Bill's Electric, Inc. *and* International Brotherhood of Electrical Workers Local Union No. 95. Cases 17–CA–18629–1, 17–CA–18697, 17–CA–18787, and 17–CA–19112

July 24, 2007

DECISION AND ORDER

BY MEMBERS LIEBMAN, KIRSANOW, AND WALSH

On August 10, 1999, Administrative Law Judge William L. Schmidt issued the attached decision. The General Counsel and Charging Party International Brotherhood of Electrical Workers Local Union No. 95 (the Union) each filed exceptions and a supporting brief. Respondent Bill's Electric, Inc. filed cross-exceptions, a supporting brief, and 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 decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended Order, as modified and set forth in full below.

This case presents several issues arising from the Union's campaign to "salt" the Respondent in 1996 and 1997. For the reasons set forth in the judge's decision, we find that the Respondent's foremen, Greg Reber and Roy Perdue, committed violations of Section 8(a)(1) of the Act,[3] and that the Respondent lawfully implemented a wage increase for its employees on May 6, 1996.[4] For the reasons discussed below in section I, we affirm the judge's conclusions that the Respondent unlawfully refused to hire organizer Ron Lundien, but that it did not unlawfully refuse to hire other union applicants on and after May 14, 1996.[5] For the reasons discussed below in section II, we agree with the judge that the Respondent unlawfully maintained and enforced a mandatory grievance and arbitration procedure that restricted employee and job-applicant access to the Board. Finally, as discussed in the amended remedy section of this decision, we will modify the judge's recommended remedies for the refusal to hire Ron Lundien and the unlawful maintenance and enforcement of the mandatory grievance and arbitration procedure.

I. THE ALLEGED HIRING DISCRIMINATION

A. Facts

The Respondent is an electrical contractor with a main office in Webb City, Missouri, and a branch office in Nixa, Missouri. The Respondent's president, Dale Wilson, and Superintendent, John Reavis, work in Webb City and oversee projects originating from there. Nixa Branch Manager Ron McInturff reports to Wilson and oversees projects originating from Nixa. Webb City and Nixa management make separate hiring decisions and consider job applicants only at the office where they apply.

Alleged discriminatee Ron Lundien became an organizer for the Union in early April 1996.[6] When the Respondent began advertising in a local newspaper for experienced electricians on April 16, Lundien and Union President Phil Brown first tried unsuccessfully to persuade Wilson to become a union contractor. The union officials then initiated an effort to have union salts apply for jobs with the Respondent. Lundien telephoned the Respondent's Webb City office to inquire about job opportunities on April 22. Superintendent Reavis invited Lundien to the office for an interview.

Lundien went to the office the next day. He gave Wilson and Reavis a resume detailing 20 years of experience

[1] The Respondent in its answering brief contends that the exceptions and briefs filed by the General Counsel and the Union should be overruled or disregarded because they fail to conform to Sec. 102.46 of the Board's Rules and Regulations. We find that the exceptions and briefs are in substantial compliance with the requirements of that section.

[2] The Respondent and the Charging Party 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.

In addition, the Respondent asserts that some of the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[3] We find no need to pass on the judge's findings that Reber and Perdue were supervisors within the meaning of Sec. 2(11). The complaint alternatively alleged that the foremen were the Respondent's agents within the meaning of Sec. 2(13). While the judge made no finding on this point, the record clearly shows that both foremen "regularly exercised apparent and actual authority whenever they independently acted as the Respondent's spokesmen on the jobsites," *Zimmerman Plumbing Co.*, 325 NLRB 106 (1997), and were acting within the scope of this authority when they made the unlawful statements attributed to them. Thus, we find that Reber and Perdue were Sec. 2(13) agents of the Respondent. Compare *Facchina Construction Co.*, 343 NLRB 886, 886–887 (2004) (finding that Foreman Spargo was the respondent employer's agent because, inter alia, employees received their daily assignments and work instructions from foremen, foremen were responsible for overseeing employees' work, employees informed foremen if they needed time off, and foremen reported personnel issues and other daily problems to the superintendent).

[4] In affirming the judge's conclusion that the May wage increase was lawful, we rely solely on the credited testimony of Respondent's president, Dale Wilson, that the increase occurred at the time in question only because it coincided with the conclusion of the Respondent's "exceptionally good" fiscal year.

[5] We agree with the judge that it is unnecessary to address any procedural issues relating to the General Counsel's dismissal of refusal-to-hire charges in Case 17–CA–18944.

[6] Unless otherwise indicated, all subsequent dates are in 1996.

as a journeyman wireman. During the interview, Lundien stated to Wilson an intent "to come to work for him to make him a hand and then with the possibility of organizing his shop."

Later, on April 23, Lundien directed Mark Miller to apply for work with the Respondent. Miller was a new union member whom the Respondent had discharged in 1994 for poor work performance. Miller called and spoke to Reavis, who said that the Respondent needed electricians. Without disclosing his union affiliation, Miller interviewed with Reavis and was hired by him on April 24. Miller worked only 1 day, on April 27, before quitting.

Lundien was not hired. Wilson variously testified that he believed Lundien had a job working for the Union, he felt Lundien was not honestly looking for a long-term job, and Lundien's appearance was unkempt. Wilson said that "we're not looking for short term people," and Lundien did not tell him that he wanted to be a long-term employee. Explaining his position about hiring union organizers, Wilson testified that "[i]f a salesman come and told me he was a bible salesman . . . I don't have anything against religion, and I don't have anything against Bibles, but I don't need one . . . I don't have anything against the Union or organizers. I just don't have a use for one." Reavis echoed Wilson's testimony that they did not think Lundien was a serious applicant and stated that, "[W]e don't need an organizer." Reavis said that he hoped any employee hired would stay for a long time.

Reavis also testified that no positions were available when Lundien applied. Lundien testified that is what Reavis told him when Lundien called the Webb City office on April 29. In fact, the Respondent continued to run its newspaper job advertisement through May 2. It hired Philip Morrison, who began work as a journeyman on May 6.[7] It also hired Steven Denby as an apprentice on May 14. Denby, like Miller, was a former employee. Respondent had recently fired Denby for excessive absenteeism and tardiness. Denby's new application shows he worked only 3 months before that discharge. When Miller and Denby reapplied, Reavis said he thought that he would give them a "second chance."

On May 13, Lundien again called the Webb City office. Wilson told him no jobs were available and that applications had to be re-signed every 30 days. Thereafter, Lundien routinely sent monthly notices to the Respondent indicating his continued interest in obtaining employment. Wilson testified that he did not view the renewal notices seriously, stating, "[T]here are better ways of doing that . . . they were just little notes."

On May 14, Lundien and union members Randy Claggett, Gerry Fleming, Jack Massey, and Lyn Uto went to the Webb City office to apply for jobs. Once inside the office, Lundien used a video camera to record the application process. Wilson asked Lundien to turn off the camera, but Lundien refused. Although Wilson did not ask Lundien to leave, he did ask his secretary to call the police to report a "disturbance." Lundien continued to videotape for approximately 10 minutes until two policemen arrived. They escorted Lundien outside. There were no arrests made or citations issued.

In the meantime, the other union members completed their applications and one asked for an interview. Lundien testified that the applicants and Wilson were "not rude, but [were] pleasant." When asked by the Respondent's counsel if Wilson had a right to ask Lundien not to videotape in the office, Lundien replied, "I suspect so." Wilson testified that he viewed the videotaping incident "very unfavorably," and he did not consider the union members to be "serious applicants" looking for full-time work. The Respondent hired two apprentices in the 30 days following May 14. The four union members who applied on that date were not offered employment until approximately 1 week before the hearing. Prior to that time, Lundien sent monthly notices to the Respondent indicating the continuing job interests of Lundien and the other four applicants.

Union salts Karl Gregory and Donald Sapp applied for work at the Webb City office on September 13 and October 4, respectively. Their applications indicated a union contractor work history and union apprenticeship training. Lundien subsequently added their names to his recurring monthly notice to the Respondent of union applicants' continued availability. Like the May 14 applicants, Gregory and Sapp were not offered work until a week before the hearing in this case. Superintendent Reavis testified that there was no work available when they applied. Hiring records show that the Respondent did not hire anyone at Webb City between September 11 and February 4, 1997. At least 12 other applicants were not hired. The Respondent did hire several applicants at the Nixa office during this time.

[7] Morrison's application is dated May 6. Reavis testified that about 2 to 3 weeks before Lundien applied he verbally hired Morrison based on a resume submitted in response to the newspaper ad. We note that the ad appeared only a week before Lundien applied. However, the judge made no credibility resolution on this point.

B. The Judge's Decision

The judge analyzed the 8(a)(3) refusal to hire or consider hiring allegations in the case under the *Wright Line*[8] test of discriminatory motivation. Without any specific discussion of evidence, the judge assumed that the General Counsel met his initial burden of proving that the Respondent was motivated by union animus in failing to hire or consider hiring all seven alleged discriminatees. He then discussed whether the Respondent had met its rebuttal burden of proving that it would have taken the same action even in the absence of union activity.

With respect to Lundien, the judge found that the Respondent had not met its rebuttal burden for refusing to hire or consider hiring Lundien from the time of his April 23 application until May 14, the date of the group application filing. The judge discredited testimony by Wilson and Reavis and rejected as pretext their defense claims about Lundien's appearance and the lack of job openings. The judge found that they "admittedly declined to treat Lundien as a 'serious applicant'" after he disclosed his intent to organize.

However, the judge found that Respondent proved it would not have hired the four May 14 union applicants because of their concerted participation with Lundien, who refused Wilson's request to cease videotaping the application process in the Webb City office. Without deciding whether the videotaping was itself protected activity, the judge stated that "[n]othing in this record suggests that Respondent has, or should be required to, consider applicants who disrupt its normal office routine and compromise the minimal security standard of concern to Wilson to the extent that it becomes necessary to summon police officers to enforce the expected order." The judge concluded that the May 14 incident was "indistinguishable" from one at issue in *Heiliger Electric Corp.*, 325 NLRB 966 (1998). He found no significance in the fact that Wilson, unlike the employer in *Heiliger*, did not request the cameraman and applicants to leave the office before Wilson summoned the police.

The judge also found that the Respondent met its rebuttal burden with respect to the applications of Gregory and Sapp. The judge specifically credited Reavis' testimony, supported by documentary evidence, that the Respondent had no work for Gregory and Sapp when they applied. He also implicitly credited Wilson's testimony about the regular application process, i.e., applications needed to be re-signed every 30 days, Lundien's repeated monthly notices of continuing availability were not adequate, and hiring at the Nixa office was limited to applications filed there.

C. Analysis

The judge's decision predates our decision in *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002). In *FES*, the Board held that, to establish a discriminatory refusal to hire under the allocation of burdens set forth in *Wright Line*, supra, the General Counsel must first show that (1) the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) 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) antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden shifts to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. Id. at 12.

We find the record in this case is sufficient to determine the merits of the refusal-to-hire allegations under the *FES* analysis. Applying this analysis to each of the alleged discriminatees, we reach the same conclusions as the judge did in his pre-*FES* decision.

The General Counsel met his initial burden of proof with respect to Lundien's April 23 job application. First, the record shows that the Respondent was hiring. It advertised for experienced electricians in a local newspaper from April 16 to May 2, it invited Lundien and Miller to job interviews, and it hired Denby and Miller.[9] Although Lundien applied for a journeyman's position, and the Respondent hired Denby and Miller as apprentices, Respondent's president, Wilson, conceded that an applicant for the more experienced position could be considered for apprentice positions. Second, there is no dispute that Lundien had experience and training relevant to the positions for hire. Third, the admissions of both Wilson and Reavis that they did not hire Lundien because of his stated intent to organize the Respondent's employees prove that the Respondent's union animus was a motivating factor in their hiring decision.[10]

The Respondent failed to meet its *FES* rebuttal burden of showing that it would not have hired Lundien even in the absence of his declared intent to organize. There is

[8] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[9] Inasmuch as the Respondent undisputedly hired Miller and Denby after Lundien applied, we need not address the credibility of Reavis' testimony that he orally committed to hire Morrison before Lundien applied.

[10] See, e.g., *Shisler Electrical Contractors*, 349 NLRB 840, 842 (2007), and *Sommer Awning Co.*, 332 NLRB 1318, 1318–1319 (2000).

no basis for reversing the judge's discrediting of testimony by Wilson that Lundien's appearance was a factor in the hiring decision. We further find that the Respondent failed to prove that it would have hired Miller[11] and Denby rather than Lundien because they were former employees or they were better prospects for long-term employment. While the Respondent has rehired former employees, such as Miller and Denby, there is insufficient evidence of a consistent policy of giving hiring priority to former employees over other applicants. Reavis' testimony indicates only that he made a discretionary decision to give Miller and Denby a second chance. Finally, although the Respondent, like most employers, may have preferred to hire applicants with the prospect of long-term employment, it failed to show why it believed Miller and Denby were better long-term prospects than Lundien. Wilson testified that Lundien did not tell him that he wanted to be a long-term employee, but there is no evidence that either Miller or Denby volunteered such a desire. Moreover, there seems to be little in these former employees' past employment with the Respondent that would inspire confidence in their prospects for long-term reemployment. We therefore affirm the judge's conclusion that the refusal to hire Lundien on and after April 23 violated Section 8(a)(3) and (1) of the Act.[12]

The General Counsel also met his initial *FES* burden with respect to the refusal to hire the four May 14 union applicants. First, the record shows that the Respondent hired two apprentices within 30 days after they applied. Second, as with Lundien, there is no dispute that the applicants had experience and training relevant to the available jobs. Finally, we find it reasonable to infer from their group application in concert with Lundien that the Respondent bore the same animus against them, as potential organizers, that it bore against Lundien, based on his avowed intent to organize.

However, we agree with the judge that the Respondent has shown that it refused to hire the May 14 applicants because they acted in concert with Lundien's refusal to cease videotaping their application process until Wilson summoned police to remove Lundien from the Webb City office. The judge's analysis of the videotaping issue is consistent with that in *Heiliger,* supra. Contrary to the General Counsel's argument in exceptions, *Heiliger* recognizes the legal right of an employer to tell applicants and those accompanying them to cease videotaping in circumstances that are disruptive of the employer's normal application process and raise concerns for office security. See 325 NLRB at 968. Notwithstanding the lack of overt hostile behavior involved in this case (in contrast to *Heiliger*), the judge reasonably found that the refusal to cease videotaping was sufficiently disruptive and disrespectful to justify the Respondent's decision not to hire the May 14 applicants who acted in concert with Lundien.[13] We therefore affirm the judge's dismissal of allegations that the refusal to hire or consider hiring Claggett, Fleming, Massey, and Uto on and after May 14 violated the Act.

Finally, with respect to the refusal to hire Gregory and Sapp, we find that the General Counsel has failed to meet his initial *FES* burden of proof. Specifically, we find that the General Counsel has failed to show that the Respondent was hiring or had concrete plans to hire at times when the applications from Gregory and Sapp were active.[14] In this regard, there is no basis for reversing the judge's findings about the lack of available jobs at Webb City, the obligation to re-sign applications every 30 days, and the separate hiring process at Nixa. Accordingly, we affirm the judge's dismissal of the refusal to hire allegations for Gregory and Sapp on this basis.

II. THE MANDATORY GRIEVANCE AND ARBITRATION PROCEDURE

A. Facts

At some point between Lundien's filing of an application on April 23 and the group application filing on May 14, the Respondent changed its application form by adding a paragraph above the signature line that required

[11] We reject the Respondent's contention that Miller's hiring cannot be considered discriminatory vis-a-vis Lundien because both applicants were union members. The record does not support the Respondent's claim that it was aware of Miller's recent affiliation with the Union when it hired him.

[12] For the same reasons, we find that the General Counsel has proved that the Respondent was motivated by union animus to exclude Lundien from consideration for hire and that the Respondent failed to prove it would not have considered hiring Lundien even absent his declared intent to engage in union organizing. See *FES*, 331 NLRB at 15.

[13] Accord: *Exterior Systems, Inc.*, 338 NLRB 677, 678 (2002) (dismissing refusal to hire and consider allegations on the basis of "disruptive" and "disrespectful" conduct by union applicants during the application process, citing *Heiliger,* supra).

[14] We therefore find it unnecessary to pass on whether the other prongs of the *FES* refusal-to-hire test were met as to these two applicants.

Only the Union excepted to the judge's findings regarding Gregory and Sapp. It did not separately contend that the Respondent unlawfully refused to consider hiring these two applicants even if it did not unlawfully refuse to hire them. Even assuming the exceptions are sufficient to raise the refusal to consider issue for our review, we find no violation. To prove an unlawful refusal to consider under *FES*, the General Counsel must show that the alleged discriminatees were excluded from the hiring process. 331 NLRB at 15. There was no such showing in this case. The Respondent accepted the applications of Gregory and Sapp but took no further action in the absence of any jobs. After 30 days, their applications were no longer active.

applicants to agree to resolve through the Respondent's grievance and arbitration procedure "any legal claims . . . in connection with my rights under Federal or State law, both in connection with the application process and afterwards as an employee." The application stated that a copy of the grievance policies and procedures, an 8-page statement denominated ADR Form 2, was available on request.

In relevant part, paragraph 5 of ADR Form 2 is entitled "Arbitration to be Exclusive Procedure for Resolution of All Disputes," and it provides that the grievance and arbitration procedure "shall be the exclusive method of resolution of all disputes, but this shall not be a waiver of any requirement for the Employee to timely file any charge with the NLRB, EEOC, or any State Agency . . . as may be required by law to present and preserve any claimed statutory violation in a timely manner." ADR Form 2 also provides for a stay of any court or agency proceeding initiated by an employee until exhaustion of arbitration proceedings. It further provides for payment to the Respondent of litigation costs if it obtains a stay or dismissal of "any lawsuit or agency proceeding . . . filed in violation of this agreement to resolve the disputes through this exclusive procedure." ADR Form 2 elsewhere provides that an arbitrator's decision shall be final, subject only to judicial review in Missouri circuit court or a United States district court or as otherwise provided under the Missouri Uniform Arbitration Act.

After charges were filed alleging the unlawful refusal to hire the May 14 applicants, the Respondent's counsel sent identical letters to Claggett, Fleming, Massey, and Uto stating that they were "required under the grievance and arbitration procedures that you agreed to in your employment application form with [the Respondent] to follow these grievance procedures as the exclusive step for resolution of any claimed violation of your rights." A grievance form and a copy of ADR Form 2 were enclosed with each letter. None of the four alleged discriminatees filed grievances, and the Respondent took no further action to enforce its mandatory policy against them.

B. Judge's Decision

The judge found that the mandatory grievance and arbitration agreement in the application form violated Section 8(a)(1) of the Act, and the letters to the four alleged discriminatees violated Section 8(a)(4) of the Act. He stated that the application and letters, read together, clearly sought to interfere with employee access to the Board. He rejected the Respondent's reliance on judicial enforcement of mandatory alternative dispute resolution procedures in individual employment rights cases, and on the enforcement of consensual grievance-arbitration systems in the collective-bargaining context. Referring to the provision for imposition of litigation costs if an employee persisted in seeking initial Board relief, the judge found that the mere maintenance of such a system, even if not enforced, would have a chilling effect on statutory rights of access to the Board.

C. Analysis

It is undisputed that the mandatory grievance and arbitration policy established in 1996 applies, inter alia, to the filing of unfair labor practice charges with the Board. On the one hand, the policy does not expressly prohibit the filing of unfair labor practice charges. Indeed, it informs applicants that their participation in the Respondent's grievance and arbitration procedure does not constitute a waiver of any Board requirements for timely filing of unfair labor practice charges, and the Respondent argues that Board review and determination of whether to defer to a final arbitration award remains an open matter. On the other hand (1) both the application forms and the letters sent in response to the filing of charges in this case emphasize that the grievance and arbitration procedure is the exclusive method for dispute resolution, subject only to limited *judicial* review, and (2) any applicant or employee seeking to pursue Board relief before completion of the arbitration process would have to bear the costs of any litigation to compel compliance with that process. At the very least, the mandatory grievance and arbitration policy would reasonably be read by affected applicants and employees as substantially restricting, if not totally prohibiting, their access to the Board's processes. We therefore affirm the judge's finding that the policy violates Section 8(a)(1) of the Act and that the attempt to enforce it in letters to the alleged discriminatees violated Section 8(a)(4) of the Act.[15]

AMENDED REMEDY[16]

The judge found that Lundien's refusal to cease videotaping the application process on May 14, in response to which Wilson summoned police to escort Lundien from the Webb City office, justified tolling remedial backpay

[15] Our decision is limited to the specific provisions and policy at issue in this case. We do not otherwise pass on the lawfulness of mandatory arbitration provisions in an unorganized employee work force. See *U-Haul Co. of California*, 347 NLRB 375, 378 at fn. 11 (2006).

[16] In addition to those remedial modifications discussed below, we shall modify the judge's recommended Order by adding the customary provision that the Respondent cease and desist from violating the Act in any like or related manner. We shall also modify the judge's Order to accord with *Ferguson Electric Co.*, 335 NLRB 142 (2001), and to require the Respondent to expunge from its files any references to its illegal refusal to consider and hire Lundien. Finally, we shall substitute new notices to conform to the Order as modified and in accordance with *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

as of that date for the Respondent's prior unlawful refusal to hire Lundien and relieved the Respondent of the usual obligation to offer Lundien instatement. We disagree. The parties litigated the issue of whether the conduct of Lundien and the four union applicants who acted in concert with him on May 14 justified the Respondent's refusal to hire those four applicants. Unlike the May 14 applicants, Lundien was already a discriminatee whom the Respondent unlawfully had refused to hire after his April 23 application. The General Counsel proved that at least one job (possibly more than one) was available from April 24 through May 14. Accordingly, the appropriate remedy for the Respondent's refusal to hire Lundien includes backpay and instatement to the position for which he applied. The parties did not litigate the discrete, separate issue of whether Lundien's subsequent conduct on May 14 would have justified terminating him if the Respondent had not unlawfully refused to hire him prior to that date. In these circumstances, we have decided to leave resolution of this unlitigated issue to compliance, where the Respondent, if it wishes to establish that Lundien is not entitled to instatement and that his backpay must be limited, will have the burden of establishing that he engaged in misconduct for which it would have discharged any employee.[17] Accordingly, we shall modify the judge's recommended Order to include instatement and backpay for Lundien.[18]

To remedy the Respondent's unlawful maintenance and enforcement of the mandatory grievance and arbitration procedure established in 1996 that interfered with employee access to the Board's processes, the judge recommended that the Respondent, if it wished to maintain this procedure, modify its application form and related documents to specify in bold print that the procedure does not apply to any matter an employee may choose to bring before the Board, to cease enforcing the procedure as to any matter brought before the Board, and to post copies of the remedial notice at all existing jobsites. We find these remedial provisions appropriate. In addition, we shall order the Respondent to mail copies of a remedial notice to applicants who were required when applying for jobs to agree to use this procedure as the exclusive means for resolving disputes about the application process and subsequent employment. "The Board provides for the mailing of individual notices when posting will not adequately inform the employees of the violations that have occurred and their rights under the Act."[19] In this case, it is undisputed that there were many job applicants who were never hired, and many others who were hired but no longer work for the Respondent, who would not receive notice of the Respondent's unlawful mandatory procedure and their statutory rights unless we required the Respondent to mail notices to them.

We note that the Respondent claims that in April 1998 it altered its application form and substituted an optional grievance and arbitration procedure for the unlawful mandatory procedure established in 1996. The parties did not litigate whether the Respondent actually implemented a new procedure and whether it communicated to prior job applicants and present and former employees that they were no longer bound by the unlawful mandatory procedure with respect to matters they choose to bring before the Board. We leave these matters to compliance proceedings.

ORDER

The National Labor Relations Board orders that the Respondent, Bill's Electric, Inc., Webb City, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that the shop would close if the Respondent had to recognize International Brotherhood of Electrical Workers Local No. 95.

(b) Promulgating or maintaining a no-solicitation policy that pertains only to solicitation on behalf of a labor organization.

(c) Soliciting employees to report any employee who fails to adhere to a no-solicitation policy that pertains only to solicitation on behalf of a labor organization.

(d) Telling employees that union sympathizers will be laid off first.

[17] *Berkshire Farm Center*, 333 NLRB 367 (2001).

[18] Backpay shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In litigating at compliance the issues of Lundien's entitlement to backpay and instatement, the General Counsel will bear the burden of proof as set forth in *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007). Although Members Liebman and Walsh dissented on this issue in *Oil Capitol*, they recognize that the majority view in that case is current Board law, and they apply it here for institutional reasons.

Member Kirsanow would not provide any make-whole relief for Lundien beyond the limited backpay recommended by the judge. The General Counsel and the Union contend in exceptions that the Respondent could not lawfully refuse to hire Lundien and the four union applicants because of the refusal to cease videotaping on May 14. They do not separately argue that even if the judge correctly found that the Respondent lawfully refused to hire the applicants because of this misconduct, he erred in tolling Lundien's backpay and denying instatement. Moreover, the issue of Lundien's conduct was fully litigated, albeit in reference to the merits of the refusal to hire allegations. In Member Kirsanow's view, insubordinate conduct that meets the Respondent's *FES* rebuttal burden and justifies a refusal to hire would a fortiori justify Lundien's discharge if he were an employee.

[19] *Parkview Hospital, Inc.*, 343 NLRB 76, fn. 3 (2004), citing *Indian Hills Care Center*, 321 NLRB 144 (1996) (when the record indicates that a respondent's facility has closed, the Board routinely provides for the mailing of notices to employees).

(e) Maintaining a grievance-arbitration procedure as a condition of employment that interferes with employee and job-applicant access to the Board's processes.

(f) Interfering with employee and job-applicant access to the Board by attempting to enforce the terms of the mandatory grievance-arbitration procedure established in 1996.

(g) Refusing to hire, or consider for hire, any applicant for employment because he or she expresses an intention to engage in union organizational activities.

(h) 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 Ron Lundien instatement to the position for which he applied or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges to which he would have been entitled absent the discrimination against him.

(b) Make Ron Lundien whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the "Amended Remedy" section of this Decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to consider and hire Ron Lundien, and within 3 days thereafter, notify him in writing that this has been done and that the discriminatory action will not be used against him in any way.

(d) Modify its employment application form and any other document containing reference to the mandatory grievance-arbitration procedure established in 1996 to specify in bold print that the grievance-arbitration procedure is entirely inapplicable to any matter employees or job applicants may choose to bring before the Board.

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

(f) Within 14 days after service by the Region, post at all existing jobsites copies of the attached notice marked "Appendix A."[20] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 23, 1996.

(g) Within 14 days after service by the Region, duplicate and mail, at its own expense, copies of the attached notice marked "Appendix B"[21] to all individuals who were required as a condition of the application process to sign application forms agreeing to the terms of the grievance-arbitration procedure established in l996. Copies of the notice, signed by the Respondent's authorized representative, shall be mailed to the last known address of each of these individuals.

(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.

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

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose not to engage in any of these protected activities.

WE WILL NOT threaten our employees that the shop will close if we have to recognize the International Brotherhood of Electrical Workers Local Union No. 95 as their exclusive collective-bargaining representative.

WE WILL NOT promulgate or maintain a no-solicitation policy that pertains only to solicitation on behalf of a labor organization.

WE WILL NOT solicit employees to report to us any employee who fails to adhere to a no-solicitation policy that pertains only to solicitation on behalf of a labor organization.

WE WILL NOT tell employees that union sympathizers will be laid off first.

WE WILL NOT maintain a grievance-arbitration procedure as a condition of employment that interferes with employee and job-applicant access to the Board's processes.

WE WILL NOT interfere with employee and job-applicant access to the Board's processes by attempting to enforce in any way the terms of the grievance-arbitration procedure adopted in 1996.

WE WILL NOT refuse to consider for employment or refuse to hire job applicants because they express an intention to engage in union organizational activities.

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

WE WILL, within 14 days from the date of the Board's Order, offer Ron Lundien instatement to the position for which he applied or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges to which he would have been entitled absent the discrimination against him.

WE WILL make Ron Lundien whole for any loss of earnings and other benefits he may have suffered by reason of the discrimination against him.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to consider and hire Ron Lundien, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the unlawful action will not be used against him in any way.

WE WILL modify our employment application form and any other document containing reference to the mandatory grievance-arbitration procedure established in 1996 to specify in bold print that the grievance-arbitration procedure is entirely inapplicable to any matter employees or job applicants may choose to bring before the Board.

BILL'S ELECTRIC, INC.

APPENDIX B

NOTICE TO EMPLOYEES
MAIL 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 maintain a grievance-arbitration procedure as a condition of employment that interferes with employee and job-applicant access to the Board's processes.

WE WILL NOT interfere with employee and job-applicant access to the Board's processes by attempting to enforce in any way the terms of the grievance-arbitration procedure we adopted in 1996 that you were required to agree to as a condition of your application to work for us.

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

WE WILL modify our employment application form and any other document containing reference to the mandatory grievance-arbitration procedure established in 1996 to specify in bold print that the grievance-arbitration procedure is entirely inapplicable to any matter employees or job applicants may choose to bring before the Board.

BILL'S ELECTRIC, INC.

Francis A. Molenda, Esq., for General Counsel.
Donald W. Jones, Atty. (Hulston, Jones, Gammon & Marsh), of Springfield, Missouri, for the Respondent.
Michael J. Stapp, Atty. (Blake & Uhlig), of Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. Local 95, International Brotherhood of Electrical Workers, AFL–CIO (Local 95 or the Union) filed Case 17–CA–18629–1 on May

13, 1996, and amended that charge on May 15 and again on July 5. On June 24, the Union filed Case 17–CA–18697 and amended that charge on August 12. Thereafter, the Union filed Case 17–CA–18787 on August 26 and amended that charge on November 8. On April 13, 1997, the Union filed the charge in Case 17–CA–19112 and then amended that charge on July 31, 1997. The Regional Director for Region 17 issued the operative complaint—the third consolidated complaint—on July 31, 1997, alleging that Bills Electric, Inc. (the Company or Respondent) engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). Respondent filed a timely answer denying that it engaged in the unfair labor practices alleged.

I heard this case at Joplin, Missouri, on April 21 and 22, 1998. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, engaged in business as a commercial electrical contractor, maintains an office and place of business in Webb City, Missouri. During the 12-month period ending June 30, 1997, Respondent's direct inflow and direct outflow exceeded the amount established by the Board for exercising its statutory jurisdiction over nonretail enterprises. Accordingly, I find that it would effectuate the purposes of the Act for the Board to exercise its statutory jurisdiction to resolve this labor dispute.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Complaint Allegations

Complaint paragraph 5 alleges that the Company violated Section 8(a)(1) of the Act by Foreman Greg Reber's conduct in promulgating an unlawful no-solicitation rule, soliciting employees to spy on the union activities of other employees and report them to the Company, and threatening employees with layoff for engaging in union or concerted activities. It also alleges that the Company violated Section 8(a)(1) by Foreman Roy Purdue's conduct in threatening employees with "plant closure" if they engaged in union or concerted activities. Respondent denied that Reber and Purdue are supervisors or agents within the meaning of Section 2(11) and (13) and further denies the specific unfair labor practice allegations attributed to them.

Complaint paragraph 6 alleges that on various dates between April 23 and October 4, Respondent granted a wage increase to employees, and refused to consider or hire seven applicants for employment because those employees joined and assisted the Union in violation of Section 8(a)(1) and (3) of the Act.[1]

Complaint paragraph 7 in effect alleges that Respondent maintains a grievance and arbitration system requiring employees and applicants for employment to utilize that system as the exclusive means of resolving all legal claims against the Company. It further alleges that the Company sought to invoke that system to resolve the claims made by four applicants for employment. The complaint avers this conduct violates Section 8(a)(1) and (4) of the Act because it seeks to prevent employee access to the National Labor Relations Board (the Board). Respondent admitted the factual allegations in paragraph 7 but denied that its grievance and arbitration system violates the Act.

B. Relevant Facts

1. Background and wage rates

For about five decades Respondent has been engaged in the electrical contracting business. Throughout that time its principal office and place of business has been located in Webb City, Missouri. In addition, for the past 10 years Respondent has maintained a branch office first located in Branson, Missouri, and later moved to Nixa, Missouri, where it remained at the time of the hearing. Historically, Respondent has performed work in throughout the immediate region that includes portions of Missouri, Arkansas, Oklahoma, and Kansas.

Dale Wilson, Respondent's president and chief executive officer, oversees the entire operation. John Reavis, Respondent's superintendent of operations, works from the Webb City office and oversees Respondent's projects under the direction of the Webb City headquarters. Ronald McInturff, the Nixa branch manager, supervises the Nixa office operation and the projects under direction of the Nixa office. Both Reavis and McInturff are primarily responsible for the hiring and terminating employees assigned to their particular offices, but as a rule both keep Wilson closely informed of their personnel actions and the reasons for those actions.

Workers seeking employment on projects under the direction of the Webb City office must apply at that office; those seeking employment at projects under the direction of the Nixa office must apply there. Although a couple of employees have been permanently transferred from Nixa to Webb City, these actions appear to have been at the employee's request. Ordinarily the employees assigned to the two separate offices are not interchanged save for rare instances where work is slow. At relevant times, Respondent employed from 45 to 65 workers exclusive of its office staff.

Charging Party's Exhibit 3, a company document dated October 13, 1995, sets forth the Company's wage scale at that time. Whether this document represented increases in pay effective on that date is not clear. Wilson described it as the Company's first effort to establish pay classifications. It sets forth four classifications of apprentices—first through fourth year—and separate classifications for journeyman and foreman. Each classification has a pay band except that it indicates that the pay band for the foreman classification is "$14.00 to $??" per hour. In the text below the pay bands, the document appears to describe the requirements for the journeyman and foreman positions and indicates clearly that movement through the apprentice level need not be tied to a time requirement in a particular classification.

On May 6, 1996, the Company adopted a new wage scale. (See GC Exh. 3.) This announcement retained the pay band concept only for the apprentice classifications and announced

[1] At the hearing, I granted the General Counsel's motion to delete complaint par. 6(b) of the complaint.

sizeable pay increases that ranged from as low as 70 cents per the high end of the first year apprentice rate to $6.24 per hour for a worker classed at the low end of the journeyman pay band under the October 1995 announcement. At the top end of the October 1995 pay bands, the May 1996 pay announcement would have resulted in significant increases that ranged from 70 cents per hour for the first year apprentice ($6.50 per hour before the May increase) to $3.74 per hour for the fourth year apprentice ($9.50 per hour before the May increase). However, no evidence was introduced that would permit a determination as to whether any worker actually received such a dramatic increase in pay or whether this was a mere anomaly resulting from the abandonment of the pay band system for that classification.

According to Wilson, the timing of the 1996 pay increase was tied to the end of the Company's fiscal year. He explained that the Company's fiscal year ends on March 31 and that its tax return is due on June 15. The 1996 pay raise determination, according to Wilson, resulted after the yearend accounting documents had been completed that reflected an exceptionally good year. In 1997, a further but substantially more modest increase in pay was announced on June 5 and Wilson indicated that a 1998 pay increase would likely be announced shortly after the hearing.

Regardless of the foregoing documentary evidence, some other evidence tends to indicate that the classification of employees remains largely a subjective exercise by Wilson, Reavis, and McInturff. In certain instances, as illustrated by employee Mark Miller, discussed below, an employee's pay rate would appear to be affected more by what the employee indicates he or she would be willing to work for rather than some objective standard concerning the employee's experience in the trade.

2. The job foremen

Respondent employs job foremen to oversee the work at its various jobsites throughout the region where it operates. As noted, the conduct of two foremen, Greg Reber and Roy Purdue, is at issue in this case but Respondent denies that either Reber or Purdue were supervisors or agents at relevant times.[2] Neither testified in this proceeding.[3]

According to Wilson, the job foremen are involved primarily in "job planning" and purchasing materials. Workers assigned to jobs where Reber and Purdue served as the job foreman observed both study blueprints for the purpose of laying out project work, assign workers to particular tasks, and reassign workers to other tasks when the assigned work was completed or work with greater priority arose.

In the spring and summer of 1996, Reber served as job foreman for three geographically separated projects in the Joplin area. Ten to twelve employees worked under his direction on one such project, the Sears job. The size of the crew on the other jobs is not known but, when needed, Reber temporarily transferred employees from the Sears job to his other projects. Reber conducted jobsite safety and information meetings among the employees. In addition, he conducted Respondent's formal apprenticeship training classes held at Joplin's American Legion Hall. Otherwise, Reber's duties included obtaining and providing the necessary materials for the work in progress,[4] and assigning overtime to selected employees where required. In at least one instance (Miller), Reber refused to recommend a pay increase. All the workers who testified looked to their job foreman for permission to be absent from work for personal business reasons and Wilson conceded that the foremen have such authority. Wilson further conceded that Purdue's duties were similar to Reber's and that he regarded both men as capable of overseeing projects with up to 15 employees.

Job foremen are responsible for maintaining the projects time records and submitting them to the office so that employees are paid in a timely fashion. Other evidence shows that Purdue distributed paychecks to crewmembers and reviewed those checks for accuracy. Under Respondent's pay system announced on May 6, the foreman classification is paid 70 cents per hour more than the journeyman wireman classification but, according to Wilson, Purdue is paid above the listed hourly rates for foremen and general foremen. Both the foreman and general foreman classifications are eligible for a profit-based bonus on the projects they oversee. The Company provided Reber and Purdue with pickups, telephone beepers, and remote radios for use in their duties. The workers observed others in Respondent's management hierarchy, such as Reavis and Wilson, on the project sites only infrequently.[5] Although the job foremen worked with the tools of the trade (estimated up to 60 percent of the workweek for Reber and far less for Purdue), their administrative duties occupied a substantial portion of their worktime.

3. The Union's salting campaign

In early April 1996, Ron Lundien became an organizer for Local 95, an affiliate of the IBEW with geographical jurisdiction extending over 10 southwest Missouri counties and 2 southeastern Kansas counties. Shortly thereafter, Lundien saw company ads in an area newspaper (the Nevada Daily Mail) for "experienced electricians." Thereafter, Lundien and Local 95 President Phil Brown visited Wilson at his office in an effort to persuade him to become a union contractor but Wilson told them he was not interested. Following this meeting, Lundien

[2] Purdue's personnel records reflect that he is classed as a "superintendent." Wilson asserted that designation was an error but conceded that Purdue's pay rate exceeds any foreman classification under the Company's written wage policy.

[3] Purdue still worked for the Company but did not appear because of his duties on a project approximately 120 miles from the location of the hearing. Reber was incarcerated in a State prison facility at the time of the hearing.

[4] Under the Company's protocol, the job foreman may purchase materials costing up to $1000. In excess of that, a requisition must be submitted to Respondent's Webb City office.

[5] Wilson asserted that Reavis visits each Webb City jobsite everyday or every other day. I find this claim as well as his claim (based on the number of company vehicles assigned to individuals) that the Company has about 20 foremen to be exaggerations, inconsistent with his other testimony about the size of crews and evidence that the Company also provides vehicles to some journeymen. But even assuming that Reavis visited the projects that frequently, given the number of such projects and their geographic distribution, it is unlikely that he would have the opportunity to engage in any significant employee supervision.

and Brown commenced an effort to organize the Company from within by having union salts seek employment with the Company.

Lundien sought employment first. On April 22, he telephoned the Company and spoke with Reavis about applying for work. Reavis invited him to the Company's Webb City office the following day to complete an application and for a personal interview. On April 23, Lundien went to the Company, completed the application form, submitted a resume, and sat for an interview by Wilson and Reavis. His resume reflects over 20 years' experience as a journeyman wireman and the names of electrical contractors for whom he had worked over the past 8 years. During the interview, Lundien told Wilson that he was "intent to come to work for him to make him a hand and then with the possibility of organizing his shop."

Based on Lundien's candid assertion that he intended to organize Respondent's employees, Reavis felt that Lundien was not a serious applicant for employment. Reavis assumed that Lundien received pay for his organizing activities and asserted that he preferred to hire employees who needed work rather than those already working. According to Reavis, the Company had no openings for an organizer and, in any event, he would not likely hire anyone who asserted, in effect, that they intended to engage in another concurrent sideline such as selling insurance or bibles. In any event, Reavis claimed that the Company had no further openings at that time. Lundien never received an employment offer from the Company.[6]

From the time of Lundien's application through May 14, Respondent hired three employees, Mark Miller, Philip Morrison, and Steven Denby, at the Webb City office. Miller, a former employee and a union salt, applied on April 24 and began work on April 27. Relevant facts about his brief tenure are detailed below. Morrison, a journeyman with experience similar to or greater than Lundien's, started work on May 6 but Reavis claims that he actually arranged for Morrison to commence his employment 2 or 3 weeks earlier and prior to the time that Lundien submitted an application. This arrangement, Reavis claims, was made at Morrison's request.[7] The Company hired Denby on May 14 and he started to work on May 15 at a pay rate in the middle of the Company's fourth year apprentice scale. Denby's application reflects that he worked for the Company from October 1995 until his discharge in January 1996.[8]

The day after Lundien submitted his first application, he instructed Mark Miller, formerly employed by the Company from 1992 to 1994 and recently accepted into union membership, to apply for employment. Miller called the Company on April 24 and spoke with Reavis. After Reavis told Miller that the Company needed electricians, Miller went to the Webb City office, completed an application, and sat for an interview by Reavis. During the interview, Miller claimed to have worked most recently for two nonunion residential electrical contractors and otherwise provided no indication that he had recently become a union member.[9] By the conclusion of the interview, Reavis had hired Miller for work at $10 per hour, the amount sought by Miller on his application, and assigned him to the Company's project at the Sears store in Joplin starting April 27.

Miller reported to the Sears jobsite at starting time on April 27. Reber provided him with his work assignment and Miller worked through the morning without incident. At the lunchbreak, Miller met with Lundien and Brown in the Sears parking lot and they provided him with union stickers that he put on his hard had and a union T-shirt that he wore back to the project following lunch. Lundien and Brown accompanied Miller and the three men spoke with Reber. Miller requested that his pay be increased to $13 per hour under the Respondent's wage scale. Reber rejected Miller's request for increased pay and when pressed further, Reber refuse to "bother" higher management (Wilson or Reavis) with Miller's request. Although Lundien claims that he advised Reber that Miller would strike if his pay was not increased, in fact Miller returned to work that afternoon.

Shortly after the lunchbreak ended, Reber, a former member of the Union, called the 10 or 12 employees on the jobsite to a meeting. At the meeting, Reber introduced Miller as a union member and told the other employees that Miller was there "to organize the employees and to share the ideas of the Union way of life." Reber also told the employees that if Miller did so during work hours they should report that to him personally because Miller could only do so "legally during break times or off hours—off work hours." Finally, Reber told the employees that as soon as the job was caught up, there would be layoffs and that the last person hired, obviously Miller, would be laid off first.[10] At the end of the day, Miller asked Reber if his pay increase had been approved. Reber told him that it was not and that he did not intend to seek approval for Miller's requested increase from higher management. Miller did not return to work the following day or thereafter. Instead, he took a job with another contractor.

On April 29, Lundien called the Company's office, spoke with Reavis, and asked again if any jobs were available. At

[6] Each month thereafter, Lundien notified the Company in writing that he remained interested in working for the Company. On March 26, 1997, Lundien completed a new application and submitted another resume. Wilson entered the following notation on Lundien's 1997 application form: "Have no need or position for an organizer, he is already employed, was unable to contact 1st previous employer, talked to Dave at ABBA and his comments were not positive." These comments appear to be Wilson's successive responses to the work history listed on Lundien's application.

[7] Morrison completed and dated a company application form on May 6. (R. Exh. 4.) However, Reavis claims that Morrison had previously submitted a resume, also a part of that exhibit, to a company foreman. Morrison did not testify.

[8] Though not entirely clear, Denby's application (R. Exh. 5) appears to list "truck problems" as his reason for leaving his previous employment with the Company.

[9] Respondent's counsel asserts at p. 20 of his brief that Respondent hired Miller knowing that he was a member of the Union and cites Tr. 101 for this assertion. Nothing at that page, or any other page for that matter, suggests support for the claim that Respondent knew of Miller's union membership when he was hired on April 27.

[10] My findings about this meeting are based on Miller's testimony. Allen Beckley also testified concerning this meeting but his recollection appeared somewhat flawed. As the substance of the meeting concerned Miller, I find it probable that his memory about the meeting would be more reliable.

that time, Reavis told Lundien that there were no jobs available. Reavis also told Lundien that his previous application would be good for a year. Lundien made another similar call to the company office on May 13 but spoke with Wilson on this occasion. Wilson told Lundien that there were no jobs available at that time and that applications had to be "re-signed" every 30 days.

In the meantime, on May 6 Reber went to the Union's office with a copy of the Company's new wage scale. Reber told Lundien that there was no further need to organize Respondent's employees as they now made as much or more than union employees did. Wilson claims that he admonished Reber when he later disclosed this visit to the Union's office.

On May 14, Lundien arranged to have union members Randy Claggett, Gerry Fleming, Jack Massey, and Lyn Uto accompany him to the Company's office to apply for work. Lundien took a video camera along to videotape their application process. Once inside the Company's relatively small office, the Company's receptionist provided applications to the four men while Lundien videotaped the process. When Wilson learned that Lundien was videotaping in the reception area, he requested Lundien to cease. Lundien refused and Wilson returned to an inner office where he instructed a secretary to telephone the police because of the "disturbance." Lundien continued to videotape until the two police officers arrived about 10 minutes later. At that time, the police officers escorted Lundien outside. According to Wilson, two of the applicants had completed their applications by about the time that the policemen arrived and they accompanied Lundien outside. Shortly thereafter, the other two applicants completed their forms, put them on the receptionist's desk and left the office. During his redirect examination, Wilson described his reaction in this manner:

> Q. And how did it impress you when they come in May 14, 1996, with their video cameras? Did you consider that was helpful to them getting a job?
>
> [Intervening objection overruled.]
>
> THE WITNESS: Again, it's similar to what I was saying a while ago. They come in and wanted the—some—ask for some applications. They filled them out. They didn't—one of them asked for an interview. They had a video camera in my office. They just laid them down on the desk and walked out.
>
> BY MR. JONES:
>
> Q. Did that impress you favorably or unfavorably?
>
> A. Very unfavorably.
>
> Q. Have you ever hired an employee that did that?
>
> A. No, sir, I have not.
>
> Q. An applicant that did that?
>
> A. No, sir.

Following a brief discussion with the police officers outside, Lundien and the four applicants left. None of the four applicants themselves took any further steps to pursue employment with the Company and none were offered employment until the week before the hearing, about 2 years later.[11] These belated offers appear to have been made to minimize the risk of litigation.

Subsequently, two more union salts submitted applications to the Company. Karl Gregory completed and submitted an application at the Webb City office on September 13. All of the prior employers listed on Gregory's applications are recognized area contractors that have a collective-bargaining agreement with the Union. On October 4, Donald Sapp completed and submitted an application to the Company at the Webb City office. Sapp likewise listed only union contractors as past employers and the applications of both men reflect that they completed a union apprenticeship program. Neither of these two men received an offer of employment until the week prior to the hearing.

Reavis testified that Gregory and Sapp were not hired at or about the time they submitted their applications because the Company had no need for additional help at that time. Company records reflect that between July 19 and February 4, the Company hired one apprentice employee, Steve Tanner, at the Company's lowest hourly rate on September 11. Tanner's application reflects no prior experience in the trade. Reavis described Tanner as an individual interested in learning the trade and the Company provided him with the opportunity to do so. Between May 23 and the end of the year, the Company received at least 12 other applications from individuals who were not hired. (See R. Exhs. 82, 89, 90, 91, 93, 94, 95, 96, 98, 100, 102A, and 104.)

In the balance of 1996, Respondent hired eight more employees, one each May, June, and September, and five in July. Six of those were employed at an hourly rate of $10 or less and, hence, were classed as apprentices. The Company classed two as temporary help; one, clearly a journeyman, worked 3 days and the other worked 2 weeks at an hourly rate of $13 which is within the Company's 4th year apprentice pay band. But overall, Respondent hired 30 employees through its Webb City office between April 27, 1996, and March 23, 1998. Between June 14, 1996, and August 14, 1997, Respondent hired 31 employees through its Nixa office. Respondent's records reflect that in this general time period at least 35 other persons (apart from those discussed above) submitted applications or resumes but were not hired. (See R. Exh. 67 described as a "partial" list of those not hired.)

At least two workers, Terry Clopton and Todd Razer, were hired with prior knowledge of their union membership. Both were hired at the Nixa office and were members of the Springfield, Missouri IBEW local. Clopton previously worked for the Company and had been the first manager at Respondent's Branson/Nixa branch office. The Company hired Razer and assigned him to the Company's project at the Branson Water Treatment plant. When Job Foreman Roy Purdue gave Razer his paycheck on March 28, he told Razer that he knew he was a union member and that he did not want Razer stirring up any

[11] After Lundien learned of Wilson's requirement that applications be "resigned" every 30 days, he sent a note on a monthly basis signifying his interest in employment. Lundien claims that he also included the names of the four May 14 applicants and later added Gregory and Sapp to his list after they applied for employment in September and October, respectively. Wilson's testimony indicates that he did not regard Lundien's monthly notes as a "resigned" application.

"union crap" on the job. Purdue also told Razer that Wilson would close the shop if he had to recognize the Union.

4. Respondent's grievance-arbitration system

Between the time of Lundien's April 23 application and the May 14 applications of Claggett, Fleming, Massey, and Uto, the Company revised its employment application forms. Among the revisions a clause was added immediately above the applicant's signature line that reads as follows:

> In order to resolve any legal questions which I may want to raise concerning any alleged violation of my rights under Federal or State laws or regulations, I understand that the Grievance and Arbitration Procedures, and which is available for all employees and job applicants, is available to me and must be utilized by me to the extent that the Employer may require. As an applicant for employment, I agree that I will utilize the Grievance and Arbitration Procedure as the exclusive procedure to raise any legal questions that I may desire to raise or to assert any legal claims against Employer, or its agents or employees or representative, in connection with my rights under Federal or State law, both in connection with the application process and afterwards as an employee, should I become employed by said employer. I understand that I may receive a copy of the grievance policies and procedures of said employer (ADR Form No. 2) upon request or such policies will be posted for my information at my Employer's office. I will abide by whatever arbitration policy that said Employer may adopt from time to time, it being understood that the procedures will need to be modified from time to time to adjust to new developments or legal requirements.

On August 14, 2 days after the Union filed its amended charge in Case 17–CA–18697 alleging that Claggett, Fleming, Massey, and Uto had been discriminatorily denied employment, Respondent's counsel sent these four applicants a copy of the Company's grievance-arbitration procedure (ADR Form 2) grievance forms (ADR Form 3), and a letter reminding them of their obligation to follow that procedure in resolving the legal claim they had with Respondent. Thus, the August 14 letter states in pertinent part as follows:

> We are legal counsel for Bill's Electric Company of Webb City, Missouri. We understand that you may have a grievance to present in connection with your claim that you were denied employment by that company.
>
> . . . .
>
> If you do claim any violation occurred in connection with your right with that company, you are required under the grievance and arbitration procedures that you agreed to in your employment application form with that company, to follow these grievance procedures as the exclusive step for resolution of any claimed violation of your rights.

ADR Form 2, the grievance-arbitration procedure sent to the four employees with the August 14 letter (R. Exh. 114) contains the following provision at pages 5 and 6:

> The parties hereto (Employer and Employee) agree that this Grievance and Arbitration Agreement shall be the exclusive method of resolution of all disputes, but this shall not be a waiver of any requirement for the Employee to timely file any charge with the NLRB, EEOC or any State Agency or any similar state agency or any similar federal agency, as may be required by law to present and preserve any claimed statutory violation in a timely manner. If any Employee should sue in court or before such agency for relief which is covered by this arbitration agreement, the parties agree that the court or agency should stay any such proceedings, pending the arbitration procedures herein being exhausted. Any failure of a Grievant to timely present his claims in accordance with the time limitations spelled out above, as well as those required by any statute or regulation, shall be deemed a waiver of any rights to assert such claims in this forum or in any other forum. If any lawsuit or agency proceeding is filed in violation of this agreement to resolve the disputes through this exclusive procedure, if the Employer obtains a stay or dismissal of such court action, the Employer shall be entitled to recover, as a part of the arbitration decision of the arbitration proceedings herein, the reasonable costs, expenses and fees of attorneys and costs of litigation caused by the improper resort to such court or agency litigation.

C. Further Findings and Conclusions

1. The refusal to hire allegations

Section 8(a)(3) prohibits employers from discriminating in regard to an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." Applicants for employment, including applicants who are also paid union organizers, are employees within the meaning of Section 2(3) of the Act and an employer violates Section 8(a)(3) by failing or refusing to hire an applicant for employment because of their union membership or sympathies. *NLRB v. Town & Country Electric,* 516 U.S. 85 (1995); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

Under the causation test established by the Board *Wright Line*, 251 NLRB 1083 (1980), and approved by the Supreme Court in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct, here union membership or seeking employment in order to organize other unorganized employees, motivated the employer's adverse action. In discriminatory refusal to hire cases, the General Counsel must establish that: (1) the alleged discriminatee applied for employment; (2) the employer knew or suspected the applicant was a union sympathizer; (3) the employer harbored an animus toward union sympathizers; (4) the employer failed or refused to hire applicant; and (5) the employer refused to hire the applicant because of its animus toward union sympathizers. *M. J. Mechanical Services*, 324 NLRB 814, 816 (1997).

If the General Counsel establishes a prima facie case, the employer then has the burden of persuading the trier of fact that the same adverse action would have been taken even in the absence of the employee's protected activity. *Best Plumbing Supply,* supra. To meet this burden "an employer cannot sim-

ply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984).

For purposes of this analysis, I have assumed that the General Counsel established the necessary elements of a prima facie case. For reasons detailed below, however, I have concluded that the Respondent rebutted the General Counsel's prime facie case as to all alleged discriminatees save for Lundien between the time of his initial application on April 23 and May 14 when Wilson caused the police to remove Lundien from the Company's office after he refused to cease videotaping there.

Both Wilson and Reavis admittedly declined to treat Lundien as a "serious" applicant for employment after he disclosed in the April 23 interview that he intended to engage in efforts to organize Respondent's employees. I find that the claims by Reavis that no work existed at that time and by Wilson that he was unfavorably impressed by Lundien's scruffy appearance to be make-weight explanations as the evidence tends to suggest that any serious consideration of Lundien's application ceased after he disclosed his organizing intentions. The fact that Respondent promptly hired Miller the day after Lundien applied and Denby 3 weeks later belies Respondent's lack of work contention through this period. In addition, the fact that both Miller and Denby had recently been terminated by Respondent because of their personal problems tends to suggest that Respondent's usual employment criteria was not as strict as Wilson's asserts in connection with Lundien's appearance.

I find, however, that Respondent's legal obligation to consider Lundien for employment ceased after the May 14 incident at its office. I further find that because of this incident Respondent had no legal obligation to consider the applications submitted by Claggett, Fleming, Massey, and Uto. Both the General Counsel and the Charging Party argue otherwise at considerable length. In essence, they claim that these four individuals were engaged in activity protected by Section 7 because they sought work as a group in furtherance of the Union's salting campaign and that their activity did not lose its protection because Lundien accompanied the four for the purpose of videotaping this exercise. Moreover, they assert that Lundien's videotaping activity was likewise protected. More particularly, the Charging Party argues that *Braun Electric Co*., 324 NLRB 1 (1997), supports the conclusion that the May 14 concerted application process did not lose its statutory protection merely because of Lundien's videotaping. In sum the General Counsel and the Charging Party argue that I should infer from all of the circumstances that Respondent's subsequent failure or refusal to hire these four applicants resulted from their protected activity on May 14 especially where, as here, Respondent hired a significant number of other employees over the next 22 months and failed to provide any plausible explanation for not hiring these applicants.

The conclusion suggested by the argument of the General Counsel and the Charging Party that Respondent refused to consider or hire the four May 14 applicants because of their protected activity ignores or accords little weight to the employer's unilateral right to establish and maintain the manner and mode of its application process. Nothing in this record suggests that Respondent has, or should be required to, consider applicants who disrupt its normal office routine and compromise the minimal security standard of concern to Wilson to the extent that it becomes necessary to summon police officers to enforce the expected order. Quite clearly, that is what occurred in connection with the May 14 applications largely because of Lundien's insistence upon videotaping the process even though Wilson requested that he cease doing so. But even assuming that the four May 14 applicants and Lundien may have been engaged in a form of concerted activity and may not have been overtly disruptive, it does not logically follow that Respondent failed or refused to hire them because of the perceived protected activity.

Instead, the very character of the Union's May 14 activity effectively transformed Respondent's application process, contrary to Wilson's wishes and instruction, into an adversarial confrontation that was the antithesis of what Respondent expected of applicants. That is particularly evident after Wilson directed Lundien to cease videotaping inside his office complex. Not surprisingly, Wilson testified that this activity impressed him "very unfavorably." His demeanor on Lundien's videotape, when compared to that I observed at the hearing, makes his displeasure unmistakably evident. Put another way, Lundien and the four applicants went to Respondent's office on May 14 to engage in a demonstration rather than to make a bona fide effort to seek work.

In all material respects, the May 14 incident is indistinguishable from that in *Heiliger Electric Corp*., 325 NLRB 966 (1998), cited by Respondent.[12] In that case, the Board adopted Judge Frye's conclusion that the applicants' conduct—which included videotaping the application process against that employer's wishes—was "sufficiently intimidating and disrespectful to privilege a decision by [the employer] to not hire the five applicants." In that case as well as *Braun Electric,* supra, the Board found it unnecessary to specifically determine whether the similar videotaping constituted protected activity. I reach a similar conclusion here. In my judgment, it would be unreasonable to conclude that Wilson refused to consider these applicants because of any protected activity. Rather, I conclude that Wilson refused to consider the May 14 applicants because they, in conjunction with Lundien, failed to comport themselves in a manner he had every right to expect of applicants while at his office complex. For these reasons, I find that Respondent did not violate the Act by failing or refusing to consider or hire the May 14 applicants or Lundien following this disruptive and insubordinate encounter.[13]

Likewise, I am satisfied that Respondent rebutted the General Counsel's case with respect to the applications of Gregory and Sapp. I credit Reavis' claim that Respondent had no work

[12] Unlike the employer in *Heilger,* Wilson made no request that the cameraman (Lundien) and the applicants vacate the office before he summoned the police. I find this fact without significance. After Lundien refused to cease videotaping, Wilson could reasonably have concluded that any further directives from him would be ignored.

[13] In view of this conclusion, I find it unnecessary to address any procedural issues resulting from the General Counsel's dismissal of Case 17–CA–18944.

for them around the time they filed their applications. His claim is strongly supported by the documentary evidence showing that only one beginning apprentice was hired from midsummer through the remainder of the year and that at least 12 other applicants in addition to Gregory and Sapp were not hired in this time period. In the absence of other evidence that would tend to establish an unlawful motive, I find the General Counsel failed to prove that Respondent refused to consider or hire Gregory and Sapp because they listed union project experience on their applications. In reaching this conclusion, I am mindful that Lundien continuously notified Respondent that they were available for employment. It is quite clear however that Wilson did not regard Lundien's brief, monthly notices as adequate and other evidence, particularly that involving Denby, indicates that Respondent required new applications even from others who had only recently worked for the Company.

2. The other allegations

a. The statements by Reber and Purdue

The General Counsel argues that Reber's remarks at the April 27 meeting effectively established an overly broad no-solicitation rule, encouraged employees to engage in surveillance of Miller's activities, and were tantamount to layoff threat directed at Miller. He seems to assert that Reber's limitations on union solicitation effectively prohibited solicitation on "company time." The Union joins the General Counsel with respect to the surveillance and layoff threat but, in contrast to the General Counsel's position, the Union seems to concede that Reber's solicitation rule was facially valid. Nevertheless, the Union argues that Reber's rule is unlawful because it was issued "in direct response to union organizing activity" and was accompanied by other antiunion announcements that implicitly explain the reason for the rule. Both the General Counsel and the Charging Party assert that Purdue's remark to Razer that Wilson would close shop if forced to recognize the Union is a serious or hallmark violation.

Respondent claims that neither Reber nor Purdue is a supervisor within the meaning of the Act and, for this reason, it is not liable for their antiunion statements. In addition, Respondent claims that even if the statements made by Reber and Purdue are true, they are "ancient history" and so isolated as to merit dismissal.

I reject both of Respondent's claims. As to the supervisory question, Section 2(11) of the Act defines a supervisor as:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

An individual exercising any of the enumerated powers in Section 2(11) is a supervisor. *NLRB v. Security Guard Service*, 384 F.2d 143, 145 (5th Cir. 1967).

I conclude that Reber and Purdue, at the very least, possessed and regularly exercised authority, requiring their independent judgment, to assign and direct the work of project employees, temporarily transfer those employees to other projects under their supervision, and select employees for overtime assignments, all in the interest of Respondent. Therefore, I find Reber and Purdue were supervisors within the meaning of Section 2(11) at relevant times.

I further conclude that Reber violated Section 8(a)(1) of the Act by statements made to employees at the meeting he obviously called in response to Miller's disclosure of his union sympathies following the April 27 lunch period. Where, as here, the Company maintained no all-inclusive rule prohibiting solicitation, it is evident that Reber, on his own, established a "project" no-solicitation rule, applicable only to union activity, immediately after he learned of Miller's allegiance to the Union. Regardless of the actual content of Reber's rule, the facts showing that he imposed the rule immediately after learning about Miller's activity and solicited employees to report any violations by Miller demonstrates that Reber sought to interfere with union activity in general and Miller's activity in particular. Given the discriminatory character of Reber's rule, I find, as alleged, that Reber's rule violates Section 8(a)(1). *Montgomery Ward*, 269 NLRB 598, 599 (1984). I also find Reber's solicitation of employee reports about violations of his newly imposed unlawful rule is itself unlawful. *Nashville Plastic Products*, 313 NLRB 462 (1993). Finally, Reber's remarks concerning layoffs in this same context were unmistakably designed to restrain legitimate employee union activity. After establishing unlawful restraints on Miller's union activity, Reber then sought to convey the message that Miller would be laid off first. By doing so, it is clear that Reber sought to intimidate both Miller and any other employee who might make common cause with the Union. This is particularly so in view of the Company's general policy, mentioned repeatedly in the testimony of Wilson and Reavis, and presumably well known to Reber, of attempting to maintain a steady core of long tenured tradesmen that were transferred from project to project. Accordingly, Reber's remark about layoffs in this context violated Section 8(a)(1), as alleged.

Likewise, Purdue's remark to Razer that Wilson would close the shop if he were "forced" to recognize the union violated Section 8(a)(1), as alleged. It is well established that blunt threats by supervisors that the employer would go out of business if union organizing succeeded are unlawful. *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969); *W. A. Kruger Co*., 224 NLRB 1066 (1976).

b. The grievance-arbitration procedure

The General Counsel claims that Respondent's alternative dispute resolution (ADR) scheme violates Section 8(a)(1) and (4) because it effectively interferes with employee access to the Board's processes. In the General Counsel's view, Respondent imposes this private arrangement for the purpose of compelling employees to waive their statutory rights as a condition of employment and, by its terms, employees can ignore it only by risking financial liability for the employer's costs and attorney fees. The Charging Party advances similar arguments but also asserts that the procedure is unlawful even if not actually enforced due to the chilling effect it would have upon employees.

In the Charging Party's view, Respondent's ADR procedure is analogous to provisions in a union's constitution requiring members to exhaust their internal remedies before resorting to the Board or courts for relief.

Respondent argues that Federal law accords considerable deference to grievance-arbitration procedures between unions and employers and that the Company has "the same rights to have such procedures as a unionized company does and that these procedures should be given the same treatment as a collective- bargaining agreement grievance and arbitration procedure." In support, Respondent cites a number of Fair Employment Practice cases to the effect that the arbitration of claims under Title VII is encouraged.

I find that Respondent's employment application ADR clause violates Section 8(a)(1) and the letters sent by Respondent's counsel to the four May 14 applicants who had union-filed cases pending before the Board violates Section 8(a)(1) and (4) of the Act. Read together, Respondent's unilaterally established grievance-arbitration procedures clearly seek to interfere with employee access to the Board's processes either by the employees themselves or others acting on behalf of the employees as was the situation with respect to the NLRB case involving Claggett, Fleming, Massey, and Uto.

Respondent's claim that it enjoys a right to establish this sweeping ADR system because union organized employers maintain grievance-arbitration provisions in collective-bargaining agreements lacks merit and legal support. Invariably grievance–arbitration provisions in a collective-bargaining agreement exist to resolve contractual disputes arising under the terms of the agreement rather than every legal right available to the employee as Respondent seeks to do here. Respondent maintains no written agreement with its employees, either individually or collectively; essentially its employees work under an at-will arrangement. To the extent that more recent common law protections accorded at-will employees might be viewed as parallel to certain terms and conditions of employment in a collective-bargaining agreement, Respondent's ADR system extends far beyond simply the common law rights enjoyed by at-will employees. Unlike the typical collectively bargained grievance-arbitration system, Respondent seeks to extend the scope of its ADR system to *every* legal right available to its employees or applicants. Regardless of the situation which obtains in other forums, Respondent can point to no Board precedent sanctioning an ADR system that effectively seeks to entirely supplant the Board's exclusive jurisdiction to resolve unfair labor practices. Moreover, even where the Board does accord deference to the grievance-arbitration provisions of a collective-bargaining agreement, it does so only in those limited circumstances where the resolution of a contractual dispute will serve also to resolve a pending statutory question and, even then, it retains jurisdiction to insure that the outcome is not repugnant to the Act. See *Collyer Insulated Wire*, 192 NLRB 837 (1971); *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). By contrast, Respondent's ADR scheme calls for deferral of all legal disputes of any kind.

The Charging Party's argument that Respondent's ADR system can be analogized to cases finding labor organizations guilty of an unfair labor practice for penalizing employee-members who resort to the Board's processes without exhausting their internal union remedies is only partially correct. Typically, the mere maintenance of an exhaustion of remedies requirement is not unlawful in itself. Rather, the imposition of penalties for failing to exhaust internal union remedies constitutes the unlawful conduct. See, e.g., *Roberts v. NLRB*, 350 F.2d 427 (1965); *Operating Engineers Local 138 (Charles S. Skura)*, 148 NLRB 679 (1964). Unlike the situation in those cases, Respondent's ADR mechanism specifies that employees can be penalized for costs and attorney's fees if they insist upon utilizing the Board's processes. For that reason, I agree with the Charging Party that the mere existence of Respondent's ADR scheme tends to chill employee access to the Board's processes and would interfere with their statutory right to seek vindication of their rights at the Board. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by maintaining a procedure of this character. See *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990). Furthermore, Respondent's well-timed letters to Claggett, Fleming, Massey, and Uto seeking to enforce its ADR scheme strongly supports the conclusion that Respondent sought to intimidate them because they cooperated with the Union in support of the unfair labor practice charges filed on their behalf. By this action, I find that Respondent violated Section 8(a)(1) and (4) of the Act, as alleged.

c. The 1996 pay increases

The General Counsel and the Charging Party both claim that Respondent's May 1996 across-the-board pay increases violated the Act because they were granted to undercut the Union's organizational activity that commenced shortly before. In their view, both the timing and Reber's admonition to Lundien that he should forgo organizing in view of the increases support the conclusion that these increases were designed to interfere with the organizing activity.

Respondent contends that the May 1996 pay increase was lawful because it was not conditioned upon employee opposition to the Union and the pay changes were a part of the employer's normal business conduct which would have occurred without regard to any union activities. In this regard, Respondent claims that the May 1996 increase occurred at a time when there had been "little or no union activity."

I have concluded that Respondent's substantial May 1996 across-the-board wage increase was lawful. Although Reber's conduct detracts from Wilson's explanation that planning for this increase commenced shortly after the conclusion of the Company's fiscal year at the end of March, the fact remains that the Union's organizing campaign had not progressed beyond a nascent state when this increase was given. Thus, the sum and substance of the Union's organizing effort to that point amounted to: (1) a request for voluntary recognition which Wilson rejected; (2) Lundien's assertion in his job interview that he sought employment with Respondent so that he could organize its employees; and (3) Miller's disclosure of his union sympathies at the Sears job on April 27. But even the import of this minimal activity is substantially diminished by the fact that Miller left his employment after working 1 day and the complete lack of evidence that any employees beyond the Sears jobsite where Miller briefly worked knew of an organizational

campaign by the Union. For these reasons, I find, notwithstanding Reber's venture to Lundien's office with the new wage scale, that this wage increase did not interfere with employee Section 7 rights or, for that matter, that it was even designed for that purpose. Instead, I credit Wilson's explanation that the increase occurred at that time only because it followed the conclusion of the Company's fiscal year and the assessment of the Company's good fortune in the prior year. Accordingly, I will recommend dismissal of this allegation.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 95 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by: (a) telling employees that the shop would close if the Company had to recognize Local 95; (b) promulgating and maintaining a no solicitation policy pertaining only to union solicitations; (c) soliciting employees to report violations of the union-related no-solicitation policy to supervision; (d) telling employees that a union sympathizer would be laid off first; and (e) maintaining a grievance-arbitration procedure as a condition of employment that interferes with free employee access to the Board processes.

4. Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act by failing and refusing to consider for hire, or hire, Ron Lundien between April 23 and May 14, 1996.

5. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (4) of the Act by retaliating against employees by attempting to enforce the terms of the grievance-arbitration procedure established in 1996 because charges were brought on their behalf before the Board.

6. Respondent's unfair labor practices of affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, my recommended order will require that it cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

It is evident that Respondent had employment available at the time Ron Lundien applied for employment. For this reason, my recommended order will require Respondent to make Lundien whole for the losses he incurred by reason of its unlawful refusal to consider him for employment between April 23 and May 14, 1996, together with interest. Backpay and interest shall be computed in accord with *F. W. Woolworth Co*., 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987), respectively. Having concluded that Respondent was privileged in its refusal to consider Lundien for employment after May 14, my recommended order will not require that Respondent consider him for employment or offer employment to him at this time.

Having concluded that Respondent's grievance-arbitration procedure unlawfully restrains employees from fully utilizing the processes of the Board, my recommended order requires Respondent, if it desires to retain this procedure, to modify its employment application forms to specify *in bold print* that this procedure is not applicable to any matter the employee may chose to bring before the Board. It further requires Respondent to cease any efforts to enforce that grievance-arbitration procedure as to any matter its employees may bring before the Board. Finally, to insure that all employees who signed an application form containing this procedure will be apprised of the holding in this case, my recommended order requires that Respondent post the attached notice at all existing jobsites.

[Recommended Order omitted from publication.]