Dial One Hoosier Heating & Air Conditioning Co., Inc. and its successor, American Residential Services of Indiana, Inc. and Sheet Metal Workers' International Association, Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL-CIO

USA Heating & Air Conditioning, Inc. and its Successor, American Residential Services of Indiana, Inc. and Sheet Metal Workers' International Association, Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL-CIO

American Residential Services of Indiana, Inc. and Sheet Metal Workers' International Association, Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL-CIO. Cases 25– CA-24178, 25-CA-24566, 25-CA-24915, 25-CA-25316, 25-CA-25611, 25-CA-25935, 25-CA-25938, and 25-CA-26351

September 29, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND KIRSANOW

This case involves allegations that, among other things, the Respondents unlawfully refused to consider and/or hire applicants because of their union affiliation. The judge found that the three Respondents, Dial One Hoosier Heating & Air Conditioning Co., Inc. (Dial One), USA Heating & Air Conditioning, Inc. (USA), and American Residential Services of Indiana, Inc. (ARS), unlawfully refused to consider and/or to hire a total of 75 applicants affiliated with Sheet Metal Workers Local 20 (the Union).¹

We agree with the judge, but only for the reasons set forth below, that Respondents Dial One and ARS unlawfully refused to hire and to consider applicants because of their union status. We reverse the judge's finding that Respondent USA violated Section 8(a)(3), concluding instead that the General Counsel failed to establish anti-union animus with respect to this Respondent. We af-

firm the rest of the judge's rulings,² findings,³ and conclusions as set forth below.

Background

The Respondents are all contractors engaged in the business of installing and servicing residential heating, ventilation, and air-conditioning (HVAC) systems. Respondents Dial One and USA were purchased by Respondent ARS in September and December 1996, respectively. Dial One operated out of Indianapolis, Indiana. ARS and USA operated out of facilities located in Indianapolis and Columbus, Indiana.

It is not disputed that during the relevant times, each of the Respondents advertised for and hired installers, service technicians (service techs), and/or helpers. Hiring advertisements were placed in local newspapers. During the relevant periods, the Respondents collectively hired a total of 135 individuals. Meanwhile, 81 applicants, who were participants in both the Union's 5-year HVAC apprenticeship program and its Youth-to-Youth program,⁴

We affirm the finding that ARS violated Sec. 8(a)(3) and (1) by unlawfully laying off employees Tom Duncan and Matt Davis because of their union activities. Unlike the judge, however, we rely only on the 8(a)(1) violations to evidence animus and not on the lawful statements made by ARS General Manager East at the January 1998 meeting.

Both 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.

As explained by the judge, Local 20 apprentices work for signatory HVAC contractors. In the third year of the apprenticeship program, the apprentice completes 102 hours of residential HVAC course work, which includes classroom instruction and practical experience. After their third year, apprentices participate in the Youth-to-Youth program, which is an organizing program established by the Union to organize nonunion employers. Apprentices participating in the Youth-to-Youth program take a leave of absence from a signatory employer to organize on behalf of the Union. The program has been fully described in prior Board cases. See *Ken Maddox Heating & Air Conditioning*, 340 NLRB 43, 49 (2003); *Sommer Awning Co.*, 332 NLRB 1318, 1322 (2000)

¹ Administrative Law Judge Bruce D. Rosenstein issued the attached decision on January 16, 2001. The Respondent filed exceptions and a supporting brief; the General Counsel filed limited exceptions, a supporting brief and an answering brief; and the Charging Party filed an answering brief.

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

The Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

² We reject, for the reasons stated by the judge, the Respondents' argument that the discriminatees should not have been permitted to testify because the Union reimbursed them for fees and mileage associated with their attendance at the hearing. No Board rule or regulation prohibits third-party reimbursement of witnesses' out-of-pocket expenses.

³ We affirm, for the reasons explained by the judge, the finding that Respondent ARS violated Sec. 8(a)(1) of the Act by unlawfully instructing employees not to discuss the Union, by prohibiting employees from wearing union hats and insignia at work, and by threatening employees with unspecified reprisals or termination if they discussed the Union. We also affirm, for the reasons stated, the judge's findings that Dial One did not unlawfully change its hiring policies in 1995 and that statements made by ARS General Manager Tom East at a January 1998 employee meeting did not interfere with the employees' Sec. 7 rights.

submitted employment applications reflecting their union affiliations, but were not hired.⁵

Dial One

Dial One publicly advertised for installers, service techs, and helpers from April 1995 through April 1996. During that time and continuing through August 1996, Dial One hired 39 applicants, including 10 installers, 3 service techs, 25 helpers, and 1 building maintenance employee. None of the applicants who were hired indicated that they were union members or supporters. During this same period of time, 27 union members, who openly indicated their union status, submitted employment applications but were neither hired nor given employment interviews.

Of the eight ads placed by Dial One during the relevant period, only one—an ad specifically seeking "commercial service, technicians and installers, with 3–5 years experience"—listed a minimum hiring requirement. Ads placed for the positions of "entry level residential and new construction installers" and helpers did not state any minimum qualifications. Of the 13 persons Dial One hired as "experienced" installers or service techs, 5 (or almost 40 percent) did not have 3 years' experience. Fourteen of the union applicants had more experience than these five installers and service techs, and most had significantly more experience than the applicants who were hired into the entry level installer and helper positions.

A Dial One manager testified that, "all things being equal," preference was given to applicants referred by current employees. Of the 13 installers and service techs hired by Dial One during the relevant time period, however, 6 (or 46 percent)—including all 5 installers or service techs hired with less than 3 years' experience—were hired without an employee referral. Similarly, of the 25 persons hired as helpers, 13 (52 percent) did not have an employee referral.

Dial One representatives testified that they preferred applicants who were likely to remain in their employment for a long period of time, and the Company's application forms specifically asked whether applicants sought "full-time, part-time, temporary [and/or] seasonal" employment. All of the union applicants indicated that they were interested in full-time positions. Meanwhile, employee turnover during 1995 and 1996 was high—between 25 and 40 percent—leading Dial

One to offer bonuses to new hires who remained longer than 90 days.

At the hearing, Dial One's hiring managers, John Marod and Roger Elkins, admitted that they did not interview or hire *any* union applicants because, according to them, it was general knowledge "in the business" that union applicants would be short-term employees who "were going to go back to the Union at some time." Neither, however, testified to knowing anything about the Union's "Youth to Youth" program or about whether any of the union applicants were participants in the program.

USA

USA generally had two installers and five service techs in its employee complement, plus a fluctuating number of helpers. On October 21, 1996, and again on November 10, 1996, USA ran newspaper advertisements for installers with 3 years' experience. Two applicants were hired during this time, one (hired November 7) as an installer and the other (hired November 15) as a helper. Between October 21 and November 15, USA received applications from 17 union applicants who openly admitted their union status. None of these applicants was given an interview or hired. Most of the union applicants had 3 or more years' experience in HVAC or sheet metal installation. The nonunion individual hired as an installer had 6 years' experience. The helper, a covert union salt, had no experience.

USA did not give any hiring preference to applicants referred by current employees. The hiring manager testified instead that he would look at "past employment history, construction aptitude, just general knowledge of construction industry and remodeling industry." He noted that sometimes union members came in as a group to apply for jobs and were loud and disruptive so that "it just didn't seem like they were sincere about gaining employment with our Company." He admitted that USA preferred to remain nonunion and also stated that it was a "general consensus" among contractors that union applicants were not qualified to be installers although he was "sure there were some" union organizers who were qualified. He denied that union status was a factor in deciding whether to hire a qualified applicant.

ARS

ARS operated two Indiana facilities, one in Indianapolis and the other in Columbus. Separate managers made hiring decisions for each facility from applications forwarded by the Company's human resources department. Between March 1997 and July 1998, ARS advertised for service techs, installers, and helpers. During that time ARS hired 92 HVAC employees, 33 as installers or ser-

⁵ Each of the three Respondents hired at least one covert union applicant during the relevant time frames.

⁶ The judge inadvertedly stated that 41 employees were hired by Dial One during this period.

vice techs and 59 as helpers. None of the applicants hired, including the two covert union salts Tom Duncan and Matt Davis, indicated any union affiliation. During this same period, 36 union members applied who openly identified their union status. None of these overt union applicants were hired.

The record does not clearly establish what kind or level of experience ARS required for installers and service techs. Advertisements placed by ARS variously indicated that it was hiring service techs and installers for which it "prefer[s] min. 3 yrs. exp. in residential and light commercial"; service techs with "5 years experience"; service techs with "5 years residential/light commercial experience"; and lead installers with "min. 3 yrs. res. exp." Some ads specified that experience in residential HVAC was necessary. Most ads, however, indicated that experience in "residential & light commercial" or "residential/light commercial" was sought. Judy Curry, the branch manager at the Columbus facility, who controlled which applications received at that location would be forwarded to the human resources department for further consideration, testified that she looked for a minimum of 5 years' experience for installers and 3 years for service techs without indicating whether this experience had to be residential. By contrast, both installation managers who reviewed the forwarded applications and made the final hiring decisions testified that they looked for 3 or more years of residential experience for installer positions.⁸ There was universal agreement, however, that finding experienced and qualified installers and service techs was "very difficult."

The expectations for helpers and apprentices were similarly inconsistent. Some ads stated a preference for "high school diploma or equivalent" with "HVAC exp[erience] or vocational school background a plus." Others indicated that "helper" applicants should have "some experience." Although Installation Manager Elkins testified that helpers did not need any prior HVAC

experience, Curry (the gatekeeper at the Columbus location) testified that she expected helpers to have 1 year's experience in the field.

Of the 33 nonunion installers and service techs hired by ARS during the relevant period, 18 (55 percent) had less than 5 years' experience; 8 (or 24 percent of the 33 hired) had less than 3 years' experience, and 3 had less than 6 months' experience. Of the 59 helpers hired, 43 (73 percent) had neither experience in the field nor a vocational school background. By contrast, all of the union applicants had at least 2 years' experience; most had more than 3 years' experience and HVAC technical college courses.

ARS's human resources department did not forward the applications of any of the union applicants to the installation and service managers who were responsible for hiring employees. No one from the human resources department testified to explain why the applications were not forwarded. The uncontested evidence does show, however, that Curry told three union applicants who filed applications in October 1997 that the company was a growing one with a heavy work backlog and that positions were available at the Columbus location. The advertisements to which these three union applicants were responding stated that ARS was accepting applications for "HVAC Service Techs" and "HVAC Crew Leaders—to work new construction/replacement" for which it "[p]refer[s] min. 3 yrs experience in residential & light commercial," and for "HVAC Apprentices" for which "HVAC exp. or vocational school background [is] a plus." One of the union applicants had 10 years' experience in the sheet metal industry with experience in over 100 residential buildings; another had 5 years' experience in commercial fabrication and installation; and the third had over 3 years' experience in sheet metal work including commercial installation. Significantly, after the applicants revealed their union status, Curry and ARS Human Resource Director Dewanna Mooneyham told one of the applicants, Travis Dick, that the company was looking *only* for entry level people. Dick replied that he would accept an entry level job. Each of the three applicants continued to contact ARS about their applications and job availability over the next few months. Dick and one of the other two union applicants reapplied for jobs in December in response to a second advertisement again seeking techs and installers with a "prefer[red] min 3 years residential experience" and HVAC apprentices with "HVAC exp. or vocational school background a plus." None of the three union applicants was hired even for the entry-level apprentice positions. Meanwhile, in the period from October to March 1998, ARS hired 10 helpers, all of whom had significantly less experience

⁷ An additional person was hired as a warehouse helper.

⁸ The evidence as to whether commercial HVAC experience was considered equivalent to residential experience also is equivocal. Roger Elkins, the installation department manager, testified that there were "very, very few" similarities between residential and commercial installations. On the other hand, Bradlee Jellison, the service department manager responsible for hiring service techs, testified that "[t]ypically commercial is a little more complicated. A lot more controls than you would have on a residential system. So, what you usually find is someone who has done commercial repair or maintenance or diagnosis, who has no problem acclimating to the residential side of doing the repairs and commercial diagnosis problems." Mark Flaskamp, Elkin's successor as installation department manager, testified that while experience in commercial sheet metal installation was insufficient, experience in "light commercial" installation was comparable to residential work

and 5 of whom had neither experience nor vocational school background.⁹

ARS managers testified that they generally gave preference, particularly for helper positions, to applicants who had employee referrals. Yet, 41 (or 44 percent) of the 93 applicants hired by ARS during the relevant time period did not have employee references. And, of the 59 helpers hired, 21 (37 percent) did not have an employee reference.¹⁰

Like Dial One, ARS gave bonuses to new hires who remained for at least 90 days. Elkins testified that he looked for applicants who were likely to stay and be long-term employees and that he could not recall ever hiring or interviewing a union applicant because he thought union applicants would not stay working long. Elkins' successor Jellison admitted, however, that he never knew how long an applicant intended to remain with the Company. Neither Elkins, Jellison, nor any other ARS representative testified to being familiar with the Union's "Youth-to-Youth" program or to knowing whether the union applicants were participants in the program.

Discussion

In refusal-to-hire cases, the General Counsel must establish "(1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants." FES, 331 NLRB 9, 12 (2000), affd. 301 F.3d 83 (3d Cir. 2002). "Once the General Counsel has met this burden, the employer must show that it would have made the same hiring decisions even absent the applicants' union affiliation." Jesco, Inc., 347 NLRB 903, 905 (2006) (citing FES, supra).

Regarding discriminatory refusals to consider for hire, the Board's test requires the General Counsel to shoulder the initial "burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not

have considered the applicants even in the absence of their union activity or affiliation. If the respondent fails to meet its burden, then a violation of Section 8(a)(3) is established." *FES*, supra.

I. THE GENERAL COUNSEL'S CASE

We find that the General Counsel readily met his burden under the first *FES* "refusal to hire" criterion with respect to all three Respondents, since it is undisputed that each of the Respondents was hiring and hired applicants at the time that the union applicants were rejected. On the second *FES* criterion, although we agree with the judge that the General Counsel met his evidentiary burden with respect to Respondents Dial One and ARS, we do so for different reasons.

The judge reviewed each applicant's relevant experience and qualifications, undertaking a lengthy evaluation and comparison of qualifications between the union applicants and the nonunion applicants who were hired. Thus, he found, for example, that certain groups of applicants "possess[ed] excellent credentials," "show[ed] good experience," "ha[d] minimal qualifications in HVAC," and "ha[d] little or no experience." We find it unnecessary to rely on the judge's comparative analysis. For, notwithstanding the qualifications and hiring preferences Respondents Dial One and ARS claimed to apply, the record establishes that each of those Respondents "has not adhered uniformly to such requirements [and that] the requirements were . . . applied as a pretext for discrimination." *FES*, supra at 12. ¹¹

The Respondents contend that the minimum experience requirement for installers and service techs was 3-years' residential HVAC field experience. The record does not support this contention. Dial One had no announced experience requirements at all, except for one advertisement stating a 3-to 5-year experience requirement, and that advertisement did not specify residential experience. And, as indicated above, the evidence concerning ARS's asserted experience requirements is so inconsistent that it would be a stretch to conclude that it actually had any "minimum" requirements.

But even assuming that the Respondents did require 3-years' HVAC experience for installers and service techs, both Dial One and ARS deviated substantially from that requirement when hiring nonunion applicants. Of the 13 nonunion installers and service techs Dial One hired, 5 (39 percent) failed to meet that standard. Similarly, eight (or 24 percent) of the nonunion applicants hired by ARS

⁹ ARS also hired three service techs who applied during this period. Their experience ranged from 2 to 6 years.

¹⁰ Fifteen of these helpers (25 percent of those hired) lacked both a referral and any experience.

¹¹ There is no evidence that USA deviated from its announced experience requirements. Because, as discussed below, we find that the General Counsel did not meet his burden of showing antiunion animus on USA's part, we do not reach the question of whether the second *FES* criterion was established with regard to USA.

for such positions were not shown to meet the 3-year standard. Accordingly, we find that the General Counsel has shown that neither Respondent "adhered uniformly" to the purported 3-year experience requirement. Moreover, given the extent to which Dial One and ARS departed from their claimed standards, we further find that their reliance on these threshold qualifiers to argue that the union applicants were unqualified for the installer and service tech positions evidences that those standards were "applied as a pretext for discrimination." ¹²

With respect to Dial One and ARS, we also agree with the judge that the General Counsel established that antiunion animus was a motivating factor in the Respondents' refusals to hire the union applicants. Dial One managers conceded that they categorically rejected all union applicants based *solely* on their union status and on their unsupported belief that union applicants would be short-term employees.¹³ In the case of ARS, animus is established by the various 8(a)(1) violations committed by company supervisors, including Curry, the gatekeeper for applications at the Columbus location, and by the discriminatory layoffs of the two covert union organizers, again by Curry, after they openly acknowledged their union status. As the judge further found, ARS's human resource managers did not forward the applications of any known union applicants to the operational managers responsible for doing the hiring and on several occasions pointedly deflected applicants once their union status was revealed. The substantial disregard by both Dial One and ARS of their own stated experience qualifications policies, as described above, also supports a finding of animus. See Jesco, Inc., supra at 905-906; American Residential Services of Indiana, 345 NLRB 995, 997-998 (2005).

We cannot conclude, however, that the General Counsel established animus where USA is concerned. There is no direct evidence of antiunion sentiment by USA representatives, and we do not find sufficient circumstantial evidence to establish the threshold showing. Although none of the overt union applicants was hired, there is no clear indication, unlike with Dial One and ARS, that union applicants were categorically rejected because of their union status. "Mere knowledge that a pool of applicants is union affiliated and the subsequent failure to hire any of them is insufficient to support a finding of ani-

mus." E & I Specialists, Inc., 349 NLRB 446, 450 (2007). The vague testimony by a USA manager that union applicants were generally considered less qualified in the industry, absent more, is in our view too insubstantial to establish animus. The same is true with respect to the testimony that USA "preferred" to remain a nonunion company. Id. Accordingly, we dismiss the complaint allegations against USA.¹⁴

II. THE RESPONDENTS' DEFENSES

The question remains whether Respondents Dial One and ARS met their burden to show that they would have made the same hiring choices even if they had not considered the applicants' union status. We conclude, as did the judge, that neither Respondent met this burden.

As a preliminary matter, both Respondents argue that the union salts were not "bona fide applicants" within the Act's protection because they were not legitimately seeking employment but only sought to file unfair labor practice charges in support of the union's organizing campaign. In this case, however, no evidence supports this argument. Indeed, if anything, the evidence establishes

Contrary to her colleagues, Member Liebman would find animus on the part of USA based on the statements made by USA representatives disparaging union applicants generally and the Respondent's unexplained failure to consider or interview any of the overt union applicants who met the minimum stated qualifications and applied before the one installer and the one helper (a covert union salt) were hired. *Fluor Daniel III*, 333 NLRB 427, 440 fn. 77 (2001), enfd. in relevant part 332 F.3d 961 (6th Cir. 2003), cert. denied 543 U.S. 1089 (2005) ("the failure to communicate with qualified applicants with union affiliation constitutes evidence of unlawful motive"); *Kaminski Electric & Service Co.*, 332 NLRB 452 (2000) (antiunion animus demonstrated by, inter alia, the refusal to consider union applicants).

Member Liebman also would reverse the judge and find that Sec. 10(b) did not bar the allegations concerning the six union applicants. While these six applicants filed their initial applications outside of the 10(b) period, it was not until well within that period that any of the six received clear and unequivocal notice that their applications were being unlawfully rejected. Even then, only three of the applicants were ever told explicitly that another applicant had been hired for the posted jobs. Within the 10(b) period, each of the six contacted USA and was falsely told that his application was still being reviewed and/or that a representative of the company would be in further contact (further indicating animus). Four of the six also submitted second applications within that time. See *Nelcorp*, 332 NLRB 179, 179 fn. 3, 191 (2000); *Great Lakes Chemical Corp.*, 298 NLRB 615 (1990).

In view of USA's failure to show that it would have rejected the union applicants for the helper position even absent their union affiliation, Member Liebman would find that USA acted unlawfully in that respect. In the absence of exceptions, Member Liebman would affirm the judge's finding that USA would have hired the same nonunion installer even absent the other applicants' union affiliations and that its rejection of union applicants for that position therefore was not unlawful.

¹² In the case of ARS, this conclusion is further buttressed by the fact that it hired completely inexperienced nonunion applicants in lieu of experienced union applicants with HVAC experience for "helper" positions that were advertised as preferring "some experience."

¹³ Chairman Battista agrees that the General Counsel established antiunion animus as a motivating factor based solely on the managers' categorical rejection of all union applicants.

¹⁴ In light of our decision, we find it unnecessary to decide whether the judge appropriately found that Sec. 10(b) barred the complaint allegations concerning six other union applicants—Michael J. Gough, Keith A. Beatty, John A. Carman, Dorian J. Wilson, Kenneth R. Brandon, and Kenneth E. Miller—who were denied employment by USA.

otherwise. The 80 union applicants who testified at the hearing¹⁵ stated unequivocally that they would have accepted a position if one had been offered. Each of the applicants personally filed employment applications, and a number explicitly reiterated their interest in employment with followup communications and applications.¹⁶

Respondents Dial One and ARS also argue that the applicants they hired were either better qualified than the union applicants and/or eligible for the hiring preference given to applicants referred by current employees. We find that the Respondents have failed to make the necessary showing on both counts. In the first place, as discussed above, the Respondents failed to uniformly apply their stated hiring standards and preferences. Thus, when hiring applicants for installer and service tech positions. both Dial One and ARS hired a sizeable number of nonunion applicants who did not meet these stated threshold qualifications. See Jesco, Inc., supra at 907 ("Where an employer departs from such a policy in a sufficient number of instances, however, it cannot carry its rebuttal burden by relying on the policy."); Fluor Daniel v. NLRB, 332 F.3d 961, 971 (6th Cir. 2003), enfg. 333 NLRB 427 (2001). Given that the Respondents' assertion that they did not hire union applicants based on their inferior qualifications was belied by their actual hiring decisions and in that sense was pretextual, the Respondents did not establish this defense. For similar reasons, the Respondents' purported reliance on an "employee referral" preference fails. As shown above, both Respondents hired a substantial number of nonunion applicants without such referrals while excluding union applicants. Moreover, there is no evidence that the Respondents ever informed the union applicants of this policy or that they were not being hired because they lacked such employee referrals. Beacon Electric Co., 350 NLRB 238, 242 (2007).

We also reject as pretextual the Respondents' argument that they lawfully rejected the union applicants because they were not likely to stay longer than 6 months. In support, the Respondents point to the applicants' participation in the Union's Youth-to-Youth organizing program. However, none of the Respondents' representa-

tives responsible for making the hiring decisions evidenced any knowledge of the Youth-to-Youth program or whether any of the union applicants were participants in this program. We also agree with the judge that the Respondents' willingness to offer bonuses to new hires who remained longer than 90 days undermines any claim that union members who might stay only 6 months were automatically unacceptable.

Because Respondents Dial One and ARS have failed to establish that they would not have hired the discriminatees even absent their union affiliation, we affirm the judge's finding that both Respondents violated Section 8(a)(3) and (1) of the Act by failing and refusing to hire those applicants.¹⁸

AMENDED REMEDY

Having found that Respondents Dial One and ARS discriminatorily refused to hire the overt union salts, we

¹⁸ We affirm the judge's finding that Respondents ARS and Dial One also unlawfully refused to consider the discriminatees for hire.

In his conclusions of law and recommended Order, the judge found the three Respondents jointly and severally liable for refusing to hire all the discriminatees. We amend this finding to find Respondent Dial One liable solely for the violations it engaged in individually. However, we affirm the judge's finding that ARS is a Golden State successor to Dial One. Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973); S. Bent & Bros., 336 NLRB 788, 790 (2001). Thus, as the judge found, ARS stipulated that prior to purchasing each of the other two Respondents, it was "put on notice of [each Respondent's] potential liability for its alleged failure to hire and consider for hire applicants who were members of the Charging Party and for other alleged unfair labor practices, as subsequently set forth in the Consolidated Complaint." It is also undisputed that ARS continued to operate Dial One basically in unchanged form with a majority of Dial One's former employees. Accordingly, Respondent ARS is appropriately liable for both its own violations and, jointly and severally with Dial One, for Dial One's unlawful refusal to hire and to consider union applicants.

Although the Respondents except to the judge's finding that ARS is a *Golden State* successor on the ground that they did not admit that status, they fail to cite any supporting authority or make any other argument for reversing the judge's findings. Pursuant to Sec. 102.46(b)(2) of the Board's Rules and Regulations, we find that these exceptions should be disregarded. See, e.g., *New Concept Solutions, LLC*, 349 NLRB 1136, 1136 fn. 2 (2007).

All complaint allegations against Respondent USA are dismissed for the reasons previously stated.

¹⁵ The remaining union applicant did not testify at the hearing

¹⁶ We also reject Respondents' additional argument that union applicants cannot be bona fide applicants because their status as union organizers creates an irreconcilable conflict of interest with their status as employees. See *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995); *Sommer Awning Co.*, 332 NLRB 1318, 1327 (2000).

Member Liebman observes that the Board has consistently held that applicants do not lose the protection of the Act merely because they might also be planning to file unfair labor practice charges if they are discriminated against in the hiring process (as happened here). *M. J. Mechanical Services*, 324 NLRB 812, 813 (1997).

¹⁷ The fact that we found that Respondent ARS met its burden by establishing a policy against short-term hires in an earlier decision is not controlling here. *American Residential Services*, 345 NLRB 995 (2005). Our decision in that case was premised on specific record evidence—not present here—showing that the hiring manager not only was aware of the specifics and potential impact of the Youth-to-Youth program on the union applicants' job tenure prospects but also factored this into his decisions, that ARS made a significant financial investment in training new hires (again, a fact not in evidence here), and that it had a set policy of preferring to hire individuals with long-term employment prospects. Id., slip op. at 3–4. Although the *American Residential Services* decision issued in September 2005, the events at issue there occurred more than a year *after* the last incident in this case, and the trial in that case was held 6 months after the trial here.

shall order the Respondents to offer to instate or reinstate the discriminatees and to make them whole for the unlawful conduct against them. Likewise, having unlawfully laid off Tom Duncan and Matt Davis, ARS must offer to reinstate them and make them whole for the unlawful layoffs. The duration of the salts' backpay period shall be determined in accordance with *Oil Capitol Sheet Metal*, 349 NLRB 1348 (2007). Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Description of the Retarded, 283 NLRB 1173 (1987).

ORDER²¹

- A. The National Labor Relations Board orders that the Respondent, American Residential Services of Indiana, Inc., Indianapolis and Columbus, Indiana, its officers, agents, successors, and assigns, shall
 - 1. Cease and desist from
- (a) Instructing its employees not to discuss the Union with other employees at any time or on the job; prohibiting its employees from wearing union hats or other union insignia at work; and threatening employees with un-

¹⁹ Member Liebman dissented in relevant part in *Oil Capitol*. See above at slip op. 10, et seq. Regarding the present proceeding, she recognizes that the majority view in *Oil Capitol* is current Board law, and accordingly, for institutional reasons only, approves its application in compliance.

²⁰ While our Order herein provides for instatement, the instatement award is subject to defeasance if, at the compliance stage, the General Counsel fails to demonstrate that the discriminatees would still be employed by the Respondent if they had not been the victims of discrimination. *Oil Capitol Sheet Metal*, supra, slip op. at 7.

In light of our instatement and backpay order for the salts, we shall, except for the two individuals listed below, delete from the recommended Order the remedy for the Respondent's failure to consider them for employment. Jobsite Staffing, 340 NLRB 332, 333 (2003) ("[W]hen both a refusal-to-hire and a refusal-to-consider for hire violation are found regarding the same applicant and an instatement and backpay remedy is ordered for the refusal-to-hire violation, the remedy for the refusal-to-consider violation is subsumed by the broader refusal-to-hire remedy."). The two exceptions are union applicants Gregory L. Wilson and Ryan O. Witham, who both applied for positions with Dial One on August 5, 1996. The record discloses that Dial One hired only one applicant after that date. Accordingly, we find that only one opening existed for these two discriminatees. We shall leave to compliance the task of determining which of the two would have been hired by Dial One in the absence of discrimination. That individual will receive an instatement and backpay remedy; the other will receive a refusal-toconsider remedy. See FES. 331 NLRB at 14.

²¹ We shall modify the judge's recommended Order in accordance with our decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). Additionally, we find merit in the General Counsel's exceptions and shall include in the notice the names of the discriminatees and language pertaining to the expungement remedy. Finally, we shall substitute a new notice pursuant to *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

specified reprisals or termination if they discuss the Union with other employees.

- (b) Refusing to hire or to consider for hire job applicants because they participated in the Union's organizing program or because of their union affiliation.
- (c) Laying off or otherwise discriminating against employees because they participated in the Union's organizing program or because of their union affiliation.
- (d) 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 Spencer Irving III, Bruce Manley, James S. Snodgrass, Tony Turner, Timothy Williamson, James L. Wilson, Kevin Bireley, Jason W. Ellis, Eric Harris, Christopher H. Meyers, Charles W. Miller, Jason Wildrick, Brian Campbell, Kerry Bowling, Robert Gandy, M. John Maynard, Chris Carson, Mark Chittum, Tim Choate, Stony Miley, Cory Stein, Charles Baldwin, Monty Shoulders, Michael Crull, Travis Dick, Jeffrey Higgins, Samuel D. Holland, Wm. Gary Rogers, Dennis Wheeler, Mark Moran, Daniel Steward, Charles Parsley, Steve Harris, William L. Hopkins, Bryan Jones, Kelley Boesken, and Trent Todd instatement in positions for which they applied or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights and privileges; if necessary terminating the service of employees hired in their stead.
- (b) Make whole all those individuals identified in subparagraph (a) above, in the manner described in the amended remedy section of this Decision.
- (c) Within 14 days from the date of this Order, offer Tom Duncan and Matt Davis full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
- (d) Make whole Tom Duncan and Matt Davis in the manner described in the amended remedy section of this Decision.
- (e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire or consider for hire the individuals listed in subparagraph (a) above and to the unlawful layoffs of Tom Duncan and Matt Davis, and within 3 days thereafter notify in writing all of the individuals referenced in this subparagraph that this has been done and that the unlawful conduct will not be used against them in any way.
- (f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for

good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

- (g) Within 14 days after service by the Region, post at its facilities in Columbus and Indianapolis, Indiana, copies of the attached notice marked "Appendix A."²² 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 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 facilities 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 March 28, 1997.
- (h) 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.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges a violation of the Act not specifically found.

- B. The National Labor Relations Board orders that the Respondent, Dial One Hoosier Heating & Air Conditioning Co., Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall
 - 1. Cease and desist from
- (a) Refusing to hire or consider for hire job applicants because they participated in the Union's organizing program or because of their union affiliation.
- (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges a violation of the Act not specifically found.

- C. The National Labor Relations Board orders that the Respondents, Dial One Hoosier Heating & Air Conditioning Co., Inc., Indianapolis, Indiana, and American Residential Services of Indiana, Inc., Indianapolis, Indiana, jointly and severally, together with their officers, agents, successors, and assigns, shall take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of this Order, offer Gabriel Brooking, Jason McKinney, Tyrone Moore, Aaron Dailey, James Santacroce Jr., Aaron Young, Stephen M. Hill, Kenneth D. Walden, Ronald L. Cornwell, Brady Piercefield, George R. Sears, Robert Sharp, Don A. Campbell, Lloyd T. Campbell, Eric J. Edwards, Darlene J. Haemmerle, Kevin A. Hechinger, Keith A. Peacher, Ryan M. Striby, Frank J. Sullivan II, Thomas W. Akers II, Thomas R. Freeman, Craig A. Gruell, Steven J. Reintjes, and Joseph Slinker Jr. instatement in positions for which they applied or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights and privileges; if necessary terminating the service of employees hired in their stead.
- (b) Make whole all those individuals identified in subparagraph (a) above, in the manner described in the amended remedy section of this Decision.
- (c) Offer instatement to the one discriminatee from the following list who is identified in the compliance stage of this proceeding as the discriminatee who would have been hired, in the position for which he applied or, if such position no longer exists, in a substantially equivalent position, without prejudice to his seniority or any other rights and privileges; if necessary terminating the service of any employee hired in his stead: Gregory L. Wilson, Ryan O. Witham.
- (d) Make whole the individual identified in subparagraph (c) above, in the manner described in the amended remedy section of this Decision.
- (e) Consider, in accordance with nondiscriminatory criteria, the remaining discriminatee identified in subparagraph (c) above for future job openings that arise, and notify the discriminatee, the Charging Party, and the Regional Director of such openings in positions for which the discriminatee applied or substantially equivalent positions.
- (f) Within 14 days from the date of this Order, remove from their files any reference to the unlawful refusals to hire or consider for hire of the individuals listed in subparagraphs (a) and (c) above, and within 3 days thereafter notify the employees in writing that this has been done and that the unlawful actions will not be used against them in any way.
- (g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated as the reasonable place.

²² 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."

nated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at the Respondents' Indianapolis, Indiana facility, copies of the attached notice marked "Appendix B."23 Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondents' authorized representative, shall be posted by the Respondents 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 Respondents 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 Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at their Indianapolis facility at any time since April 3, 1995.

(i) 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 Respondents have taken to comply.

APPENDIX A

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT instruct our employees not to discuss the Union with other employees.

WE WILL NOT instruct our employees not to talk about the Union on the job.

WE WILL NOT prohibit our employees from wearing union hats or other union insignia at work.

WE WILL NOT instruct our employees to remove their union hats.

WE WILL NOT threaten our employees with unspecified reprisals or termination if they discuss the subject of the Union with other employees.

WE WILL NOT discourage membership in Sheet Metal Workers' International Association, Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL–CIO, or in any other labor organization, by laying off employees or refusing to hire or consider applicants for employment because of their union sympathies.

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

WE WILL, within 14 days from the date of the Board's Order, offer Tom Duncan and Matt Davis full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Tom Duncan and Matt Davis whole for any loss of earnings and other benefits that they have suffered as a result of their unlawful layoffs, less any net interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, offer instatement to Spencer Irving III, Bruce Manley, James S. Snodgrass, Tony Turner, Timothy Williamson, James L. Wilson, Kevin Bireley, Jason W. Ellis, Eric Harris, Christopher H. Meyers, Charles W. Miller, Jason Wildrick, Brian Campbell, Kerry Bowling, Robert Gandy, M. John Maynard, Chris Carson, Mark Chittum, Tim Choate, Stony Miley, Cory Stein, Charles Baldwin, Monty Shoulders, Michael Crull, Travis Dick, Jeffrey Higgins, Samuel D. Holland, Wm. Gary Rogers, Dennis Wheeler, Mark Moran, Daniel Steward, Charles Parsley, Steve Harris, William L. Hopkins, Bryan Jones, Kelley Boesken, and Trent Todd in positions for which they applied or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights and privileges; if necessary terminating the service of employees hired in their place.

WE WILL make the individuals named above whole for any loss of earnings and other benefits that they have suffered as a result of our unlawful refusal to hire them, less any net interim earnings, plus interest.

²³ 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."

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful layoffs and refusals to hire or to consider for employment the named individuals, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that our unlawful conduct will not be used against them in any way.

AMERICAN RESIDENTIAL SERVICES OF INDIANA, INC.

APPENDIX B

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT discourage membership in Sheet Metal Workers' International Association, Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL—CIO, or in any other labor organization, by refusing to hire or consider applicants for employment because of their union sympathies.

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

WE WILL, within 14 days from the date of the Board's Order, offer instatement to Gabriel Brooking, Jason McKinney, Tyrone Moore, Aaron Dailey, James Santacroce Jr., Aaron Young, Stephen M. Hill, Kenneth D. Walden, Ronald L. Cornwell, Brady Piercefield, George R. Sears, Robert Sharp, Don A. Campbell, Lloyd T. Campbell, Eric J. Edwards, Darlene J. Haemmerle, Kevin A. Hechinger, Keith A. Peacher, Ryan M. Striby, Frank J. Sullivan II, Thomas W. Akers II, Thomas R. Freeman, Craig A. Gruell, Steven J. Reintjes, and Joseph Slinker Jr. in positions for which they applied or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights and privileges; if necessary terminating the service of employees hired in their place.

WE WILL offer instatement to the one discriminatee from the following list who is identified in the compliance stage of this proceeding as the discriminatee who would have been hired, in the position for which he applied or, if that position no longer exists, in a substantially equivalent position, without prejudice to his seniority or any other rights and privileges; if necessary terminating the service of any employee hired in his place: Gregory L. Wilson and Ryan O. Witham.

WE WILL make either Gregory L. Wilson or Ryan O. Witham and the remaining individuals named above whole for any loss of earnings and other benefits that they have suffered as a result of Dial One's unlawful refusal to hire them, less any net interim earnings, plus interest.

WE WILL consider, in accordance with nondiscriminatory criteria, the remaining discriminatee named above for future job openings that arise, and notify him, the Union, and the Board's Regional Director of such openings in positions for which the discriminatee applied or substantially equivalent positions.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful refusals to hire or to consider for employment the named individuals, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that our unlawful conduct will not be used against them in any way.

DIAL ONE HOOSIER HEATING & AIR CONDITIONING CO., INC.

AMERICAN RESIDENTIAL SERVICES OF INDIANA, INC.

Steve Robles, Esq. and Raifael W. Williams, Esq., for the General Counsel.

Todd M. Nierman, Esq. and *Philip J. Gibbons Jr.*, of Indianapolis, Indiana, for the Respondent-Employer.

Neil E. Gath, Esq., of Indianapolis, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on March 6–10, April 24–27, May 1–4, 30, and 31, and June 1, 2000, in Indianapolis, Indiana, pursuant to a consolidated complaint and notice of hearing (the complaint) issued by the Acting Regional Director for Region 25 of the National Labor Relations Board (the Board) on September 29, 1999. The complaint, based on original and amended charges in the above-noted cases, filed on various dates between August 31, 1995, and September 27, 1999, by Sheet Metal Workers' International Association, Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL–CIO (Charging Party

or Union), alleges that Dial One Hoosier Heating & Air Conditioning Co., Inc., and its Successor, American Residential Services of Indiana, Inc. (Respondent Dial One or Dial One), USA Heating & Air Conditioning, Inc., and its Successor, American Residential Services of Indiana, Inc. (Respondent USA or USA) and American Residential Services of Indiana, Inc. (Respondent ARS, ARS, or collectively as Respondents), has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (Act). The Respondents filed timely original and amended answers to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that between April 1995 and July 1998, the Respondents violated Section 8(a)(1) and (3) of the Act by refusing to hire or consider for hire 85 union organizers who overtly applied for employment, and discharged two covert "salts." Matt Davis and Tom Duncan, after they announced their union affiliation. Additionally, the complaint alleges that Respondents violated Section 8(a)(1) of the Act by instructing employees not to talk about the Union on the job, prohibited employees from wearing union hats or insignia and threatened employees with discharge and other reprisals if they talked about the Union. Also, the complaint further alleges additional 8(a)(1) and (3) violations when the Respondents changed their hiring policies by giving preferential consideration to employee-referred employment applicants, by reducing its application retention period to 30 days and requiring applicants to apply at Respondent ARS' main Indianapolis office rather than individual locations.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondents are corporations engaged in the installation, service, and repair of heating, ventilating, and airconditioning systems (HVAC), with a number of offices located in Indiana, where they annually purchase and receive goods valued in excess of \$50,000 directly from points outside the State of Indiana. The Respondents admit and I find that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

In September and December 1996, Respondent ARS pur-

chased the assets of Respondent Dial One and Respondent USA and since then has continued to operate both enterprises in basically unchanged form, and has employed as a majority of its employees individuals who were previously employed at both entities. Respondent ARS admits and I find that it has continued both employing entities and is a successor to Respondent Dial One and Respondent USA.

At all material times, Respondents management team is comprised of the following individuals. Tom Wells served as chief financial officer, John Marod and Tom East held the position of general manager, Roger Wilkins was an operations supervisor, Judy Curry and Dewanna Mooneyham served as human resource managers, and Steve Dantzinger held the position of production manager.

A. Facts

1. The youth-to-youth program

In July 1990, the Union established the Youth-to-Youth program to assist its efforts in organizing nonunion employers in its jurisdictional area. The program requires every individual enrolled in the Union's 5-year-apprenticeship program to take a leave of absence from their current signatory employer in order to work for approximately 6 months as a paid organizer for the Union.² As an employee of the Union, an organizer is paid the same hourly wage that he/she receives as an apprentice under the pertinent collective-bargaining agreement, plus the hourly wage paid by the nonunion employer, if he/she is successful in obtaining employment with such a company. Under the Youthto-Youth program, organizers are required to continuously seek employment with nonunion contractors. Once hired by a nonunion employer, the organizers are instructed to work hard, do a good job, and inform their coworkers during nonworking hours about the benefits of belonging to the Union. In addition, the organizers are required to complete "job application reports" each time they apply for a job with a non-union contractor and a "call-back log sheet" when an organizer checks on the status of his/her application noting any conversations that take place with representatives of the nonunion company.

Organizers can apply for employment either overtly or covertly. When applying overtly, the organizer typically wears a union hat, T-shirt, or other union insignia, applies in a group of two or three individuals, and submits an employment application and resume that reflects his/her union affiliation and apprenticeship. When applying covertly, the organizer wears nothing to identify his/her union membership, applies alone, and conceals his/her union apprenticeship from the prospective

¹ During the hearing, the General Counsel requested that alleged discriminatees' Peter Williams, Anthony W. Smith, and Charles K. Clark be removed from par. 6(d) of the complaint, and that Dale Davis, be removed from par. 6(f) of the complaint. Accordingly, the subject complaint now involves the Respondents refusal to consider or hire 81 overt applicants for employment.

² In accordance with the pertinent collective-bargaining agreement, an apprentice leaves his job with the signatory contractor to work for the Union and, in most cases, returns to his/her job with the same signatory contractor after 6 months. Representatives of the Union coordinate with the signatory contractor, often in writing to schedule an apprentice for the required leave of absence and the return to work. The apprentice normally completes 3 years of his/her apprenticeship before entering the Youth-to-Youth program. In the third year of the apprenticeship program, they complete 102 hours of course work in residential heating and air conditioning installation. The course includes classroom instruction and practical experience in refrigeration, duct design and electrical wiring and gas piping.

nonunion employer.

2. The application process

At various times between April 1995 and July 1998, 81 organizers overtly applied to Respondent Dial One, Respondent USA and Respondent ARS. The organizers applied in groups of two or three and wore union hats or other union insignia, and submitted individual employment applications for installer or other positions that were listed in approximately 20 separate advertisements in the classified section of local newspapers.³ Many of the organizers attached typed resumes to their completed employment applications that listed the signatory contractors for whom they presently or previously worked, educational achievements, and identified that they were presently members and organizers for the Union. The organizers were provided job employment application forms by Respondents, filled them out on the premises, and requested interviews when turning in the application. Several union organizers were told they would be contacted for an interview, but never were. Many of the organizers checked on the status of their applications in person, some filed multiple employment applications, while others checked by telephone on more than one occasion. In either case, the majority of the organizers were never contacted by Respondents to schedule an interview or to inquire about the credentials listed on their job application or resume. Indeed, while other individuals were hired pursuant to the newspaper advertisements, it is undisputed that none of the 81 individuals listed in paragraphs 6(d) through (f) of the complaint were ever employed or offered employment by Respon-

John Marod testified that Respondent Dial One ran advertisements on a fairly regular basis during the critical period and that they were placed in the newspaper even when they did not need to fill positions due to the high turnover rate of between 25 and 40 percent. Tom Wells confirmed that in 1995 and 1996, the labor plan he prepared for Respondent Dial One and Respondent ARS called for expansion and the need to hire new employees.

B. The 8(a)(1) Violations

1. Allegations concerning Judy Curry

The General Counsel alleges in paragraphs 5(a) and (d) of the complaint that Curry on November 13 and December 8, 1997, at Respondent ARS' Columbus facility, instructed its employees not to discuss the Union with other employees and threatened its employees with discharge if they talked about the Union on the job.

Tom Duncan and Matt Davis applied covertly at ARS' Columbus facility and after reviewing their job applications, Curry hired both individuals in October 1997. On November 13, 1997, Duncan and Davis initiated a meeting with Curry and informed her, for the first time, that they were union organizers.

Curry asked them why they were not up-front about this before they were hired and then said, "Don't talk to my employees about the Union." Curry acknowledges that she met with Duncan and Davis in her office that day, but denies that she instructed them not to talk with employees about the Union. Rather, Curry admits that she told Duncan and Davis not to talk to employees about the Union during worktime.

On December 8, 1997, Davis met with Curry in her office. Curry provided an informal counseling form for Davis to sign that prevented him from talking to employees on worktime about the Union (GC Exh. 17). The form also states that if Davis continues to talk to employees on worktime, it could lead to more counseling and possibly termination. Davis responded that if other employees were talking on the clock about baseball, football, and their kids, then he had a right to talk about the Union. Davis received a copy of the counseling form approximately 2 days later.

The general test applied to determine whether employer statements violate Section 8(a)(1) of the Act is "whether the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the free exercise of rights under the Act." *NLRB v. Aimet, Inc.*, 987 F.2d 445 (7th Cir. 1993); *Reeves Bros., Inc.*, 320 NLRB 1082 (1996).

In regard to the statement by Curry not to discuss the Union with other employees, I am of the opinion that Curry made such a statement to Duncan and Davis on November 13, 1997. In this regard, I conclude that Curry was surprised and hurt that Duncan and Davis did not disclose their union affiliation earlier, and her first instinct was to shield ARS employees from discussions about the Union with Duncan and Davis. Both Duncan and Davis testified in a sincere and forthright manner and their testimony does not seem contrived. Such a statement tends to coerce employees in the exercise of Section 7 rights and communications about the Union on nonworking time has long been held by the Board to be protected by the Act.

In the particular circumstances of this case, I further credit the testimony of Duncan and Davis that employees regularly engaged in conversations about nonwork-related matters on worktime and were never cautioned against doing so or disciplined for such activity. Therefore, when Curry instructed Duncan and Davis not to discuss the Union with other employees on worktime, such a statement likewise violates the Act as the Respondent regularly permitted other employees to engage in conversations about nonwork-related matters. *Teledyne Advanced Materials*, 332 NLRB 539 (2000).

Under these circumstances, when Curry told Duncan and Davis on November 13, 1997, that they should not discuss the Union with other employees, the Respondent violated Section 8)(a)(1) of the Act as alleged in paragraph 5(a) of the complaint. See *ITT Industries*, 331 NLRB 4 (2000).

With respect to the allegation in the complaint that on December 8, 1997, Curry threatened Davis with discharge if he talked about the Union on the job, the evidence establishes such a violation. In this regard, Davis was given the counseling memorandum because he talked to an employee on November 17, 1997, about the Union on worktime. Curry made it clear in the counseling form dated December 8, 1997, that if Davis continued to discuss the Union with other employees on work-

³ A representative ad stated: HVAC service technicians and installers to work service/replacement. Prefer minimum 3 years' residential experience. For HVAC entry level apprentices' to work new construction/replacement the ad stated, must be 18 years of age with valid driver's license. High School diploma or equivalent preferred. HVAC experience or vocational school background a plus.

time it could lead to more counseling or possibly termination (GC Exh. 17).

Based on the foregoing, and particularly noting that Respondent ARS permitted employees to discuss nonunion subjects during worktime, I find that Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 5(d) of the complaint.

2. Allegations concerning Steve Dantzinger

The General Counsel alleges in paragraphs 5(b), (c), and (e) of the complaint that Dantzinger instructed employees not to discuss the Union with other employees, discriminatorily instructed and prohibited employees from wearing union hats or other union insignia at work, and threatened employees with unspecified reprisals if they discussed the Union with other employees.

Davis testified that on December 2, 1997, while he and Dantzinger were in the shop, Dantzinger told him not to talk about the Union with his employees on worktime. Duncan said, "that other employees talk about cars and girls on worktime and he should be given the same opportunity to talk about the Union." Dantzinger did not testify in the proceeding and the statements and allegations attributed to him are unrebutted.

On December 3, 1997, Davis wore his union hat into work. Dantzinger informed Davis that he could not wear his union hat at work, as it was not part of the ARS uniform. Davis said, "that other employees were permitted to wear Nike and Tommy Hilfinger hats, and he should be able to wear a Union hat." Dantzinger reaffirmed that a union hat was not part of the ARS uniform.

On December 9, 1997, Davis had a conversation with Dantzinger in the shop. Davis credibly testified that Dantzinger instructed him to take off that "f—king" union hat and told him he could not wear a union hat. Davis asked Dantzinger why he could not wear a union hat at work. Dantzinger replied, "that if you bring the union in the company, it will only cause trouble." Davis pointed out to Dantzinger that other employees wore "Nike" and "Tommy Hilfinger" hats at work. Dantzinger said, "those hats could be part of the uniform, as long as it was not a Union hat." Dantzinger further told Davis, that he was not to talk about the Union with other employees.

On December 10, 1997, Duncan testified that he had a conversation with Dantzinger near the garage wherein Dantzinger told him to lose the union hat. Duncan asked Dantzinger about the hats worn by fellow employees. Dantzinger responded that he did not care about other hats worn by employees at work. Duncan removed his union hat and did not wear it again while on worktime.

In all respects, I found Duncan and Davis to be sincere and credible in their testimony regarding the numerous conversations they had with Dantzinger. Additionally, both individuals adhered to their stories during Respondent's thorough cross-examination.

The Board has held that an employer violates Section 8(a)(1) of the Act when it disparately prohibits employees from displaying union slogans or insignia on clothing but permits employees to wear like clothing that does not contain union insignia. Here, I find that when Dantzinger prevented Duncan and Davis from wearing their union hats at work while permitting

other employees to wear hats that contained the logo of "Nike" and "Tommy Hilfinger," it discriminated against them in violation of Section 7 of the Act. *Eby-Brown Co., L.P.,* 328 NLRB 496 (1999).

Likewise, I find as I did previously regarding Curry, that when Dantzinger instructed Davis not to discuss the subject of the Union with other employees, the Act was violated. Lastly, I find that when Dantzinger told Davis that if he brings the Union into the Company it will only cause trouble, that such a statement is coercive and the subject of unspecified reprisals, thereby violating Section 8(a)(1) of the Act.

In summary, and in agreement with the General Counsel's allegations in paragraphs 5(b), (c), and (e) of the complaint, I find that the Respondent violated Section 8(a)(1) of the Act.

3. Allegations concerning Tom East

The General Counsel alleges in paragraph 5(f) of the complaint that East on January 14, 1998, at Respondent ARS' Columbus facility, informed its employees that it would be futile to select the Union, threatened employees with discharge if they joined the Union, and instructed employees not to talk to other employees about the Union.

Duncan and Davis testified that on January 14, 1998, they along with employees from the Columbus and Bloomington facilities attended an all-employee meeting conducted by General Manager East in the meeting room. In addition to East, management representatives Mooneyham, Curry, and Dantzinger attended the meeting. According to Duncan and Davis, East read from a prepared speech and opened the meeting by informing those in attendance that they had a big problem as the Union had sent Duncan and Davis to organize the ARS employees. East informed the employees that Duncan and Davis would ask them to fill out authorization cards and if the Union was selected to represent the employees it could put up a picket line around the facility and if employees crossed the line, they could be fired. East further said that if the employees went on strike he could replace them and would do so. Davis testified that East told the employees that any employee that goes union he would terminate and replace with nonunion people, and the job market would be better when union's are gone. Lastly, Davis testified that East told the employees that "if the union organizers approach you, tell them to get lost."

East, who left the employ of ARS in November 1998, testified that as the then chief-executive officer of ARS, he sought legal counsel shortly after he was informed that the Union was trying to organize ARS employees. East obtained the prepared statement from his attorney approximately 2 weeks before January 14, 1998, that he closely studied and committed to memory in advance of the all-employee meeting (R. Exh. 19). That statement consisted of 7-typed pages, and according to East, he did not deviate from the prepared script.⁴

⁴ In part the prepared speech stated:

I want to take a few minutes to talk to you about what is going on with the Union, what this Union could mean to you and your job, and what may happen next.

Some of you have already been approached by Tom Duncan or Matt Davis, who talked with you about the Union, asked you to go to a Union meeting, or maybe even asked you to sign a Union

I am inclined to credit the testimony of East that he followed the prepared script during the course of the meeting, and at no time during the presentation did he tell the employees that he would terminate them, that the employees should not talk to other employees about the Union, or that it would be futile to select the Union. I base this conclusion on a number of factors. First, East credibly testified that he discussed the presentation in advance with his attorney, and was told not to deviate from the prepared script. Second, while he admitted that he often looked at the employees while he spoke, the presentation was partially memorized and paraphrased and he does not remember responding to any questions after the meeting was completed. Third, the speech specifically covers the subject about whether it is legal to terminate the union organizers. Thus, I do not credit the testimony of Duncan and Davis that East threatened to terminate the employees and hire nonunion people or that any employee that goes union East would terminate and replace with nonunion people.

Under these circumstances, and principally relying on the content of the prepared script which I find to be a lawful presentation, I recommend that paragraph 5(f) of the complaint be dismissed.

D. The 8(a)(1) and (3) Violations

1. The policy changes

The General Counsel alleges in paragraph 6(a) of the complaint that on April 3, 1995, Respondent Dial One changed its hiring policies by, inter alia, giving preferential employment considerations to employee-referred employment applicants.

The General Counsel called Marod, Wells, and Roger Wilkins as adverse witnesses during the course of the hearing. Each of these individuals credibly testified that at least since January 1995 or before, a practice existed at Dial One that greater consideration was given to applicants referred by incumbent employees and the practice remained in effect until Dial One was acquired in September 1996, by Respondent ARS. Wells also noted that referral applicants went to the top of the list and some incumbent employees received up to \$250 for such referrals. The General Counsel did not submit any other evidence to contradict the above testimony or to substantiate the allegations in paragraph 6(a) of the complaint.

Under these circumstances, I find that Respondent Dial One did not change its hiring policies by giving preferential treatment to employee-referred employment applicants. Rather, I conclude that such a practice always existed at Dial One both before and after April 3, 1995. Accordingly, I recommend that the allegations in paragraph 6(a) of the complaint be dismissed.

The General Counsel alleges in paragraph 6(b) of the complaint that about mid-February 1996, Respondent Dial One

card. It is your decision whether or not you sign that card. However, there are many facts about which you should think before you make that decision.

Now some of you may be thinking, "Why doesn't ARS just go ahead and terminate these Union organizers?" I cannot do that. It would be illegal. The Union's organizers have to follow the same work rules that you do, and if they violate the rules, they can be terminated like anyone else. But I cannot terminate them because they are union organizers.

further changed its hiring policies by reducing its application retention period to 30 days.

As general manager, Marod has the overall responsibility for hiring at Dial One. He testified that Dial One's policy was always to retain job applications in the human resources office and they remained current for 30 days. Although the applications were retained in a pool and not discarded, prospective applicants were informed that if a job offer was not forthcoming in 30 days from the date the application was filed, a new application must be filed. Indeed, Union Organizers Darlene Haemmerle, Frank Sullivan, Keith Peacher, Ryan Striby, and Craig Gruell testified that they all filled out new job applications at Dial One, as it was their understanding that the initial application only remained current for 30 days. Likewise, Union Organizer Kevin Hechinger testified that he was informed when filing his job application at Dial One that it would remain current for 30 days.

Under these circumstances, I do not find that Dial One changed its hiring policies by reducing its application retention period to 30 days. Rather, I conclude that Dial One always maintained a policy that an initial job application only remained current for 30 days and if the applicant wanted further consideration for the job or was interested in applying for another position, a new employment application was required to be filed

Based on the forgoing, the General Counsel did not substantiate the allegations in paragraph 6(b) of the complaint and I recommend that they be dismissed.

The General Counsel alleges in paragraph 6(c) of the complaint that on or about December 12, 1997, Respondent ARS changed its hiring policies by, inter alia, requiring applicants to apply at Respondent ARS' main Indianapolis office, rather than individual locations.

The General Counsel relies on the testimony of Union Organizers Travis Dick, William Rogers, Dennis Wheeler, Sam Holland, and Jeffery Higgins to support this allegation. Dick testified that on September 24, 1997, he applied for work at the ARS Indianapolis location in response to a newspaper ad dated September 23, 1997 (GC Exh. 20), and filed an application on that day (GC Exh. 3(bb)). On October 22, 1997, he left a voice mail message at the ARS Indianapolis location inquiring about the status of his application. On October 28, 1997, Dick went to the ARS Indianapolis location and filed a second job application (GC Exh. 3(cc)), in response to a newspaper ad dated October 27, 1997 (GC Exh. 14). On October 29, 1997, Dick along with Rogers and Wheeler went to the ARS Columbus location and each of them filed job applications. They individually spoke with Curry who informed them that ARS was a growing company with a heavy work backlog. Each of the employees informed Curry that they were union organizers. Curry inquired about their backgrounds and apprised the three employees that although she had openings in Columbus she would forward their applications to Indianapolis, as it was closer to their residences. Upon returning to his home on October 29, 1997. Dick received a voice mail message from Mooneyham in the Indianapolis facility. The next day Dick called Mooneyham and they discussed his background and HVAC experience. Additionally, after Mooneyham inquired how much Dick was currently making per hour, she apprised him that ARS was looking for entry level people that were paid \$7 per hour. Wheeler also spoke with Mooneyham on October 29, 1997, and they discussed his background and experience. During this telephone conversation, Wheeler apprised Mooneyham that he was a union organizer. On November 4, 1997, Dick called and spoke to Mooneyham and learned that no one had been hired in Indianapolis. Mooneyham promised to get back to him as she was still reviewing applications. Later that day, Dick telephoned Curry at the ARS Columbus facility. Curry apprised him that she was looking for entry-level employees and since he was a union organizer, she did not think he was interested in such a position. Dick informed Curry that he would take an entry-level position. Holland applied at ARS Indianapolis on September 29, 1997, and submitted an application and resume on that date. On December 12, 1997, Holland and Higgins went to ARS Columbus. They asked the receptionist whether ARS Columbus was hiring and were told they would have to go through ARS Indianapolis and ARS Columbus would check with them.

On December 8, 1997, Dick telephoned the ARS Indianapolis facility to check on the status of his application. Later that day, Dick, along with Wheeler, visited the facility and they both filed a third job application based on a newspaper ad dated December 6, 1997 (GC Exh. 19). Both Dick and Wheeler spoke with Mooneyham and discussed their experience in working on commercial and residential heating systems. Mooneyham told both employees that she would get back to them if interested, after reviewing their backgrounds and qualifications.

Based on the above recitation, it is apparent that Dick, Rogers, and Wheeler had no problems in filing applications at either the Indianapolis or Columbus facilities. Indeed, each of the individuals met or spoke with Curry and Mooneyham and discussed their qualifications and HVAC backgrounds. Although Curry might have informed the individuals that she would refer their applications to the ARS Indianapolis facility, as it was closer to their residences, it did not in any manner impede their ability to interview or file employment applications with either the Columbus or Indianapolis ARS location. Moreover, there was no evidence presented that any ARS management official changed its hiring policies by requiring applicants to apply at the main Indianapolis office rather than the Columbus or other ARS locations. The only other evidence that is remotely related to the complaint allegation is that an unnamed receptionist informed Holland and Higgins that they would have to go through ARS Indianapolis to get hired. In my opinion, such testimony is not binding on Respondent ARS. In this regard, there is no evidence in the record that the unnamed receptionist had either actual or apparent authority to speak on behalf of the Respondent concerning the finite procedures of the hiring process. See Custom Top Soil, Inc., 327 NLRB 121 (1998). While a receptionist might respond to routine questions about hiring and physically hand applications to job applicants, the record is silent as to any other hiring responsibility or authority granted to the ARS receptionist in the present situation. I also note that the testimony presented by Dick, Rogers, and Wheeler establishes that they were permitted to file their applications at both the Columbus and Indianapolis facilities without restrictions. Thus, I conclude that the General Counsel did not support the allegation in paragraph 6(c) of the complaint and, I recommend that it be dismissed.

2. The refusal to hire the employees listed in paragraphs 6(d), (e), and (f) of the complaint⁵

In Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding discrimination cases turning on employer motivation. The General Counsel must persuasively establish that the evidence supports an inference that protected conduct was a motivating factor in the employer's decision.⁶ In a refusal-to-hire case, the General Counsel specifically must establish that each alleged discriminatee submitted an employment application, was refused employment, was a union member or supporter, and was known or suspected to be a union supporter by the employer who harbored antiunion animus and who refused to hire the alleged discriminatee because of that animus. Big E's Foodland, 242 NLRB 963, 968 (1979). Inference of animus may be inferred from the total circumstances proved and in some circumstances may be inferred in the absence of direct evidence. Fluor Daniel, Inc., 304 NLRB 970 (1991). Once that is accomplished, the burden shifts to the employer to persuasively establish by a preponderance of the evidence that it would have made the same decision even in the absence of protected activity. T&J Trucking Co., 316 NLRB 771 (1995). The Board in FES, 331 NLRB 9 (2000), determined that the General Counsel must show in a discriminatory refusal-to-hire violation the following at the hearing on the merits. First, that the respondent was hiring, or had concrete plans to hire. Second, that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination. Third, that

⁵ The employees are: Gabriel Brooking, Jason McKinney, Tyrone Moore, Aaron Dailey, James Santacroce Jr., Aaron Young, Stephen M. Hill, Kenneth D. Walden, Ronald L. Cornwell, Brady Piercefield, George R. Sears, Robert Sharp, Don A. Campbell, Lloyd T. Campbell, Eric J. Edwards, Darlene J. Haemmerle, Kevin A. Hechinger, Keith A. Peacher, Ryan M. Striby, Frank J. Sullivan II, Thomas W. Akers II, Thomas R. Freeman, Craig A. Gruell, Steven J. Reintjes, Joseph Slinker Jr., Gregory L. Wilson, Ryan O. Witham, Michael J. Gough, Keith A. Beatty, John A. Carman, Dorian J. Wilson, Kenneth R. Brandon, Kenneth E. Miller, Terry L. Netherton, Bryan C. Mirowski, Dean L. Broyles, Tony A. Eldridge, Kenneth R. Weimer, Lance D. Hale, Clifford E. Wright, William B. Shields, Stephen D. Shea, Larry W. Sharp, Michael R. Rohr, Spencer Irving III, Bruce Manley, James S. Snodgrass, Tony Turner, Timothy Williamson, James L. Wilson, Kevin Bierley, Jason W. Ellis, Eric Harris, Christopher H. Meyers, Charles W. Miller, Jason Wildrick, Brian Campbell, Kerry Bowling, Robert Gandy, M. John Maynard, Chris Carson, Mark Chittum, Tim Choate, Stony Miley, Cory Stein, Charles Baldwin, Christopher H. Meyers, Monty Shoulders, Michael Crull, Travis Dick, Jeffrey Higgins, Samuel D. Holland, Wm. Gary Rogers, Dennis Wheeler, Mark Moran Daniel Steward, Charles Parsley, Steve Harris, William L. Hopkins, Bryan Jones, Kelley Boesken, and Trent Todd.

⁶ Manno Electric, 321 NLRB 278 fn. 12 (1996).

antiunion animus contributed to the decision not to hire the applicants. If the respondent asserts that the applicants were not qualified for the positions it was filing, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity. To establish a discriminatory refusal-to-consider violation, pursuant to FES, supra, the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

3. Respondents knowledge of the applicants' union membership and its union animus

The Respondents do not deny that they received the employment applications of the individuals listed in paragraphs 6(d), (e), and (f) of the complaint. Likewise, there is no challenge to the fact that all were union members, and that none were hired.

The evidence establishes that the entries on all of the respective application forms and the personal resumes sufficiently notified the Respondents that the applicants belonged to the Union. In this regard, all of the individuals included on their applications or resumes that they were members of the Union and its apprenticeship program and were union organizers. In addition, all of the overt applicants were union hats or other identifiable insignia when submitting their applications, which served to alert the Respondents that they were union members.

Credible evidence also exists of antiunion animus. As previously found, the Respondent engaged in 8(a)(1) conduct when it instructed its employees not to discuss the Union with other employees, prohibited its employees from wearing union hats or other union insignia, and threatened its employees with reprisals if they discussed the subject of the Union with other employees. Likewise, Respondents rejected all of the overt applications that were submitted and only gave interviews to a few individuals. On the other hand, Respondents considered the covert applications of employees Jason Tice, William Hovermale, Davis, and Duncan, and hired all four individuals.

Accordingly, I find that the General Counsel has satisfied its initial burden of persuasively establishing that the alleged discriminatees were not considered or hired because of their union membership. Respondents must now establish that its hiring decisions would have been the same in the absence of union membership.

4. The Respondents' defenses

(a) The alleged discriminatees are incompetent to testify

In the instant case, the General Counsel subpoenaed each of the alleged discriminatees named in the complaint for the purpose of obtaining testimony on behalf of the Board. Respondents contend that since the Union compensated each of the alleged discriminatees for time spent testifying and reimbursed them for parking and time spent with the General Counsel's attorneys while preparing to testify, the witnesses are incompetent to testify. In part, the Respondents rely on the holding in NLRB v. Thermon Heat Tracing Services, 143 F.3d 181, 188–191 (5th Cir. 1998). In my opinion reliance on that case is misplaced. First, the Respondents are relying on the opinion of dissenting Circuit Court Judge Garza to support their argument. Indeed, the majority of the Court did not have a problem in enforcing the Board's decision. Second, that case dealt with the status of a paid informer who was hired to gather information. Moreover, in that case there is no discussion that either the General Counsel or the Charging Party subpoenaed the witness

In the subject case, the General Counsel subpoenaed the alleged discriminatees. Witnesses summoned by subpoena to a trial shall be paid the same fees and mileage that is paid witnesses in the Federal courts, by the party who issued the subpoena. Here, although the Union paid the fees and mileage for the alleged discriminatees to testify instead of the General Counsel, I do not see a material difference. In this regard, the witnesses were required to be paid for their testimony pursuant to the Board's subpoena and this was complied with. Indeed, the Board has held in *Zurn/N.E.P.C.O.*, 329 NLRB 484 (1999), that it is an "undue burden" to require a disinterested witness to advance his own costs for a 550-mile round trip.

Accordingly, I reject the Respondents' argument that the alleged discriminatees who testified and were reimbursed for their fees and mileage by the Union were incompetent to testify

(b) The union organizers are not "bona fide" applicants covered by the Act

Respondents assert that the refusal-to-hire and/or considerfor-hire the individuals named in paragraphs 6(d), (e), and (f) of the complaint was lawful because these individuals are not bona fide applicants for employment within the meaning of the Act, as they were not legitimately seeking employment. It first argues that the union organizers submitted employment applications knowing that they would be rejected. Once this occurred, it enabled the union organizers to file numerous unfair labor practice charges not only against Respondents, but also with other nonunion contractors. I reject this argument and find that the evidence shows otherwise.

In this regard, each of the union organizers followed the Respondents normal application procedure after viewing advertisements in the classified section of the newspaper that sought job applicants. Indeed, the overt union applicants pursued employment by contacting Respondents on several occasions to request interviews or to ascertain the status of their employment applications. In many instances, the overt union applicants telephoned and/or visited the Respondents' offices on several occasions. Additionally, a number of the union organizers returned to Respondents' facilities on numerous occasions and filed new employment applications in order that their status remained current and/or in response to new newspaper advertisements. The evidence therefore supports the reasonable inference that the union organizers were serious about obtaining

jobs with the Respondents.

The record evidence further demonstrates that each of the overt union applicants would have accepted employment if offered a position. Each of the union organizers credibly testified that they are supposed to obtain employment with a nonsignatory contractor, do the best job possible to demonstrate that they are dependable workers, and explain the benefits of joining the Union to their coworkers during nonworking hours. If the union organizers are not able to obtain employment with a nonunion employer, he/she is required as part of the Youth-to-Youth program to continue seeking employment until being hired by a nonunion employer. Thus, I conclude that the ultimate goal of the union organizers is to become employed at nonunion contractors such as the Respondents.

With respect to the Respondents argument that the union organizers are only interested in generating unfair labor practice charges, it is axiomatic that all employees have the right to enforce statutory rights. *M. J. Mechanical Services*, 324 NLRB 812, 813 (1997) (even if "salting" is intended in part to provoke an employer to commit unfair labor practices, that would not deprive employees of protection of the Act). Here, there is no evidence that the overt union applicants sought to provoke the Respondents into committing unfair labor practices or in anyway precluded the Respondents from conducting its business operations. To the contrary, the union organizers were polite and followed all procedures when filing employment applications

Lastly, in *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), the Supreme Court held that paid union organizers applying for jobs are statutory employees entitled to the protection of the Act. Thus, I find that the union organizers, who applied for positions at Respondents, were bona fide applicants for employment entitled to the protections of the Act. *Sunland Construction Co.*, 309 NLRB 1224 (1992).

(c) Employment as a union organizer conflicts with the obligations they would owe Respondents

The Respondents also argue that the union organizers are not entitled to the protections of the Act because their employment with the Union conflicts with their obligations if they were employees of the Respondents. It asserts that the Union could direct the union organizers to cease work for the nonunion employer or cause the nonunion employer to lose control over day-to-day operations. In effect it argues that the union organizers are not protected by the Act because they would act adverse to the Respondents interests.

This same argument was rejected by the Supreme Court in *Town & Country*, supra at 96, as the Court noted that a union organizer's participation in a salting program did not necessarily result in an irreconcilable and disqualifying conflict of interest with his duties as an employee of a nonsignatory contractor.

In the subject case, there is no evidence that the union organizers would interfere with the Respondents ability to direct its day-to-day operations.

Likewise, there is no evidence that the Union exerted "total control" over the decisions and actions of the union organizers. In this regard, the evidence shows that there were no hard and fast rules with respect to how long a person would work for a

nonsignatory contractor. Rather, a number of the union organizers testified that a determination was made in conjunction with the Youth-to-Youth program's advisor as to whether to stay or leave the nonunion employer and the ultimate decision was left to the union organizer. Indeed, some of the union organizers credibly testified that they worked for a nonunion contractor for more than 6 months. In any event, the Board has held that paid union organizers are protected by the Act, even if they do not intend to retain their employment beyond the duration of an organizing campaign. *Sunland Construction Co.*, supra at fn. 33.

Under these circumstances, and noting that the Respondents did not establish that the union organizers or the Union interfered with the daily activities of the Respondents, I find that union organizers are employees entitled to the full protections of the Act.

(d) The union organizers are temporary employees

The Respondents further argue that it lawfully refused to hire the 81 overt union organizers because they only sought temporary employment. In this regard, Respondents assert that the Youth-to-Youth organizers would not work beyond 6 months and therefore must be considered as temporary employees, not eligible to be a member of a bargaining unit. In further support of this defense, I note Marod's and Elkins' testimony that Respondents would not be able to manage its business if job applicants could not be counted on to remain as long-term employees. Elkins specifically testified that individuals, who openly listed their union affiliation in their job applications, would not stay employed for a long period of time, and they were not hired or considered for hire because of that reason. In my opinion, this acknowledgement by Elkins confirms that the overt union organizers were not considered or hired solely due to their participation in the Youth-to-Youth program and listing on their applications that they were "voluntary union organizers." Indeed, the union organizers did not tell any of the Respondents representatives that they were seeking a temporary position nor did they testify that they were seeking temporary positions when applying for jobs at the Respondents facilities.

This argument also lacks credibility based on the testimony of Wells who stated that advertisements were placed in the newspaper offering to pay a bonus to any job applicant who remained employed at least 90 days. This concession establishes that the Respondents were eagerly seeking new employees and were willing to pay a bonus to an applicant even if the individual worked for only 90 days. Such an individual could work for 90 days as a temporary employee and after that period there was nothing to prevent the employee from retaining the bonus and resigning his/her employment. Thus, the argument that the Respondents did not hire the union organizers based on the fact that they were temporary employees who would not work more than 6 months does not withstand scrutiny.

(e) Comparing qualifications

In defending its refusal to hire the 81 union organizers, Respondents assert that the individuals that they hired at Dial One, USA, and ARS possess superior qualifications to those of the union organizers. Moreover, Respondents argue that due to

their longstanding policy of giving greater consideration to applicants referred by incumbent employees, those applicants were considered first in comparison to the applications of the union organizers who were not referred by a known source.⁷

The records introduced into evidence show that Dial One hired 41 employees during the period between April 3, 1995, and August 5, 1996, when the union organizers listed in paragraph 6(d) of the complaint filed their applications. I have carefully reviewed the applications of those hired and have determined that 11 of the individuals possess excellent credentials, 7 show good experience, 10 13 have minimal qualifications in HVAC, 11 and 10 individuals have little or no experience. With respect to the 27 union organizers' applications during that same time period, I find that 13 possess excellent credentials, 13 10 have good experience, 14 2 have minimal experience, 15 and two have little or no HVAC experience. 16

The records for USA establish that two individuals were hired between October 21 and November 22, 1996, the dates that the union organizers listed in paragraph 6(e) of the complaint filed their applications (R. Exh. 9). As found below, those union organizers that filed applications with USA on October 21, 1996, are time barred from asserting that they were not considered or hired by USA. In any event, I find that Jesse Hunter, the employee that USA hired on November 11, 1996, possessed exemplary credentials and would have been hired even in the absence of considering the protected activities of the union organizers. Indeed, when comparing his 16 years' experience with the qualifications of the union organizers that are listed in paragraph 6(e) of the complaint, it is apparent that Hunter is superior. The other USA hire was William Hovermale, who was a union member and organizer when he applied covertly to USA and was hired as a helper on November 16, 1996. In comparing his qualifications to those of the union organizers that applied to USA during the critical period, I find that a number of the union organizers possessed significantly better qualifications than Hovermale¹⁷ and all of the overt applicants possessed at least equal qualifications to Hovermale. Indeed, while Anderson testified that he generally looked for applicants with past HVAC experience, he hired Hovermale who possessed limited HVAC expertise (helped a friend install a furnace).

In regard to ARS, the individuals listed in paragraph 6(f) of the complaint filed their applications between March 28 and November 13, 1997. During that period, ARS hired 56 individuals. I have reviewed the qualifications for the individuals hired, and have determined that 14 of the employees possess excellent credentials, ¹⁸ 8 have good experience, ¹⁹ 14 have minimal qualifications, ²⁰ and 20 possess little or no HVAC experience. ²¹

With respect to the 34 applications of the union organizers during the same period, I have determined that 16 possess excellent qualifications, ²² 10 have good experience, ²³ and 7 have little or no HVAC experience. ²⁴ Between February 10 and August 19, 1998, ARS hired 48 individuals (R. Exh. 10(b)). During that period, five union organizers listed in paragraph 6(f) of the complaint filed applications with ARS. I have reviewed the applications of the 48 employees hired by ARS, and have determined that 16 individuals possess excellent experience, ²⁵ 8 have good qualifications, ²⁶ 8 have minimal experience

⁷ While I previously found that the Respondents did not change their policy of relying on incumbent referrals when hiring new employees, the evidence establishes that a substantial number of new hires were not referred by incumbents and the Respondents relaxed their advertised job requirements when hiring new employees.

⁸ The employees hired at Dial One are found in R. Exh. 7.

⁹ The employees are: Kenny Bell, Timothy Rich, Mark Todd, Daniel Stultz, Thomas Alexander, Mark Huffman, Jay Noah, Kenneth Sandal, Scott Williams, Tom McIlguham, and Paul Beasley.

The employees are: Robert Hunt, Troy Mason, Gerald Nelson, William Grooms, Jeffrey Bushorg, Chip Shepperd, and Frederick Zarniger.

¹¹ The employees are: David Childers, Robert Grillo, Roger Nelson, Richard Silcox, Stephen Slattery, Terry Tolan, Jason Tice, Alvin Thompson, Terry Biggs, Timothy Cantrell, Anthony Boyden, Barry Thacher, and Paul Getchell.

¹² The employees are: Ken Bell, Bobby Nedino, Maurial Smith, Richard Bowen, Edward Lynn, Dustin Jenkins, Joseph Henderson, Melvin Marcinak, Steven Carnes, and Harvey Lee.

¹³ The individuals are: Aaron Dailey, Gabriel Brooking, James Santacroce Jr., Aaron Young, Stephen Hill, Kenneth Walden, Brady Piercefield, Robert Sharp, Lloyd T. Campbell, Ryan Striby, Thomas Freeman, Darlene Haemmerle, and Joe Slinker.

¹⁴ The individuals are: Tyrone Moore, Ronald Cornwell, George Sears, Eric Edwards, Keith Peacher, Craig Gruell, Kevin Hechinger, Steven Reintjes, Ryan Witham, and Gregory Wilson.

¹⁵ Jason McKinney and Thomas Akers are the two individuals.

¹⁶ Don A. Campbell and Frank Sullivan are the two individuals.

¹⁷ The individuals are: Kenneth Weimer, William Shields, Dean Broyles, Lance Hale, and Stephen Shea.

¹⁸ The employees are: Floyd Stutgill, Steve Rosemeyer, Pierce Moss, Jeffrey Proffitt, David Hammons, James Dahl, Tony Hurt, Chrispopher Safranek, Jesse McClung, Thomas Hofmann, Buddy Hall, Gary Smith, Joseph Medle, and John Gant.

¹⁹ The employees are: Timothy Bornman, David Doty, Michael Pherson, James O'Brien, Matthew Oakes, Thomas East, James Bair, and Ovie McClure.

²⁰ The employees are: Erik Wickens, Thenneg Rogers, Larry Smith, Cecil Wall, Kurt Fuchs, Ryan Bergman, Deuan Criswell, Craig Keener, Mark Smith, Charles Phillips, Jason Land, Michael Martin, Iran Sterling, and Thomas Kral.

²¹ The employees are: Edward Craig, Daniel Greene, Ronald Gruhlke, Victor Shepherd, Andy Albaugh, Larry Smith, John Miller, Mike Roth, Andrew Burnell, Jason Gibbons, Joshua Bonanon, Mark Stum, John Dugger, Donny Brown, Brad Shutters, Brad Robinson, Ronald Clayton, Justin Davis, Russel Greeve, and Joshawa Gardner.

The individuals are: Mark Moran, Monty Shoulders, Robert Gandy, Tom Duncan, Matt Davis, Bruce Manley, John Maynard, Charles Miller, Samuel Holland, Jason Wildrick, Jeffrey Higgins, Kerry Bowling, Stony Miley, Michael Crull, Travis Dick, and William Gary Rogers.

²³ The individuals are: James Snodgrass, Timothy Williamson, Charles Parsley, Tony Turner, Chris Meyers, Chris Carson, Cory Stein, Brian Campbell, Mark Chittum, and Dennis Wheeler.

²⁴ The individuals are: Daniel Steward, Timothy Choate, Tom Cassidy, Kevin Bireley, James R. Wilson, Jason Ellis, and Charles Baldwin.

²⁵ The employees are: Scott Brown, Matt Timmons, Christopher Shoots, Michael Kelly, Charles Quick, Randall Capshaw, Brett Lo-Biorco, Gregory Good, David Franklin, Jason Conder, Douglas Mowery, Brian Martin, Mark Moore, Joshua Alexander, James Smothers, and Anthony Keppler.

ence,²⁷ and 16 possess little or no HVAC experience.²⁸ With respect to the union organizers who applied in 1998, I have determined that William Hopkins, Bryan Jones, and Trent Todd possessed excellent qualifications, while Kelley Boeskin, and Steve Harris have good experience.

In summary, I conclude that while a number of the employees hired by Dial One, USA, and ARS possess excellent credentials, the evidence equally demonstrates that a large number of the union applicants also have excellent qualifications. I conclude that a large number of the union applicants had the experience or training relevant to the announced requirements of the service technician and installer positions and all of the union applicants met the requirements for the helper or apprentice positions sought by the Respondents. The evidence also establishes, that ARS and Dial One hired a large number of individuals that had less than the 3-years' advertised experience sought for installer and service technician positions and hired helpers that possessed minimal HVAC experience.²⁹ Thus, it is apparent that the Respondents did not uniformly adhere to their advertised requirements when seeking applicants and relaxed their hiring standards. I conclude, therefore, that the reason the Respondents relaxed their hiring standards was to foreclose hiring the union organizers, even if they possessed superior qualifications to the employees that were hired. Further evidence that the Respondents foreclosed the opportunity for the union organizers to be hired or considered for hire is shown by the following. First, the Respondents interviewed and in four instances hired union organizers that applied covertly and did not reveal their union affiliation. In the majority of these instances, the covert applicants had limited HVAC experience. Second, representatives of the Respondent frequently called back union organizers who did not reveal their union affiliation in initial telephone calls to the job line or granted interviews to these individuals, but after they revealed their union affiliation no further contact was made. Third, it is highly suspect that none of the 81 overt union applicants, many of whom possessed superior qualifications, were ever offered employment during a period of aggressive hiring by the Respondents. Fluor Daniel, Inc., 311 NLRB 498, 500 (1993) (We find it reasonable to infer that it was not just coincidental that not a single one of the applicants who proclaimed himself to be a "voluntary union organizer" was employed and only two were ever contacted). Fourth, Union Organizer Tom Cassidy applied for a position at ARS in October 1997, but did not reveal his union affiliation. On July 27, 1998, Respondent ARS telephoned him and inquired whether he was still interested in a position. This telephone call was made despite the July 1998 applications on file from Union Organizers William Hopkins, Bryan Jones, Kelley Boesken, and Trent Todd, all of whom possessed excellent or good HVAC credentials that were superior to Cassidy. Fifth, and specifically compelling, is the admission against interest made by ARS Installation Supervisor Mark Flaskamp. In this regard, he confirmed that while he reviewed the applications and conducted interviews for the individuals he hired at ARS, Human Resources Manager Mooneyham withheld and did not refer any of the applications of the union organizers for his consideration.³⁰ Sixth, it strains credulity that ARS hired three employees who had been convicted of felonies within 10 years of their applications, when Respondents' officials repeatedly stressed that new hires must be held to strict safety standards as they are in customers' homes on a regular basis.³¹ Lastly, at no time did the Respondents contact the Union to inquire about the qualifications of the applicants or whether the union organizers would accept permanent positions at entry level wages. Therefore, and based on the totality of the evidence, I find that Dial One, USA, and ARS did not hire the union organizers solely because of their protected activities. With respect to the refusal-to-consider violation, the testimony of Flaskamp and Jellison firmly establishes that Respondent ARS excluded applicants from the hiring process solely due to their union activities. I likewise conclude, primarily based on Marod's and Elkins' testimony that Dial One and USA excluded the applications of the union organizers from the applicant pool and did not consider them for employment.

Accordingly, I reject all of Respondents' affirmative defenses as to why they did not consider or hire the majority of

²⁶ The employees are: Charles Lee, Michael Petty, Kenneth Holchausen, Joseph Hinson, Christopher Baker, Robert Corbett, Tracey King, and Alan Wright.

²⁷ The employees are: Joshua Rich, Brad Johnson, Clinton Brooks, Damon Dexter, Brian Caughron, Dennis Anness, William Rubin, and Scott Tichenor.

²⁸ The employees are: James Weinke, Christopher Dieperick, Christopher Holliday, Grage Roberts, Joe Fee, James Bentley, Lester Hollon, Jeffrey Taylor, Brandon Goebel, Brian Schlenz, Donald Stout, Troy Schlenz, Warren Elsbury, Ruben Legoas, Christopher Pool, and Nicholas Atchison.

²⁹ See, as examples, the applications of employees hired at Dial One (R. Exh. 7), including Tracy Tolan, Robert Grillo, Robert Hunt, Stephen Slattery, Richard Silcox, Maurice Smith, John Faulkner, David Childers, Joseph Henderson, Jay Noah, Richard Bowen, Kenneth Sandala, Anthony Boyden, Dustin Jenkins, Edward Lynn, Melvin Marciniak, Paul Getchell, Harvey Lee, and Steven Carnes. Likewise, see as examples the applications of employees hired at ARS (R. Exhs. 10(a) and (b)), including Larry Smith, David Doty, Dan Greene, Kirt Fuchs, Ryan Bergman, Ron Gruhlke, Craig Keener, Victor Shepherd, Andy Albaugh, Larry Smith, Mike Roth, Andrew Burnell, Jason Gibbons, Josh Bohanon, Charles Phillips, Mark Stum, James O'Brien, Donny Brown, Matthew Oakes, Brad Shutters, Thomas Duncan, Brad Robinson, Ron Winegar, Jason Land, Matthew Davis, Thomas Duncan, Russell Greene, Iran Sterling, Joshawa Gardner, Thomas Kral, James Weinke, Brad Johnson, Christopher Diederich, Clinton Brooks, Christopher Holliday, Graye Roberts, Joe Fee, Michael Petty, James Bentley, Lester Holton, Dennis Anness, Jeff Taylor, Kenneth Holzhausen, Joseph Hinson, Brandon Goebel, William Rubin, Donald Stout, Brian Schlenz, Christopher Baker, Troy Schlenz, Warren Elsbury, Rubin Legoas, Chris Pool, Scott Tichenor, Robert Corbett, and Nicholas Atchison.

³⁰ Likewise, ARS Service Manager Bradlee Jellison testified that between September 1997, and August 1998, he hired a number of individuals for installer and helper positions. During that period, however, he never recalled receiving applications from human resources or reviewing applications from individuals who were affiliated with the Union.

³¹ The three employees are: Randall Capshaw, Dennis Anness, and Brian Martin. Additionally, a number of ARS hires had criminal records and 18 of them had past DWI convictions or suspended driver's licenses.

the 81 overt union organizers. Thus, the Respondents failed to meet their *Wright Line* burden of showing that it would not have hired the discriminatees even in the absence of their union activity. I, therefore, find that the Respondents violated Section 8(a)(1) and (3) of the Act. *Sommer Awning Co.*, 332 NLRB 1318 (2000).

(f) A portion of Case 25–CA–25316 is time barred

The Respondents argue that the allegations in paragraph 6(e) of the complaint that it refused to hire or consider-for-hire applicants Michael J. Gough, Keith A. Beatty, John A. Carman, Dorian J. Wilson, Kenneth R. Brandon, and Kenneth E. Miller on October 21, 1996, are time barred. This defense was raised with me at the commencement of the hearing. In this regard, the original unfair labor practice charge in Case 25–CA–25316 was filed on April 22, 1997, a period more than 6 months after the filing of the job applications by the above-noted individuals on October 21, 1996. To be timely, Respondents assert that the subject charge needed to be filed on April 21, 1997.

Based on the foregoing facts, I am in agreement with Respondents' position. I find that the charge was not timely filed since the job applications were filed on October 21, 1996, a period more than 6 months before the subject charge was filed. Here, there is no evidence that the Respondents fraudulently concealed the operative facts that could give rise to a violation. Therefore, the employees noted above who filed job applications on October 21, 1996, are foreclosed from alleging they were not considered for hire or hired by the Respondents based on their membership and concerted activities on behalf of the Union. *Amalgamated Industrial & Service Workers Local 6 (X-L Plastics)*, 324 NLRB 647 fn. 2 (1997).

5. The terminations of Tom Duncan and Matt Davis

The General Counsel alleges in paragraph 6(g) of the complaint that on or about January 15, 1998, Respondent ARS discharged its employees Duncan and Davis.

Tom Duncan and Matt Davis applied covertly at ARS' Columbus facility and after reviewing their job applications, talking with them on the telephone, and conducting personal interviews with both individuals Curry hired them in October 1997. On November 13, 1997, Duncan and Davis initiated a meeting with Curry and informed her, for the first time, that they were union organizers. Curry asked them why they were not up-front about this before they were hired and then said, "Don't talk to my employees about the Union." Curry acknowledges that she met with Duncan and Davis in her office that day, but denies that she instructed them not to talk with her employees about the Union. Curry admits, however, that she informed Duncan and Davis not to talk to employees about the Union while on worktime.

Davis testified that on December 2, 1997, while he and Dantzinger were in the shop, Dantzinger told him not to talk about the Union with his employees on worktime. Duncan said, "that other employees talk about cars and girls on worktime and he should be given the same opportunity to talk about the Union."

On December 3, 1997, Davis wore his union hat into work. Dantzinger informed Davis that he could not wear his union hat at work, as it was not part of the ARS uniform. Davis said, "That other employees were permitted to wear Nike and Tommy Hilfinger hats, and he should be able to wear a Union hat." Dantzinger reaffirmed that a union hat was not part of the ARS uniform.

On December 8, 1997, Davis met with Curry in her office. Curry provided an informal counseling form for Davis to sign that prevented him from talking to employees on worktime about the Union (GC Exh. 17). Davis responded that if other employees were talking on the clock about baseball, football, and their kids, then he had a right to talk about the Union. Davis received a copy of the counseling form approximately 2 days later.

On December 9, 1997, Davis had a conversation with Dantzinger in the shop. Davis credibly testified that Dantzinger instructed him to take off that "f—king" union hat and told him he could not wear a union hat. Davis asked Dantzinger why he could not wear a union hat at work. Dantzinger replied that, "if you bring the union in the company, it will only cause trouble." Davis pointed out to Dantzinger that other employees wore "Nike" and "Tommy Hilfinger" hats at work. Dantzinger said, "Those hats could be part of the uniform, as long as it was not a Union hat." Dantzinger further told Davis, that he was not to talk about the Union with other employees.

On December 10, 1997, Duncan testified that he had a conversation with Dantzinger near the garage wherein Dantzinger told him to lose the union hat. Duncan asked Dantzinger about the hats worn by fellow employees. Dantzinger responded that he did not care about other hats worn by employees at work. Duncan removed his union hat and did not wear it again while on worktime.

On December 22, 1997, all employees were released early for the day due to a work shortfall. Duncan and Davis stayed around for approximately 2 to 3 hours and talked to fellow employees in the parking lot about the Union.

On December 30, 1997, Duncan was 5 minutes late for work. Dantzinger told Duncan at the garage door that because he was late for work he missed a job assignment and was being sent home.

On December 31, 1997, Duncan worked all day with Curry doing inventory in the shop. While Duncan was counting the inventory, he found a broken part and said to Curry that the elbow needed to be thrown away. Curry said, "[I]t must have been made by a union guy."

On January 2, 1998, Davis attended the regular Friday employee meeting. East also was in attendance. After the meeting, Davis was instructed to proceed to Curry's office along with Mooneyham. Both Curry and Mooneyham presented Davis with a memorandum concerning the soliciting of employees about the Union on nonworktime (GC Exh. 18). Davis signed the memorandum.

On January 5, 1998, Duncan and Davis along with other employees worked a half day. They remained in the area for approximately 2 hours and individually talked to fellow employees about the Union.

On January 6, 1998, Duncan and Davis were on a job as-

³² Duncan was hired on October 24, 1997, while Davis commenced work on October 27, 1997.

signment in Taylorsville along with coworker Tim Malan who was the lead person on the job. At the end of the day a dispute arose and Milan told Davis to go back to the shop and directed Duncan to remain on the jobsite to help unload the van. Duncan disagreed with these instructions and told Milan he would ride back to the shop with Davis and await Milan's return to help unload the van. Upon arriving back at the shop, Dantzinger informed Duncan that Milan called him and said that Duncan had walked off the Taylorsville job. Duncan told Dantzinger that Milan does not treat him with respect and he did not walk off the job.

On January 7, 1998, Curry and Dantzinger convened a meeting to discuss the incident that occurred the prior day involving Milan, Duncan, and Davis. Duncan indicated that he wanted to be treated with more respect on the job by Milan. Davis told Dantzinger that he was frustrated with Milan. Curry said that Davis had an attitude and Davis responded so does Milan. Milan said that Davis was saying things about the Union on the job, and Davis responded that we should not talk about the Union. The meeting ended with Duncan and Milan leaving together for a job assignment.

On January 14, 1998, Duncan and Davis attended an allemployee meeting convened by East who was the principal spokesperson. During that meeting, East spoke from a prepared script and apprised the employee's that:

[Flor several years, the Union has been trying to unionize the residential and light commercial heating and air-conditioning business in and around Indianapolis. One of the ways they have gone about this is by sending union members who are professional organizers to get hired at nonunion companies. The union organizers keep secret that they are also working for the Union until after they are hired at the nonunion company. Once they get hired, then they go to work trying to unionize the Company. If you don't already know, I am very sorry to have to tell you that the Union has sent two of its professional full-time agents here to work as undercover organizers. The union organizers are Tom Duncan and Matt Davis. If you do not want to become part of the Union's losing record tell Tom Duncan and Matt Davis to get lost. Ask them if the Union will guarantee you 40 hours of work a week and guarantee that you will receive the Union's pay rate. Ask them if they will guarantee that we will not lose business when our bids are more than our competitors. If the Union cannot give you these kinds of guarantees, how can you trust it with your future? Remember that even when the union companies lay off employees or go out of business the union organizers keep their jobs and keep getting paid. It is not their future that is at risk. It's yours.

On January 15, 1998, Curry called Duncan and Davis into her office and met with each individual separately. She informed both employees that due to work being slow they were being laid off in accordance with seniority. Duncan said that Davis and Jason Land should be laid off ahead of him as they were hired after he started employment. Curry handed Duncan a layoff slip to sign but he refused. Duncan asked Curry if he could work out of the Bloomington office and Curry said, "no." Duncan then asked Curry about being placed on a callback list

and Curry said, "I don't think so."

Davis did sign the layoff slip that Curry provided but challenged Curry's assertion that work was slow. Indeed, he told Curry that he just started a new house construction job and was working with two other employees.

Under the *Wright Line* analysis (251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982)), discussed above, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

For the following reasons, I find that the General Counsel has made a strong showing that the Respondent was motivated by antiunion considerations in laying off Duncan and Davis. First, immediately after announcing their union affiliation on November 13, 1997, in Curry's office, the Respondent instructed them not to discuss the Union with other employees. On December 8, 1997, Davis received an informal counseling form from Curry that threatened additional counseling or possibly termination if he continued to talk to employees on worktime about the Union. On December 3 and 9, 1997, Dantzinger prohibited Duncan and Davis from wearing their union hats and threatened them with reprisals if they joined or supported the Union. Lastly, on January 14, 1998, the day before the layoffs, East specifically mentioned their names as professional union organizers in the all-employee meeting held on that day. Moreover, East encouraged his employees to tell Duncan and Davis to get lost, if they were approached about the Union.

The Respondent defends the layoffs on the fact that work was slow and Duncan and Davis were laid off in accordance with seniority.

I find that the reasons advanced by Respondent are pretextual and suggest a predetermined plan to create a reason to lay off Duncan and Davis and rid the facility of the two leading union activists. I base this finding on the fact that Respondent engaged in 8(a)(1) conduct regarding both individuals and effectuated the layoffs 1 day after the all-employee meeting wherein East announced the names of Duncan and Davis as professional union organizers. Additionally, I reject the defense that work was slow as ARS advertised for new employees in newspaper ads dated December 6, 1997 (GC Exh. 19), and January 25, 1998 (GC Exh. 16), a period of time both before and shortly after the layoffs. Moreover, I fully credit Davis' testimony that at the time of the layoff on January 15, 1998, he had just commenced working on a new construction home along with two other employees. Further evidence of pretext is established by ARS Indianapolis hiring of at least six helpers after the hire dates of Duncan and Davis. Those employees remained employed after the layoff of Duncan and Davis on January 15, 1998 (R. Exh. 20). While Curry testified that there was little interchange or transfer of employees between ARS Indianapolis and Columbus, she did not rebut the testimony of Union Organizers Dick, Rogers, and Wheeler that their applications would be forwarded to Indianapolis as it was closer to their residences. Nor did Curry rebut the testimony of Duncan that in his interview with her on September 23, 1997, Curry apprised him that he might be floated back and forth between Columbus and Bloomington if work demands required it. Thus, and particularly noting that interchange was contemplated between the two facilities. I find that the helpers hired at ARS Indianapolis after Duncan and Davis should have been laid off before them in accordance with seniority. Likewise, as it concerns ARS Columbus, the record confirms that employee Jason Land was hired the same day as Davis but after Duncan. Thus, Davis and Land should have been the first two individuals selected for layoff according to Respondent's defense. Land informed Curry that he heard there might be a layoff and therefore quit his employment on January 15, 1998. In regard to employee Michael Martin who was hired as a helper on October 29, 1997, and was assigned to the Bloomington facility, he was not laid off until February 2, 1998. Although Curry testified that Martin was the only helper in Bloomington and was not laid off on January 15, 1998, for that reason, I conclude that Martin is carried on the ARS Columbus seniority list, is junior to Duncan and Davis, and should have been laid off before them. I find that the reason Martin was not laid off earlier is solely because he was not engaged in protected activities. Lastly, I note that Respondent ARS hired 48 employees in 1998, many of whom were helpers, yet neither Duncan nor Davis was contacted and offered any of these positions while on layoff status.

Accordingly, for the reasons noted above, I find that Respondent ARS laid off Duncan and Davis on January 15, 1998, for their engaging in protected activities in violation of Section 8(a)(1) and (3) of the Act.

6. The Golden State successor issue³³

The General Counsel alleges in paragraphs 2(o) and (p) of the complaint that prior to the purchase of Respondent Dial One and Respondent USA, Respondent ARS was put on notice of the unfair labor practice charges filed against both employers. Accordingly, in paragraph 2(q) of the complaint, the General Counsel asserts that Respondent ARS has continued the employing entities with notice of their potential liability to remedy the alleged unfair labor practices.³⁴

On October 12 and 13, 2000, the parties entered into a stipulation of facts (Jt. Exh. 1). That stipulation provides that prior to the purchase of Respondent Dial One and Respondent USA, Respondent ARS was put on notice of the potential liability for

their alleged failure to hire and consider for hire Charging Party employment applicants and for other alleged unfair labor practices.

Liability under *Golden State* normally attaches only if the successor acquires the predecessor's business with the knowledge that the predecessor has committed unfair labor practices. In light of the parties stipulation, and particularly noting that Respondent ARS purchased the assets of Respondent Dial One and Respondent USA with knowledge of the unfair labor practices presently pending, I find that Respondent ARS is a *Golden State* successor to Respondent Dial One and Respondent USA. Accordingly, I conclude that Respondent ARS is jointly and severally liable with Respondent Dial One and Respondent USA for their unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

- 1. The Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The union organizers are bona fide employees within the meaning of Section 2(3) of the Act.
- 4. The Respondents violated Section 8(a)(1) of the Act by engaging in the following conduct.
- (a) By instructing its employees not to discuss the Union with other employees.
- (b) By instructing its employees not to talk about the Union on the job.
- (c) By prohibiting its employees from wearing union hats or other union insignia at work.
- (d) By discriminatorily instructing its employees to remove their union hats.
- (e) By threatening its employees with unspecified reprisals if they discussed the subject of the Union with other employees.
- 5. The Respondents violated Section 8(a)(1) and (3) of the Act by engaging in the following conduct.
- (a) By refusing to hire or consider for hire the following applicants on the following dates:

| • | |
|----------------------|--------------------|
| Gabriel Brooking | April 3, 1995 |
| Jason McKinney | April 3, 1995 |
| Tyronne Moore | April 3, 1995 |
| Aaron Dailey | May 4, 1995 |
| James Santacroce Jr. | June 12, 1995 |
| Aaron Young | June 16, 1995 |
| Stephen M. Hill | September 26, 1995 |
| Kenneth D. Walden | September 26, 1995 |
| Ronald L. Cornwell | February 5, 1996 |
| Brady Piercefield | February 26, 1996 |
| George R. Sears | February 26, 1996 |
| Robert Sharp | March 4, 1996 |
| Don A. Campbell | March 25, 1996 |
| Lloyd T. Campbell | March 25, 1996 |
| Eric J. Edwards | March 25, 1996 |
| Darlene J. Haemmerle | March 25, 1996 |
| Kevin A. Hechinger | March 25, 1996 |
| Keith A. Peacher | March 25, 1996 |
| Ryan M. Striby | March 25, 1996 |
| | |

³³ Golden State Bottling v. NLRB, 414 U.S. 168 (1973). The Supreme Court in Golden State held that a successor employer that acquires and continues a business with knowledge that the predecessor employer committed unfair labor practices may be held jointly and severally liable, with the predecessor, to remedy the unlawful conduct.

³⁴ On May 3, 2000, before the General Counsel rested its case, it moved to amend the consolidated complaint to include the above-noted paragraphs. I took the matter under advisement and requested that the parties submit written submissions on the propriety of the proposed amendment. After careful consideration of the submissions, I issued an Order dated May 23, 2000, denying the General Counsel's motion to amend the complaint. Thereafter the General Counsel and the Charging Party filed a special appeal with the Board. By unpublished Order dated September 14, 2000, the Board reversed my ruling and remanded the matter to me for further proceedings.

| Frank J. Sullivan II | March 25, 1996 |
|-----------------------------|--------------------|
| Thomas W. Akers II | March 26, 1996 |
| Thomas R. Freeman | March 26, 1996 |
| Craig A. Gruell | March 26, 1996 |
| Steven J. Reintjes | March 26, 1996 |
| Joseph Slinker Jr. | March 26, 1996 |
| Gregory L. Wilson | August 5, 1996 |
| Ryan O. Witham | August 5, 1996 |
| Terry L. Netherton | October 22, 1996 |
| Bryan C. Mirowski | October 22, 1996 |
| Dean L. Broyles | October 22, 1996 |
| Tony A. Eldridge | October 22, 1996 |
| Kenneth R. Weimer | October 22, 1996 |
| Lance D. Hale | November 14, 1996 |
| Clifford E. Wright | November 14, 1996 |
| William B. Shields | November 18, 1996 |
| Stephen D. Shea | November 22, 1996 |
| Larry W. Sharp | November 22, 1996 |
| Michael R. Rohr | November 22, 1996 |
| Spencer Irving III | March 28, 1997 |
| Bruce Manley | March 28, 1997 |
| James S. Snodgrass | March 28, 1997 |
| Tony Turner | March 28, 1997 |
| Timothy Williamson | March 28, 1997 |
| James L. Wilson | March 28, 1997 |
| Kevin Bireley | March 31, 1997 |
| Jason W. Ellis | March 31, 1997 |
| Eric Harris | March 31, 1997 |
| Christopher H. Meyers | March 31, 1997 |
| Cimistophier 11. 1110 y ers | July 21, 1997 |
| Charles W. Miller | March 31, 1997 |
| Jason Wildrick | March 31, 1997 |
| Brian Campbell | April 15, 1997 |
| Kerry Bowling | April 28, 1997 |
| Robert Gandy | April 28, 1997 |
| M. John Maynard | June 20, 1997 |
| Chris Carson | June 20, 1997 |
| Mark Chittum | July 18, 1997 |
| Tim Choate | July 18, 1997 |
| Stony Miley | July 18, 1997 |
| Cory Stein | July 18, 1997 |
| Charles Baldwin | July 21, 1997 |
| Monty Shoulders | July 21, 1997 |
| Michael Crull | Sept. 24, 1997 |
| | October 31, 1997 |
| | December 8, 1997 |
| Travis Dick | September 24, 1997 |
| Travis Dick | October 8, 1997 |
| | December 8, 1997 |
| Jeffrey Higgins | September 29, 1997 |
| Jenney Higgins | December 8, 1997 |
| Samuel D. Holland | September 29, 1997 |
| Samuel D. Holland | December 8, 1997 |
| Wm. Gary Rogers | October 21, 1997 |
| win. Gary Rogers | October 29, 1997 |
| | OCHUUCI 43, 1337 |
| Donnia Whaeler | October 21 1007 |
| Dennis Wheeler | October 21, 1997 |
| | October 29, 1997 |

| Mark Moran | October 28, 1997 |
|--------------------|-------------------|
| Daniel Steward | October 29, 1997 |
| Charles Parsley | November 13, 1997 |
| Steve Harris | June 11, 1998 |
| William L. Hopkins | July 7, 1998 |
| Bryan Jones | July 7, 1998 |
| Kelley Boesken | July 9, 1998 |
| Trent Todd | July 14, 1998 |
| | |

- (b) By laying off Tom Duncan and Matt Davis on January 15, 1998.
- 6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
- 7. The Respondent did not otherwise engage in any other unfair labor practice alleged in the complaint in violation of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they 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 refused to hire or consider for hire the individuals listed in the conclusions of law section of the decision in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that the Respondents be ordered to immediately offer these individuals instatement at rates paid to the individuals hired by the Respondents for the positions to which they applied or for which they would have been qualified to perform or, if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights and privileges; and if necessary, terminating the service of employees hired in their stead, and to make the aforesaid individuals 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).

Other considerations regarding the remedy and the specifics of the relief granted the job applicants which the Respondents refused to hire or consider for hire must wait until the compliance stage of the proceeding, see *Eldeco*, *Inc.*, 321 NLRB 857, 858 (1996).

Having found that Respondent ARS discriminatorily laid off Tom Duncan and Matt Davis, I shall recommend that they be ordered to immediately offer them full reinstatement, without prejudice to their seniority or any other rights and privileges; if necessary, terminating the service of employees hired in their positions, and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of layoff to the date a proper offer of reinstatement is made, as prescribed in *F. W. Woolworth, Co.*, supra, less any interim earnings, with the amounts due and interest thereon computed in accordance with *New Horizons for the Retarded*, supra.

[Recommended Order omitted from publication.]