CBI Na-Con, Inc. *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Plumbers and Steamfitters Local Union No. 198, AFL–CIO. Cases 15–CA–13906, 15–CA–13906–3, and 15–CA–13992

November 30, 2004

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND MEISBURG

On September 25, 1997, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief. On June 7, 2000, the Board remanded this proceeding for further consideration pursuant to *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002). On December 21, 2000, Judge Grossman issued the attached supplemental decision. The Respondent filed exceptions to the supplemental decision and a supporting brief.

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

The Board has considered the decision, supplemental decision, and the record in lights of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Supplemental Decision and Order. We shall substitute a new notice for that of the judge.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to consider or to hire 14 applicants for employment. He also found, and we agree, that the Respondent violated Section 8(a)(1) by coercively interrogating employees concerning their union membership and sympathies. For the reasons below, however, we reverse the judge's conclusions regarding the alleged failure to consider and to hire applicants and we shall, therefore, dismiss the 8(a)(3) and (1) allegations.

The Respondent was engaged as a construction contractor at a chemical plant in Geismar, Louisiana, in 1996 and 1997.[2] Hiring decisions for welders and pipefitters—the positions for which the alleged discriminatees assertedly were not considered or employed—were made by the Respondent's piping superintendent, Gary Kinchen. The complaint alleges that starting about May 29, 1996, the Respondent failed to consider or hire any of the 14 named alleged discriminatees at the Geismar project.

From May 29[3] to late November, the Respondent, through Kinchen, hired about 38 pipefitters and 50 welders at the project. Kinchen used a preferential hiring system to fill these positions, as follows, in descending order of priority: (a) employees with whom Kinchen or an employee of the Respondent had a "personal" relationship; (b) employees who were recommended by a current trusted employee of the Respondent; (c) transfers from other worksites of the Respondent; and (d) the general applicant pool.

It is undisputed that the overwhelming majority of employees hired at the jobsite fit into one of the first three priority categories noted above.[4] The Board has held that an employer legitimately may implement a hiring policy based on a hiring system that gives preference to former employees and employees referred by current employees. *Ken Maddox Heating & Air Conditioning, Inc.,* 340 NLRB 43 (2003). Thus, hiring decisions "based on neutral hiring policies, uniformly applied" are lawful. *Sunland Construction Co*., 309 NLRB 1224, 1229 (1992).

The judge found that the Respondent's preferential hiring policy was not neutral, based primarily on what he deemed the "practical result" of the hiring process itself: i.e., the nonhire of the 14 alleged discriminates. To be sure, if the Respondent's policy were inherently discriminatory or unlawful on its face, the failure to hire union members pursuant to such a policy would support a finding of discrimination. However, there is no allegation in this case that the preferential hiring policy, on its face, is discriminatory towards union members, and, as noted above, Board precedent establishes that such a policy is legitimate. Moreover, to the extent that the judge's reliance on the "practical result" of the policy meant that it created a closed system in which union members would not likely have hiring priority, he is factually mistaken. It is undisputed that several open union members were hired when they successfully met the Re-

[1] The Respondent has 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 Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (ed Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, the Respondent contends that the judge's findings demonstrate bias. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit. We disavow, however, the judge's comment in his supplemental decision that "If Respondent managed to hire 'some' applicants at subjourneyman or helper wages, this tends to support the Union's arguments for the necessity of union representation."

[2] We correct the judge's inadvertent error in identifying the Respondent's business as the manufacture of gas products.

[3] All dates hereinafter are in 1996 unless noted otherwise.

[4] As explained in his brief to the judge, the General Counsel noted that the pool hired employees "was almost exclusively" made up of referred employees, those with whom Kinchen testified that he had worked with in the past, and personal friends.

spondent's preferential hiring criteria.[5] Consequently, the General Counsel bears the ultimate burden of proving, by specific evidence, that the alleged discriminates were the subject of disparate treatment in the facially neutral hiring process because of their union membership. We find the General Counsel has failed to prove this violation.

First, it is undisputed that the Respondent hired known union members, albeit the precise number of such hires is unclear. At a minimum, Kinchen hired known union member Danny Aucoin and his son, Brian Aucoin. The judge found that Kinchen did not know of the union affiliations of other union members hired by the Respondent "in most of the instances." But, in addition to Danny and Brian Aucoin, it is uncontradicted that the Respondent hired union members Jerry Jones and Kurt Richard. Although the judge discredited Kinchen's testimony regarding his knowledge of the union affiliation of other employees, the judge did not make a specific finding with regard to Jones and Richard.[6] In any event, irrespective of the exact number of known union members hired by Kinchen, it is evident that the Respondent hired both "covert" and known union members.

Second, the record indicates that the Respondent did not apply its hiring policies disparately. Put another way, the Respondent failed to hire numerous nonreferral applicants from the general application pool, whether union or nonunion. As we noted in *Ken Maddox Heating & Air Conditioning*, supra, the nonhire of large numbers of nonunion applicants, as well as union applicants, is evidence that antiunion discrimination did not influence the Respondent's hiring decisions. Id. at 45.

Third, the judge erroneously stated that the Respondent did not interview any of the alleged discriminatee applicants and spent little time investigating their job credentials. In fact, the Respondent not only interviewed several of the alleged discriminates, but it offered employment to applicants Michael Armstrong and Louis LeBlanc pursuant to such interviews. As to Armstrong, a job offer was made to him in late July.[7] As to LeBlanc, the judge found that the Respondent offered LeBlanc a job and that LeBlanc did not reject the offer. Further, the judge found that it was uncontradicted that the Respondent offered employment to alleged discriminatees Jerry Ruiz and Danny Percle, but found it unnecessary to make a specific finding on the matter.[8]

Finally, we disagree with the judge's finding that Kinchen's interrogation of employees concerning their union activities, and his comment that the Union was "causing him trouble," undermined the bona fides of the Respondent's preferential hiring system. However, even if we were to find that Kinchen's comments manifested union animus on the Respondent's part, it does not prove disparate treatment of union applicants in the hiring system when, as here, the evidence as a whole establishes that the Respondent knowingly hired or attempted to hire union applicants and treated nonunion, nonreferred applicants in similar fashion to union, nonreferred applicants.[9]

In these circumstances, we find that the Respondent's hiring decisions, and its consideration for hire of the alleged discriminates, were undertaken pursuant to a valid, neutral preferential hiring system, were not applied disparately, and were not discriminatory in practice. We conclude, therefore, that the Respondent did not violate Section 8 (a)(3) and (1) of the Act, as alleged.

ORDER

The National Labor Relations Board orders that the Respondent, CBI Na-Con, Inc., Geismar, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating applicants for employment regarding their union membership and sympathies.

(b) 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.

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[5] We therefore do not reach the issue whether there could be a violation if the employer utilized a set of criteria which had the foreseeable and inevitable consequence of excluding union members. See *Contractors Labor Pool v. NLRB*, 323 F.3d 1051, 1056–1061 (D.C. Cir. 2003), denying enf. in relevant part sub nom. *Aztech Electric* Co., 335 NLRB 260 (2001).

[6] At fn. 30 of his original decision, the judge set forth the names of several employees for whom Kinchen asserted knowledge of alleged union membership, as to which the judge discredited Kinchen, but the judge did not specifically include Jones and Richard in that group.

[7] Member Schaumber does not rely on the judge's finding that the offer of employment to Armstrong was "tainted" by Kinchen's asking him whether he would cross a picket line. Because the violations are cumulative, Member Schaumber finds no need to pass on whether Kinchen's inquiry violated Sec. 8(1)(1). See *Napervillle Ready-Mix, Inc*., 329 NLRB 174, 178 fn. 19 (1999), enfd. 242 F.3d 744 (7th Cir. 2001) (respondent's inquiry about nonunion truckdrivers' willingness to cross picket line was not unlawful).

[8] In his initial decision, the judge noted that Kinchen testified without contradiction that he made offers of employment to Ruiz and Percle, but the judge deferred the matter to compliance.

[9] We adopt the judge's findings that Kinchen interrogated applicants Bullion, Civella, Michael Armstrong, and Quave regarding their union membership. We note that the complaint does not allege any unfair labor practice with regard to Kinchen's comment about the Union "causing him trouble" and the judge made no finding of a violation. Even assuming arguendo that the judge correctly considered this comment as evidence of animus, rather than a statement of obvious fact (the Union was picketing Respondent's jobsite at the time), there is insufficient proof of discriminatory motivation in the hiring process.

(a) Within 14 days after service by the Region, post at its office in Geismar, Louisiana, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 11, 1996.

(b) 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 it has taken to comply with this Decision.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate applicants for employment about their union membership and sympathies.

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

[10] 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."

CBI NA-CON, INC.

Zoë Panarites, Esq, for the General Counsel.
Melvin Hutson, Esq. (Thompson & Huston), of Greenville, South Carolina, for the Respondent.
William Lurye, Esq. (Robein, Urann & Lurye), of Metairie, Louisiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. Charges in these cases were filed at various times by United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Plumbers and Steamfitters Local Union No. 198, AFL–CIO (Local 198, or the Union).[1] A consolidated complaint issued on August 30, 1996. It alleges that CBI Na-Con, Inc. (Respondent or CBI) interrogated its employees concerning their union membership, activities, and sympathies in violation of Section 8(a)(1) of the Act, and violated Section 8(a)(3) by refusing to consider for hire or to hire 14 applicants for employment because they assisted the Union and engaged in other concerted protected activities.

A hearing was held before me on these matters in Baton Rouge, Louisiana, on May 5, 6, and 7, 1997. Thereafter, the General Counsel, Respondent, and the Union filed briefs. Based on the entire record in this case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office at Geismar, Louisiana, where it is engaged in the manufacture of gas products at a site called the Liquid Carbonics jobsite. During the 12-month period ending July 31, 1996, Respondent purchased and received at its Geismar worksite goods valued in excess of $50,000 from points outside the State of Louisiana.[2] Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

[1] The original charge in Case 15–CA–13906 was filed on June 5 and an amended charge on July 1, 1996. All dates are in 1996 unless otherwise indicated. The charge in Case 15–CA–13906-3 was filed by the Union on July 1, and the charge in Case 15–CA–13992 on July 25.

[2] Respondent's answer admits the complaint allegation regarding the purchase of goods valued in excess of $50,000 "but denies that it conducted the operations described in paragraph 2 during the 12-month period ending July 31, 1996, for the reasons stated in paragraph 2 of the Answer." Paragraph 2 of the answer admits that Respondent has a temporary office at Geismar, denies that it has a "place of business" there engaged in the manufacture of gas products, and says nothing about the purchase and receipt of goods. Respondent has not "specifically denied or explained" the commerce allegation in the complaint, as required by Sec. 102.20 of the Board's Rules, and I conclude that the complaint allegation is correct.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Applications

1. The May 29 applications

On May 29, 9 alleged discriminatees[3] applied at the CBI trailer in Geismar for employment as pipefitters, pipe welders, iron workers, or boilermakers. Other experience was listed. All wore buttons reading "UA Organizing Committee" and one wore a union T-shirt. Six of the applicants indicated on their applications that they were voluntary union organizers,[4] and three either indicated Union Business Manager Louis LeBlanc as a reference or stated that they had worked through the Union.[5] Respondent denies that it refused to consider them but admits that it refused to hire them.[6]

The applications state that they remain active for 60 days. However, Gary Kinchen, Respondent's piping superintendent and an admitted supervisor, testified that applications are active and the applicant is eligible for hire until the project is completed.

The applications show several construction skills, some with multiple skills and advanced training. All applications show extended experience, 31 years by Gordon Laiche, and 36 years by Louis LeBlanc.

2. The application of Brent Bullion

Brent Bullion was referred to Respondent by employee Randy Quave. Bullion called piping superintendent Kinchen on May 28 and again on June 12.[7] Respondent denies that it refused to consider him but admits that it refused to hire him.[8]

Kinchen called Bullion at home on June 20, and asked whether he would be ready to go to work the following week. Bullion replied that he was ready. He testified without contradiction that Kinchen asked whether he was working out of the Union and whether he was a member. Bullion replied affirmatively, and Kinchen said that he would contact Bullion later to go to work. Bullion did not hear further from Respondent. Kinchen testified that he kept a notebook in which he listed the names of applicants, and that he wrote "198" next to Bullion's name.

3. The application of Matthew Landrey on June 25

As indicated, on May 29, the applicants applied at Respondent's trailer. There was a guard shack on the jobsite, and Respondent had an arrangement with a security company. After May 29, Respondent left blank applications at the guard shack, with instructions that the guard was to receive them. Kinchen testified that they were picked up on a daily basis.

Matthew Landrey testified that he filled out an application on June 25, and left it with the guard at the guard shack. He wore a union organizer button, put "Union Organizer" at the top of the application, and listed a Local 198 apprenticeship course in the body of the application. Landrey further testified that he taped the conversation.[9] The guard told him that the Company was hiring and that she would give the application to the Company.

Respondent asserts that it never received the application. I credit Landrey's testimony and conclude that the security guard was an agent of Respondent. *NLRB v. Southwire Co.*, 801 F.2d 1252 (11th Cir. 1986).

4. The application of Ronnie Civella on July 8

Employee Randy Quave also suggested to Ronnie Civella that he apply for employment. Civella called Piping Superintendent Kinchen on July 8, and related his work experience. Kinchen replied that some welders had walked off the job[10] and that he was hiring welders. Civella testified without contradiction that Kinchen asked him whether he was a member of Local 198. Civella responded that he was, and Kinchen responded, "I guess that's the end of this, then," and ended the conversation. Civella called Kinchen again on July 11, and Kinchen told him that he was "on the top of his list."

On August 1, Kinchen called Civella and asked whether he was working. Civella said that he was, and Kinchen responded: "Sorry I couldn't have helped you out." Respondent argues that this conversation constitutes evidence that Kinchen offered Civella a job.

Respondent also argues that Civella's testimony about Kinchen's union inquiry should not be credited because he did not know certain details such as dates and days of the week. These minor lapses do not diminish the probative weight of the fact that Civella's testimony about Kinchen's union inquiry is uncontradicted. I credit Civella's testimony.

5. The application of Michael Armstrong

Michael Armstrong was a brother of Union Assistant Business Agent Jeffrey Armstrong. On July 8, he submitted the first of 3 applications at the guard shack. On July 11 he called Kinchen and described his qualifications. Kinchen asked whether he ever "worked out of a union." Kinchen said that the Union had put up a picket line, and asked Armstrong whether he would cross the picket line. Armstrong replied that he would do so. Kinchen said that he did not have Armstrong's application on his desk. Armstrong then went down to the guard shack and submitted a second application on the same day as his conversation with Kinchen, July 11.

A few days later, Armstrong called Kinchen again, and the latter informed him that he, Kinchen, had also lost the second application. On July 17, Armstrong filled out a third application and delivered it to the guard shack. He called Kinchen, who informed him that the Union was giving him some trouble, and again asked Armstrong whether he would cross the picket line. Armstrong said that he would do so, and Kinchen asked him to come to the jobsite and fill out some pre-employment papers.

[3] Jeffrey Armstrong, Louis LeBlanc, Cynthia Kelly, Ronald T. Sessions, Van Himel, Jerry Ruiz, Danny J. Percle, Roger Duplessis, and Gordon J. Laiche.

[4] GC.Exhs. 3(a), 3(e), 3(f), 3(h), 3(k), 3(l).

[5] GC Exhs. 3(d), 3(g), 3(j).

[6] GC Exh. 1(o), par. 8.

[7] GC Exh. 3(c).

[8] GC Exh. 1(o), par. 8.

[9] GC Exh. 21.

[10] Several employees engaged in a brief strike after the May 29 applications.

Armstrong returned to the jobsite, filled out some papers, and had a conversation with Kinchen. The latter again asked Armstrong whether he would cross the picket line, and received the same affirmative answer. Kinchen asked Armstrong whether he was "kin" to Jeffrey Armstrong.

Armstrong said he was ready to work the next morning. Kinchen replied that he had just received a call from his "boss" in Lake Charles who informed him that they would be transferring some employees to the Liquid Carbonics job. Accordingly, Kinchen could not hire anybody.

There is no documentary evidence of a message from Lake Charles, or of any transfer in late June of employees to the Liquid Carbonics job.

Two or three weeks later, i.e., in late July, Kinchen called Armstrong and asked whether he was ready to work the next morning. Armstrong said he would try to be there. He called later and informed a guard that he had prior commitments and would not take the job.

6. The application of Charles Middleton

Charles Middleton filed an application for employment as a pipe welder on July 1.[11] Respondent denies that it refused to consider him, but admits that it refused to employ him.[12]

The application gives Union Business Manager Louis LeBlanc as a reference, and states that Middleton had been a union organizer. It relates Middleton's extensive experience as a pipefitter and welder, and as a welding instructor.[13] Although Middleton did not testify, Respondent stipulated at the hearing that General Counsel's Exhibit 3(i), and the other applications, are the applications of the named discriminatees.

B. Respondent's Hiring at the Liquid Carbonics Job

Respondent hired about 38 pipefitters from June 1 through November 23, including 6 in June, 4 in July, and 10 in August.[14] On June 4, General Superintendent George Martin told Assistant Business Agent Jeffrey Armstrong that CBI had no need to hire pipefitters, and Piping Superintendent Kinchen told job applicant (Richard Albee) the same thing, despite the fact that Respondent hired two pipefitters on June 1, two on June 15, and two on June 29.[15] CBI hired about 50 welders, from June 1 through November 29, including 6 in June, 7 in July, and 13 in August.[16]

Kinchen asserted that his preferred order of hiring was (1) he or someone working at CBI had a prior working relationship with the applicant; (2) a trusted current employee made the recommendation; (3) the employee was transferred from another CBI job: or (4) a general application pool.

Kinchen testified that employees were hired at the Liquid Carbonics jobsite in the foregoing four categories, most in the first or second category. His testimony is not completely supported by CBI records. Thus, Kinchen testified that three employees were transfers although their applications show that they had not previously worked for CBI.[17] Four employees contradicted Kinchen's testimony that they had previously worked for CBI.[18] Most of the approximately 88 hired employee applications do not show the length of experience and multiplicity of skills reflected in the discriminatees' applications.

Applicants for welding positions were not given welding tests in any routine manner. Some were tested before they were hired, but others were not tested until after they were hired. One applicant was hired although he failed two welding tests.[19] Kinchen testified that some employees were hired without filing an application although they were required to file one after being hired.

C. Kinchen's Conversation with Randy Quave

Kinchen called Randy Quave on June 11, to offer a job, pursuant to a covert application Quave had submitted. He asked Quave whether he was a member of a local union, and Quave denied it. The applicant said he would join a union if he needed to in order to get the job. Kinchen replied, "No, I'm tired of the damned union out there," and that they were giving him too much trouble. He told Quave that he did not want no more union out there. Asked whether he made this statement, Kinchen replied, "I don't think so." I credit Quave's unambiguous testimony.

D. The Job Offers to Louis LeBlanc, Jerry Ruiz, and Danny Percle

Piping Superintendent Kinchen testified that CBI offered jobs to Louis LeBlanc, Jerry Ruiz, and Danny Percle in late October. LeBlanc confirmed that he received such an offer on October 24. He replied to Kinchen that he had a subpoena to go to Arizona to testify in a Board proceeding, but would be ready to work on November 4. LeBlanc also faxed Kinchen a copy of the subpoena.[20] Respondent's records show that it hired four welders on November 2, 8, and 9. It also hired four pipefitters on November 9, and five more during the rest of November.[21]

On October 30, CBI sent LeBlanc a letter confirming that it had offered him a job as a welder and expressing regret that he had "declined it."[22] LeBlanc replied on November 6, citing his subpoena. He added that the timing of the offer was "ironic"

[11] GC Exh. 3(i).
[12] GC Exh. 1(o), par. 8.
[13] GC Exh. 13(i).
[14] GC Exh. 9; GC Exhs 12(k); 13(g), (r), (h), (c), (f), (i), (aa), (y), (z), (s), (d), (o), (n), (dd), (m), (i), (f), (a), (cc), (ee), (v), (p), (w), (u), (q), (j), (t), and (b); and 4; CP Exh. 1.
[15] GC Exh. 9.
[16] GC Exhs. 10; 7; 12(w), (g), (rr), (m), (gg), (jj), (j), (v), (ii), (i), (o), (e), (pp), (b), (ee), (o), (ss), (hh), (cc), (r), (l), (n), (dd), (f), (d), (y), (mm), (z), (kk), (t), (p), (h), (u), (oo), (ff), (ee), (nn), (bb), (s), (q), (a), (tt), and (x), plus other applications.
[17] Rudy Hostetler, GC Exh. 12(t); Cletus Munrose, GC Exh. 12(ee); and Anthony Nicholas, GC Exh. 12(ff).
[18] Ray Gilbert (GC Exh. 12(p); Leland Durbin (testimony of Durbin); Phillip Hanna (GC Exh. 7, testimony of Hanna); and Billy Gay (GC Exh. 4, testimony of Gay).
[19] Kinchen contended that the employee, James Willis, did not perform standard welding jobs. Kinchen was contradicted by Willis and Danny Aucoin.
[20] GC Exh. 16. Respondent points out that the subpoena does not show a fax number. The same is true of LeBlanc's answer to Kinchen.
[21] GC Exhs. 9, 10.
[22] R. Exh. 2.

considering his application of 4 months standing, and added that the offer was an attempt to limit CBI's backpay liability, and violated Section 8(a)(4) of the Act.[23]

Respondent argues that either LeBlanc did not send the subpoena because there is no fax number on it, or that Respondent did not receive it. But Respondent clearly received LeBlanc's reply to its offer—it responded with an answer which characterized LeBlanc's response as a declination. LeBlanc's reply to this communication refers to his prior response and his submission of a copy of the subpoena, and bears a fax number.[24] Respondent was thus clearly put on notice of the nature of LeBlanc's business in Phoenix, and the fact that he was issued a Board subpoena. Respondent did not ask for a copy of the subpoena or otherwise reply to LeBlanc's communication of November. 6.

E. Respondent's Defense

1. Summary of the evidence

(a) Respondent's rationale

Respondent's defense is essentially that it hired union members, and thus demonstrated that it did not have antiunion animus. Some of the hirings took place before the May 29 applications of the alleged discriminatees, and some after the applications.

(b) The hirings prior to the May 29 applications

Danny Aucoin was hired on May 25. Kinchen testified that he had known for many years that Aucoin was a member of Local 198. Aucoin testified that he was a member. He had known Kinchen for some time, and was friendly with him. Aucoin had previously worked together with Kinchen on a nonunion job. He worked for CBI on the Liquid Carbonics job for about a week in January 1996. Although he spoke to some employees about the Union, he did not try to organize, and did not wear any union insignia. Kinchen called him in May, and he started working again but was not asked to sign an application until about a month later. No employee wore union insignia prior to May 31, when some of them started wearing union buttons.

Leland Durbin was hired on May 25. Kinchen testified that Durbin said that he was a member of Local 198. Durbin testified, and agreed that he was a Local 198 member. He denied that he discussed his union membership with any member of management and denied that there was any way that management could have known of his union membership.

Kinchen testified that he knew that "Arthur Jewell" was a Local 198 member, and Respondent's records show that an "Arthur Jewell" was hired on May 25.[25] A witness named "Duane Jewell" testified, and identified as his application a document wherein the applicant is named "Arthur Duane Jewell."[26] I conclude that Duane Jewell and Arthur Jewell are the same person.

Jewell testified that he called Kinchen and asked for work. There was brief conversation, in which there was no mention of the Union or Jewell's membership. Jewell testified that he did not tell Kinchen that he was a member, and that there was no way that CBI management could have known about his membership prior to his being hired.

Jewell was shown his application, which appears to be dated "5–13–96," with the "5" being written over an original "6." Jewell testified that he signed the application on June 13, after having worked for several weeks. Kinchen struck out the "6" and wrote "5" over it. Asked how he knew this, Jewell testified: "I was standing there watching him." The application denies prior employment by CBI.

Johnny Peart was hired on June 1. Kinchen testified that he knew Peart was a Local 198 member because he wore a Local 198 belt buckle. Respondent's records show that Johnny Peart was hired on June 1.[27] He went to the jobsite in May, and had a conversation with Kinchen. He discussed his qualifications, but did not fill out an application. Peart did not wear any union insignia. Kinchen called him later, and told him to report for work. He was asked to submit an application and take a welding test after he was already working. Peart denied on cross-examination that he owns a Local 198 belt buckle.

Earl and Danny Moran were hired on May 25. Kinchen asserted that he had known for years that they were affiliated with unions, and with Local 198. However, Local 198 assistant business manager Jeffrey Armstrong testified that the Moran brothers were not members of the Union.

Jason Onstead was hired on May 25. Kinchen contended that he was in the Local 198 apprenticeship program. Assistant Business Manager Jeffrey Armstrong testified that he instructed Onstead to apply covertly.[28] Onstead did not testify.

(c) Respondent's hirings after May 29

Pursuant to a call Phillip Hanna made to Kinchen, Hanna was hired on June 29. Kinchen testified that he knew Hanna was a member of "Local 102," and that he had known him for 20 years. Hanna testified that he had been a member of Local 406 of the Operating Engineers for 26 years, and had not known Kinchen before the latter told him to report for work.

Respondent hired Billy Gay on June 29. Kinchen testified that Gay "and his daddy" worked in a "Local 198 fab shop," and that he "figured" that Gay was a union member. Gay testified about the jobs listed on his application,[29] and averred that he did not work with Kinchen on any of them. He also testified that his father was not a pipefitter.

Kinchen asserted knowledge of the alleged union membership of other persons who were hired, but who did not testify.[30]

[23] R. Exh. 3.
[24] Id.
[25] GC Exh. 9.
[26] GC Exh. 12(vv).
[27] GC Exh. 9.
[28] Armstrong gave the same instruction to Danny Aucoin, Brian Aucoin, Duane Jewell, Mark Kirby, Leland Durbin, Mark Pecanty, Johnny Peart, Melvin Quave, Randy Quave, and others.
[29] GC Exh. 4.
[30] Mark Kirby, Ricky Berthelot, Ronald Bello, Dupuy Glynn, Paul Cagle, Danny Christian, and Brent Patterson.

2. Factual analysis

The employee witnesses listed above were truthful in demeanor. Each was testifying about one or more conversations he had with Kinchen, whereas the latter was testifying about many. I credit the testimony of these witnesses. They show that the Union instructed its members to make covert applications prior to the May 29 applications. Thereafter, some began wearing union buttons, and there was a strike. Although Respondent did hire some union members, the evidence shows that Respondent did not know of the union affiliations in most of the instances. In light of the many contradictions of Kinchen supplied by these witnesses, I do not credit his testimony as to other applicants and their asserted union membership, where none was called by Respondent to support Kinchen's testimony.

F. Legal Conclusions

1. The alleged unlawful interrogation

The credited evidence shows that Piping Superintendent Kinchen asked several applicants for employment whether they were union members, or would cross a union picket line.

In an early statement of the principles to be applied in such cases, the Board stated:

> In our view, the test is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act. The fact that employees gave false answers when questioned, although relevant, is not controlling. The Respondent communicated its purpose in questioning the employees–a purpose which was legitimate in nature–to the employees and assured them that no reprisal would take place. Moreover, the questioning occurred in a background free of employer hostility to union organization. These circumstances convince us that the Respondent's interrogation did not reasonably lead the employees to believe that economic reprisal might be visited upon them by Respondent. [*Blue Flash Express*, 109 NLRB 591, 593 (1954).]

The Board distinguished its decision in *Blue Flash* from a contrary holding, in which the interrogation took place a week before a Board election, and the employer failed to give the employees any legitimate reason for the interrogation or assurances against reprisal (id.).

The Board reiterated this standard in *Rossmore House*, 269 NLRB 1176 (1984), where it rejected a per se approach to interrogation of open union adherents and concluded that the test was whether, under all of the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce, employees in the exercise of rights guaranteed by the Act (id. at 1177). The Board stated some of the factors to be considered:

> Some factors which may be considered in analyzing interrogations are: (1) the background; (2) the nature of the information sought; (3) the identity of the questioner, and (4) the place and method of interrogation. See *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). These other relevant factors are not to be mechanically applied in each case. Rather, they represent some areas of inquiry that may be applied in applying the *Blue Flash* test of whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. [Id., 269 NLRB at 1178 fn. 20.]
>
> The Board has concluded that interrogation of a known union adherent's union sympathies was coercive. *Baptist Medical System*, 288 NLRB 882 (1988). In *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), the Board applied the same test to interrogation of employees who were not open union adherents. The Court of Appeals for the Fifth Circuit recently affirmed a Board finding of coercive interrogation because of the employer's promulgation of an illegal rule, and a history of attempting to engage in the same practice in the past. *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359 (5th Cir. 1990), enfd. in part 294 NLRB 462 (1989).[31]

In this case the alleged discriminatees were asked about their union membership by a ranking supervisor at a time when they were attempting to get jobs. The Board has held in numerous cases that these circumstances meet the criteria set forth above. Accordingly, I conclude that Respondent thereby violated Section 8(a)(1) of the Act.

2. The alleged discrimination

The complaint alleges that Respondent failed to consider for hire or to hire the discriminatees. The elements of this violation are (1) the applications were filed during the hiring stages; (2) the applicants were shown to be or could be expected to be union supporters; (3) the employer knew of their union membership or sympathy; (4) the employer had animus against the union; and (5) the employer refused to hire the applicants because of this animus.[32]

Each of these criteria has been met. The applications were filed before, after, and in the midst of the employer's hiring of other applicants. The applications continued to be viable for the duration of the project, according to CBI's piping superintendent. The fact that some applications were made verbally without a written application does not detract from their status as applications, since Respondent hired other applicants without requiring a written application. Accordingly, the applicants listed in footnote 3 above filed applications on May 29, Brent Bullion on May 28,[33] Matthew Landrey on June 25, Charles Middleton July 1, Ronnie Civella on July 8, and Michael Armstrong on July 8.

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[31] Citing *Bourne*, supra the court listed eight factors to be considered in determining whether interrogation has been coercive: (1) the history of the employer's attitude toward its employees; (2) the nature of the information sought or related; (3) the rank of the questioner in the employer's hierarchy; (4) the place and manner of the conversation; (5) the truthfulness of the employee's response; (6) whether the employer had a valid purpose in obtaining the information sought; (7) whether a valid purpose, if existent, was communicated to the employee that no reprisals would be forthcoming. Although some of these factors were not satisfied, the court in *NLRB v. Brookshire Grocery*, supra, agreed with the Board that the interrogation had been coercive.

[32] *J. E. Merit Constructors*, 302 NLRB 301, 303 (1991); *Big E's Foodland, Inc.*, 242 NLRB 963 (1979).

[33] Supplemented by a written application on June 12.

The alleged discriminatees were shown to be union members or sympathizers, as indicated by the information on their written applications listed above, their union insignia, or their answers to Kinchen's interrogations.

Respondent had animus against the Union, as shown by Kinchen's coercive interrogations, his statement to Michael Armstrong that the Union was giving him trouble, his statement to Randy Quave that he was "tired of the damned Union," his writing "198" in a notebook opposite Brent Bullion's name, and his hiring of applicants with lower qualifications than those of the alleged discriminatees. Duane Jewell's testimony shows that Kinchen backdated Jewell's application to a date prior to the May 29 applications of the alleged discriminatees. The only discernible reason for this action was to make it appear that Jewell's application was filed prior to those in issue here. An employer who establishes hiring policies designed to impede or screen out union applicants violates Section 8(a)(3). *Starcon, Inc.*, 323 NLRB 977, 982 (1997).

Respondent's argument that it did not have animus because of the hiring of some union members is not persuasive for the reasons given above. The hiring of a union member does not necessarily rebut other evidence of animus. Thus, Danny Aucoin was hired despite his union membership. However, he was friendly with Kinchen and had previously worked with him on a nonunion job. Aucoin did not pose a threat to Respondent compared with applicants such as Louis LeBlanc and Jeffrey Armstrong, union business agents, or with other individuals whose applications stated that they were union organizers. The evidence showed that Respondent did not have knowledge of the union membership of most of the appicants it hired. Its hiring of these members who did not display organizational intentions is overcome by the weight of the evidence of union animus.

The final issues are whether Respondent in fact did make offers of employment to several discriminatees. I do not agree that Respondent made an offer to Ronnie Civella on August 1. When Kinchen called and asked him whether he was working, and Civella replied that he was, Kinchen merely said that he was sorry he "couldn't have" helped Civella. This is phrased in the past tense, and does not constitute a current offer of employment.

Kinchen's exchange of communications with Louis LeBlanc in early November does not establish that LeBlanc declined an offer of employment. It merely shows that LeBlanc agreed, but needed a one-week delay because of a subpoena to attend a Board hearing. This was not a rejection of the offer.[34]

Based on the testimony of Kinchen and Michael Armstrong, I conclude that Kinchen offered Armstrong a job in late July, and that Armstrong declined it. However, Armstrong applied on July 8, and Kinchen "lost" several applications, and repeatedly asked Armstrong whether he would cross the picket line. An offer made with this condition was tainted, and did not constitute a valid offer.

Kinchen's testimony that he made job offers to Jerry Ruiz and Danny Percle in late October is uncontradicted. This does not affect my finding that Ruiz and Percle made applications on May 29, and I defer to the compliance stage of this proceeding the issue of whether Kinchen in fact made such offers.

In sum, the General Counsel has established a prima facie case that Respondent refused to consider or to hire the alleged discriminatees because of their union membership or sympathies. Respondent has not rebutted the General Counsel's case, and, accordingly violated Section 8(a)(3) and (1) of the Act.[35]

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. CBI Na-Con, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Plumbers and Steamfitters Local Union No. 198, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees regarding their union membership and sympathies.

4. Respondent violated Section 8(a)(3) and (1) of the Act by failing to consider or to hire the applicants for employment named in the complaint on the dates set forth above.

5. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent unlawfully failed to consider or to hire Jeffrey Armstrong, Louis LeBlanc, Cynthia Kelly, Ronald T. Sessions, Van Himel, Jerry Ruiz, Danny J. Percle, Roger Duplessis, and Gordon J. Laiche on May 29, 1996, Brent Bullion on May 28, Matthew Landrey on June 25, Charles Middleton on July 1, Ronnie Civella on July 8, and Michael Armstrong on July 8, I shall recommend that Respondent be required to offer each of them immediate employment in the positions for which they applied, or, if nonexistent, to substantially equivalent positions, and make them whole for any loss of earnings they may have suffered because of the discrimination against them, by paying each of them a sum of money equal to the amount he would have earned from the date of its unlawful refusal to consider or hire him to the date of an offer of employment, less net interim earnings during such period, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289

[34] LeBlanc's reply to Kinchen could be termed a new application. Respondent was then hiring employees. However, this analysis is unnecessary for the reasons given above.

[35] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), *Manno Electric, Inc.*, 321 NLRB 278 fn. 12 (1996).

(1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[36]

I shall also recommend that Respondent be ordered to expunge from its records all references to its unlawful failure to consider or hire the discriminatees, and inform each of them in writing that this has been done, and that the aforesaid actions will not be used as the basis of any future discipline of them.

I shall also recommend the posting of notices.

[Recommended Order omitted from publication.]

Zoë, Panarites, Esq., for the General Counsel.
Melvin Hutson, Esq. (Thompson & Huston), for the Respondent.
William Lurye, Esq. (Robein, Urann & Lurye), for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. My initial Decision in the above-captioned case issued on September 25, 1997. Thereafter, the Board remanded the decision to me for consideration in light of its Decision in *FES,* 331 NLRB 9 (2000). The parties submitted briefs after my initial Decision, supplemental briefs, and responses to my Order to Show Cause. I have carefully considered them as well as the record.

The Board in *FES* lists several elements of a discriminatory violation. The first is a finding that the Respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct. Respondent hired about 38 pipefitters and 50 welders from June through November 1996, when a project on which it was working was completed. These figures are based on Respondent's payroll and personnel files, which were produced at the hearing in response to the General Counsel's subpoenas.

Respondent argues that this conclusion is not warranted because a "substantial percentage" of individuals were hired at subjourneyman or helper rates, and that it is not discriminatory for an employer to refuse to hire an applicant who is "overqualified." This argument is without merit. Respondent advertised for pipefitters and welders, as. Kinchen conceded. If Respondent managed to hire "some" applicants at subjourneyman or helper wages, this tends to support the Union's arguments for the necessity of union representation. Further, only "some" rates were at this low level, and the Board held in *FES* that General Counsel must establish at least one available opening (*FES*, at 14). The General Counsel established far more than this, enough to establish openings for 14 discriminatees.

The second element necessary to establish a refusal-to-hire violation is that the applicants had experience or training relevant to the generally known requirements for the positions for hire, or, in the alternative at that the employer did not adhere uniformly to the requirements. Id. Most of the applications were in writing, and, as found in my original Decision, revealed extensive experience in pipefitting and welding. Respondent did not interview any of these applicants, or submit any proof that their experience failed to meet the standards required by the jobs. Kinchen received some applications by telephone, and in person but there is no evidence that he challenged any of the experience claims made by the applicants. In fact, Respondent claims that it offered work to some of the applicants, arguments that I have rejected in my original Decision. Finally, Respondent allowed some welders who were hired to delay taking a welding test until after they had been hired, and even hired one individual who failed the test. Respondent thus failed to administer uniformly its own hiring rules.

Respondent's anitunion animus is described in my initial Decision. I conclude that the General Counsel has established a prima facie case.

Respondent argues that even if a prima facie case has been established, it would not have hired the alleged discriminatees for reasons unconnected with their Union activities. Its reason was that Respondent used a "valid neutral hiring process". Under this process, applicants were considered in categories of preference. The highest category considered applicants who had a personal relationship with somebody else in the Company on the site. Next was an applicant recommended by a trusted employee. Further on the list was an employee transferred from another Company job site. Finally, unknown applicants were considered.

Kinchen testified that the purpose of this policy was to assure that the Company hired qualified applicants. Another motive is suggested by Kinchen's interrogation of employees concerning their Union activities, their willingness to cross a picket line, and his statement that the Union was causing him trouble. Kinchen spent time investigating the Union activities of applicants but little time investigating their credentials as employees. The practical result was to exclude 14 highly qualified applicants from employment on a project. See *D.S.E. Concrete Forms*, 303 NLRB 890, 897 (1991), enf. mem. 21 F.3d 1109 (5th Cir. 1994); *Ultasystems Western Constructors,* 310 NLRB 545, 554 (1993), affirmed in part, remanded as remedy, 18 F.3d 251 (4th Cir. 1994).

The hiring process in this case was not "neutral" in light of this result. It was in fact discriminatory, and thus cannot form the basis of a rebuttal of the General Counsel's case.

For these reasons, I reaffirm my original findings of fact, conclusions of law, and my recommended Order. [Which are omitted from publication.]

[36] Under *New Horizons*, interest is computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. §6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 281 NLRB 651 (1977).