M.J. Mechanical Services, Inc. *and* Sheet Metal Workers' Local Union No. 46. Cases 3–CA–19751 and 3–CA–19753

July 15, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND LIEBMAN

On April, 2, 1997, Administrative Law Judge Arthur J. Amchan issued the attached decision.[1] The Respondent and the General Counsel filed exceptions with supporting briefs, and the General Counsel and the Charging Party filed answering briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below[2] and to adopt the recommended Order as modified and set forth in full below.

We adopt the judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to *consider* for hire applicants because of their union affiliation. In doing so, we rely on his finding that the Respondent has failed to rebut the General Counsel's showing that union animus was a motivating factor in the Respondent's failure and refusal to consider the applicants for hire. Thus, we find it unnecessary to pass on the judge's alternative finding that the Respondent's hiring practices were inherently destructive of the applicants' Section 7 rights.

We shall amend the judge's Conclusion of Law to reflect more accurately the violations found. We also shall modify the remedy and shall include in our Order language to conform to that traditionally used in refusal-to-consider cases. See *The 3E Co.*, 322 NLRB 1058 (1997); *Ultrasystems Western Constructors*, 316 NLRB 1243 (1995); *Fluor Daniel, Inc.*, 304 NLRB 970, 981 (1991); *D.S.E. Concrete Forms*, 303 NLRB 890, 898–899 (1991). In this connection, we shall permit the Respondent, during the compliance proceedings, to introduce evidence that these discriminatees would not, in any event, have been hired after the dates indicated on their application forms. The Respondent shall, however, bear the burden of proving that the employees hired after the application dates of the discriminatees actually had superior qualifications to the discriminatees. See *D.S.E. Concrete Forms*, supra.

To remedy the Respondent's unlawful refusal to consider these 23 applicants for hire, we shall order it to consider them for hire and to provide backpay to those whom it would have hired but for its unlawful conduct. In addition, if at the compliance stage of this proceeding it is determined that the Respondent would have hired any of the 23 employee-applicants, the inquiry as to the amount of backpay due these individuals will include any amounts they would have received on other jobs to which the Respondent would later have assigned them. Finally, if at the compliance stage it is established that the Respondent would have assigned any of these discriminatees to current jobs, we shall order the Respondent to hire those individuals and place them in positions substantially equivalent to those for which they applied at the jobsite at Tonawanda and Rochester. See *Ultrasystems Western Constructors*, supra.

AMENDED CONCLUSION OF LAW

By failing and refusing to consider for hire the 23 applicants named in the complaint, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) of the Act. In addition, by establishing policies by which it would no longer distribute employment applications from its Rochester office and by which it would no longer provide applicants with copies of their applications, the Respondent has violated Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that the Respondent, M.J. Mechanical Services, Inc., Tonawanda, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[1] Following the issuance of Judge Amchan's decision in this case, the Board issued its decision in an earlier case involving the same parties. See *M.J. Mechanical Services*, 324 NLRB No. 130 (Oct. 24, 1997). In that case, the Board found, among other things, that the Respondent violated Sec. 8(a)(3) by discharging employees after they announced they were union organizers, by refusing to hire qualified job applicants because of their union affiliation, by issuing written warnings to employees for engaging in union activities, and by imposing a significant travel requirement for union-affiliated job applicants. The Board also found that the Respondent violated Sec. 8(a)(1) by interrogating job applicants about their union affiliations, by threatening to discharge an employee for engaging in union activities, and by promulgating an overly broad no-solicitation rule prohibiting employees from engaging in union solicitation during their breaktimes.

[2] We shall amend the recommended Order and notice to conform to the judge's finding that the Respondent violated Sec. 8(a)(1) by establishing policies by which it would no longer distribute job applications from its Rochester, New York office and by which it would no longer provide applicants with copies of their applications. In addition, we shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 324 NLRB No. 14 (Nov. 7, 1997).

(a) Failing and refusing to consider for hire applicants on the basis of their union affiliation or based on Respondent's belief or suspicion that they may engage in organizing activity once they are hired.

(b) Refusing to distribute or provide copies of job applications to applicants because of the applicants' union affiliations.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole any of the following job applicants for any losses they may have suffered by reason of Respondent's discriminatory refusal to consider them for hire as determined in the compliance stage of this proceeding. Offer those applicants, who would currently be employed but for the Respondent's unlawful refusal to consider them for hire, employment in positions for which they applied. If those positions no longer exist, Respondent must offer these applicants substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against by Respondent:

James Helch	Francis Keatley
Craig Peterson	Michael Dubowyk
Edward Reiss	Karl-Heinz Haber
George Dailey	Mark Miller
William Scott	Robert Loewke
Charles Faisst	Frederick French
William Dowdle	Anthony Patalano
James Ling	Robert Capostagno
Nicholas French	Ron Sanger
Sean Loewke	David Holtfoth
Chris Hollfelder	Brian Taylor
Steve Mackie	

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

(c) Within 14 days after service by the Region, post at its Tonawanda and Rochester, New York offices copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 7, 1995.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

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

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to consider for hire applicants on the basis of their union affiliation or based on our belief or suspicion that they may engage in organizing activity once they are hired.

WE WILL NOT refuse to distribute or provide copies of job applications to applicants because of the applicants' union affiliations.

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

WE WILL make whole, with interest, those of the applicants named below who, as determined in an NLRB compliance proceeding, are found to have suffered economic loss as a result of our failure and refusal to consider them for hire:

James Helch	Francis Keatley
Craig Peterson	Michael Dubowyk
Edward Reiss	Karl-Heinz Haber
George Dailey	Mark Miller
William Scott	Robert Loewke

Charles Faisst	Frederick French
William Dowdle	Anthony Patalano
James Ling	Robert Capostagno
Nicholas French	Ron Sanger
Sean Loewke	David Holtfoth
Chris Hollfelder	Brian Taylor
Steve Mackie	

WE WILL offer those applicants listed above who would be currently employed by us, but for our unlawful refusal to consider them for employment, employment in positions for which they applied. If those positions no longer exist, we will offer them employment in substantially equivalent positions, without prejudice to seniority or any other rights or privileges to which they would have been entitled if we had not discriminated against them.

WE WILL notify in writing all applicants listed above that any future job application will be considered in a nondiscriminatory manner.

M.J. MECHANICAL SERVICES, INC.

Rafael Aybar, Esq., for the General Counsel.
Thomas S. Gill, Esq. (Saperston & Day, P.C.), of Buffalo, New York, for the Respondent.
Richard D. Furlong and *Adrianne E. Stella, Esqs. (Furlong and Delmonte, P.C.)*, of Cheektowaga, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Buffalo, New York, on November 18–22, 1996. The charges were filed November 24, 1995[1] and the complaint was issued July 2, 1996.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by all three parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is a construction contractor specializing in sheet metal installation. Its headquarters are located in Tonawanda, New York, near Buffalo. It annually performs services valued in excess of $50,000 in states ther than New York. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The General Counsel and the Charging Party allege that Respondent (MJ) violated Section 8(a)(1) and (3) in refusing to hire three members of Sheet Metal Workers Local 46 (the Union) who applied for a job on April 7, 4 who applied on April 18, 3 who applied on May 2, 12 who applied on September 19, and 1 who applied on November 29. All of these individuals applied for work as part of a ''salting'' campaign by the Union.

Respondent argues that these applicants were not hired because M.J. Mechanical does not hire anybody who walks in off the street and fills out an employment application. Furthermore, the Company contends that it was entitled to refuse to hire any voluntary organizers from Local 46 on the basis of its past experiences with the Union and other union members/voluntary organizers.

The 1994 Union Effort to Salt MJ

Respondent is a large and growing nonunion mechanical contractor. It employs approximately 165 people, including approximately 100 craftsmen and has annual gross receipts between $8 and $10 million (Tr. 320–321, 797). In the summer of 1994, it began installing the sheet metal duct work on two large projects in Rochester. One was the construction of the headquarters for Bausch & Lomb, Inc., a $1.2 million contract, and the other was at the University of Rochester, an $800,000 contract. MJ also had some smaller contracts in the Rochester area (Tr. 907).

Early in 1994, the Sheet Metal Workers International Union contacted MJ and asked that it enter into an 8(f) prehire agreement with its Rochester local, Local 46 (R. Exh. 9, p. 4.) MJ declined the offer. As project manager for Bausch & Lomb, MJ hired James Johnson, a former Local 46 member.[3] Johnson hired a number of former and current members of Local 46. Among them were several members who were ''salts'' who intended to organize the employees on the project. Indeed, one of the hires, Paul Colon, was the principal organizer for Local 46.

On June 3, 1994, Colon and Steve Derleth informed Johnson that they were union organizers and he immediately fired them (R. Exh. 9, p. 10). The Union met with higher MJ management, including Luis Delafuente, the general manager of the airside (sheet metal) division. MJ agreed to reinstate Colon and Derleth on June 7. They returned to work on June 13 and shortly thereafter received a warning alleging that they had been organizing on company time. In response to the warning Colon and Derleth left the jobsite and returned the next day on a picket line. On June 28, Colon requested that Johnson reinstate him; Johnson refused. The Union filed an unfair labor practice charge over this refusal which was litigated with other charges before Administrative Law Judge Raymond P. Green. In his decision, dated July 27, 1995, Judge Green concluded that Colon's picketing was not protected by the Act. He therefore dismissed the unfair labor practice charge regarding Colon's dismissal (R. Exh. 9, pp.

[1] All dates are in 1995 unless otherwise indicated.

[2] Respondent's posthearing motion to admit R. Exhs. 6 and 7 is granted.

[3] Johnson left MJ in October 1995 under less than amicable circumstances. He has rejoined Local 46 and testified on its behalf in the instant hearing.

17–18, 22). Judge Green's decision is pending before the Board upon the filing of exceptions (R. Exh. 10).[4]

Another union salt, Christopher Diak, began work at the Bausch & Lomb project in August 1994. On August 4, several days after he began work, Diak received a warning alleging that he had not worn his hard hat and safety glasses at all times. Diak contended that he had taken them off for less than a minute to wipe away sweat (R. Exh 9, pg. 20).[5] The same day Diak installed a ''sweep tap'' backwards[6] and injured his thumb with a hammer. On August 5, Diak announced he was a ''salt'' and joined a union picket line at the jobsite. He was fired by Luis Delafuente that day for listing a nonexistent former employer on his job application and possibly because Delafuente believed he was a ''salt.'' Judge Green found Diak's salting activities unprotected and dismissed the Union's unfair labor practice charge filed on his behalf (R. Exh. 9, p. 21).

The Union filed a number of unfair labor practice charges against Respondent arising out its salting activities in 1994. Judge Green dismissed most of them. He did find that MJ violated the Act in discharging Paul Colon and Steve Derleth on June 3 and in telling them on June 6 that they could not engage in organizing activities during break periods (R. Exh. 9, pg. 22). During the hearing before Judge Green the Union held up a large sign outside the courthouse in Rochester. Between late December 1994 and March or April 1995, union pickets held up a large sign outside of Respondent's Tonawanda headquarters proclaiming that MJ was ''GUILTY, GUILTY, GUILTY.''[7]

Local 46's 1995 Salting Campaign

In January 1995, Chris Hollfelder, previously a journeyman sheet metal worker, became Local 46's organizer, replacing Paul Colon. Upon assuming that post, Hollfelder went to Respondent's Tonawanda office, obtained an employment application and made copies. He also called Respondent's general manager, Luis Delafuente, on several occasions. He asked Delafuente if Respondent had a need for the Local 46's members and also renewed the Union's request that MJ enter into a contractual relationship with it. Delafuente again declined the offer to enter into a prehire agreement and told Hollfelder that Respondent did not need any union members.

During one of these telephone conversations, Hollfelder told Delafuente that his objective was ''to take my [Delafuente's] men to a level that they could afford to drive a decent car, afford to pay their rent, afford to buy Christmas gifts . . . this is all he wanted and couldn't I understand that and isn't that something that I should want for my own employees.'' (Tr. 534.)[8]

Also during a telephone conversation, Hollfelder told Delafuente that the Union would distribute handbills to its customers if it did not sign an agreement with Local 46. Afterwards, Hollfelder went to several CVS drug stores and gave copies of a handbill to the store manager. He also faxed or mailed a copy to CVS corporate headquarters. One of these handbills read as follows:

WHAT WERE YOU DOING ON
JULY 27, 1995???
CVS CONTRACTOR M.J. MECHANICAL WAS BUSY
BEING CONVICTED BY A FEDERAL GOVERNMENT
ADMINISTRATIVE JUDGE OF MULTIPLE INSTANCES OF
coercion
restraint
AND
discrimination
DIRECTED TOWARDS, INNOCENT, LAW ABIDING CITIZENS
ISN'T IT ENOUGH TO MAKE YOU SICK?
CVS

[R. Exh 1. See also R. Exh. 2.]

Hollfelder also went to a Bausch & Lomb shareholders meeting and handed a flyer to shareholders as they left the meeting. He also placed it underneath some windshields. The flyer read:

BAUSCH & LOMB
SHAME SHAME SHAME
[IN THE CENTER WAS THE PICTURE OF A RODENT
LABELED ''SCAB'' INSIDE A CIRCLE WITH A LINE
THROUGH IT]
M.J. MECHANICAL, A CONTRACTOR FACING MULTIPLE
FEDERAL
CHARGES OF ILLEGAL RESTRAINT AND COERCION IS
CURRENTLY
WORKING ON THE BAUSCH & LOMB WORLD
HEADQUARTERS.
ASK BAUSCH AND LOMB CEO DANIEL E. GILL (716-338-
6000) ABOUT
M.J. MECHANICAL'S LEGAL TROUBLES. SORE TOPIC.
VERY SORE
TOPIC...

[R. Exh. 3.]

On one occasion, Delafuente told Hollfelder that his suggestions for doing business with Local 46 could not have come at a worse time given the way MJ's president, Mike Poole, and vice president, Jack Bergman, felt about ''the situation and embarrassment that's been created with the picketers'' (Tr. 513–514).

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[4] I take judicial notice of only those facts recounted in Judge Green's decision that are not disputed by any party.

[5] It appears from this record that it is commonplace for construction workers to remove their hardhats and glasses for short periods to wipe off sweat.

[6] The record in the instant case clearly establishes that Diak's installation of the sweep tap backwards was an accident and not an act of sabotage (Tr. 885). Moreover, this mistake has been made by many other sheet metal workers and does not pose a fire hazard if uncorrected. I would note further that there is no evidence establishing that any of the other Union salts in 1994 performed their jobs incorrectly.

[7] I assume the sign was intended to allege that MJ was guilty of unfair labor practices.

[8] Most of the employees hired by Respondent in 1994 and 1995 were paid between $7.50 and $10 per hour. Frederick French, a third-year union apprentice at the time of the hearing, received wages of $6.25 per hour (not including fringe benefits) as a first year apprentice. In December 1996 he was making between $12 and $13 per hour (not including benefits) (Tr. 611). Edward Reiss, a union journeyman, was being paid approximately $21 per hour in 1995 (Tr. 701).

Early in April, Hollfelder encountered James Helch a 30-year old Local 46 journeyman at the union hall looking for work. Over a quarter of Helch's 4-year apprenticeship training related to sheet metal fabrication. Hollfelder asked Helch if he would consider filing employment applications with some nonunion contractors. Helch replied affirmatively. Hollfelder instructed him that he would be expected to try to organize other employees during nonwork hours. He also told Helch to do a good job if hired and to try to negotiate his wage rate. Helch was also told that the Union would supplement his salary if the nonunion contractor paid him less than union scale.[9]

Hollfelder also called Local 46 members Craig Peterson, who had been laid off in February 1995, and Francis Keatley, who had been laid off on March 15. He asked them to accompany him to MJ's offices to file employment applications. He explained that the purpose of doing so was to organize MJ employees. On April 7, Helch, Peterson, and Keatley accompanied Hollfelder to MJ's office in Rochester. Hollfelder wore a Local 46 hat. The three journeymen filed employment applications. Hollfelder asked Respondent's receptionist, Natalia ''Natasha'' Trieste, to copy and initial the applications. She did so. Trieste understood that the four men were from the Union. While at the office, Hollfelder talked to Mark West, the service operations manager of Respondent's Rochester division. West told Hollfelder that applications were good for a year or two. Trieste forwarded the three applications to MJ's headquarters office in Tonawanda.

Luis Delafuente was informed whenever Hollfelder filed employment applications or brought union members to Respondent's offices to do so. He was aware of the connections of all the alleged discriminatees with Local 46. He was also aware that the union applicants would try to organize MJ. The union applications were placed on Delafuente's chair. He discarded them without reading them (Tr. 439). Fred Strasser, who made a number of initial hiring decisions on Delafuente's behalf, was not informed of the applications filed by Local 46 members.

On April 18, Hollfelder took employment applications for four unemployed union journeymen, Edward Reiss, George Dailey, Michael Dubowyk, and William Scott, to Respondent's Tonawanda headquarters. MJ's Tonawanda receptionist, Kim Nowak, complied with Hollfelder's request that she initial and provide him copies of their applications.

When his application was filed, Reiss had been unemployed since August 1994—with the exception of 15 weeks' work for his brother-in-law. At some point in his career, Reiss attended a ''Comet'' training session put on by the Sheet Metal Workers' International Union. He recalled being told that the Union was trying to have its members hired by nonunion companies so that they could be part-time organizers during lunch and breaks. If a nonunion employee showed interest, the ''salt'' was to tell them to go to the union hall to obtain more information (Tr. 702–703). He was given similar instructions by Hollfelder. Half of Reiss' 19 years as a sheet metal journeyman has been spent working in fabrication shops.

On May 2, Hollfelder accompanied union members William Dowdle, Charles Faisst and Karl-Heinz Haber to Respondent's Rochester office. The three filed employment applications and were provided copies of these applications by Natalia Trieste. Trieste forwarded these applications to Tonawanda.

Sometime between May 2 and September 19, a meeting was held in Respondent's Tonawanda office. Among those present at the meeting were Respondent's president, Mike Poole, Luis Delafuente, the entire staff of the Rochester office (Mark and Mary West and Natalia Trieste), Jim Johnson, Kim Nowak, and Respondent's counsel, Thomas Gill. At the meeting, Trieste was told that she was not to hand out anymore job applications at Rochester. Applicants were to be told to contact the Tonawanda office. She and Kim Nowak were also told not to provide copies of employment applications to any applicants. After the meeting, Trieste continued, and may have been told that she could continue, to forward applications or resumes to Tonawanda, if an applicant had already prepared such a document.

Nonunion Applicants Hired in the Summer of 1995

Between May 2, and September 19, Respondent hired the following individuals to work as either sheet metal installers or fabricators. MJ made no reference checks with the prior employers of any of these individuals (Tr. 229):

Greg Hamilton, who had no prior experience in the industry, was hired as a sheet metal installer on June 2. His previous two jobs were as a stock clerk in a food store and 7 months as an electrician's apprentice in 1992. Hamilton was hired because a friend, Charles Wilson, an MJ employee, asked Luis Delafuente to hire him.

Donald Olsen was hired as a sheet metal installer on June 15. Luis Delafuente hired him because Olsen's brother told Delafuente that Olsen had just completed a rehabilitation program and needed a job. There is no indication that Olsen had any prior experience as a sheet metal installer.

David Warren was hired as a sheet metal installer on June 19 at the request of the wife of Fred Strasser, one of MJ's project coordinators. Warren's prior work experience was as a vehicle driver. He had some training in heating and air-conditioning repair in 1982–1983, but apparently never worked in the field. Warren had been terminated by his last employer in January 1995.

Luis Delafuente hired Richard Prisinzano as a sheet metal fabricator on June 23 at the request of President Mike Poole's wife.

On June 30, Delafuente hired Wayne Thompson as sheet metal fabricator. Thompson was hired through a temporary labor services company.[10] He left MJ on November 7.

[9] Respondent issued subpoenas to all 23 of the alleged discriminatees in this case. The Union and the Charging Party moved to quash these subpoenas. In a conference call just before trial, I denied the motion to quash with regard to six of the alleged discriminatees to be chosen by Respondent. I granted the motion to quash with regard to the others pursuant to Rule 403 of the Federal Rules of Evidence. However, I advised Respondent's counsel that if he thought testimony by more of these applicants would not be unnecessarily cumulative I would entertain a motion to reconsider my ruling (Tr. 7–8).

[10] Respondent had hired individuals through temporary service agencies prior to 1995. However, there is no evidence that prior to the Union's 1995 salting campaign that MJ had a policy of only hiring ''strangers'' through temporary agencies, as opposed to applicants who walked into its office (see Tr. 432–433).

In July, MJ put a number of individuals who were employees of Temp Power Temporary Services to work with sheet metal duct materials on the University of Rochester project. General Counsel's Exhibit 47 shows that Peter Klotzbach, David Korzkowski, and George Ludwig worked 40-hour weeks and some overtime for a period of approximately 3 months, primarily at the University site, without being put on MJ's payroll. Korzkowski submitted an employment application to Respondent on June 12. He had no prior experience in the sheet metal industry. After 3 months on the Temp Power payroll, he was put on the MJ payroll on October 16. General Counsel's Exhibit 47 also shows that William E. Fleck worked with sheet metal duct at the University of Rochester for over a month in July and August 1995. Klotzbach, Ludwig, and Fleck were apparently never transferred to the MJ payroll. Also see General Counsel's Exhibit 46, Tr. 777–780.

On July 24, Michael Devay was hired as a sheet metal installer through a temporary services agency. He had no prior experience in the sheet metal industry and left Respondent's employ on October 9.

Delafuente hired Waymon Miles on August 8 through a temporary labor services company. Miles had 2 years' experience with Custom Sheet Metal company. He was or had been a member of Sheetmetal Workers Union Local 71 in Buffalo. However there is no evidence that he was a voluntary organizer. Due to his prior experience in the industry Miles' starting salary was $10 per hour. Inexperienced new employees were hired at a lower starting salary, some at $7.50 an hour (Tr. 798–799).

On August 24, Delafuente hired Marcus Wagner as a sheet metal installer. Wagner was hired on the recommendation of Don Olsen, who had been hired on June 15, and his brother, Carl. Wagner's employment application states that he had 6 years of experience installing aluminum siding and trim.

Delafuente hired Dan Sprowell as a sheet metal installer on August 30. Sprowell was hired at the request of an employee of a contractor with whom MJ worked. He stayed with MJ only for a month.

Raymond Walker was hired as a sheet metal installer on September 11. Walker was hired because he was the roommate of another MJ employee. His job application suggests that he was employed by two companies when he sought employment with MJ. One of these companies was a heating and air-conditioning firm. The application also indicates that Walker was fired sometime in the past by a firm in the same industry. Delafuente was not familiar with Walker's prior employers and, as noted before, made no inquiries to them regarding Walker.

Alvin Rhoda, Jim Johnson's next door neighbor, was hired as a sheet metal installer on September 18. Rhoda appears to have had no prior experience in the sheet metal industry.

The September 19 Union Applicants

On September 11 and 12, Union Organizer Chris Hollfelder went to two or more apprenticeship classes at Local 46's union hall and solicited members to fill out MJ employment application forms. On September 19, he took such applications from 11 apprentices and one he filled out himself and submitted them to Respondent at its Tonawanda office.[11] The apprentices whose applications he submitted were Mark Miller, Robert Loewke, James Ling, Frederick French, Anthony Patalano, Nicholas French, Robert Capostagno, Ron Sanger, Sean Loewke, David Holtforth, and Brian Taylor.

Frederick French, Nicholas French, Ron Sanger, and Brian Taylor testified at the hearing pursuant to subpoenas issued by Respondent. Their testimony, which I credit, is consistent with regards to what they were told by Hollfelder and their motivation in filling out the MJ employment applications. Hollfelder told them that the Union was trying to get members hired by MJ so that they could talk to MJ's employees about the benefits of the Union during breaks and before and after work. Some were told that the Union would supplement their income to make up the difference between their MJ salary and union scale.[12] They were not told they had to accept a job from MJ if offered, but all said they would because they believed it to be in their long-term interests. At least some were instructed that if hired they should perform their work for MJ to the best of their ability.

There is no evidence that any union member received contrary instructions. Similarly, there is no evidence that any of the union members were told how long they would work for MJ if hired and no evidence that any of them were told they were to try to get MJ employees to quit their jobs.[13] Nicholas French, for example, testified that he understood the objective of the salting campaign was to organize MJ. He also understood that if he was offered a job with MJ and accepted it, the Union would have provided his employer another apprentice as a replacement.

Ron Sanger had already proselytized MJ employees about the benefits of joining the Union. He had worked on the Bausch & Lomb project for a union contractor whose task was to balance the sheet metal installation performed by Respondent. On his breaks and at lunch, Sanger had discussed the differences of working for union and nonunion contractors with MJ employees. In addition to aiding the Union in its salting campaign, Sanger testified that he was very anxious to do sheet metal installation work instead of balancing.

Nonunion Applicants Hired by MJ Between September 19 and November 20, 1995

On September 25, Respondent hired Greg Pontillo as a sheet metal fabricator. He was hired because he was the son of an MJ customer.

David Korzkowski was moved to the MJ payroll on October 16. On November 20, James Orlando was hired a sheet metal fabricator. Another employee of Respondent recommended Orlando to MJ and told Orlando to seek employment through a temporary services agency. Orlando was interviewed by Respondent's shop superintendent, David Valesquez. Other than inquiring whether Orlando knew how to read a tape measure and use a hammer, Valesquez made no inquiry into his skills or prior employment record. He

[11] Several days earlier, Hollfelder had submitted several of these applications to MJ's Rochester office.

[12] Frederick French, Nicholas French, Brian Taylor, and Ron Sanger had either been continuously employed in 1995 and 1996 or experienced only brief periods of layoff.

[13] Exh. R-4 indicates that a Local 46 member working for a nonunion contractor would be obligated to quit the employ of that contractor upon notification to do so by the Union.

hired Orlando without having him fill out an employment application.

November 29 Application by Union Member Steven Mackie

On November 29, Chris Hollfelder accompanied union member Steven Mackie to Respondent's Buffalo office. Mackie submitted an employment application which indicates that he had recently become unemployed. His application also indicated some experience in both sheet metal fabrication and installation. There is nothing on his application or in the record that indicates that Mackie intended to be a voluntary organizer, although I assume this to be the case from the fact that he went to MJ's office with Hollfelder. I also infer that MJ made the same assumption.

Hollfelder asked about the status of his employment application. Luis Delafuente responded that he would call him if he needed him. On several visits to MJ's Rochester office, Hollfelder received a similar response from Natalia Trieste to inquiries about the fate of the union members' job applications. Neither Hollfelder nor any union applicant was ever told that MJ did not hire individuals who submitted job applications at the office (Tr. 542). None of these applicants was ever told that they would have to go through a temporary services agency to be hired by MJ.

Nonunion Applicants Hired in 1996

In 1996 MJ hired seven more sheet metal installers and one fabricator. It hired Harry Baker on April 8. Baker had worked for MJ previously and is the brother of another MJ employee.

On May 23, MJ hired James Rodriguez, Delafuente's brother-in-law, as a fabricator. Rodriguez had some sheet metal experience but was not skilled in the trade (Tr. 249). On May 28, MJ put Greg Dolegala on its payroll as a sheet metal installer. Respondent received Dolegala's resume unsolicited from Labor Force, a temporary employment agency. He had been working for MJ as an employee of Labor Force since March 11, 1996. Dolegala had prior experience installing heating and air-conditioning units and because of this was given a higher salary than new hires with no such relevant experience (Tr. 798–799). He was paid $9 an hour when on the Labor Force payroll and was raised to $10 when he went on the MJ payroll. In contrast, inexperienced new hires such as David Korzkowski and David Warren received a starting salary of $7.50 an hour.[14]

Delafuente hired Michael Sinatra in June. Sinatra had worked for MJ previously. Then on June 10 he hired Bill Patrick, a personal friend who had experience in sheet metal work. Patrick was not getting along with his previous employer. On June 24, Delafuente hired Daniel Figueroa through Labor Force. Figueroa had several years of experience in the installation of heating and air conditioning systems.

On August 26, 1996, Delafuente hired Darold Housley to be a sheet metal installer through a temporary services agency. Housley had been a member of Sheet Metal Workers Local No. 58 from September 1973 to January 1994. He was assigned to projects in the Syracuse area and was paid more than entry level employees.

MJ also hired Dana Jimmerson as a sheet metal installer on September 19, 1996. Jimmerson, a Native American of the Seneca Nation, was hired to work on a project at the reservation. MJ's contract required it to employ a member of the Seneca tribe.

Respondent Bore Animus Toward the Union and its Salting Campaign

The record is replete with evidence of animus on the part of Respondent towards Local 46 and its voluntary organizers. At hearing, Luis Delafuente, the general manager of the sheet metal division, conceded as much on the several occasions:

> Q. Were you aware that these employees [the Union applicants] would have attempted to organize the company or encourage the other employees to join the union?
>
> A. Yes, I was, sir.
>
> Q. That didn't play a factor at all into your decision not to hire them?
>
> A. It might have played a small factor, but a very small factor. [Tr. 198.]
>
> A. . . . I've been in the HVAC or sheet metal industry for over twenty-five years . . . and I've worked in harmony or alongside of all contractors. And I mean all contractors. Until I got to Rochester and Local 46 had a different approach to doing business. And it was something I [had] never seen before, wasn't used to.
>
> Q. Can you tell us specifically what are some of the things that went into your consideration in deciding or partially deciding not to hire these employees?
>
> A. Well, we had a lengthy court case that occurred in Rochester, which I sure you're familiar with. We had some handouts that Mr. Gill showed you yesterday that I'm sure you're familiar with . . . .
>
> . . . .
>
> Q. The handbills?
>
> A. The handbills.
>
> . . . .
>
> A. I have employees that have personally been threatened by Local 46 members. I've been harassed verbally by Local 46 members. I've had—I've had to drive—all I've ever wanted to do in my life was build something, and essentially I came into contact with a couple of individuals that let me be a part of a respectable corporation and we've built a nice company out on Military Road, and it was very offensive for three, four or five months last winter and spring to drive by a van out in front of our building that said, ''Guilty, guilty, guilty'' prior to a decision being made.
>
> We've had instances of on-site—documented instances of sabotage, relative to construction quality, relative to Local 46 members violating O.S.H.A. standards, drawing attention to themselves as an M.J. employee, intentionally breaking O.S.H.A. rules.

[14] I discredit the testimony of MJ Project Coordinator/Estimator Fred Strasser that the individuals listed on G.C. Exh. 28 were not hired to be sheet metal installers and fabricators. The record as a whole, including the testimony of MJ Project Manager Nicholas Buerster, establishes they were hired to install sheet metal, not simply to be laborers.

Q. So you're saying that because of these actions, then, the company will never hire a member from Local 46?

A. No, I didn't say that, sir. I said it put a bad taste in my mouth. That's what I said.

Q. But that went into your consideration as to the hiring process of these applicants, is that correct?

A. It certainly did, sir. [Tr. 204–205.]

Q. So if these discriminatees show up at your office tomorrow, and you have work available, you just may hire them?

A. I've got a problem with that, sir.

Q. Why is that?

A. Well, Mr. Hollfelder testified that he hasn't changed his practices prior to his taking office as a union organizer and Mr. Golding[15] hasn't given my company any indication that they've changed their practices and Mr. Miller[16] clearly stated to me on a number of occasions, it's public record, that his intent was to put people in my company, to dislodge my work force and to steal them away from me. sir.

. . . .

Q. The alleged discriminatees in this lawsuit here, do you know whether or not they were the individuals who you claim engaged in sabotage and brought O.S.H.A. onto your job site?

A. I do know that they used Chris Hollfelder and came in the door holding his hand, so I just—you know, I'd have to—I would feel that they were involved in some way, shape or fashion.

[Tr. 327–328., also see Tr. 446–447, 490–491, 530, 952.]

Analysis

Respondent Violated Section 8(a)(1) and (3) in Refusing to Hire the 23 Union Applicants in this case.

The General Counsel has established that 10 experienced sheet metal workers who were also Union ''salts'' applied for employment with Respondent between April 7 and May 2, 1995. Twelve more salts applied on September 19 and another on November 29. Respondent did not give the slightest consideration to hiring any of these individuals. Luis Delafuente, the individual in charge of hiring for MJ's sheet metal division, who knew these individuals were union salts, discarded their applications or copies thereof, without reading them.

Between April 1, 1995, and November 12, 1996, Respondent hired at least 22 employees, 17 as sheet metal installers, and 5 as sheet metal fabricators.[17] In addition, it used a number of people, who were at least nominally employees of temporary labor agencies, to handle duct work on its projects. Respondent argues that it did not discriminate against the union applicants but also contends that it was entitled to do so due to misconduct by the Union and other voluntary union organizers. Respondent concedes that it has no evidence of misconduct by any of the union applicants in this case with the possible exception of Chris Hollfelder, Local 46's organizer, who submitted an application on September 19.

Respondent contends that it did not discriminate because it did not hire any individual, unknown to it, who submitted an employment application at its offices in Tonawanda or Rochester. It only hired individuals, who were known to the company, or were referred by a temporary labor services company. MJ's disregard of the union applications is not explained solely by its lack of personal contacts with the salts. Of the individuals it hired, the following had no such contact with MJ: David Korzkowski, Michael Devay, Waymon Miles, Greg Dolegala, Daniel Figueroa, Darold Housley, and Dana Jimmerson. Moreover, in many of the instances in which new hires came recommended to MJ, there is no indication that the individual recommending the applicant knew him in any context other than a social setting. The record is devoid of any information which would have given Respondent a basis for concluding that the following employees would be competent sheet metal workers: Greg Hamilton, Don Olsen, David Warren, Richard Prisinzano, Dan Sprowell, Alvin Rhoda, Wayne Thompson, and Dana Jimmerson.

I conclude that in failing to consider the union salts, Respondent was motivated by its animus towards them, which is amply demonstrated in the record. The testimony quoted herein makes it absolutely clear that Luis Delafuente was very angry at Local 46 as a result of its salting campaign, picketing and handbilling. His testimony makes it equally clear that he would not knowingly have hired anyone who might have been a union salt.

Nevertheless, Respondent contends that although it probably would have discriminated against the 23 Local 46 salts herein if it had the opportunity, it did not do so. It explains its decision to hire nonunion strangers to the company as a nondiscriminatory application of a company policy to hire such applicants only through temporary service agencies. However, there is no evidence that MJ had a policy of hiring nonreferrals only through a temporary services agency and not hiring individuals who applied for a job at its offices—at least not until the salts started applying for jobs. Moreover, if it had such a policy and was acting without discriminatory motive, Respondent would have so informed the union applicants. If a job applicant with skills directly applicable to the employer's business shows up at its door and the employer is hiring, it is unlikely it will conceal from the applicant the means for having his or her application considered, if acting without a discriminatory motive.[18] In this regard, the fact that MJ had not previously hired applicants who ''walked-in'' to its offices, does not necessarily indicate that its failure to hire any Local 46 ''walk-ins'' was nondiscriminatory. It may well be that prior walk-in applicants had no experience in the sheet metal industry, or had other problems.

[15] Paul Golding was the Local 46 organizer at the time of the hearing.

[16] Donald Miller was Local 46's business manager between approximately 1992 and 1995.

[17] Respondent's September 1995 company newsletter indicates there may other individuals who were hired by MJ's sheet metal division during this period (Tr. 564–571, Exh. G.C.–45).

[18] Indeed, MJ demonstrated on several occasions a willingness to ignore its normal hiring procedures when it had an job applicant it desired. James Orlando and Wayne Thompson, for example, were not required to fill out an employment application.

Respondent's suggestion that it would not consider an applicant who had prior experience in the sheet metal industry, or would hold such experience against the applicant is contradicted by its own hiring practices. It not only hired individuals with prior sheet metal or related experience, it paid them more than it paid inexperienced individuals. MJ's failure to advise the union applicants that it only hired ''walk-ins'' through temporary agencies (if this was the case) indicates that Respondent intended to screen them out of the hiring process. *Casey Electric*, 313 NLRB 774, 775 (1994).

In conclusion, I find that the General Counsel has established a prima facie case that Respondent failed to consider the alleged discriminatees for employment and refused to hire them due to antiunion animus. *Fluor Daniel, Inc*., 304 NLRB 970, 971 (1991). Respondent has failed to satisfy its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). It has not shown that it would have failed to hire the discriminatees in the absence of their union affiliation and Respondent's understanding that they would be encouraging MJ employees to join Local 46.

Respondent's defense, to the extent that it relies on its hiring policy in favor of applicants referred or recommended to it, fails because this policy is inherently destructive of employee section 7 rights. Therefore, Respondent's failure to hire the alleged discriminatees violates the Act regardless of evidence of employer animus.

I conclude that Respondent's cannot rely on its policy on giving preference to applicants who have been referred to it as a justification for its refusal to hire the alleged discriminatees in this case. In *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967), the Supreme Court held that the Board can find an unfair labor practice without proof of antiunion motivation if it can be concluded that the employer's discriminatory conduct was ''inherently destructive'' of important employee rights. If the adverse effect on these rights is comparatively slight, antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for its conduct.

In cases in which the adverse effects on important employee rights is not comparatively slight, proof of antiunion motivation is not necessary even if a legitimate and substantial business motivation is established. *H. B. Zachry Co*., 319 NLRB 967 at 981 (1995). I conclude that Respondent's hiring policy insofar as it gives preference to applicants recommended or referred to it is inherently destructive of important employee rights and that the adverse effect of this policy is not comparatively slight.[19]

The right to seek employment free from discrimination on the basis on union membership and/or proclivity to engage in protected conduct is one of the most basic rights accorded by the National Labor Relations Act. Respondent's hiring policy, which allows it to avoid hiring union members or activists by simply having anyone vouch for a nonunion (or nonsalt) applicant seriously diminishes that right. Depending on the number of new employees an employer needs and the number of available applicants in its locale, a preferential system for recommended or referred applicants can effectively insulate an employer from union sympathizers—as it did in this case.

When Edward Reiss' application was filed with MJ on April 18, he had been unemployed since the previous August with the exception of 15 weeks work for his brother-in-law. In filing an application with MJ, Reiss was motivated by a desire to help Local 46 organize Respondent's work force. However, it is quite possible that he would also have liked to get a job, any job.[20] His right and that of the other union applicants to be considered for employment on a nondiscriminatory basis was severely compromised by MJ's preferential treatment of any applicant referred to it.

Respondent was not entitled to discriminate against the union salts on the basis of alleged prior misconduct by the Union or other voluntary organizers.

In *NLRB v. Town & Country Electric*, 116 S.Ct 450 (1995), the United States Supreme Court held that a paid union organizer is an employee within the meaning of the Act, and is thus entitled to the protection afforded employees against discrimination on the basis of union or concerted protected activity. Although an employer may in some instances refuse to hire or reinstate employees who are guilty of misconduct against it, an employer cannot discriminate against the alleged discriminatees in this case on the basis of misconduct committed or allegedly committed by other union members, including voluntary organizers. *Brown & Root USA, Inc*., 319 NLRB 1009 (1995).

Respondent suggests that it is entitled to discriminate against the union applicants because their activities would be performed pursuant an objective stated by the Union in the past, namely depriving MJ of its employees. All this record shows in that regard is that in 1994 union salts were able to persuade one MJ employee to join the Union. When he did so the Union assigned him to work for a union contractor who needed an apprentice. He could have, however, been assigned to continue working for MJ as a salt. Union salts were able to convince another MJ employee to visit the union hall, but he did not join.

In trying to convince MJ 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 MJ employees in the exercise of their rights. The salts merely told MJ employees about the benefits of belonging to the Union and referred them to the union hall. One apparently decided that joining was in his best interests and the other reached the opposite conclusion.

Local 46's objectives are no different from that of any union. Its members are engaging in concerted activity to protect their wage rates and benefits. Their objective is to prevent contractors such as Respondent from threatening these benefits by restricting the supply of labor it can obtain at

[19] 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 it jobsites forever is inherently destructive of these rights. See *Belfance Electric*, 319 NLRB 945 (1995), and *D.S.E. Concrete Forms*, 303 NLRB 890, 897–898 (1991).

[20] The notion that a union employee would never be interested in a job that paid less than union scale is undercut by the fact that at least three of MJ's employees (Buerster, Housley and Miles) were former union members who accepted a lower salary in exchange for the prospect of steady employment.

rates below that set forth in its collective-bargaining agreements. As Chief Justice Stone noted, ''[a] combination of employees necessarily restrains competition among themselves in the sale of their services to the employer.'' *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 502 (1941). The National Labor Relations Act allows employees to collectively attempt to restrict the labor supply in such a manner. If the alleged discriminatees herein convince MJ employees to join the Union and to withhold their labor from MJ unless MJ pays union scale, they would be exercising rights explicitly granted by the Act.[21]

Moreover, Respondent is simply incorrect in arguing that Local 46 was trying to drive it out of Rochester by depriving it of labor. It is abundantly clear that if MJ entered into an 8(f) agreement with the Union, it would have been provided with an adequate supply of labor to complete any project it undertook in the Rochester area. The issue between MJ and the Union was not whether Respondent worked in Rochester, it was whether Respondent worked in Rochester with employees who made significantly less in wages and benefits than union employees.

MJ has defenses to a salting campaign other than discriminating against the Union salts. It may be able to convince its employees that working nonunion is to their advantage. Several MJ employees gave up their union membership because they apparently believed their opportunity for steady employment was better without it. Further the record herein indicates that Local 46 members at times suffered through significant periods of unemployment. The Union's ability to place an unlimited number of MJ employees with union contractors would appear to be restricted by the lack of full employment of its existing membership.

Respondent also contends that it was entitled to discriminate because the Union could tell any of the salts to quit MJ's employ at any time and they would have to do so. This contention was answered by the Supreme Court in *Town & Country*, supra, as follows:

> If a paid union organizer might quit, leaving a company employer in the lurch, so too might an unpaid organizer, or a worker who has found a better job, or one whose family wants to move elsewhere.. . . A company disturbed by legal but undesirable activity, such as quitting can offer its employees fixed-term contracts, rather than hiring them ''at will.''. . . or it can negotiate with its workers for a notice period. [116 S.Ct at 456–467.]

Respondent's personnel manual states that ''all employees are employed at the will of the Company for an indefinite period. Employees may resign from the Company at any time, for any reason, and may be terminated by the Company at any time, for any reason, and with or without notice.'' (R. Exh. 16, p. 8.) As General Counsel's Exhibit 28 demonstrates, a number of MJ's employees have worked for it for a very short time: Wayne Thompson, a little over 4 months; Mike Devay, 2-1/2 months; and Dan Sprowell, 1 month. In addition, MJ utilized employees of temporary labor agencies, who worked on its projects for what appear to be periods of 1–3 months. In light of this record, I conclude that MJ's reliance on a concern that union salts would work for only short periods of time is pretextual.

Respondent was not Entitled to Discriminate Against Chris Hollfelder

The issues regarding Chris Hollfelder, who was a full-time organizer for Local 46 at the time he applied for work with MJ, are somewhat different than those concerning the other alleged discriminatees. There is no alleged prior misconduct by the 22 other union applicants that Respondent can argue justifies it refusal to hire them. Indeed, all this record shows is that each of these individuals was committed to encourage MJ employees to join the Union. Respondent cannot discriminate against them for this reason. *AJS Electric*, 310 NLRB 121 fn. 2 (1993).

Hollfelder, of the other hand, is a full-time organizer, who distributed handbills and assisted in the picketing of MJ headquarters, both endeavors which Respondent found very offensive. I cannot assume that Hollfelder was not a bona fide job applicant merely because he was a full-time union organizer. It appears that the Bausch & Lomb and University of Rochester contracts were two of the biggest projects within Local 46's jurisdiction. I infer that Local 46 viewed MJ as a grave threat to the economic well-being of its members unless it agreed to a prehire agreement with the Union. It may be true that Hollfelder and the Union deemed organizing these projects worthy of Hollfelder's full attention even it required him to install sheet metal for 8 hours or more each day to do so. In this regard, it is important to note that Hollfelder was in fact a sheet metal installer for his entire employment career until January 1995.

Secondly, Respondent is unable to point to any prior activity by Hollfelder that was illegal or just cause to discriminate against him.[22] While his distribution of handbills to MJ customers may be upsetting to Respondent, it does not violate Act, *Service Employees Local 399 (Delta Air Lines)*, 293 NLRB 602 (1989). The fact that MJ may find this and other

[21] I give no credence to Respondent's argument that Local 46's activities were unprotected because they did not seek to improve the lot of MJ's employees. If MJ signed a collective-bargaining agreement with the Union, the compensation of current MJ employees might well increase. Moreover, the NLRA protects the right of union members to defend their wage rates so long as they do so by legal methods.

Similarly, I disagree with Respondent's argument that Local 46 could not bargain in good faith with MJ. Respondent makes this claim because the Union's collective-bargaining agreement (cba) requires it to offer all employers who are party to the agreement, any terms that are more advantageous to MJ than the existing cba. Respondent's December 6, 1996 motion to admit Respondent's Exhibits 6 and 7. It is impossible to say what the Union might do in negotiations with Respondent. Conceivably Local 46 might make concessions to MJ that it would then accord to other union contractors. Secondly, the Union is not required in bargaining to recede from an announced position if it reasonably believes that position to be fair. *Kankakee-Iroquois County Employers' Assn. v. NLRB*, 825 F.2d 1091, 1094 (7th Cir. 1987).

[22] Respondent has not established that any union member has engaged in sabotage, intentionally violated OSHA regulations or threatened any employee of Respondent with violence. At worst the record indicates that Paul Colon, on one occasion, engaged in organizing activities on company time in 1994 and that the Union was able to persuade one MJ employee to join Local 46. That employee quit MJ's employ to be placed with a contractor who had signed a collective-bargaining agreement with the Union.

of Hollfelder's activities offensive is not enough to justify its refusal to hire him. The issue in this case is analogous to the question of what type of misconduct justifies an employer's refusal to reinstate a striker. Unless Hollfelder did something or said something that may reasonably tend to coerce or intimidate MJ employees or its managers, Respondent is not entitled to refuse to hire him, *Nickell Moulding*, 317 NLRB 826 (1995). There is no evidence of this nature in the instant record.

Respondent violated section 8(a)(1) in refusing to hand out employment applications at its rochester office and in instructing its receptionists not to provide applicants copies of their employment applications.

Sometime between May and September 1995, Respondent held a meeting in which it instructed its Rochester personnel that they were no longer to give out employment applications. Respondent's Tonawanda and Rochester receptionists were also instructed not to provide copies of employment applications. Delafuente testified that the meeting was called as a result of the salting campaign and the Union was discussed. From this I infer that the new policies were motivated by a desire to make it more difficult for union members to apply for work with MJ.

Both of these new policies interfered with the employees' Section 7 rights and therefore violated Section 8(a)(1) as alleged. As to the first change in policy, Local 46 members are likely to live near Rochester. Requiring them to go to Tonawanda to obtain an employment application obviously complicates the application process. With regard to the second policy, employers may choose not to make copies of employment applications for nondiscriminatory reasons. However, it is clear from this record that the reason for Respondent's decision not to provide copies was to interfere with the salting campaign. Indeed, there appears no other reason for the establishment of this policy. As Natalia Trieste testified, the cost of providing such copies was not a rationale for its implementation.

CONCLUSION OF LAW

By refusing to consider for employment and refusing to hire the 23 union members named in the complaint, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3). By establishing policies by which it would no longer distribute employment applications from its Rochester office and by which it would no longer provide applicants with copies of their applications, Respondent violated Section 8(a)(1).

REMEDY

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

Having found that the Respondent violated Section 8(a)(1) and (3) of the Act by refusing to consider 23 applicants for employment, I shall order Respondent to consider them for hire and to make whole those discriminatees whom the Respondent would have hired, for any losses sustained by reason of the discrimination against them, including amounts they would have earned on other jobs to which Respondent subsequently would have assigned them. If it is shown at the compliance stage of this proceeding that the Respondent, but for the discrimination, would have assigned any of these discriminatees to present jobs, the Respondent shall hire those individuals and place them in positions substantially equivalent to those for which they applied. *3E Co.*, 322 NLRB 1058 (1997). Backpay shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]