in telling employees that their wages were confidential and that they should not be discussing their wages with others.

Respondent contends that Breon and Rohman were not acting on behalf of Respondent because they were simply trying to make their jobs easier. Assuming that were the case, they did not inform the employees that they were merely requesting a personal favor. From an objective standpoint, any reasonable employee would believe that Breon and Rohman were conveying company policy.

Analysis

Refusal to Consider/Refusal to Hire: The legal framework

This is what is commonly referred to as a salting case. There are a number of cases under the Act that apply to salting cases and thus establish the framework for considering the facts of this case. The most important of these cases are:

> *NLRB v. Town & Country Electric, Inc.*, in which the Supreme Court, noting the considerable deference accorded to the Board's interpretation of the Act, affirmed that the Board could lawfully construe the Act's definition of "employee" to include paid union organizers. 516 U.S. 85, 94–95, 98 (1995).
>
> *FES,* 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). In *FES,* Board held that:
>
> To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

The FES framework was modified by the Board in *Toering Electric Co.,* 351 NLRB 225, 232–234 (2007).[11] The Board found that in salting cases, the General Counsel bears the ultimate burden of proving the applicant's genuine interest in employment. This burden has two components: (1) that there was an application for employment; and (2) that if the employer contests the applicant's actual interest employment, the General Counsel must prove by a preponderance of the evidence that that the applicant was genuinely seeking to establish an employment relationship with the employer.

Another case which is not directly applicable to the proceeding on the merits before me, but which obviously has great bearing on the litigation posture of this is case is *Oil Capitol & Sheet Metal*, 349 NLRB 1348 (2007). In that case the Board held that the General Counsel, as part of his existing burden of proving a reasonable gross backpay amount due, must present affirmative evidence that the salt/discriminatee, if hired, would have worked for the employer for the backpay period claimed in the General Counsel's compliance specification.

[9] Earlier in this decision I discredited Dan Mehmen's testimony that he understood that Joe Stock was affiliated with the Union when he placed Stock at Fremont Electric.

[10] On the other hand Respondent did place Andrew Stock with a client in April 2012, after he had demonstrated his union sympathies. Recruiter Jason Brandau attempted to contact union salt David Erwin in August 2012. However there is no evidence as to whether Brandau was aware of Erwin's union affiliation (R. Exh. 31).

[11] The same day that the Board issued its decision in *Toering*, it issued a decision in *Tradesman, Inc.,* 351 NLRB 399 (2007), in which the employer's business was virtually identical to that of the Respondent in this case.

Aerotek was hiring; all four alleged discriminatees applied for work with Aerotek and were genuinely interested in employment. All four had training and experience relevant for the jobs for which Aerotek was hiring

I conclude that, applying the standards set forth in *FES* and *Toering,* the General Counsel has established that Respondent violated Section 8(a)(3) and (1) in refusing to consider for hire and refusing to hire Brett Johnson, Tim Hendershot, Alan Winge, and Tim Jankowski. Respondent has not met its burden of showing that it would not have hired the alleged discriminatees even in the absence of the indication that they intended to engage in organizing activity. Aerotek placed numerous employees after the four discriminatees applied for employment at Aerotek. All four were licensed electricians with experience and training relevant to virtually all these jobs.[12] Although Aerotek contests the discriminatees' interest in the available jobs, I conclude that the General Counsel has met its burden under *Toering.*[13]

In finding that all four were interested in the posted jobs, I rely on the fact that Hendershot, Winge, and Jankowski were unemployed or underemployed at the time of their application to Aerotek and have worked in their trade when jobs became available. I also rely on the fact that at least 8 other union members worked as salts for the companies to which they were sent by Aerotek. As to Johnson, he has demonstrated his willingness to work for nonunion companies in furtherance of his organizing goals, as demonstrated by his completion of a job assignment with Tradesman in March 2011 (Tr. 232–234, GC Exh. 41).[14]

Respondent's reliance on the *Toering* decision in arguing that Winge did not apply for employment with Aerotek is misplaced both factually and legally. The Board stated in *Toering* that the fact that applications are submitted in batch, is not in and of itself sufficient to destroy genuine applicant status, if the submitter has the requisite authorization from the individual applicants, 351 NLRB at 233 fn. 51. Respondent does not contend that Johnson had no such authorization from Hendershot and Jankowski. However, Respondent contends that Johnson was not authorized to submit Winge's application to it. However, one week prior to the submission, Winge authorized Johnson to submit his resume to Sentry Engineering and any other salting targets of the Union. Given that fact that Winge was unemployed at the time, I conclude that Winge, through Johnson, did in fact apply for employment at Aerotek.[15]

Hendershot's genuine interest in employment is established in part by his uncontradicted testimony that he attempted to respond to Curtis Coatman's call twice and left voicemail messages to which he received no response.

The General Counsel made an initial showing of discrimination which was not rebutted by Respondent

I infer discriminatory motive from several factors. First, that Respondent made no attempt to place any employee who indicated that they were a voluntary organizer, with the exception of what appears to be Curtis Coatman's accidental contact with Hendershot. I infer that Coatman's call was accidental and not meant to be an attempt to place Hendershot from the fact that Respondent neither contradicted Hendershot's testimony that he replied to Coatman nor offered an explanation for that fact that it did not return his subsequent telephone calls.

I find Respondent's explanation for failing to contact Johnson, i.e., his wage history, to be pretextual and further evidence of discriminatory motive. First of all, Respondent does not have a rule or policy against placing employees in jobs lower than their prior wages (Tr. 211–212). Secondly, Respondent in fact placed several employees in jobs paying considerably less than they had earned previously. Thus Respondent did not show that it lawfully refused any of the alleged discriminatees based on a consistently applied wage comparison policy, *Tradesman International,* 351 NLRB 579, 582–583 (2007).

In the end result, Respondent has not offered any credible nondiscriminatory explanation for failing to place the four discriminatees in the many jobs that were available to them. The reasons Respondent gives for failing to consider or hire Jankowski, Hendershot, and Winge are totally lacking in specifics (Tr. 102–105). Thus, for Jankowski and Hendershot, Jacob Shank speculated that they were not hired "probably" due to timing rather than lack of qualifications. I infer discriminatory motive from the fact that Respondent bypassed the discriminatees in favor of employees who were not more qualified and probably, in some cases, clearly less qualified, *Flour Daniel, Inc.,* 350 NLRB 702, 705–706 (2007).

I also infer discriminatory motive from the disparate way Respondent treated the applications of the four discriminatees as opposed to those of David Myhr and Jeffrey Thomsen. On August 8, Jacob Shank told Brett Johnson that Respondent was only seeking to place apprentices. On August 19, Shank knew that Fremont Electric wanted two journeymen electricians. Recruiter Dan Mehmen attempted to contact David Myhr on August 24 and then reached him and Jeffrey Thomsen on Au-

[12] Respondent concedes as much at p. 20 of its brief.

[13] Respondent's argument at pp. 20–22 of its brief, that the alleged discriminatees were included in Aerotek's hiring process, is somewhat inconsistent with its position that they were not genuinely interested in employment and its argument that Winge never applied to work at Aerotek.

[14] On October 27, 2011, Recruiter Dan Mehmen asked Johnson if he was interested in a foreman's position when Johnson, using an alias, called Mehmen to give a reference for another union salt. Johnson did not follow up on that offer, Tr. 283–284, Exh. R-25. I conclude that Johnson's failure to express interest in a foreman's position, mentioned to him under an assumed name, has no bearing on whether he had a genuine interest in offers of employment made in response to applications made in his real name.

[15] The fact that Winge showed up at the hearing and testified as to his interest in placement by Aerotek is one of many factors that distinguishes his case from that of the employees discussed in *Toering* at 351 NLRB 234. Other factors are that he was unemployed and that the resume submitted to Aerotek was current. I would also note that Respondent entered Winge into its RWS database on August 12, 2012 (GC 34 Exh. He thus became a potential candidate for any position available through Aerotek, Tr. 443, 558–560, 590. Respondent's placement and maintenance of Winge's name in RWS (see R. br. at 22) is inconsistent with its contention that he is not a job applicant with Aerotek.

gust 26. Myhr and Thomsen were placed with Fremont on August 30 and 31, respectively. Respondent has not offered any explanation as to why it did not attempt to inform any of the discriminatees of the openings for journeymen at Fremont, or why it placed Myhr and Thomsen at Fremont instead of the discriminatees (GC Exhs. 9, 10, and 11).[16]

With regard to Winge, Respondent offered no reason for its failure to contact him. Shank was also unable to definitively state the reason Brett Johnson was not placed with one of Aerotek's customers (Tr. 196). Without such an explanation, I conclude that Aerotek failed to consider the discriminatees for hire or place them with their customers because they indicated that they intended to organize after they were hired. Even if Respondent knowingly hired several union members or supporters, which I find it did not, that would not negate the strong evidence that it discriminated against Hendershot, Winge, Jankowski, and Johnson because of their declared union organizer status, *Hi-Tech Interiors, Inc.,* 348 NLRB 304 (2006).

Respondent's disabling conflict argument

On February 29, 2012, Brett Johnson and another Local 22 representative visited the offices of Interstates Electric in Omaha and met with Interstates Manager Lee Heitmann. Johnson told Heitman that IBEW members were working on Interstates' Tyson Foods job. He then offered to "cut out the middleman" and refer electricians directly to Interstates. Heitmann declined the offer. On March 7, Johnson called the owner of Interstates and offered the union's direct assistance in furnishing manpower to the Tysons Foods job (R. Exh. 23, Tr. 267).

Respondent appears to contend that this conduct entitled it to deny employment to all four of the discriminatees. However, since it did not rely on this in failing to hire any of the four alleged discriminatees, it cannot defend against the allegations in the complaint on this basis, *Aztech Electric Co.,* 335 NLRB 260, 265 (2001). Moreover, there is no basis for denying Winge, Hendershot, and/or Jankowski instatement or a full backpay remedy on the basis of misconduct on the part of Brett Johnson, *Crown Plaza LaGuardia,,* 357 NLRB 95 (2011), and cases cited therein. However, whether Brett Johnson's backpay should be tolled and/or whether Respondent should be required to "instate" Johnson is a different issue.

In *North American Dismantling,* 341 NLRB 665 (2004), the Board found an employee was not entitled to reinstatement and limited his backpay due to his employer's awareness that the employee had attempted to steal work from the Respondent.[17] Under a strict reading of Board precedent, there is no basis for denying Brett Johnson instatement or limiting Respondent's backpay liability because there is no evidence as to when Aerotek became aware of Johnson's solicitation of Interstates' business prior to the second day of the instant hearing (Oct. 30, 2012), and there is no testimony by Respondent that it would have refused to hire him on that basis, *Smucker Co,* 341 NLRB 35 (2004).

The Board in *Smucker Co.* relied in part on the testimony of Smucker's human resources manager that he would have deemed the discriminatees' employment application invalid had he known that they had cheated on their preemployment skills test. The Board did not specifically reject Judge Schlesinger's conclusion that the discriminatees' conduct was "*Malum in se*." (conduct generally regarded as wrong regardless of whether it has been expressly prohibited by statute or other means).

I conclude that Johnson's conduct in attempting to exclude Aerotek from Interstates work is so obviously inconsistent with the duties of an employee that his backpay should be tolled as of February 29, 2012, when he visited Interstates' office. On the other hand, neither Winge, Hendershot, nor Jankowski engaged in any activity that is unprotected and which would warrant Aerotek from discriminating against any of them now or in the future.

Respondent violated Section 8(a)(1) as alleged Linsey Rohman and Kristin Breon were agents of Aerotek when telling employees that their wages were confidential

Board law regarding the principles of agency is set forth and summarized in its decision in *Pan-Oston Co.,* 336 NLRB 305 (2001). The Board applies common law principles in determining whether an employee is acting with apparent authority on behalf of the employer when that employee makes a particular statement or takes a particular action. Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. Either the principal must intend to cause a third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief.

The Board also stated in *Pan-Oston,* supra*,* that the test for determining whether an employee is an agent of the employer is whether, under all the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and/or acting for management. The Board considers the position and duties of the employee in addition to the context in which the behavior occurred. It also stated that an employee may be an agent of the employer for one purpose but not another.

In the instant case there is no question but that employees speaking to Rohman and Breon about wages would reasonably believe that the two recruiters were speaking for Aerotek management and were conveying company policy. In communicating to employees that wages were confidential and that employees should not discuss them, Respondent, by Rohman and Breon, violated Section 8(a)(1) of the Act, *Freund Baking Co.,* 336 NLRB 847 (2001). The fact that employees were not disciplined nor threatened with discipline is irrelevant, *Independent Stations Co.,* 284 NLRB 394, 396–397 (1987); *Cintas Corp.,* 344 NLRB 943, 945–946 (2005). The communication of such a rule or policy violates Section 8(a)(1). It is clear from the record also that Rohman and Breon had no reason to know that they were not communicating company policy, assuming

[16] Dan Mehmen, did not, for example, testify that he placed the most recent applicants or that Myhr and Thomsen were more qualified than the discriminatees, which in any event does not appear to be the case.

[17] Other cases in which the Board has found an employee's activities in competition with the employer to be unprotected are *ATC/Forsyth,* 341 NLRB 501 (2004); *Associated Advertising Specialists, Inc.,* 232 NLRB 50, 53–54 (1977); and *Kenai Helicopters,* 235 NLRB 931, 934–936 (1978).

that was the case.

CONCLUSION OF LAW

Respondent violated Section 8(a)(3) and (1) by refusing to consider or hire Brett Johnson from about August 1, 2011, to February 29, 2012, and refusing to consider for hire and refusing to hire Tim Hendershot, Tom Jankowski and Alan Winge since about September 1, 2011.

Respondent violated Section 8(a)(1) in telling employees that wages were confidential and are not be discussed with other employees.

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.

The Respondent having discriminatorily refused to hire Brett Johnson, Tim Hendershot, Tom Jankowski, and Alan Winge, it must make them whole for any loss of earnings and other benefits, consistent with the Board's decision in *Oil Capitol and Sheet Metal*, 349 NLRB 1348 (2007), computed on a quarterly basis less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest compounded daily, *Kentucky River Medical Center,* 356 NLRB 6 (2010), as computed in *New Horizons*, 283 NLRB 1173 (1987).[18]

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee(s) for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB 518 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, Aerotek, Inc., Omaha, Nebraska, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to consider for employment or refusing to hire any job applicant because the applicant is a union organizer or seeks union representation.

(b) Telling any employee that wages are confidential and are not to be discussed with others.

(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 necessary to effectuate the policies of the Act.

(a) Within 14 days of the Board's Order, offer immediate employment to Tim Hendershot, Tom Jankowski and Alan Winge in the positions for which they applied, or, if such positions no longer exist, to substantially equivalent positions.

(b) Make Tim Hendershot, Tom Jankowski, and Alan Winge whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the Board's decision. Make Brett Johnson whole through February 29, 2012.

(c) Within 14 days of the Board's Order, remove from Respondent's files any reference to the unlawful refusal to hire Tim Hendershot, Tom Jankowski, and Alan Winge and within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them..

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Omaha, Nebraska facility copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 17, 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. 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 August 1, 2011.

In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(f) 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.

Dated, Washington, D.C. March 11, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[18] With regard to Brett Johnson this obligation is tolled as of February 29, 2012.

[19] 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.

[20] If this Order is enforced by a judgment of a 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."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to consider for hire or refuse to hire any job applicant because we believe that they intend to try to organize employees.

WE WILL NOT tell employees that they are not to discuss wages with others.

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 of the Board's Order, offer immediate employment to, Tim Hendershot, Tom Jankowski, and Alan Winge in the positions for which they applied, or, if such positions no longer exist, to substantially equivalent positions.

WE WILL make Tim Hendershot, Tom Jankowski, and Alan Winge whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the Board's decision. WE WILL make Brett Johnson whole for any such losses through February 29, 2012.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful refusal to hire Tim Hendershot, Tom Jankowski, and Alan Winge and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire him will not be used against them.

AEROTEK, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/17-CA-071193 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.