

**CONSTRUCTION INDUSTRY
ORGANIZING:
USEFUL CASE CITATIONS**

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existed, because the employer did not rely on that reason when it refused to hire the two salts (rather, it claimed it did not hire them because of its 30% wage rule).

This “disabling conflict” defense, however, is becoming increasingly popular among employers, and the Board and the courts of appeals may be becoming more sympathetic to it. Local Unions should, therefore, be even more mindful of how they conduct their organizing campaigns. See e.g., *Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190 (D.C. Cir. 2003); *Exterior Systems, Inc.*, 338 NLRB No. 82 (Nov. 22, 2002); and *Abell Engineering & Manufacturing, Inc.*, 338 NLRB No. 42 (Oct. 18, 2002) – all discussed below.

2. *National Labor Relations Board v. FES*, 301 F.3d 83 (3d Cir. 2002).

Issue: Employer Defenses: “Neutral” Policies: Prior High Wages: Defense Unsuccessful

The court of appeals affirmed the Board’s decision that the employer’s “wage compatibility” defense was pretextual, because it did “not exist in written form, [was] not strictly adhered to, and thus, in the circumstances of this case, appear[s] to be a post hoc justification[] for disqualifying a union applicant...” 301 F.3d at 94.

3. *International Union of Operating Engineers, Local 150 v. NLRB (Brandt Construction Co.)*, 2003 U.S. App. Lexis 5934 (7th Cir. March 28, 2003).

Issue: Employer Defenses: “Neutral” Policies: Priority Hiring Systems: Defense Successful

Here, the employer established that it had a preference of preferring applicants in the following order: (1) current employees; (2) past employees with good records; (3) applicants recommend by supervisors; (4) applicants recommended by current non-supervisory employees; (5) unknown (walk-in) applicants. In the underlying case, the General Counsel did not challenge this policy as “inherently destructive,” even though it operated to exclude virtually all union applicants. The Board determined that the employer did not apply this priority system in a discriminatory manner, and affirmed the ALJ’s dismissal of the refusal to hire charges. The court of appeals agreed.

The union challenged the system before the court of appeals as “inherently destructive,” but the court rejected the argument because the General Counsel had not raised or litigated the argument before the Board, and thus it could not

be an issue before the court of appeals. While it is certainly still possible to win this argument, such cases will have to be carefully litigated in future, especially with the new conservative board. Local Unions faced with such policies should be in touch with their organizing coordinators about the best approach to take with the Region and at trial.

4. *Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190 (D.C. Cir. 2003).

**Issue: Employer Defenses: Union Intent to Harm: Disabling
Conflict: Defense Unsuccessful**

The Court of Appeals for the District of Columbia upheld the Board's finding that the employer did not establish a "disabling conflict" that would have relieved it of liability for failing to hire two organizers and for refusing to assign work to a third. In the Court's view, such a finding is possible only if the Board is presented with evidence of an economic strike situation, subterfuge, bad faith, sabotage, or an attempt to drive the employer out of the area, or out of business. The court relied on *Sunland*, 309 NLRB 1224 (1992), *M.J. Mechanical Services*, 324 NLRB 812 (1997); and *Braun Electric*, 324 NLRB 1 (1997).

The employer had offered to prove that one organizer had filed applications with several employers at different times while working for Casino, and had engaged in a short economic strike and a subsequent unfair labor practice strike against Casino; that the second discriminatee had, after being denied employment, attempted to convince a Casino employee to go to work for a different employer; and that 30 applicants attempted to apply at the same time that two organizers were denied employment. The court agreed that none of these facts, even if proven, would have established a disabling conflict.

5. *International Union of Operating Engineers v. NLRB (Tidewater Construction Corp.)*, 294 F.3d 186 (D.C. Cir. 2002).

**Issue: Other Employer Defenses: Applicants Lawfully
Locked Out: Defense Unsuccessful**

The Operating Engineers won an important victory in the Court of Appeals for the District of Columbia Circuit, when they convinced the court to remand this case to the Board for further proceedings.

Here, the union won an election and then struck to get a contract. The employer refused the strikers' offers to return to work about six weeks later, and instead,

announced that it was declaring a lockout. The employer then created a lockout list that included the 25 striking employees; 40 other individuals (all of whom were union members) who had been on the Excelsior list ten months earlier; and 16 individuals the company thought were union members, but who were neither strikers nor on the Excelsior list. The company refused to hire six members of this last group when they applied, telling them that the company had no work available.

The union filed refusal to consider charges on these six, an ALJ dismissed the complaint, and the Board, in a split decision, upheld the ALJ. (Democratic Member Liebman dissented). The Union sought review, and the court agreed with the Union that: (1) the Board unreasonably disregarded the employer's inability to explain why individuals who were neither strikers nor Excelsior list members (but who the employer *thought* were union members) were included on the lockout list; (2) the Board failed to explain why the employer's false statements to the six union applicants (*i.e.*, telling them there were no jobs, instead of telling them they were on the lockout list) was not evidence of antiunion animus; and (3) the Board's failure to explain why use of an outdated Excelsior list (where everyone on the list was a union member) was also not evidence of anti-union animus. The Board remanded the case for further proceedings consistent with its opinion, and the union should prevail.

6. *Wayne J. Griffin Electric, Inc. v. NLRB*, 2002 U.S. App. Lexis 10948 (April 4, 2002) (unpublished).

Issue: **Other Employer Defenses: Bias of the NLRB: Defense Unsuccessful**

The court of appeals upheld the Board's finding that the employer violated §8(a)(1) and (3) during a salting campaign, by making various anti-union statements to employees. The case is mostly notable for the court's rejection of the employer's argument that the Board's policies "favor salting." The court found absolutely no evidence that the Board had acted improperly in any way, especially in view of the "litany of unfair labor practices" committed by the employer.

7. *NLRB v. Wolfe Electric, Inc.*, 314 F.3d 325 (8th Cir. 2002).

Issue: **Other Employer Defenses: Personal Animosity: Defense Unsuccessful**

The court enforced the Board's rejection of the employer's "personal animosity" defense in this refusal to hire case. The Board has upheld such a defense where an employer proved it did not hire someone because of personal animosity and dislike and not because of any activity protected by the Act. *See, e.g., Bay Electric, Inc.*, 323 NLRB 200 (1997). In this case, however, the employer disliked the applicants *because of* protected activity, that is, he disliked them because they were applying for jobs with the intention of unionizing the Wolfe workforce.

8. *Cobb Mechanical Contractors, Inc. v. NLRB*, 295 F.3d 1370 (D.C. Cir. 2002).

Issue: Reinstatement and Backpay (Compliance Issues)

In this salting compliance case, the court of appeals upheld the Board on one of three challenged rulings, and remanded the other two issues for further consideration.

(1) The court agreed with the Board that it was appropriate to calculate the starting date of back pay for pipefitters on dates that plumbers were hired, because Cobb did not meet its burden of proving it would not have hired pipefitters for plumbers' jobs.

(2) The court agreed with Cobb, and remanded to the Board the question of when other discriminatees (plumbers) would have been hired, because the Board had used hire dates for plumbers' helpers, and the employer had testified convincingly that it did not hire plumbers for plumbers' helper positions.

(3) The court agreed with Cobb, and remanded to the Board the *Dean General Contractor's* issue, because the ALJ dismissed the employer's argument without considering its evidence that only two of the newly-hired journeymen plumbers and pipefitters actually transferred to other projects when the project at issue ended.

9. *National Labor Relations Board v. River City Elevator Co.*, 289 F.3d 1029 (7th Cir. 2002)

Issue: NLRB Elections

The court of appeals refused to enforce the Board's bargaining order because it found that the underlying election (which was decided by one vote) was invalid. The court set the election aside specifically because of the union's promise to give all employees a "mechanic's card" regardless of whether they had completed the

required course work and examinations. While the Board had ruled that the promise did not violate election “laboratory conditions,” because the benefit was not conditioned on support for the union, the court found instead that this promise was in fact a gift that was valuable enough to effectively buy votes for the union.

In accordance with well-established law, the court did agree, however, that the union’s promises to waive initiation fees, and to lower dues until a first contract was reached, were not impermissible gifts, both because the promises were not conditioned on support for the union, and because the promises served the legitimate function of removing artificial (financial) barriers to union membership.

10. *Jacee Electric, Inc. v NLRB*, 2003 U.S. App. Lexis 1631 (Jan. 27, 2003) (unpublished).

Issue: NLRB Elections

The court of appeals upheld the Board’s ruling that that a laid-off pro-union worker’s ballot should be counted in election (if the ballot was counted, the union was expected to win), despite a lack of direct evidence that the employer knew that the worker was pro-union. The court agreed that it was reasonable for the Board to infer that the layoff was motivated by anti-union sentiment from the totality of the circumstances, which included: the timing of the layoff (shortly after the election petition was filed), the employer’s general knowledge about the employees’ union activities; the company’s anti-union animus (proved through statements made to other employees); and the employer’s pretextual reason for laying the worker off (lack of work).

11. *Various Post-FES Cases*

Issue: FES in the Court of Appeals

While a number of courts of appeals have reviewed cases decided under FES, only one has actually ruled on the validity of the new standards: The Seventh Circuit (Illinois, Indiana, Wisconsin), in *Masiogale Electrical-Mechanical, Inc.*, 2003 U.S. App. Lexis 5487 (7th Cir. March 31, 2003), expressly endorsed the Board’s test, under *FES*, for refusal to *hire* violations. The decision is particularly significant because the Seventh Circuit was one of the courts that had criticized the Board’s approach to salting cases, and to which the Board responded when it issued *FES*. In fact, the court states expressly in *Masiogale* that it, in its view,

“this framework [for refusal to hire violations] addresses the concerns we described in *Starcon*....”

Other courts have not ruled definitively on *FES*. See *International Union of Operating Engineers v. NLRB*, 294 F.3d 186 (D.C. Cir. 2002)¹ (the court recited the refusal to *consider* test in *FES*, but failed to comment on it or apply it because it remanded the case on other grounds); *NLRB v. Nelcorp*, 2002 U.S. App. Lexis 23795 (2d Cir. Nov. 15, 2002) (New York, Vermont, Connecticut) (the court (in a summary opinion) upheld the Board’s ruling that the employer unlawfully refused to hire union members because of their membership. The employer did not directly challenge the NLRB’s refusal to *hire* standard under *FES*, and the court declined to rule on its challenge to the refusal to *consider* standard under *FES*, since the refusal to hire standard had been met); *National Labor Relations Board v. FES*, 301 F.3d 83 (3d Cir. 2002) (Pennsylvania, New Jersey, Delaware) (The new standard for refusal to *hire* was not challenged. At note 3, the court expressly stated that it was *not* deciding the legality of the *FES* standard for refusal to hire cases. And, while the employer did challenge the refusal to *consider* standard, the parties agreed at oral argument that the court need not rule on the standard, because the ALJ’s decision on remand (which the Board approved) had converted the case into a refusal to hire case.); *Little Rock Electrical Contractors, Inc.*, 2002 U.S. App. Lexis 15016 (4th Cir. July 26, 2002) (Maryland, Virginia, West Virginia, North and South Carolina) (unpublished) (the Court discussed *FES* as “the” standard for refusal to hire cases, but the *FES* standards were not challenged in this case).

The Fifth Circuit (Texas, Louisiana, Mississippi) issued a decision, in *PNEU Electric, Inc.*, 309 F.3d 843 (5th Cir. 2002), in which it appeared to disapprove of the Board’s standard for refusal to *consider* cases. The decision is so confused, however, that it’s really hard to tell what the court may do in future.

When the Sixth Circuit (Michigan, Ohio, Kentucky, Tennessee) issues its long-awaited ruling in the third *Fluor Daniel* case, it is likely to endorse the *FES* standard for refusal to *hire*. In *Glenn’s Trucking Co.*, 298 F.3d 502 (6th Cir. 2002), the court appeared to lay the foundation for its approval. Citing the “2 element” test of *NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953 (6th Cir. 1998) (“*Fluor II*”), the Court of Appeals found that the General Counsel had proven the second element required to establish discrimination in regard to hire, that is, “the existence of a

¹ While the D.C. Circuit technically covers only the District of Columbia itself, anyone challenging a ruling of the NLRB anywhere in the country can actually bring the case to the D.C. Circuit.

covered action.” The court specifically noted that the General Counsel had “matched applicants with available jobs” when he showed that: (1) the applicants submitted applications for employments; (2) there were enough jobs available for all applicants; and (3) the discriminatees’ qualifications were in the same range as those who were hired.

It is less certain what the Sixth Circuit will do with the refusal to *consider* issue, although, in *Kamtech, Inc. v. NLRB*, 314 F.3d 800 (6th Cir. 2002), the court upheld the Board’s finding that an employer unlawfully refused to consider a pro-union applicant by denying him an opportunity to take a welding test. The court did not, however, call the violation a refusal to consider. Instead, the court reasoned that, when all applicants are offered such tests, the company is prohibited from discriminating against only union members by denying them equal opportunities to compete for available positions.

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

The Board has become increasingly interested in the defenses presented by employers under the category we call “Union Intent to Harm.” We are now facing a majority Republican Board that can be expected to be more hostile to salting than its predecessors. It is, therefore, more important than ever that IBEW organizers not give the employer any grounds to argue that the union was operating with an intent simply to do damage to the employer, or that the organizers behaved in any rude or intimidating manner during the application process.

12. *Abell Engineering & Manufacturing, Inc. (Sheet Metal Workers’ Local 20)*, 338 NLRB No. 42 (Oct. 18, 2002).

Issue: **Employer Defenses: Union Intent to Harm -- Stripping:
Defense Successful**

This is the *first* case in which the Board has ruled that an organizer’s conduct, in attempting to recruit an employee to work for another employer, deprived the organizer of the Act’s protection. Consequently, the Board found that the employer’s termination of the organizer was not unlawful. Admittedly, the case has extremely bad facts: there were only three employees in the unit being organized (one of whom was the organizer); and the union admitted that the organizing campaign was over when the organizer attempted to recruit one of the two other employees to quit the employer. Leaving the employer with only one employee, the Board found, would have been temporarily crippling, and “possibly

fatal” to the employer. Under these circumstances, the Board (which included Democratic Member Liebman) found the organizer’s actions unprotected, since the actions would have been “deeply injurious to the employer” and were “unrelated to organizing.”

Although this case represents a very unusual situation, and one not likely to occur in an IBEW campaign, the current Board does appear to be very concerned about the tactic called “stripping,” and is likely looking for ways to curtail organizers’ efforts to recruit employees currently working for non-unionized employers. It is very important, therefore to engage in such recruitment *only within the context of an organizing campaign*. It is also important to begin to educate Administrative Law Judges that the IBEW’s organizing program is aimed both at organizing the employees of specific employers, and at organizing the entire workforce of construction electricians.

13. *Exterior Systems, Inc. (Operative Plasterers and Cement Masons Local 8)*, 338 NLRB No. 82 (Nov. 22, 2002)

Issue: **Employer Defenses: Union Intent to Harm -- Bona Fide Applicant: Defense Successful**

In this case the Board adopted the ruling of ALJ Paul Bogas, that an employer lawfully refused to hire a union organizer who engaged in “rude” and “intimidating conduct,” citing *Heiliger Electric Corp.*, 325 NLRB 966 (1998). The conduct the Board found objectionable included: making fun of one owner’s Asian accent; criticizing the way work was being carried out; telling a worker that “we’ll probably take your job”; stating that the organizers would start work immediately, and demanding to know what they would be getting paid. The Judge noted that it was not clear that the organizers *intended* to be intimidating, or whether they were merely “behaving with what they viewed as tenacity and good humor.” Nevertheless, the Judge, with Board approval, ruled that “reasonable persons in the [employers’] positions would have felt that they were being bullied.”

This case is additionally significant because of the separate (concurring) decisions written by each of the three Board members on the panel. The two Republican members insist that proof of “applicant” status (*i.e.*, “bona fide applicant” status) either *is* now part of the General Counsel’s case (Cowen’s view), or should *become* part of the General Counsel’s overall burden of proof under *FES* (Bartlett’s view). This would mean that the General Counsel would have the nearly impossible task of proving that each applicant for employment was sincere in his or her

desire to obtain a job with the employer. The sole Democratic member on the panel, Wilma Liebman, strongly disagreed, and argued that the employer should remain responsible for proving, if it can, that it refused to hire a given applicant because of rude or intimidating behavior. This issue is likely to be kept alive, even though Cowen and Bartlett are no longer Board members. As stated, the Republicans now control the Board (with three out of five members), and the new Board Chairman, Republican Robert Battista, has appointed Cowen to a special staff position.

14. *Lackawanna Electrical Construction, Inc. (IBEW Local 81)*, 337 NLRB No. 62 (April 24, 2002).

Issue: **Employer Defenses: Union Intent to Harm: Disabling Conflict: Defense Unsuccessful**

In the underlying decision, ALJ George Aleman found that the employer had not proven the existence of a disabling conflict based solely on the applicants' status as union organizers. In addition, the Judge found that, as in *Aztech Electric*, the employer could not win on this defense because it did not *rely* on any "disabling conflict" in rejecting the organizer applicants. The Board agreed with the Judge, specifically on the second ground.

15. *Colden Hills, Inc.*, 337 NLRB No. 86 (May 28, 2002).

Issue: **Employer defenses: Former High Wages: Defense Unsuccessful**

In this case the Board approved an ALJ's rejection of the employer's claim that it did not hire a union organizer because the organizer had previously earned more than the employer was paying, and because the organizer lived 91 miles from the jobsite. The Judge had found that the organizer had agreed to work for the employer's rate and that the employer had hired a number of employees in a single month, all of whom had previously earned more than the employer was currently paying. The Judge had also found that the employer hired several employees who lived considerable distances from the worksite, although none lived even half as far away as the organizer.

16. *Tim Foley Plumbing Service, Inc.*, 337 NLRB No. 88 (May 31, 2002).

Issue: **Proving the Elements of the General Counsel's Case Under FES: Hiring**

Here, the Board affirmed an ALJ's rejection of an employer's claim that it was not hiring when it filled the jobs at issue through a temporary employment agency, so that it would not have to lay off any of its permanent workforce when work slowed. The ALJ had found that the employer's "sudden" decision to use the temp agency after union applicants appeared, coupled with its decision to stop using the temp agency once the union applications expired, was proof that the employer had turned to the temp agency to avoid hiring union applicants.

17. *Tejas Electrical Services, Inc. (IBEW Local Union No. 716)*, 338 NLRB No. 39 (Oct. 11, 2002)

**Issue: Proving the Elements of the General Counsel's
Case under FES: Acting on Anti-Union Animus**

The decision by two Republican Board members in this case gives some indication of how difficult it may become to convince the new majority Republican Board that employers are acting on anti-union animus when they refuse to hire union salts.

In *Tejas*, there was proof that two overt union organizers applied and were not offered jobs, and that two covert salts applied shortly after them and were hired. There was also proof that the company employee who interviewed the two applicants told them that the field superintendent was "nervous" about the applications, and that the person he worked for "did not care for unions." The Republican Board members found that the order of applications was an insufficient basis for inferring animus in the absence of evidence that the employer had a practice of hiring on a first-come, first-served basis. The Repubs also held that, although the Board is *permitted* to infer anti-union animus from the interviewer's comments, it is not *required* to do so. The only Democratic member on the panel, Wilma Liebman, argued that the evidence was sufficient to support of finding of anti-union animus, and that the case should be remanded to the Judge to reconsider other errors.

18. *United Food and Commercial Workers (Visiting Nurse Health System)*, 336 NLRB No. 35 (Sept. 28, 2001).

**Issue: NLRB Elections: Benefits of Certification through a
Board Election**

In this *UFCW* case the Board ruled, for the first time, that a union can engage in

“secondary” activity if it is seeking to enforce its certification rights, *i.e.*, if it is seeking to force an employer to recognize and bargain with it as the certified representative of the employer’s employees. This case underscores one of the advantages of going through an NLRB election, and obtaining certification as a §9(c) representative.

Here, the Board certified the UFCW as the exclusive collective-bargaining representative of a unit of nurses employed by the Visiting Nurse Health System (VNHS). The VNHS refused to recognize and bargain with the UFCW, which filed charges that resulted in a Board order finding the VNHS in violation of Section 8(a)(5) of the Act. The UFCW then undertook a picketing and leafleting campaign at the United Way headquarters in Atlanta. The campaign sought to convince United Way contributors to stop supporting the United Way, until it stopped funding VNHS. The Board found the UFCW action did not violate §8(b)(4)(B), because the conduct was aimed at enforcing the union’s certification as the VNHS employees’ exclusive collective bargaining representative, and because §8(b)(4)(B) clearly exempts such conduct from the prohibition against secondary boycotts.

STANDARDS AND REMEDIES IN REFUSAL TO HIRE AND REFUSAL TO CONSIDER CASES:

***FES*, 331 NLRB 9 (2000)**

In 2000, the Board clarified its standards for litigating refusal to hire and refusal to consider cases.

The following discussion first sets forth the Board's revised standards for refusal to *hire* cases, including the elements of a violation, the remedies available, and the burdens of proof at each stage of the proceedings -- first at the unfair labor practice hearing itself (the "liability" phase), and then during the compliance phase, which may include a compliance hearing, and may result in a Supplemental Decision by an Administrative Law Judge. The same issues are then addressed in the context of refusal to *consider* violations. Next, the elements of the General Counsel's case are set forth, with specific cases on each element. Finally, actions taken by the various federal courts of appeals in approving and/or disapproving *FES* are discussed.

REFUSAL TO HIRE

One of the most important results of the Board's decision in *FES* is that most cases in which the employer discriminates in the hiring process will now be handled as refusal to *hire* cases. Only those situations in which the employer was not actually hiring, or where the number of discriminatees exceeds the number of available openings, will be treated as refusal to *consider* violations. In all charges filed in salting cases, therefore, the charging party should always allege a refusal to *hire* violation.

OVERALL FRAMEWORK AND BURDENS OF PROOF

The Board retained the *Wright Line* framework for refusal to hire cases, and thus the same burdens of proof continue to apply.

As in the past, the General Counsel must first prove the elements of the violation, and then the burden shifts to the employer to show that it would not have hired the applicants even if they had not been pro-union. If the General Counsel meets his burden, and the employer fails to show that it would have made the same decision even in the absence of union activity or affiliation, then the General Counsel has established a violation of Section 8(a)(3) of the Act.

ELEMENTS OF THE GENERAL COUNSEL'S CASE

The General Counsel must establish the following elements in a refusal to hire case:

- (1) the employer was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; and
- (2) one of the following:
 - a. the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire; **or**
 - b. the employer has not adhered uniformly to such requirements; **or**
 - c. the requirements were themselves pretextual or were applied as a pretext for discrimination; and
- (3) that antiunion animus contributed to the decision not to hire the applicants.

There are two additional points to remember in assessing the General Counsel's case. First, although not specifically stated in *FES*, the General Counsel will still have to show *employer knowledge* of union membership or activity. See Section (below) on "Employer Knowledge." Second, *FES* did not change the way in which the General Counsel establishes anti-union animus. See Section (below) on "Acting on Anti-Union Animus."

QUALIFICATIONS

With regard to the second specific element of the General Counsel's case ("qualifications"), it is important to note that the General Counsel only has to make a *minimal* showing of *basic* qualifications. This element of proof is satisfied by showing, for example, that applicants were "journeyman electricians" who applied for "journeyman electrician" positions. Once the General Counsel makes this showing, the employer has the burden of proving that the applicant was not qualified for the job, *i.e.*, that the applicants did not meet the employer's specific job requirements.

The General Counsel has the burden of proof only on *objective* job qualifications

(that is, factors that can easily be measured or shown), such as “two years’ experience” or “licensed electrician”. If the employer claims that an applicant did not meet its *subjective* criteria (that is, factors that depend on personal judgment, such as “outstanding skills in wiring”) the employer has the burden of proving that the union applicant did *not* have such skills, or that it hired someone who had better skills than the union applicant.

Even if the General Counsel does not establish that the union applicant met the employer’s advertised qualifications, however, the General Counsel can still meet the second element of proof by establishing that the employer did not require *all* applicants to have the qualifications at issue.

Finally, the General Counsel can also prove this element by establishing that qualifications were merely a *pretext* for why the employer decided not to hire the applicant. For example, the General Counsel could show that the employer had decided to hire the union applicant, but changed its mind after discovering the applicant was a union supporter. For additional discussion of “pretext,” see Section (below) on “Acting on Anti-Union Animus.”

THE EMPLOYER'S AFFIRMATIVE DEFENSES

Once the General Counsel has established these elements, the employer may only escape a finding that it violated the Act if it can prove that it would not have hired the union applicants, even if they had not been union applicants. The Board made it clear the employer bears the burden of proving, for example, that it did not hire any of the union applicants because they did not have the specialized qualifications the employer was seeking. See the following Sections (below) for discussion of specific employer defenses: “Employer Defenses: ‘Neutral’ Hiring Policies,” “Employer Defenses: Union Intent to Harm,” and “other Employer Defenses.”

REMEDIES FOR A REFUSAL TO HIRE VIOLATION

(1) Cease and Desist Order

The Board disagreed with the view taken by the Court of Appeals for the Sixth Circuit, in *NLRB v. Fluor Daniel*, 161 F.3d. 953 (6th Cir. 1998), that to establish a discriminatory refusal to hire, the General Counsel has to match each qualified applicant to a job opening. Instead, the Board ruled that in cases involving more than one applicant, the General Counsel need only establish that *one* applicant was discriminated against in order to find a violation and obtain a cease and

desist order.

(2) Back pay and Instatement Order

In order to obtain an Order for back pay and instatement (a job offer),² the General Counsel must establish the number of available job openings during the initial unfair labor practice hearing (liability phase), but can defer proving which applicant would have been hired for which opening until the compliance phase. The General Counsel does not, therefore, have to “match” applicants to job openings during the liability phase.

REMEDIES IN CASES WHERE THERE ARE MORE APPLICANTS THAN AVAILABLE JOBS

One of the most confusing areas of the law, prior to the Board’s decision in *FES*, was the question of the appropriate remedy in cases where there were more discriminatees than available jobs. The Board has now clarified that two different types of remedies will be afforded in these cases. Remedies for refusal to hire, discussed above, will be afforded for the number of discriminatees equal to the number of available jobs. The remaining discriminatees will receive what the Board now describes as “refusal to consider” remedies.

(1) Refusal to Hire Remedies: Instatement and Back pay

At the conclusion of the unfair labor practice hearing, the Board will *not* order the employer to pay back pay and offer jobs to more applicants than there are proven openings. Where there are more applicants than jobs, the General Counsel can obtain this traditional “make-whole” remedy only for the number of applicants equal to the number of available jobs. Thus, the General Counsel can obtain an order requiring the employer to:

- cease and desist from refusing to hire union applicants; and
- pay back pay and offer instatement to the number of applicants equal to the number of job openings.

² In refusal to hire cases, the Board now refers to the remedy which requires the Employer to offer the discriminatee a job as “instatement,” rather than reinstatement, because the applicant has never actually been employed by the employer.

(2) Refusal to Consider Remedies: Consideration for Future Employment, Notice of Future Openings, and a Subsequent Order for Instatement and Back pay

For the remaining discriminatees, the General Counsel can obtain refusal to *consider* remedies. This means that the General Counsel can obtain an order requiring the employer to:

- a cease and desist from refusing to consider union applicants;
- place the discriminatees in the position in which they would have been, absent discrimination, for consideration for future openings and to consider them for the openings in accordance with non-discriminatory criteria; and
- *notify* the discriminatees, the *Charging Party*, and the Regional Director of future openings in positions for which the discriminatees applied, or substantially equivalent positions.³

And, although this remedy will not be part of the order issued at the close of the unfair labor practice hearing, the Board clarified in *FES* that the General Counsel also may secure a back pay and instatement remedy for refusal to consider discriminatees, at a subsequent compliance hearing, if additional jobs become available. (See discussion, below, of compliance procedures in unfair labor practice cases.)

Example:

The General Counsel establishes at the unfair labor practice hearing that 15 union applicants met the employer's basic qualifications, and that anti-union animus contributed to the employer's decision not to hire any of the union applicants, but only establishes that there were 10 openings. The employer in turn fails to prove that it would not have hired any of the 15 for non-discriminatory reasons.

The General Counsel has established a refusal to hire violation. He can obtain a cease and desist remedy, and a back pay and instatement remedy -- but only for 10 of the 15.

³ The Unions requested this Notice remedy in their Briefs to the Board in *FES*.

For the remaining 5, the General Counsel can obtain an order that the employer consider the 5 in the order they would have been considered if the employer had not discriminated against them, and notify the 5, as well as the Union (where the Union files the charge) and the Regional Director, of future relevant job openings. In a subsequent compliance hearing, the General Counsel may be able to secure an order for back pay and reinstatement for some (or all) of these 5 discriminatees, if additional jobs become available.

COMPLIANCE PROCEEDINGS

- (1) *In cases where the number of discriminatees matches the number of available jobs:*

The compliance hearing will be limited to the usual factors involved in the correct calculation of the back pay amount. Here, the General Counsel generally has the burden of establishing that the back pay amount is reasonable. The employer then bears the burden of establishing elements that lessen its back pay liability, such as the applicant's failure to mitigate damages (by failing to seek other employment in the interim); or the fact that the back pay period would have ended when the job in question ended, by showing that the discriminatee would not have been transferred to the next job.

- (2) *In cases where there are more discriminatees than available jobs:*

In addition to the issues outlined above, the compliance hearing will be used to determine which discriminatees will be given a back pay and reinstatement remedy, and which discriminatees will be given a refusal to consider remedy. In addition, the General Counsel can use the compliance hearing to secure an reinstatement and back pay remedy, based on positions that became available during or after the unfair labor practice hearing, for any discriminatees who were only awarded a refusal to consider remedy. (See discussion, below, of compliance proceedings in refusal to consider cases.)

REFUSAL TO CONSIDER

In *FES*, the Board also explicitly reaffirmed its view that an employer violates Section 8(a)(3) of the NLRA when it refuses to *consider* an applicant for anti-union reasons.

The Board rejected the argument, advanced by the Court of Appeals for the Sixth Circuit in *NLRB v. Fluor Daniel*, 161 F.3d. 953 (6th Cir. 1998), that an employer cannot violate the NLRA's ban on discrimination with regard to hire unless the employer actually is hiring. Instead, the Board found that a violation can exist if the employer has some kind of process for retaining applications for future employment -- even if it is not hiring, and has no present plans to hire. As the Board stated:

Preventing union applicants from entering the pool of applicants for future job openings is as much an obstacle to collective bargaining through self organization as is refusing to hire union applicants for current openings.

FES, slip op. at 8.

OVERALL FRAMEWORK AND BURDENS OF PROOF

The Board also retained the *Wright Line* framework for refusal to consider cases, and thus the same burdens of proof continue to apply.

The General Counsel must first prove the elements of the violation, and then the burden shifts to the employer to show that it would not have considered the applicants even if they had not been pro-union. If the General Counsel meets his burden, and the employer fails to show that it would have made the same decision even in the absence of union activity or affiliation, then the General Counsel has established a violation of Section 8(a)(3) of the Act.

ELEMENTS OF THE GENERAL COUNSEL'S CASE

The General Counsel must establish the following elements in a refusal to consider case:

- (1) the employer excluded applicants from a hiring process; and
- (2) anti-union animus contributed to the decision not to consider the applicants.

There are two additional points to remember in assessing the General Counsel's case. First, although not specifically stated in *FES*, the General Counsel will still have to show *employer knowledge* of union membership or activity. See Section (below) on "Employer Knowledge." Second, *FES* did not change the way in which

the General Counsel establishes anti-union animus. See Section (below) on “Acting on Anti-Union Animus.”

QUALIFICATIONS

It is important to note that the General Counsel does *not* have to show even minimal qualifications, or the existence of any actual openings for which the applicants might have been qualified, to establish a refusal to *consider* violation.

THE EMPLOYER'S AFFIRMATIVE DEFENSES

Once the General Counsel has established its case, the employer may only escape a finding that it violated the Act if it can prove that it would not have considered the union applicants, even if they had not been union applicants.

REMEDIES FOR A REFUSAL TO CONSIDER VIOLATION⁴

One of the most controversial issues before the Board in *FES* was the question of the appropriate remedies in refusal to consider cases, in particular, the question whether a refusal to consider violation can ever result in an order for reinstatement and back pay. The Board's decision makes it clear that such an order can be the eventual result of a refusal to consider violation.

In addition, the Board will now require employers to give *notice* of subsequent job openings -- a requirement that may not result in many back pay awards, but which could create substantial additional opportunities for organizing.

In specific, when the General Counsel proves a refusal to consider violation, he can obtain an order requiring the employer to:

- (1) cease and desist from refusing to consider union applicants;
- (2) place the discriminatees in the position they would have been in, absent discrimination, for consideration for future openings and to consider them for the openings in accordance with non-discriminatory criteria; and
- (3) *notify* the discriminatees, the *Charging Party*, and the Regional Director of future openings in positions for which the discriminatees applied, or substantially equivalent positions.

⁴ As discussed above in the Refusal to Hire Section, these remedies are also available in refusal to hire cases for the number of discriminatees that exceeds the number of available openings.

And, although this remedy may not be part of the initial order, the Board clarified in *FES* that the General Counsel also may secure a back pay and reinstatement remedy for refusal to consider discriminatees, at a subsequent compliance hearing, if additional jobs become available.

COMPLIANCE PROCEEDINGS

As noted, the Board made it very clear in *FES* that a refusal to consider violation can result in an eventual order for reinstatement and back pay, and that the General Counsel may obtain such an reinstatement and back pay remedy during the compliance phase of a refusal to consider case.

To obtain such an order, the General Counsel must first establish at a compliance hearing that job openings became available, either after the start of the unfair labor practices hearing, or before the start of that hearing (if the General Counsel could not have known about the openings). And the General Counsel must then establish that the discriminatees would have been selected, by showing, for example, that they had qualifications or training related to the announced or generally known requirements of the positions, and their applications would still have been regarded as active when the jobs became available.⁵

If the General Counsel meets this burden, the employer then has the opportunity to prove that it would not have hired the discriminatees to fill those jobs, even if it had not discriminated by refusing to consider them. If the employer fails to meet its burden, then it must offer the discriminatees the positions in question, or substantially equivalent positions, and make them whole for any financial losses (that is, pay them back pay).

⁵ Because the employer has already been found in violation of Section 8(a)(3) for refusing to consider the applicants, the General Counsel does not have to prove anti-union animus in the compliance proceeding. Issues related to the hiring decision itself that have not yet been litigated will, however, have to be proven in compliance.

PROVING THE ELEMENTS OF THE GENERAL COUNSEL'S CASE, UNDER *FES*

REFUSAL TO HIRE

Hiring

Prior to *FES*, the General Counsel typically put on evidence demonstrating that the employer was, in fact, hiring at the time the union applicants applied. This was helpful in demonstrating that the failure to hire was the result of an anti-union animus (they needed people, but didn't hire us) and in rebutting the employer's defense that it simply did not need anyone at the time the union members applied. Indeed, some of the pre-*FES* formulations of the elements of a refusal-to-hire violation included a requirement that the General Counsel demonstrate that the employer was hiring.⁶

While *FES* made evidence of hiring a formal part of the GC's case-in-chief, this has not had a dramatic impact on the types of evidence or methods by which the GC demonstrates employer hiring activity. The most dramatic difference has been that GC is now required to demonstrate the number of available jobs in order to get anything more than a cease-and-desist order and an order of reinstatement and back pay for a single employee.

1. The most common method is of proving hiring to introduce records demonstrating that the employer hired employees after the union applicants applied. *See, e.g., H.B. Zachry Co.*, 332 NLRB No. 110 (2000); *C.P. Associates, Inc.*, 336 NLRB No. 12 (2000); *Masiogale Electrical - Mechanical, Inc.*, 337 NLRB No. 4 (2001); *Niblock Excavating, Inc.*, 337 NLRB No. 5 (2001); *Casino Ready Mix, Inc.*, 335 NLRB No. 39 (2001); *Interstate Builders, Inc.*, 334 NLRB No. 104 (2001); *Wolfe Electric Company, Inc.*, 336 NLRB No. 48 (2001), *aff'd*; 314 F.3d 325 (8th Cir. 2002); *Nelcorp, Inc.*, 332 NLRB No. 17 (2000). This evidence is typically coupled with evidence that the employer advertised for workers (*see C.P. Associates, Inc.*, 336 NLRB No. 12 (2000); *Masiogale Electrical - Mechanical, Inc.*, 337 NLRB No. 4 (2001); *Casino Ready Mix, Inc.*, 335 NLRB No. 39 (2001); *Interstate Builders, Inc.*, 334 NLRB No. 104 (2001)) and/or evidence that employer representatives made statements to the effect that the employer needed to hire additional employees. *Masiogale Electrical - Mechanical, Inc.*, 337 NLRB No. 4 (2001); *Niblock Excavating, Inc.*, 337 NLRB No. 5 (2001).

⁶ *See, e.g., J.E. Merit Constructors, Inc.*, 302 NLRB 301 (1991).

Other cases present some interesting variations on the proof used to establish hiring.

2. *Americlean*, 335 NLRB No. 83 (2001). As proof of hiring, the ALJ cited to evidence of newspaper ads seeking painters, together with evidence that the employer interviewed applicants and took applications from the seven discriminatees. Moreover, the parties stipulated as to time periods when the employer hired employees, and, apparently, the numbers of employees hired.
3. *Fred'k Wallace and Sons, Inc.*, 331 NLRB 914 (2000). Proof that the employer offered the discriminatee a position, and then retracted the offer upon learning that the applicant was a union organizer, established both that the employer was hiring and that the applicant was qualified under *FES*.
4. "Initially, we note that a customary prerequisite to an unlawful refusal-to-hire allegation is evidence that the alleged discriminatee has sought work with the respondent. Actual application is not required, however, where applying would be futile." *Sunland Construction Company, Inc.*, 311 NLRB 685, 686 (1993).
5. In *Tim Foley Plumbing Service, Inc.*, 337 NLRB No. 88 (May 31, 2002), the Board affirmed an ALJ's rejection of an employer's claim that it was not hiring when it filled the jobs at issue through a temporary employment agency, so that it would not have to lay off any of its permanent workforce when work slowed. The ALJ had found that the employer's "sudden" decision to use the temp agency after union applicants appeared, coupled with its decision to stop using the temp agency once the union applications expired, was proof that the employer had turned to the temp agency to avoid hiring union applicants

Concrete plans to hire

The addition of this method of proving hiring has tended to extend the time period at which the Board will look to determine whether a refusal to hire violation can be found. For example:

6. *Kaminski Electric & Service Co.*, 332 NLRB No. 42 (2000). Before *FES* was decided, the ALJ found only a refusal to consider two discriminatees because the employer had not actually hired anyone during the time period when the two applied. The Judge deferred to compliance the issue whether the employer would have hired the two for subsequent openings, absent the refusal to consider. Post-*FES*, however, the Board reversed the ALJ and found that the General Counsel had made out a prima facie case of refusal to *hire*. As the Board noted, on the

same day the employer rejected the union applicants, it arranged to have a temp agency refer applicants to it for similar positions, and, five days later, began interviewing applicants in anticipation of its future hiring needs on a project on which it had bid. Then, over the next several months, the employer hired at least 23 other applicants as electricians and helpers. The Board found that these facts demonstrated that the employer at least had *concrete plans to hire* at the time the union applicants attempted to apply.

7. *Watkins Engineers & Constructions, Inc.*, 333 NLRB No. 99 (2001): Pre-*FES* the ALJ had rejected refusal-to-hire allegations because he found that the employer was not, in fact, hiring in January and early February, when the union applicants called about work. In remanding the case, the Board found that the General Counsel had established the necessary elements of an unlawful refusal-to-hire under *FES*, in part because the creation of a call-in list demonstrated that the employer had “concrete plans to hire.”
8. *All Seasons Construction, Inc.*, 336 NLRB No. 94 (2001). Concrete plans to hire and actual hiring were found where the employer’s representative told current employees the employer was interested in hiring more carpenters, and where the employer hired eight carpenters in the four months following the date the discriminatees applied.

Available jobs

FES clarified that, for a refusal to hire violation to be found, the GC has to prove that there was an available opening for at least one applicant, and that, for a refusal to hire remedy to be awarded to more than one applicant, the GC has to establish in the hearing on the merits, that there were sufficient openings for all discriminatees. Where the number of discriminatees exceeds the number of available jobs, the “extra” discriminatees will get only refusal to consider remedies. Recent cases illustrate how the Board is handling this requirement.

9. *Little Rock Electrical Contractors, Inc.*, 336 NLRB No. 8 (2001), *enfd* 2002 U.S. App. Lexis 15016 (4th Cir. July 26, 2002). Evidence of hiring included the fact that the employer participated in a job fair and that record evidence shows that, during the project at issue, the employer hired 73 employees. Twenty of the hires were Native Americans, hired pursuant to an agreement with the Indian tribe sponsoring the project that the employer would give preference to Native American applicants. The ALJ, with Board approval, removed these 20 jobs from the pool, leaving 53 jobs for 57 applicants. The question of which of the 53 applicants get the jobs was left to the compliance phase.

10. *Fluor Daniel, Inc.*, 333 NLRB No. 57 (2001). The Board found a sufficient number of available jobs for all one hundred plus discriminatees, based on hiring documents and statistics in the record, coupled with the fact that the employer never argued that there was not enough work to hire the discriminatees. Instead, the employer had argued that, under its 30-day rule, the discriminatees' applications were never current when a job opening became available. The Board rejected the thirty-day rule as a defense, finding that it was enforced against the employer's financial self-interest, was never communicated to the discriminatees, and was enforced selectively in favor of non-union applicants.
11. *Jet Electric Company, Inc.*, 334 NLRB No. 133 (2001). The GC moved for Summary Judgment when the employer failed to answer the complaint alleging the employer failed to hire eight union applicants. The Board found that the allegations in the complaint were sufficient to establish a refusal-to-hire violation under *FES*, but insufficient to establish a *remedy*. The complaint alleged that the employer "filled job openings," but did not specifically allege that there were at least eight such openings filled. Thus, the Board may order a cease and desist remedy, but may not order backpay and reinstatement until it is determined there were sufficient openings for the applicants. The Board remanded the case on that limited issue.⁷ In the subsequent post-remand decision, in *Jet Electric Co.*, 338 NLRB No. 77 (Nov. 22, 2002), the Board affirmed the remedy of reinstatement and back pay for all eight discriminatees, based on the Judge's determination that the employer filled eight job openings in the four months after the refusals to hire occurred.

Qualifications

The requirement that the GC prove that the applicants possessed the generally known requirements for the position was the most controversial of the *FES* elements. The employer, taking its cue from the Sixth Circuit's decision in *Fluor Daniel II*, argued to the Board in *FES* that the GC should be required to match alleged discriminatees with particular jobs. The Board rejected this, and instead required the GC only to demonstrate that the discriminatees met the generally known, or publicly announced, objective requirements for the job. More importantly, the Board made it clear that, if it is shown that the hiring criteria are themselves pretextual or that the employer has applied them in a pretextual manner, the GC is relieved of the burden of demonstrating qualifications

⁷ See also *Just Electric, Inc.*, 338 NLRB No. 95 (Jan. 28, 2003); and *Trade Force, Inc.*, 338 NLRB No. 99 (Jan. 29, 2003).

altogether.

12. As with evidence of hiring, it was common, pre-*FES*, for the GC to introduce evidence of union applicant's qualifications, to demonstrate animus and to rebut the employer's defense that none were hired because they were not qualified. While *FES* has heightened the importance of proving qualifications, it has not really changed the way in which qualifications are demonstrated. A comparison of the qualifications of those hired with those of the alleged discriminatees (often using job applications), remains the most common method. See, e.g., *H.B. Zachry Co.*, 332 NLRB No. 110 (2000); *All Seasons Construction, Inc.*, 336 NLRB No. 94 (2001)⁸; *Masiogale Electrical - Mechanical, Inc.*, 337 NLRB No. 4 (2001). See also *Casino Ready Mix, Inc.*, 335 NLRB No. 39 (2001) (employer admitted that one of two union applicants was qualified; second organizer found qualified because he had "comparable qualifications" to the first organizer).
13. Qualifications will also be established where the employer actually offers one or more of the discriminatees a job, as in *C.P. Associates, Inc.*, 336 NLRB No. 12 (2000), where the Board found the applicants qualified because evidence established that the employer's jobsite manager initially offered both individuals jobs and then, after consulting with the home office, told them that he could not hire them, stating "with you being union, I can't put you on." See also, *Sommer Awning Co.*, 332 NLRB No. 136 (2000).

Other post-*FES* cases indicate the variety of issues that can arise when litigating qualifications:

14. *Americlean*, 335 NLRB No. 83 (2001). The employer's ads called for painters with at least five years of experience. The Board found two union applicants qualified, despite the fact that they did not list five years of experience on their applications. First, the application only asked for the applicant's past four employers and did not ask for the number of years spent in the industry. Second, both discriminatees testified to having 20 to 21 years of experience. Moreover, the evidence established that the employer hired applicants who did not indicate five years of experience on their application and interviewed several others who did not show five years experience on their application.

⁸ The ALJ, with Board approval, found five out of six discriminatees qualified on this evidence. The ALJ, once again with Board approval, rejected the claim on behalf of the sixth discriminatee, on grounds that, because no application was introduced, the GC had not established that the sixth discriminatee was qualified.

In dissent, Member Hurtgen argued that the GC must establish that the employer *knew* that the applicants had the requisite experience. The majority (Liebman and Truesdale) noted to the contrary that nothing in *FES* requires General Counsel to establish the employer *knew* that an applicant had the requisite experience: *FES* simply requires the General Counsel to demonstrate that the applicant met the public or announced generally known requirements of the job. The Board expressly found that the fact that the employer's ad sought five years experience, while its application forms only allowed space for the last four employers, meant that the burden was on the employer to show that the applicant failed to meet the specific qualification of five years experience.

15. *Little Rock Electrical Contractors, Inc.*, 336 NLRB No. 8 (2001), *enfd* 2002 U.S. App. Lexis 15016 (4th Cir. July 26, 2002). The ALJ found all union applicants to be qualified, based on a review of their job applications, and the fact that the employer did not submit any evidence to suggest union applicants were unqualified. At the Board, the majority (Liebman and Walsh) agreed, but Chairman Truesdale dissented. Truesdale conceded that comparing qualifications is a legitimate way to determine whether the applicants were in fact qualified, but he argued that the employer never had the opportunity to present evidence that those persons it hired had superior qualifications, because the ALJ did not reopen the record. The majority's response to this was that, when the ALJ solicited the parties' positions on reopening the record, the employer did not argue that the record needed to be reopened for any reason.
16. *Boydston Electric, Inc.*, 331 NLRB 1450 (2000), slip op. at 4-5. The CG met his burden of proving that two applicants were qualified for journeymen electrician positions, where their applications showed they had both completed Joint Apprenticeship Training programs and had worked for recognized contractors.
17. *Wolfe Electric Company, Inc.*, 336 NLRB No. 48 (2001), *aff'd*, 314 F.3d 325 (8th Cir. 2002). The ALJ found all applicants qualified, noting that the company's owner testified that "he did not care what qualifications union applicants had, he would not hire them if they were the last electricians on earth." The GC showed that all applicants, save one, were journeymen electricians. The ninth applicant was a journeyman ironworker. However, the ALJ found the record established that the company's owner stated he would hire inexperienced workers to meet his needs and, in fact, did so.
18. *Masiongale Electrical - Mechanical, Inc.*, 337 NLRB No. 4 (2001), *aff'd in relevant part*, 2003 U.S. App. Lexis 5487 (7th Cir. Mar. 21, 2003). Applicants found qualified based on a comparison of qualifications, as reflected in job applications,

of union members with those individuals actually hired. ALJ finds, on this basis, that union applicants had superior qualifications. In addition, ALJ finds that employer's hiring criteria was not uniformly applied, inasmuch as the ad which the employer ran required applicants to have a valid plumbers license, yet evidence established that the employer hired covert applicants who had no plumbing license but rejected union applicants who possessed a license.

19. *Moses Electric Services, Inc.*, 334 NLRB No. 78 (2001). The ALJ, with Board approval, rejected the employer's defense that it did not hire union applicants because they had industrial, as opposed to commercial, experience. The ALJ found the reason to be pretext, as several individuals were hired who also had significant industrial experience.
20. *Norman King Electric*, 334 NLRB No. 12 (2001). The employer never stated what the requirements of the jobs actually were, and the ALJ noted that it was thus unclear whether the GC need make any showing at all to satisfy this element of the initial burden. Slip op. at 5. (The ALJ nonetheless found the applicants qualified, as experienced electricians.) Further, the employer's testimony demonstrated that its criteria were subjective and not quantifiable (e.g., "qualified for what they're doing," "honest," "safe," "good worker"), so the employer, rather than the GC, bore the burden of proof on this question. And the employer failed to introduce evidence that the discriminatees did not meet its subjective criteria.

REFUSAL TO CONSIDER

Pre-*FES* discussions of the refusal-to-consider violation were a complete mess. *FES* changes the way in which the violation is conceptualized by focusing on the exclusion from a hiring process, and by clearly articulating why such an exclusion violates the Act, even in the absence of job openings or actual hiring. Post-*FES* cases have elaborated on the notion of what constitutes a "hiring process".

Hiring process

21. *Kamtech, Inc.*, 333 NLRB No. 33 (2001), *aff'd in the finding of a violation*, 314 F.3d 800 (6th Cir. 2002). The Board found a refusal to consider violation when the employer refused to give a union supporter a welding test, where the test was part of the employer's hiring process for welders. Because it could not be determined whether the discriminatee would have passed the test, the Board could not find that the employer unlawfully refused to hire him. The Board then ordered the employer to give the discriminatee the test and, if he passed, to offer him

employment and pay him back pay. *See also Walker Stainless, Inc.*, 334 NLRB No. 131 (2001) (refusal to consider violation found where employer allows union applicants to fill out applications, but refuses to allow them to take a weld test, telling them that they are not bona fide applicants because they are union organizers).

22. *Wayne Erecting, Inc.*, 333 NLRB No. 149 (2001): The Board agreed with the ALJ's pre-*FES* ruling that the employer unlawfully refused to consider one union applicant. The employer claimed it never received the discriminatee's application, but the GC proved that it did receive the application, and the employer's foreman commented that the employer would not hire the discriminatee because of his union activity and affiliation. The Board remanded the question whether the employer also refused to hire the discriminatee for further consideration in light of *FES*.
23. *Colburn Electric Company*, 334 NLRB No. 72 (2001). In affirming the ALJ's rejection of refusal-to-consider allegations, the Board finds that the test for refusal-to-consider articulated in *FES* supersedes and overrules that outlined in *3E Company*, 322 NLRB 1058, 1061-62 (1977), *enfd mem.* 132 F.3d 1482 (D.C. Cir. 1997); *Ultrasystems Western Constructors*, 316 NLRB 1243, 1243-44 (1995); and *Lancet Arch*, 324 NLRB 191 (1997).

EMPLOYER KNOWLEDGE

24. Although *FES* makes no specific mention of the need to prove employer knowledge, this element remains a fundamental requirement of proof in any case alleging discrimination under Section 8(a)(3) of the Act, in accordance with *Wright Line*, 251 NLRB 1083, 1090 (1980), *enfd*, 662 F.2d 899, 108 LRRM (BNA) 2513 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).
25. In *Ultrasystems Western Constructors, Inc.*, 310 NLRB 545, 545 n.2 (1993), *enforcement denied*, 18 F.3d 251, 145 LRRM (BNA) 2641 (4th Cir. 1994), the Board noted that the listing on an employment application of prior union jobs, of union membership, of pay at union scale, and of membership in a union apprenticeship program, evidences union affiliation on the face of the application.
26. In *J & L Enterprises, Inc.*, 310 NLRB 121, 121 (1993), the Board held that an employer had knowledge of an applicant's union affiliation. Specifically, the Board stated:

[The applicant's] application listed . . . the 'Position Applying For' as

‘Journeyman Electrician,’ and the ‘Salary Desired’ as \$23.55 . . . and ‘Former Employers’ as ‘1960-1989 IBEW.’ This information constituted clear notice to any reviewer of the application that [the applicant] had secured work through the union hiring hall for the preceding 29 years and might be a member of IBEW Local 441. Contrary to the judge, we find that [another applicant] similarly revealed his IBEW affiliation by listing on his application his participation in the IBEW apprenticeship training program and by requesting the union wage scale. Moreover, [the applicants] made [their] application with the [employer] in a group of four whose affiliation with IBEW Local 441 was openly acknowledged [by wearing IBEW hats and jackets].

27. In *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), *enforced*, 976 F.2d 744 (11th Cir. 1992), the Board stated:

Here, the Respondent clearly had knowledge that all [the] alleged discriminatees were union affiliated. As found by the Judge, . . . the applications revealed some indicia of union membership, and all but two of the applications were filed . . . en masse, at the Respondent's employment office. None of the discriminatees was offered a position with the Respondent, called in for an interview, or even contacted by the Respondent after submitting an application . . . even though . . . each had at least a few years of experience and many listed credentials which should have at least warranted some type of inquiry by the Respondent.

28. “There is a difference, however, between an applicant for employment who has worked in the past for a union contractor and an applicant for employment who states on his application that he is a voluntary union organizer. The latter employee is putting the employer on notice that he will try to exercise his federally protected right to organize his fellow employees.” *Fluor Daniel, Inc.*, 311 NLRB 498, 505 (1993), *enfd in part*, 161 F.3d 953, 159 LRRM (BNA) 2794 (6th Cir. 1998).
29. In *BE & K Construction Co.*, 321 NLRB 561, 561 n.2 (1996), *enforcement denied*, 133 F.3d 1372 (11th Cir. 1997), the Board held that an employment application revealing prior participation in a union apprenticeship program was not sufficient to show employer knowledge of an applicant's union affiliation.
30. Under the Board's “small plant” doctrine, the employer's knowledge of union activity may be inferred from evidence that the union activities were carried on in

such a manner or at such times, that in the normal course of events, the employer would have noticed them. *Coral Gables Convalescent Home, Inc.*, 234 NLRB 1198, 1199, 1201 n.3 (1978). In that case, the employer, who had 58 employees (and about 20 on the discriminatee's shift), was presumed to have had knowledge of the discriminatee's open union involvement.

ACTING ON ANTI-UNION ANIMUS

FES did not alter in any way the proof needed to establish anti-union animus, and there have been several interesting post-*FES* decisions that are very helpful on the issue of animus in salting cases. The first case discussed, however, *Tejas Electrical Services, Inc.*, gives some indication of how difficult it may become to convince the new majority Republican Board that employers are acting on anti-union animus when they refuse to hire union salts.

31. In *Tejas Electrical Services, Inc.*, (*IBEW Local Union No. 716*), 338 NLRB No. 39 (Oct. 11, 2002), there was proof that two overt union organizers applied and were not offered jobs, and that two covert salts applied shortly after them and were hired. There was also proof that the company employee who interviewed the two applicants told them that the field superintendent was “nervous” about the applications, and that the person he worked for “did not care for unions.” The Republican Board members found that the order of applications was an insufficient basis for inferring animus in the absence of evidence that the employer had a practice of hiring on a first-come, first-served basis. The Repubs also held that, although the Board is *permitted* to infer anti-union animus from the interviewer's comments, it is not *required* to do so. The only Democratic member on the panel, Wilma Liebman, argued that the evidence was sufficient to support of finding of anti-union animus, and that the case should be remanded to the Judge to reconsider other errors.
32. The Board's decision in the third Fluor Daniel case, *Fluor Daniel, Inc.*, 333 NLRB No. 57, slip op. at 12-13, notes 62-82 (2001) (“*Fluor III*”), provides an extensive catalogue of evidence that supports a finding of anti-union animus, and some of the cases in which such evidence is discussed. The catalogue includes: prior unfair labor practices; concealing information from union applicants about the hiring process; rigid enforcement of hiring policies with respect to union applicants, coupled with lax enforcement as to others; telling union applicants no hiring is going on; refusing to provide union applicants with application forms; using the term “loyal” to mean “non-union”; changing application policies to restrict union access; repeated involvement of the same managers in unfair labor practice cases; hiring former employees with undesirable work records while

ignoring qualified union applicants; acting against financial interest; lack of any business justification; and failing to communicate or follow up in any way with union applicants.

33. With regard to motivation, rarely does an employer experienced in labor law litigation provide a smoking gun. For that reason, circumstantial evidence is sufficient to prove an 8(a)(3) violation. *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 297 (6th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986).
34. *H.B. Zachry Co.*, 332 NLRB No. 110, slip op. at 4 (2000). In finding anti-union animus, the Board relied in part on a prior ruling that the employer had engaged in widespread 8(a)(1) violations and had unlawfully fired two employees. The case is significant because the Board, in relying on the prior case, noted that the events in both cases occurred within two years of each other. *See also Nelcorp, Inc.*, 332 NLRB No. 17 (2000), slip op. at 1 (citing, among other things, as proof of animus, the Board's prior finding of animus in *Nelcorp, Inc.*, 316 NLRB 625 (1995)).
35. *Glenn's Trucking Co.*, 332 NLRB No. 87 (2000), *enfd*, 298 F.3d 502 (6th Cir. 2002). Where an employer failed to hire 18 union applicants for any of 116 job vacancies, the statistical evidence of such a blatant disparity in the employer's treatment of applicants could be used as an element of animus.
36. "[A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel*, 255 NLRB 722, 722 (1981), *enfd*, 705 F.2d 799, 113 LRRM (BNA) 2517 (6th Cir. 1982). A pretextual reason, of course, supports an inference of an unlawful one." *Keller Manufacturing Co.*, 237 NLRB 712, 717 (1978), *enfd in part*, 622 F.2d 582, 106 LRRM (BNA) 2546 (7th Cir. 1980).
37. In *Madison South Convalescent Center*, 260 NLRB 816, 831 (1982), the ALJ drew an inference of an unlawful motive in a discriminatory failure to hire case, when the actions the employer took in the alternative were unexplained, and were against its own self-interest:

I find it particularly significant that the use of contract labor was against Respondent's self-interest. Contract labor was more expensive. Both [management officials] were allegedly told to hire LPNs and reduce the cost of contract labor. However, rather than reduce such costs, Respondent increased its use of the more

expensive contract labor services. Respondent would not have acted in this manner unless it had a reason. Respondent's failure to explain its reasons leads me to conclude that it had a reason which it desires to conceal - - an unlawful and discriminatory one.

38. In *McCain Foods, Inc.*, 236 NLRB 447 (1978), *enfd*, 598 F.2d 666, 101 LRRM (BNA) 2328 (1st Cir. 1979), the employer's anti-union animus was established by showing that management had an interest in the applicants' backgrounds and a strong desire to operate without a union.
39. "It is well established that questions concerning union preference, in the context of job application interviews, are inherently coercive and unlawful even when the applicant is hired." *Gilberton Coal Company*, 291 NLRB 344, 348 (1988), *enfd without op.*, 888 F.2d 1381, 134 LRRM (BNA) 2568 (3d Cir. 1989).
40. In *B E & K Construction Co. (IBEW LU 238)*, 321 NLRB 561, 569 (1996), *enforcement denied*, 133 F.3d 1372 (11th Cir. 1997), the Board adopted that part of the ALJ's decision inferring union animus from the employer's status as a merit shop contractor. "[W]hile it would be unfair to assume that union membership or employment alone would impel the Respondent to violate the law, it would be naive to assume that it would treat with equanimity applicants who are not just interested in a job, but whose application evinces an overt organizational threat in terms so bold as to be equitable with commitment to undermine the merit shop philosophy."
41. In *Edelco, Inc.*, 321 NLRB 857 (1996), *enfd in part*, 132 F.3d 1007, 157 LRRM (BNA) 2046 (4th Cir. 1997), the Board adopted the ALJ's decision which, among other things, found that union animus could be inferred from the employer's failure to hire any union applicants on any of its job sites.
42. In *Starcon, Inc.*, 323 NLRB 977 (1997), *enfd in relevant part*, 176 F.3d 948, 161 LRRM (BNA) 2233 (7th Cir. 1999), the Board affirmed an ALJ's finding that a contractor had decided to subcontract work to avoid hiring voluntary union organizers. Originally, the company had aggressively recruited applicants, but when faced with a union organizing drive, the company switched tactics and subcontracted the work. The court found that this abrupt about-face, together with direct evidence of anti-union animus, proved that the contractor had decided to subcontract the work merely to avoid hiring voluntary organizers.
43. Evidence that an employer concealed its methods and pattern of hiring from applicants supports a finding of unlawful motivation. *Beacon Electric, Inc.*, JD

115-98, 1998 NLRB Lexis 461 (Beddow, July 14, 1998) (citing *American Press*, 280 NLRB 937, 942 (1986), *enfd*, 833 F.2d 621, 126 LRRM (BNA) 3131 (6th Cir. 1987)).

44. In *Richard Mellow Electrical Contractors Corp. (IBEWLU 81)*, 327 NLRB 1112 (March 31, 1999), the Board noted that the employer's witnesses offered "shifting explanations" of the company's failure to hire union applicants, and that such shifting explanations are evidence of anti-union motivation: the employer testified that he only hired people who had worked for him before; when that proved to be untrue, a second witness testified that the employer had told her he also had hired some people he knew of personally, some people who were recommended to him, and some who had always wanted to work for him. The Board specifically stated that "the shifting nature of the [employer's] explanations of its failure to consider the 14 union applicants is further evidence of unlawful motivation."
45. "It is . . . well settled . . . that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal." *Fluor Daniel, Inc.*, 311 NLRB 498, 498 (1993), *enfd in part*, 161 F.3d 953, 159 LRRM (BNA) 2794 (6th Cir. 1998).
46. In *Town & Country Electric, Inc.*, 309 NLRB 1250, 1275 (1992), *enforcement denied*, 34 F.3d 625 (8th Cir. 1994), *rev'd*, 516 U.S. 85 (1995), the Board adopted the ALJ's statement that:

Economic reality neutralizes any debate concerning [the employer's] posture with respect to union organization. As a merit shop employer, it is dedicated to a method of operation in the highly competitive construction industry which is not compatible with wage and benefit standards sanctioned by affiliated craft unions such as the IBEW.

47. In Memorandum OM 94-73 (August 12, 1994), issued by the Office of the General Counsel, Division of Operations-Management, the General Counsel noted that statistics may be helpful in proving anti-union animus:

A statistical analysis may be beneficial in certain cases to determine whether the employer discriminated against union applicants. In *Fluor Daniel, Inc.*, 311 NLRB 498 (1993), a violation was established, in part, by the showing that despite the fact that union applicants comprised a significant number in the applicant pool,

none were hired.

FES IN THE COURTS OF APPEALS

48. While a number of courts of appeals have reviewed cases decided under FES, only one has actually ruled on the validity of the new standards: The Seventh Circuit (Illinois, Indiana, Wisconsin), in *Masiongale Electrical-Mechanical, Inc.*, 2003 U.S. App. Lexis 5487 (7th Cir. March 31, 2003), expressly endorsed the Board's test, under FES, for refusal to *hire* violations. The decision is particularly significant because the Seventh Circuit was one of the courts that had criticized the Board's approach to salting cases, and to which the Board responded when it issued FES. In fact, the court states expressly in *Masiongale* that it, in its view, "this framework [for refusal to hire violations] addresses the concerns we described in *Starcon*...."
49. Other courts have not ruled definitively on FES. See *International Union of Operating Engineers v. NLRB*, 294 F.3d 186 (D.C. Cir. 2002)⁹ (the court recited the refusal to *consider* test in FES, but failed to comment on it or apply it because it remanded the case on other grounds); *NLRB v. Nelcorp*, 2002 U.S. App. Lexis 23795 (2d Cir. Nov. 15, 2002) (New York, Vermont, Connecticut); (the court (in a summary opinion) upheld the Board's ruling that the employer unlawfully refused to hire union members because of their membership. The employer did not directly challenge the NLRB's refusal to *hire* standard under FES, and the court declined to rule on its challenge to the refusal to *consider* standard under FES, since the refusal to hire standard had been met); *National Labor Relations Board v. FES*, 301 F.3d 83 (3d Cir. 2002) (Pennsylvania, New Jersey, Delaware) (The new standard for refusal to *hire* was not challenged. At note 3, the court expressly stated that it was *not* deciding the legality of the FES standard for refusal to hire cases. And, while the employer did challenge the refusal to *consider* standard, the parties agreed at oral argument that the court need not rule on the standard, because the ALJ's decision on remand (which the Board approved) had converted the case into a refusal to hire case.); *Little Rock Electrical Contractors, Inc.*, 2002 U.S. App. Lexis 15016 (4th Cir. July 26, 2002) (Maryland, Virginia, West Virginia, North and South Carolina) (unpublished) (the Court discussed FES as "the" standard for refusal to hire cases, but the FES standards were not challenged in this case).

⁹ While the D.C. Circuit technically covers only the District of Columbia itself, anyone challenging a ruling of the NLRB anywhere in the country can actually bring the case to the D.C. Circuit.

50. The Fifth Circuit (Texas, Louisiana, Mississippi) issued a decision, in *PNEU Electric, Inc.*, 309 F.3d 843 (5th Cir. 2002), in which it appeared to disapprove of the Board's standard for refusal to *consider* cases. The decision is so confused, however, that it's really hard to tell what the court may do in future.
51. When the Sixth Circuit (Michigan, Ohio, Kentucky, Tennessee) issues its long-awaited ruling in the third *Fluor Daniel* case, it is likely to endorse the *FES* standard for refusal to *hire*. In *Glenn's Trucking Co.*, 298 F.3d 502 (6th Cir. 2002), the court appeared to lay the foundation for its approval. Citing the "2 element" test of *NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953 (6th Cir. 1998) ("*Fluor II*"), the Court of Appeals found that the General Counsel had proven the second element required to establish discrimination in regard to hire, that is, "the existence of a covered action." The court specifically noted that the General Counsel had "matched applicants with available jobs" when he showed that: (1) the applicants submitted applications for employments; (2) there were enough jobs available for all applicants; and (3) the discriminatees' qualifications were in the same range as those who were hired.
52. It is less certain what the Sixth Circuit will do with the refusal to *consider* issue, although, in *Kamtech, Inc. v. NLRB*, 314 F.3d 800 (6th Cir. 2002), the court upheld the Board's finding that an employer unlawfully refused to consider a pro-union applicant by denying him an opportunity to take a welding test. The court did not, however, call the violation a refusal to consider. Instead, the court reasoned that, when all applicants are offered such tests, the company is prohibited from discriminating against only union members by denying them equal opportunities to compete for available positions.

EMPLOYER DEFENSES: "NEUTRAL" POLICIES

Employers often try to defend a refusal to hire charge by claiming they followed some "neutral" hiring policy or practice in an evenhanded manner. The most common of these policies and practices are discussed below. As these decisions demonstrate, it is generally possible to defeat the employer's defense by showing that the policy was *not* applied in an even-handed manner, and that it was in fact applied only to union applicants.

In addition, unions have had some success in attacking these policies as themselves unlawful, as the cases discussed below demonstrate. Organizers should, therefore, seriously consider alleging that the employer's hiring policy itself is *unlawful*, in addition to alleging that it was discriminatorily applied. The two most important questions to answer in making a case that the policy is itself

unlawful are: (1) *when* and *why* was the rule put in place (e.g., in response to an organizing drive, or an attempt to thwart a unionization effort, or on advice from an anti-union organization, such as the ABC or IEC); and (2) whether the rule operates to automatically exclude union applicants in most instances. *See also* the section discussing “Inherently Destructive Employer Conduct,” below.

53. In Memorandum OM 94-73 issued by the Office of the General Counsel, Division of Operations-Management, on August 12, 1994, the Regional Directors were instructed that “the [unfair labor practice] investigation may have to probe the utilization of facially neutral application rules and/or hiring priorities which have a disparate impact on union members or supporters.” This memorandum went on to say that:

The investigation should also encompass any rules that the employer follows in accepting or rejecting applications. The rules should be thoroughly reviewed and, if in writing, copies should be secured. For example, the investigation should cover: (1) whether applications are accepted only when vacancies occur; (2) whether an applicant appears in person; (3) whether only original applications are accepted; (4) whether applications are active for only a prescribed period; (5) whether references are required; and (6) whether the applicant is required to provide a detailed employment history including the names of former employers and wage rates. Additionally, the business justification for the rules may be significant.

PRIORITY HIRING SYSTEMS

Defense Successful

54. In *International Union of Operating Engineers, Local 150 v. NLRB (Brandt Construction Co.)*, 2003 U.S. App. Lexis 5934 (7th Cir. March 28, 2003), *aff'g* 336 NLRB No. 58 (2001), the employer established that it had a preference of preferring applicants in the following order: (1) current employees; (2) past employees with good records; (3) applicants recommended by supervisors; (4) applicants recommended by current non-supervisory employees; (5) unknown (walk-in) applicants. In the underlying case, the General Counsel did not challenge this policy as “inherently destructive,” even though it operated to exclude virtually all union applicants. The Board determined that the employer did not apply this priority system in a discriminatory manner, and affirmed the ALJ’s dismissal of the refusal to hire charges. The court of appeals agreed.

The union challenged the system before the court of appeals as “inherently destructive,” but the court rejected the argument because the General Counsel had not raised or litigated the argument before the Board, and thus it could not be an issue before the court of appeals. While it is certainly still possible to win this argument, such cases will have to be carefully litigated in future, especially with the new conservative board. Local Unions faced with such policies should be in touch with their organizing coordinators about the best approach to take with the Region and at trial.

55. In *Zurn/N.E.P.C.O. (International Brotherhood of Boilermakers)*, 329 NLRB 484 (1999), the Board upheld an ALJ’s ruling that the company’s priority hiring policy had not been unlawfully *applied* to union applicants. The Board stressed in its decision, however, that it was *not* ruling on the question whether the policy *itself* was unlawful, because the General Counsel had not made that argument. In *Zurn/N.E.P.C.O.*, the *Boilermaker’s Union* argued that the policy was itself unlawful, but the ALJ and the Board both explained that the General Counsel’s theory of the case is controlling, and that a charging party (here, the Union) cannot expand or change the General Counsel’s theory.
56. *Kanawha Stone Company*, 334 NLRB No. 28 (2001). This is one of the few cases in which the GC claimed that a priority hiring system was inherently destructive, and where the Board rejected that argument. Here, the employer used three criteria when hiring: (1) current employees on temporary layoff; (2) former employees; and (3) referrals from current employees. The Board found that the policy was not inherently destructive, because, of the 36 people hired between March and August 1996, 7 “were affiliated with a union.” The Board went on to state “[e]ven though few of those employees showed any interest in union organizing activity, this alone is not sufficient to support a finding of an inherently destructive hiring policy.” Slip op. at 3.

Defense Unsuccessful

57. In *D.S.E. Concrete Forms, Inc.*, 303 NLRB 890 (1991), *enfd without op.*, 146 LRRM (BNA) 2448 (5th Cir. 1994), the Board approved an ALJ’s ruling that an employer’s hiring practices had the effect of discriminating against union supporters. In *D.S.E.*, when a job became available, the employer first gave preference to existing employees at its other job sites. Next, the employer gave preference to the employees available for transfer from another non-union employer with whom it had a management contract. Third, if no individuals were available, the employer relied on referrals from its existing employees.

Based on the facts of the case, the Board adopted the ALJ's conclusion that "the practical effect of the Respondent's first three job criteria was to preclude employment of union members at the jobsite." *Id.* at 890 n.2. The ALJ had rejected the employer's defense and held:

I find that Respondent's hiring criteria do not establish that D.S.E. would not have hired the applicants 'in any event,' as Respondent argues. Rather, the criteria reinforce the General Counsel's position that the applications were not considered because the applicants were union members. The preponderance of the evidence establishes that Respondent was pursuing a pattern or practice by which it systematically declined to consider any union members for employment.

Id. at 898.

58. In *Starcon, Inc.*, 323 NLRB 977 (1997), *enfd in part*, 176 F.3d 948, 161 LRRM (BNA) 2233 (7th Cir. 1999), the Board affirmed an ALJ's finding that a contractor unlawfully refused to consider applications marked "voluntary union organizer." In its defense, the contractor asserted it was following two neutral hiring policies when it did not consider the applications. First, the contractor required applicants to appear in person. Second, the contractor gave preferences to employees who either had worked for the company or had a supervisor's recommendation. The ALJ rejected the contractor's argument because it had formulated its policies in response to an organizing drive, and because the contractor selectively applied them to known union applicants.
59. In *Richard Mellow Electrical Contractors Corp. (IBEW LU 81)*, 327 NLRB 1112 (1999), an employer refused to consider for hire fourteen union applicants. The employer argued that the thirteen individuals it did hire all had either worked for the company previously, had been referred to the employer personally, or had expressed an interest in working for the employer before the union applicants applied, and the Administrative Law Judge ruled that the employer had acted in accordance with a legitimate, nondiscriminatory, priority hiring policy.

The Board reversed, however, finding that the employer had failed to prove that such a priority hiring policy even existed. The Board also noted that the employer's witnesses offered "shifting explanations" of the company's failure to hire the union applicants, and that such shifting explanations are evidence of anti-union motivation: the employer testified that he only hired people who had

worked for him before; when that proved to be untrue, a second witness testified that the employer had told her he also had hired some people he knew of personally, some people who were recommended to him, and some who had always wanted to work for him. The Board specifically stated that “the shifting nature of the [employer’s] explanations of its failure to consider the 14 union applicants is further evidence of unlawful motivation.” Slip op. at 4 n.18.

60. In *Cobb Mechanical*, 1995 NLRB Lexis 447 (1995), *enforced without opinion* 91 F.3d 139 (5th Cir. 1996), the ALJ refused to find the employer’s hiring preference system *per se* unlawful, but did find that it was unlawful as applied in this case, where they served to systematically exclude union members from consideration for employment.¹⁰
61. *Nelcorp, Inc.*, 332 NLRB No. 17 (Sept. 21, 2000), *enfd* 2002 U.S. App. Lexis 23795 (2d Cir. Nov. 15, 2002). The employer argued that it refused to accept applications and failed to hire any of nine union applicants based on its hiring policy. The employer claimed it did not rely on applications from unknowns, but filled positions through: (1) transfer of existing employees; (2) applications from former employees; and (3) “positive referrals” from current employees. The ALJ and the Board rejected the argument, because the employer departed from “its purported ‘no applications’ policy and advertised for journeymen in New York, hired individuals who were not former employees, and hired without positive referrals.” Slip op. at 2. The Board thus agreed with the Judge that the “policy” was applied in a discriminatory manner. The Board disavowed any finding by the ALJ that could be interpreted as a ruling that the policy was inherently discriminatory, however, because that issue was not litigated.
62. *Niblock Excavating, Inc.*, 337 NLRB No. 5 (2001). The ALJ rejected the employer’s defense that union applicants were not hired because of a policy of keeping applications on file for only thirty days, as well as a policy of only hiring former employees, friends of employees, or students. The ALJ found that all these policies were adopted shortly after union applications were received and thus were implemented to thwart the union’s organizing efforts. The ALJ, with Board approval, found the change itself to be a violation of 8(3).¹¹ The ALJ noted

¹⁰ The citation to this case is somewhat unusual, but, as reported in a subsequent case, the Board enforced the ALJD on June 23, 1995 on summary judgment (unreported decision), and the Court of Appeals for the Eleventh Circuit enforced that summary judgment order at 91 F.3d 139, without opinion.

¹¹ See also *Tim Foley Plumbing Service, Inc.*, 332 NLRB No. 158 (2000) (employer’s

in particular that, while the employer had a longstanding practice of hiring applicants referred by current employees, “its policy or practice of *not considering* any applicant who does not have such a referral is recent (TR 29) and was implemented to thwart the organizing efforts of Local 150.” Slip op. at 8, n. 15, (emphasis in original).

63. *Norman King Electric*, 334 NLRB No. 12 (2001). The ALJ, with Board approval, rejected the employer’s argument that he failed to hire any of the union applicants because none fit into its priority hiring system: an applicant had to be known by the owner, or recommended by someone known to the employer. The ALJ found the policy discriminatory in its inception (it was adopted only after union members began applying), and discriminatory in its application (the employer hired non-union applicants who were neither known to it nor referred to it by someone known to the owner).
64. An ALJ found that a contractor's implementation and application of a “priority hiring” system discriminated against union sympathizers in *Zurn/N.E.P.C.O.*, JD 34-07, 1997 NLRB Lexis 121 (February 24, 1997). The employer's policy gave preference to past and present employees and to referrals by employees. The ALJ ruled that the employer unlawfully implemented the policy because, based on statistical evidence, the policy resulted in a completely non-union work force, and because, through personal interviews, the employer could identify and exclude all applicants with union backgrounds. The ALJ also found that the employer selectively applied the policy by using it simply to avoid hiring applicants with union backgrounds. (This is a different case than the case discussed above at p.25.)
65. In *Houston Stafford Electric, Inc. (IBEW, IBEW LU 716)*, JD (ATL) 72-98, 1998 NLRB Lexis 762 (Grossman, Sept. 29, 1998), ALJ Howard Grossman ruled that priority hiring systems used by some of the contractors unlawfully excluded pro-union applicants.
66. In the underlying decision in *M.J. Mechanical Services, Inc. (SMW LU 46)*, 325 NLRB 1098 (1998), ALJ Arthur Amchan ruled that the employer’s hiring policy, which gave preference to applicants referred or recommended to the employer, was “inherently destructive of important employee rights,” and was therefore unlawful. The Judge made a compelling point when he compared a preferential

sudden switch to exclusive use of a temporary agency to fill its manpower needs violates the Act because it was motivated by the appearance of union applicants).

hiring policy that *could* be lawful, to one that excludes union adherents. As Judge Amchan noted:

A one-time ad hoc hiring preference for relatives, friends and business acquaintances for short-term tasks, made in the absence of any evidence of antiunion motivation may not be inherently destructive of employee rights. A formal company policy that allows an employer to avoid hiring known union members on all its jobsites forever is inherently destructive of these rights.

Slip op. at 9 n.19. In adopting the Judge's rulings, the Board relied on an alternative theory, however, and noted that it found it "unnecessary" to pass on the Judge's finding that the employer's hiring practices were inherently destructive of the applicants' Section 7 rights.

67. In *Pollock Electric, Inc. (IBEW LO 716)*, JD (ATL) 50-96, 1998 NLRB Lexis 440 (July 7, 1998), ALJ Howard Grossman found that the employer's preferential hiring system containing seven categories was "inherently destructive" of employee rights, because union applicants would always be restricted to the last two categories in the list and thus stood little, if any chance of ever being hired. As the ALJ noted:

[I]t may be stated as a general principle that a hiring procedure based upon a sequence of categories of applicants is discriminatory where none of the categories contains union members, or where they first appear at or near the end of the sequence.

NO-MOONLIGHTING POLICIES

Defense Successful

68. The United States Court of Appeals for the Sixth Circuit held, in *Architectural Glass & Metal Co. v. NLRB*, 107 F.3d 426 (6th Cir. 1997), that an employer could lawfully maintain a rule prohibiting employees from working two full-time jobs and that a refusal to hire a union organizer pursuant to such a policy would be lawful, as long as the employer applied the rule in a nondiscriminatory manner.
69. The Board held, in *Little Rock Electric Contractors (IBEW LU 480)*, 327 NLRB 932 (1999), that a no-moonlighting policy was a valid defense to an employer's refusal to hire two union organizers. The Board noted, however, that "[t]here is no allegation that the [no-moonlighting] rule is unlawful." This case underscores the importance of challenging these policies as illegal in and of themselves: in a separate decision, in which the same policy was attacked as discriminatory, ALJ Lawrence Cullen held that the policy was unlawful and "inherently destructive of employee rights." See *Little Rock Electrical Contractors, Inc. (IBEW LU 238)*, JD (ATL) 65-98 (Cullen, Oct. 16, 1998).

Defense Unsuccessful

70. In *Tualatin Electric (IBEW LU 48)*, 319 NLRB 1237 (1995), the Board held that the employer's "no-moonlighting" policy violated Section 8(a)(1) of the Act, because the Board found that the Employer had enacted its policy in order to prevent IBEW salts from being hired. The Board stated, "[w]hen, as here, an employer implements a rule with the purpose of restricting or preventing employees from engaging in protected activity, Section 8(a)(1) of the Act has been violated." *Id.* at 1237.
71. In the underlying decision in *Little Rock Electrical Contractors, Inc. (IBEW LU 238)*, 336 NLRB No. 8 (2001), the ALJ held that a no-moonlighting policy was unlawful and "inherently destructive of employee rights." The Board upheld the Judge on other grounds, and did not rule on his finding that the policy was inherently destructive.
72. In *Tech Electric, Inc. (IBEW LU 532)*, JD (SF) 97-97, 1997 NLRB Lexis 980 (Dec. 5, 1997), the ALJ found that a no-moonlighting policy violated Section 8(a)(1) because the contractor adopted the policy to restrict employees from engaging in protected activity. As proof that the contractor aimed the policy at protected activity, the ALJ noted that the contractor had implemented the policy soon after

the union started its organizing campaign

PRIOR HIGH WAGES AND HISTORY OF SHORT TERM EMPLOYMENT

Defense Successful

73. *Contractors' Labor Pool Inc. v. NLRB*, 2003 U.S. App. Lexis 5933 (D.C. Cir. March 28, 2003).

In the underlying decision, in *Aztech Electric Co.*, 335 NLRB No. 25 (Aug. 27, 2001), the Board ruled that the employer could not rely on its 30% wage rule (under which it excluded applicants who previously earned 30% higher or lower than the employer was offering), because the rule had the effect of systematically excluding all union applicants, and thus was “inherently destructive” of employee rights.

The Court of Appeals for the District of Columbia Circuit, however, overturned the Board’s ruling, in *Contractors' Labor Pool Inc. v. NLRB*, 2003 U.S. App. Lexis 5933 (D.C. Cir. March 28, 2003). The court essentially adopted the employer’s argument that, because the ALJ had expressly found (and the Board had adopted the finding) that the employer had not adopted the rule for a discriminatory reason, it was precluded from finding that the rule violated Section 8(a)(3), which requires evidence of discriminatory intent.

In so ruling, the court rewrote one decision of the United States Supreme Court and marginalized another. In *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), the Supreme Court ruled that, when conduct is inherently destructive of important employee rights, “no proof of antiunion motivation is needed.” In the D.C. Circuit’s view, however, the statement “no proof” in *Great Dane* does not really mean “no proof.” Instead, the court of appeals is sure that what the Supreme Court intended to say was “no further proof.” The IBEW had also pointed out to the court of appeals that the Supreme Court expressly ruled in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), that an 8(a)(3) violation can be established in the absence of proof of unlawful motive. The court of appeals agreed with this characterization, but called *Republic Aviation* an “anomaly.” The Court also expressly declined to apply Title VII “disparate impact” theory to cases under the NLRA.

The ALJ had based his finding that the employer did not adopt the rule for a discriminatory reason on the extensive evidence the employer presented at trial, which included a comprehensive wage survey. The Judge concluded that this

evidence established that the employer had adopted the rule for legitimate business reasons. Unions may yet be able to get a court decision that such a rule is “inherently destructive” in cases where the employer does not present such strong proof of an alternative reason, *and* where the Board’s decision does *not* contain a finding that the employer did not adopt the rule for anti-union reasons.

But, because any employer can seek review of a Board decision in the District of Columbia Circuit, the Court’s decision could seriously harm any attempt to have such a policy declared “inherently destructive,” if the employer mounts a credible defense that it adopted the rule for legitimate business reasons, with no intention to discriminate. Moreover, such a case may not even come before a court of appeals in the near future, given the current Republican majority on the Board.

Unions should still be able to defeat this defense, however, as they always have, in cases where there is evidence that the employer applies its rule unevenly, or where the union can establish, for example, that the employer adopted the rule after the organizing campaign began. *See* cases discussed below, under heading, “*Defense Unsuccessful.*”

74. In *Wireways, Inc. (IBEW LU 637)*, 309 NLRB 245 (1992), the Board upheld the ALJ’s determination that an employer’s policy of not hiring applicants whose wage history reflected higher wages than the current job offered, did not violate the Act. It is important to note, however, that this case may be limited to its particular facts and record: In *Wireways*, the ALJ refused to credit the testimony of two of the union witnesses, and found that there was *no* evidence of unlawful motivation, and also found that there was also *no* proof that the “wage practice had a different impact on employees depending on their union affiliation or lack thereof.” *Id.* at 253.
75. In *J.O. Mory, Inc. (IBEW LU 305)*, 326 NLRB 604 (1998), the Board ruled that an employer did not discriminatorily fail to hire union applicants, but instead rejected them on neutral criteria, which included the employer’s policy of not hiring, at entry level positions, applicants who were currently earning more than the employer was paying. The Board rejected the ALJ’s ruling that one exception from this policy was sufficient to establish that it was applied in a discriminatory manner. *The policy itself was not alleged to be unlawful.*
76. The Board accepted as a legitimate business reason, unrelated to union animus, a contractor’s “high wages” defense in *Northside Electrical Contractors, Inc. (IBEW LU 153)*, 331 NLRB 1564 (2000). According to the ALJ, though the contractor had displayed “more than a dislike of unions,” the preponderance of the evidence showed that the contractor’s reason for refusing to hire several union organizers

was their high wage histories. To support his finding, the ALJ noted that the contractor operated a small business, had made hiring decisions based in large part on an applicant's wages, had hired union members in the past, and had rejected all applicants - whether associated with the union or not - who had a history of high wages.

77. *Walton & Company, Inc.*, 334 NLRB No. 101 (2001): The Board affirmed the ALJ's dismissal on the basis of a *Wireways* defense. The GC had alleged that the employer's policy of not hiring applicants who had a past history of receiving wages in excess of the wages paid by the employer was both inherently destructive and discriminatory as applied. In affirming the ALJ, the Board relied solely on the Judge's finding that the policy was not discriminatorily applied because, in the Board's words, the record of the case "does not permit us to ascertain the severity of any disparate impact resulting from the application of the Respondent's policy." Member Liebman concurred, but reiterated her belief that the *Wireways* standard may be undermining the enforcement of the Act in the construction industry. *See also Benfield Electric Co.*, 331 NLRB 590, n. 6 (2000).
78. *Micrometl Corp.*, 333 NLRB No. 135 (2001). Union applicants started applying in March of 1996. In late 1995, the employer had instituted a policy of not hiring anyone who made more than \$10 per hour on his or her last job. The ALJ found this suspicious, since "union members will almost invariably have made more than \$10 per hour in their last employment." Slip op. at 2. The ALJ found that this rationale could only pass muster if it was uniformly applied. He then found that it was uniformly applied – there were only two deviations out of 198 hires. The employer rejected 152 out of 1000 applicants on this basis, 42 of whom were the discriminatees.
79. *Kelly Construction of Indiana, Inc.*, 333 NLRB No. 148 (2001). The evidence showed that the employer consistently hired only those individuals with prior earnings within a range of \$6 to \$8 per hour, with only one deviation during the relevant time period. The Board noted that high wage policies are acceptable reasons for not hiring, in the absence of evidence of disparate application, and also noted that the GC in this case did not allege that the policy itself was discriminatorily motivated or inherently destructive.

Defense Unsuccessful

80. The Board continues to reject this defense where it is shown that the employer has hired non-union applicants with a high wage history. *See, e.g. Hogan*

Transports, Inc., 331 NLRB 312 (2000); *Masiongale Electrical - Mechanical, Inc.*, 337 NLRB No. 4 (2001).

81. In *Colden Hills, Inc.*, 337 NLRB No. 86 (May 28, 2002), the Board approved an ALJ's rejection of the employer's claim that it did not hire a union organizer because the organizer had previously earned more than the employer was paying, and because the organizer lived 91 miles from the jobsite. The Judge had found that the organizer had agreed to work for the employer's rate and that the employer had hired a number of employees in a single month, all of whom had previously earned more than the employer was currently paying. The Judge had also found that the employer hired several employees who lived considerable distances from the worksite, although none lived even half as far away as the organizer.
82. *Boydston Electric, Inc.*, 331 NLRB 1450 (2000). The Board rejected a former high wages defense, because the employer never raised his concern that the union applicants could not be serious when they stated they were seeking "better employment," since he paid less than their previous jobs. The Board noted the employer had admitted at the hearing that there are many legitimate reasons why an individual might leave a higher paying job for a lower paying one. And here the discriminatee testified that she was willing to work for lower wages in order to help the union organize, and to have a shorter commute and more regular hours. *See also, Hogan Transports, Inc.*, 331 NLRB 312 (2000) (in addition to disparate application, the Board noted that the employer never discussed the impact of taking a lower paying job with the applicant.)
83. *Americlean*, 335 NLRB No. 83 (2001). The employer claimed to have only hired those with a wage history of making \$12.00 an hour or less. The evidence showed that the employer regularly departed from this policy, including an instance where the employer called an applicant with a history of making \$16.00 an hour for an interview and then, upon learning of the applicant's union background, terminated the conversation and never called back.
84. *Casino Ready Mix, Inc.*, 335 NLRB No. 39 (2001), *enfd*, 321 F.3d 1190 (D.C. Cir. 2003). The ALJ, with Board approval, rejected the former high wages defense. The employer's sole evidence was the testimony of its manager, which the ALJ discredited because the manager presented shifting reasons to justify the refusal to hire.
85. In *AJS Electric (IBEW LU 441)*, 310 NLRB 121 (1993), the Board upheld the ALJ's rejection of the employer's argument that its failure to hire union

organizers was lawfully based on its policy of never hiring applicants who requested a wage rate substantially above the employer's wage scale. Essentially, the ALJ found this defense to be a pretext, because the employer (1) did hire at least one applicant who had a higher wage history than the job paid; *and* (2) refused employment to union applicants who stated that they would accept lower wages than they had worked for in the past; *and* (3) rejected at least one applicant after learning he had previously been a union business representative.

86. In *Clock Electric, Inc. (IBEW LU 38)*, 323 NLRB 1226 (1997), *enforcement denied in part*, 162 F.3d 907, 159 LRRM (BNA) 3025 (6th Cir. 1998), the Board affirmed an ALJ's holding that the General Counsel had successfully rebutted a contractor's "high wages" defense. The contractor argued that it had refused to hire union organizers who earned higher wages in the past because, in the contractor's experience, applicants who took pay cuts left soon after hire, and the contractor was not willing to pay the wage rate that the applicants would want. The ALJ rejected the contractor's defense as pretext for avoiding union applicants because, among other things, the contractor did not prove that: (1) those who took a pay cut to work for the contractor stayed for a shorter period than those who did not take a pay cut; and (2) the contractor considered its budget limits when hiring.

On appeal, the Sixth Circuit enforced the Board's order on this issue only where a history of high wages was the sole factor that distinguished union applicants from those who were hired.

87. In *Donald A. Pusey, Inc. (IBEW LU 654)*, 327 NLRB 140 (1998), the Board panel majority (Members Liebman and Fox) rejected an employer's defense that it would not have hired a union applicant in any event because the applicant previously earned higher wages than the employer was paying. The employer stated that it followed this policy because it believed that such applicants are more likely to leave for higher paying jobs. The Board found that the employer's excuse was merely a "pretext" to avoid hiring the pro-union applicant, because the employer admitted he had been impressed with the applicant, and the applicant had told the employer he would stay for at least a year. Member Hurtgen dissented, because, among other things, there was no showing that the applicant would stay for more than a year; that one year would have been adequate for the employer; or that the applicant would stay one year in any job offered to him.
88. In *Hogan Transports, Inc.*, 331 NLRB 312 (June 9, 2000), a non-salting case, the Board affirmed the ALJ's rejection of the employer's "prior high wages" defense

because: (1) the employer had offered work to at least one other applicant who had earned significantly more than the union applicant, and (2) the employer never discussed the impact of taking a lower paying job with the applicant.

89. In *Payne Electric Co. (IBEW LU 369)*, JD 188-98, 1998 NLRB Lexis 863 (Wagman, Nov. 5, 1998), ALJ Leonard Wagman ruled that the employer had violated Section 8(a)(3) and (1) of the Act by maintaining and enforcing a policy of refusing to hire employment applicants with earnings substantially in excess of its wage rates, and with histories of short-term employment. As the Judge noted, these two factors were characteristics unique to union electricians in the geographic work area at issue. Because the hiring criteria effectively barred union adherents from employment with the company, they were, according to Judge Wagman, “inherently destructive” of employee rights to adhere to a labor organization.

EXTRANEOUS OR UNREQUESTED INFORMATION POLICIES

Defense Successful

As discussed below, the *Board* has *not* found this defense successful, but at least two U. S. Courts of Appeals (including the D.C. Circuit) have disagreed with the Board and have accepted this defense from employers.

Defense Unsuccessful

90. In *H.B. Zachry Co.*, 319 NLRB 967 (1995), *enforcement denied*, 127 F.3d 1300 (11th Cir. 1997), the Board ruled that an employer had violated Sections 8(a)(1) and 8(a)(3) of the Act by adopting and maintaining a policy to disqualify job applicants who provided additional, unrequested information on the job application forms. The employer used this policy to justify its refusal to hire 18 job applicants who had written on their forms that they were voluntary union organizers. The Board adopted the ALJ’s statement that “[n]othing could be more inherently destructive of Section 7 rights than [a policy] automatically disqualifying union supporters from employment.”

The Eleventh Circuit, reversing the Board, upheld an employer’s “nonresponsive information” defense in *Boilermakers v. NLRB*, 127 F.3d 1300, 156 LRRM (BNA) 2881 (11th Cir. 1997). The employer rejected applications that supplied information that the employer had not requested. The Eleventh Circuit found that the employer’s policy was lawful as written (in that it did not prevent an applicant from indicating union affiliation on other parts of the form) and as

applied (in that the employer also disqualified other applicants who wrote extraneous information on the form, and offered all applicants ? including volunteer organizers ? the opportunity to apply).

91. The Board in *TIC-The Industrial Company Southeast, Inc.*, 322 NLRB 605 (1996), *enforcement denied*, 126 F.3d 334, 156 LRRM (BNA) 2485 (D.C. Cir. 1997), rejected the employer's explanation, that the decision not to hire union applicants was based on their failure to fill out the application form correctly, where certain nonunion applicants (but no union applicants) had been asked to submit corrected applications.

But the D.C. Circuit disagreed. In *TIC - The Industrial Co. Southeast Inc. v. NLRB*, 126 F.3d 334, 156 LRRM (BNA) 2485 (D.C. Cir. 1997), the D.C. Circuit accepted the contractor's assertion that it was following its "no extraneous information" policy, and was not acting with anti-union animus, when it refused to consider applications marked "union organizer." Despite a supervisor's statement that the company was avoiding union personnel, the court found the employer rejected the applications based on its neutral policy requiring applicants to fill out special watermarked application forms and to include only requested information. Even assuming that the General Counsel established a *prima facie* case, according to the court, the contractor established an affirmative defense by proving it followed a neutral guideline without regard to the applicant's union affiliation.

92. In *Mainline Contracting Corp.*, 334 NLRB No. 120 (2001), the Board reaffirmed its view that employer policies that prevent organizers from indicating their pro-union sentiments on their job applications violate the Act. The employer in *Mainline* instituted a policy which forbade applicants from marking applications to indicate "race, color, religion," etc. or "protected concerted activity." The employer developed the rule *after* it began receiving union applications: it had no formal hiring policy prior to that. The Board ruled that the policy was "inherently destructive" of important employee rights. Slip op. at 1, n. 3. The Board distinguished this case from the decision of the Eleventh Circuit in *H.B. Zachry* and that of the D.C. Circuit in *TIC* (both discussed above), on the grounds that the policy at issue in the Eleventh Circuit forbade any extraneous information of any sort, and that, in *TIC*, the D.C. Circuit had disagreed that the policy was disparately enforced.

More fundamentally, the Board disagreed with the Eleventh Circuit, and held that the act of self-identification as a union organizer is concerted protected activity, analogous to the display of union insignia. The Board stated that such

activity is a first step to seeking union recognition and engaging in collective bargaining. It noted that the practical impact of the Eleventh Circuit rule would be to prohibit current employees from discussing union affiliation, and that the real purpose of the rule was to avoid litigation. While the rule may have avoided frivolous claims, it also prevented the demonstration of union knowledge. The Act protects employees against discrimination, not employers against discrimination claims.

93. In *Refrigeration Systems Co.*, 321 NLRB 1085 (1996), the Board adopted the ALJ's decision describing the employer's explanation, that it did not consider union members for employment because they submitted incomplete applications, as a "fabrication."

NO RECENT EXPERIENCE

Defense Successful

94. In *Rondout Electric, Inc. (IBEW Local Union No. 363)*, 329 NLRB No. 87 (Nov. 8, 1999), the Board adopted the ALJ's determination that an employer did not discriminate when it refused to hire a union applicant who had not worked in the trade for several years. The Board stated that the employer "regularly rejected applicants for electrician positions who had not recently worked in the trade." In the underlying case, the ALJ credited the employer's witness who claimed that, in his view, an electrician who does not work in the trade for an extended period of time loses the skills, and is not deemed a qualified candidate. The applicants at issue in this case had not been working in the trade for anywhere from 2 to 12 years. In direct contrast to this decision, see *Merit Electric Co. (IBEW Local Union No. 728)*, 328 NLRB No. 29 (April 30, 1999), below.
95. In the underlying decision in *Zurn/N.E.P.C.O (Boilermakers)*, 329 NLRB 484 (1999), the ALJ accepted the employer's claim that it had not hired two union applicants because they had insufficient recent experience. The employer had testified to this fact, and the ALJ noted that one applicant had had no hands-on experience for three to four years, and the other had only three months hands-on experience in the past five years. The ALJ also noted that the employer had not hired anyone with less recent experience than these two applicants.

Defense Unsuccessful

96. In *Merit Electric Co. (IBEW Local Union No. 728)*, 328 NLRB 212 (1999), the Board upheld the Administrative Law Judge's (ALJ's) rejection of the employer's

claim that it had refused to hire IBEW Local 38's Business Manager because he would need "extensive retraining due to his 18-year absence from hands-on work in the trade." The Board specifically agreed with the ALJ's reasoning that the employer had admitted on cross-examination that basic electrical systems were the same as 20 years ago, and that a journeymen electrician could be retrained in 2 or 3 minutes on most of the new materials the employer used.

97. In *Technical Electric (IBEW Local Union No. 684)*, 1998 NLRB Lexis 337 (May 27, 1998) (ALJ Cracraft), the ALJ rejected the employer's defense that it legitimately refused to hire an organizer because he had not worked in the trade for almost two years. In that case, the ALJ found the defense pretextual, because the employer had hired workers with less recent experience than the union applicant.
98. In *Houston Stafford Electric, Inc. (IBEW Local Union No. 716)*, JD (ATL)-72-98 (Sept. 29, 1998), the ALJ rejected the employer's "no recent experience" defense as it applied to a union organizer who had not worked in the trade for over 2½ years. Here the Judge also found the defense to be pretext, because the numerous applicants had been hired who had no recent experience. Slip op. at 13, 29.
99. In *The Industrial Company*, JD (SF)-70-97, 1997 NLRB Lexis 617 (July 25, 1997), the ALJ refused to credit the employer's defense that he had failed to hire an organizer who had not worked with the tools for about 2 years, because of his lack of recent experience. As the Judge pointed out, the employer had hired electricians who also had no worked with the tools for extended periods of time.

OTHER POLICIES

100. In *Industrial Construction Services, Inc. (IBEW LU 479)*, 323 NLRB 1037 (1997), the Board adopted an ALJ's dismissal of a refusal-to-consider charge based on the employer's no-photocopied-application policy. The contractor wrote on its applications "photocopies of this form will not be accepted." The local union faxed several applications. At trial, the General Counsel did not show what the contractor did with the applications after receiving them. Lacking evidence that the employer treated the union members' applications differently from other applications, and despite ample evidence of anti-union animus, the ALJ accepted the employer's assertion that it refused to consider the applications based on its no-photocopied-application policy.
101. In *Walz Masonry, Inc.*, 323 NLRB 1258 (1997), *enforced without opinion*, 1998 U.S. App. Lexis 8799 (8th Cir., May 4, 1998), the Board rejected a contractor's

argument that a volunteer organizer had to call the contractor to keep his application alive when the contractor had unlawfully refused to give the organizer an application in the first place.

102. In *K & W Electric, Inc. (IBEW LU 288)*, JD-7-98, 1998 NLRB Lexis 15 (January 15, 1998), an ALJ found that the employer had violated Section 8(a)(1) by adopting two policies -- prohibiting group applications and prohibiting employment with any other employer while employed by K & W Electric -- adopted solely because they had been recommended in ABC's publication "Coping with COMET." That the employer failed to offer any other reason for adopting those policies showed that they had been adopted for the purpose of weeding out union salts. This decision was subsequently vacated, pursuant to a settlement agreement. See 327 NLRB No. 21 (Oct. 30, 1998).
103. In *Houston Stafford Electric, Inc. (IBEW LU 716)*, JD (ATL) 72-98, 1998 NLRB Lexis 762 (Grossman, Sept. 29, 1998), ALJ Howard Grossman ruled that an employment arrangement system between non-union contractors in which the contractors agreed to share each others' employees (through a "shared man" program) was inherently discriminatory. The ALJ held that the shared man program effectively excluded union members from being hired.
104. In *Houston Stafford Electric, Inc. (IBEW LU 716)*, JD (ATL) 72-98, 1998 NLRB Lexis 762 (Grossman, Sept. 29, 1998), ALJ Howard Grossman ruled that a \$50 processing fee, charged to applicants who want to submit more than one application in a 30 day period, was applied only to union applicants, and was therefore, inherently discriminatory. The fee was waived for employees laid off from contractors that are members of the non-union Independent Electrical Contractors ("IEC").
105. In *Houston Stafford Electric, Inc. (IBEW LU 716)*, JD (ATL) 72-98, 1998 NLRB Lexis 762 (Grossman, Sept. 29, 1998), ALJ Howard Grossman held that non-union contractor associations that run referral/application systems must tell applicants where their applications were referred so that the applicants will be able to enforce their rights under the Act. Otherwise, the Judge held, applicants would be trapped in a system where they could not find out whether their applications had even been considered. In *Houston Stafford*, the ALJ compared the employer association's responsibilities to those imposed on unions when they operate hiring halls.

EMPLOYER DEFENSES: UNION INTENT TO HARM

Many employers also attempt to defend salting charges by claiming that the union's real intent is to put the employer out of business, rather than organize the contractor's employees. The best defense against such claims is, of course, solid evidence that the union's actual objective was to organize. As several of the cases discussed below demonstrate dramatically, however, the **more** evidence the union has of actual organizing activity, the easier it will be to put this employer defense (of "evil" union intent) to rest.

DISABLING CONFLICT

Defense Unsuccessful

106. In its long-awaited decision in *Aztech Electric Co.*, 335 NLRB No. 25 (2001), *aff'd in relevant part sub nom Contractors' Labor Pool Inc. v. NLRB*, 2003 U.S. App. Lexis 5933 (D.C. Cir. March 28, 2003), the Board rejected the employer's argument that it was justified in refusing to hire IBEW organizers because the organizing activities they engaged in created a "disabling conflict" with the employer.

The unions involved in *Aztech* had engaged in traditional salting activities, and the bulk of the discriminatees were union applicants whom the employer had refused to hire. A smaller group, made up primarily of paid union organizers, had engaged in what one of the Board members referred to as more "confrontational" activities, leading to the filing of numerous unfair labor practice charges. Some of the organizers testified at the hearing that the purpose of these activities was to "bankrupt the contractors" and "increase their costs on these jobs." Slip op. at 9. The Administrative Law Judge, relying on *Sunland Construction Co.*, 309 NLRB 1224, 1230-31 (1992), had found that these activities created such a "disabling conflict" that the paid organizers involved were no longer "employees" under the Act, so that the failure to hire them was not a violation.

The Board unanimously rejected this defense. The Board noted that, even assuming the existence of a "disabling conflict", under *Town & Country* paid organizers are employees under the Act. The Board then found that it need not decide whether certain aspects of the union's salting campaign "as promulgated and effectuated by its paid agents" created a disabling conflict comparable to the one found in *Sunland*.¹² The Board found it unnecessary to decide the issue

¹² The "conflict" identified in *Sunland* arose when a paid organizer applied for a job at a time when the union he worked for was sponsoring a strike and picketing the job

because the “disabling conflict” defense is a *Wright Line* defense, requiring the employer to demonstrate that it actually relied on the defense in refusing to hire the union applicants. Here, the Board found that the employer never proved that it knew that the discriminatees were paid union organizers at the time it refused to hire them, or that it denied them employment because of the union’s strategies. Instead, the employer relied on various other defenses, most notably its “30% rule.”

When this case reached the court of appeals, the court upheld the Board’s ruling. The court relied on essentially the same reasoning as the Board had used, and held that it did not have to reach the issue of whether a disabling conflict existed, because the employer did not rely on that reason when it refused to hire the two salts. This “disabling conflict” defense, however, is becoming increasingly popular among employers, and the Board and the courts of appeals may be becoming more sympathetic to it. Local Unions should, therefore, be even more mindful of how they conduct their organizing campaigns.

107. In *Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190 (D.C. Cir. 2003), the Court of Appeals for the District of Columbia upheld the Board’s finding that the employer did not establish a “disabling conflict” that would have relieved it of liability for failing to hire two organizers and for refusing to assign work to a third. In the Court’s view, such a finding is possible only if the Board is presented with evidence of an economic strike situation, subterfuge, bad faith, sabotage, or an attempt to drive the employer out of the area, or out of business. The court relied on *Sunland*, 309 NLRB 1224 (1992), *M.J. Mechanical Services*, 324 NLRB 812 (1997); and *Braun Electric*, 324 NLRB 1 (1997).

The employer had offered to prove that one organizer had filed applications with several employers at different times while working for Casino, and had engaged in a short economic strike and a subsequent unfair labor practice strike against Casino; that the second discriminatee had, after being denied employment, attempted to convince a Casino employee to go to work for a different employer; and that 30 applicants attempted to apply at the same time that two organizers were denied employment. The court agreed that none of these facts, even if proven, would have established a disabling conflict.

108. In the underlying decision in *Lackawanna Electrical Construction, Inc. (IBEW Local 81)*, 337 NLRB No. 62 (April 24, 2002), ALJ George Aleman found that the

site. The Board held that, under these particular circumstances, the employer need not hire the organizer. 309 NLRB at 1230-31.

employer had not proven the existence of a disabling conflict based solely on the applicants' status as union organizers. In addition, the Judge found that, as in *Aztech Electric*, the employer could not win on this defense because it did not rely on any "disabling conflict" in rejecting the organizer applicants. The Board agreed with the Judge, specifically on the second ground.

These cases alleging "disabling conflict" are in some cases just variations on employer allegations that union applicants are not "bona fide," as discussed below. In *Lackawanna*, for example, the terms are used interchangeably.

BONA FIDE APPLICANT

Defense Successful

109. In *Heiliger Electric Corp. (IBEW LU 1141)*, 325 NLRB 966 (1998), the Board adopted the ruling of ALJ Randall Frye, that an employer lawfully rejected applications from pro-union individuals who engaged in intimidating conduct during the application process. The conduct found to be intimidating included: "intrusive" videotaping; the refusal to discontinue videotaping; close scrutiny and videotaping of personal papers on the manager's desk; and the refusal to leave the office when asked.
110. In *Exterior Systems, Inc. (Operative Plasterers and Cement Masons Local 8)*, 338 NLRB No. 82 (Nov. 22, 2002), the Board adopted the ruling of ALJ Paul Bogas, that an employer lawfully refused to hire a union organizer who engaged in "rude" and "intimidating conduct," citing *Heiliger Electric Corp.*, 325 NLRB 966 (1998). The conduct the Board found objectionable included: making fun of one owner's Asian accent; criticizing the way work was being carried out; telling a worker that "we'll probably take your job"; stating that the organizers would start work immediately, and demanding to know what they would be getting paid. The Judge noted that it was not clear that the organizers *intended* to be intimidating, or whether they were merely "behaving with what they viewed as tenacity and good humor." Nevertheless, the Judge, with Board approval, ruled "reasonable persons in the [employers'] positions would have felt that they were being bullied."

This case is additionally significant because of the separate (concurring) decisions written by each of the three Board members on the panel. The two Republican members insist that proof of "applicant" status (*i.e.*, "bona fide applicant" status) either *is* now part of the General Counsel's case (Cowen's view), or should *become* part of the General Counsel's overall burden of proof under *FES* (Bartlett's view).

This would mean that the General Counsel would have the nearly impossible task of proving that each applicant for employment was sincere in his or her desire to obtain a job with the employer. The sole Democratic member on the panel, Wilma Liebman, strongly disagreed, and argued that the employer should remain responsible for proving, if it can, that it refused to hire a given applicant because of rude or intimidating behavior. This issue is likely to be kept alive, even though Cowen and Bartlett are no longer Board members. As stated, the Republicans now control the Board (with three out of five members), and the new Board Chairman, Republican Robert Battista, has appointed Cowen to a special staff position.

Defense Unsuccessful

111. In *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 133 L. Ed. 2d 371 (1995), the United States Supreme Court held that a worker or an applicant paid by a union to organize a company is an “employee” protected by the National Labor Relations Act. This ruling effectively ends the debate whether the union’s ***intent to organize*** an employer’s operations withdraws the Act’s protections from applicants who are also paid union organizers.
112. In its ruling in *Town & Country Electric, Inc.*, the Supreme Court endorsed the Board’s conclusion that an organizer’s “service to the union for pay does not ‘involve abandonment of . . . service’ to the company.” 133 L. Ed. 2d at 380. The Court also noted that the practice of organizing for pay during non-work hours is “wholly consistent with a company’s control over its workers as to their assigned duties.” *Id.* Finally, the Court insisted that, even if the company perceives organizing activity as disloyal, “the employer has no legal right to require that, as a part of his or her service to the company, a worker refrain from engaging in protected activity.” *Id.*
113. In *Pan American Electric (IBEW LU 446)*, 328 NLRB No. 7 (April 16, 1999), the Board rejected an employer’s claim that applicants were not “bona fide” because they were paid union organizers. In so ruling, the Board agreed with ALJ Lawrence Cullen that the Supreme Court’s decision, in *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), compels the conclusion that employees who are union organizers and who intend to act as “salts” are protected as “employees” under the Act. The Board and the ALJ also rejected the employer’s argument that various IBEW organizational and “salting” manuals constituted evidence of conspiracy in restraint of trade. As the Board stated, “[t]hese show only the Union’s desire to organize nonunion employers and to target what it perceives as unfair labor practices and wage scales and employment practices that undermine its

standards.” Slip op. at 2 n.10.

114. In *Zeppelin Electric Co. (IBEW LU 25)*, 328 NLRB 452 (1999), the NLRB reversed Administrative Law Judge Raymond Green’s decision that an employer’s discharge of, and threat to kill, a union organizer did not violate the Act. Judge Green had agreed that the employer had made the threat, but found that the threat was not inspired by the organizer’s union activities, but by the employer’s reasonable belief that the organizer was trying to sabotage the job. The only evidence of such “sabotage”, however, was the employee’s status as a salt. The Board flatly rejected Judge Green’s assumptions that, because the employee was a salt, he was merely looking for a way to get fired. Instead, the Board ruled that any finding of an attempt to sabotage has to be based on actual evidence, and not merely the Judge’s personal opinion of, and assumptions about, salting.
115. The fact that the Union may have had institutional objectives in mind in requesting large numbers of its members to apply for work with the Respondent renders those applications no less bona fide. At the time they applied, the applicants were qualified and willing to accept work with the Respondent. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), *enforced*, 976 F.2d 744 (11th Cir. 1992).
116. “There is a difference, however, between an applicant for employment who has worked in the past for a union contractor and an applicant for employment who states on his application that he is a voluntary union organizer. The latter employee is putting the employer on notice that he will try to exercise his federally protected right to organize his fellow employees.” *Fluor Daniel, Inc.*, 311 NLRB 498, 505 (1993), *enfd in part*, 161 F.3d 953, 159 LRRM (BNA) 2794 (6th Cir. 1998).
117. In *Sunland Construction Co.*, 309 NLRB 1224, 1230 (1992), the Board stated that:

[t]he statute’s premise is at war with the idea that loyalty to a union is incompatible with an employee’s duty to the employer. The fact that paid union organizers intend to organize the employer’s workforce if hired establishes neither their unwillingness nor their inability to perform quality service for the employer. Indeed, because the organizers seek access to the jobsite for organizational purposes, engaging in conduct warranting discharge would be antithetical to their objective.

118. In *Little Rock Electrical Contractors, Inc. (IBEW LU 480)*, 327 NLRB 932 (1999), the Board adopted the ALJ's ruling that a business agent's possession of the manual "*Union Organizing in the Construction Industry*" did not establish that the local union intended to use its organizing campaign to drive the contractor out of business, or that certain applicants were not *bona fide*. Although the union *could* have used the manual to support an unlawful objective, that was irrelevant, the ALJ ruled, because the real issue was what the union actually did. And, the facts revealed that the union's campaign was not improper. ***This should not be a recurring issue in IBEW organizing campaigns, however, since this book is no longer in use, and Local Unions should no longer have any in their possession.***
119. In *Labor Ready, Inc. (Tri-State Building and Construction Trades Council)*, 332 NLRB No. 33 (Sept. 27, 2000), the employer argued that four union members were not bona fide applicants (and thus not protected under the Act), based on passages in union logs maintained by one of the four. The employer insisted these passages constituted evidence that the applicants had no intention of working for the employer, and were only seeking to undermine and disrupt company operations.

The remarks at issue made reference to: attempts by the union to "turn up the heat a little" against the employer by finding legitimate unfair labor practice charges to file against it; one applicant's observation that he didn't believe the union would be successful in organizing the employer, but that the company would have a hard time taking care of business during the organizing campaign; and the applicant's belief that the employer might decide that it would not be worth it to continue doing business in the area. The Board agreed with the Judge that these isolated passages were nothing more than the applicant's opinion concerning how the employer might react to a vigorous organizing campaign, and could not justify depriving the applicants of the Act's protections.

120. *Boydston Electric, Inc.*, 331 NLRB 1450 (2000). The Board reversed a pre-FES ALJD, in which the Judge had dismissed refusal to hire allegations and had accepted the employer's argument that he had not hired two union electrician applicants, a husband and wife, because he did not view them a "serious applicants." The employer claimed not to believe the two were serious because: (1) they brought their child with them to the interview; (2) their job history showed a series of short-term jobs; and (3) both stated they were looking for "better employment," even though their last jobs had paid more than the employer was paying. The Board rejected this defense, largely because the

employer never even raised his concerns with the discriminatees, and because of the many legitimate reasons the discriminatees might have given for the issues that troubled the employer.

For example, the Board noted, a couple might bring their child with them to a job interview because the baby sitter never showed up. In addition, one of the discriminatees testified that she was willing to take a cut in pay and work for the respondent to help the union organize, at the same time saving two hours driving time every morning. In other words, “better employment” can include more than simply wages. The Board concluded that the employer did not raise his questions with the union applicants, because he did not want to hear legitimate explanations.

121. *Little Rock Electrical Contractors, Inc.*, 336 NLRB No. 8 (Sept. 28, 2001). The employer presented a medley of “disabling conflicts”, including the facts that: applications were submitted in group form; the applicants were currently employed; the applicants were paid union officers; and that the applicants intended to organize the union if hired. The Board affirmed the ALJ’s rejection of all of these arguments. The ALJ had noted that the employer provided no justification for excluding group applicants or employees who had another occupation. All of the union organizers testified they could fulfill their duties as an employee of the respondent while performing their union duties on their own time. The fact that they intended to organize was not sufficient to justify excluding them from the hiring process. The ALJ specifically noted that there was no contention that the union members were “rude or did anything improper which would have justified their exclusion from hiring consideration” when they applied. Slip op. at 10.
122. *See also HVAC Mechanical Services, Inc.*, 333 NLRB No. 24, slip op. at 1 (2001); *Tim Foley Plumbing Service, Inc.*, 332 NLRB No. 158 (2000)
123. In *Beacon Electric, Inc.*, JD 115-98, 1998 NLRB Lexis 461, at *31 (Beddow, July 14, 1998), the ALJ rejected the employer’s argument that the union applicants were not bona fide, stating, among other things, that:

The law also does not require that job applicants must be unobtrusive in respect to their union affiliation in order to be considered to be bona fide applicants.

* * *

A job seeker’s participation in group attempts to file applications

and the fact that a union may have supplemental objectives in supporting its members in their attempts to obtain employment does not act to preclude their viability as legitimate job applicants.

* * *

The fact that the tactics used by the Union may be unwise or unsuccessful does not make a Respondent's conduct any less discriminatory. The propriety of an employer's conduct in a failure to hire proceeding turns on the nature of the act, *not on the motive or intent of the job applicant*, unless special circumstances, not shown here, exist.

(Emphasis supplied).

124. In *Payne Electric Co. (IBEW LU 369)*, JD 188-98, 1998 NLRB Lexis 863 (Nov. 5, 1998), ALJ Leonard Wagman rejected the employer's argument that eight applicants were not "employees" protected under the Act because, in the employer's view, the applicants' true purposes were to entrap the contractor into violating the Act. Judge Wagman noted that there was no evidence of any such intent, and stated that:

[i]nstructing the salts as to their rights under the Act and other statutes and alerting them to the need for gathering information relating to possible violations did not impair their right to the Act's protection.

STRIPPING

Defense Successful

124. *Abell Engineering & Manufacturing, Inc. (Sheet Metal Workers' Local 20)*, 338 NLRB No. 42 (Oct. 18, 2002), is the **first** case in which the Board has ruled that an organizer's conduct, in attempting to recruit an employee to work for another employer, deprived the organizer of the Act's protection. Consequently, the Board found that the employer's termination of the organizer was not unlawful. Admittedly, the case has extremely bad facts: there were only three employees in the unit being organized (one of whom was the organizer); and the union admitted that the organizing campaign was over when the organizer attempted to recruit one of the two other employees to quit the employer. Leaving the employer with only one employee, the Board found, would have been temporarily crippling, and "possibly fatal" to the employer. Under these circumstances, the Board (which included Democratic Member Liebman) found the organizer's actions unprotected, since the actions would have been "deeply injurious to the employer" and were "unrelated to organizing."

Although this case represents a very unusual situation, and one not likely to occur in an IBEW campaign, the current Board does appear to be very concerned about the tactic called "stripping," and is likely looking for ways to curtail organizers' efforts to recruit employees currently working for non-unionized employers. It is very important, therefore to engage in such recruitment *only within the context of an organizing campaign*. It is also important to begin to educate Administrative Law Judges that the IBEW's organizing program is aimed both at organizing the employees of specific employers, and at organizing the entire workforce of construction electricians.

Defense Unsuccessful

125. In *M.J. Mechanical Services, Inc.*, 324 NLRB 812 (1997), *enforced*, 1998 U. S. App. Lexis 33922 (D.C. Cir., Dec. 28, 1998) (opinion unpublished), the Board explicitly rejected ALJ Raymond Green's generalized findings that the union had designed its salting program to interfere with the contractor's business, to entrap the contractor into committing unfair labor practices and to engage in acts of sabotage. Moreover, the Board specifically disavowed Judge Green's personal opinions about salting, which, according to the Board, the Judge had relied on to reach his decision. Instead, the Board found that the Act protected the union's activities in pursuit of its salting program, including persuading one employee to leave the contractor for a union apprenticeship program. Significantly, the Board

found that even if salting is intended in part to provoke an employer to commit unfair labor practices, “that would not deprive employees of [the] protection of the Act.” *Id.* at 813-14 (quoting *Godsell Contracting*, 320 NLRB 871, 874 (1996)).

126. *Oden Mechanical Contractors, Inc.*, 336 NLRB No. 87 (2001). The employer defended its refusal-to-hire union applicants on the grounds that it had a reasonable basis to believe that any people placed by the union on the job would just be pulled off the job, resulting in economic harm to the employer. The ALJ rejected this argument, though her rationale is not entirely clear. She noted that any sensible business person tries to protect against economic harm, but that this protection cannot be at the expense of the employees’ protected rights. She noted also that there was no evidence that any of the applicants intended to do the employer any economic harm, and that Board law does not entitle the employer to discharge or refuse to hire employees because they have engaged in a strike or might engage in a future strike. In other words, there was nothing to demonstrate that the applicants were not sincerely interested in coming to work for the employer.
127. In *Payne Electric Co. (IBEW LU 369)*, JD 188-98, 1998 NLRB Lexis 863 (Nov. 5, 1998), ALJ Leonard Wagman rejected the employer’s argument that eight applicants were not “employees” protected under the Act because, in the employer’s view, the applicants’ true purposes were to entrap the contractor into violating the Act, and to “strip” employees from the contractor. With regard to the “stripping” claim, Wagman held that, even if the applicants had been under instructions to engage in stripping: “such conduct was part of their organizing effort on the Union’s behalf, and would not remove them from the Act’s coverage” (citing *M.J. Mechanical Services, Inc.* 324 NLRB 812, 815 (1997)).
128. In the underlying decision in *M.J. Mechanical Services, Inc. (SMW LU 46)*, 325 NLRB 1098 (1998), ALJ Arthur Amchan rejected the employer’s argument that it could lawfully refuse to hire union applicants because their intent was to deprive M.J. of its employees. In addition to noting that the organizers had only persuaded one employee to join the union, and the union had assigned that employee to another contractor, the Judge explicitly defended stripping as a right protected by Section 7 of the Act. First the Judge noted that the new union member could have been assigned to continue working for M.J. as a salt. The Judge then stated that:

In trying to convince M.J. employees to join Local 46, *the salts were exercising rights granted to them by Section 7 of the Act.* There is no suggestion that they coerced, interfered

with, or restrained M.J. employees in the exercise of their rights. The salts merely told M.J. employees about the benefits of belonging to the Union and referred them to the union hall.

Id. at 1106. The Board made no comment on this ruling when it adopted, in part, the ALJ's opinion; but the ALJ's ruling is consistent with the Board's decision in another case involving the same employer and the same allegation, *M.J. Mechanical Services, Inc.* 324 NLRB 812 (1997), *enforced*, 1998 U.S. App. Lexis 33922 (D.C. Cir., Dec. 28, 1998) (unpublished opinion).

129. In *Arlington Electric, Inc. (IBEW LU 728)*, 332 NLRB No. 74 (Oct. 24, 2000), the Board affirmed the ALJ's rejection of employer's argument that it had rightfully fired a paid union organizer for handing out a flyer, which listed the union wage rate. The employer argued that the union organizer had handed out the flyer to injure the employer by "*stripping*" away its employees, and therefore, lost the Act's protection. The ALJ found, however, that the organizer's purpose in handing out the flyer - to induce employees to seek higher wages and better working conditions - was legitimate and, therefore, was protected by the Act.

OTHER EMPLOYER DEFENSES

APPLICATIONS TOO OLD

Defense Unsuccessful

130. *Fluor Daniel, Inc.*, 333 NLRB No. 57 (2001). The employer argued that, under its 30-day live application rule, the discriminatees' applications were never current when a job opening became available. The Board rejected the thirty-day rule as a defense, finding that it was enforced against the employer's financial self-interest; was never communicated to the discriminatees; and was enforced selectively in favor of non-union applicants.
131. *Masiongale Electrical - Mechanical, Inc.*, 337 NLRB No. 4 (2001), *enforced in relevant part*, 2003 U.S. App. Lexis 5487 (7th Cir. Mar. 21, 2003). The ALJ, with Board approval, rejected the employer's defense that it failed to hire any of the union applicants because their applications were more than thirty days old. The union applications were all filled out in January but not submitted until March. The ALJ rejected the employer's argument that the thirty days began to run when the application was filled out because he discredited the testimony of the employer's witness to that effect.

132. *Niblock Excavating, Inc.*, 337 NLRB No. 5 (2001). The ALJ, with Board approval, rejected the employer's defense that union applicants were not hired because of a policy that made applications on file active for only thirty days. The ALJ found that the policy was adopted shortly after union applications were received and thus was implemented to thwart the union's organizing efforts. ALJ, also with Board approval, found the change itself to be a violation of 8(3).

WE HIRED A UNION GUY

Defense Unsuccessful

133. *H.B. Zachry Co.*, 332 NLRB No. 110, slip op. at 5-6 (2000). The Board rejected the employer's argument that its attempt to hire an applicant with a union history proved that it had not unlawfully failed to hire the discriminatees, all of whom indicated an intent to organize on their applications. First, the Board found that the applicant's ties to the union were not clearly current ties. Second, the Board emphasized the distinction between past union affiliation and notice of present intent to organize.
134. *Niblock Excavating, Inc.*, 337 NLRB No. 5 (2001). The ALJ, with Board approval, rejected the employer's argument that it lacked animus because it hired a member of an Operating Engineers Local at around the same time the alleged discriminatees applied. The Board noted that the individual hired "was not an organizer" and there was no evidence that the employer was aware of the union's organizing effort at the time this individual was hired.
135. In *Casey Electric, Inc. (IBEW LU 26)*, 313 NLRB 774, 786, n. 34 (1994), the Board adopted the ALJ's ruling that "[t]he General Counsel correctly argues that the fact that Respondent eventually hired [the applicants] neither excuses Respondent's failure to hire them when they originally sought employment nor does it detract from Respondent's failure to hire other union applicants."

ATTEMPTS TO OFFER EMPLOYMENT

Defense Unsuccessful

136. *H.B. Zachry Co.*, 332 NLRB No. 110, slip op. at 5-6 (2000). The Board rejected the employer's argument that it had tried to offer jobs to the discriminatees. Phone records indicated that calls to the discriminatees, where made, would register as 1-minute calls when the employer simply dialed, established a

connection, and then hung up. Also, the employer never left messages on any of the discriminatees' answering machines; and one applicant, who always had his phone on call-forwarding, testified that he never received any calls from the employer.

THE APPLICANT LIED TO GET THE JOB

Defense Unsuccessful

137. *Hartman Brothers Heating & Air Conditioning, Inc. v. NLRB*, 2002 U.S. App. Lexis 1797 (7th Cir. 2002), *enforcing*, 332 NLRB No. 142 (2000). An applicant does not lose the protection of the Act if he or she lies about his or her status as a salt to get a job, rather than about any actual qualifications for the job. The discriminatee also does not forfeit the right to back pay.

APPLICANTS LOCKED OUT

Defense Unsuccessful

138. *International Union of Operating Engineers v. NLRB (Tidewater Construction Corp.)*, 294 F.3d 186 (D.C. Cir. 2002). The Operating Engineers won an important victory in the Court of Appeals for the District of Columbia Circuit, when they convinced the court to remand this case to the Board for further proceedings.

Here, the union won an election and then struck to get a contract. The employer refused the strikers' offers to return to work about six weeks later, and instead, announced that it was declaring a lockout. The employer then created a lockout list that included the 25 striking employees; 40 other individuals (all of whom were union members) who had been on the Excelsior list ten months earlier; and 16 individuals the company thought were union members, but who were neither strikers nor on the Excelsior list. The company refused to hire six members of this last group when they applied, telling them that the company had no work available.

The union filed refusal to consider charges on these six, an ALJ dismissed the complaint, and the Board, in a split decision, upheld the ALJ. (Democratic Member Liebman dissented). The Union sought review, and the court agreed with the Union that: (1) the Board unreasonably disregarded the employer's inability to explain why individuals who were neither strikers nor Excelsior list members (but who the employer *thought* were union members) were included on the lockout list; (2) the Board failed to explain why the employer's false statements to the six union applicants (*i.e.*, telling them there were no jobs, instead of telling them they were on the lockout list) was not evidence of antiunion animus; and (3) the Board's failure to explain why use of an outdated Excelsior list (where everyone on the list was a union member) was also not

evidence of anti-union animus. The Board remanded the case for further proceedings consistent with its opinion, and the union should prevail.

BIAS OF THE NLRB

Defense Unsuccessful

139. *Wayne J. Griffin Electric, Inc. v. NLRB*, 2002 U.S. App. Lexis 10948 (April 4, 2002) (unpublished). The court of appeals upheld the Board's finding that the employer violated §8(a)(1) and (3) during a salting campaign, by making various anti-union statements to employees. The case is mostly notable for the court's rejection of the employer's argument that the Board's policies "favor salting." The court found absolutely no evidence that the Board had acted improperly in any way, especially in view of the "litany of unfair labor practices" committed by the employer.

PERSONAL ANIMOSITY

Defense Unsuccessful

140. *NLRB v. Wolfe Electric, Inc.*, 314 F.3d 325 (8th Cir. 2002). The court enforced the Board's rejection of the employer's "personal animosity" defense in this refusal to hire case. The Board has upheld such a defense where an employer proved it did not hire someone because of personal animosity and dislike and not because of any activity protected by the Act. *See, e.g., Bay Electric, Inc.*, 323 NLRB 200 (1997). In this case, however, the employer disliked the applicants *because of* protected activity, that is, he disliked them because they were applying for jobs with the intention of unionizing the Wolfe workforce.

DISCRIMINATION AFTER HIRE

141. In cases alleging discrimination after hire, the General Counsel's burden of proof is the same as in cases alleging discriminatory refusal to hire, that is, the test set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd*, 662 F.2d 899, 108 LRRM (BNA) 2513 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must first make a *prima facie* showing that the protected activity was a motivating factor in the employer's action.

In order to establish a *prima facie* violation in a case involving *discrimination after hire* the General Counsel must establish:

- (1) that the alleged discriminatees engaged in union activities;

- (2) that the employer had knowledge of such;
- (3) that the employer's actions were motivated by union animus; and
- (4) that the discharge or other discrimination had the effect of encouraging or discouraging membership in a labor organization.

See Farmer Brothers Company, 303 NLRB 638, 649 (1991), *enforced*, 988 F.2d 120 (9th Cir. 1993).

- 142. "The General Counsel must prove certain elements to establish a *prima facie* case of discrimination. Those elements are (1) that the affected employee had engaged in activity protected by the Act; (2) the employer had knowledge of that activity; (3) that the adverse personnel action imposed on the employee was motivated by union animus; and (4) that the discipline had the effect of encouraging or discouraging membership in a labor organization. The General Counsel has the burden of proving his case by a preponderance of the evidence." *WMUR-TV*, 253 NLRB 697, 703 (1980). *See also Aero Metal Forms, Inc.*, 310 NLRB 397, 406 (1993).
- 143. Disparate disciplinary treatment by an employer, as between two employees -- one known to be supportive of union representation and one known to be opposed to same -- establishes a *prima facie* case of unlawful discrimination. The burden then shifts to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct. *See, e.g. Aratex Services*, 300 NLRB 115 (1990); *Minnesota Boxed Meat*, 282 NLRB 1208 (1987).
- 143. In order for the Board to find that a discharge or threat of discharge for engaging in protected, concerted activity violated Section 8(a)(1), it is not necessary that the employer knew that the activity was concerted or protected. *Scioto Coca-Cola Bottling Company*, 251 NLRB 766 (1980).
- 144. In *Arlington Electric, Inc. (IBEW LU 728)*, 332 NLRB No. 74 (Oct. 24, 2000), the Board affirmed the ALJ's rejection of an employer's argument that it had rightfully fired a paid union organizer for handing out a flyer, which listed the union wage rate. The employer argued that the union organizer had handed out the flyer to injure the employer by "*stripping*" away its employees, and therefore, the organizer lost the Act's protection. The ALJ found, however, that the organizer's purpose for handing out the flyer - to induce employees to seek higher wages and better working conditions - was legitimate and, therefore, was protected by the Act.

ANTI-UNION ANIMUS

145. “[T]he Board has consistently held that conduct that may not be found violative of the Act may still be used to show antiunion animus.” *Gencorp*, 294 NLRB 717, 717 n. 1 (1989). See also, *General Battery Corporation*, 241 NLRB 1166, 1169 (1979).
146. A *prima facie* case of unlawful motivation may rest entirely on circumstantial evidence. *Pincus Elevator and Electric Co.*, 308 NLRB 684, 693 (1992).
147. “In determining whether the conduct in question is unlawfully motivated, the Board will rely on circumstantial as well as direct evidence to infer discriminatory motivation on the part of an employer. It will consider circumstantial evidence such as the following:
 - (1) delay in the discharge after knowledge of the offense [*National Grange Mut. Ins. Co.*, 207 NLRB 431 (1973)];
 - (2) departure from established procedures for discharge [*Wells Dairy*, 287 NLRB 827 (1987), *enfd*, 865 F.2d 175 (8th Cir. 1989)];
 - (3) failure to warn the employee prior to discharge [*Great Atlantic & Pacific Tea Co.*, 210 NLRB 593 (1974)];
 - (4) failure to tell the employee the reason for the discharge at the time of discharge [*Forest Park Ambulance Serv.*, 206 NLRB 550 (1973)];
 - (5) changes in position in explaining the reason for the discharge [*Coca-Cola Bottling Co.*, 232 NLRB 794 (1977), *enfd in part*, 616 F.2d 949 (6th Cir.), *cert. denied*, 449 U.S. 998 (1980)]; and
 - (6) timing of the discharge (e.g. discharge immediately after the employer gains knowledge of the employee’s union activity) [*Clark & Wilkins Indus.*, 290 NLRB No. 19 (1988), *enfd*, 887 F.2d 308 (D.C. Cir. 1989)].”

The Developing Labor Law, 198 (Patrick Hardin ed., 3d ed. 1992).

148. In *NLRB v. E.I. Du Pont de Nemours*, 750 F.2d 524, 529, 118 LRRM (BNA) 2014, 2017 (6th Cir. 1984), the court stated:

Motive is subjective, and an employer rarely admits that an employee has been discharged because of activities protected by the Act. Therefore, the Board may rely on circumstantial evidence in determining actual motive.

* * *

Antiunion motivation reasonably may be inferred from a variety of factors, such as the company's expressed hostility towards unionization combined with knowledge of the employee's union activities . . . proximity in time between the employee's union activity and his discharge . . . and disparate treatment of the discharged employee compared to other employees with similar work records.

149. "Since an employer rarely admits that it discharged an employee for engaging in protected concerted activities, the NLRB may rely on circumstantial evidence in determining an employer's 'actual motive'." *Electronic Data Systems Corp. v. NLRB*, 985 F.2d 801 (5th Cir. 1993) (citation omitted).

150. "An inference of anti-union animus is proper when the timing of the employer's actions is 'stunningly obvious'." *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 60, 112 LRRM (BNA) 2529, 2532 (2d Cir. 1982), *cert. denied*, 461 U.S. 906 (1983). *See also NLRB v. Aquatech*, 926 F.2d 538 (6th Cir. 1991).

THE EMPLOYER'S *WRIGHT LINE* DEFENSE

151. As explained above in the Sections on "The Board's Revised Standards for Refusal to Hire and Refusal to Consider Cases" and "Discrimination After Hire," in *Wright Line*, 251 NLRB 1083 (1980), *enfd*, 662 F.2d 899, 108 LRRM (BNA) 2513 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), the Board outlined the burden and allocation of proof in cases that turn on an employer's motivation. In such cases, the General Counsel first must make a *prima facie* showing that the protected activity was a motivating factor in the employer's action. *See also Hyatt Hotels Corp.*, 296 NLRB 259 (1989) (under *Wright Line*, the General Counsel must establish that an employee's protected activity was a "motivating or substantial factor" in Respondent's decision to discharge the alleged discriminatee).

152. In order to rebut the General Counsel's *prima facie* case (and affirmatively *defend*

its actions), an employer must then show by a preponderance of the

evidence (i.e., that it is more likely than not) that it would have discharged the employee *even in the absence of the protected activity*. *Fuhr Glass and Mirror, Inc.*, 305 NLRB 1, 3 (1991); *Centre Property Management*, 277 NLRB 1376 (1985), *enfd in part*, 807 F.2d 1264, 125 LRRM (BNA) 2409 (5th Cir. 1987); and *Hicks Oils & Hicksgas, Inc.*, 293 NLRB 84 (1989), *enfd*, 942 F.2d 1140, 138 LRRM (BNA) 2650 (7th Cir. 1991).

153. In *M.J. Mechanical Services, Inc.*, 324 NLRB 812 (1997), *enforced*, 1998 U.S. App. Lexis 33922 (D.C. Cir., Dec. 28, 1998) (*unpublished*), as its *Wright Line* defense, the contractor argued it had discharged a union organizer for falsifying his resume in violation of a company rule. The Board, however, rejected this defense because, at the time of the discharge, the contractor had not told the employee why it had fired him, nor did the contractor connect his discharge with the company rule at an earlier evidentiary hearing. A contractor cannot carry its burden under *Wright Line*, the Board held, by merely showing that it *could* have disciplined the employee. Instead, the contractor must show it *would* have taken the adverse action against the employee even without the employee's protected activity. *See also Aztech Electric Co.*, 335 NLRB No. 25 (2001) (Board found that it need not decide whether certain aspects of the union's salting campaign created a "disabling conflict" because that defense is a *Wright Line* defense, requiring the employer to demonstrate that it actually relied on the defense in refusing to hire the union applicants).
154. In *Hudson Valley Electrical Construction & Maintenance, Inc.*, 331 NLRB 939 (2000), the Board affirmed the ALJ's ruling that the employer successfully met its burden under *Wright Line*, and proved that it would not have hired a union organizer in any event, because the organizer had falsely reported to a state agency that the employer had committed electrical code violations at the jobsite.

"INHERENTLY DESTRUCTIVE" EMPLOYER CONDUCT

While many ALJs, as well as the Board itself, have held that certain employer conduct is "inherently destructive" of protected rights, the federal courts have not been so friendly to the argument, despite the Supreme Court's decision in *NLRB v. Great Dane Trailers*, as the cases discussed below illustrate.

155. In *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34, 18 L. Ed. 2d 1027 (1967), the Supreme Court explained that, even in the absence of proof of an anti-union motivation, an employer may be in violation of Sections 8(a)(1) and (3) of the Act. As the Court noted, some employer conduct is so "inherently destructive of employee interests" that independent proof of anti-union

motivation is not required:

Some conduct, however, is so ‘inherently destructive of employee interests’ that it may be deemed proscribed without need for proof of an underlying improper motive. *Labor Board v. Brown*, [380 U.S.] at 287 [(1965)]; *American Ship Building Co. v. Labor Board*, [380 U.S.] at 311 [(1965)]. That is, some conduct carries with it ‘unavoidable consequences which the employer not only foresaw but which he must have intended’ and thus bears ‘its own indicia of intent.’ *Labor Board v. Erie Resistor Corp.*, [373 U.S. 221] at 228, 231 [1965].

Id. at 33.

Where the discriminatory conduct has a “comparatively slight” effect on employee rights, and the employer provides evidence of “legitimate and substantial business justifications” for the conduct, the policy may still be found unlawful if the General Counsel establishes anti-union motivation. *NLRB v. Great Dane Trailers*, 388 U.S. at 34; *Labor Board v. Brown*, 380 U.S. 278, 289 (1965); and *H.B. Zachry*, 319 NLRB 967 (1995).

156. In *Contractors’ Labor Pool Inc. v. NLRB*, 2003 U.S. App. Lexis 5933 (D.C. Cir. March 28, 2003), the Court of Appeals for the District of Columbia Circuit struck down the Board’s determination that a so-called “neutral hiring policy” was inherently destructive of employee rights.

In the underlying decision, in *Aztech Electric Co.*, 335 NLRB No. 25 (Aug. 27, 2001), the Board had ruled that the employer could not rely on its 30% wage rule (under which it excluded applicants who previously earned 30% higher or lower than the employer was offering), because the rule had the effect of systematically excluded all union applicants, and thus was “inherently destructive” of employee rights. The Court of Appeals for the District of Columbia Circuit, however, overturned the Board’s ruling. The court essentially adopted the employer’s argument that, because the ALJ had expressly found (and the Board had adopted the finding) that the employer had not adopted the rule for a discriminatory reason, it was precluded from finding that the rule violated Section 8(a)(3), which requires evidence of discriminatory intent.

In so ruling, the court rewrote one decision of the United States Supreme Court and marginalized another. In *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), the Supreme Court ruled that, when conduct is inherently destructive of

important employee rights, “no proof of antiunion motivation is needed.” In the D.C. Circuit’s view, however, the statement “no proof” in *Great Dane* does not really mean “no proof.” Instead, the court of appeals is sure that what the Supreme Court intended to say was “no further proof.” The IBEW had also pointed out to the court of appeals that the Supreme Court expressly ruled in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), that an 8(a)(3) violation can be established in the absence of proof of unlawful motive. The court of appeals agreed with this characterization, but called *Republic Aviation* an “anomaly.” The Court also expressly declined to apply Title VII “disparate impact” theory to cases under the NLRA.

The ALJ had based his finding that the employer did not adopt the rule for a discriminatory reason on the extensive evidence the employer presented at trial, which included a comprehensive wage survey. The Judge concluded that this evidence established that the employer had adopted the rule for legitimate business reasons. Unions may yet be able to get a court decision that such a rule is “inherently destructive” in cases where the employer does not present such strong proof of an alternative reason, *and* where the Board’s decision does *not* contain a finding that the employer did not adopt the rule for anti-union reasons. But, because any employer can seek review of a Board decision in the District of Columbia Circuit, the Court’s decision will seriously harm any attempt to have such a policy declared “inherently destructive,” if the employer mounts a credible defense that it adopted the rule for legitimate business reasons, with no intention to discriminate. Moreover, such a case may not even come before a court of appeals in the near future, given the current Republican majority on the Board.

157. In *H.B. Zachry Co.*, 319 NLRB 967 (1995), *enforcement denied*, 127 F.3d 1300 (11th Cir. 1997), the Board ruled that an employer had violated Sections 8(a)(1) and 8(a)(3) of the Act by adopting and maintaining a policy of disqualifying job applicants who provide additional, unrequested information on the job application forms. The employer used this policy to justify its refusal to hire 18 job applicants who had written on their forms that they were “voluntary union organizers.” The Board adopted the ALJ’s ruling that:

To the extent that Respondent has applied its extraneous information policy to disqualify applicants who exercise their Section 7 right by indicating on their applications that they are “volunteer union organizers” Respondent’s action is inherently destructive of such employee rights.

Id. at 980.

158. In *H.B. Zachry Co.*, 319 NLRB 967 (1995), *enforcement denied*, 127 F.3d 1300 (11th Cir. 1997), the Board also adopted the ALJ's statement, with regard to the employer's use of its "extraneous information" policy, that:

Nothing could be more inherently destructive of Section 7 rights than [a policy] automatically disqualifying union supporters from employment. As the Supreme Court specifically held, in *Great Dane Trailers, supra*, in such cases, "no proof of anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations."

Id. at 980.

159. In *Mainline Contracting Corp.*, 334 NLRB No. 120 (2001), the Board reaffirmed its view that employer policies that prevent organizers from indicating their pro-union sentiments on their job applications violate the Act. The employer in *Mainline* instituted a policy which forbade applicants from marking applications to indicate "race, color, religion," etc. or "protected concerted activity." The employer developed the rule *after* it began receiving union applications: it had no formal hiring policy prior to that. The Board ruled that the policy was "inherently destructive" of important employee rights. Slip op. at 1, n. 3. The Board distinguished this case from the decision of the Eleventh Circuit in the *H.B. Zachry Co. /International Brotherhood of Boilermakers* case (discussed above) on the grounds that the policy at issue in the Eleventh Circuit forbade any extraneous information of any sort.
160. In the underlying decision in *M.J. Mechanical Services, Inc. (SMW LU 46)*, 325 NLRB 1098 (1998), ALJ Arthur Amchan ruled that the employer's hiring policy, which gave preference to applicants referred or recommended to the employer, was "inherently destructive of important employee rights," and was therefore unlawful. The Judge made a compelling point when he compared a preferential hiring policy that *could* be lawful, to one that excludes union adherents. As Judge Amchan noted:

A one-time ad hoc hiring preference for relatives, friends and business acquaintances for short-term tasks, made in the absence of any evidence of antiunion motivation may not be inherently destructive of employee rights. A formal company policy that allows an employer to avoid hiring known union members on all its jobsites

forever is inherently destructive of these rights.

Slip op. at 9 n.19. The Board itself, however, has not yet indicated how it will rule on these policies. In adopting the Judge's rulings, the Board relied on an alternative theory and noted that it found it "unnecessary" to pass on the Judge's finding that the employer's hiring practices were inherently destructive of the applicants' Section 7 rights.

161. *Kanawha Stone Company*, 334 NLRB No. 28 (2001). This is one of the few cases in which the GC claimed that a priority hiring system was inherently destructive, and where the Board rejected that argument. Here, the employer used three criteria when hiring: (1) current employees on temporary layoff; (2) former employees; and (3) referrals from current employees. The Board found that the policy was not inherently destructive, because, of the 36 people hired between March and August 1996, 7 "were affiliated with a union." The Board went on to state "[e]ven though few of those employees showed any interest in union organizing activity, this alone is not sufficient to support a finding of an inherently destructive hiring policy." Slip op. at 3.
162. In *Houston Stafford Electric, Inc. (IBEW LU 716)*, JD (ATL) 72-98, 1998 NLRB Lexis 762 (Grossman, Sept. 29, 1998), ALJ Howard Grossman ruled that an employment arrangement system, under which a number of non-union contractors shared employees via a referral system run by the Houston Chapter of the Independent Electrical Contractors ("IEC"), was unlawful. The ALJ ruled that the "shared man" program itself was inherently discriminatory because it effectively excluded union members from being hired.

Second, the ALJ also ruled that a \$50 fee, charged to applicants who want to submit more than one application in a thirty-day period, was applied only to union applicants and was also inherently discriminatory. As Grossman explained, the contractors must have foreseen the consequences of imposing this requirement only on union applicants.

163. In *Pollock Electric, Inc. (IBEW LU 716)*, JD (ATL) 50-96, 1998 NLRB Lexis 440 (July 7, 1998), ALJ Howard Grossman found that the employer's preferential hiring system containing seven categories was "inherently destructive" of employee rights, because union applicants would always be restricted to the last two categories in the list and thus stood little, if any, chance of ever being hired. As Grossman noted:

[I]t may be stated as a general principle that a hiring procedure

based upon a sequence of categories of applicants is discriminatory where none of the categories contains union members, or where they first appear at or near the end of the sequence.

164. In *Little Rock Electric Contractors, Inc. (IBEW LU 238)*, JD (ATL) 65-98 (October 16, 1998), ALJ Lawrence Cullen found that the employer had failed to establish any justification for its policy against hiring applicants who work for another employer. On the contrary, according to Cullen, the policy was discriminatorily motivated and was designed to exclude union members, officials, and sympathizers. The employer's hiring procedure was, therefore, inherently destructive of employee rights.
165. In *Payne Electric Co. (IBEW LU 369)*, JD 188-98, 1998 NLRB Lexis 863 (Nov. 5, 1998), ALJ Leonard Wagman ruled that the employer had violated Section 8(a)(3) and (1) of the Act by maintaining and enforcing a policy of refusing to hire employment applicants with earnings substantially in excess of its wage rates, and with histories of short-term employment. As the Judge noted, these two factors, which barred applicants from employment with the company, were characteristics peculiar to union electricians in the work area at issue. Because the hiring criteria effectively barred union adherents from employment with the company, they were, according to Judge Wagman, "inherently destructive" of employee rights to adhere to a labor organization.

SECTION 8(a)(1) VIOLATIONS

166. Motive is not the critical element of a Section 8(a)(1) violation. The Board's well settled test is that:

interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. *American Freightways Co.*, 124 NLRB 146, 147 (1959); *see also Roadway Express*, 250 NLRB 393 (1980); *Cooper Thermometer Co.*, 154 NLRB 502, 503 n. 2 (1965); *NLRB v. Illinois Tool Works*, 153 F.2d 811 (CA 7, 1946).

The Developing Labor Law, 76 and n. 18 (Patrick Hardin ed., 3d. ed. 1992).

167. In *Wright Electric v. NLRB (IBEW LU 292)*, 200 F.3d 1162, 163 LRRM (BNA)

2353 (8th Cir. 2000), the Court of Appeals for the Eight Circuit upheld the Board's ruling that an employer who seeks to obtain union authorization cards through discovery in a state court anti-salting lawsuit commits an unfair labor practice in violation of the National Labor Relations Act. The Board can enjoin such requests, the court noted, in accordance with the Supreme Court's statements, in *Bill Johnson's Restaurants*, 461 U.S. 731, 738 n. 5, 76 L. Ed. 2d 277 (1983), that the Board has the authority to enjoin matters filed in state court when they have an objective that is illegal under federal law.

168. "Questions concerning union preference, in the context of job applications, are inherently coercive." *Pan American Electric (IBEW LU 446)*, 328 NLRB No. 7, slip op. at 1 (April 16, 1999) (citing *Gilberton Coal Co.*, 291 NLRB 344, 348 (1988), *enfd without op.*, 888 F.2d 1381, 134 LRRM (BNA) 2568 (3d Cir. 1989)). In *Pan American*, the employer's job superintendent asked organizer applicants whether they were "union men" during employment interviews. In accordance with the policy stated above, the Board found the question violated Section 8(a)(1) of the Act.
169. A contractor may not bar a union organizer from contacting its employees while they are on property the contractor does not own, when the employees are on non-working time, in non-working areas. In *Ambrose Electric (IBEW LU 724)*, 330 NLRB 78 (1999), the Board found that a contractor violated Section 8(a)(1) of the Act when it sent a letter to a union organizer telling him that he should limit his organizing efforts to "times other than working hours and locations other than the job sites" where the employer's employees are working. The Board found the restriction overly broad, because it encompassed break times (non-work times) and break areas (non-work areas) on any properties the employer had jobs, including those it did not own.
170. Section 8(a)(1) of the Act is violated if it is shown that a discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity and that the employee was not in fact guilty of that misconduct. It is not a valid defense that the employer believed in good faith that the misconduct occurred. *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).
171. If the employer makes statements or acts in a manner which conveys a clear message to employees that overt union support will result in an immediate and negative response from the employer, such comments or actions are in violation of Section 8(a)(1) of the Act. See *Litton Systems*, 300 NLRB 324 (1990), *enforced*, 949 F.2d 249 (8th Cir. 1991), *cert. denied*, 503 U.S. 985 (1992); *Guille Steel*

Products Company, 303 NLRB 537 (1991); *Dennett Road Manor Nursing Home, Inc.*, 295 NLRB 397 (1989), *enfd without op.*, 933 F.2d 1001 (4th Cir. 1991); *Kellwood Company*, 299 NLRB 1026, 1027 (1990), *enforced*, 948 F.2d 1297 (11th Cir. 1991); and *Matheson Fast Freight, Inc.*, 297 NLRB 63 (1989).

172. “It is well established that questions concerning union preference, in the context of job application interviews, are inherently coercive and unlawful, even when the applicant is hired.” *Electro-Tec, Inc.*, 310 NLRB 131, 134 (1993), *enfd*, 1993 U.S. App. Lexis 11822 (6th Cir. May 12, 1993). *See also Adco Electric, Inc.*, 307 NLRB 1113, 1117 (1992), *enforced*, 6 F.3d 1110 (5th Cir. 1993); *Windemuller Electric, Inc.*, 306 NLRB 664, 673 (1992), *enforced in relevant part*, 34 F.3d 384 (6th Cir. 1994).
173. Discussion among employees of their wages is “an inherently concerted activity clearly protected by Section 7 of the Act.” *Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992), *enforced*, 977 F.2d 582 (6th Cir. 1992).
174. An employer’s rule “prohibiting employees from discussing their wages constitutes a clear restraint on employees’ Section 7 right to engage in concerted activities for mutual aid and protection concerning an undeniably significant term of employment.” *Leather Center, Inc.*, 312 NLRB 521, 527 (1993) (quoting *Waco, Inc.*, 273 NLRB 746, 748 (1984)).
175. “[T]he coercive and unlawful effect of a statement is not blunted merely because interrogations of, warnings to, or disparaging statements about union adherents are accompanied by laughter or made in an offhand humorous way.” *Ethyl Corporation*, 231 NLRB 431, 434 (1977).
176. Directives to employees that they inform management if they are put under pressure from the union, or are harassed by union supporters, violate Section 8(a)(1) of the Act. *J.H. Block & Company, Inc.*, 247 NLRB 262 (1980). *See also Hawkins-Hawkins Company, Inc.*, 289 NLRB 1423 (1988); *Brunswick Electric Membership Corp.*, 308 NLRB 361, 372 (1992), *enforced*, 991 F.2d 790 (4th Cir. 1993).
177. The Board has regularly found that statements to employees that a union activist who is unhappy should seek work elsewhere violate Section 8(a)(1). *See Rolligon Corporation*, 254 NLRB 22, 22 (1981); *Intertherm, Inc.*, 235 NLRB 693, 693 n. 6 (1978), *enfd in part*, 596 F.2d 267, 100 LRRM (BNA) 3016 (8th Cir. 1979); *726 Seventeenth, Inc.*, 235 NLRB 604, 606 (1978); *Padre Dodge*, 205 NLRB 252 (1973).

178. “Similarly violative is [the supervisor’s] suggestion . . . that those who were ‘so nitpicking’ as to complain about detrimental actions taken unilaterally by the Employer should seek other employment. Such statements convey the message that complaints about working conditions and continued employment are incompatible and implicitly threaten discharge to those who would voice them.” *Stoody Company (IBEW LU 369)*, 312 NLRB 1175, 1181 (1993) (citing *Fontaine Body & Hoist*, 302 NLRB 863, 866 (1991); *House Calls, Inc.*, 304 NLRB 311 (1991); and *Rolligon Corporation*, 254 NLRB 22 (1981)).
179. A rule prohibiting union solicitation by an employee outside of working hours, although on company property, is presumed to be an unreasonable impediment to self-organization and therefore, unlawfully discriminatory, in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). Employers may not prohibit union solicitation by employees during breaks, lunch and before and after work. *Our Way*, 268 NLRB 394 (1983). However, an employer has the right to prohibit distribution by *non-employees* of organizing materials on its premises, except in rare circumstances. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 117 L. Ed. 2d 79 (1992); and *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 100 L. Ed. 2d 975 (1956).
180. In *Tualatin Electric (IBEW LU 48)*, 319 NLRB 1237 (1995), the Board held that the employer’s “no-moonlighting” policy violated Section 8(a)(1) of the Act, even though it applied to all employees, because the Board found that the Employer had enacted its policy in order to prevent IBEW salts from being hired. The Board stated, “[w]hen, as here, an employer implements a rule with the purpose of restricting or preventing employees from engaging in protected activity, Section 8(a)(1) of the Act has been violated.” *Id.* at 1237.
181. In *GM Electrics (IBEW LU 952)*, 323 NLRB 125, 126 (1997), several union organizers overheard a secretary say, “I know [one applicant is] union. They’re all union,” while speaking on the telephone with the owner of the company. The Board held that this statement implied that the contractor would not treat the union organizers fairly in the application process. Therefore, the secretary’s statement violated Section 8(a)(1). The Board repeated that the declarant’s motive is irrelevant to whether a statement tends to restrain, coerce or interfere with rights guaranteed under the Act.
182. In *Gayfers Department Store (IBEW LU 756)*, 324 NLRB 1246, 156 LRRM (BNA) 1257 (1997), the Board held that employees working for a construction contractor

at a department store may lawfully engage in peaceful area standards picketing during non-work time in the store's non-sales areas. Because the contractor's employees are not strangers to the department store premises, but worked there "regularly and exclusively," the department store could have them removed only if "necessary to maintain discipline and production." *Id.* at 1249-50. Thus, the department store violated Section 8(a)(1) by threatening the employees with arrest and by removing them from the store.

183. In *M.J. Mechanical Services, Inc.*, 324 NLRB 812 (1997), *enforced*, 1998 U.S. App. Lexis 33922 (D.C. Cir. Dec. 29, 1998) (unpublished opinion), an employer unlawfully interrogated an applicant, whom the employer knew was a union member, regarding internal union discipline for working non-union. The Board, quoting the ALJ's decision, stated that internal union discipline is the applicant's business and "not something that the company needed to be concerned about." *Id.* at 813.
184. The ALJ in *Tech Electric (IBEW LU 532)*, JD (SF) 97-97, 1997 NLRB Lexis 980 (Dec. 5, 1997), held that requiring applicants to sign a loyalty oath, verifying the applicants' willingness to comply the company's non-union policy, violated Section 8(a)(1). The oath unlawfully implied that organizing would be futile and would result in discipline.
185. In *Shell Electric (IBEW LU 24)*, 325 NLRB 839, 840-41 (1998), the Board adopted an ALJ's ruling that an employer violated Section 8(a)(1) of the Act when the company president asked a union applicant, during the employment interview, whether, if hired, he could "refrain from speaking about union wages and benefits on the job to the other employees." Such a restriction amounts to a "gag order" prohibiting employees from engaging in clearly protected conduct.
186. In *L&B Construction Co.*, 326 NLRB 1311, n. 2 (1998), the Board adopted an ALJ's ruling that an employer violated Section 8(a)(1) of the Act by **creating the impression that the employer was engaging in surveillance of employees' union activity**, when the employer told a salt that "things had been getting back" to the employer that the salt was trying to convince the company's employees to join the union.
187. In *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), *enforcement granted in relevant part*, 268 F.3d 1095 (D.C. Cir. 2001) the Board ruled that employers must extend "Weingarten" rights to employees who are not represented by a labor organization, and the employer's failure to do so violates Section 8(a)(1) of the Act. This decision, which should aid organizing efforts,

means that employers must grant requests by non-union employees to be accompanied by a co-employee of their choice at any investigatory meeting that the employee “reasonably believes” may result in disciplinary action.

188. In the underlying decision in *EPI Construction (Carpenters)*, 336 NLRB No. 16 (2001), ALJ Mary Cracraft ruled that the employer’s attorney violated Section 8(a)(1) of the Act when he questioned a company employee, during an interview about the employee’s recent suspension, about the employee’s union activity. In addition to constituting unlawful interrogation, the Judge ruled that the questioning also violated the Board’s decision in *Johnnie’s Poultry*, 146 NLRB 770, 775 (1964), *enforcement denied on other grounds*, 344 F.2d 617 (8th Cir. 1965), because it took place without any assurances that the employee did not have to answer the questions asked and that no reprisals would be taken against him for any answers he gave, and because the question exceeded the scope of the interview (which was about the employee’s suspension). The Board itself upheld Judge Cracraft’s ruling on the unlawful interrogation violation, but expressly declined to rule on whether *Johnnie’s Poultry* applied in this case. Slip op. at 8-9.

SECTION 8(a)(3) VIOLATIONS

189. It is a violation of Section 8(a)(3) of the Act to refuse to hire an individual for employment if that refusal is based upon the applicant’s union membership or activity. *Phelps Dodge Corporation v. NLRB*, 313 U.S. 177 (1941).
190. In *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 133 L. Ed. 2d 371 (1995), the United States Supreme Court rendered its unanimous opinion that a worker or an applicant paid by a union to organize a company is an “employee” protected by the National Labor Relations Act.
191. Discriminatory selection of union supporters for layoff is unlawful, even when the underlying layoffs are economically justified. *Hoffman Plastic Compounds, Inc.*, 306 NLRB 100, 106-107 (1992).
192. Hiring new employees as replacements for those who have been laid off is obvious evidence that the Respondent’s stated reasons for the layoff are a pretext, offered to conceal its unlawful motivations. *Northwind Maintenance & Painting Co.*, 281 NLRB 317, 320 (1986); *and Fedco Freightlines, Inc.*, 273 NLRB 399, 400-401 (1984).
193. In *Manno Electric, Inc.*, 321 NLRB 278 (1996), *enfd*, 127 F.3d 34 (5th Cir. 1997), the Board found that the employer had violated Section 8(a)(3) by assigning

known union organizers to isolated job sites.

194. The Board has held that a constructive discharge occurs when an employee quits because an employer has deliberately made working conditions unbearable. Two elements must be proven to establish a constructive discharge:

First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.

Algreco Sportswear Co., 271 NLRB 499, 500 (1984) (quoting *Crystal Princeton Refining Company*, 222 NLRB 1068, 1069 (1976)). See also *Keller Manufacturing Co.*, 237 NLRB 712, 722-23 (1978), *enfd in part*, 622 F.2d 582, 106 LRRM (BNA) 2546 (7th Cir. 1980).

195. The constructive discharge test is difficult to meet. In *Algreco Sportswear Co.*, 271 NLRB 499 (1984), an employee quit after she was assigned the lowest of three newly-established wage rates. The Board found that the wage rate paid to the employee was based on her support for the union and was, therefore, discriminatory. But the Board refused to find that the burden imposed by Algreco was so intolerable as to force her resignation. "The test is, of necessity, an objective one, taking into account the circumstances of each case. The mere existence of discrimination is insufficient to warrant consideration of abandonment of employment as a constructive discharge." *Id.* at 500 (citing *Van Pelt Fire Trucks*, 238 NLRB 794 (1978); and *Walker Electric Co.*, 142 NLRB 1214, 1215 (1963)).
196. In *Contractor Services, Inc. (IBEW LUs 443 & 347)*, 324 NLRB 1254 (1997), *enfd, mem.*, No. 00-10668-AA (llth. Cir. Aug. 2, 2000), the Board ruled that an employment agency had violated the Act by requiring, as a condition of being listed for hire, that a local union and its members sign an "irrevocable authorization form." The form required the local union to waive its right to call a strike, as well as its authority to penalize members for working non-union. The form also required union members to disclose their union affiliation. According to the Board, the employment agency violated the Act in several ways. First, the forms requiring applicants to reveal their union affiliation in order to be considered for employment were "coercive on their face as they require[d] employees to reveal their union affiliation in order to be considered for employment." *Id.* at 1255 n.4. Second, the employment agency unlawfully

refused to hire three applicants who did not return the form, because, according to the Board, refusing to return the form was protected activity. Third, the employment agency required applicants, as a condition of employment, to waive their right to engage in a work stoppage - a clear violation of Section 8(a)(3). Finally, the employment agency required union members to sign the form, but did not require non-union applicants to sign the form. The employment agency, therefore, unlawfully discriminated against applicants based on their union membership. The Board rejected the employment agency's defense - that the form assured that the union would not force its members to quit their jobs - because the employment agency made protected activity the *only* forbidden reason for quitting, out of the many reasons motivating employees to quit their job.

197. In *Mauka Inc. (IBEW LU 673)*, 327 NLRB 803 (1999), the Board reversed an ALJ's ruling and held that an organizer who walked off the job *alone* to protest the company's unfair labor practices was engaged in a protected unfair labor practice strike because his actions were a "*direct outgrowth*" of employees' protected *concerted* activity. In this case, two salts approached the company president, while wearing pro-union buttons and t-shirts, and asked for raises that would include union benefits and wages. The boss told them he would not speak to them together, and instructed them never to wear union insignia again. The two salts then picketed their respective work sites during non-work time. One of the salts, who had been removed from his work site for picketing, opted to go out on strike, rather than return to the job site. When he later offered to return unconditionally, the employer fired him. The Board found the firing violated Section 8(a)(3), because the employee had been engaged in a strike that, although carried out by only one person, was nonetheless protected, because it was engaged in to protest unfair labor practices committed in the context of the Union's organizing campaign. The Board emphasized that the strikers' actions had to be viewed in the context of other concerted activity, such as: (1) the employees' attempt to organize; (2) the approach to the employer for union wages and benefits; and (3) the picketing for union wages and benefits.

The more concerted activity organizers engage in before a strike, therefore, the better the chance that a one-person strike will be held protected.

RECORDINGS AND TRANSCRIPTS

198. The Board has held that surreptitiously recorded conversations and the transcripts thereof are admissible if they are properly identified and

authenticated, and if they were not obtained in violation of the U.S. Constitution or Federal law. *Nanticoke Homes, Inc.*, 261 NLRB 736 (1982), *enfd without op.*, 113 LRRM (BNA) 3816 (4th Cir. 1983), *East Belden Corporation*, 239 NLRB 776, 782 (1978), *enfd without op.*, 634 F.2d 635, 108 LRRM (BNA) 2104 (9th Cir. 1980); *Plasterers Local 90*, 236 NLRB 329 (1978), *enfd*, 606 F.2d 189, 102 LRRM (BNA) 2482 (7th Cir. 1979).

199. Tapes of conversations between employees and employers are admissible under Board law if they were not made in a bargaining context. See *Wellstream Corporation*, 313 NLRB 698 (1994); *Algreco Sportswear Company*, 271 NLRB 499 (1984).
200. The Board has sometimes found tape recordings of employee meetings to be the best evidence of what was said. *McAllister Brothers, Inc.*, 278 NLRB 601, 601 n.2 (1986), *enfd*, 819 F.2d 439, 125 LRRM (BNA) 2566 (4th Cir. 1987).
201. In *Tech Electric, Inc. (IBEW LU 532)*, JD (SF) 97-97, 1997 NLRB Lexis 980 (December 5, 1997), an ALJ admitted into evidence a recording of an interview that a union organizer had secretly taped. The ALJ expressed no opinion on whether the organizer had violated state law by secretly taping the interview.
202. **Note:** The preceding cases deal with the **admissibility** of tapes in Board proceedings. The state law on concealed tape recording also should be checked to avoid potential criminal violations. For example, in some states it is illegal to tape a conversation surreptitiously unless the person taping is participating in the conversation. In other states, the criminal law may be even more restrictive.
203. In *Braun Electric Co., Inc. (IBEW LU 428)*, 324 NLRB 1 (1997), the Board held that a contractor violated Section 8(a)(1) by suing a business agent and a local union for videotaping and filing unfair labor practice charges against the contractor. The Board applied *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), in which the Supreme Court held that a lawsuit would violate Section 8(a)(1) if: (1) the plaintiff had filed the suit in retaliation for activity protected by Section 7; and (2) the suit was without merit. The contractor's testimony revealed it had sued the business manager and local union to retaliate for what the Board found were attempts to exercise rights protected by the Act. The Board also found that the suit was without merit because the state court had dismissed the action. Therefore, under *Bill Johnson's*, the Board ruled that the suit violated Section 8(a)(1). As a remedy, the Board ordered the contractor to reimburse the union for the legal expenses it had incurred defending against the lawsuit.

204. In *Delta Mechanical, Inc.*, 323 NLRB 76 (1997), the Board affirmed an ALJ's ruling that the Board's *Jencks* rule, 29 C.F.R. 102.118(b)(1), did not require a local union to turn over a videotape to a contractor. A union organizer had recorded the videotape, which revealed the contractor's reaction to applications from union organizers. Under the *Jencks* rule, after a witness testifies and if the respondent so requests, the General Counsel or charging party must turn over to the respondent, for purposes of cross-examination, any "statement" made by a witness that relates to his or her testimony. Board regulations define "statement" as a verbatim recital of a witness's account of an earlier event. 29 C.F.R. 102.118(d)(2). Because the union organizer recorded the videotape *during* the actual event, and because the tape was not an account of an *earlier* event, the videotape was not a "statement" subject to the *Jencks* rule. If the respondent, however, had properly subpoenaed the videotape, the General Counsel or the charging party would have had to give a copy of the videotape to the respondent.
205. In *Heiliger Electric Corp. (IBEW LU 1141)*, 325 NLRB 966 (1998), the Board adopted the ruling of ALJ Randall Frye, that an employer lawfully rejected applications from pro-union individuals who engaged in intimidating conduct during the application process. The conduct found to be intimidating included: "intrusive" videotaping; the refusal to discontinue videotaping; close scrutiny and videotaping of personal papers on the manager's desk; and the refusal to leave the office when asked.

SUBPOENAS AND AFFIDAVITS

IN GENERAL

206. In an unfair labor practice case, an employer cannot obtain by subpoena witness affidavits given to the NLRB General Counsel. The Board follows the *Jencks* decision and permits access to a witness' pre-trial statement *only* after the witness has testified and *only* for the limited purpose of cross-examination. *P.S.C. Resources, Inc. v. NLRB*, 576 F.2d 380, 386-87, 98 LRRM (BNA) 2432 (1st Cir. 1978).
207. Even if witness affidavits have been given to the union as well as the General Counsel, they are immune from production under a subpoena, because the interests of the Board and the union are **aligned** when the union is the charging party. See *H.B. Zachry Co.*, 310 NLRB 1037 (1993) (privilege of confidentiality is not waived when witness affidavits taken by the NLRB are also in the possession of the union, where the Board is prosecuting charges the union filed against the

employer).

See also United Technologies Corp. v. NLRB, 632 F. Supp. 776, 784 (D. Conn.) (work product privilege is not waived when union shares documents with the NLRB, which is prosecuting charges the union filed, since they share “common interests” in the litigation), *affirmed*, 777 F.2d 90 (2d. Cir. 1985).

208. In a Section 8(a)(3) case the employer is not entitled to obtain by subpoena copies of authorization cards signed by employees or notes showing which employees attended organizational meetings, even if those documents are relevant to the issues in the case. “[T]he confidentiality interests of employees who have signed authorization cards and attended union meetings are paramount to the Respondent’s need to obtain the identities of such employees for cross-examination and credibility impeachment purposes.” *National Telephone Directory Corp.*, 319 NLRB 420, 421 (1995). *See also Wright Electric v. NLRB (IBEW LU 292)*, 200 F.3d 1162, 163 LRRM (BNA) 2353 (8th Cir. 2000) (an employer who seeks to obtain union authorization cards through discovery in a state court anti-salting lawsuit commits an unfair labor practice in violation of the National Labor Relations Act, and the Board can enjoin such requests).
209. In *Iplli, Inc. (IBEW LU 25)*, 321 NLRB 463 (1996), the Board described the ALJ’s discussion of goals of the union’s salting program as “irrelevant” to the question whether the employer violated Section 8(a)(3) by discharging an employee. That case could be cited to support the argument that information on salting, designed to show the goals of the program, are irrelevant to the issues in a Section 8(a)(3) case and therefore cannot be obtained by subpoena.
210. And, in *Interstate Builders, Inc.*, 334 NLRB No. 104 (2001), the ALJ, with Board approval, revoked a subpoena served by the employer on the union. The subpoena sought various items, including the union’s constitution, referral records, dues payment records, minutes of union meetings, and manuals or other instructional materials relating to methods of organizing employees. The ALJ denied the employer’s demand for these documents, noting that “the Respondent’s request would appear to be a collateral attack on the Union’s organizing practices or ‘salting’ program. The likelihood of it producing any information that would tend to relate to any material fact in dispute is so remote that it is an unjustified burden on the parties and the procedures of the Board.” Slip op. at 8.
211. In *Dayton Typographical Service, Inc.*, 273 NLRB 1205 (1984), the Board found that the employer had committed an unfair labor practice by asking an employee for a copy of the affidavit that he had given to the NLRB General Counsel, without assuring the employee that production of the affidavit was strictly

voluntary and that no reprisal would result from his refusal to produce it.

212. By contrast, in *Magic Chef, Inc.*, 286 NLRB 380 (1987), the Board held that a request for an affidavit given to the NLRB General Counsel was not an unfair labor practice where the employer repeatedly assured the employee that production would be voluntary and that no reprisal would follow a failure to produce the affidavit.

INVESTIGATORY SUBPOENAS

213. The Ninth Circuit (Washington, Oregon, Idaho, Nevada, California, Alaska and Hawaii) ruled in *NLRB v. Bakersfield Californian*, 128 F.3d 1339, 156 LRRM (BNA) 2932 (9th Cir. 1997), that the Board's authority to subpoena information extends to parties who are not subject to an unfair labor practice investigation. Specifically, the court affirmed the Board's authority to subpoena from a newspaper the name, address and telephone number of an employer who placed an anonymous classified advertisement and allegedly committed an unfair labor practice.
214. The Sixth Circuit (Michigan, Ohio, Kentucky and Tennessee), however, has refused to enforce an NLRB subpoena seeking the identity of an employer placing an anonymous advertisement for employees, in *NLRB v. Midland Daily News*, 151 F.3d 472, 158 LRRM (BNA) 2919 (6th Cir. 1998). Also, presumably because of this decision, the Division of Advice told Region 7 (which is in the Sixth Circuit), **not** to pursue a subpoena against a local newspaper to determine the identity of an employer who had advertised anonymously for electricians and had not responded to any applications from union members, in *Unknown Electrical Contractors*, 7-CA-41188 (Oct. 6, 1998).

Organizers should still push for these subpoenas, however, as the Board has issued them, and the Court of Appeals for the Ninth Circuit, as discussed above, has enforced compliance with such an investigative subpoena in a salting case.

STRIKES

215. As the Supreme Court pointed out in *NLRB v. Washington Aluminum Company*, 370 U.S. 9, 16 (1962), it has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination whether the activity is protected under Section 7 of the Act.
216. For concerted activities to be considered protected, it is not necessary that all

employees in a plant, a bargaining unit, on a construction site, or in a group join in those activities. The fact that there may be dissent does not destroy the rights of those who decide to take concerted action. However, where employees engage in partial or repeated intermittent work stoppages, or create a safety hazard by a precipitate walkout, the activity is not protected by the Act. *Jasper Seating Company*, 285 NLRB 550 (1987), *enforced*, 857 F.2d 419, 129 LRRM 2337 (7th Cir. 1988). Nor is a work stoppage protected where there is in effect a collective bargaining agreement that prohibits the stoppage. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

217. Justice Brennan stated in *Insurance Agents* that the use of economic strength is part and parcel of the collective bargaining process, and does not evidence a refusal to bargain in good faith. Nevertheless, certain actions such as violence, slow-downs, sit-ins, and disloyal tactics are unprotected activities. *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960).
218. "The right to engage in a strike, *i.e.*, a concerted work stoppage, is basic to the Act. *NLRB v. Washington Aluminum Company*, 370 U.S. 9 (1962). That right becomes merely illusory if one employee may be precluded from seeking the support of others to join with him or her in a strike or from counseling with . . . others about the possibility or tactics of a work stoppage." *Stoody Company (IBEW LU 369)*, 312 NLRB 1175, 1181 (1993).
219. Employees' failure to make a specific demand in connection with their job-related complaints does not render their cessations of work unprotected. *Eaton Warehousing Company*, 297 NLRB 958 (1990), *enfd*, 135 LRRM (BNA) 3272 (6th Cir. 1990).
220. A concerted job action does not lose its Section 7 protective status because the agreement of the affected employees to take such action is spontaneous and casual. *Vic Tanny International*, 232 NLRB 353 (1977), *enforced*, 622 F.2d 237, 104 LRRM (BNA) 2395 (6th Cir. 1980).
221. "The law is clear. The right to honor a picket line is protected by the Act. A threat to discipline or discharge an employee for refusing to cross a picket line violates the Act. See *Newberry Energy Corp.*, 227 NLRB 436 (1976); *Torrington Construction Co.*, 235 NLRB 1540 (1978); *Western Stress*, 290 NLRB 678 (1988)." *Fluor Daniel, Inc.*, 311 NLRB 498, 501 (1993), *enfd in part*, 161 F.3d 953, 159 LRRM (BNA) 2794 (6th Cir. 1998). However, the right to honor a picket line is not protected activity where such conduct is clearly and unmistakably prohibited by a collective bargaining agreement that is in effect. Furthermore, sympathy

strikers, like economic strikers, may be permanently replaced in order to continue the efficient operation of the employer's business. *Butterworth Mortuary*, 270 NLRB 1014 (1984), *enfd*, 767 F.2d 933 (9th Cir. 1985).

222. In *Mauka Inc. (IBEW LU 673)*, 327 NLRB 803 (1999), the Board held that an organizer who walked off the job *alone* to protest the company's unfair labor practices, was engaged in a protected unfair labor practice strike because his actions were a "*direct outgrowth*" of employees' protected *concerted* activity. In this case, two salts approached the company president, while wearing pro-union buttons and t-shirts, and asked for raises that would include union benefits and wages. The boss told them he would not speak to them together, and instructed them never to wear union insignia again. The two salts then picketed their respective work sites during non-work time. One of the salts, who had been removed from his work site for picketing, opted to go out on strike, rather than return to the job site. When he later offered to return unconditionally, the employer fired him.

The Board found the firing violated Section 8(a)(3), because the employee had been engaged in a strike, that, although carried out by only one person, was nonetheless protected, because it was engaged in to protest unfair labor practices committed in the context of the Union's organizing campaign. The

Board emphasized that the strikers' actions had to be viewed in the context of other concerted activity, such as: (1) the employees' attempt to organize; (2) the approach to the employer for union wages and benefits; and (3) the picketing for union wages and benefits.

The more concerted activity organizers engage in before a strike, therefore, the better the chance that a one-person strike will be held protected.

ULP STRIKES IN PARTICULAR

223. It is well settled that unfair labor practice strikers cannot be permanently replaced, but instead must be offered immediate and full reinstatement on submission of an unconditional offer to return to work. *NLRB v. Fleetwood Trailer Company*, 389 U.S. 375, 379, n. 5 (1967); *Decker Coal Company*, 301 NLRB 729, 748 (1991).
224. In the underlying decision in *Forsyth Electrical Company, Inc. (IBEW LU 342)*, 332 NLRB No. 68 (Sept. 29, 2000), an ALJ rejected the General Counsel's assertion that several union organizers engaged in an unfair labor practice strike. Instead, the ALJ found the strike was "recognitional at its core." The ALJ relied primarily on the following evidence: the contractor had not yet committed any unfair labor practices when the volunteer organizers stopped work; several volunteer organizers had engaged in a concerted work slowdown before they went on strike; the local union business manager coordinated the volunteer organizers' activities; and many strikers had new jobs lined up before they went out on strike.
225. In *Mauka Inc. (IBEW LU 673)*, 327 NLRB 803 (1999), the Board reversed an ALJ's ruling and held that an organizer who walked off the job *alone* to protest the company's unfair labor practices, was engaged in a protected unfair labor practice strike because his actions were a "*direct outgrowth*" of employees' protected *concerted* activity. See discussion of this case in the preceding section ("Strikes").

UNLAWFUL SURVEILLANCE

226. The Board has long held that, absent proper justification, employer photographing of employees engaged in protected picketing activity tends to intimidate and, therefore, violates Section 8(a)(1) of the Act. Photographing by the employer in the mere belief that some "[misconduct] might happen" does not

constitute a proper justification. *F.W. Woolworth Company*, 310 NLRB 1197, 1197 (1993); *Toledo (5) Auto/Truck Plaza*, 300 NLRB 676, 679 (1990), *enfd without op.*, 986 F.2d 1422 (6th Cir. 1993); *Waco, Inc.*, 273 NLRB 746 (1984).

227. Photographing of picketing employees is permitted only in the narrowest of circumstances in which the employer can establish that there is a reasonable apprehension of imminent unlawful conduct on the picket line (e.g., violence, blocking ingress or egress) or that photographing is necessary to prepare for litigation. *See, e.g., Concord Metal, Inc.*, 295 NLRB 912, 921 (1989).
228. In *United Charter Service, Inc.*, 306 NLRB 150, 150 (1992), the Board set forth the following test for whether an employer has created an impression of unlawful surveillance: “whether employees would reasonably assume from the statement in question that their union activities have been placed under surveillance.”
229. In *L&B Construction Co.*, 326 NLRB 1311, n. 2 (1998), the Board adopted an ALJ’s ruling that an employer violated Section 8(a)(1) of the Act by creating the impression that the employer was engaging in surveillance of employees’ union activity, when the employer told a salt that “things had been getting back” to the employer that the salt was trying to convince the company’s employees to join the union.

SIX-MONTH TIME LIMIT (SECTION 10(b) OF THE ACT)

230. Amended charges based upon conduct occurring more than six months before the filing and service of the amended charge will be untimely unless the additional conduct cited in the amended charge “relates back” to the conduct alleged in the original charge. *Daniel Construction Company*, 244 NLRB 704, 705 (1979). This may occur, for example, when the amended charge particularizes general allegations in the original charge or is based upon the same pattern of conduct. *See, e.g., Air Express International Corporation*, 245 NLRB 478 (1979), *enfd in part*, 659 F.2d 610, 108 LRRM (BNA) 2795 (5th Cir. 1981), *cert. denied*, 459 U.S. 835 (1982); *Schraffts Candy Company*, 244 NLRB 581 (1979); *Staco, Inc.*, 244 NLRB 461 (1979). In such cases, the amendment will be timely even though some of the conduct may have occurred more than six months earlier.
231. In *Leach Corporation*, 312 NLRB 990, 991 (1993), *enfd*, 54 F.3d 802, 149 LRRM (BNA) 2285 (D.C. Cir. 1995), the Board reaffirmed that it is “firmly established that the 10(b) period commences only when a party has clear and unequivocal notice of a violation of the Act. *E.g., Desks, Inc.*, 295 NLRB 1, 11 (1989).” The Board also has noted that “the burden of showing such clear and unequivocal

notice is on the party raising the affirmative defense of Section 10(b).” *Chinese American Planning Council*, 307 NLRB 410 (1992), *enf’d without op.*, 990 F.2d 624 (2d Cir. 1993).

232. In *MacDonald’s Industrial Products, Inc.*, 281 NLRB 577 (1986), the facts were such that the alleged violation occurred on March 4, 1985 and the charge was filed on September 4, 1985. The employer contended that the 6-month limitation period set forth in Section 10(b) includes the day of the alleged offense. The Board, however, found that “computation of Section 10(b) of the Act’s 6-month limitation period properly begins the day following the commission of the alleged unfair labor practice” *Id.* at 577. In this regard, the Board noted that under Section 102.114 (now Section 102.111) of the Board’s Rules and Regulations, the day of an act is not counted toward the relevant time period.
233. In *Brown & Sharpe Manufacturing Company*, 312 NLRB 444 (1993), the Board noted that it has consistently applied the equitable doctrine in *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946), which holds that if a party “has been injured by fraud and ‘remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered’” In addition, the Board held that it agrees with the standard in *Fitzgerald v. Seamans*, 553 F.2d 220, 228 (D.C. Cir. 1977), holding that “deliberate concealment of *material* facts tolls the Federal statutes of limitations until the plaintiff discovers or with due diligence should have discovered the basis of the lawsuit.” *Id.* at 444 (quoting *Fitzgerald*).

REINSTATEMENT AND BACK PAY (COMPLIANCE ISSUES)

GENERAL PRINCIPLES

234. By the time an unfair labor practice case reaches the compliance phase, the employer has already been adjudicated the wrongdoer. The compliance process is, therefore, intended to vindicate the rights of the adjudicated discriminatee. Consequently, the General Counsel, as the representative of the aggrieved employee, bears the burden of proof only on the gross backpay amount, that is, the amount the discriminatee would have earned had the employer not discriminated. *Fugazy Continental Corp.*, 276 NLRB 1334, 1336, *enf’d* 817 F.2d 979 (2d Cir. 1987).
235. The employer, as the adjudicated wrongdoer, bears the burden of proof on any deductions to the backpay amount. *See e.g., NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1318 (D.C. Cir. 1972). Moreover, any uncertainties in the evidence

must be resolved against the employer, whose misconduct created the uncertainty in the first place. See e.g., *NLRB v. Machinists Local 91*, 934 F.2d 1288, 1297 (2d Cir. 1991); and *Ryder/P*I*E* Nationwide*, 297 NLRB 454, 457, enforced in relevant part, 923 F.2d 506 (7th Cir. 1991); *Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 576 (5th Cir. 1966).

236. Although a back pay award is not intended to be punitive, several courts of appeals have recognized that it is intended to have a *deterrent* effect on discriminatory conduct, in addition to reimbursing the discriminatee for any financial losses suffered as a result of the discrimination. See e.g., *NLRB v. Ferguson Electric Co.*, 242 F.3d 426, 431 (2d Cir. 2001); and *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1316 (D.C. Cir. 1972). *Accord Hedstrom Co. v. NLRB*, 629 F.2d 305 (3d Cir. 1980) (*en banc*) (bargaining order serves both to effectuate employee free choice and to deter employer misconduct.) *But see Aneco, Inc. v. NLRB*, 2002 U.S. App. Lexis 5310 (4th Cir. 2002) (back pay award may not serve as a punitive sanction or deterrent).
237. The “back pay period” typically runs from the date of discrimination until the date the employer makes an unconditional job offer to the discriminatee. The employer can have this backpay period shortened, and thus cut off its liability for back pay, if it meets its burden of proving that the job at issue would have ended at a certain date.

In *Dean General Contractors*, 285 NLRB 573 (1987), the Board recognized that, in the construction industry, jobs are often short term. In order to afford construction industry employees the same presumption (that they are entitled to back pay until the employer offers them reinstatement) as workers are afforded in other industries, the Board held in *Dean General* that it would presume that a discriminatee in the construction industry would have continued working for the employer on subsequent jobs. The employer can rebut (overcome or cancel) this presumption, but only if it can prove that it does not have a practice of transferring employees on to subsequent jobs.

238. The Board and the courts of appeals have reaffirmed and approved the principal announced in *Dean General Contractors* many times. See, e.g., *Tualatin Electric, Inc. v. NLRB*, 253 F.3d 714, 718 (D.C. Cir. 2001), enforcing 331 NLRB 36 (2000); *Ferguson Electric Co.*, 330 NLRB No. 75, slip op. 2 (2000), *aff'd* 242 F.3d 426 (2d Cir. 2001); *Stark Electric, Inc. (IBEW LU 317)*, 324 NLRB 1207 (1997), enforcement denied in part, 166 F.3d 1210 (4th Cir. 1998), and *Laben Electric Co. (IBEW LU 611)*, 323 NLRB 428 (1997).

239. The discriminatee should be reinstated to the position he or she formerly held. Reinstatement to a different position or to a similar position at a different facility generally is insufficient. *See e.g., Orbit Corporation*, 294 NLRB 695, 699 (1989), *enforced*, 918 F.2d 225 (D.C. Cir. 1990); and *Professional Porter & Window Cleaning Co.*, 275 NLRB 12 (1985). The Courts of Appeals generally have approved this Board doctrine. *See e.g., NLRB v. Jackson Farmers, Inc.*, 457 F.2d 516, 518 (10th Cir. 1972); and *NLRB v. Seligman & Associates, Inc.*, 808 F.2d 1155, 124 LRRM (BNA) 2277 (6th Cir. 1986), *cert. denied*, 484 U.S. 1026 (1988). In *Seligman*, the Court considered and rejected the employer’s argument that it believed in good faith that the employees would be “better off” reinstated at another location:

The difficulty is, however, that the option should have been that of the [discriminatee] as the injured party and not of [the employer], and that [the employer’s] offer, coming on the heels of admitted violations of the Act, could very likely be seen by [the employer’s] other employees as grudging compliance at best and, at worst, as punitive. An employer may not transfer employees for the purposes of discouraging membership in a labor organization. [citation omitted] Reinstatement to another location after termination because of protected activity, absent a dominant legitimate business reason, would achieve the same result as a transfer to discourage union membership.

Id. at 124 LRRM (BNA) 2281.

240. “I decline to find that in construction or any other industry, an employer has the right to withhold reinstatement to the former position at the former location of employment absent evidence either that the job is no longer existent or for other ‘dominant legitimate business reasons’ not present here. I find therefore the only basis for Respondent to have legitimately withheld reinstatement to the Project Thunder position would have been if the job no longer existed.” *Tualatin Electric (IBEW LU 48)*, 312 NLRB 129, 133 (1993), *enfd*, 84 F.3d 1202 (9th Cir. 1996).
241. “I find that Respondent as a matter of law is not entitled to conclude that, because the time remaining in a job at a particular location is short, that the job no longer exists. Rather I hold that the term ‘reinstatement,’ as the Board has interpreted that term, requires that the employee be given his old job at the old location for the remainder of the period work is available. . . . Accordingly, I find that Respondent in failing to offer [the employee] reinstatement to his former position did not comply with the terms of the settlement agreement.” *Tualatin Electric*

(*IBEW 48*), 312 NLRB 129, 133 (1993), *aff'd*, 84 F.3d 1202 (9th Cir. 1996).

242. The Sixth Circuit affirmed, in *Norman King Electric v. NLRB*, 177 F.3d 430, 161 LRRM (BNA) 2435 (6th Cir. 1999), that the Board's bifurcated (*i.e.*, "two-stage") approach to determining specific remedies is appropriate. Here the employer had argued that the court should refuse enforcement of the Board's order that the employer hire six applicants, because the applicants would have been terminated in any event at the end of the project in question, which was now long over. The court rejected this argument, however, relying on the Board's decision in *Dean General Contractors*, 285 NLRB 573 (1987), that there is a presumption in the construction industry that employment would have continued beyond the end of a given project, which the employer may overcome (disprove) at the compliance stage of the proceedings); and *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902, 81 L. Ed. 2d 732 (1984) (recognizing that a bifurcated ("two-stage") procedure is an appropriate way to customize a remedy to cure unfair labor practices).
243. In *Ferguson Electric Co.*, 335 NLRB No. 15 (2001), the full Board amended the standard order it issues at the close of an unfair labor practice case when back pay is awarded. The Board used to order the employer to "make [payroll, etc.] records available" so that back pay could be calculated based on wages paid by the employer to the worker(s) it hired in place of the discriminatee. This apparently resulted in some employers forcing on the Board the cost of copying documents, as well as the job of sorting through massive amounts of documents to find relevant information.

The Board's new standard order now requires the respondent to bring copies of all payroll and associated records to an office designated by the Board. The Board noted that this change should discourage employers from non-cooperation in producing records and will further the "sound public policy favoring the imposition of the costs of compliance on the violator who is responsible for them, rather than on the general public." Slip op. at 2.

BACK PAY FOR UNPAID/VOLUNTEER UNION ORGANIZERS

244. In *Tualatin Electric, Inc. v. NLRB*, 253 F.3d 714 (D.C. Cir. 2001), *enforcing* 331 NLRB 36 (2000), the Court of Appeals for the District of Columbia Circuit agreed with the Board that union discriminatees do not engage in a willful failure to mitigate damages when they follow their normal pattern of seeking employment through the union's hiring hall. The Court found reasonable the Board's ruling that, in order to meet their obligation to engage in a good faith attempt to find interim employment, union members do *not* have to subject themselves to

internal union charges and sanctions by seeking work with non-signatory contractors.

The Court in *Tualatin* also agreed with the Board that a union member does not engage in a willful failure to maintain interim employment, when he or she leaves a non-union job after the union revokes authorization for its members to work there. Just as with the effort to obtain interim employment, union members do not have to subject themselves to internal union charges and sanctions by continuing to work for non-signatory contractors once the union withdraws permission, in order to meet their obligation to engage in a good faith attempt to *maintain* interim employment.

245. In *Wright Electric, Inc.*, 334 NLRB No. 129 (2001), the Board found that: (1) the discriminatee (a volunteer organizer) made a reasonable effort to mitigate his financial losses (he successfully found work for all but seven weeks of the six-year back pay period by following his usual method of obtaining work through the union's hiring hall); and (2) showing that the discriminatee was unsuccessful during an isolated portion of the backpay period is not sufficient to satisfy the burden of establishing that he failed to diligently seek interim employment during the backpay period *as a whole*. The employer has appealed the Board's decision, and this case is presently pending in the Court of Appeals for the Eighth Circuit.

246. In *Cobb Mechanical Contractors, Inc.*, 333 NLRB No. 142 (2001), *enforced in part and remanded*, 295 F.3d 1370 (D.C. Cir. 2002), the Board rejected the employer's argument that twenty-two journeymen plumbers should be denied backpay because they would not have accepted jobs as plumber's helpers. The Board based its decision on the compliance officer's credible testimony that the discriminatees informed her they would have accepted the helpers jobs if offered. The employer sought review of the Board's decision, and the court of appeals upheld the Board on one of three challenged rulings, and remanded the other two issues for further consideration.

(1) The court agreed with the Board that it was appropriate to calculate the starting date of back pay for pipefitters on dates that plumbers were hired, because Cobb did not meet its burden of proving it would not have hired pipefitters for plumbers' jobs.

(2) The court agreed with Cobb, and remanded to the Board the question of when other discriminatees (plumbers) would have been hired, because the Board had used hire dates for plumbers helpers, and the employer had testified

convincingly that it did not hire plumbers for plumbers helper positions.

(3) The court agreed with Cobb, and remanded to the Board the *Dean General Contractor's* issue, because the ALJ dismissed the employer's argument without considering its evidence that only two of the newly-hired journeymen plumbers and pipefitters actually transferred to other projects when the project at issue ended.

See Cobb Mechanical Contractors, Inc. v. NLRB, 295 F.3d 1370 (D.C. Cir. 2002).

BACK PAY FOR PAID UNION ORGANIZERS

247. In *NLRB v. Ferguson Electric Co.*, 242 F.3d 426, 166 LRRM (BNA) 2513 (2d Cir. 2001), the Court of Appeals for the Second Circuit affirmed the Board on three important rulings that will be helpful in winning back pay and reinstatement for salting discriminatees.

(1) First, the court affirmed that a paid union organizer's union wages should be treated like any other wages from secondary employment (or "moonlighting") and should *not* be deducted from his back pay award. In so ruling, the court quoted directly from the Supreme Court's decision in *NLRB v. Town & Country*, 516 U.S. 85, 95 (1995):

Union organizing, when done for pay but during *nonwork* hours, would seem *equivalent* to simple moonlighting, a practice wholly consistent with a company's control over its workers as to their assigned duties.

The court also rejected the employer's argument that the organizer's union employment was really his "primary" employment, and thus he could not be "moonlighting" at his union job:

Whether his job as a union organizer is more precisely characterized as "primary" or "secondary" employment is not controlling: the relevant inquiry is whether the income [the discriminatee] received during the back pay period is income for work he would have performed *in addition to his duties as an electrician*, had he been hired by Ferguson.

Slip op. at 12 (emphasis added).

- (2) Second, the court also agreed that the mere existence of a union rule requiring that an organizer limit his or her job search to non-union contractors is not, standing alone, evidence of a failure to mitigate damages. It is important to remember, however, that *all* discriminatees do have a duty to attempt to mitigate back pay damages by seeking other employment during the back pay period. If any employer can prove there has been no good faith effort to mitigate, the employer can escape all back pay liability and the discriminatee can end up with nothing. The key to proving a good faith effort is *keeping a written record of the dates and places the discriminatee applied for work*.
- (3) Finally, the court rejected the employer's argument that the union should have to prove how long its campaign would have lasted, in order for an organizer to be eligible for back pay for the entire back pay period. Instead, the court agreed with the Board that, because the employer had acted illegally, the employer itself has to bear the cost of any uncertainty over what the organizer's length of employment would have been. As the Court stated:

It is appropriate and consistent with the policies underlying the Act to resolve the doubt on the question whether [the discriminatee] would have left Ferguson prior to July 1996 against Ferguson – the party that violated the Act.

248. In *Aneco Inc. v. NLRB*, 2002 U.S. App. Lexis 530 (4th Cir., March 29, 2002), *enforcing in part and denying enforcement in part*, 333 NLRB No. 88 (2001), the Court of Appeals for the Fourth Circuit expressed its general dislike for back pay awards for paid union officials and, in the process, shifted the burden of proof on the length of the back pay period from the employer to the General Counsel/discriminatee.

The court's decision was favorable in one aspect: it affirmed the Board's ruling that a paid organizer who applied for 50 jobs in ten calendar quarters engaged in a good faith effort to mitigate his financial losses and was therefore entitled to back pay. The court actually expanded protection for paid organizers on this issue: it noted that it would not have found the interim job search reasonable for a different discriminatee, but likened the restrictions placed by the union on the paid organizer's job search to those imposed by any other employer for which a

discriminatee already works, citing cases in which the Board has found such restrictions reasonable in the past.

In the second part of its ruling, however, the court limited the paid organizer's back pay period to approximately five weeks because, when the Employer finally offered the discriminatee a job (some five years after the initial refusal to hire), the organizer stayed only about five weeks before going on strike. In the underlying case, the Board had reasoned that, while that evidence proved the discriminatee *could* have stayed only five weeks in the first instance, it was the employer's burden to prove that it was more likely than not that the organizer *would* actually have stayed only five weeks if the employer had originally hired him. In limiting back pay to only five weeks, the Court effectively rejected a long line of Board and court cases that hold that the burden of proof in compliance matters rests with the employer. Those cases explain that there is always uncertainty in trying to recreate what would have happened, but that the respondent must bear the burden of that uncertainty, because its misconduct created the uncertainty in the first place.

EFFORTS TO MITIGATE DAMAGES MUST BE DOCUMENTED

249. As a separate but related issue, it is important to remember that *all* discriminatees do have a duty to attempt to mitigate back pay damages by seeking other employment during the back pay period. If an employer can prove there has been no good faith effort to mitigate, the employer can escape all back pay liability and the discriminatee can end up with nothing. The key to proving a good faith effort is keeping a written record of the dates and places the discriminatee applied for work.

SUPERVISORY STATUS/AGENCY

A contractor will be responsible for the actions of its supervisors and/or agents. Proof of supervisory or agency status is therefore necessary when attributing the acts of individuals to the employer. Supervisory status can be a complicated proof matter; agency status is often far easier to prove.

250. An employee does not become a statutory supervisor merely because he occasionally directs the work of employees or assigns them work. The statute itself requires that the exercise of this authority be more than "merely routine," and requires "the use of independent judgment." In *Goldies, Inc. v. NLRB*, 628 F.2d 706, 709, 105 LRRM (BNA) 2625, 2626 (1st Cir. 1980) (quoting *Stop & Shop Co. v. NLRB*, 548 F.2d 17, 19, 94 LRRM (BNA) 2416 (1st Cir. 1977)), the Court

stated:

‘The test must be the significance of his judgments and directions.’ [citation omitted]. This sounding is to be taken with respect to the fundamental twin principles that a supervisor represents the interests of his employer vis-a-vis other employees and is not ‘one of the gang who merely gives routine instructions.’

251. In *NLRB v. Security Guard Service, Inc.*, 384 F.2d 143, 147, 66 LRRM 2247, 2248 (5th Cir. 1967), the Court stated: “the statute expressly insists that a supervisor 1) have authority 2) to use independent judgment 3) in performing such supervisory functions 4) in the interest of management.”
252. “The true test involves an inquiry into the significance of the individual’s judgment which is usually determined by observing whether the individual ‘identif[ies] with the interests of the employer rather than the employees’ . . . An individual does not become a supervisor merely because he possesses greater skills and job responsibilities than his fellow employees.” *NLRB v. Lauren Manufacturing Co.*, 712 F.2d 245, 248, 113 LRRM (BNA) 3552, 3554 (6th Cir. 1983).
253. In *Stewart & Stevenson Services, Inc.*, 164 NLRB 741, 742 (1967), *enforced*, 414 F.2d 232 (5th Cir. 1969), the Board stated: “It has long been held that the sporadic assumption of supervisory duties, e.g., during annual vacation periods of a regular supervisor, is not sufficient to establish supervisory status at other times.”
254. In *Latas De Aluminio Reynolds, Inc.*, 276 NLRB 1313, 1313 (1985), the Board stated: “the appropriate test for determining the status of employees who substitute for supervisors is whether they spend a regular and substantial portion of their working time performing supervisory tasks.” There the Board denied supervisory status to an employee who substituted for supervisors for about five weeks in one year.
255. The critical issue in making a determination of agency is whether, under all the circumstances, the employees would reasonably believe that the alleged agent was reflecting company policy and was speaking and acting for management. *Community Cash Stores*, 238 NLRB 265 (1978). See also *Injected Rubber Products Corporation*, 258 NLRB 687 (1981); *B-P Custom Building Products*, 251 NLRB 1337 (1980); and *Einhorn Enterprises, Inc.*, 279 NLRB 576 (1986).

256. Contractors may argue that they are not responsible for actions taken by their office staff because administrative personnel do not have the authority to act as the contractor's agent. The Board stated in *GM Electrics (IBEW LU 952)*, 323 NLRB 125 (1997), that one test for whether a contractor's employee has authority to bind the contractor is “whether, under all circumstances, the employees ‘would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management’” (quoting *Southern Bag Corp.*, 315 NLRB 725, 725 (1994) and *Waterbed World*, 286 NLRB 425, 426-27 (1987)). In *GM Electrics*, a secretary was stationed in the contractor’s office, was assigned to distribute and collect job applications, and described the contractor's hiring needs to applicants. The Board found that job applicants reasonably believed that the secretary had authority to speak on the contractor's behalf when it came to the contractor's hiring process. The contractor, therefore, was responsible for certain statements, which the Board found constituted unfair labor practices, that the secretary made concerning the contractor's hiring process.

ALTER EGO

IN GENERAL

257. A determination of “alter ego” status can be used to bind a second employer to a collective bargaining agreement negotiated between the union and the employer’s alter-ego, and to obligate the second employer to bargain with the union as the representative of its own employees. See *Mining Specialists, Inc.*, 314 NLRB 268 (1994); *Advance Electric, Inc. (IBEW LU 124)*, 268 NLRB 1001, 1004 (1984).
258. In *Mining Specialists, Inc.*, 314 NLRB 268 (1994), the ALJ described the Board’s longstanding (and fact-specific test) for determining alter-ego status as including the following factors, none of which is determinative on its own of such status:
- (1) common management and ownership;
 - (2) common business purpose, nature of operations and supervision;
 - (3) common premises and equipment;
 - (4) common customers, i.e., whether the employers constitute “the same business in the same market;”
 - (5) the nature and extent of the negotiations and formalities surrounding the transaction; and

- (6) whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act.

Id. at 271 (citing *Fugazy Continental Corp.*, 265 NLRB 1301 (1982), *enfd.*, 725 F.2d 1416, 115 LRRM (BNA) 2571 (D.C. Cir. 1984)).

259. In *Advance Electric, Inc.*, 268 NLRB 1001, 1002 (1984) (quoting *Denzil S. Alkire*, 259 NLRB 1323, 1324 (1982), *enforcement denied*, 716 F.2d 1014, 114 LRRM (BNA) 2180 (4th Cir. 1983)), the Board described the test for determining alter ego status:

The legal principles to be applied in determining whether two factually separate employers are in fact *alter egos* are well settled. Although each case must turn on its own facts, we generally have found *alter ego* status where the two enterprises have ‘substantially identical’ management, business purpose, operation, equipment, customers, and supervision, as well as ownership.

260. In *MIS, Inc.*, 289 NLRB 491, 491-92 (1988) the Board stated that: “No one factor is determinative of alter ego status, and not all of these indicia need be present to find that an alter ego relationship exists” (citing *Advance Electric*).

UNION’S RIGHT TO INFORMATION ABOUT ALTER-EGO STATUS

261. Employers are statutorily obligated to furnish information that is relevant and reasonably necessary to the union’s performance of its collective bargaining responsibilities. *Mining Specialists, Inc.*, 314 NLRB 268, 272 (1994). A union is entitled to information relating to the relationship between two companies that it believes may be alter-egos. *Brisco Sheet Metal, Inc.*, 307 NLRB 361, 366 (1992). As the ALJ in *Brisco* noted, the employer must furnish information relevant to alter-ego status if it is established that the union has “an objective factual basis for believing that one entity is an ‘alter-ego’ or single employer of the other.” *Id.*
262. A union is entitled to information about one employer’s relationship with another employer if it has a “reasonable belief” or suspicion that some type of relationship exists that would subject an additional employer to the terms and conditions of an existing collective bargaining agreement, whether the relationship is that of an alter-ego or single employer. *See e.g., Brisco Sheet Metal, Inc.*, 307 NLRB 361,

366 (1992); *Arch of West Virginia, Inc.*, 304 NLRB 1089, 1093 (1991); and *Maben Energy Corp.*, 295 NLRB 149, 152-53 (1989).

JOINT EMPLOYER

263. The concept of “joint employer” focuses on the situation where two companies that are separate entities may voluntarily share labor relations. “[T]he ‘joint employer’ concept recognizes that the business entities involved are in fact separate but that they *share* or co-determine those matters governing the essential terms and conditions of employment.” *NLRB v. Browning-Ferris Indus. Inc.*, 691 F.2d 1117, 111 LRRM (BNA) 2748, 2752 (3d Cir. 1982).
264. It is important to recognize the difference in the effect of establishing “joint employer” status, rather than “alter ego” status. Unlike “alter ego” status, a finding of “joint employer” status does not necessarily expand the scope of the existing bargaining unit to include employees working for a second employer. If one employer has a collective bargaining agreement with a union, and it is established that the employer and a second company are “joint employers,” it does not *automatically* follow that the second company’s employees are also covered by the collective bargaining agreement. *Connecticut Yankee Atomic Power Co.*, 317 NLRB 1266, 1268 (1995). *See also* discussion, below, of *M. B. Sturgis*.
265. “Joint employer” status can be asserted, however, to impose a bargaining obligation on an additional employer, with regard to those workers who are in the bargaining unit and are “jointly” employed by two nominally separate employers. *See e.g., U.S. Pipe & Foundry Co.*, 247 NLRB 139, 140-42 (1980) (USP found to be a joint employer “for that portion of the bargaining unit assigned to work at USP”).
266. “Joint employer” status is used more commonly to hold one employer liable for the unfair labor practices of another employer. *Sun-Maid Growers (IBEW LU 100)*, 239 NLRB 346, 351 (1978), *enforced*, 618 F.2d 56 (9th Cir. 1980); and *Capitol EMI Music, Inc.*, 311 NLRB 997 (1983), *enfd*, 146 LRRM (BNA) 2448 (4th Cir. 1994).
267. In *Capitol EMI Music, Inc.*, 311 NLRB 997, 1000 (1993), *enfd*, 146 LRRM (BNA) 2448 (4th Cir. 1994), the Board set forth the test for determining if one company will be liable for another employer’s unlawful discharge, or discipline, where the two employers are “joint employers.”

The General Counsel must first show (1) that two employers are joint employers of a group of employees and (2) that one of them

has, with unlawful motivation, discharged or taken other discriminatory actions against an employee or employees in the jointly managed work force. The burden then shifts to the employer who seeks to escape liability for its joint employer's unlawfully motivated action to show that it neither knew, nor should have known, of the reason for the other employer's action or that, *if* it knew, it took all measures within its power to resist the unlawful action (footnote omitted).

268. In *Volt Services Group*, Case No. 31-CA-20293 (General Counsel Memorandum) (May 6, 1994), the General Counsel advised that where an employee is referred by an employment agency to a contractor and the contractor unlawfully terminates or disciplines the employee, a complaint should issue against both the agency and the contractor as "joint employers." If the temporary agency knows or should know of the unlawful conduct, the agency will be liable for the unlawful conduct as a "joint employer."
269. And, in *Continental Winding Co.*, 305 NLRB 122, 123 n.4 (1991), the Board upheld an ALJ's finding that an employment agency and a contractor were "joint employers" of the employees referred to the contractor by the agency, because the employment agency and contractor "shared or co-determined" essential employment conditions of the affected employees. In *Continental*, the agency hired the workers and set their wages, but the contractor retained the sole authority to assign, schedule and supervise the agency-referred employees, who worked alongside the contractor's own employees.
270. The Board has held that an employer's regular direct supervision of another employer's employees may be sufficient to establish a joint employer relationship. *Syufy Enterprises*, 220 NLRB 738, 740 (1975); *Sun-Maid Growers (IBEW LU 100)*, 239 NLRB 346, 351 (1978), *enforced*, 618 F.2d 56 (9th Cir. 1980).
271. To establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." *Laerco Transportation and Warehouse*, 269 NLRB 324, 325 (1984).
272. In *M.B. Sturgis, Inc.*, 331 NLRB 1298 (Aug. 25, 2001), the Board changed its rules on elections involving employees that are employed by two different employers. Before *Sturgis*, employees of a "joint employer" could only be included in the same bargaining unit with employees solely employed by one of the employers, if both employers consented. After *Sturgis*, neither employer's

consent is required, as long as the proposed unit also meets the Board's test for an appropriate unit.

The Board changed its rules chiefly to address the increased use of "contingent" or "temporary" employees, hired through a temporary employment agency. In *Sturgis*, the Board refers to the employment agency as the "supplier" employer, and the employer to which the employees are supplied as the "user" employer. The following examples illustrate the form in which election petitions that cover joint employees can now be filed under *Sturgis*:

- (1) A union can now file an election petition seeking to represent, for example, 15 temporary employees, who are jointly employed by a temporary employment agency ("supplier") and an electrical contractor ("user"), in the same unit with the contractor's 35 permanent employees, providing the community of interest test for an appropriate unit is also met. In this situation, both employers have to be named in the election petition.
- (2) A union can now petition for an election among all of a temporary employment agency's ("supplier's") employees performing similar work, regardless of how many "user" employers the employees work for, as long as the employees otherwise constitute an appropriate unit. In this situation, the union must *only* name the supplier employer (i.e., the temporary employment agency). The union will be restricted to bargaining over only those terms and conditions of employment that the supplier employer controls.
- (3) In situation 2, above, if the temporary employment agency is nationwide, the union should be able to petition for an election among employees in a specific geographic location, such as "all of the employees of XXX, who perform electrical work, and who are referred out of the ZZZ office." These employees will have to meet the test for an appropriate unit, and the petition must name only the supplier employer.

The Board in *Sturgis* also ruled that employees of the supplier employer may be *accreted* to a bargaining unit containing employees of a user employer, and thus may have an existing collective bargaining agreement applied to them. The separate test for an accretion must also be met for this rule to apply, however. As this is a difficult test to meet, it is advisable that any Local Union attempting to go this route consult with their attorney beforehand.

EMPLOYEE OR INDEPENDENT CONTRACTOR?

An “independent contractor” is not an “employee” under the National Labor Relations Act. Therefore, it may be important to establish that a worker is not an independent contractor so that he or she will be protected by the Act.

273. In *H&H Pretzel Co.*, 277 NLRB 1327, 1328 (1985), *enfd*, 831 F.2d 650, 126 LRRM (BNA) 2712 (6th Cir. 1987), the Board stated:

In determining the status of individuals alleged to be “independent contractors,” the Board applies a ‘right of control’ test. If the person for whom the services are performed retains the right to control the manner and means by which the results are to be accomplished, the person who performs the services is an employee. If only the results are controlled, the person performing the services is an independent contractor. *A.S. Abell Publishing Co.*, 270 NLRB 1200 (1984).

274. In addition to the “right to control” test, the Board has also said that “for an independent contractor relationship to exist, the arrangement most typically should exhibit entrepreneurial or proprietary characteristics.” *Roadway Package System*, 288 NLRB 196, 198 (1988). Thus, “whether [workers] have the opportunity to make decisions which involve risks taken by the independent businessman which may result in profit or loss,” will also be determinative of independent contractor status. *Standard Oil Company*, 230 NLRB 967, 968 (1977).

TERMINATING BARGAINING AUTHORITY

IN GENERAL

275. In *Reliable Electric Co.*, 286 NLRB 834, 836 (1987), the Board held that an 8(f) contractor that had signed a “Letter of Assent A” and had not withdrawn bargaining authority from NECA was bound to the successor agreement:

[T]he [contractor’s] authorization to NECA did not terminate at the end of the then current commercial agreement, but bound it to succeeding agreements as well. Authorization continued unless the [contractor] subsequently took some action effectively withdrawing the multi-employer group’s authority to bargain on the [contractor’s] behalf. As found by the judge, no such notice had been given at the time the 1983-1986 successor commercial agreement was executed or the following winter when the [contractor] repudiated that

agreement. Under the *Deklewa* principles, the successor commercial agreement was ‘binding, enforceable, and not subject to unilateral repudiation by the [contractor].’ Thus, the [contractor’s] unilateral repudiation of the contract violated Section 8(a)(5).

276. In *James Luterbach Construction Co.*, 315 NLRB 976 (1994), the Board held that, where the authorization to bargain given by an employer to a multi-employer association does not bind the employer to future agreements, the employer will not be bound to a new agreement unless it makes an “affirmative showing” that it wishes to be bound.

The Board in *James Luterbach*, however, was careful to distinguish this case from the situation in *Reliable Electric Co.*, 286 NLRB 834 (1987). The Board’s decision in *Reliable Electric* concerned the IBEW/NECA “Letter of Assent A,” which, the Board explained, does bind an employer to a subsequent agreement, absent some action by the employer to withdraw the association’s bargaining authority. In such a situation, the Board noted, the employer will be bound to a new agreement even though the employer does not make an “affirmative showing” that it wishes to be bound. The standard IBEW/NECA “Letter of Assent A” thus binds an employer to a subsequent agreement if the employer does not take effective action to withdraw.

ENFORCEMENT BY THE C.I.R.

277. In *IBEW Local Union No. 666 v. Stokes Electrical Service*, 225 F.3d 415 (4th Cir. 2000), the Court of Appeals for the Fourth Circuit held that the interest arbitration provision of the IBEW/NECA inside construction agreement is enforceable by the CIR against an employer who gives timely notice of intent to terminate. As the court noted, the agreement specifically provides that an unresolved issue over the desire to terminate may be submitted to the CIR for adjudication. Thus, the CIR may impose one final agreement on an employer after it has withdrawn from NECA and has given notice of its intent to terminate. The final agreement may not itself contain an interest arbitration provision, however, since interest arbitration is a non-mandatory subject of bargaining. The Court also ruled that, even if an employer is relieved of its *statutory* duty to bargain, by (for example) its good faith doubt about the union’s majority status, it nevertheless retains a *contractual* obligation to bargain with the union.
278. In *Sheet Metal Workers Local 162 (Dwight Lang Enter.)*, 314 NLRB 923, 926 (1994), in the context of an unfair labor practice charge against the union, the Board discussed invoking interest arbitration against an employer that has given notice withdrawing the multi-employer association’s authority to bargain on its

behalf, and has given notice of its intention to terminate the contract:

The analytical framework for resolving 8(b)(1)(B) allegations of this nature was established in *Electrical Workers IBEW Local 113 (Collier Electric)*, 296 NLRB 1095 (1989) Under *Collier*, the Board considers whether the union has a reasonable basis in fact and law for submitting unresolved bargaining issues to interest arbitration. If such a basis exists -- i.e., if the agreement arguably binds the employer to the interest arbitration provisions -- the union may lawfully invoke its contract rights, including initiating court action to enforce any resulting contract.

The *Collier* doctrine has met with court approval. See *West Coast Sheet Metal v. NLRB*, 938 F.2d 1356, 137 LRRM (BNA) 2853 (D.C. Cir 1991).

279. Several courts have recognized that where an interest arbitration clause is invoked properly, an interest arbitration award is enforceable even if awarded after the expiration of the agreement. In other words, interest arbitration survives beyond the expiration of the collective bargaining agreement. *IBEW Local 58 v. Southeastern Michigan Chapter NECA*, 43 F.3d 1026, 148 LRRM (BNA) 2065, 2068 (6th Cir. 1995); *Beach Air Conditioning v. Sheet Metal Workers Ass'n Local No. 102*, 55 F.3d 474, 149 LRRM (BNA) 2391 (9th Cir. 1995); *Sheet Metal Workers Local 20 v. Baylor Heating and Air Conditioning, Inc.*, 877 F.2d 547, 131 LRRM (BNA) 2838 (7th Cir. 1989).

NLRB ELECTIONS

280. In *United Food and Commercial Workers (Visiting Nurse Health System)*, 336 NLRB No. 35 (Sept. 28, 2001), the Board ruled, for the first time, that a union can engage in "secondary" activity if it is seeking to enforce its certification rights, *i.e.*, if it is seeking to force an employer to recognize and bargain with it as the certified representative of the employer's employees. This case underscores one of the advantages of going through an NLRB election, and obtaining certification as a §9(c) representative.

Here, the Board certified the UFCW as the exclusive collective-bargaining representative of a unit of nurses employed by the Visiting Nurse Health System (VNHS). The VNHS refused to recognize and bargain with the UFCW, which filed charges that resulted in a Board order finding the VNHS in violation of Section 8(a)(5) of the Act. The UFCW then undertook a picketing and leafleting campaign at the United Way headquarters in Atlanta. The campaign sought to

convince United Way contributors to stop supporting the United Way, until it stopped funding VNHS. The Board found the UFCW action did not violate §8(b)(4)(B), because the conduct was aimed at enforcing the union's certification as the VNHS employees' exclusive collective bargaining representative, and because §8(b)(4)(B) clearly exempts such conduct from the prohibition against secondary boycotts.

281. In *TradeSource, Inc. v. NLRB*, 2001 U.S. App. Lexis 19285, 168 LRRM (BNA) 2799 (2001) (unpublished), the Court of Appeals for the Fourth Circuit affirmed the Board's ruling that salts cannot be automatically excluded from voting in construction industry elections on the grounds that they are "temporary."
282. In *National Labor Relations Board v. River City Elevator Co.*, 289 F.3d 1029 (7th Cir. 2002), the court of appeals refused to enforce the Board's bargaining order because it found that the underlying election (which was decided by one vote) was invalid. The court set the election aside specifically because of the union's promise to give all employees a "mechanic's card" regardless of whether they had completed the required course work and examinations. While the Board had ruled that the promise did not violate election "laboratory conditions," because the benefit was not conditioned on support for the union, the court found instead that this promise was in fact a gift that was valuable enough to effectively buy votes for the union.

In accordance with well-established law, the court did agree, however, that the union's promises to waive initiation fees, and to lower dues until a first contract was reached, were not impermissible gifts, both because the promises were not conditioned on support for the union, and because the promises served the legitimate function of removing artificial (financial) barriers to union membership.

283. *Jacee Electric, Inc. v. NLRB*, 2003 U.S. App. Lexis 1631 (Jan. 27, 2003) (unpublished), the court of appeals upheld the Board's ruling that that a laid-off pro-union worker's ballot should be counted in election (if the ballot was counted, the union was expected to win), despite a lack of direct evidence that the employer knew that the worker was pro-union. The court agreed that it was reasonable for the Board to infer that the layoff was motivated by anti-union sentiment from the totality of the circumstances, which included: the timing of the layoff (shortly after the election petition was filed), the employer's general knowledge about the employees' union activities; the company's anti-union animus (proved through statements made to other employees); and the employer's pretextual reason for laying the worker off (lack of work).

MISCELLANEOUS

284. In *IBEW Local Union No. 48 (Footlick)*, JD (SF) 20-00 (April 21, 2000), ALJ Mary Cracraft ruled that the union did not breach its duty of fair representation, and thus did not violate Section 8(b)(1)(A) of the Act, when it dispatched members who worked as salts and peppers for the union ahead of other qualified journeyman who had higher positions on the out-of-work list. The ALJ agreed with the union that its deviations from the hiring hall rules, in furtherance of the union's salting program, served legitimate union interests and was necessary to the effective performance of the union's representative function. It is important to note that the ALJ also specifically stated that (1) none of the charging parties had lost employment opportunities due to the union's deviation from its hiring hall rules; and (2) there had only been 15 deviations over a two-year period. The case is on appeal to the Board.
285. "Threats made and actions taken by an employer against an employee based on the employer's belief the employee engaged in or intended to engage in protected concerted activity are unlawful even though the employee did not in fact engage in or intend to engage in such activity." *Monarch Water Systems*, 271 NLRB 558, 558 n.3 (1984).
286. Employer attempts to influence an employee's testimony before the Board or discourage an employee from pursuing an unfair labor practice charge or a contractual grievance are unlawful. *Aero Metal Forms*, 310 NLRB 397, 398 (1993) (discharging an employee for refusing to fabricate Board testimony held unlawful); *Weinreb Management*, 292 NLRB 428, 432 (1989) (pressuring an employee to abandon a grievance held unlawful); *Independent Stave Co.*, 278 NLRB 593, 598 (1986) (telling an employee that he would "get his ass in trouble" for filing unfair labor practice charges held unlawful).
287. When a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual issue on which the witness may have knowledge. "In particular, it may be inferred that the witness, if called, would have testified adversely to the party on that issue." *International Automated Machines, Inc.*, 285 NLRB 1122, 1123 (1987). Similarly, an adverse inference is warranted where a party fails to produce relevant evidence bearing on the case that is within its control without offering a satisfactory explanation for that failure. *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, 15 n.1 (1977); see also *Cargill, Inc. d/b/a Paramount Poultry*, 294 NLRB 867, 868 n.9 (1989); *Jennie-O Food, Inc.*, 301

NLRB 305, 332 (1991).

288. “It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated.” *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enforced*, 920 F.2d 130 (2d Cir. 1990). *See also Williams Pipeline Company*, 315 NLRB 630 (1994).
289. In *NLRB v. Labor Ready, Inc.*, 253 F.3d 195 (4th Cir. 2001), the Court of Appeals for the Fourth Circuit enforced the Board’s ruling that workers who must return to a temporary employment agency every day to receive assignments are “employees” under the Act, and thus enjoy the same rights to distribute union literature on the employer’s property as do other employees. In this case, Labor Ready had removed a worker (Donald Huff) from its roster of incumbent workers after Huff circulated a petition in the waiting area where workers seeking employment were required to wait every morning. The petition protested rule changes that required the workers to report every morning rather than receive assignments by telephone.

Labor Ready attempted to defend the subsequent 8(a)(3) discrimination charge by arguing that Huff was not its employee, because the application form the company used specified that the employment relationship terminated at the end of each specific assignment. The Board, with the court’s approval, found that the employment relationship was ongoing, citing as significant the facts that the company kept applications on file, and allowed workers to keep company equipment (such as boots and hard hats) beyond the duration of each specific assignment.

290. In *Central Illinois Construction*, 335 NLRB No. 59 (2001), the Board adopted the test set forth by the Court of Appeals for the Tenth Circuit, in *NLRB v. Triple C Maintenance*, 219 F.3d 1147, 1155 (10th Cir. 2000), to evaluate whether a union with 8(f) status has acquired 9(a) status under a written agreement with an employer. The Board now holds that a recognition agreement or contract provision will be independently sufficient to establish a union’s 9(a) representation status where the language indicates that (1) the union requested recognition as the majority or Section 9(a) representative; the employer recognized the union as the majority or Section 9(a) bargaining representative; and (3) the employer’s recognition was based on the union’s having shown, or having offered to show, evidence of majority support.
291. The Board’s decision in *B&C Contracting Co.*, 334 NLRB No. 25 (2001),

demonstrates why unions must be careful when submitting applications by fax. In this case there were two groups of applicants: one group applied in person, and the other group had their applications faxed to the employer's office. The GC demonstrated that the fax had been received by the employer's machine, and argued for a ruling that knowledge of a document faxed to the correct fax number during business hours should be imputed to the employer. The ALJ, with Board approval, rejected this, and instead credited the testimony of the employer's hiring agent that he never received the applications.