

**Nos. 16-4520, 17-1206**

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**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

**AEROTEK, INC.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 22**

**Intervenor**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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## **SUMMARY OF THE CASE**

The National Labor Relations Board seeks enforcement of its Order against Aerotek finding unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act. The Board seeks summary enforcement of the uncontested portions of its Order related to Aerotek telling employees not to discuss their wages. In addition, the Board found that Aerotek further violated the Act by discriminatorily refusing to hire or consider four job applicants because they expressed an intent to organize if hired. Having found that Aerotek violated the Act, the Board ordered reinstatement and backpay for the four rejected applicants, and various notice-related remedies.

The Board's conclusions are based on established legal principles and factual findings that are supported by substantial evidence in the record, and the Board acted within its broad discretion in crafting a remedy. The Board believes that 15 minutes per side for oral argument is appropriate.

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**BRIEF FOR THE  
NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF JURISDICITON**

This case is before the Court on the petition of Aerotek, Inc. for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued on December 15, 2016, and reported at 365 NLRB No. 2. The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”). 29 U.S.C. § 160(a). The Court has jurisdiction over this appeal because the Board’s Decision and Order is final under Section 10(e) and (f) of the Act.

29 U.S.C. § 160(e) and (f). The petition and application are timely, as the Act provides no time limit for such filings. Venue is proper in this circuit because the unfair labor practices occurred in Omaha, Nebraska.

### STATEMENT OF ISSUES

I. Is the Board entitled to summary enforcement of the portions of its Order related to its uncontested finding that Aerotek violated Section 8(a)(1) of the Act by telling employees not to discuss their wages?

- *NLRB v. Bolivar-Tees, Inc.*, 551 F.3d 722 (8th Cir. 2008)
- *Handicabs, Inc. v. NLRB*, 95 F.3d 681 (8th Cir. 1996)
- 29 U.S.C. § 158(a)(1)

II. Does substantial evidence support the Board's finding that Aerotek violated Section 8(a)(3) and (1) by refusing to hire or consider four applicants because of their intent to organize?

- *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995)
- *Cobb Mech. Contractors, Inc.*, 356 NLRB 686 (2011)
- *Toering Elec. Co.*, 351 NLRB 225 (2007); *Fluor Daniel, Inc.*, 311 NLRB 498 (1993)
- 29 U.S.C. § 158(a)(1), (3)

III. Did the Board act within its broad remedial discretion in ordering make-whole relief for an unlawful refusal to consider or hire?

- *NLRB v. Beverly Health & Rehab. Servs., Inc.*, 187 F.3d 769 (8th Cir. 1999)
- *The Fund for the Public Interest*, 360 NLRB 877 (2014)
- *Hawaii Tribune-Herald*, 356 NLRB 661 (2011)
- *O'Daniel Oldsmobile, Inc.*, 179 NLRB 398 (1969)

## **STATEMENT OF THE CASE**

### **I. PROCEDURAL HISTORY**

The Board's Acting General Counsel issued a complaint alleging that Aerotek violated Section 8(a)(3) and (1) of the Act by refusing to hire or consider Brett Johnson, Tim Hendershot, Tom Jankowski, and Alan Winge because of their union and concerted activities, and Section 8(a)(1) by telling employees not to discuss wages. After a hearing, the administrative law judge issued a decision and recommended order finding violations as alleged. The judge recommended full make-whole relief for Hendershot, Jankowski, and Winge, but concluded that Johnson should not be awarded reinstatement and that his backpay should be tolled as of the date he contacted one of Aerotek's clients.

On December 15, 2016, the Board (one Member dissenting in part) affirmed the judge's rulings and conclusions in part and adopted the judge's recommended order in part, but reversed as to the remedy for Johnson, awarding reinstatement and full backpay. The Board also ordered additional remedies.

### **II. THE BOARD'S FINDINGS OF FACT**

#### **A. Aerotek Hires Electricians for Temporary, Project-Based Positions**

Aerotek is a staffing agency with an office in Omaha, Nebraska. It recruits and hires employees for other companies in a variety of fields, in both temporary and direct-placement positions. The Environmental and Engineering division

places employees such as electricians in temporary, project-based positions in the construction industry. Each division has several recruiters, whose primary role is finding and screening job candidates. (JA 1170; JA 32, 188-89, 432.)<sup>1</sup>

Aerotek finds candidates based on personal referrals, walk-ins, online job boards, and social-networking or other websites. It maintains an internal Recruiter Workspace database, known as RWS, where recruiters input the names of potential candidates whom they contact and document any communications with them. In addition, any individual who applies through the online job boards Career Builder or Thingamajob is automatically entered into RWS. (JA 1170; JA 34-35, 65-66, 99-100, 480-83, 597.) When filling a position, recruiters can either search through existing entries in RWS or find a new candidate who is not yet in the database. Aerotek interns periodically contact all candidates in RWS to touch base, but are not responsible for evaluating them. (JA 1170; JA 28-29, 176, 508-09, 590.)

Recruiters negotiate wage rates with candidates, subject to approval by the client company. If hired, employees are paid by Aerotek. The recruiter remains employees' main point of contact at Aerotek for the duration of the job. (JA 1173; JA 30-31, 454-56, 515.)

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<sup>1</sup> "JA" citations are to the Joint Appendix. References preceding a semicolon are to the Board's findings; cites following a semicolon are to supporting evidence. "Br." cites are to Aerotek's opening brief to the Court.

**B. Electrician and Union Organizer Brett Johnson Applies for Work, but Is Not Hired**

Brett Johnson is an organizer with International Brotherhood of Electrical Workers Local 22 (“Local 22”) and a licensed journeyman electrician. He applied for work with Aerotek as early as 2007, and was added to the RWS database in 2009. In March 2011, he worked an electrician job with Tradesmen International, a non-union contractor, until he was laid off for lack of work. (JA 1170, 1174; JA 217-18, 232-34, 857.) On July 27, 2011, Aerotek intern Kacie Woodley called Johnson and asked if he was looking for work. Johnson informed her that he was an organizer with Local 22 and offered to send his resume. Woodley documented the call in RWS. Johnson emailed his resume later that day and, the next morning, wrote again to Woodley and explained that “any electrical position will do apprentice or journeyman.” His resume listed his position with Local 22, and stated that his objective was “[t]o secure employment and to organize all electrical contractors into the IBEW.” The resume also showed that he was licensed in Nebraska and Iowa and had industrial and commercial wiring experience. (JA 1170; JA 219-22, 857, 861-67.)

On July 28, Johnson asked Local 22 member Joe Stock to apply to Aerotek. Stock contacted Aerotek to inquire about work later that day, and came in for an interview with recruiter Dan Mehmen the same afternoon. He did not submit a resume, and did not say in the interview that he was a member of or otherwise

currently affiliated with Local 22. (JA 1170-71; JA 41, 224-25, 380-84, 776.)

That evening, Mehmen wrote to the owner of Fremont Electric Company that Stock was available to start work in a journeyman position the following week.

Mehmen mentioned that Stock previously had worked as an IBEW electrician, but had left to take a different position. Stock started work at Fremont Electric on August 1. (JA 1170-71; JA 625-26, 821.)

Mehmen also spoke to Brandon Strine on the 28th, and referred him to Fremont Electric for a position that evening. Strine had first applied for work the previous February, and Woodley has spoken to him on July 20. In RWS, Mehmen noted that Strine “was in the union for a short time, most experience is non union.” (JA 1171; JA 594-95, 821, 825-26.) Strine’s resume listed “Local 22 temporary member” for a four-month job in 2008, but made no other reference to a union. (JA 1171; JA 778.) Strine started work at Fremont Electric on August 1. Fremont complained to Aerotek that Strine was a slow worker, and later reported that he left to take another position before the job was complete. (JA 1171; JA 50, 625-26, 827, 829.)

On August 5, Aerotek posted a notice for a journeyman position that required commercial and industrial experience. Johnson wrote to recruiter Mehmen on August 8 to reiterate his interest in working with Aerotek, and specifically referenced the new job posting. He again stated that he wanted to

introduce more electricians to Local 22. Account manager Jacob Shank called Johnson later that day and told him that Aerotek currently was looking only for apprentices. Johnson replied that he would take an apprentice position, and Shank said he would consider Johnson for future jobs. (JA 1171; JA 227-28, 637, 868.)

**C. Electricians and Voluntary Organizers Tim Hendershot, Tom Jankowski, and Alan Winge Apply for Work, but Are Not Hired**

In early August, Johnson solicited Local 22 members to take part in a salting campaign, in which they would apply for jobs with non-union companies and, if hired, attempt to organize the other employees while working there. Local 22 members and journeyman electricians Tim Hendershot, Tom Jankowski, and Alan Winge volunteered to participate. Johnson helped each of them draft a resume, using a template created to assist members with low computer skills. Both Hendershot and Jankowski expressly authorized Johnson to submit their resumes to Aerotek. Johnson did not specifically identify Aerotek to Winge as one of the subjects of the salting campaign, but Winge knew that Johnson was going to submit his resume to several employers. (JA 1171; JA 229, 312-14, 328-31, 337-38, 345.)

Johnson submitted Hendershot's, Jankowski's, and Hinge's resumes to Aerotek on August 12 through an online job board. The resumes were automatically entered into RWS. Each man's resume stated that he was a voluntary organizer with Local 22 and had the goal of both securing employment

and organizing the workplace. At the time, Hendershot had been unemployed for around a year and a half, and Winge for almost two months. Jankowski generally was working three days a week, but often went weeks at a time without any work. (JA 1171; JA 228, 315, 331, 341-43, 858-60, 870-72.)

On August 19, Fremont Electric requested several journeyman electricians from Aerotek. On August 24, recruiter Mehmen created an RWS profile for Jeffrey Thomsen after Thomsen posted to an online job board called Nebraska Works. Mehmen contacted Thomsen for a phone interview that same day. Also on the 24th, Mehmen reached out to David Myhr, who was already in the RWS database and had applied for a position with Aerotek on July 28. Neither Thomsen nor Myhr referenced Local 22 or any other union on his resume. Both men were hired and placed with Fremont Electric in journeyman positions on August 30. (JA 1171, 1174-75; JA 595-97, 625-26, 774, 780-83, 827-29, 832, 1140-43.)

**D. Aerotek Continues To Bypass Johnson, Hendershot, Jankowski, and Winge**

Johnson emailed Mehmen on November 30 to reiterate his interest in “any electrical construction position available” and to update him regarding additional certifications Johnson had received. Mehmen did not respond, and did not document the contact in RWS. (JA 1171; JA 230-31, 600, 873-80.)

Aerotek continued to post job notices throughout November and December. In December, Aerotek hired 4 apprentices for IES Commercial, and rehired

Brandon Strine for a new job. (JA 1171-72; JA 625-27, 639-51.) Beginning in January 2012, Interstates Construction requested multiple journeymen and apprentices for a project retrofitting a Tyson's Food pepperoni plant across the river in Council Bluffs, Iowa. The job was short term, slated to last through April or May. Between January and March, Aerotek hired 14 journeymen and 10 apprentices for the Interstates job. (JA 1172; JA 187-88, 616-21, 841-54.) Several of those individuals were interviewed or hired the same day they first contacted Aerotek to express interest in work. (JA 1172; JA 353-55, 399-400, 406, 411.) Not all had an Iowa electrician's license or prior industrial experience, which the job required, and some of the individuals hired as apprentices previously had worked as journeymen. (JA 1172; JA 47, 76-78, 82-83, 97-98, 181-82, 618, 716, 718-20, 841.) Some of the hired applicants were covert participants in the Local 22 salting campaign who did not list union organizer on their resume or application, or otherwise reveal their union affiliation. (JA 1172; JA 198, 652-64, 674-76, 688-95, 698-708, 1128.)

Aerotek never contacted Johnson, Jankowski, or Winge about a job. (JA 1172; JA 103-05.) On February 24, recruiter Curtis Coatman, who normally worked in the Scientific division rather than the Environmental and Engineering division, spent one day recruiting candidates for the Interstates job. He called and emailed several applicants listed in RWS, and left a voicemail message for

Hendershot asking about his current job status and if he was interested in a journeyman position. Hendershot called back twice and left messages, but did not receive a response or any other communication from Aerotek. (JA 1172; JA 339-41, 557-58, 564-65, 884, 1137.)

On February 29, Johnson and another Local 22 official visited the Interstates office in Omaha, told them that Local 22 members were working on the Tyson's Food job who had been hired by Aerotek, and offered to refer electricians to them directly through the Local 22 hiring hall. Interstates said it did not need any more electricians on the job. The following week, Johnson left a phone message with Interstates making the same offer of direct assistance. (JA 1175; JA 1128.) On March 9, Johnson wrote to Aerotek informing it that some of Aerotek's employees on the Interstates job were seeking to organize, and identifying the employees who would serve as Local 22's organizing committee for the campaign. (JA 1172; JA 249, 881.)

**E. Aerotek Recruiters Tell Employees Not To Discuss Wages**

In early March, Aerotek employee Carlos Ramos asked for a raise after learning that other employees at the Interstates job with similar qualifications and experience were earning more than him. In response, recruiter Lindsay Rohman asked him to keep his wages confidential and not to discuss them with his co-workers. Rohman made a similar request of employee Mike Miodowski after he

asked for a raise, and told applicant Adrian Sterns before he was hired to keep wages confidential. After employee Julio Juarez asked for a raise, recruiter Kristin Breon asked him to keep his wages confidential. Breon subsequently contacted employees Dave Erwin and Andrew Stock and told them that pay was confidential. (JA 1173; JA 357-58, 370-72, 518-19, 523-24, 536-37, 542, 885.)

### **III. THE BOARD'S CONCLUSIONS AND ORDER**

On December 15, 2016, the Board (Chairman Pearce and Members Miscimarra and McFerran)<sup>2</sup> issued a Decision and Order finding that Aerotek violated Section 8(a)(3) and (1) of the Act by refusing to hire or consider Johnson, Hendershot, Jankowski, and Winge, and violated Section 8(a)(1) by telling employees that wages were confidential and not to be discussed with others. The Board's Order requires Aerotek to cease and desist from the violations found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

Affirmatively, the Board's Order directs Aerotek to offer employment to Jankowski, Hendershot, and Winge, make them whole for any loss of earnings and other benefits as a result of the discrimination against them, and post a remedial notice. The Board (Chairman Pearce and Member McFerran; Member Miscimarra, dissenting) further ordered Aerotek to offer employment to Johnson

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<sup>2</sup> On April 24, 2017, Member Miscimarra was named Chairman of the Board.

and make him whole for any loss of earnings and other benefits from the discrimination; to mail copies of the remedial notice to the four discriminatees, all applicants for electrician positions in the Omaha office's region since July 29, 2011, and all current electrician employees in the Omaha office's region who do not regularly work out of Aerotek's office; and to include remedial language on all of its job applications and advertisements for electrician positions in the Omaha office's region for a period of six months.

### **STANDARD OF REVIEW**

The Court “affords the Board’s order great deference,” *King Soopers, Inc. v. NLRB*, 254 F.3d 738, 742 (8th Cir. 2001), and “will enforce the Board’s order if it has correctly applied the law and its factual findings are supported by substantial evidence on the record as a whole.” *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 779-80 (8th Cir. 2013) (internal quotations omitted)). The Board’s factual findings “shall be conclusive” if they are “supported by substantial evidence on the record considered as a whole,” 29 U.S.C. § 160(e), which “is evidence that ‘a reasonable mind might accept as adequate to support’ a finding,” *NLRB v. Am. Firestop Solutions, Inc.*, 673 F.3d 766, 768 (8th Cir. 2012) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). Employer motive regarding a hiring decision is a factual issue that is reviewed for substantial evidence. *Wright Elec., Inc. v. NLRB*, 200 F.3d 1162, 1168 (8th Cir. 2000). The Court similarly

“afford[s] great deference” to the Board’s credibility determinations, *RELCO Locomotives*, 734 F.3d at 787, which it will not overturn “[a]bsent a showing of extraordinary circumstances,” *NLRB v. Quick Find Co.*, 698 F.2d 355, 359 (8th Cir. 1983).

Once the Board has found a violation, “[t]he Board’s remedies are reviewed for an abuse of its broad discretion in its field of specialization.” *NLRB v. Beverly Health & Rehab. Servs., Inc.*, 187 F.3d 769, 772 (8th Cir. 1999) (internal quotations omitted); *see also NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969) (“[T]he remedial power of the Board is ‘a broad discretionary one, subject to limited judicial review.’” (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964))). The Board’s choice of remedy “will not be disturbed unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Fibreboard Paper Prods.*, 379 U.S. at 216 (internal quotations omitted).

## **SUMMARY OF ARGUMENT**

The Act’s protection of employees’ right to organize includes a prohibition on employers refusing to hire or consider job applicants because they express an intent to exercise that right. Aerotek thus violated well-established law when it failed to hire or consider Brett Johnson, Tim Hendershot, Tom Jankowski, and Alan Winge based on their stated intention to organize the workplace if hired.

Likewise unlawful was Aerotek recruiters telling employees not to discuss their own wages—a clear violation that Aerotek does not contest on appeal.

Substantial evidence supports the Board's finding that Aerotek refused to hire or consider Johnson, Hendershot, Jankowski, and Winge because of their union activity. The four men's experience, expressed desire for a job, and current employment status show a genuine interest in working for Aerotek. Yet animus against organizing activity motivated Aerotek's decision not to hire or consider them, even as it filled over 30 positions for which they had relevant experience and training. Its failure to consistently apply its proffered reasons for rejecting the four applicants reveal those reasons to be pretext, and it bypassed them in favor of candidates with no union affiliation or more attenuated connections who in some cases did not meet stated criteria for the job. The pretextual basis for its decision also undermines any contention that Aerotek would not have hired Johnson, Hendershot, Jankowski, and Winge even absent their union activity.

The Board also acted within its broad discretion in crafting a remedy to redress Aerotek's unlawful actions. Aerotek has not met its heavy burden of showing that it should be relieved of its remedial obligation to Johnson following its unlawful discrimination against him. Given that Johnson's alleged misconduct occurred only after such discrimination, that conduct was not so extraordinary as to render him unfit for service and was unlikely to continue if he were hired.

Aerotek's other challenges to the remedy, raised for the first time on appeal, have been forfeited and thus are not properly before the Court.

## ARGUMENT

Employees have the right “to self-organization” and “to ... assist labor organizations” in that effort. 29 U.S.C. § 157. Aerotek’s failure to hire or consider Brett Johnson, Tim Hendershot, Tom Jankowski, and Alan Winge because they intended to exercise that right thus constitutes an unfair labor practice under well-settled law. That violation demands a remedy, and Aerotek has not met its burden of showing that it should be allowed to evade its remedial obligations.

### **I. The Board’s Uncontested Finding That Aerotek Unlawfully Told Employees Not To Discuss Wages Should Be Summarily Enforced**

An employer violates Section 8(a)(1) of the Act by “interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed” in Section 7. 29 U.S.C. § 158(a)(1). Conduct that “reasonably tends to interfere with the employees’ exercise of their Section 7 rights” is thus unlawful. *Mississippi Transp., Inc. v. NLRB*, 33 F.3d 972, 977-78 (8th Cir. 1994) (internal quotations omitted). For example, it is well established that a “prohibition of wage discussion among employees ... violat[es] the Act.” *Handicabs, Inc. v. NLRB*, 95 F.3d 681, 684 (8th Cir. 1996); *see also Cintas Corp.*, 344 NLRB 943, 946 (2005) (“It makes no difference whether the employees were ‘asked’ not to discuss their wage rate or ordered not to do so.” (internal quotations omitted)), *enforced*, 482 F.3d 463 (D.C. Cir. 2007). Yet here, it is uncontested that Aerotek recruiters Breon and Rohman

told numerous employees on multiple occasions that wage rates were confidential and not to be discussed.

Aerotek does not challenge the Board’s finding of a Section 8(a)(1) violation in the argument section of its opening brief or list the matter in its statement of issues. Accordingly, it has forfeited the issue, and “[t]he Board is entitled to summary enforcement of the uncontested portions of its order” addressing that violation. *NLRB v. Bolivar-Tees, Inc.*, 551 F.3d 722, 727 (8th Cir. 2008) (internal quotations omitted). Aerotek mentions the violation in a footnote in its procedural-history section (Br. 4 n.3), but a sentence or two on an issue “not otherwise briefed or discussed” and “not included in the statement of issues” does not “suffice to properly preserve an issue on appeal.” *Borough v. Duluth, Missabe & Iron Range Ry. Co.*, 762 F.2d 66, 68 n.1 (8th Cir. 1985).<sup>3</sup>

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<sup>3</sup> Even if the issue were preserved, substantial evidence supports the Board’s finding, and Aerotek’s assertion that it has no “policy” regarding wage discussion and that some employees continued to talk about wages without discipline (Br. 4 n.3) is unmeritorious. Regardless of whether they reflected a formal “policy,” the statements were made by the Aerotek officials who were employees’ main point of contact. Aerotek’s actions also were unlawful regardless of whether employees were, in fact, restrained from exercising their rights so long as those actions would “reasonably tend[]” to do so, *Mississippi Transp.*, 33 F.3d at 977-78; *see also Westside Cmty. Mental Health Ctr., Inc.*, 327 NLRB 661, 666 (1999) (finding Section 8(a)(1) violation even when “there was no explicit penalty mentioned”).

## **II. Aerotek Refused To Hire or Consider Johnson, Hendershot, Jankowski, and Winge Because of Their Intent To Organize**

Substantial evidence supports the Board’s finding that Aerotek unlawfully refused to hire or consider Johnson, Hendershot, Jankowski, and Winge, in violation of well-established law regarding an employer’s treatment of job applicants who express an intent to exercise their right to organize if hired.

### **A. An Employer’s Discriminatory Refusal To Hire or Consider Job Applicants Based on Union Activity Violates the Act**

An employer violates Section 8(a)(3) of the Act “by discrimination in regard to hire ... [to] discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3).<sup>4</sup> The Act’s protection extends to job applicants because “[d]iscrimination against union labor in the hiring of men is a dam to self-organization at the source of supply,” such that “[t]he effect of such discrimination ... inevitably operates against the whole idea of the legitimacy of organization.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941). It similarly applies when the individuals seeking employment also intend to organize the workplace if hired, as the Act protects “the right of employees to organize ... without employer interference.” *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 87-88, 91 (1995) (internal quotations omitted); *accord Town & Country Elec., Inc. v. NLRB*, 106 F.3d 816, 818-20 (8th Cir. 1997). Accordingly, “[w]hen an employer’s refusal to

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<sup>4</sup> A violation of Section 8(a)(3) also derivatively violates Section 8(a)(1). *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n. 4 (1983).

hire an applicant is motivated by anti-union animus, § 8(a)(3) is violated.” *Wright Elec.*, 200 F.3d at 1168.

To show an unlawful refusal to hire or consider, the Board’s General Counsel must first demonstrate that the applicant was “genuinely interested in seeking to establish an employment relationship with the employer.” *Toering Elec. Co.*, 351 NLRB 225, 233 (2007). Specifically, the General Counsel must show that “there was an application for employment”—either by the applicant himself or by someone authorized to do so on his behalf—and that “the application reflected a genuine interest in becoming employed by the employer.” *Id.* Because the Board will not “presume ... that an application for employment is anything other than what it purports to be,” the application itself suffices to show a genuine interest in employment unless the employer puts forth evidence that “creates a reasonable question as to the applicant’s actual interest in going to work.” *Id.* If the employer does so, the General Counsel must rebut such a challenge by proving genuine interest. *Id.* Evidence of an applicant’s genuine interest includes experience and certification in the relevant field, *Cossentino Contracting Co.*, 351 NLRB 495, 496 (2007), lack of current employment, and credited testimony that he would have accepted a position if offered, *Cobb Mech. Contractors, Inc.*, 356 NLRB 686, 696 (2011).

If the application reflects a genuine interest in employment, the General Counsel next must demonstrate that (1) the employer was hiring or had concrete plans to hire at the time, (2) the applicant had relevant experience or training for the requirements of the position, and (3) union animus was a motivating factor in the decision not to hire the applicant. *FES*, 331 NLRB 9, 12 (2000), *enforced*, 301 F.3d 83 (3d Cir. 2002); *New Silver Palace Rest.*, 334 NLRB 290, 291 (2001); *see also Wolfe Elec. Co.*, 336 NLRB 684, 690 (2001) (same), *enforced*, 314 F.3d 325 (8th Cir. 2002). For an unlawful failure to consider, the General Counsel must show that the employer excluded the applicant from a hiring process based on union animus. *FES*, 331 NLRB at 15. Once the General Counsel has made that showing of unlawful motivation, the employer bears the burden of proving, as an affirmative defense, that it would not have hired or considered the applicant even in the absence of his union activity or support. *Id.* at 12, 15.

The Board may rely on circumstantial evidence of animus, such as an employer's vague or pretextual reasons for the hiring decision or its disparate treatment of union applicants. *RELCO Locomotives*, 734 F.3d at 787; *York Prods., Inc. v. NLRB*, 881 F.2d 542, 545-46 (8th Cir. 1989). An employer's proffered reason is properly dismissed as pretext when, for example, it was not applied consistently. *Wright Elec.*, 200 F.3d at 1166, 1168. Moreover, the Board is "permitted to draw reasonable inferences" from such evidence. *Pace Indus., Inc. v.*

*NLRB*, 118 F.3d 585, 590 (8th Cir. 1997) (internal quotations omitted). Indeed, if the employer’s stated reason for not hiring the applicant is false or pretextual, the Board reasonably may infer that the true reason was unlawful discrimination. *See Wright Elec., Inc.*, 327 NLRB 1194, 1207 (1999) (noting that an employer’s “fail[ure] to advance a credible reason for not considering [an applicant] for employment is, itself, a factor tending to show that [the] true reason had been an unlawful one”), *enforced*, 200 F.3d 1162 (8th Cir. 2000). In addition to serving as evidence of unlawful motivation, a showing of pretext undermines the employer’s affirmative defense; when its proffered reasons are “largely pretextual,” the employer “d[oes] not sustain its burden of showing that it would have taken the same action even absent the unlawful motivation.” *Pace Indus.*, 118 F.3d at 593; *see also RELCO Locomotives*, 734 F.3d at 782 (same).

**B. Aerotek’s Refusal To Hire or Consider Genuine, Qualified Applicants Was Unlawfully Motivated**

Substantial evidence supports the Board’s finding that Aerotek refused to hire or consider Johnson, Hendershot, Jankowski, or Winge “because they indicated that they intended to organize after they were hired.” (JA 1175.) The four men were genuinely interested in and qualified to fill the many positions for which Aerotek was hiring, yet were bypassed based on union animus. Aerotek’s arguments to the contrary are based on pretextual reasons, unsupported or discredited claims, and inapt comparisons.

## 1. The Rejected Applicants Were Genuinely Interested in Employment

The Board reasonably found that Johnson, Hendershot, Jankowski, and Winge each had a genuine interest in working for Aerotek. As an initial matter, all four men applied for employment. Johnson had applied to work there in the past, and he submitted his resume shortly after he was contacted by Aerotek intern Woodley on her periodic check in with individuals in the RWS database. Hendershot, Jankowski, and Winge each worked with Johnson to create a resume and authorized Johnson to submit it to Aerotek—Hendershot and Jankowski expressly, and Winge by volunteering for the salting campaign with the knowledge that his resume would go to several employers. *See Toering Elec.*, 351 NLRB at 233 (accepting evidence that “the individual applied for employment ... or that someone authorized by that individual did so on his or her behalf”). Each resume contained the individual applicant’s own length of experience, education, licenses, and certifications.

The applications also reflected a genuine interest in employment with Aerotek. All four men were licensed electricians with many years of experience in the field. *Cossentino Contracting*, 351 NLRB at 496. Moreover, Hendershot and Winge were unemployed and looking for work at the time they applied, and Jankowski was working at most only three days a week and facing sporadic stretches without any work. The need for steady (or any) work is clearly

compelling grounds to apply for a job. *See Cobb Mech. Contractors*, 356 NLRB at 696 (applicants who “were out of work and credibly testified that they would have accepted a position if offered, were legitimate applicants seeking to establish an employment relationship”). Johnson had recently worked for a non-union company as part of an organizing campaign, suggesting a willingness to do so again. After submitting his resume, Johnson followed up via phone and email to express his continued interest on several occasions over the next few months. Similarly, Hendershot twice attempted to reach Aerotek recruiter Coatman after Coatman left a message for him.<sup>5</sup> Finally, Johnson and Winge both testified (JA 234, 332-33) that they would have accepted jobs with Aerotek if offered. *Cobb Mech. Contractors*, 356 NLRB at 696; *Cossentino Contracting*, 351 NLRB at 496.

Aerotek’s attempt to question the genuineness of the four applicants’ interest in employment runs contrary to the record evidence and settled caselaw. Aerotek notes (Br. 34) that Hendershot’s, Jankowski’s, and Winge’s resumes arrived together, but when, as here, the submission of each resume was authorized, “[t]he fact that applications may be submitted in a batch is not, in and of itself, sufficient

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<sup>5</sup> Aerotek’s assertion that, other than Johnson, “none of the applicants followed up” (Br. 34) is thus incorrect. And although Johnson’s and Hendershot’s efforts to contact Aerotek highlight their interest in the job, not taking that extra step does not, as Aerotek contends (Br. 34), show a lack of interest, as Aerotek does not require applicants to follow up after submitting their information. *See Cobb Mech. Contractors*, 356 NLRB at 695 (not contacting employer after applying did not cut against genuine interest when applicant “was not told that he needed to do [so]”).

to destroy genuine applicant status.” *Toering Elec.*, 351 NLRB at 233 n.51. Indeed, Aerotek recruiter Mehmen acknowledged (JA 598) that submitting resumes together is not grounds for disqualifying them. Further, Aerotek’s description of the three resumes as “nearly identical” (Br. 34) ignores the individualized details noted above, and Aerotek makes no contention that any of the information that appeared on all three resumes did not accurately describe each individual applicant. And the fact (Br. 34) that Hendershot’s contact information accidentally appeared on some—but not all (JA 228, 871)—copies of Winge’s resume indicates more an administrative error than any reflection on Winge’s desire for work. In any event, Johnson’s resume was highly detailed with information specific to him, and he was not hired either. As demonstrated below, the common feature of the resumes that mattered most in Aerotek’s refusal to hire was the title of union organizer.

Aerotek also suggests (Br. 35) that Johnson, Hendershot, Jankowski, and Winge lacked a genuine interest because they might have left the job if Local 22 decided to call off the organizing campaign. But as the Supreme Court has explained, such an argument “proves too much,” as it is not limited to organizers; if a “union organizer might quit, ... so too might ... a worker who has found a better job, or one whose family wants to move elsewhere.” *Town & Country Elec.*, 516 U.S. at 96. Moreover, all of the jobs for which Aerotek was hiring were short

term. (JA 191.) As the Board noted (JA 1171 n.4), Aerotek hired applicants who expressly stated in their applications or interviews that they had future commitments: Kyle Modlin was going to return to his current job (JA 836-37) and Jason Darnold had plans to start working as a truck driver (JA 855-56). It also rehired Brandon Strine for another job even though he left the previous one before it ended. The lack of support in the record or caselaw for each of its arguments undermines Aerotek's assertion that it "reasonably questioned" (Br. 34) whether Johnson, Hendershot, Jankowski, and Winge were genuinely interested in employment.

In sum, both the fact that Johnson, Hendershot, Jankowski, and Winge applied to work at Aerotek and the circumstances under which they did so reflect a genuine interest in employment. Despite that interest, Aerotek's response was to bypass the four organizers for scores of open positions over the course of multiple months.

**2. The Rejected Applicants Were Qualified for Available Positions, and Aerotek's Refusal To Hire or Consider Them Was Motivated by Animus**

Substantial evidence supports the Board's finding that their intent to organize motivated Aerotek's refusal to hire or consider Johnson, Hendershot, Jankowski, and Winge, and that Aerotek failed to show that it would not have hired them even absent their union activity. As an initial matter, Aerotek does not

contest the Board’s finding that Johnson, Hendershot, Jankowski, and Winge possessed experience and training relevant to the positions for which Aerotek was hiring. Nor could it, as the four men were all licensed electricians with between 6 and 22 years of experience in the field. And although Aerotek questions whether “there were openings for the four applicants” (Br. 31-32), it acknowledges that it had well more than four available positions during the relevant time period. Indeed, it is uncontested that Aerotek placed at least 37 electricians with 6 different employers between August 2011 and March 2012.<sup>6</sup>

The Board’s finding that “animus against union activity was a motivating factor in [Aerotek’s] failure to hire” (JA 1160) is likewise supported by the record. Aerotek did not hire any applicant who expressly stated that he was an organizer with Local 22, and “[a]n employer’s exclusion of union affiliated applicants who give notice of a present intent to organize establishes a hostile motive.” *Cobb Mech. Contractors*, 356 NLRB at 695 (internal quotations omitted). By contrast, applicants with no union affiliation, or more attenuated connections, were selected. For example, rather than consider the four organizers for the Fremont Electric job, which opened up the week after Hendershot, Jankowski, and Winge applied,

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<sup>6</sup> To the extent Aerotek’s reference (Br. 32) to the number of individuals listed in the RWS database when discussing “openings” goes to its purported reasons for not hiring Johnson, Hendershot, Jankowski, or Winge, the evidence of animus detailed below shows that Aerotek does not undermine the Board’s finding of discrimination simply by stating that it had a large pool of candidates.

Aerotek reached out to Myhr and Thomsen, neither of whom had any union connection. Although Johnson, Hendershot, Jankowski, and Winge were never even considered for a job, some candidates who did not describe themselves as union organizers were interviewed and hired within days—sometimes even the same day—of applying.<sup>7</sup>

Animus is also shown by the pretextual nature of Aerotek’s proffered reasons for not hiring. At the same time that it purportedly rejected Johnson because he had earned more on past jobs than Aerotek was offering (JA 102, 196, Br. 27-29), Aerotek hired numerous candidates who would earn less with Aerotek than they had for previous work.<sup>8</sup> Likewise, even though account manager Shank deflected Johnson’s query about a job posting by saying that they were hiring only apprentices, Aerotek hired other journeyman electricians, including Jason Darnold and Charles Christman, for apprentice positions (JA 183-84, 618, 716, 718-20).

Aerotek’s inconsistent application of a facially neutral criterion such as wage

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<sup>7</sup> Aerotek does not challenge the Board’s well-supported conclusion (JA 1160, 1174) that substitute recruiter Coatman’s call to Hendershot did not reflect an actual intent to consider him. Coatman simply contacted an assortment of applicants from the RWS database, and no one at Aerotek ever responded to Hendershot’s two attempts to return the call.

<sup>8</sup> For example, Julio Juarez and Duane North both previously had made \$30/hour and were hired at Aerotek for \$25 and \$23, respectively. (JA 617, 666, 684.) John Tonn had earned over \$30/hour for almost seven years, and was hired for \$13. (JA 626, 786.) Jason Darnold had made \$24.50/hour and Charles Christman had made \$20/hour before both men were hired for \$16. (JA 78-79, 618, 855-56.)

history is quintessential evidence of pretext. *See, e.g., Wright Elec.*, 200 F.3d at 1166 (rejecting employer’s argument that applicant was not hired because he “recently worked on higher paying commercial jobs” when “the individual hired for the position had also recently worked on commercial jobs”); *Masiongale Elec.-Mech., Inc.*, 337 NLRB 42, 43 (2001) (finding inconsistently applied wage-history reason pretextual), *enforced in relevant part*, 323 F.3d 546 (7th Cir. 2003); *Clock Elec., Inc.*, 323 NLRB 1226, 1232 (1997) (employer’s “policy against hiring someone who would have to take a pay cut was not uniformly followed”), *enforced in relevant part*, 162 F.3d 907 (6th Cir. 1998).

Moreover, Johnson informed Aerotek numerous times that he was willing to take any available position, and the administrative law judge specifically credited (JA 1170 n.1) Johnson’s testimony that, because his goal was to get hired and organize the workplace, he did not insist upon a certain pay rate (JA 222-23). *Cf. Pace Indus.*, 118 F.3d at 591 (finding pretextual employer’s contention that applicants “were rejected because they had entered too high a wage rate on their applications” when they “also indicated that they would accept a reasonable or compatible rate”).<sup>9</sup>

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<sup>9</sup> Aerotek’s assertion (Br. 28) that Johnson requested \$30/hour is thus contrary to the credited evidence, and Aerotek has not presented the “extraordinary circumstances” needed to reject the Board’s credibility determination. *Quick Find Co.*, 698 F.2d at 359. In any event, Johnson swiftly corrected any mistaken

Similarly pretextual is Aerotek's proffered reason of "timing" pursuant to a policy of filling positions within a 72-hour "red zone," and not actively doing so prior to that window. (JA 103-04, Br. 29-31.) It claims to have bypassed Johnson, Hendershot, Jankowski, and Winge for the Fremont Electric job under the red-zone policy because other candidates applied closer to the start date, but any such practice was not followed consistently. For example, Aerotek hired Strine for a job starting August 1 even though it spoke to him on February 23 and July 20 (JA 825-26) but subsequently received Johnson's resume on July 27 (JA 857, 861-64). Moreover, Aerotek has no rule that recruiters must fill positions with the most recent applicants—a policy that would seem to undermine the purpose of maintaining the RWS database.

Likewise unsupported is the related suggestion (Br. 29-31) that Johnson, Hendershot, Jankowski, and Winge were overlooked for applying in advance of the red-zone period. Even if "positions are only filled within a 72-hour time frame" prior to the start date (Br. 30), Aerotek has selected candidates who applied outside of that window. It hired Kyle Modlin in December 2011 and Julio Juarez in February 2012, for example, even though both men's first contact with Aerotek was in July 2011 or earlier (JA 91, 836-38)—far more of a gap than elapsed

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impression that caused Aerotek intern Woodley to note such a request in RWS on July 27 by emphasizing his flexibility in a follow-up email to her on July 28.

between the submission of Hendershot's, Jankowski's, and Winge's resumes on August 12 and the start of the Fremont Electric job on August 30. And contrary to the purported hard-and-fast rule that candidates will not even be considered for a position outside of the 72-hour window (Br. 29-30), Dave Erwin and Jason Darnold were both contacted about jobs at Interstates two weeks in advance. (JA 93, 365-66, 616, 618.) Even if timing were a factor in the Fremont Electric job, moreover, Aerotek does not contend that it was the reason for not hiring Johnson, Hendershot, Jankowski, or Winge for open positions in November, December, January, February, or thereafter.<sup>10</sup>

Further supporting the Board's finding of animus is that Aerotek hired other applicants who "were not more qualified and probably, in some cases, clearly less qualified" (JA 1174). Johnson, Hendershot, Jankowski, and Winge are all licensed electricians with years of industrial and commercial experience who live in the Omaha area. Yet Aerotek hired numerous applicants whose resumes gave no indication that they had such experience or certifications, including for industrial jobs like Interstates that required an Iowa electrician license. *Cf. Masiogale Elec.-Mech.*, 337 NLRB at 51-52 (hiring less experienced, unlicensed applicants

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<sup>10</sup> Aerotek's only other argument regarding Jankowski, Hendershot, and Winge is the vague assertion that their resumes were "suspicious" (Br. 29), but the resumes were legitimate for the same reasons that they indicated a genuine interest in employment, *see* pp. 22-24. Again, Aerotek acknowledged (JA 598) that submitting resumes together does not disqualify applicants for employment.

evidence of animus). For example, Warren Kennedy had only three months of electrical experience, entirely in residential (JA 682-83), and Rodgina Miller had never before worked in the field (JA 744-46). Aaron Flores was hired as a journeyman even though he had no journeyman experience and had applied for an apprentice position. (JA 616-17, 678-79.) And even though account manager Shank testified that geographical proximity to the worksite is an important factor, Aerotek hired Flores for the Interstates job in Council Bluffs, Iowa that was two and a half hours away from his home in Grand Island, Nebraska. (JA 94, 175.) Along with the evidence of pretext, Aerotek’s practice of consistently favoring such candidates over applicants who intended to organize amply supports the Board’s finding of animus.<sup>11</sup>

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<sup>11</sup> Given the Board’s express finding that animus was a “motivating factor” (JA 1160) and that Aerotek refused to hire the four applicants “because of their declared union organizer status” (JA 1175), Aerotek’s assertion that the Board “failed to require a showing of causation” (Br. 22) is incorrect. To the extent Aerotek claims (Br. 19-20) that *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548 (8th Cir. 2015), demands some further showing, that argument is not properly before the Court, as it was not raised before the Board. Under Section 10(e) of the Act, “[n]o objection that has not been urged before the Board ... shall be considered by the court” absent “extraordinary circumstances.” 29 U.S.C. § 160(e); see also *NLRB v. Chipotle Servs., LLC*, 849 F.3d 1161, 1162-63 (8th Cir. 2017) (finding employer’s *Nichols Aluminum* argument forfeited under Section 10(e)). In any event, the Board did not, as Aerotek suggests, rely on “general animus” (Br. 20); the evidence that the Board cited in finding animus—favoring non-union applicants, rejecting organizers based on pretextual reasons, selecting less experienced candidates—all relates directly to the hiring decision.

Although Aerotek contends that it lacked animus because it hired other “union members and supporters” (Br. 24-27), the Board found that Aerotek “was unaware of any of those other applicants’ current union affiliations when it hired them” (JA 1161). Aerotek relies (Br. 26) on Shank’s testimony that he knowingly hired union supporters for the Interstates job, but the Board discredited that testimony as inconsistent with more contemporaneous evidence (JA 1172). In an affidavit from May 2012, Shank stated that he first learned that Aerotek had hired Local 22 members to work at Interstates when another employee complained about organizing efforts by those members there, and that, even then, he did not know which employees belonged to the union. (JA 113.) Recruiter Breon, who hired for the Interstates job, likewise testified that she did not know that any of the applicants she selected were union. (JA 525, 529.)

Even if Aerotek did knowingly hire “members and supporters” (Br. 24), however, its refusal to hire Johnson, Hendershot, Jankowski, and Winge was still unlawful. None of the hired applicants stated an intent to organize, and an employer’s hiring of “known or suspected union applicants does not negate ... that it discriminated against [other applicants] because of their declared union organizer status.” *Hi-Tech Interiors, Inc.*, 348 NLRB 304, 304 (2006). Unlike individuals who are simply union members, organizer-applicants give express notice that they will exercise their Section 7 rights in the workplace, and discrimination against

union activity is unlawful regardless of whether the employer also discriminates against union support.

Further distinguishing the hired applicants is the nature of their purported union support. Aerotek notes (Br. 25) that some of them worked for a unionized contractor at some point in the past, but “there is a significant difference between past union affiliation and notice of present intent to organize.” *Fluor Daniel, Inc.*, 333 NLRB 427, 440 (2001), *enforced in relevant part*, 332 F.3d 961 (6th Cir. 2003); *see also Cobb Mech. Contractors*, 356 NLRB at 689, 695-96 (hiring former union members did not preclude finding animus); *Clock Elec.*, 323 NLRB at 1231 (same). Likewise, an employer’s “willingness to employ [an applicant] who has only attenuated union links[] is insufficient to refute a finding of hostile motive.” *H.B. Zachry Co.*, 332 NLRB 1178, 1183 (2000). Indeed, the Board has rejected evidence similar to Aerotek’s as insufficient to defeat a showing of animus against organizers, distinguishing “an applicant for employment who puts on his application that he has worked in the past for a union contractor and one who states clearly that he is a ‘voluntary union organizer.’” *Fluor Daniel, Inc.*, 311 NLRB 498, 500 (1993), *enforced in part, remanded in part on other grounds*, 161 F.3d 953 (6th Cir. 1998); *see also Tradesmen Int’l, Inc.*, 351 NLRB 579, 600-01 (2007)

(same).<sup>12</sup> Thus, none of the applicants hired instead of Johnson, Hendershot, Jankowski, and Winge are comparable to them as to the relevant factor of being a current union member and active supporter with an express intent to organize; all of the applicants matching that description were rejected.<sup>13</sup>

Finally, the pretextual or otherwise non-credible nature of Aerotek's purported reasons for not hiring Johnson, Hendershot, Jankowski, and Winge also permits the inference that the true reason for its refusal was their intent to organize.

*Wright Elec.*, 327 NLRB at 1207. As the Board held, because Aerotek "has not

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<sup>12</sup> The specific individuals that Aerotek invokes (Br. 24-26) are also inapt comparators. Many were hired or contacted outside of the relevant August 2011-March 2012 timeframe, including Joshua Combes in April 2010, William Klement in 2008, and Dave Erwin in August 2012. There is no evidence that the recruiter who contacted Erwin was aware of his previous organizing activity, moreover, and the only union reference on Combes's resume was completing a union-run apprentice training program in 2008. (JA 1070, 1073-75, 1152, 1173 n.10.) Andrew and Joe Stock had displayed union support, but had not been identified as organizers, and the jobs for which Aerotek subsequently contacted them were not electrical. (JA 388, 627.) Josh Carlin similarly was hired for a managerial position, which would not be included in a collective-bargaining unit. (JA 147-49.)

<sup>13</sup> The cases that Aerotek cites (Br. 26) are thus distinguishable, as the employers hired applicants with direct connection to unions. *See E&I Specialists, Inc.*, 349 NLRB 446, 447-48 (2007) (hired applicants were referred by union and union organizer); *Shell Elec.*, 325 NLRB 839, 841 (1998) (hired applicants had "at least as strong union affiliation" as alleged discriminatees).

Even if the hired applicants' union connections were comparable in this case, "an employer's failure to discriminate against all applicants in a class is not a defense" to discrimination against some of them. *Fluor Daniel*, 333 NLRB at 440; *see also Town & Country Elec.*, 106 F.3d at 817 (employer hired union member but unlawfully refused to hire others).

offered any credible nondiscriminatory explanation” (JA 1161) for failing to hire or consider the four men, it has not met its burden of showing it would not have hired them even absent that status. *RELCO Locomotives*, 734 F.3d at 782; *Pace Indus.*, 118 F.3d at 593. Aerotek’s treatment of Johnson, Hendershot, Jankowski, and Winge thus constitutes unlawful discrimination in violation of Section 8(a)(3) and (1), and demands remedial action.

### **III. Aerotek Has Not Shown That the Board Acted Outside of Its Broad Remedial Discretion**

After finding that Aerotek violated the Act, the Board exercised its statutorily authorized discretion in crafting a remedy to redress those unlawful actions. Aerotek challenges only two aspects of that remedy, but its arguments rely largely on inapposite principles or are not properly before the Court, and are thus insufficient to show an abuse of discretion.

#### **A. An Employer Bears a Heavy Burden To Escape Its Remedial Obligations to the Victims of Its Discrimination**

The Act empowers the Board to remedy unfair labor practices, including by ordering the violating party “to take such affirmative action ... as will effectuate the policies of th[e] Act.” 29 U.S.C. § 160(c); *see also NLRB v. Miller Waste Mills*, 315 F.3d 951, 955 (8th Cir. 2003) (“Congress expressly delegated to the Board the authority to order appropriate relief for unfair labor practices.”). The Board’s typical remedy for a refusal-to-hire violation includes instatement and

backpay for the victim of discrimination (similar to the remedy of *reinstatement* and backpay for an unlawfully discharged employee). *See, e.g., Wright Elec.*, 200 F.3d at 1166. Such relief makes the applicant whole by placing him in the position he would have occupied but for the employer’s unlawful action. By contrast, “denial of the normal remedy leaves the effects of the ... unlawful conduct unremedied and thus fails to effectuate the policies of the Act.” *Owens Illinois, Inc.*, 290 NLRB 1193, 1193 (1988), *enforced mem.*, 872 F.2d 413 (3d Cir. 1989).

The Board may depart from its customary remedy for unlawful discharge if the employer shows that the discharged employee subsequently engaged in “misconduct so flagrant as to render the employee unfit for further service, or a threat to efficiency in the plant.” *Hawaii Tribune-Herald*, 356 NLRB 661, 662 (2011) (quoting *O’Daniel Oldsmobile, Inc.*, 179 NLRB 398, 405 (1969)), *enforced*, 677 F.3d 1241 (D.C. Cir. 2012). Employers bear a “heav[y] burden” in such circumstances, as the discharge has already been shown to violate the Act, and they are seeking to “escape fully remedying the effects of their unlawful actions.” *Id.* The heightened unfit-for-service standard also embodies the understanding that a victim of discrimination naturally may “react with some vehemence” to such treatment, and that the employer should not benefit from the “natural human reactions” to its own wrongdoing. *Id.* (internal quotations omitted); *cf. NLRB v. Vought Corp.*, 788 F.2d 1378, 1384 (8th Cir. 1986) (noting that “an employer may

not rely on employee conduct that it has unlawfully provoked” (internal quotations omitted)). It is thus a more stringent standard than for evaluating pre-discharge misconduct that the employer claims was a lawful basis for the discharge, and that was not a response to illegal discrimination.

An unlawfully discharged employee is denied reinstatement or backpay as unfit for service “only in ‘extraordinary situations.’” *The Fund for the Public Interest*, 360 NLRB 877, 877 (2014) (quoting *Timet*, 251 NLRB 1180, 1180-81 (1980), *enforced*, 671 F.2d 973 (6th Cir. 1982)). The Board has found that standard satisfied when, for example, a discharged employee subsequently engaged in violence or egregious threats, or manipulated the unfair-labor-practice proceeding through actions such as witness tampering. *See, e.g., Hadco Aluminum & Metal Corp.*, 331 NLRB 518, 520-21 (2000) (citing cases). By contrast, statements to customers targeting the employer’s product or business operations frequently have been found insufficient to render an employee unfit for further service. In *Hawaii Tribune-Herald*, for example, the discharged employee publicly criticized his former employer’s reporting at the time that he was considering starting a rival newspaper, yet nonetheless received the customary relief of backpay and reinstatement. 356 NLRB at 661-63, 669; *see also id.* at 662 & n.8 (citing cases). Nor were former employees deemed unfit for service who told parents that a school maintained unsafe conditions, *Golden Day Schools, Inc.*,

236 NLRB 1292, 1296-97 (1978), *enforced*, 644 F.2d 834 (9th Cir. 1981), or publicly decried a fundraising organization as a “Ponzi scheme,” *Fund for the Public Interest*, 360 NLRB at 889-90.

**B. Aerotek Has Not Shown That Johnson Should Be Denied Instatement and Backpay as Unfit for Service**

The Board acted within its “broad discretion” to craft remedies, *Beverly Health & Rehab. Servs.*, 187 F.3d at 772, in applying the unfit-for-service standard and rejecting Aerotek’s contention that its discriminatory refusal to hire Johnson should go unremedied. Unlike past cases dealing with post-discharge misconduct by a current employee (or misconduct by an employee or applicant prior to any discrimination), this case presents the unique situation of evaluating an applicant’s conduct after an unlawful refusal to hire; as the Board explained, it thus “does not fit squarely into any category established by Board precedent” (JA 1162). Yet like an unlawfully discharged employee, an applicant whom the employer refuses to hire because of his union activity is the victim of an unfair labor practice. *Phelps Dodge*, 313 U.S. at 185. In both scenarios, moreover, the employer is seeking to avoid remedial liability for its unlawful actions based on subsequent conduct that was not a factor in those actions. The heightened unfit-for-service standard is thus equally appropriate in both discharge and failure-to-hire contexts.<sup>14</sup>

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<sup>14</sup> For purposes of this case, the Board assumed (JA 1162-63) that there is a duty of loyalty owed to prospective employers. As it recognized (JA 1162 n.18),

Even assuming that, as Aerotek contends (Br. 36-38), Johnson engaged in misconduct by contacting Interstates officials about hiring directly from Local 22, the Board did not abuse its discretion in finding that Aerotek failed to show that such conduct made Johnson unfit for service. Given the latitude afforded victims of discrimination, the Board reasonably concluded that Johnson’s actions were not “so disproportionate or indefensible as to be disqualifying” (JA 1163). His unsuccessful offer to refer electricians to Interstates is not the kind of “extraordinary situation” akin to threatening violence or manipulating Board proceedings that would render him unfit. *Fund for the Public Interest*, 360 NLRB at 877. At most, his actions had the potential to harm one aspect of Aerotek’s business, but so did the disparaging public statements about the employers found insufficient to deny make-whole relief in cases like *Hawaii Tribune-Herald*, *Golden Day Schools*, and *Fund for the Public Interest*. And unlike the employees awarded reinstatement and backpay in those cases, Johnson did not criticize the quality of Aerotek’s services.

Further, as the Board found, “nothing ... suggest[s] that, if he were instated to employment, that conduct would continue” (JA 1163). The two conversations

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caselaw is inconsistent as to whether such a duty exists. *Compare Am. Steel Erectors, Inc.*, 339 NLRB 1315, 1317 (2003) (agreeing that applicant “owed the [employer] no duty of loyalty at the time”), *with Five Star Transp., Inc.*, 349 NLRB 42, 46 (2007) (discussing “duty of loyalty owed to a prospective employer by ... applicants”), *enforced*, 522 F.3d 46 (1st Cir. 2008).

with Interstates occurred nearly seven months after Johnson first applied for work with Aerotek, and after he and the other organizers had been bypassed for over 30 positions in favor of non-union or non-organizer candidates. The evidence thus suggests that Johnson turned to direct contact with Interstates as Plan B only after it had become clear that Plan A—the salting campaign—faced the obstacle of Aerotek’s discrimination. Based on that evidence, it was reasonable for the Board to conclude that Johnson would not proceed with the secondary approach if he were instated and the organizing drive could continue unimpeded. Once hired, as the Board further noted, he “would have a strong incentive to honor his duty of loyalty ... in order to retain his position and to be able to pursue his organizing activity” (JA 1163).<sup>15</sup>

Aerotek’s challenges to the Board’s remedy are either insufficient to show an abuse of discretion or not properly before the Court. Aerotek argues for the first time on appeal that “unfit for further service” should not be the test (Br. 43, 51),

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<sup>15</sup> Aerotek states that Johnson made “at least two efforts” (Br. 48) to speak with Interstates, but there is no evidence of any other contact besides February 29 and March 7. Aerotek also references one incident (Br. 37, 48, 50) in which employee and covert Local 22 member Dave Erwin recorded conversations with Aerotek officials. But the only evidence connecting Johnson to the incident is that he asked Erwin to make the recording. There is nothing indicating that he told Erwin what to say, let alone engaged in an “effort to procure confidential and proprietary information and trade secrets” (Br. 37). Erwin asked about Aerotek’s billing rates because he was “curious,” but his primary goal was to gather evidence of recruiters telling him not to discuss his own wages. (JA 377-78.)

but it did not make that argument before the Board in exceptions or a motion for reconsideration, and thus cannot do so now. 29 U.S.C. § 160(e); *Int'l Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975). Indeed, Aerotek itself invoked the unfit-for-service standard in its brief to the Board; its only argument was that Johnson's conduct met that standard. In any event, Aerotek's suggestion (Br. 43) that the test should not apply to Johnson because he was an applicant rather than a discharged employee and because he was a union organizer is contrary to the well-settled principle that labor-law rights and remedies apply equally to applicants, *Phelps Dodge*, 313 U.S. at 185, and organizers, *Town & Country Elec.*, 516 U.S. at 87-88, as to other employees.<sup>16</sup>

Because it fails to recognize the proper standard, the bulk of Aerotek's argument (Br. 38-42) rests on inapposite caselaw. Unlike here, cases like *North American Dismantling Corp.*, 341 NLRB 665, 665-66 (2004), and *Five Star Transportation*, 349 NLRB at 42-47, dealt with employee conduct that occurred *before* the employer discharged or refused to hire them. The question when

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<sup>16</sup> Aerotek states that the Court “must examine the Board’s findings more critically” when the Board reverses an administrative law judge “‘since the [judge’s] opinion is part of the record against which the substantiality of the evidence must be measured’” (Br. 36 (quoting *GSX Corp. v. NLRB*, 918 F.2d 1351, 1356 (8th Cir. 1990)). But the issue on which the Board reversed the judge here is the remedy, which is not a factual finding reviewed for substantial evidence, but a legal determination as to how best to serve the policies of the Act, which is reviewed for abuse of discretion.

evaluating the misconduct in those cases thus was whether the employer's actions were lawful rather than, as here, whether Aerotek should be allowed to "escape fully remedying the effects of [its] unlawful actions," *Hawaii Tribune-Herald*, 356 NLRB at 662. Likewise, although the Board limited backpay for the unlawful discharge in *Rex Printing Co.*, 227 NLRB 1144, 1144, 1151 (1977), it did so based on the employees' pre-discharge conduct that occurred before they were the victims of discrimination. Whether those cases suggest that Johnson's conduct would have justified failure to hire if it had occurred prior to Aerotek's discrimination is thus beside the point.<sup>17</sup>

Even when it applies the correct standard, Aerotek fails to meet its burden of showing that Johnson is unfit for service. It contends that Johnson's overtures to Interstates might "threat[en] ... Aerotek's ability to operate" (Br. 52), but that argument assumes that the overtures would continue if Johnson were hired, and the Board reasonably concluded otherwise, *see* pp. 39-40. Indeed, Aerotek's

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<sup>17</sup> All but one of Aerotek's other cited cases (Br. 40-41) likewise involved pre-discharge conduct. *See ATC/Forsythe & Assocs., Inc.*, 341 NLRB 501, 503 (2004); *Kenai Helicopters*, 235 NLRB 931, 934-36 (1978); *Assoc. Advertising Specialists, Inc.*, 232 NLRB 50, 53-54 (1977); *Crystal Linen & Uniform Serv., Inc.*, 274 NLRB 946, 947-49 (1985). *Marshall Maintenance Corp.*, 145 NLRB 538, 539-40 (1963), involved post-discharge conduct, but the employees were not denied reinstatement or backpay; nor did the Board condition their reinstatement, as Aerotek states (Br. 41), but rather permitted the employer to do so if it wished. Unlike here, the Board in that case made no finding that the employees' conduct was unlikely to continue if they were reinstated.

conjecture that Johnson’s conduct would continue (Br. 50) ignores or discounts the context in which he spoke to Interstates—in light of strong evidence that Aerotek had unlawfully refused to hire him and the three other applicants who stated an intent to organize. The fact that Johnson approached Interstates only after Aerotek obstructed the organizing campaign also belies Aerotek’s assertion that he was “prepared to sacrifice” (Br. 50) the campaign all along and would do so even if hired. Moreover, its contention that Johnson would not have a “natural human reaction” (Br. 44-45) to such discrimination because he was a union organizer singles out organizers for different treatment contrary to the principles of *Town & Country Electric*. And its suggestion that Johnson’s contact with Interstates rendered him unfit for service because it occurred within the context of his organizing activity (Br. 44-49) appears to equate organizing with disloyalty, ignoring the Supreme Court’s teaching that employees have a right to organize “even if a company perceives those protected activities as disloyal,” *Town & Country Elec.*, 516 U.S. at 95-96.

In sum, Aerotek’s arguments as to the application of the unfit-for-service standard to the facts of this case are no more availing than its challenge to the standard itself. Because Aerotek has not met its burden of showing that Johnson was unfit for service, it has not shown that the Board abused its broad remedial

discretion in awarding the customary reinstatement and backpay remedy for an unlawful refusal to hire.

**C. Aerotek Has Forfeited Any Challenge to Including Remedial Language on Its Job Advertisements**

Recognizing that most of Aerotek's unfair labor practices related to applicants rather than current employees, and that applicants would not necessarily see a remedial notice posted at Aerotek's office (because they do not always interview in person or, even if hired, work at that location), the Board ordered Aerotek to include remedial language on its job advertisements for six months. (JA 1163-64.) Aerotek's challenge (Br. 53-54) to that requirement is not properly before the Court. The Board's General Counsel requested such a remedy in his brief to the Board (JA 1156), but Aerotek's only response was to ask that the request be stricken as beyond the scope of Aerotek's exceptions (JA 1159); Aerotek never challenged the proposed remedy on the merits, and thus has forfeited the issue. 29 U.S.C. § 160(e). Nor does the exchange between the Board majority and dissent on the matter satisfy Section 10(e), as that provision "bars review of any issue not *presented* to the Board, even where the Board has discussed and decided the issue." *HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1069 (D.C. Cir. 2015) (internal quotations omitted); *accord NLRB v. Monson Trucking, Inc.*, 204 F.3d 822, 826 (8th Cir. 2000) (explaining that "mere

discussion of an issue by the Board does not necessarily prove compliance with section 10(e)” (internal quotations omitted)).

Pursuant to statutory authority and in exercise of its broad discretion, the Board crafted a remedy to redress Aerotek’s unfair labor practices. Aerotek violated the Act by refusing to hire or consider the only four applicants who openly stated their intent to organize, and should not be permitted to evade the consequences of its actions. Indeed, leaving the violation unremedied would compound the damage to employees’ right to organize by immunizing interference with that core right and reinforcing the “dam to self-organization at the source of supply,” *Phelps Dodge*, 313 U.S. at 185, erected by Aerotek’s unlawful discrimination.

## CONCLUSION

The Board respectfully requests that the Court deny Aerotek's petition for review and enforce the Board's Order in full.

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National Labor Relations Board

May 2017

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

AEROTEK, INC.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 16-4520, 17-1206
v.	)	
	)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	)	17-CA-071193
	)	17-CA-075605
Respondent/Cross-Petitioner	)	17-CA-078720
	)	
and	)	
	)	
INTERNATIONAL BROTHERHOOD OF	)	
ELECTRICAL WORKERS, LOCAL 22	)	
	)	
Intervenor	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 10,855 words of proportionally spaced, 14-point type, the word-processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC  
this 10th day of May, 2017

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	)	
and	)	
	)	
INTERNATIONAL BROTHERHOOD OF	)	
ELECTRICAL WORKERS, LOCAL 22	)	
	)	
Intervenor	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on May 10, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC  
this 10th day of May, 2017