Eckert Fire Protection, Inc. and its Successor Eckert Fire Protection Company *and* Road Sprinkler Fitters Local Union No. 669, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO

Eckert Fire Protection Company *and* Indiana State Pipe Trades Association, United Association of Plumbers and Pipe Fitters, AFL–CIO and Road Sprinkler Fitters Local Union No. 669, U.A., AFL–CIO, a/w United Association of Journeymen and Apprentices of the Plumbing Industry of the United States and Canada, AFL–CIO. Cases 25–CA–24505 and 25–CA–24871.

September 21, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On April 24, 1998, Administrative Law Judge Earl E. Shamwell Jr. issued the attached decision. The Respondents and the General Counsel filed exceptions, supporting briefs, and answering briefs. Charging Party Road Sprinkler Fitters Local Union No. 669 filed exceptions, a supporting brief, an answering brief, and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The 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,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

The General Counsel has excepted to the judge's dismissal of numerous refusal to hire and/or consider allegations. For the following reasons only,[4] we find no merit to the General Counsel's exceptions.

With respect to the refusal to consider allegations, under *FES*, 331 NLRB 9, 15 (2000) the General Counsel must show, inter alia, that the employer excluded applicants from the hiring process. Here, the General Counsel has failed to make that showing. Thus, for example, there is no credited evidence that the Respondents ever refused to accept job applications tendered by the alleged discriminatees or that they otherwise indicated that they would not consider union-affiliated applicants for employment. Therefore, we find that the refusal to consider allegations of the complaint must be dismissed.

With respect to the refusal to hire allegations, under *FES*, 331 NLRB 9,12, (2000) the General Counsel must show, inter alia, that the employer was hiring at the time of the alleged unlawful conduct. Here, the credited testimony of the Respondents' management official, Wayne Bennett, is that the Respondents operated under two hiring modes: an "active" mode and a "passive" mode. When the Respondents were in an "active" mode, they actively sought applications, which, once received, were subjected to a ranking process and, if appropriate, a job offer would follow. When the Respondents were in a "passive" mode, they did not actively seek applications, but if one was submitted, it would be accepted, although it might not even be reviewed. According to Bennett's credited testimony, regardless of the mode, the Respon

[1] The Respondents and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel, in his exceptions, argues that some of the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we find that the General Counsel's contentions are without merit.

The General Counsel has excepted to the judge's dismissal of several 8(a)(1) allegations. We find it unnecessary to pass on the General Counsel's exceptions as any additional findings would be cumulative to the 8(a)(1) findings the judge made, which we adopt, and would not affect the remedy.

Member Hurtgen does not agree that the Respondents unlawfully interrogated John Strunk. In his view, the Respondent was simply trying to ascertain whether Strunk could be counted upon to work for the Respondent for a reasonable period. The Respondents therefore asked whether Strunk intended to return to the unionized companies whence he came.

[2] The judge's conclusion that the Respondents unlawfully refused to hire employees Randy Long and Keith Scott Weisbrodt is consistent with our decision in *FES,* 331 NLRB 9 (2000). Specifically, we find that the record establishes that the Respondent Eckert Fire Protection, Inc. (EFP-1) was hiring at the time Long and Weisbrodt applied for employment; that Long and Weisbrodt had experience and training relevant to the announced or generally known requirements of the position for hire (sprinkler fitter); and that antiunion animus contributed to the decision not to hire them. We also agree with the judge, for the reasons stated by him, that EFP-1 failed to satisfy its burden of showing that it would not have hired Long and Weisbrodt even in the absence of their union activities.

In finding a violation as to Long and Weisbrodt, Member Hurtgen notes that the Respondents does not argue that there was an absence of antiunion animus.

[3] The judge inadvertently failed to provide in his recommended Order that the Respondents cease and desist from refusing to hire job applicants because of their union membership or support. We shall correct this error. In accord with *Excel Container,* 325 NLRB 17 (1997), we shall change the date in par. 2(d) of the judge's recommended Order from February 28, 1996, to January 19, 1996, the date of the first unfair labor practice.

[4] We do not pass on any of the judge's discussion throughout his decision of whether the job applicants were "bona fidely [sic] interested in gaining employment when they submitt[ed] applications."

dents had a policy that they would not consider job applications over 30 days old on the ground that they were not "fresh."[5]

Having carefully reviewed the record in the light of Bennett's credited testimony about the Respondents' hiring policies, we find that there is no evidence that any hiring took place during any 30-day period during which the applications submitted by the alleged discriminatees were "fresh" and the Respondents were in an "active" hiring mode. Accordingly, we find that these refusal to hire allegations of the complaint must be dismissed on the ground that the General Counsel has failed to establish that the Respondents were hiring at the time of the alleged unlawful conduct.[6]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Eckert Fire Protection, Inc. and its Successor Eckert Fire Protection Company, Indianapolis, Indiana, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(g) and reletter the subsequent paragraph accordingly.

"(g) Failing or refusing to hire job applicants because of their known or suspected membership in and/or support of the Road Sprinklers Local Union No. 669 and the Indiana State Pipe Trades Association, or any other labor organization."

Joanne C. Mages, Esq. and *Norton B. Roberts, Esq.,* for the General Counsel.

Jeffrey Mullins, Esq. (Coolidge, Wall, Womsley, & Lombard), of Dayton, Ohio, for the Respondent, Eckert Fire Protection, Inc.

Keith E. White, Esq. (Bose, McKinney & Evans), of Indianapolis, Indiana, for the Respondents, Eckert Fire Protection Company and Eckert Fire Protection, Inc.

Robert H. Morsilli, Esq. (Osborne Law Offices), of Washington, D.C., for the Charging Party, Road Sprinkler Fitters Local Union No. 669.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. This case was tried before me in Indianapolis, Indiana, on February 5, 6, 7, 25, and 26, 1997, pursuant to unfair labor practice charges originally filed with the National Labor Relations Board (the Board), by the Road Sprinklers Fitters Local Union No. 699, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO (Sprinkler Fitters), on February 28, 1996, in Case 25–CA–24505 against Eckert Fire Protection, Inc. (EFP-1) and originally jointly by the Indiana State Pipe Trades Association, United Association of Plumbers and Pipe Fitters, AFL–CIO (Pipe Trades Association), and the Sprinklers Fitters on August 27, 1996, in Case 25–CA–24871 against Eckert Fire Protection Company (EFP-2). On May 20, 1996, the Board, by the Regional Director for Region 25, issued the first amended complaint and on October 29, 1996, issued a second amended complaint against EFP-1 and EFP-2 in Case 25–CA–24505. On October 29, 1996, the Regional Director issued the first amended complaint in Case 25–CA–24871 against EFP-2. On November 26, 1996, the Regional Director issued an order consolidating the aforementioned cases.

The consolidated complaint alleges that EFP-1 and its alleged successor, EFP-2, violated Section 8(a)(1) of the Act by interrogating applicants for employment about their union activities, prohibiting employees from wearing union insignia; falsely and discriminatorily accusing union supporting employees with sabotaging company property; threatening employees with unspecified discipline and reprisals for discussing the Union and/or engaging in union organizing activities; and threatening employees because the Unions herein filed charges with the Board. The consolidated complaint, as amended, also alleges violations of Section 8(a)(1) and (3) of the Act by EFP-1 and EFP-2 for discharging two employees because of their union involvement and activities, and failing to hire 33 applicants for employment because of their union membership and support, and engaging in concerted activities.

On January 27, 1997, the Regional Director issued an amendment to the consolidated complaint. EFP-1 and EFP-2 (collectively the Respondent) filed timely answers to both the consolidated and amended consolidated complaints denying any violations of the National Labor Relations Act (the Act).

The General Counsel, counsel for the Charging Party, and counsel for EFP-1 and EFP-2 timely filed briefs in support of their respective positions.1

On the entire record in this case, including posthearing briefs filed by the parties, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, EFP-1 was a corporation with offices in Cincinnati, Ohio; Greenwood, Indiana; and Lexington, Kentucky, engaged in the design, installation, inspection, maintenance, and service of fire protection systems. EFP-1 ceased doing business on or about May 30, 1996. During the 12-month period ending May 31, 1996, EFP-1, in conducting its business operations, purchased and received at its Greenwood, Indiana facility goods valued in excess of $50,000 directly from points outside the State of Indiana.2 EFP-1 admits, and I find, that at all material times through May 31, 1966, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, EFP-2, a corporation, with an office and place of business in Greenwood, Indiana, has been engaged in the design, installation, inspection, maintenance, and service of fire protection systems. EFP-2 began its business operations on or about May 31, 1996. EFP-2 admits, and I find, that since May 31, 1996, it will annually purchase and receive at its Greenwood, Indiana facility, goods valued in excess of $50,000 directly from points outside the State of Indiana. EFP-2 admits, and I find, that at all material times since May 31, 1996, it is, and has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[5] Although the General Counsel has excepted to the judge's finding that the Respondents had such a policy, we find no basis for reversing the judge's credibility finding. See fn. 1, supra. There is no allegation that the Respondents' 30-day policy is unlawful.

[6] We recognize that, under *FES*, the General Counsel "may establish a discriminatory refusal to hire even when no hiring takes place if he can show that the employer had concrete plans to hire and then decided not to hire because applicants for the job were known union members or supporters." *FES*, 331 NLRB 9 fn. 7. The record, however, does not support a finding of a refusal to hire violation under this alternative theory.

[1] On March 27, 1997, the parties, pursuant to the request of counsel for the Charging Party, were granted an extension of time for filing briefs to April 17, 1997.

[2] In its answer, EFP-1 denied that it purchased and received goods in this amount as alleged in the consolidated complaint in par. 2(6) thereof. However, the Company later stipulated and agreed that it had been an employer engaged in interstate commerce during all material times through May 31, 1996. (See Jt. Exh. 1.) EFP-2, on the other hand, admitted in its answer to the consolidated complaint that EFP-1 purchased and received goods in the amount in question.

II. THE LABOR ORGANIZATION INVOLVED

EFP-1 and EFP-2 admit, and I find, that at all material times, the Sprinkler Fitters and the Pipe Trades Association (collectively the Unions) have been labor organizations within the meaning of Section 2(5) of the Act.

A. The Business and Personnel of Eckert Fire Protection (EFP-1) and Eckert Fire Protection Company (EFP-2)

EFP-1 engaged in the design, installation, inspection, maintenance, and servicing of fire protection systems; EFP-1 operated and maintained offices in Cincinnati, Ohio; Lexington, Kentucky; and Greenwood-Indianapolis, Indiana.[3] EFP-1 was owned by Mark Mosely who acted as president and chief executive officer. In February 1995, EFP-1 hired Wayne Bennett who served as the Company's vice president and general manager through May 31, 1996. Bennett's principal office was located in Cincinnati, but he regularly and routinely communicated with the other branches and specifically visited the Greenwood office about three times per month on average. Bennett's duties and responsibilities with EFP-1 included establishing, overseeing, and implementing the Company's various employment and other administrative policies and practices.

Kevin Douthitt was employed as EFP-1's branch manager at the Indianapolis office; Steve Miller served as the Company's field supervisor. Douthitt was responsible for the day-to-day supervision of the Indianapolis office, including supervising the designer staff and clerical help. Miller was principally the direct onsite supervisor of EFP-1's sprinklers and pipe fitters who installed and maintained fire protection systems under contract with its various customers. Both Miller and Douthitt shared responsibility for hiring sprinkler-fitters; however, Miller was primarily responsible for disciplining these workers.[4]

In addition to Douthitt and Miller, EFP-1 employed a service manager, two designers, a secretary-receptionist, and approximately nine sprinkler-fitters at its Indianapolis facility during the period ending in late April to early May 1996.[5]

Some time in late April 1996, EFP-1's president, Mosely, advised Bennett that he was going to shut down the business effective immediately because of very heavy indebtedness.

Consequently, Bennett, who wanted to continue in the fire protection business, formed and incorporated EFP-2 on May 30; and on May 31, and entered into an agreement with Mosely to purchase certain assets of EFP-1 related to its Indianapolis operations, including various contracts and receivables, tools, vehicles, office equipment, and other materiel.[6] Under the new regime at EFP-2, Bennett became owner, president, and the highest member of management. Douthitt assumed the position of vice president. Miller continued in the position of field superintendent. The duties and responsibilities of the three principals changed little substantively, only expanding somewhat within the same realms by dint of the formation of the new Company. For instance, Bennett became more responsible for and attentive to the day-to-day operations of the Company, now operating exclusively in the Indianapolis (as opposed to Cincinnati) area. Bennett still remained primarily responsible for EFP-2's hiring policies and practices, and other executive level matters. Douthitt's and Miller's duties also changed little if at all. Douthitt still generally managed the office and participated as before in the hiring process for all employees; Miller, as field superintendent, performed his usual duties, including hiring and, more specifically, disciplining the sprinkler-fitter force.

EFP-2 performed the same services as EFP-1, i.e., installing, servicing, maintaining, and designing fire protection systems, but only in the Indianapolis area; EFP-2 continued to employ sprinkler-fitters, designers, and other office personnel.[7] At the time of EFP-2's inception, Bennett retained or at least offered jobs to all of EFP-1's fitters; although all did not accept employment at EFP-2. Thus, at the time, EFP-2 began its operations, the employee base was essentially the same as that of EFP-1 at Indianapolis. EFP- 2, after its formation, either completed or initially performed contracts initiated by EFP-1 by virtue of the purchase of contracts or as a subcontractor per the above-mentioned purchase agreement. All of the contracts were performed by EFP-2 out of the former EFP-1 facilities in the Indianapolis-Greenwood area.

B. The Successorship Issue

The complaint alleges, and the General Counsel and the Charging Party contend, that, in essence, EFP-2 is a successor employing entity to EFP-1 with notice at the time of its acquisition of the assets and general business of EFP-1 of the predecessor company's potential liability for any unfair labor practices committed by EFP-1; and that EFP-1 is obligated to remedy any violations of the Act determined to have been committed by EFP-1. Respondent EFP-2 has generally denied in its answer, though not in its brief, that it is a successor to Respondent EFP-1.[8]

In *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), the Supreme Court held that a successor employer may become obligated to remedy unfair labor practices committed by its predecessor where as purchaser, the successor had notice of a pending unfair labor practice proceeding but acquired and continued the business without interruption or substantial change in operation, employee complement, or supervisory personnel. In such case, the successor will have joint and several liability to remedy the unfair labor practices, including backpay and reinstatement.

In *Fall River Dyeing Corp.*, 482 U.S. 27, 43 (1987), the Supreme Court restated the law and standards to be applied in this area:

> In *Burns* we approved the approach taken by the Board and accepted by courts with respect to determining whether a new company was indeed the successor to the old. 406 U.S., at 280-281, and n. 4 [92 S.Ct., at 1578-1579, and n. 4]. This approach, which is primarily factual in nature and is based upon the totality of the circumstances of a given situation, requires that the Board focus on whether the new company had "acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations." *Golden State Bottling Co. v. NLRB*, 414 U.S., at 184 [94 S.Ct., at 425]. Hence, the focus is on whether there is "substantial continuity" between the enterprises. Under this approach, the Board examines a number of factors: whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and

[3] The Greenwood office is and was during the hearing generally referred to as the Indianapolis office. The Lexington office of EFP-1 ceased operations in July 1995.

[4] With respect to sprinkler-pipefitters, Miller actually played the more significant role in terms of hiring and firing as compared to Douthitt. Miller generally received and reviewed all fitter applications, decided whether to interview an applicant, conducted the interview(s), and as often as not would, on his own, make the hiring decision; occasionally, he would consult with Douthitt about a potential new hire. Miller's recommendations for discipline, including termination, were usually followed. At EFP-1, hiring and firing decisions were often made without Bennett's input.

[5] All dates hereinafter are in 1996 unless otherwise indicated.

[6] GC Exhs. 2 and 3, with attachments, list the contracts and other assets purchased by Bennett on May 31. Bennett further testified that he purchased 80 percent of the tools of EFP-1 and paid 50 to 60 percent of their residual value; 95 to 98 percent of the office equipment; and 10 to 20 percent of EFP-1's vehicles.

[7] It should be noted that at its inception, EFP-2 did not retain the services of EFP-1 service manager, John Carpenter, and secretary-receptionist Jackie Wirey. The record is unclear if the service manager position was ever filled, but Bennett operated EFP-2 without a secretary-receptionist because he deemed the position unnecessary.

[8] Indeed, Respondents EFP-2 and EFP-1 have not addressed the successorship issue at all in their brief, thus, leading me to conclude they probably have conceded the point. However, I have discussed the issue so as to complete the record.

basically has the same body of customers. See *Burns*, 406 U.S., at 280, n. 4 [92 S.Ct., at 1578, n. 4]; *Aircraft Magnesium, a Division of Grico Corp.*, 265 N.L.R.B. 1344, 1345 (1982), enfd. 730 F.2d 767 (9th Cir. 1984); *Premium Foods, Inc.*, 260 N.L.R.B. 708, 714 (1982), enfd. 709 F.2d 623 (9th Cir. 1983).

Notably, alter ego or successor status may also be found where only a portion of the predecessor's business is transferred to the new enterprise. *NLRB v. Burgess Construction*, 596 F.2d 378, 385 (9th Cir. 1979), enfg. 227 NLRB 765 (1977), and where the operations transferred from the predecessor are only a portion of the new enterprise's total business. *Continental Radiation Corp.*, 283 NLRB 234 (1987). Therefore, before a determination of whether EFP-2 can be deemed liable for any unfair labor practice committed by EFP-1, it must first be determined whether EFP-2 is a successor entity. It is undisputed that EFP-2 on May 31, 1996, acquired assets and the general business of the Indianapolis branch of EFP-1, and that this part of EFP-1's business was a substantial part of EFP-1's overall operation;9 that EFP-2 completed and performed contracts originally initiated by EFP-1; that EFP-2 performed the same services using the same processes, tools, and methodologies as EFP-1 with no interruption of business; EFP-2 performed all work out of the same facility as EFP-1; and that EFP-2 assumed and serviced the same customer-client base in the Indianapolis area. It is uncontroverted that EFP-2 hired the majority of EFP-1's work force (especially the sprinkler-fitter workers) and these former EFP-1 workers constituted the bulk of EFP-2's work force; and that the affected employees were essentially performing the same jobs, under the same working conditions, and under the same supervisors (Bennett, Douthitt, and Miller).

In these circumstances, the General Counsel has virtually to a certainty established that EFP-2 was a successor to EFP-1. It is also abundantly clear on this record that the General Counsel has established by direct evidence that EFP-2 acquired the business of EFP-1, fully aware of an unfair labor proceeding pending against EFP-1.10 Accordingly, I would find and conclude that EFP-2 is a successor employing entity to pending unfair labor practices at the time of EFP-2's requisition, and that it acquired in substantial part the asserts and general business of its predecessor employing entity with actual and constructive notice of the pending unfair labor proceedings filed with the Board against EFP-1. *Robert G. Andrew, Inc.*, 300 NLRB 444 (1990). Accordingly, EFP-2 will be held jointly and severally liable for any violations of the Act by EFP-1 determined by me herein.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Applicable Law Regarding the 8(a)(1) Allegations

The complaint alleges that during the period covering January 19 through July 26, 1996, Respondent EFP-1 and its successor, EFP-2, through its agents and supervisors, violated Section 8(a)(1) of the Act by: interrogating applicants for employment about their union membership, activities, and sympathies; prohibiting employees from wearing union buttons on the job; falsely accusing (and thereby disparaging) employees supportive of the Unions and/or union organizers of sabotaging company vehicles; threatening employees with discipline and unspecified reprisals because of their union membership, activities, support, and sympathies; and informing employees and applicants for employment that the Company had discharged employees because of their membership in, support of, and activities and sympathies for the Union.

Employer interference, restraint, or coercion of employees who exercise their statutory right to form, join, or assist labor organizations are unlawful under Section 8(a)(1) of the Act. The test under Section 8(a)(1) does not turn on the employer's motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which it may be reasonably said tends to interfere with the free exercise of employee rights under the Act. *Gissel Packing Co.*, 395 U.S. 575 (1969); *Almet, Inc.*, 305 NLRB 626 (1991); *American Freightways Co.*, 124 NLRB 146, 147 (1959); Thus, it is violative of the Act for the employer or its supervisor to engage in conduct, including speech, which is specifically intended to impede or discourage union involvement. *F. W. Woolworth Co.*, 310 NLRB 1197 (1993); *Williamhouse of California, Inc.*, 317 NLRB 699 (1995). The test of whether a statement or conduct would reasonably tend to coerce is an objective one, requiring an assessment of all the circumstances in which the statement is made as the conduct occurs. *Electrical Workers Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109 (1995).

The Board has long recognized that job applicants "may understandably fear that any answer [they] might give to questions about union sentiments posed in a job interview may well affect [their] prospects." *United L-N Glass*, 297 NLRB 329 fn. 1 (1989), cited in *Adco Electric,* 307 NLRB 1113, 1117 (1992), and such questions can be inherently coercive. *Godsell Contracting*, 320 NLRB 871, 873 (1996).

In *Republican Aviation Corp.*,11 the Supreme Court upheld as protected activity the right of employees to wear union buttons while at work. Consistent with that principle and established Board law, the general rule is that employees may wear not only union buttons but other emblems of union support and membership such as badges, hats, and T-shirts to work. *Fairfax Hospital*, 310 NLRB 299, 307 (1993). However, this right is not without limitations. The Board, in attempting to strike a balance between the right of employees to express their support for unionism and that of employers to conduct their business in an orderly and efficient manner, allows the employer to promulgate and enforce rules against wearing union insignia and emblems. Example of special circumstances are maintenance of production and discipline,12 safety,13 preventing alienation of customers,14 preventing discord and violence between competing groups of employees,15 and promoting health and welfare of patients in a health care setting.16 Absent such special circumstances, the Board has held that employer directives to employees to stop wearing emblems insignia and union paraphernalia can be violative of Section 8(a)(1). *Overnite Transportation Co.*, 254 NLRB 132 (1981); *Fieldcrest Cannon*, 318 NLRB 470 (1995).

The Board has also found violations of Section 8(a)(1) by an employer's disparaging or undermining employees supportive of the union, and the union or its representatives. *Prudential Insurance Co. of America*, 317 NLRB 357 (1995); *Oster Specialty Products*, 315 NLRB 67 (1994). Employers, likewise, may violate Section 8(a)(1) by informing employees that another employee was disciplined or terminated for engaging in protected activities. *Baker Electric*, 317 NLRB 835 (1995).

Finally, while Section 8(a)(1) prohibits certain speech and conduct deemed coercive, employers are free under Section 8(c) of the Act to express their views, arguments, or opinions about and regarding unions as long as such expressions are unaccompanied by threats of reprisals, force or promise of benefit.17

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[9] While the record is not totally clear, the Indianapolis branch's operations constituted at least geographically one-half of the total business reach of EFP-1, the other half being located in Cincinnati. Also, the total value of the contracts covered by the purchase agreement between EFP-1 and EFP-2 is $697,554, which I would conclude represents a substantial part of EFP-1's business (See GC Exh. 3).

[10] Bennett testified candidly that before he purchased EFP-1, while serving as its vice president, he was apprised of the unfair labor practices (in Case 25–CA–2405) by Douthitt, and that the purchase agreement (GC Exh. 3) on May 31, 1996, was written with his awareness of the Board charges in mind. Bennett did not specifically indicate to which provisions of the purchase agreement he was referring. Notably, in par. 5 of the document, EFP-1 agrees to defend and indemnify EFP-2 for all claims prior to the transfer of the business on May 31, 1996.

[11] 324 U.S. 793 (1945).

[12] *Midstate Telephone Corp. v. NLRB*, 706 F.2d 401 (2d Cir. 1983), enfg. in part and denying in part 262 NLRB 1291 (1982).

[13] *Fluid Packaging Co*., 247 NLRB 1469 (1980).

[14] *Burger King Corp. v. NLRB*, 725 F.2d 1053 (6th Cir. 1984), enfg. in part and denying in part 265 NLRB 1507 (1982).

[15] *United Aircraft Corp.*, 134 NLRB 1632 (1961).

[16] *Mesa Vista Hospital*, 280 NLRB 298 (1986).

[17] Sec. 8(c) provides:

> The expressing of any views, arguments, or opinion, or the dissemination thereof, whether in writing, printed, graphic, or visual form, shall not constitute or be evidence of any unfair labor practice under any of the provisions of this Act [subchapter], if such

With these principles in mind, we turn to the specific allegations as charged in the complaint.

B. Discussion and Conclusions Regarding the Alleged 8(a)(1) Violations

1. The alleged 8(a)(1) violations by Steve Miller and Kevin Douthitt on January 19, 1996

The General Counsel and the Charging Party have alleged that the Respondent's supervisors unlawfully interrogated an applicant for employment, John Strunk, about his union membership activities and sympathies on January 19.

By way of background, in late December 1995 and early January 1996, EFP-1 placed advertisements in local newspapers soliciting resumes for experienced sprinkler-fitters; resumes were to be sent by mail to EFP-1's Greenwood-Indianapolis facility.18 Pursuant to these ads, Union Business Agent Michael Eads called John Strunk and advised him of the availability of openings at EFP-1 and suggested that Strunk apply there.

Strunk appeared at the hearing and testified. Strunk testified that acting on Eads' suggestion, he mailed his resume to EFP-1 on or about January 8, 1996.19 Miller called him and set up an interview. On January 11, Strunk and Miller met. According to Strunk, Miller appeared to be interested in him because of Strunk's 10-year experience in the sprinkler trade. Additionally, Miller was concerned with only having qualified and experienced people because of past problems in these areas with others. Strunk and Miller met for only about 20–25 minutes. Miller asked Strunk to fill out an application20 at the end of the interview and advised him that he needed to check with Douthitt and then he would get back with him.

On January 19, Strunk was reinterviewed, initially alone by Miller in Miller's office. In this interview, according to Strunk, Miller asked him if he had any intention of going back to the Union, to which Strunk responded that he did not know. Miller also asked why Strunk was out of work, and Strunk explained that his former employer had run out of work and he was consequently laid off. Miller then ushered Strunk into Douthitt's office, whereupon the interview continued. According to Strunk, Douthitt also asked him whether he intended to go back to the Union, and this time Strunk answered no. In the course of the second interview, Douthitt also cryptically commented that nonunion propaganda is actually union propaganda and inquired of Strunk whether he intended, once hired by EFP-1, to file lawsuits against the Company. Strunk denied having any such intentions. This interview lasted about 15–20 minutes, concluding with Strunk's being offered a foreman's job with EFP-1; Strunk accepted the offer and began work on January 25.

Steve Miller testified at the hearing.21 Miller testified that he received Strunk's resume by mail on or about January 9 and reviewed it on January 10. Miller knew that Strunk was a member of the Union because a copy of Strunk's union card was printed on the last page of his resume materials. Miller testified that he also was aware of Strunk's union involvement because of the inclusion in his resume package documentation of his participation in the union apprenticeship program and Strunk's listing as former employers at least two companies known to Miller as union employers. Regarding his conversation with Strunk during the two interviews, Miller denied discussing the Union at all. Miller did not further elaborate nor did he comment on Douthitt's part in the interview of Strunk. I would credit Strunk's version of the events and conversations occurring in the two interview sessions.

The General Counsel and the Charging Party contend (in essence) that Miller's and Douthitt's questioning Strunk about his intentions regarding returning to the Union (which I interpret to mean working for union companies) and Douthitt's remark that nonunion propaganda is actually union propaganda redound to an unlawful interrogation of Strunk about his union involvement, background, and commitment. The Respondent, evidently conceding that Miller and Douthitt engaged in the conversations attributed to them, nonetheless, denies that these conversations were coercive or threatening. The Respondent argues that first, Strunk's union membership was obvious and known to the two interviewers. Thus, Miller's and Douthitt's questions were intended to test Strunk's bona fides for employment, that is, whether he sincerely intended to work for the Respondent or was seeking employment merely to drum up an unfair labor practice charge. The Respondent argues, thusly, that it was well within its right to inquire in these areas, especially when its inquiries were unaccompanied by threats or promises.

I would conclude that in questioning Strunk about his intentions regarding the Union, the Respondent violated the Act. Significantly, as noted, Douthitt did not testify at the hearing and Miller merely generally denied discussing the Union at all. On this record, the Respondent's argument, while plausible and perhaps even reasonable, has no evidentiary support. Thus, to the extent that the Respondent's defense is predicated on its legitimate business concerns, it fails. On the other hand, as I examine the totality of the circumstances of Strunk's interview, he was twice asked questions regarding his intentions of going back to work for a union contractor; this clearly could lead him to conclude that his job prospects with the Respondent hinged on giving the proper response. Consequently, in the second interview with both Douthitt and Miller, he changed his answer from "don't know" to "no" in terms of returning to work with a union contractor. It can hardly be gainsaid that Strunk was not coerced and thus reasonably that the statements of two of the Respondent's hiring supervisors were not coercive.

2. The January 25, 1996 conversations between Strunk and Miller

The General Counsel alleges that on January 25, the Respondent's supervisor, Miller, violated Section 8(a)(1) of the Act by prohibiting Strunk from wearing union buttons, falsely accusing him of sabotage of company equipment, and threatening him with unspecified reprisals if he discussed the Union with other employees.

Strunk reported for work in January 25 and was immediately assigned to the Respondent's Master Guard project. Strunk testified that he and coworker Miguel Lopez traveled together to the jobsite and at the time Strunk was wearing certain union paraphernalia—a "Union Yes" button, a UAW organizer button,22 and another button proclaiming "I support Local 669"—pinned to his jacket. Upon his arrival, Strunk discussed various details of the job with Miller. According to Strunk, Miller mentioned that the Company's delivery truck would not start that morning and as a result, certain materials needed for the job were not available. In the course of conversing with Miller, Strunk testified that he told Miller that he was a union (UA) organizer. According to Strunk, Miller then almost immediately accused him of sabotaging the truck which Strunk denied. Miller also told Strunk that he did not want Strunk wearing union buttons (at work); Strunk did not reply to this directive. According to Strunk, he and Lopez were told by Miller at around 10 a.m. that the delivery truck was out of service and that they should quit for the day. Once more, Miller told Strunk not to wear union buttons on the job. Because there was no work, both Strunk and Lopez left the job early as instructed. Later in the evening of January 25, Strunk was called by Miller regarding another job assignment. According to Strunk, Miller, in this conversation told him not to discus the Union with other employees, warned him Strunk to dot his "i's" and cross his "t's," and said that production standards were going to be set for Strunk which, if not met, would lead to Strunk's being reprimanded.

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expression contains no threat of reprisal or force or promise of benefit.

[18] The copies of these advertisements adduced at the hearing indicate they appeared in the December 30 and 31, 1995, and January 1, 5, 6, 7, and 8, 1996 editions of the *Indiana Star & News* (see GC Exhs. 8(a)–(g)).

[19] Strunk's resume "package included a cover letter, a copy of his high school diploma, his Indiana Pipe Trade Association and United Association membership cards, a certificate of completion of a State of Indiana-administered inspection program and his registration as an inspector in the program, a copy of an Indiana Pipe Trades Association certificate of his completion of a 40-hour cross-connection control and back flow prevention course, and a copy of a certificate of Strunk's completion of the Local 669 Joint Apprenticeship Committee apprenticeship program" (GC Exh. 20).

[20] Strunk's application is contained in GC Exh. 19.

[21] Kevin Douthitt was not called as a witness by the parties.

[22] The record herein clearly shows that Strunk was a United Association of Pipe Fitters organizer. The transcript, on p. 268, indicates "UAW" on the button. However, according to his resume, he was not in any way involved with the United Auto Workers. The UAW reference is a mistake either in transcription or Strunk simply misspoke.

Miller testified regarding certain of the statements attributed to him. Miller, admitting that on January 25, that he was aware of Strunk's organizer status with the Union, denied that he accused Strunk of sabotaging the company truck. Miller testified that with regard to the Master Guard job, there was a problem with shutting down the existing sprinkler system so that Strunk and Lopez could work on it. According to Miller, he never had a conversation with Strunk about the truck's ever being inoperable—none of the Company's vehicles were out of repair for the Master Guard job—let alone being sabotaged by anyone. Miller acknowledged that Strunk and Lopez were released early but only because they were not able to work on the system; the availability of materials due to an out-of-repair truck had nothing to do with the matter. Miller categorically denied ever telling Strunk to dot his "i's" and cross his "t's." However, Miller admitted that he told all new employees, including Strunk, about his general expectations of them in terms of their job duties and responsibilities.

Miller, in spite of two separate appearances on the stand, did not deny (or even touch on) Strunk's allegations that he directed Strunk not to wear union buttons on two occasions and not to discuss the Union with other employees.

There were no other witnesses to the statements allegedly made by Miller to Strunk. Accordingly, whether they were made is a matter of credibility. Regarding this issue, both Miller and Strunk, for all intents and purposes, were equally credible. Therefore, to a degree, the evidence regarding the utterance of the statements is in equipoise—no witness deserving more credibility than the other. However, inasmuch as Miller did not deny making the statements regarding wearing union buttons and instructing Strunk not to talk to other employees about the Union, I would conclude that Miller indeed made these statements. Therefore, I would conclude the Respondent violated Section 8(a)(1) by instructing Strunk, a known union organizer, not to wear union buttons at work on the two occasions as related by Strunk. I note that the Respondent argues that Miller's directions were not actually coercive because Strunk clearly continued to wear the buttons throughout the time of his employment. In point of fact, Strunk was quite adamant about his right to wear the buttons at work and evidently continued to wear them. However, it is clear that the effect of directives on the employee is not controlling according to Board law. Rather, it is whether the complained of act reasonably interferes with or coerces the employees in the exercise of rights—here wearing buttons in support of the Union. Notably, the Respondent offered no "special circumstances" to justify its actions. Thus, in my view, the General Counsel has made out a clear violation of the Act with regard to the aforementioned statements by Miller.

I would also conclude that the Respondent violated the Act by telling Strunk not to talk to other employees about the Union. Much need not be said about the interference and coercive effect such a statement would convey to Strunk, who the Respondent knew almost immediately intended to organize its employees. Thus, I would conclude that the Respondent violated the Act in directing Strunk not to discuss the Union with the Respondent's employees.

With respect to the allegation that Miller accused Strunk of sabotaging a company vehicle after being advised of Strunk's organizer status, I would conclude that the General Counsel has not met its burden of proof. First, as noted, Miller credibly denied making the statement. Moreover, he denied that any vehicles were out of service, and that other reasons caused him to shut the job down. The General Counsel adduced no contrary evidence; therefore, the charge fails. I would recommend dismissal of this aspect of the complaint. Similarly, I would conclude that the General Counsel failed in his proof of the allegations regarding Miller's threat to discipline Strunk for failure to meet performance standards and warning him to dot "i's," etc. Here, too, Miller credibly denied making these statements. I would recommend dismissal of this aspect of the complaint.

3. The January 26 allegation of threats and reprisals by Miller

The complaint alleges that on or about January 26, 1996, the Respondent, by and through Miller, threatened its employees with discipline and other unspecified reprisals because of their union membership, activities, and sympathies.[23]

As I view the record herein, the General Counsel produced no evidence to substantiate this allegation. Additionally, the briefs of the General Counsel and the Charging Party do not refer to any testimony, occurrences, statements, or events that would correspond to this date. I would note that to the extent that the alleged unfair labor practices of January 25 may be construed to be "about January 26," these have been dealt with earlier herein. Additionally, I am cognizant that in its brief, the Respondent responded to the allegation and argued that there was no evidence of record to support the allegation.[24] I agree with the Respondent, but not for the reasons advanced by the Respondent. Rather, I would find and conclude that this part of the complaint should be dismissed on grounds of duplicity and/or insufficiency of the evidence. I recommend dismissal of this part of the complaint.

4. The March 5, 1996 allegation of threats and reprisals by Miller

On or about March 5, 1996, Strunk was assigned to work at one of the Respondent's projects—the Barden and Robeson job. Strunk testified that while working there and discussing various changes in the job specifications with Miller, Miller commented to him that he was unhappy about the Union's filing unfair labor practice charges against EFP-1 with the Board.[25] Miller also stated to Strunk in this conversation that he did not understand why Eads had alleged that he was "harassing" Strunk. Strunk's response was to tell Miller to take the matter up with Eads and not him. Strunk had no further conversation with Miller on March 5. Again, Miller did not offer any testimony regarding the March 5 conversation with Strunk. Accordingly, I would find and conclude that Miller made the statements attributed to him on the date in question.

At this juncture, I would note that I am not required to accept blindly any testimony simply because it is not contradicted. *NLRB v. Howell Chevrolet Co.*, 204 F.2d 79, 86 (9th Cir. 1953), affd. 346 U.S. 482. However, I cannot dismiss or disregard uncontroverted testimony without having sufficient reason to do so. *Missouri Portland Cement Co. v. NLRB*, 965 F.2d 217, 222 (7th Cir. 1992). Moreover, when the absence of contradiction is based on a statement attributed to a respondent's supervisor or agent, then that absence can provide a basis for drawing an inference that the testimony of the supervisor or agent would have been adverse to the interests or position of a respondent-employer. *Paramount Poultry*, 294 NLRB 867, 868 fn. 9 (1989). With respect to this conversation, the General Counsel (and the Charging Party) contends that Miller's comments about the charges equate to an impermissible interrogation of Strunk about the very filing of the charges; and second, by Miller's expressing his displeasure not only with the charges but also his perception that the Union (Eads) felt he was harassing Strunk, Miller threatened Strunk with unspecified reprisals for Strunk's engaging in protected organizing activities, here, the filing of the charges in question.

Evidently, conceding that Miller made the statements attributed to him, the Respondent, nonetheless, contends that Miller was merely expressing his disappointment about the charges and that (as I interpret the Respondent's argument) Miller's comment about harassment reflected only his personal opinion.

The Respondent argues, moreover, since there were no promises of benefit or threats of reprisal made by Miller, there is no violation of the Act. I would agree with the Respondent. In my view, given the context of the conversation, Miller was engaging in protected speech when he expressed his unhappiness with the charges and questioned why the Union felt he was harassing Strunk. In my view, there is probably no one on the face of the earth who would be "happy" when sued; and clearly, if one sincerely feels that he has not engaged in improper conduct, he would wonder (perhaps aloud) about the charges filed against him or his company.

[23] The allegation is contained in part 5(a)(iii) of the consolidated complaint.

[24] Like myself, the Respondent evidently was at loose ends to respond to this allegation. Accordingly, perhaps out of caution, but certainly on surmise, the Respondent associated Miller's holding Strunk to a standard of installing 100 sprinkler heads per day on January 26 as a possible basis for the above-stated charge (see GC Exh. 44). However, I do not agree that this evidence satisfies the General Counsel's burden of establishing a prima facie case by competent proof.

[25] The Union (United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada) had filed charges against EFP-1 on February 26, 1996, alleging that the Company was unlawfully coercing and interrogating its employees, including Strunk, and refusing to hire certain named persons because of their union membership and/or activity.

I also note that Miller's comments could not reasonably be said to have interfered or coerced Strunk (and perhaps other employees who may have heard the conversation). First, it is highly speculative as to what other reprisals could be levied on Strunk that could not be redressed by resort to another unfair labor practice charge. Certainly the Union was fearless and vigilant in this regard. Second, the filing of the charge in question, already a fait accompli, more likely enhanced Strunk's organizing efforts and probably encouraged the Respondent's employees to pursue and protect their rights guaranteed under the Act. Additionally, examining the conversation and comments in context, Strunk's seemingly unfazed reaction to Miller's remarks suggests that he nor any other reasonable employee reasonably could be coerced or intimidated by the utterances. On bottom, Miller was expressing his personal view—displeasure—with the suit and merely voiced his lack of understanding of the Union's position in the matter; Miller threatened no one in his outspoken musings. Accordingly, I would recommend dismissal of this aspect of the complaint.

5. The June 27, 1996 conversations between Bennett and Theison

The complaint alleges that on June 27, the Respondent, through Bennett, violated the Act by interrogating an employee—Thomas Theison—about his union membership, informing him that applicants supportive of the Union would not be hired or considered for hire and informing him that it had discharged employees because they supported the Union.

The General Counsel called Thomas Theison to establish these charges.

Theison, an experienced sprinkler-fitter, testified that he had been laid off of his last job on about June 6 and was actively in search of employment. Theison, who was not a member of the Union at the time, however, knew that Michael Eads was the Union's business agent. Theison contacted Eads about joining the Union as well as obtaining employment; a meeting was set up so that the two could discuss the matter. On about June 23, Theison met with Eads and Union organizer Tony Bane26 for lunch at a local restaurant. At this meeting, Eads and Bane discussed with Theison the benefits of union membership and employment with union companies. While Eads did not then attempt to sign up Theison for membership, he, nonetheless, provided Theison with copies of the Union's constitution and bylaws and other informational pamphlets. During the meeting, Eads also mentioned that there were several companies the Union was interested in organizing, including EFP-2; Eads suggested that Theison should apply for work there. While not expressly promising him a job with a union contractor, Theison testified that Eads said that he would help Theison find employment if he would make application at EFP-2.27 At the meeting's end, Theison reiterated his concern for obtaining work and his continuing interest in joining the Union. However, Theison was not resolved to join then and Eads suggested that he think the matter over for a few days.

On June 27, Theison, acting on Eads' instructions applied in person at EFP-2's Greenwood facility. He met with Bennett who greeted him at the front desk and provided him with an application.28 While filling out the application, Theison and Bennett conversed generally about Theison's sprinkler-fitter experience and his previous employer. According to Theison, Bennett asked him if he was a union member and what was his opinion about unions. Theison responded that he was not a union member and did not know enough about unions to have an opinion. Also, Bennett, while discussing EFP-2's ongoing projects, then showed Theison 12–15 job applications which Bennett said he thought were union members. According to Theison, Bennett then said he was not going to hire the union applicants because he felt they wanted too much pay for the experience they possessed. Bennett, thereupon, in Theison's presence, ceremoniously threw the applications in the trash, saying he (Bennett) was not going to hire them. Theison also testified that Bennett also told him that he had fired someone because he *thought* the individual was a union member; however, Bennett did not identify the person in this conversation. Theison finished filling out his resume and departed.29

Bennett testified about his meeting with Theison on June 27. According to Bennett, on the day in question, he happened to be at the receptionist's desk when Theison appeared. Theison asked for an application which he then filled out. Bennett and Theison discussed some of the projects EFP-2 was then working on, and Theison ultimately submitted his application and left. Bennett, who testified that he had never met Theison before, emphatically denied throwing away any union applications; asking about Theison's union membership; and making statements about having fired a union member.30

Obviously, here, inasmuch as there were no witnesses to the conversations, the issue redounds once more to credibility of the witnesses and, in this instance, the plausibility of the uttered remarks and attendant behavior. First, I believe that Theison's version of the events of June 27 with Bennett are a clear fabrication, made up to curry favor with Eads to secure for himself a higher paying union job and to support the charges herein. In my mind, Theison only sought employment with EFP-2 to assist Eads in his organization efforts for which Eads promised him an immediate benefita union job.31 In fact, Theison himself admitted the existence of a deal of sorts with Eads who he said would "help" him to get a job with a *union* contractor if he would apply at EFP-2 or to other nonunion contractors to further Eads' organizing goals. In fact, just 1 day after Theison applied at EFP-2, Eads advised him that he had secured a job for Theison at a union contractor (J. A. House) which he could and did start on July 1.32 Significantly, Theison was not then even a member of the Union. Thus, because of this arrangement and Theison's financial stake, I would find his testimony here not worthy of belief.

In addition to the taint of Theison's arrangement with Eads, I found Theison's version of the June 27 events highly implausible and frankly just shy of preposterous. First, Bennett appeared to some to be a highly credible witness. He was an educated and sophisticated businessman and one well versed and experienced in employment matters, having been responsible for the establishment and implementation of, among other things, the Respondent's hiring policies and its compliance with applicable Federal and state labor laws. Second, Bennett was fully aware that an unfair labor practice charge had been filed against the Respondent (EFP-1) in February 1996 and that this charge involved allegations of both discriminatory discharge of a known and identified union supporter (Strunk) as well as refusal to hire union members by the Respondent.33 I observed Bennett over 5 days of hearings, and I would conclude that he is not a person given to irresponsible and needlessly theatrical behavior (and with complete strangers no less) in the workplace. In sum, Bennett presented himself as a serious and forthright witness and, as such, a person who would most likely not engage in the conversations and behavior as related by Theison; therefore, I believe Bennett's categorical denial of the June 27 conversations and conduct attributed to him by Theison. I would recommend dismissal of this aspect of the complaint.

6. The July 12, 1996 conversation between Theison and Miller

The complaint alleges that Respondent again violated the Act by Miller's interrogating Theison about his union membership, activities, and sympathies; threatening him with unspecified reprisals for his support of the Union and informing him that he had fired employees because of their support of the Union.

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[26] Theison could not recall any conversations with Bane at this meeting.

[27] Theison eventually, with Eads' assistance, obtained employment at J. A. House, a union contractor (Theison was not a union member at that time) at union scale of $16.83 per hour. As will be discussed herein, Theison's startup date with J. A. House was July 1.

[28] Theison's application is contained in GC Exh. 34 and includes various awards and certificates related to his sprinkler-fitter training and experience. Theison represented in his application that he was currently unemployed, his last job being terminated due to layoff in June 1996.

[29] The entire interview lasted approximately 30 minutes.

[30] Bennett was present during all of Theison's testimony at the hearing.

[31] Eads testified that for their assistance, he did not promise any of the EFP-1 or EFP-2 applicants a job with a union contractor. I believe the facts associated with Theison cast doubt on this denial by Eads.

[32] Theison was ultimately hired by EFP-2 on July 27; he voluntary left J. A. House to work for EFP-2. Theison's hiring and subsequent discharge by the Respondent will be discussed later herein.

[33] On the score, Theison's story really becomes suspect because Bennett surely *knew* that Strunk, the obvious reference, was a union member, as opposed to *thinking* that he was one as Theison reported.

Respondent, through Miller, decided to hire Theison after the July 12 interview. Theison reported to work on July 22 and 26 and was scheduled to work at one of Respondent's sites. Theison testified that once there at around 8:30 a.m., Miller pulled him aside and stated to him that he had heard that Theison was a union member and that he was working for J. A. House. Theison denied the accusations although he actually had been working for J. A. House about 2–3 weeks before he started working for the Respondent.[34] According to Theison, Miller made additional antiunion comments to him. For instance, after asking about his employment, Miller then stated in a very stern voice from a distance of only a couple of feet, that if he found out that Theison was "union, Theison should be real careful. Miller also repeated to him in this conversation that he had had problems with another union organizer—John Strunk—and that he had fired him because of his union involvement and wanted nothing do with "it" again.[35]

Theison had no further conversations with Miller on that day and continued with his assigned tasks. However, according to Theison, he felt very much threatened by Miller's earlier comments and later that night called union organizer, Bane, to relate the day's events. According to Theison, as a result of this conversation, he decided that he would go on strike.

Here again, Miller did not deny or even offer any testimony regarding the statements and actions attributed to him. As such, Theison's allegations are unrebutted and uncontroverted.[36] Accordingly, with reluctance, I am constrained to credit Theison's testimony regarding the occurrences of July 26. I would again find and conclude, consistent with the authorities cited, supra, that the Respondent violated Section 8(a)(1) of the Act on July 26. Specifically, I would find and conclude that Miller's questioning Theison about his employment at a union contractor and his statement that if Theison were a union member, he was advised to be careful, redound to unlawful interrogation about Theison's union membership and a threat of unspecified reprisals for his union membership; moreover, that Miller's informing Theison that he had fired a union organizer for union activities was impermissibly coercive, all in violation of the Act.[37]

C. *The Refusal-to-Hire and Unlawful Discharge Allegations*

The complaint alleges that EFP-1 and its successor EFP-2 unlawfully refused to hire and/or consider for hire 33 applicants for employment because of their union involvement and membership and their engaging in concerted activities for or on behalf of the Union during the period covering January 10 through May 31, 1996, and continuing thereafter.[38]

EFP-1 is also charged with unlawfully discharging Strunk because of his union membership and activities;[39] EFP-2 is likewise charged with discharging Theison essentially because of his activities on behalf of the Union.[40]

Regarding the refusal-to-hire allegation, the record discloses that applications for employment for 33 alleged discriminatees were submitted to the Respondent (EFP-1 and EFP-2) at different times and circumstances in 1996 which will be more fully explained in the following sections.

However, before discussing the individual cases of either the 33 applicants not hired by the Respondent or the discharges of Strunk and Theison, a few prefatory remarks are in order.

First, not all of the 33 alleged discriminatees testified at the hearing.[41] Thus, for those applicants who did not testify, I have of necessity had to evaluate crucial matters such as the position applied for, qualifications, and sincerity or bona fides of these applicants from the decidedly limited vantage point of the naked applications and resumes submitted by them or on their behalf. Of course, I have considered other relevant evidence of record which could shed light on the issue. In short, it should be stated at the outset that I have employed a certain amount of judicious guesswork to resolve these matters pertaining to these nontestifying applicants.

Second, the credible evidence of record amply describes the sprinkler-fitter trade and the general requirements of those who seek to perform fitter work. Having carefully examined the applications and resumes, I would conclude that, by and large, the vast majority of the 33 applicants were indeed qualified to perform sprinkler-fitter work as that job was explained to me by witnesses from union and managerial representatives and the applicants themselves. Thus, I will not devote much space in this decision to descriptions of sprinkler-fitter work, or the qualifications of obviously qualified applicants.[42] Any appropriate exceptions to this general finding will be discussed later herein.

Third, there is the matter of the legal principles applicable to alleged discriminatory refusal to hire and/or discharge of union members or sympathizers.

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization 29 U.S.C. § 158(a)(3).

Preliminary to determining whether an employer has discriminated against an employee in violation of Section 8(a)(3) or (1) of the Act, the Board has held that the General Counsel must first make a prima facie showing sufficient to support the inference that the protected activity(ies) of the employees was a motivating factor in the employer's decision to discipline or discharge him. If this is established, the burden then shifts to the employer to demonstrate that the discipline or discharge would have occurred irrespective of whether the employee was engaged in protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

The *Wright Line* analysis is applicable not only to allegedly unlawful discharges but also refusals by an employer to hire or consider for hire applicants because of their union membership or activities. *Belfance Electric, Inc.*, 319 NLRB 945 (1995); *American Signcrafters*, 319 NLRB 649 (1995); *Industrial TurnAround Corp.*, 321 NLRB 181 (1996), and *Bat-Jac Contracting*, 320 NLRB 891 (1996).

In a refusal-to-hire case, the General Counsel must establish per *Wright Line* the following elements: (1) that each applicant for employment[43] submitted an application for employment; (2) that the employer refused to hire or consider for hire each; (3) that the employer knew of the

[34] Theison, in fact, had not formally quit his job at J. A. House but had voluntarily left that job to take the opening with Respondent. Theison, with obvious hesitance and uncertainty, testified that he did not tell Miller the truth because he was actively trying to get the Respondent organized. I assume that all of this was done as part of the deal Theison struck with Eads to assist Eads with the Union's organizational objectives at EFP-2.

[35] The "it," referred to by Theison on p. 316 of the transcript, I take to mean the Union or related to unions and organizing.

[36] In its brief, the Respondent argues that Theison's testimony should be categorically rejected on grounds of his general lack of credibility. The Respondent offers no argument regarding why Miller did not testify about his conversation with Theison on either July 12 or 26.

[37] I do not find that Miller's inquiries about whether Theison was employed by another company violative of the Act. Clearly, Miller was within his right to inquire whether one of his employees was then working for a competitor, irrespective of whether the competitor was unionized or not.

[38] Par. 6(a) of the complaint (as amended) lists the names of 33 persons as having applied for work with Respondent EFP-1 on certain dates. These individuals technically applied at EFP-1 before EFP-2 came into existence. However, because I have determined that EFP-2 is a successor to EFP-1, this distinction is of no consequence to the resolution of the issue of whether the Respondent violated the Act as charged.

[39] Par. 6(c) of the complaint.

[40] Par. 6(d) of the complaint.

[41] Of the 33 applicants, only 20 testified. As to the remaining 13, no reason was given for their nonappearance and no continuance was requested by the General Counsel or the Charging Party to secure their presence. Notable, too, is the fact the hearing took place over a 3-week period during which there was a hiatus of 2 weeks between the beginning of the hearing and its adjournment.

[42] Strunk and Theison, of course, were hired as sprinkler-fitters by the Respondent; therefore, their qualifications are not in issue. Because these persons made application and were ultimately hired by the Respondent, they have served as useful examples of qualified fitters against whom I have assessed the qualifications of the nonhired applicants.

[43] It is well settled that an applicant for employment is an employee within the meaning of the Act. *Briggs Mfg. Co.*, 75 NLRB 569, 570 (1947); *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177 (1941).

applicant's union status or activities; and (4) that the employer's refusal to hire or consider for hire each applicant was due to union animus. *Big E's Foodland, Inc.,* 242 NLRB 963, 968 (1979); *Clock Electric*, 323 NLRB 1226 (1997).

It is also well settled, however, that when an employer's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the employer desires to conceal. The motive may be inferred from the total circumstances proved. Under certain circumstances, the Board will infer animus in the absence of direct evidence; that finding may be inferred from the record as a whole. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

A prima facie case is made out where the General Counsel establishes union activity, employer knowledge of that activity, animus, and adverse action against those involved, which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Once the General Counsel has made out a prima facie case, the burden shifts back to the employer. That burden requires a respondent "to establish its *Wright Line* defense only by a preponderance of evidence. The Respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. [Fn. omitted.]" *Merrilat Industries*, 307 NLRB 1301, 1303 (1992).

Finally, the Respondents contend that applicants for employment (the alleged discriminatees) should be held to a good-faith standard regarding their applications for work. That is, at the time of the submission of his application, the applicant should have been sincerely interested in gaining employment with the Respondent. Implicit in his argument, if it can be shown that at the time of submission of the application, the prospective employee had no such intention of working but was, for example, only applying because a union superior asked him or he intended to file an unfair labor practice charge and would not have accepted a job if offered one, then the charge as to that applicant should be dismissed; that such conduct is not consistent with the policies of the Act.

Clearly, one of the broad purposes and functions of the Act, as amended, is to protect the statutory rights of employees, but also in the process those rights must be balanced against the rights of employers. It is also the policy of the Act to promote labor peace and reduce burdens on commerce occasioned by labor strife. In light of these policies and the remedial nature of the Act, applicants for employment in my view should be bona fidely interested in gaining employment when they submit applications, even where they also harbor an intention from whatsoever source derived to organize or engage in other protected activities if hired. In my view, it is also consonant with the spirit of the Act that such applicants should demonstrate that their applications were submitted in a good-faith attempt to secure employment and not for purposes that run counter to the policies of the Act.[44] Accordingly, I have considered carefully the testimony and circumstances of each alleged discriminatee's application for purpose of determining whether it was submitted in good faith or for purposes that I believe run counter to the Act.

[44] At common law, multitudinous and useless lawsuits and speculation in such suits were specifically proscribed by law. These laws were aimed at officious intermeddlers who intentionally cultivated strife and contention through use of lawsuits. Such lawsuits tended to disturb the peace of society while leading to corrupt practices and interference with the remedial process of the law. Today, similar conduct now falls within the scope of actions for abuse of process, wrongful initiation of litigation, and malicious prosecution. One of the particularly offensive prohibited practices was barratry. Barratry is described as simply inciting or arousing conflict and litigation between parties either at law or otherwise. Barratry has been made an offense by statute in addition to its common law beginning and includes inducing others to commence even just suits but commenced with a ruinous or oppressive motive. In my view, the Act should not countenance behavior designed in large part to harass, oppress, or disrupt the parties, even if such behavior is combined with protected activity such as the right of employees to organize or engage in union concerted activity. [Citations for the above are intentionally omitted.]

IV. THE 8(A) (1) AND (3) UNFAIR LABOR PRACTICE ALLEGATIONS

A. The 8(a)(1) and (3) Allegations

1. The discharge of John Strunk

Strunk was employed as a sprinkler-fitter foreman by the Respondent (EFP-1) from January 25 through March 26, 1996, on which latter date he was discharged.

Bennett testified regarding his role in Strunk's discharge.

Although not involved in the day-to-day supervision of Strunk, Bennett knew early on that Strunk was a member of the Union and was or would be engaging in organizing activities.[45]

According to Bennett, he was not familiar firsthand with the issues and events which led to Strunk's termination. This information was conveyed to him by Miller, Strunk's supervisor in the field, and Douthitt at the Indianapolis office. He, however, did converse with Miller prior to Strunk's termination. Miller told him that he was considering terminating Strunk for several reasons, including poor work performance, lateness, and attendance during Strunk's probationary period. Bennett felt that Miller evidently had come to the conclusion very early in Strunk's employment, that is within the first few weeks. The problem, it seemed, was that Strunk had been hired primarily for his extensive experience and was being paid commensurately. Miller, however, had become disappointed in the amount and quality of Strunk's work, along with time and attendance problems. Bennett credibly testified that he was sensitive to the fact that Strunk was a union member and organizer, and that the Union had filed unfair labor practice charges against the Company in February 1996 regarding Strunk.[46] Bennett was eventually informed by Miller and Douthitt about three formal writeups of Strunk but did not actually see them prior to Strunk's discharge. According to the information conveyed to him by Miller and Douthitt, Strunk was to be terminated for excessive tardiness, for not calling in on time, and poor quality work within the 60-day probationary period. Bennett concurred with Miller and Douthitt's recommendation, and Strunk was discharged on March 26, 1966. After Strunk was terminated, Bennett instructed Miller to prepare a log or memorandum setting out chronologically various violations or infractions committed by Strunk during his tenure with the Respondent. Bennett asked Miller to prepare this document[47] from Miller's notes and memory of his experience with Strunk because he knew that the matter would end up in court and wanted to buttress the Company's position that Strunk was not fired because of his union activities.

Miller testified and provided his reasons for terminating Strunk.

Miller decided to terminate Strunk on March 26 and informed Strunk on that day that he was discharged. However, according to Miller, Strunk was not discharged because of a single incident, rather on the strength of a number of incidents and violations of company rules by Strunk over a period of time. Miller denied that Strunk's union membership or organizing activities played any part in his decision to terminate Strunk.

Miller explained that the Respondent employs a progressive discipline process wherein four or more warnings could lead to termination. However, as Miller testified, the process is not "set in stone" and depends on the individual and circumstances for its implementation and execution. Miller who admitted that he, too, was aware of Strunk's union membership and organizing activities at the time.

In any event, according to Miller, he relied principally on three formal written warnings to Strunk to justify his termination. But Miller added that these warnings were not reflective of all of the problems he had experienced with Strunk. Accordingly, after Strunk was let go, he prepared a log or memorandum of incidents and problems he had had with Strunk based on notes he had jotted down to refresh his memory about Strunk's on-the-job problems. According to Miller, he started keeping notes on Strunk about January 26 and continued keeping a running account of Strunk's problems. These notes were placed in Strunk's personnel file but

[45] Bennett candidly acknowledged receiving Eads' letter of January 25, 1996 (GC Exh. 36), in which Eads advised the Company that Strunk was a member of the Union and would be engaging in organizing activities. However, Bennett said that he knew Strunk was a union member before receiving the letter, presumably from Miller and Douthitt who had interviewed him.

[46] Bennett was faxed a copy of the February Board charges by Douthitt.

[47] The Miller log or memorandum is contained in GC Exh. 44.

were not written on official company warning forms. Miller explained that often, as he supervised the Company's projects, he did not have copies of the forms and jotted down his observations and comments about employees on scraps of paper.[48] Also, Miller did not confine his criticisms of Strunk to written notes. According to Miller, he, on several occasions, verbally admonished Strunk with pointed reference to his probationary status and about his missing days and lateness. Miller admitted that he began keeping close tabs on Strunk fairly early on in his employment—around January 26—but not because of Strunk's union activities or out of any personal animosity. Rather, Miller explained that he had high expectations of Strunk as his foreman and leadman because of his experience and he had communicated his feelings to Strunk before he hired him. Because of his experience, Strunk was paid one of the highest wages at the Company and, in short, he was expected to perform. With these notions in mind, Miller felt that he was justified in keeping notes on Strunk to "cover" himself. As later events unfolded, Miller determined that Strunk was not living up to his expectations, and in that context, told Strunk that he was not a team player and he was clearly disappointed in Strunk's performance.[49]

Miller first wrote Strunk up formally on February 5, 1996, for failing to notify the Company that he would be absent due to illness prior to the commencement of his shift[50] as required by the company rules. On February 22, Miller again issued a formal disciplinary warning to Strunk for failing to report for work at 6:30 a.m.[51]

Miller issued his final disciplinary warning to Strunk on March 26.[52] Miller, in this final discipline, cited Strunk for failing to follow his instructions to consult with the job superintendent[53] before commencing work on a ceiling, with the result that the sprinkler work was unacceptable and the ceiling tiles had to be replaced; for failing on three separate occasions to straighten (level) out pipe; and for being 10 minutes late for work that day. Miller discharged Strunk when he arrived at the site that day.

However, according to Miller, he had discussed Strunk's possible termination with Bennett on March 24, the day on which the superintendent advised him of the problems with the heads and ceiling tiles, but had not reached a decision then to fire him. Miller decided only to terminate Strunk on March 26 because Strunk was even late for the meeting to discuss the problem. Miler became exasperated with Strunk and decided to terminate him on the spot. Miller testified that on balance, Strunk's work was deficient in terms of quantity and quality, he was excessively tardy and missed too many days of work during his probationary period;[54] however, the "documents" relied on by him to fire Strunk were the three written notices.

Strunk admitted that during his probationary period, he had been late for work on several occasions due to personal problems but that he had not been disciplined.[55] Strunk admitted further that on the date of his discharge, he was 10 minutes late because of problems with his automobile. Strunk also admitted that Miller had commented to him on one occasion that Strunk should be installing at least 100 sprinkler heads per day. Strunk's excuse for not meeting this standard was his working in an unheated building with no roof, and that he in fact did install 100 heads on other occasions, weather permitting. Regarding the February 5 writeup for failing to call in prior to the start of his shift, as he knew was required, Strunk disagreed with Miller's charge, saying that he did try to call in but there was no one available at the shop to receive his calls. Strunk also made calls to Miller's mobile telephone and pager which also were not answered. Strunk finally reached Miller at 8 a.m.[56]

With regard to the February 22 writeup, Strunk agreed that he had not reported for work at 6:30 a.m. on the preceding Sunday (the 18th), but explained that his failure was due to confusion and a possible misunderstanding with Miller about which Sunday he was to report. Strunk testified that he understood he was to meet Miller on the following Sunday—the 25th—and obtain a truck and carry materials to a job in Vedersburg, Indiana, which was later canceled.[57] Concerning the March 26 writeup, Strunk admitted that he was 10 minutes late for work because of automobile problems; and that with respect to the charge that he had not corrected the level of the sprinkler piping, he had asked one of the helpers assigned to him twice before to see to the matter, but evidently his instructions had not been carried out. Regarding the problems with the ceiling tiles, Strunk testified that he had talked to the job superinten-dent prior to commencing work on the ceiling and that the blueprints for the job did not require sprinkler heads in the center of the tiles; and that there were no tiles in the ceiling at the time he cut the heads. Regarding the two other writeups, Strunk disagreed with this part of the March 26 discipline but chose not to argue with Miller about it. Strunk, being notified of his firing, left the jobsite and on the following Wednesday, turned in his tools and received his final paycheck.

I would conclude that under *Wright Line*, the General Counsel established a prima facie case of a violation of Section 8(a)(3) and (1) of the Act by the Respondent regarding Strunk's discharge. In assessing the credibility of the Respondent's witnesses, I believe that Bennett testified credibly, especially in regards to his sensitivity to the requirements of the law and his good-faith attempts to comply therewith. However, for all of his efforts, he was undone by Miller (and, to a lesser extent, by Douthitt). I have earlier determined that Miller, on several

[48] These notes were not produced at the hearing. Miller and Bennett indicated that they were thrown away. Miller, in his initial testimony, could not recall other instances of writing up employees on note paper as opposed to the forms. However, in a subsequent appearance on February 26, 1997, he recalled and produced notes on an employee, Ken Metcalf. These notes are contained in R. Exh. 4 and were taken from Metcalf's personnel file.

[49] Miller cited, as an example of the beginning of his loss of confidence in Strunk's abilities, Strunk's installing only 55 sprinkler heads on January 26 when in his opinion Strunk should have installed 100. Miller felt that Strunk was not trying to be a part of the Company's "team" and get the work done.

[50] This formal writeup is contained in GC Exh. 41.

[51] See GC Exh. 42. The warning states that "John understands he needs to be on time. Further problems could result in termination."

[52] GC Exh. 43.

[53] This was the Barden and Robeson project supervisor.

[54] Miller pointed to the various incidents and observations set out in GC Exh. 44 as examples of Strunk's generally poor showing as a worker. Miller estimated that Strunk missed 3 or 4 days of work and was late three or four times during his probationary period. Also, he had received information from the Barden and Robeson superintendent that Strunk had been late numerous times throughout the time he was on that job.

[55] For instance, Strunk agreed that Miller's notation of his lateness in the aforementioned log (GC Exh. 44) dated February 29 was accurate although he could not remember why he was late. Strunk denied the February 20 entry however.

[56] Strunk testified that he believed the secretary answered the shop telephone on February 22 and he asked her how he could reach Miller; the secretary suggested Miller's mobile telephone. Miller testified that he investigated the matter and determined that the shop's answering machine had no message from Strunk, and one of the designers who was at the shop at 7:30 a.m. told him no calls were received; and Miller himself was in the shop until roughly 7:30 a.m., and no call was received from Strunk. I would credit Miller's version of this matter.

[57] Miller testified that he talked to Strunk on the Sunday night preceding February 22 and asked him to meet him at the shop the following morning at 6:30 because Miller would not be able to get to the jobsite. Miller also asked Strunk if he would mind taking a groover (machine) out to the site, and Strunk agreed. Strunk did not show up and was written up; the actual warning was delivered to Strunk by another employee on February 22. Notably, Strunk, in disagreeing with the writeup, stated on the form that he was not willing to carry heavy equipment in his car but that he was at the jobsite at 7:30 a.m. Strunk acknowledged that he was told to be at the shop at 6:30 a.m. to pick up the truck. I would credit Miller's version of these events. Not only was Strunk's version of the events surrounding the writeup inconsistent and confusing, he was overly defensive, petulant, rather smart alecky, and disrespectful in answering reasonable questions put to him by the Respondent's counsel. Also, Strunk's dates do not stack up. I note that he even dated the writeup "9–22–96."

other occasions during and after Strunk's employment with Eckert, engaged in conduct violative of Section 8(a)(1). In my view, these violations support a finding of animus against the Union on the Respondent's part, Miller's denials notwithstanding. *Northeast Industrial Service Co.*, 320 NLRB 977 (1996). Strunk's union membership, his known organizing activities, and objectives were to me motivating factors relative to his discharge by the Respondent. However, I believe, as the Respondent contends, that it would have terminated Strunk even in the absence of his engaging in protected conduct and its animus against the Union. In my view, Strunk did not perform on the level he was reasonably expected and, in fact, admitted his deficiencies, albeit with various excuses and rationalizations that were not very convincing to me. Also, Strunk exhibited a certain contrariness or uncooperativeness[58] even as he testified, which leads me to conclude, as did the Respondent ultimately, that Strunk was not a good fit for the Company. *Be-Lo Stores*, 318 NLRB 1 (1995). Accordingly, I would recommend dismissal of this aspect of the charges.

2. The alleged termination of Tom Theison

Tom Theison, as stated earlier herein, began his employment at EFP-2 as a sprinkler-fitter on July 22, 1996; Theison's last date of employment at EFP-2 was July 29, 1996.

Theison testified that the first 4 days on the job with the Respondent were uneventful. However, on July 26, he had a conversation with Miller which he found disturbing. According to Theison, he was scheduled to work at a project with Miller's brother, Matt. While unloading material, Miller allegedly pulled him aside and said that he had heard that Theison was a union member and that Theison was actually employed by J. A. House at the same time he was working for the Respondent. Theison denied these accusations although, in truth, he had actually worked at J. A. House for 3 weeks before joining the Respondent. Miller, also during this conversation, as stated earlier herein, made the remarks regarding Theison's having to be really careful should Miller find out he was a union member and that Miller had fired a union organizer (Strunk) because of his organizing and union involvement. The day ended with no further discussions. However, according to Theison, he felt threatened by Miller's questioning and remarks; so later that evening, he called the union organizer, Bane, and advised him as to what had happened. Based on his discussion with Bane, Theison decided over the weekend to go on strike—to withhold his services from the Respondent.

Theison reported to the jobsite wearing a union baseball cap at about 7:30 the following Monday morning. According to Theison, Miler asked him about the cap and Theison told him that he was going on strike because he felt the Respondent needed to be unionized.[59] According to Theison, Miller responded by saying "Oh what a dick," and kept on unloading tools. Miller later responded to Theison's pressing of the issue of the need for unionization by allegedly telling him if Theison were going on strike, then people on strike do not work. Theison testified that he assumed with this statement that he was fired on the spot; he voluntarily turned in his company-issued tools and left the jobsite.[60] The next day, Theison called the Respondent's offices and spoke first with Douthitt in an attempt to talk to Bennett. Douthitt advised that Bennett was busy and could not be disturbed. Theison inquired about picking up his last check, and Douthitt told him that he had to turn in the company tools and equipment first in order to get his check.

A couple of days later (around August 1), Theison spoke to Bennett over the telephone and queried Bennett as to why he had not been called to another job. According to Theison, Bennett stated that he had assumed that Theison had quit. Theison countered that he had not quit but had gone out on strike. The conversation then went back and forth, with Bennett's maintaining that Theison had quit and Theison's asserting that he was on strike. Theison admitted that after the conversation, he never spoke to anyone from the Respondent again and, specifically, never offered to return to work (unconditionally) or otherwise indicate that he was ceasing his strike activities. In fact, on August 5, 1996, Theison acknowledged that he went back to work at J. A. House at union scale.[61]

Miller testified about the events of July 29. According to Miller, Theison told him that he was going on strike that day because he felt that EFP-2 needed a union. At that point, Miller testified that he did not feel that Theison was quitting. However, because Theison voluntarily turned in his tools, he concluded that Theison was indeed quitting. Accordingly, on July 29, he prepared an employee warning sheet memorializing the event.[62] In this warning, Miller, among other things, wrote that Theison informed him that he was a union organizer, that EFP-2 should be union and that he was going on strike; Miller wrote that he asked Theison whether being on strike meant that Theison was not going to work. According to Miller, Theison responded yes to this question.

Bennett also testified about Theison's departure.

Bennett did not have firsthand knowledge of the events of July 29 but was told by Miller that Theison had announced that he was on strike, and had turned in his tools and left the jobsite in the midst of the crew's setting up of the job when there was work for him to do. Bennett considered Theison's action as "walking off" the job and, thus, a voluntary quit. Bennett testified that 2 days later, around July 30, Theison called him and asked what his status (with the Company) was. Bennett, who memorialized part of this conversation with Theison in a memorandum[63] placed in Theison's file, told Theison, in essence, if he was on strike, he should report the next morning for work, or to strike. However, according to Bennett, Theison did not show up the next workday. Instead, Theison came in on July 31 to pick up his last check and return the rest of the Company's tools.[64]

The General Counsel and the Charging Party contend that Theison's strike was from its inception a lawful unfair labor practice strike; that is, it was based on the Respondent's unlawful interrogation, threats, and informing him that it had fired an employee because of support for the Union on July 26 and, therefore, was protected under the Act. These parties further argue that Miller's alleged statement to Theison, to wit, "people who strike do not work," in effect was an order to Theison to leave the jobsite and operated as an unlawful discharge. Conceding that Theison never made an unconditional offer to return to work, the General Counsel, nonetheless, argues that the Respondent's (Miller's and Bennett's) words and actions left Theison with no indication that an unconditional offer to return to work would be honored in any way. Therefore, his making an unconditional offer would be merely an exercise in futility.

The Respondent argues, in essence, that it never discharged Theison. Specifically, Respondent asserts that Miller's statement to Theison was nothing more than a statement of fact because people on strike (by definition) do not work. Theison "assumed" that he was discharged and then voluntarily turned in his tools and left the job. Moreover, Theison, once he left the jobsite, never returned to picket or otherwise act on his claim of being on strike. Regarding the discussion between Bennett and Theison as to whether Theison had quit or was on strike, the Respondent argues that Bennett's offer to Theison to report to work the next day clearly demonstrates that the Respondent had not discharged Theison. The Respondent points to Theison's own statement on the record after going on strike, that he never offered to return to work (with or without conditions) and never declared the strike to be over. In short, according

[58] On this point, I am reminded of Strunk's showing of a poor work attitude and testiness in relating at the hearing why he would not transport the relatively light groover to a worksite in his personal vehicle.

[59] On cross-examination, Theison stated that "strike" to him meant withholding his services from an employer and that he had planned to go on strike that morning. Theison also admitted that he did not mention to Miller how he felt threatened by Miller's past Friday's questions and remarks, or by any questions or remarks on Monday. His only statement to Miller was that he thought the Company needed a union. However, on direct examination, Theison originally stated that he told Miller on Monday that he felt threatened by the previous Friday's remarks and that was why he was going on strike.

[60] Theison admitted that Miller did not ask him to turn in his tools or leave the worksite.

[61] Theison received $14 per hour at EFP-2 and $16.83 per hour at J. A. House.

[62] GC Exh. 51.

[63] See GC Exh. 39—Bennett's handwritten notes of his conversation with Theison on July 30 and noting Theison's picking up his check and returning his tools on July 31.

[64] Bennett acknowledged that based on EFP-2's employee policies, had Theison attempted to return to work, he would have received a disciplinary action up to and including termination for walking off the job. Bennett admitted that he so informed Theison in the telephone conversation.

to the Respondent, Theison continues to be on strike even today if his testimony is to be believed.

It is axiomatic under court and Board law precedent that an unfair labor practice strike is strike activity initiated in whole or in part in response to unfair labor practices committed by an employer. *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *NLRB v. Pecheur Lozenge Co.*, 209 F.2d. 393 (2d Cir. 1953), cert. denied 347 U.S. 953 (1954). A striker who has been engaged in an unfair labor practice strike is entitled to reinstatement to his former job upon an unconditional offer to return to work. In fact, the unconditional offer to return to work is an essential perquisite to a finding of unlawful failure to reinstate. *Orit Corp.*, 294 NLRB 695 (1989). *Domsey Trading Corp.*, 310 NLRB 777, (1993), enfd. 16 F.3d 517 (2d Cir. 1994). *NLRB v. Champ Corp.*, 933 F.2d 688 (9th Cir. 1990), cert. denied 502 U.S. 957 (1991). However, the Board has been equally clear in not requiring employees to perform a futile act. *Abilities & Goodwill, Inc.*, 241 NLRB 27 (1979) (and authorities cited therein).

I have previously determined herein that the Respondent (through Miller) committed unfair labor practices with respect to Theison on July 26, and on the record I would conclude and find that those practices are shown to have been at least a contributing reason for Theison's strike and presumably his continuation thereof. Therefore, I would agree with the General Counsel and the Charging Party that Theison is protected by the Act regarding his announced strike. However, I would also conclude and find that Theison at no time ever made an unconditional offer to return to work as required and, furthermore, the Respondent's actions on this record would not have made such an offer from Theison a futile act.

As I have stated earlier, I have deep reservations about Theison's bona fides in this matter. I believe that he undertook employment at the Respondent pursuant to a deal or arrangement with the Union that would secure for him his preference for a higher paying union job and to file unfair labor practice charges against the Respondent. Thus, I have earlier discredited Theison's testimony in part. To the extent that I credited Theison at all, it was because of the Respondent's silence in the face of accusation. My belief that this arrangement or deal was still in effect at the time Theison decided to strike is buttressed by his consulting with the Union over the week and coming to work with union insignia on July 29, announcing his organizing objectives, and then going on strike. This to me seems a fairly scripted performance. It is also noteworthy that Theison, based on what I consider a rather offhand (almost cryptic) statement from Miller, assumed he had been fired. Since Theison himself admitted that he did not tell Miller on July 29, that he felt threatened by the statements Miller allegedly made to him on July 26, it defies logic for Theison to believe he was fired because he had engaged in protected activities. Theison, however, promptly turned in his tools and left the job. Then Theison, letting barely a day pass, called the Respondent to inquire about receiving his last check. These actions do not reflect, in my view, one who considers himself a striking employee. Rather, he seemed to be a quitting employee. Theison, to me, wanted to leave the Respondent's employ for he had done what he promised for the Union. His desire was to get back to his higher paying union job. In fact, Theison was back at work with his employer of choice, J. A. House, within a week of his so-called strike. Moreover, Theison clearly has never offered to end his strike and offer to come back to work. While Bennett's actions and testimony with regard to Theison vacillated between calling Theison's action a voluntary quit and a legitimate strike, I believe his confusion stemmed from Theison's ambiguous and confusing behavior, that is insisting that he was on strike but demanding his last check, voluntarily turning in his tools and equipment, and not showing up for work or to continue striking as requested by Bennett. It appears to me that the Respondent was justified in considering Theison as having abandoned his job. In any event, it is clear that the Respondent, in my view, did not unlawfully discharge him. I would recommend dismissal of the aspect of the complaint principally on grounds of Theison's having voluntarily quit or abandoned his employment at EFP-2. *MDI Commercial Services*, 325 NLRB 53 (1997).

B. The Applications of Alleged Discriminatees Randy Long and Keith Scott Weisbrodt on March 2, 1996

1. Randy Long appeared and testified at the hearing

Long described himself as a journeyman sprinkler-fitter with about 8 years' experience in the industry, he is a member of the Union.[65]

Around the end of February 1996, while on a break, Long and one of his coworkers, Scott Weisbrodt, happened to meet Miller in the parking lot of a local gas station. Long, who noticed that Miller's truck had "fire protection" on it, struck up a conversation with Miller in which he expressed his dissatisfaction with his current employment situation. Long's main complaint to Miller was that he was not getting a full week's work and he suspected his employer (union contractor, Fireomatic) was getting low on work.[66] Miller gave Long his business card and, according to Long, said that his Company, Eckert Fire Protection, had plenty of work and that he and Weisbrodt should apply.[67] As a result of this conversation, Long and Weisbrodt went to Eckert's office on March 2 and spoke to the secretary, telling her that Miller had sent them. According to Long, he and Weisbrodt filled out applications and submitted them to the secretary.

Because he had not been contacted by Eckert, approximately 3 or 4 months later, Long went to Eckert's (now EFP-2) office and spoke to a man he later found out was Bennett (identified by Long at the hearing) to check on the status of his application.[68] According to Long, Bennett asked how long had it been since he submitted his application. When Long told him 3 to 4 months ago, Bennett said it probably had been thrown out and that Long should fill out another, which he did. According to Long, Bennett did not mention any problems with the second application and did not ask for additional information.

Long testified that he was never contacted by either EFP-1 or EFP-2 regarding either of his applications. However, had he been, he claimed that he would have "considered" taking a position as a sprinkler-fitter and would have performed that job for the Company even if it meant working for less money. Also, Long admitted that he did not follow up on his second application. Miller provided only minimal testimony regarding his handling of Long's application(s). Upon being shown a copy of Long's applications (along with those of a number of other alleged discriminatees) by the General Counsel, Miller testified merely that he nor anyone at EFP-2 contacted, interviewed, or hired Long for possible employment at the Company; no reasons were given by him. Thus, Miller offered virtually no information about his first meeting with Long (and Weisbrodt), or their conversations, or how, if at all, he handled Long's application. Again, this is a significant omission. Thus, I would conclude by inference that Long's version of the events occurring between himself and Miller is believable, and I will credit Long's version of these events.

Bennett testified regarding Long's application. First, Bennett identified Long's application as having been received by EFP-1, but supplied by him only in compliance with the subpoena request of the General Counsel for records in the possession of EFP-2. Second, according to Bennett, Long's application was submitted during a time when EFP-1 was not hiring[69] and,

[65] Long did not explain how long he had been a member of the Union, nor did he expressly indicate he was a member of the Union. I will assume, based on Eads' testimony, that he was a member of the Union during the relevant period.

[66] As it turned out, Long was not actually laid off from Fireomatic until around May 1996. Long thereafter took a job with another contractor, Brown Sprinkler, at $21.05 per hour. Long remained with Brown until around the end of November 1996.

[67] Weisbrodt was not present during the entire conversation between Long and Miller.

[68] Long on this second visit was wearing a T-shirt with "Union Yes" stenciled on it; he could not remember what he was wearing when he first applied in March.

[69] It should be noted this statement seems directly contrary to what Long stated Miller told him about their being plenty of work and suggesting that Long apply. However, I note that a valid distinction can be drawn between the availability of work and the need to hire people to do the work in question.

therefore, Long and any other applicants would not have been contacted by the Respondent. Bennett acknowledged that Long personally submitted a second application to EFP-2 on his instructions. However, Bennett testified that he could not locate Long's second application, suggesting that since it was (now) over 30 days, it would not be readily available. However, by referring to a log of applications70 received by EFP-2, he was able to establish that Long reapplied to EFP-2 on August 7, 1996, but was not hired. Bennett testified that Long was not hired because his application was incomplete. Asked by the Respondent's counsel why he did not tell Long that his application was incomplete, Bennett responded, "I'm afraid I didn't look at the application."

2. Scott Weisbrodt testified at the hearing

Weisbrodt has been a sprinkler-fitter for about 6-1/2 and a journeyman for about 1-1/2 years. He has been a member of the Union for 6-1/2 years. In late February 1996, Weisbrodt and coworker Long, while on break, saw an Eckert truck parked in the gas station lot. Long stopped to talk to the driver, and Weisbrodt went into the store. After completing his business, Weisbrodt caught the last part of the discussion between Long and the Eckert man who said that we have more work than men and to put an application in. The man provided him (and Long) with a business card with the name Steve Miller on it. Acting on Miller's suggestion on March 2, he and Long both went to Eckert to obtain applications for fitter positions. At the time, Weisbrodt was wearing a hat and T-shirt with the Sprinkler Fitter Union's official logos. Once at the Respondent's shop, Long did most of the talking and explained to the secretary that Miller had sent them to apply for work, and she provided applications for them to fill out. Weisbrodt filled out the application71 and returned it to the secretary who said he would be called back. Weisbrodt knew Eckert was nonunion and at the time, Weisbrodt was employed in the Indianapolis area; but his employer was running out of work or so he assumed.72 According to Weisbrodt, however, he did not seek employment with any other companies in the Indianapolis area; nor was he on the Union's employment list. Weisbrodt testified that he was never contacted by EFP-1 (or EFP-2) but would have "considered" working at a sprinkler position if he had been, and for less than the $21.05 per hour he was then making. Weisbrodt never contacted Eckert to check on the status of his application.

As noted in my discussion of Long, Miller provided little insight into his handling of Weisbrodt's application except to say essentially it was received but not considered by EFP-1. Thus, again with respect to the occurrences and events in the parking lot between Weisbrodt and Miller, I will credit Weisbrodt's version thereof.

Likewise, Bennett made scant reference to Weisbrodt's application, and in fact does not discuss him by name at all. Bennett, in essence, testified that with respect to certain applications, including Weisbrodt's, received by EFP-1 prior to the formation of EFP-2, he had little or no direct dealing with them. After EFP-2's formation, Bennett testified he did not consider any application (which would include Weisbrodt's) from EFP-1 which were over 30 days old; and, furthermore, he had a full complement of workers at EFP-2 and was not hiring.73

The General Counsel and the Charging Party essentially contend that Respondent EFP-1, contrary to the assertions of Bennett, was indeed hiring at the time and point first to Miller's parking lot solicitations of Long and Weisbrodt as proof. The General Counsel also notes that between January 8 and May 6, the Respondent (EFP-1) hired six sprinkler-fitters and upon EFP-2's formation, hired 10 sprinkler-fitters. I would agree with the General Counsel regarding Miller and the role he played with respect to the two applicants. Applying the *Wright Line* standards, I would find and conclude that with respect to Long and Weisbrodt's applications, the General Counsel has made out a prima facie case of unlawful discrimination under Section 8(a)(3) of the Act. Moreover, I am not persuaded by the Respondent's defenses of the charges. As noted, the credible evidence discloses that Miller, the person largely responsible for interviews during March, invited Long and Weisbrodt to apply for work. Yet, when given the opportunity to explain his part in the matter, he is strangely silent. I cannot help but conclude that any direct testimony from him would have been unfavorable to the Respondent. It is also significant to me that it was during the period (January through March) that the Respondent (and clearly Miller) was experiencing the effects, unwelcome as it was, of the Union's aggressive organizing efforts. In all likelihood, Miller at that time wanted to hire Long and Weisbrodt like he would want the proverbial "hole in the head." Thus, I believe Miller's refusal to hire or consider for hire these two was largely motivated by their known union membership and involvement with the Union which was then strenuously trying to organize the Respondent.

I note in passing that I have considered Bennett's testimony as to Long and Weisbrodt very carefully because, in general, I found him to be a very credible witness. For example, it is noteworthy that Long's application of March 2 (GC Exh. 10(a)) is indeed woefully incomplete. The education section lists only the Penn State Sprk (sic) training; the names of his grammar and high schools are omitted; other categories are blank and names of present and past employees are absent; absolutely no references are provided; it is deficient in other ways also. According to Long, his second application was hardly better. Thus, I believe Bennett's assertion that *he* rejected Long's *second* application in August solely because it was not properly filled out. However, his defense, though credible, cannot rescue the Respondent from Miller's unlawful actions in March. 74 Accordingly, as successor to EFP-1, EFP-2 is liable for the violations determined by me as to Long and Weisbrodt.

C. The Applications of Alleged Discriminatees Ramiro Martin, Tom Cox, Patrick Schlegel, and Dallas Hudson

1. Ramiro Martin

Martin testified at the hearing. Martin, a member of the Union since September 1995, applied for work at EFP-1 by submitting a copy of his resume by mail to the Company around January 10, 1996.75 Martin, who was unemployed at the time, applied because Eads had advised him that EFP-1 was taking applications and told him to apply. Martin was not sure whether he was applying to EFP-1 or EFP-2; nor did he know whether the Company was union or nonunion. Martin also did not apply for a specific position with Eckert. Martin was never contacted by the Respondent; however, he never followed up on his application after its submission. In answer to a leading question from the General Counsel, Martin testified that had he

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[70] Bennett testified that based on his experience as vice president of EFP-1, he created an ongoing log of employment applications received by EFP-2. Records of these types, according to Bennett, were required to be kept by the U.S. Department of Labor and were associated with the applications submitted by all who applied for work.

[71] Like Long's, Weisbrodt's application—GC Exh. 10(b)—noted that he was referred by Miller and, also like Long's, was rather incomplete, but not nearly like Long's. Weisbrodt included in the education part of the application his completion of high school and stated that he had completed the Union's Penn State [sprinkler] training program. Weisbrodt only listed his current employer—Fireomatic Sprinkler—(a known union contractor) and his current wage of $21.05 per hour and that he was a sprinkler-fitter. The rest of the application was left blank. Weisbrodt's address and telephone number were current.

[72] Weisbrodt continued working with Fireomatic for some months after applying at EFP-1.

[73] Bennett testified that at the time of EFP-2's formation, his employee base was the employees who formerly worked for EFP-1 at the Indianapolis branch and who agreed to come with the new Company. Bennett testified that EFP-2 continued to hire fitters (approximately 10) after June 1, 1996; none of these new hires were members of the Union. See GC Exhs. 25–34.

[74] I would note at this juncture that the Respondent's defenses—the 30-day application policy, the bona fides of applicants, and the creation of EFP-2 as a new entity—are inapposite to Long and Weisbrodt.

[75] Martin's resume (GC Exh. 9(a)) is dated January 10; however, it was received by the Respondent on January 18, 1996. The resume clearly states under "professional experience" that Martin was a member of the Union. Martin's testimony and experience indicate that he was basically qualified as an apprentice level sprinkler-fitter with about 2 years' experience. Martin's address and telephone number as stated on the resume were current as of the date of the hearing. At the time of his application to EFP-1, Martin also sent his resume to numerous prospective employers, including other unionized fire protection contractors. Martin was later hired by a union fire protection company to whom he personally delivered his resume.

been contacted by the Respondent, he would have been "interested in pursuing a job with the company."

2. Tom Cox

Cox testified at the hearing. Cox has been employed as a sprinkler-fitter for about 12 years, a member of the Union for 2 years, and has achieved journeyman status; he credibly testified to substantial experience in the sprinkler fitting industry, including some supervision and coordination of entire jobs (running jobs). In early January 1996, Cox's current employer76 was in a slow period. Anticipating a layoff, Cox called Eads about the availability of work. Eads told Cox that EFP-1 had placed an ad in the paper and that he should send in a resume. Cox, acting on Eads' suggestion, sent the Respondent a resume with a cover letter by mail on approximately January 10.77 Cox also was looking elsewhere for work at the time of his application to Eckert through the Union's "1-800" employment line and by calling other union business agents around the country. Cox testified that while he was aware that he could be penalized (even expelled) by the Union for working nonunion, he would have taken a job at Eckert if offered one. Cox was never contacted by anyone from Eckert about a job, and he never followed up on his application. Cox went to work with a union contractor in Detroit shortly after submitting his resume to Eckert.

3. Patrick Schlegel

Schlegel testified and described himself as a 5-year journeyman sprinkler-fitter with over 10 years' experience in the trade; he has been a member of the Union for over 10 years.

Schlegel had been laid off from a previous job in early to mid-January 1996 and as a consequence took a job in Detroit, Michigan with a union contractor there. While in Detroit, Schlegel was contacted by Eads and asked to submit an application to EFP-1. Acting on this request, on about February 5, Schlegel submitted a cover letter and resume by certified mail to the Respondent indicating his interest in employment and availability for an interview.78 On cross-examination, Schlegel admitted that he had no independent knowledge of any possible openings at Eckert and, prior to Eads' call, had no intention of applying there for work. Moreover, while he remained on the Union's employment list in Indianapolis, Schlegel did not seek work with any other nonunion company79 in the Indianapolis area at the time of his submission to Eckert. According to Schlegel, he would, however, come back to the Indianapolis area on weekends and contact union contractors about employment. Ultimately, as a result of these inquiries, he was hired by an Indianapolis vicinity contractor between March 1 to mid-March 1996.80 Schlegel testified that he was never contacted by anyone from Eckert although had he been contacted, he would have "considered" taking a position at the Company. Schlegel never followed up on his application; nor did he ever inform Eckert that he had obtained other employment.

4. Dallas Hudson

Hudson testified at the hearing. Hudson had been employed as a sprinkler-fitter for nearly 18 years; he has been a member of the Union for about 8 years and a journeyman fitter for around 5 years. Hudson applied for work at the Respondent—he was not sure whether it was EFP-1 or EFP-2—by mailing his resume and two letters of recommendation to the Respondent toward the end of February (around the 28th); he was unemployed at the time and had been out of work since January 2.81 Hudson applied at Eckert based on Eads' advice that the Company was hiring.82 Hudson also called other union contractors about work at this time.

Hudson was never contacted by anyone from the Respondent. According to Hudson, if he had been contacted, he would have "considered" working for Eckert as a fitter although he knew at the time of submitting his resume that Eckert was nonunion.83 Hudson also testified that he never followed up on his application with Eckert in spite of not finding employment until April 15, 1996, with a union contractor.

Bennett testified generally about the Respondent's hiring policies and practices vis-a-vis the Respondent's handling of applications of the alleged discriminatees.

According to Bennett, he was responsible for setting hiring policies at EFP-1 and later EFP-2. Both EFP-1 and/or EFP-2 operated under essentially two hiring modes—an active and a passive mode. When the Company was in an active hiring mode, it actually sought applications which, once received, were subjected to a ranking process; a good prospect was called back for initial interviews and if the Company determined that the person "fit" and there was a need for filling that position, a second interview was scheduled; and offers would then follow if deemed appropriate. Bennett described the Respondent's passive hiring mode as one wherein the Company was not actively or affirmatively seeking applications, although interested individuals were free to come in and submit applications which were ordinarily accepted by the receptionist. Applications, however, submitted in the passive mode might not be even looked at. Irrespective of the mode, according to Bennett, he instituted a policy not to consider any sprinkler-fitter applications over 30 days old. This was the policy he followed since February 1995 for all of the Respondent's operations.84 The 30-day policy was a response by the Company (either EFP-1 or EFP-2) to practices in the construction industry in which sprinkler-fitters frequently move around from job to job. Consequently, it was determined that applications over 30 days old were not "fresh" and to consider older applications would be wasteful of company time and resources because, according to Bennett, the fire protection industry was an "available now" type of industry. Bennett could not recall deviating from the 30-day rule and generally required an applicant to come in and fill out another application if his previous submission was over 30 days old.85 Applications over 30 days old were not generally re-

[76] At the time Cox was working for a union sprinkler contractor—Dalmation; he was laid off that job around January 20.

[77] Cox's handwritten resume and cover letter (GC Exh. 9(b)) set out his general education, work experience, and position sought—sprinkler-fitter; he sought no specific wage. Cox also specifically states his membership in the Union and lists Mike Eads as a personal reference. Cox's listed address changed on August 9, 1996, but he testified his wife remained at the residence and knew how to reach him. The resume and letter were received by the Respondent on about January 15.

[78] Schlegel's resume and cover letter are contained in GC Exh. 40. Schlegel does not make reference to Eads' request in the letter but mentions Respondent's "recent ad in the Indianapolis Star" as the basis for submitting his resume. Schlegel's resume clearly indicates his union membership; and his address and telephone number were current.

[79] Schlegel testified that he was very familiar with union contractors in the Indianapolis area and, hence, knew that Eckert was nonunion.

[80] Schlegel was recalled by Dalmation Fire Inc., the union contractor for whom he worked prior to going to Detroit, at $20.04 per hour.

[81] Hudson's resume (GC Exh. 9(c)) lists his membership in the Union and his work history with various union contractors, as well as his current address and telephone number. Hudson did not indicate a specific acceptable wage rate in his resume, leaving the matter of pay to negotiation.

[82] Eads told Hudson about the Respondent's newspaper ads.

[83] Hudson testified that he knew of no union rule prohibiting a member from working for a nonunion employee.

[84] The 30-day policy was an internal policy and not disclosed to applicants according to Bennett and applied mainly to the fitters. Some employees, such as designers, were considered professional, and the policy was not applicable to them. Bennett testified that he committed the 30-day policy to writing when he came on board at EFP-1, but he was unable to produce the document for the hearing. The 30-day policy was carried over by him when he assumed ownership of EFP-2.

[85] Bennett, in subsequent testimony after the resumption of the hearing, recalled an exception to the 30-day policy in the case of Toby Snow. According to Bennett, Snow applied to EFP-1 for a job on March 14. EFP-1 hired Snow on May 6 after Snow called the Respondent's office once or twice weekly and even Miller's home looking for work.

tained.[86] However, applications which were 30 days or more old were not moved from any official "active" to "inactive" file but were simply not utilized to fill jobs.

Bennett was not directly involved in the hiring at EFP-1; rather, this was Miller's (and Douthitt's) responsibility at Indianapolis at least as to fitters. According to Bennett, Miller was (or should have been) aware of the 30-day policy and he assumed that Miller followed the policy for EFP-1, and later EFP-2.[87] According to Bennett, the Respondent's receptionist, Jackie Wirey, had no authorization or responsibility regarding this policy or other policies. Consistent with being in an active hiring mode, on December 30 and 31, 1995, and January 1 and 5 through 8, 1996, Bennett caused to be placed a series of ads in local newspapers in which the Respondent solicited applicants for experienced sprinkler-fitter positions.

Bennett testified that the Respondent received seven resume/applications in response to these ads during the period covering January 3 through 10. The individuals who responded to the ads and the approximate day of receipt of these resume/applications were Dale Ratliff (January 2), Miguel Lopez (January 9), Gerald Hough (January 6),[88] Ralph Tate (January 11), John Strunk (January 9), Terry Cooper (January 3), and Brad McCool (January 10). Of these seven persons, EFP-1 hired Ratliff and Lopez as helpers, and Tate and Strunk as fitters.

As to the applications of alleged discriminatees Martin, Cox, and Hudson, Bennett was only able to identify these as having been received by EFP-1 on January 15, 18, and February 29, respectively; Bennett was not aware of EFP-2's ever having received an application from Schlegel.[89] In any event, neither of the individuals were to his knowledge interviewed, contacted, or hired by the Respondent because Eckert had satisfied its need for employees and was no longer hiring.

Miller acknowledged that he was the primary person, in Indianapolis, responsible for the hiring of fitters. All applications would ultimately be forwarded to him by the secretary, and he made the decision to call applicants in for the initial interview. Although he generally consulted with Douthitt in ultimate hiring decisions, he alone sometimes made the hiring decision. Miller confirmed that EFP-1 was in a hiring mode in January 1996 and that as a consequence, the Company hired four workers. Once these individuals were hired, according to Miller, EFP-1 did not require additional fitters. Miller further testified that the resumes of Martin, Cox, and Hudson were received after those of seven who responded to the ads in early January. Miller, too, could not recall ever seeing Schlegel's cover letter and resume though he acknowledged their receipt by EFP-1.[90] Martin, Cox, and Hudson were never considered by Miller for employment. Of the four, he did hire, Miller knew that two—Strunk and Tate—were members of the Union as evidenced by their resumes and applications;[91] the other two successful applicants, as well as the nonhired ones, were not known by him to be union members. Miller could not tell from their applications if they were union or not.

Miller did not testify (nor was he asked by the parties) about the circumstances surrounding Scott's and Snow's applications and their eventual hiring by the Respondent on February 14 and May 16, respectively.[92]

With respect to the charges of the Respondent's alleged discriminatory nonhiring or refusal to hire Martin, Cox, Schlegel, and Hudson and applying the *Wright Line* analysis, I would conclude that the General Counsel has failed to establish a prima facie case that the nonhiring of these four applications was motivated by or because of their union membership or involvement.

In reaching this conclusion, I have generally credited the testimony of Bennett who impressed me as a knowledgeable, straightforward, and candid witness. And, although as events unfolded, Miller would prove fallible (especially in the context of the Union's later organizational push) at the time of these four applications, I believe he hired workers during this period in a nondiscriminatory way.

My conclusion of no violation of the Act with respect to the Respondent's treatment of Martin, Cox, Schlegel, and Hudson, is principally based on the credible testimony of Bennett regarding the Respondent's active and passive hiring modes and Miller's hiring of known union members. Regarding the Respondent's hiring modes, I believe the record supports Bennett's version. The Respondent clearly was in an active hiring mode in late December 1995 and early to mid-January 1996. However, it makes eminent sense that after a reasonable time and the receipt of a number of applications, a small employer such as the Respondent would cease accepting applications and begin interviewing prospects and making hiring decisions. I believe Bennett when he says that after receiving seven responses pursuant to the newspaper ads, the Respondent considered itself positioned to hire. Notably, of the four hired were Strunk and Tate,[93] whom Miller credibly testified he knew to be members of the Union when he hired them. It also seems plausible and reasonable to me that a small company such as the Respondent would or could be in and out of hiring phase (active or passive) and yet be amenable to accepting applications from inquiring walk-ins and, consequently, possibly hiring workers a la carte without advertising. On this record, the fire protection business seems particularly susceptible to the vicissitudes of the construction industry, including first successfully bidding on a job, then staffing the job, and then keeping enough work to hold onto workers. Also, it is clear that sprinkler-fitters are often transigent and will seek work wherever it exists. They frequently move from job to job, applying even out of their home states, and accept jobs without notice to the employers to whom they may have applied. Thus, given the realities of the industry, the Respondent's 30-day application policy is reasonable and, hence, valid.

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[86] Bennett explained that the EFP-1 applications produced at the hearing were made available to him pursuant to the General Counsel's subpoena requests; these documents were found in EFP-1's offices along with other EFP-1 records which he had not had time to peruse and had not thrown out because of possible legal requirements to keep them.

[87] Miller did not testify about the 30-day policy at all.

[88] Hough applied for a helper position. Hough evidently sent a resume to EFP-1 around December 30, 1995 (see GC Exh. 23), which may have been lost or misplaced. Hough then filled out an application on January 9. It is not clear from the record whether Hough was responding to the ads. However, it is evident from his application and resume that he was not an experienced sprinkler-fitter. Miller interviewed Hough but did not hire him. Miller could not recall whether Hough's failure to call back to him was the reason he was not hired.

[89] Bennett did not consider the applications of the four alleged discriminatees to be part of the records of his Company (EFP-2). According to Bennett, he searched for and provided the records pursuant to his compliance with the General Counsel's subpoena duces tecum. However, Bennett did not claim that EFP-1 had not received Schlegel's application, only that he had not seen it before his search pursuant to the subpoena.

[90] Miller was shown a copy of Schlegel's cover letter and resume (GC Exh. 40) by the General Counsel and credibly stated he could not recall ever seeing it. Miller claimed that many applications (around 30–50) were received while he was employed at EFP-1; he could not remember individual names of applicants. I would presume that Schlegel's application and resume were lost or misplaced and never at any time was given any consideration whatsoever by the Respondent.

[91] The applications and resumes of Strunk and Tate contained union certificates, cards and other indicia of union membership. Miller also was familiar with the names of certain union contractors who were listed as part of Strunk's and Tate's prior work experience. The other applicants gave no clue to their union or nonunion status according to Miller.

[92] Bennett testified that Snow was hired in May based on a second application which he could not locate for the hearing. However, Bennett produced an EFP-1 record entitled "Former Employees After December 1995" (GC Exh. 38) which indicates that Snow submitted applications on March 14 and April 29, 1996, for helper positions.

[93] Because Eads testified that Tate had been previously expelled from the Union for nonpayment of dues, the General Counsel argues that Tate was not a member of the Union. Tate's application, relied upon by the Respondent, indicates beyond a doubt that he is a union member and makes no reference to any problems with the Union. It is also notable that Tate was actually hired after the Respondent had received the Union's letter notifying it of Strunk's intent to engage in organizing activities.

Bennett credibly testified about the inception of the policy, its implementation, and application in the instant case. Therefore, aside from my conclusions that the Respondent did not unlawfully discriminate against Martin, Cox, Schlegel, and Hudson during the active period, I note that after 30 days, the Respondent, for valid reasons, would not have considered them for employment because of the 30-day policy.

I am cognizant that the General Counsel argues, however, that the Respondent really had no valid 30-day policy for applications and cites the fact that not only was it not communicated to applicants, but that the Respondent's receptionist/secretary told some of the alleged discriminatees that the Respondent considered applications active for 6 months. However, I note that Bennett, the Respondent's functioning personnel officer, testified that the 30-day policy was an internal policy and was not intended for publication.94 Bennett also denied that the EFP-1 receptionist (Jackie Wirey)95 was in any way authorized to make representations about applications and the time for which they were good or active. Contrary to the General Counsel's arguments, in spite of testimony from certain of the alleged discriminatee applicants regarding statements made by Wirey, there is no otherwise credible evidence that Wirey's authority in the hiring process was anything more than carrying out the ministerial duties of meeting/greeting applicants, giving out applications, and accepting them back. Therefore, in my view, she lacked any authority to bind the Respondent with regard to any statements she may have made and is neither an agent or supervisor within the meaning of the Act. *Amperage Electric*, 301 NLRB 5 (1991).

Thus, as to alleged discriminatees Martin, Cox, Schlegel, and Hudson, I would recommend dismissal of the complaint.

I note in passing that with respect to Martin, Schlegel, and Hudson, I have serious reservations about the bona fides or sincerity of their intentions actually to work for the Respondent. Statements such as "being interested" in working for the Respondent (Martin) and would have "considered" working (Schlegel and Hudson) are at best tepid, noncommittal, and hardly reflective of a serious intent to work for someone in my view. Also, it is not well established on this record whether the Respondent's representatives ever saw Hudson's application to reject or accept. These concerns aside, I believe there was no violation of the Act with respect to these four.

D. The Applications of Alleged Discriminatees George Garr, Paul Philpot, John Wade, Melvin Curtis, Guy Schnepp, Steven Taylor, Richard Walsh, Kirk Bickel, and Elmer Glassing from March 7–15, 1996

1. George Garr

Garr testified and provided the following.

Acting on Eads' suggestion, Garr, an experienced journeyman sprinkler-fitter (since 1974) and long-term member of the Union (since 1989), applied for a fitter position with Eckert on March 7.96 In addition to making application, Garr was instructed by Eads to gather as much information as he could on Eckert because he understood that the Union was trying to organize the Company.97

Garr appeared in person98 and spoke to a person whom he believed was one of Eckert's designers who said the Company was accepting applications and provided him with one. Garr filled out the application99 and turned it in. Garr was never contacted by the Respondent regarding his application, but testified that he would have "considered" employment as a sprinkler-fitter if offered a job and would have performed the duties of a fitter while so employed. On cross-examination, Garr was asked to explain his then-employment status. Garr testified that at the time of his application to Eckert, he had been unemployed for about 3 weeks, was on the Union's employment list, and had applied by telephone to various union job superintendents for work. Garr was told by the union superintendents that they were not hiring at the time, but to call back in 2 weeks.100 Approximately 2 weeks after applying at Eckert, Garr called a union contractor and was hired at union scale. Garr never followed up on his application with Eckert nor did he inform it of his accepting another job. Garr admitted that he never intended to apply at Eckert and was unaware of any job opportunities there; he applied solely on Eads' request.101

2. Paul Philpot

Philpot testified at the hearing.

Philpot described himself as a sprinkler-fitter since 1985 and experienced in several types of sprinkler systems as applied to multi-unit residential and commercial buildings.102 He achieved journeyman status about 11 years ago and has been a member of the Union since 1985.

Philpot, unemployed during early March 1996, was seeking employment. According to Philpot, Eads wanted to organize Eckert and suggested that Philpot submit an application for a fitter position.103 According to Philpot, he was told that Eckert was hiring and, consequently, he and fellow union member John Wade, both wearing union insignia, went to Eckert's offices to apply for fitter positions on March 12.104 According to Philpot, although Wade did most of the talking, both men asked for and received applications from the receptionist and then submitted them to her. Philpot testified that he had no plans to apply at Eckert before Eads' request and had in fact submitted applications to other employers (both union and nonunion) around the time of his Eckert application.105

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[94] Bennett was not able to find for the hearing a copy of the Respondent's written statement of the 30-day policy.

[95] Wirey did not testify at the hearing. When Bennett formed EFP-2, he let Wirey go.

[96] Garr credibly testified about his experience as a fitter and his training principally through the Union's apprenticeship Penn State program—his qualifications are not in dispute.

[97] Garr testified that Eads instructed him to gather any pertinent information he could, such as jobs the Company was working on, without, as he phrased it, being a thief. Garr copied the number of Eckert's application form and looked at the blueprints of one of the Company's jobs—for a Kroger's grocery—and reported this to Eads. Garr admitted that information gathering, along with making application for work, was part of the assignment given to him by Eads.

[98] Garr was wearing casual street clothes and a baseball cap with Local 699's emblem on the front.

[99] Garr's application (GC Exh. 10(c)) lists his completion of the union apprenticeship program and at least two union contractors as former employers—the third employer is illegible.

[100] Garr's testimony regarding his employment status at the time he personally applied to Eckert was inconsistent and actually confusing. However, out of the jumble, it seems that he claims to have applied at Eckert on a Tuesday but had called the union superintendent on the previous Monday. I would note that March 7, 1996, the date he applied, was a Thursday.

[101] Garr also was aware that Eckert was nonunion and the Union had a rule against members working for nonunion employees. However, Eads had given him permission to apply at Eckert.

[102] Philpot credibly testified to his qualifications and experience as a sprinkler-fitter.

[103] Philpot's application (GC Exh. 10(d)) indicates, however, he was referred by John Strunk. In a hesitant and stumbling fashion, Philpot confessed that he did *not* know Strunk at the time of his application but could not explain why or who asked him to list a stranger as a reference. Philpot did not think Eads was responsible for this.

[104] Philpot testified initially that at the time he submitted his application, he was told that Eckert was hiring. He then changed his testimony to say that he believed there was an ad in the newspaper but that he had not read it, that someone had told him about the ad. Then Philpot testified that he had put in several applications at other employers but could not recall which employer had placed the ads. Finally, he came full circle and said that Eads had told him that Eckert was hiring.

[105] Philpot could not recall the names of any of these employers. Philpot also knew that Eckert was nonunion and that union rules prohibited members from working at nonunion shops. However, according to Philpot, Eads had given him permission to apply at Eckert because "everyone in the field" (as Philpot put it) knew the Union was trying to organize the Respondent.

Philpot identified the application106 he ultimately submitted to the receptionist and indicated that this information was current except that his address had changed; but his mail was forwarded to his new address. Philpot was never contacted by anyone from Eckert. However, according to Philpot, if he had been contacted by either EFP-1 or EFP-2, he would have "considered" working for either as a sprinkler-fitter, and that any organizing activities on his part would not have interfered with the performance of his fitter duties.

3. John Wade

Wade, an experienced journeyman sprinkler-fitter and a 10-year member of the Union, testified about the submission of his application to Eckert.

Wade, accompanied by Philpot, went to the Respondent's Greenwood office to apply for work based on Eads' suggestion. Wade was wearing his union jacket and hat, which he described as clearly inscribed with the Union's emblem and insignia. Once there, he spoke to Eckert's receptionist and asked for applications which were given to him and Philpot. The receptionist then directed them to a room in which there were drafting and blueprint tables to fill out the forms. At that time, according to Wade, a man (unidentified) told the receptionist, "[T]hese guys are union, I don't want them there." The receptionist then took them to another area to complete the paperwork. Wade filled out the application and returned it to the receptionist.

Wade testified that at the time he had been unemployed for about 3 months and was very anxious to get employment.107 He knew that Eckert was nonunion; however, he was aware of no union rule against members working nonunion. Wade was adamant (in his testimony) about his not wanting to "hide" his union membership from the Respondent at the time of his application and indicated that in addition to his union attire he listed his completion of the Penn State training program, his "employment" with the Union, and inclusion of the Union's business agent, Eads, as a reference.

Wade was never contacted by Eckert. However, as he testified, if he had been, he would "have went [sic] back up and talked to them." Wade never followed up on his application.

4. Melvin Curtis

Melvin Curtis testified at the hearing.

Curtis, an experienced journeyman sprinkler-fitter and member of the Union since 1994, was asked by Eads at a union meeting to submit an application to Eckert for a fitter position. Curtis believed that he had seen a newspaper ad for work opportunities at Eckert around the beginning of January or before. Curtis also talked to Strunk who said Eckert was hiring. In any event, on March 13, he went to Eckert's office wearing a jacket with the Union's logo on front and back and spoke to the receptionist who provided an application. Curtis filled out the application and returned it to the receptionist.108

According to Curtis, if he had been contacted by the Respondent, he would have "considered" a position with the Company, especially since he was unemployed for about a month prior to his application. Curtis admitted that he had no plans to seek employment at Eckert before talking with Eads, nor did he ever follow up on his application.109 In fact, at the time of his application at EFP-1, he was on the employment lists of both Local 669 and another plumbers and Pipe Fitters union. Within a few weeks of applying, he obtained employment as a welder with a union contractor and has worked for several other contractors since.110

5. Guy Schnepp

Schnepp testified without contradiction that he was a journeyman sprinkler-fitter (8 years) with 12 years' experience in the trade; he is also a member of the Union. Schnepp applied for work at Eckert111 based on information from friends and a suggestion by Eads to apply there on March 13. He was unemployed at the time but had no plans to apply before his conversation with Eads.112

Schnepp obtained an application from the Eckert secretary and turned it in. Schnepp identified his application and noted that his union membership was not expressly stated.113 He was never contacted by the Respondent; however, had he been, he would have "considered" taking a job with either EFP-1 or EFP-2. Schnepp never followed up on his application but claimed that this was his normal practice. Schnepp knew in advance that Eckert was nonunion and was concerned about the Union's rule against working for nonunion employers.114

6. Steven Taylor

Taylor has been a member of the Union for nearly 13 years.115 In early March, he received a call from Eads informing him that Eckert, a nonunion company with which he was somewhat familiar, was hiring; Eads suggested that he apply there.116 Although Taylor did not himself know that Eckert was hiring and would not have applied but for Eads' suggestion, he, nonetheless, went to Eckert's offices on March 14 to apply for a sprinkler-fitter job because

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[106] Philpot's application clearly listed his union apprenticeship training and his "employment" with the Union from November 1985 through March 1996. Philpot explained that he was not really employed by the Union, but through it; and that he actually was laid off from his last job in February 1996.

[107] Wade's application is contained in GC Exh. 10(e) and is dated March 12, 1996. Wade's application, however, indicates he was employed by the Union from September (what appears to be 1996) to the present. I assume this was a mistake. I note here that Wade became rather combative, defensive, and sarcastic in explaining that he listed the Union as his employer because of the "vast" number of contractors he has worked for over the years. To Wade, this was the easiest way for the Respondent to verify his employment and was convenient for him. However, incredibly, Wade could not remember his last employer before applying at Eckert, nor could he remember any of his past employers by name. Equally odd was Wade's claim that he called several union contractors about work but could not recall if he was then on the Union's employment list.

[108] Curtis' application (GC Exh. 10(f)) indicates that he was applying for a sprinkler-fitter/welder position. He listed Eads as a reference and union contractors as former employers.

[109] Curtis knew Eckert was nonunion and knew that the union rules prohibited nonunion work. However, he had discussed this with Eads who gave him permission to work at Eckert. Curtis also has worked for nonunion plumbing (but not sprinkler-fitter) companies with Eads' knowledge and permission.

[110] Curtis who impressed me as a generally candid and forthright witness, albeit with some memory deficits, also testified on redirect by the General Counsel that if he were offered a job with Eckert but was already employed, he would not accept their offer because he would probably be making more money. Curtis also admitted he never informed Eckert that he had obtained employment elsewhere.

[111] Schnepp, like all of the alleged discriminatees who were asked, did not know whether he was applying to EFP-1 or EFP-2.

[112] Schnepp also was seeking employment with other employers, approximately 13 union contractors at the time of his Eckert application. However, he did not submit any applications to other nonunion employees.

[113] Schnepp's application is contained in GC Exh. 10(g) and is dated March 13, 1996. According to the application, Schnepp was not applying for any particular position, leaving that "negotiable." As to his union membership or affiliation, I note that at least three of the four former employers Schnepp listed were known by the Respondent to be union contractors.

[114] Schnepp claimed not to have discussed his concerns with anyone from the Union.

[115] Taylor credibly testified that he had about 13 years of extensive and varied sprinkler-fitter experience, including holding foreman's status for the last 6-1/2 years; he completed the Union's apprenticeship program and (presumably) had achieved journeyman status.

[116] On cross-examination, however, Taylor changed his testimony and said that he called Eads and asked if there was anything going on and Eads told him that Eckert was hiring.

he had been out of work for 2½ months.117 Once there, Taylor obtained an application from the receptionist and returned it to her. Taylor identified the application he submitted that day and noted that he listed Eads as a reference and his former employers were union contractors.118

Taylor was never contacted by Eckert. However, he testified that he would have "accepted" a fitter job with Eckert as he was unemployed at the time.119

7. Richard Walsh

Walsh, a journeyman sprinkler-fitter with 12 years of extensive and varied experience in the trade, and a 12-year member of the Union, testified that he applied in person for a sprinkler-fitter position with Eckert on March 14. According to Walsh, Eads told him that the Company was possibly hiring and suggested that he should submit an application; Eads told him to wear union paraphernalia (union jacket and hat with the Union's logo) when he applied. At the time, Walsh had never heard of Eckert and, therefore, had no plans to seek work there and no knowledge as to whether it was a unionized company. In fact, Walsh was unemployed then and seeking employment elsewhere only with union contractors, he was on the Union's employment list.

Walsh obtained an application from Eckert's receptionist and completed it there.120 According to Walsh, he has never been contacted by Eckert, although his address and telephone number were current. If he had been contacted by Eckert, he would have "considered" taking a position as fitter and performed those duties. Walsh never contacted Eckert about his application and, in fact, accepted a job with a union sprinkler contractor at union scale in April 1996.

8. Kirk Bickel121

Bickel testified that he is a journeyman sprinkler-fitter with 10 years' experience in the trade and has been a member of the Union during that time.

Bickel was asked by Eads to apply for work at Eckert and, being unemployed, he applied in person for a fitter position on March 15.122 Bickel identified the application he submitted, noting that all of his listed former employers were union contractors.123 Bickel was never contacted by the Respondent. However, he would have "considered" an offer to work there. Bickel never, however, followed up on his application and by April 13, was employed by a union contractor earning $21.55 per hour.

9. Elmer Glassing

Glassing, a 20-year, foreman-level124 sprinkler-fitter with about 30 years of substantial and varied experience in the trade and a member of the Union for about 24 years, testified that he was asked in early March by Eads to apply at Eckert for a sprinkler-fitter position; at the time of the request, he had been out of work approximately 3½ weeks. Although Glassing testified that he had no plans to apply at Eckert, which was not known by him to be union or nonunion, he went to Eckert's office on March 15, obtained an application from the receptionist, and filled it out onsite. Glassing identified his application in question, which indicated that he was referred by "Eads Local 669" and, as he testified, listed union contractors as former employers.125 At the time of his application with Eckert, Glassing testified that he was trying to find employment with a number of union contractors in and outside of Indiana and even unwittingly called nonunion sources.126 Glassing was never contacted by Eckert but, if contacted, testified he would have "considered" working for the Respondent. Glassing ultimately obtained employment on about March 28 with a union contractor in St. Louis, Missouri, for whom he worked for 3 months and then with another St. Louis union contractor.127

With respect to this group of nine alleged discriminatees, the General Counsel, in essence, argues that it has established a prima facie case of unlawful discrimination under *Wright Line* and that the Respondent's defenses fail as pretextual.128

The Respondent counters and argues that the General Counsel has failed in establishing its initial burden of a discriminatory nonhiring or refusal to hire, principally on grounds of the applicants lack of bona fides or sincerity in seeking employment with the Company.129 I agree with the Respondent. My reasons are as follows. First, each of these applicants were asked to apply by Eads and would not have were it not for his request. Clearly, they were conscripted to apply because of Eads' plan to organize the Company and to me merely lent their names to his cause. Although there are in individual cases clear and certain indicia of nonsincerity, e.g., Garr was sent by Eads, in my view, to gather intelligence, not gain employment, Wade insisted on not hiding his union affiliation, Curtis and Taylor took union jobs within weeks of their application, I am most struck by the fact that none of the nine ever bothered to follow up on their applications. It seems that once applying, they abandoned any interest in employment with the Respondent. Moreover, as eight of the nine testified, if contacted, they would have merely "considered" employment with Eckert. Taylor was the only exception. As he indicated, he would have accepted employment. However, Taylor had accepted a union job in April and did not inform the Respondent of that; again, he, too, never followed up on his application. In my view, an alleged discriminatee's saying that he would have "considered" employment seems to beg the question. By the act of applying in the first instance, what were the applicants doing but considering possible employment with the Respondent? Hardly can this response

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[117] Taylor knew that union rules prohibited members from working nonunion and he did not think he had gotten permission from Eads to work at Eckert. He reasoned that Eads was merely letting him know that there was work available, but it was not union. At the time, Taylor was also on the Union's employment list and made random calls to other companies in the construction field. He could supply no names however.

[118] Taylor's application (GC Exh. 10(h)) indicates that he was applying for a sprinkler-fitter position and that he had completed Local 669's apprenticeship Pipe Fitting program.

[119] Taylor never followed up on his Eckert application. However, in April, he accepted a job with a union sprinkler contractor, earning union scale wages. Taylor presumably did not inform Eckert of his having accepted another job.

[120] Walsh's application (GC Exh. 10(I) is dated March 14, 1996, and list Eads as one of his references and known union contractors as former employers; he also indicated his participation in the Penn State training program.

[121] The transcript of proceedings indicates Bickel's given name as Kurt. (Tr. 415.) However, on Bickel's application (GC Exh. 10(j)), his name appears as Kirk. I assume Kurt is an error in transcription.

[122] Bickel was also looking for other employment and had called two union contractors as part of his search; he applied at no nonunion firms except Eckert.

[123] Bickel's application also states that he was referred by Eads; there are no other obvious indications of his affiliation with a union. Bickel was hired by Shambaugh, one of the union contractors he contacted at the time of his application at Eckert. He worked for the Company for 9 months.

[124] Glassing explained that a foreman differs from a journeyman in that the former is "a little more detailed than the latter." Based on Glassing's testimony regarding his extensive training and experience, I believe Glassing was modestly saying that a foreman is of a higher status than a journeyman.

[125] Glassing's application is contained in GC Exh. 10(k). The application also indicates Glassing's completion of the Local 669 apprentice training program at Penn State.

[126] Glassing testified that he was and is aware of the Union's rule against working nonunion but not familiar with what the "boundaries" of the rule were. His general understanding is that he was not supposed to work nonunion. Glassing claims that he did not discuss the rule or his possible exemption from it with Eads.

[127] Glassing resided in Indianapolis but worked extensively at out-of-state jobs over his career. Glassing testified that he did not prefer working in Indianapolis.

[128] The General Counsel actually has treated the nonhiring of the 33 union members as a collective and continuing discriminatory act or omission of the Respondent. This record, in my view, does not permit such facile and categorical treatment.

[129] The Respondent has advanced several additional arguments by way of its defense. Because I believe the nine applicants were not bona fide applicants for employment, I have elected not to discuss these.

suggest to me sincerity of intention to gain employment. I find it redundant and, frankly, not persuasive regarding the alleged discriminatees' bona fides, that is a sincere intention to work for the Respondent and to perform the duties incumbent upon a fitter.130

In my view, these applicants were merely lending their names to Eads' organizational campaigns and did not want to and would not work for a nonunion employer. I do not believe that any one of them ever intended to work for the Respondent or would have accepted employment with Eckert if offered. I would venture to say that the goal here was to file charges against, not work for the Respondent. On this score, I note that in my view the organizing objective here does not affect the applicants' protection under the Act. I simply am of the mind on this record that these alleged discriminatees were not sincerely interested in working for the Respondent. Accordingly, I would recommend dismissal of this aspect of the complaint as to these alleged discriminatees.

E. The Applications of Alleged Discriminatees Michael Eads, Malcolm Zimmer, and William Durr on March 28, 1996

1. Michael Eads

Among other matters, Eads testified regarding his application for employment at Eckert.

Eads currently is the full-time business agent for the Union and has been so employed for the past 23 years;131 he has also served as president of the Indiana State Pipe Trades for 8 years. Eads credibly testified to his experience in the sprinkler-fitter trade, although he confessed to not having "hung pipe" in over 20 years; he achieved journeyman status in 1970.132

Eads initially became aware of employment opportunities at EFP-1 in the summer of 1995; however, because very few of his members were out of work, he took no action. However, in December of that year, there were significant numbers of members out of work. Thus, when Eads saw that EFP-1 was once more advertising in December 1995 and later in January 1996, he made calls to out-of-work members and suggested that they apply, a number of the members applied.

Eads also discussed the employment at EFP-1 at the Union's monthly meeting on about March 21, 1996, at North Liberty, Indiana. At this meeting, Eads asked a number of members to fill out applications for employment. Eads ultimately mailed these to EFP-1 on or about April 15, 1996.

On March 28, 1996, Eads himself decided to apply at EFP-1. According to Eads, he knew133 beforehand that Eckert was hiring, so Malcolm Zimmer (a pipe trades union organizer), and William (Dave) Durr (a union business agent from Kentucky), and he personally went to EFP-1 on March 28 to apply for work. Eads freely admitted that he and the others applied to Eckert not only to get hired but to organize the Company.134 Eads spoke to the receptionist who told them that Eckert was hiring and provided each man with an application.135 According to Eads, the secretary also told them that their applications were good for 6 months. At the time, according to Eads, he was wearing a union lapel pin (which said, "Indiana State Pipe Trades"); Durr wore a golf shirt with "Sprinkler Fitters Local 669" and the union emblem on it; and Zimmer wore a Local 136 windbreaker jacket.

While filling out his application, Eads claimed to have heard an unidentified male tell the receptionist not to take any more applications. Eads was never contacted by any one from EFP-1 or EFP-2.136 Eads testified on direct examination that he would have "considered" employment with Eckert as a sprinkler-fitter had he been contacted, even if he had to accept less than the $22.54 per hour he received as the Union's business agent.137

2. Malcolm Zimmer

Zimmer testified that he currently is a full-time paid organizer to the Indiana State Pipe Trades Association, a position he has held for 2 years; he is also a member of Local 136 of the United Association of Plumbers and Steamfitters, U.S. and Canada, located in Evansville, Indiana.138 Zimmer's organizing duties require that he cover 92 counties in Illinois and Indiana; he resides in Evansville. In late March, Zimmer happened to be in the Indianapolis area for union business, and Eads suggested that he apply for work at Eckert. Prior to Eads suggestion, he had no plans to apply for work at Eckert.

On March 28, Zimmer, accompanied by Eads and William Durr, another business agent for the Union, applied for work at Eckert's Indianapolis shop; he was not sure whether the Company was EFP-1 or EFP-2. According to Zimmer, he intended to get hired and then help organize Eckert's employees. At the time he was wearing a United Association hat and his Local 136 jacket. According to Zimmer, he asked the secretary if the Company was hiring. Although she made no verbal reply to his inquiry, she provided the three with applications and writing implements and instructed them to complete the forms. Zimmer completed the application139 and returned it to the secretary. Zimmer asked for a copy of his application and again asked if the Company were hiring, and specifically if welders (Zimmer's skill) were needed. According to Zimmer, he believes the secretary told him that Eckert did not have a welding fabrication shop and that the Company was not then hiring but that "some things [work or project] were coming up." In response to Durr's question, Zimmer heard the secretary say that the applications were good for 6 months.

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130 The General Counsel has cited the Supreme Court case of *NLRB v. Town & Country Electric*, 116 S.Ct. 450 (1995), to counter the Respondent's argument. I view the holding in *Town & Country* as inapposite here, as the applicants' status as employees, and therefore their protected coverage under the Act, is not in issue, nor the grounds upon which I have determined their lack of bona fides.

131 Eads acknowledged that his job duties as the Union's business agent is a full-time job (a Monday through Friday type of job) that requires him to work weekends; he is quite busy in the performance of his business agent functions.

132 In spite of not actually working as a sprinkler-fitter, Eads, to keep current, credibly testified that he has taken various classes through the Union's apprenticeship programs and various certification courses dealing with new systems, equipment, and (state) code requirements.

133 Eads did not explain how he "knew" Eckert was hiring. Accordingly, I view this as his unsupported opinion to which I will not accord much weight or credibility regarding the Respondent's actual hiring posture at the time.

134 Eads acknowledged in effect that his was a "salting" effort, that is, he was trying to get himself and the union members employed by Eckert and then to organize it from within.

135 Eads' application (GC Exh. 10(l)) clearly identifies him as a union member, referred by a union member, trained through a union training program, and employed by the Union. In fact, Eads used Strunk as his reference, knowing full well beforehand that the Respondent had fired him a couple of days or so before.

136 Eads testified that he discovered sometime in April or May 1996, that EFP-1 had been sold and that it was now EFP-2. Eads did not explain why he did not update his application or apply directly to the new Company.

137 Eads was not seeking employment with any other employers at the time. On cross-examination, Eads insisted in spite of working 23 years as a business agent earning $22.54 per hour, he, nonetheless, wanted to work for EFP-1 (at whatever [it] will pay) and would have taken a job with the Company if he had been offered one.

138 Zimmer's experience includes 20 years as a pipefitter, 16 of which as a journeyman. Zimmer credibly testified that sprinkler fitting is a branch of pipefitting, employing similar technology, equipment, and tools; he has also performed sprinkler fitting work during his career. According to Zimmer, the Indiana State Pipe Trades Association is comprised of various plumbers, pipefitters, and sprinkler-fitters.

139 Zimmer's application (GC Exh. 10(n)) indicates that he applied for a fitter/welder "mech[anic]" position; he could start "today" and was willing to work for the Respondent's current rate of pay. Zimmer also indicates that he still is currently employed with the Indiana State Pipe trades Association as an organizer making $45,000 per year. Zimmer listed Eads and two other union officials as references.

Zimmer was never contacted by either EFP-1 or EFP-2 regarding his application which included a current address and telephone number.140 However, if he had been contacted, he would have "considered" taking a position and performed any work to which he was assigned. Zimmer explained that he could have worked for Eckert without quitting his organizer job and without changing his residence, although he is responsible for a vast territory which requires more than 5 days and 8 hours per day to complete. Zimmer reasoned that since organizing requires talking to employees onsite, he would be in effect handling both Eckert's work and his organizing activities at the same time. And since he customarily worked 16 hours per day, 7 days a week, he could cover his other organizing responsibility presumably after completing his tour with Eckert. Thus, Zimmer's plan was to work both jobs at the same time. Zimmer admitted that his goal was to organize Eckert and, if successful, he would terminate his employment with Eckert. His organizing, in his view, would not have interfered with his duties as an employee.

3. William D. Durr

William (Dave) Durr141 testified that he was in Indianapolis for the same meeting as Zimmer and while there, Eads asked him to apply for a job at Eckert;142 Eads, Zimmer, and he drove to Eckert's offices on March 28 , and once there, encountered a secretary—"Jackie"—whom one of the three asked about the availability of work. Jackie responded, according to Durr, that Eckert had work but it was "spotty." Durr asked for and received an application which he filled out in the office and returned it to Jackie.143 According to Durr, "someone" asked Jackie how long the applications were kept on file and she said 6 months.

Durr identified the application (GC Exh. 10(m)) he provided to the Respondent, noting that he clearly stated thereon that he was currently employed as a business agent for Local 669, earning $44,000 per year, and listed certain union contractors as former employers. Durr included the general president of the United Association as his only reference.

Durr testified that he would have taken a sprinkler-fitter job at any wage if offered one by Eckert; however, he was never contacted by the Company. Durr never followed up on his application.

Durr admitted that his job as business agent for the Union was a full-time job (in Kentucky) which, had he accepted employment at Eckert, would not have been covered. He had not thought about this at the time of his application. However, to Durr, he would not have been forced to give up this job because he planned to stay with Eckert only a short time to organize the Company and then return to his local. Moreover, while conceding that a position with Eckert would have interfered somewhat with his business agent duties in Kentucky, Durr would have shifted his duties to nighttime. Durr felt his organizing efforts at Eckert would not have interfered with his fitter duties there.

I would recommend dismissal of the complaint as to Eads, Zimmer, and Durr. I agree with the Respondent that the three simply were not sincerely interested in working for the Respondent and applied to organize the Respondent's employees and not to work as sprinkler-fitters.144 I note that each was clearly experienced and qualified and could perform the work; and that as paid union employees, they are nonetheless protected by the Act. *NLRB v. Town & Country Electric*, supra. However, regarding their intentions to work for the Respondent, I found their testimony self-serving and insincere. For instance, Eads had not "hung pipe" for 20 years and clearly was the prime mover and architect for the Union's organizing efforts. I simply cannot believe that his intentions were to work for the Respondent. Zimmer and Durr were out-of-state representatives who happened to be in town for a union meeting and were happily drafted by Eads to apply in spite of their demanding and clearly time-consuming present jobs for union employers in Kentucky and Illinois. All three claimed that they intended to keep their jobs with the Union. Each in his own self-serving way explained how he could pull off representing union members, organizing other employers, working for Respondent duties incumbent upon them, and traveling long distances in the process. I found their explanations incredible. For instance, could Zimmer cover 92 counties in Illinois and Indiana while residing in Evansville and work for Eckert in Indianapolis? I think not. Also, I must again note that saying one would merely consider employment if asked and, moreover, never follow up on one's application, does not bespeak a bona fide intention to work. I believe that Eads, Zimmer, and Durr applied at Eckert to serve Eads' organizing objective and, if they were not hired, to seek charges against Eckert with the Board. I would recommend dismissal of this aspect of the complaint.

F. The April 2, 1996 Applications of Alleged Discriminatees Colbert Oldham, Dennis Turner, John Turner, Michael Keiper, Jackie Ray, Jack Turner, Vernon Chambers, Alan O'Neal, Gary Engel, David Turman, Douglas Ailes, Douglas Klapp, and Paul Rohan

Eads testified regarding the applications of the individuals listed above.

According to Eads, having found out through Garr that Eckert used certain commercially available employment forms, he obtained copies from a local office supply store. At the Union's regular meeting in late March, he asked the members to fill out the forms for submission to Eckert. Eads admitted that his objective, as before, was to attempt to get his members employed with Eckert so as to organize them from within. Eads specifically instructed the members to indicate Local 669's apprenticeship program where the form called for education and for salary desired to say "anything you're willing to pay." Later, Eads mailed 15 completed forms to Eckert along with a cover letter from the Local indicating that the applicants were all qualified fitters interested in working for Eckert and requesting that the Company give them consideration for hire.145 Eads testified that all but two of the 15 applicants had achieved journeyman status, the exceptions being Ailes and Engel. Nonetheless, he considered all to be "good" sprinkler-fitters about whom he never (in 23 years as business agent) received complaints from contractors regarding their work. Eads noted that he had personally observed the work of several, namely Weston, Raines, and Oldham; moreover, that several (i.e., Dennis Turner, John Turner, and Ray) were foremen; others, Jack Turner, O'Neal, Chambers, and Klapp had "run" jobs as (presumably) leadmen on various projects. Eads admitted it was his idea for the members to apply and they did so based on his request. Eads did not actually know whether the applicants would have accepted employment with Eckert if asked.146 Finally, Eads did not know about Eckert's having been sold in part until May.147

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[140] Zimmer, admitted, however, that he never followed up on his application.

[141] Durr testified that he was a business agent for Local 669 operating out of Louisville, Kentucky, for the past 18 months. He has been a member of the Union for 30 years and a sprinkler-fitter for 29 years. He has been a journeyman for 24 of those years. He credibly testified to very substantial experience both as a journeyman fitter and project superintendent-foreman over the years.

[142] Durr was not sure whether he was applying or had applied to EFP-1 or EFP-2.

[143] While filling out his application, Durr, like Eads, claims to have heard some unknown person tell Jackie that they were no longer taking applications.

[144] In addition, I found the testimony of the three to be contrived. For instance, each purportedly was told by the receptionist that applications were good for 6 months, a point that neatly counters the Respondent's stated 30-day policy and covers the fact that most, if not all—Long is the only exception—of the alleged discriminatees here never followed up on their application. Randy Long is the only exception.

[145] The cover letter (GC Exh. 11(a)) is dated April 2l, 1996, and the applications for the 13 alleged discriminatees listed above (GC Exh. 11(d)—(p)) are all dated March 21. All were admitted to have been received by the Respondent (Bennett). The application of two other alleged discriminatees, James Raines and Richard Weston, will be discussed separately herein.

[146] Eads, without specifically identifying them, knew that two applicants were laid off at the time, and in his view would have accepted employment. (According to their applications, Oldham (GC Exh. 11(d)) and Ray (GC Exh. 11(h)) were laid off.) Eads also maintained that if he had asked Dennis Turner to work for Eckert, he would have. Eads also noted that the applicants all live in northern Indiana, about 1½ hours from Indianapolis.

[147] Eads did not expressly testify about any followup efforts on his part regarding the 15 applications he submitted. However, it is clear to

As has earlier been stated, the Respondent, through Bennett, admitted that the applications and cover letters in question were received by EFP-1 and were discovered in the offices of EFP-2 as part of the Respondent's compliance with the General Counsel's subpoena request.

Because these 13 alleged discriminatees did not appear at the hearing, the record is devoid of any credible evidence from them regarding their intentions actually to work as fitters for the Respondent. I have generally credited Eads' testimony regarding their qualifications as experienced fitters; their individual applications generally corroborate his assessment of their abilities. However, in my view, Eads could not credibly speak to the sincerity of their intentions to work and to the extent his testimony may go to this point, it fails to establish the bona fides or sincerity of the applicants to be willing, able, and ready to go to work for the Respondent if called upon. Accordingly, I agree with the Respondent that the General Counsel has failed to establish a prima facie case of unlawful hire or refusal to hire with regard to these 13 applicants. I recommend that this aspect of the complaint be dismissed.

G. The April 2,1996 Applications of Alleged Discriminatees James Raines and Richard Weston

1. James Raines

Raines, an experienced (20-year) journeyman and union member for over 20 years, testified that on March 21, he filled out an application for employment at Eckert while attending a regularly scheduled meeting of the Northern Indiana Sprinkler Fitters Association; the application was supplied by Eads. According to Raines, he and others attending the meeting were asked by Eads to fill out the application "to see if Eckert was willing to even talk to us, [our] being 669 members." (Tr. 662.) Raines filled out his application and returned it to Eads, who he believed was to mail it in to Eckert, although he did not know when it was sent in.148

Raines was never contacted by Eckert; nor did he ever follow up on his application. Raines had no contact with Eckert other than Eads' submission of the application on his behalf. When asked by the General Counsel if he would have accepted a position with Eckert, Raines replied, "It depended on whether I was out of work at the time or not." On cross-examination, Raines testified that at the time of his application, he was employed by a union contractor and continues in its employ as of the hearing date.149

2. Richard Weston

Weston, a very experienced sprinkler-fitter with 25 years of service in the trade and a 20–year journeyman member of the Union, testified that he, Raines, and other members attending a union meeting were asked by Eads to apply for work at Eckert, basically to test whether Eckert would even contact them at all about their applications. Weston identified the application150 he filled out on March 21 on which his union affiliation is clearly evident. Weston was never contacted by the Respondent; nor, however, did he ever follow up on his application. When asked by the General Counsel if he would have accepted a job offered by the Respondent, Weston responded, "Oh, it's possible."151

As to Raines, ambivalent as he was, it seems to me that had he been contacted by Eckert about a job, he would not have accepted employment with the Company. Moreover, Raines admitted that he was actually only submitting an application in the first instance to see if the Respondent would respond to the batch of union applications. Thus, it is clear to me that Raines was not sincerely interested in working for the Respondent but merely lent his name to Eads' test.

I would recommend that the complaint be dismissed as to Raines.

For essentially similar reasons, I would recommend that the complaint should be dismissed as to Weston.

CONCLUSIONS OF LAW

1. The Respondents, Eckert Fire Protection, Inc. and its successor Eckert Fire Protection Company (EFP-1 and EFP-2), are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. EFP-2 is a successor employing entity to EFP-1, having acquired in substantial part the assets and general business of its predecessor employing entity, EFP-1, with actual and constructive notice of pending unfair labor practices proceeding filed with the National Labor Relations Board against EFP-1.

3. EFP-2 is jointly and severally liable for violations of the Act by EFP-1.

4. The Unions, Indiana State Pipe Trades Association, United Association of Plumbers and Pipefitters, AFL–CIO, and Road Sprinkler Fitters Local Union No. 669, U.A. AFL–CIO, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO, are labor organizations within the meaning of Section 2(5) of the Act.

5. By interrogating an applicant for employment, John Strunk, about his intentions regarding working for union employers, the Respondents violated Section 8(a)(1) of the Act.

6. By prohibiting an employee, John Strunk, from wearing union emblems, buttons, and other paraphernalia, the Respondents violated Section 8(a)(1) of the Act.

7. By telling an employee, John Strunk, not to discuss the Union with the Respondents' employees, the Respondents violated Section 8(a)(1) of the Act.

8. By interrogating an employee, Thomas Theison, about his union membership, threatening him with unspecified reprisals for his support of the Unions, and informing him that the Respondents had fired employees because of their support of the union, the Respondents violated Section 8(a)(1) of the Act.

9. By Refusing to hire Randy Long and Scott Weisbrodt, the Respondents violated Section 8(a)(1) and (3) of the Act.

10. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

11. The Respondents did not otherwise engage in any other unfair labor practices alleged in the complaint in violation of the Act.

THE REMEDY

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

Having found that the Respondents failed or refused to hire Randy Long and Scott Weisbrodt in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that the Respondents be ordered to immediately offer these individuals employment at rates paid sprinkler-fitters hired by the Respondents with commensurate experience; if necessary, terminating the service of employees hired in their stead, and to make them whole for wage and benefit losses they may have suffered by virtue of the discrimination practiced against them, computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), less any interim earnings, with the amounts due and interest thereon computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended152

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me, based on the credible evidence of record, that no followup was made by any of the particular applicants. Also, Eads clearly made no attempt to resubmit the applications when EFP-2 was formed.

148 Raines identified his application (GC Exh. 11(c)) which is dated March 21 and states that he is currently employed (wages not provided) and would accept minimum wage. The Local 669 apprenticeship program is listed as part of Raines' education. Raines' testimony and application clearly show that he was a qualified sprinkler-fitter.

149 Raines reluctantly and in a roundabout way admitted that he would not have taken a job with the Respondent if offered one.

150 Weston's application (GC Exh. 11(b)) dated March 21 also indicates he was referred by Eads and that he was willing to work as a sprinkler-fitter for minimum wages. Upon my examination, Weston explained that he would work for minimum wage if he were out of work; he was not willing to go on welfare.

151 On cross-examination, Weston, however, candidly admitted that if Eckert had called about a job when he was working for his present employer, a union contractor, he probably would not have accepted employment with them.

152 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recom-

ORDER

The Respondents, Eckert Fire Protection, Inc. and its Successor Eckert Fire Protection Company, Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating job applicants regarding their intentions to work for unionized companies.

(b) Prohibiting employees from wearing buttons, emblems, and other paraphernalia of the Road Sprinklers Local Union No. 699, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO, and Indiana State Pipe Trades Association, United Association of Plumbers and Pipe Fitters, AFL–CIO, or any other labor organization.

(c) Telling employees not to discuss the Road Sprinklers Local Union No. 699 and Indiana State Pipe Trades Association or any other labor organization.

(d) Interrogating employees about their union membership activities.

(e) Threatening employees with unspecified reprisals for their support of the Road Sprinklers Local Union No. 699 and Indiana State Pipe Trades Association or any other labor organization.

(f) Informing employees that the Company had fired employees because of their support of unions.

(g) 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 from the date of this Order, offer Randy Long and Scott Weisbrodt employment at rates paid to sprinkler-fitters hired by the Respondent with commensurate experience; if necessary, terminating the service of employees hired in their stead.

(b) Make Randy Long and Scott Weisbrodt 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 decision.

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

(d) Within 14 days after service by the Region, post at its offices in Indianapolis, Indiana, and all jobsite within a 75-mile radius of Indianapolis, Indiana, copies of the attached notice marked "Appendix."153 Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 19, 1996.

(e) 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.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT interrogate job applicants regarding their intentions to work for unionized companies.

WE WILL NOT prohibit employees from wearing buttons, emblems, and other paraphernalia of the Road Sprinklers Local Union No. 699 and Indiana State Pipe Trades Association or any other labor organization.

WE WILL NOT tell employees not to discuss the Road Sprinklers Local Union No. 699 and Indiana State Pipe Trades Association or any other labor organization.

WE WILL NOT interrogate employees about their union membership activities.

WE WILL NOT threaten employees with unspecified reprisals for their support of the Road Sprinklers Local Union No. 699, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO, and Indiana State Pipe Trades Association, United Association of Plumbers and Pipe Fitters, AFL–CIO, or any other labor organization.

WE WILL NOT inform employees that the Company had fired employees because of their support of unions.

WE WILL NOT fail or refuse to hire job applicants because of their known or suspected membership in and/or support of the Road Sprinklers Local Union No. 669 and the Indiana State Pipe Trades Association, or any other labor organization.

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

WE WILL, within 14 days from the date of this Order, offer Randy Long and Scott Weisbrodt employment at rates paid to sprinkler-fitters hired by the Respondent with commensurate experience; if necessary, terminating the service of employees hired in their stead.

WE WILL make Randy Long and Scott Weisbrodt whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

ECKERT FIRE PROTECTION, INC. AND ITS SUCCESSOR ECKERT FIRE PROTECTION COMPANY

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mended 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.

153 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."