Greg Murrieta, d/b/a GM Electrics, a Sole Proprietorship *and* International Brotherhood of Electric Workers Local Union 952, AFL–CIO. Case 31–CA–20959

February 27, 1997

DECISION AND ORDER REMANDING

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND HIGGINS

On March 8, 1996, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order Remanding.

The amended complaint alleged that in November and December 1994[2] the Respondent unlawfully interrogated, threatened, and refused to hire and/or consider for hire job applicants because of their union affiliations. The judge found no violations of the Act and dismissed the complaint.

In his exceptions, the General Counsel contends that certain statements by the Respondent's agents, Greg Murrieta and Cecily Eaton, made to union applicants who were seeking employment with the Respondent violated Section 8(a)(1). He also argues that the Respondent violated Section 8(a)(3) and (1) by failing to hire or consider for hire eight union applicants—Daniel DeMinico, Fred Young, Richard Fukutomi, Carl Ivie, Pete Richardson, John Schimp, Albert Shotwell, and Tom Vint.

1. We adopt the judge's dismissals of the 8(a)(1) allegations attributed to Murrieta and the 8(a)(3) allegations involving DeMinico and Young. In affirming these 8(a)(1) dismissals, we rely on the fact that the judge credited Murrieta's testimony and found that his inquiry into DeMinico's union affiliation was lawful under the circumstances. The judge also credited Murrieta's stated reasons for not hiring DeMinico and Young. Murrieta testified that DeMinico wanted too much compensation and had driven another company's truck to his job interview with the Respondent. Murrieta testified that Young failed to appear at his November job interview.[3] Furthermore, the judge discredited Young and found that he never reapplied or appeared with the other union applicants at the Respondent's office on December 2.[4]

2. The judge also dismissed the 8(a)(1) allegations involving Cecily Eaton, the Respondent's secretary. He found that Eaton was not a statutory agent of the Respondent, and, that even if she were an agent, she did not engage in any unlawful activity on December 2. We reverse the judge on both points. The evidence shows that Eaton was an agent within the meaning of Section 2(13) of the Act and that her telephone comments overheard by the union applicants and her interrogation of employee James Solano on December 2 violated Section 8(a)(1) of the Act.[5]

In *Southern Bag Corp.*, 315 NLRB 725 (1994), the Board reiterated the following guidelines:

> The Board applies common law principles when examining whether an employee is an agent of the employer. Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. See generally *Great American Products*, 312 NLRB 962, 963 (1993); *Dentech Corp.*, 294 NLRB 924 (1989); *Service Employees Local 87 (West Bay)*, 291 NLRB 82 (1988). The test is whether, under all the circumstances, the employees "would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management." (Citations omitted.) *Waterbed World*, 286 NLRB 425, 426–427 (1987). As stated in Section 2(13) of the Act, when making the agency determination, "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

In this case, Eaton was the only person who was stationed throughout the day at the Respondent's office and assigned by Murrieta to distribute and collect job

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Based on our examination of the record, we are satisfied that there is no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated any bias. Thus, we find no merit in the General Counsel's contention that the judge was biased against his position.

[2] All dates are in 1994 unless otherwise indicated.

[3] The amended complaint does not allege Young's November rejection by the Respondent as a separate violation.

[4] We therefore find it unnecessary to rely on the judge's alternative analysis based on an assumption that Young was at the Respondent's office on December 2.

[5] We adopt the judge's dismissal of the other 8(a)(1) allegation involving Eaton and Solano. The judge discredited Solano and found that Eaton had not told him that she kept union applications separate from nonunion applications. However, in adopting this dismissal, we do not rely on the characterization of Solano's testimony in fn. 10 of the judge's decision as "some sort of mantra to be chanted."

applications. Murrieta was often out of the office visiting jobsites and potential customers. In handling the job applications, Eaton would talk to the job applicants and relate to them the Respondent's hiring needs. Indeed, as found by the judge, "[w]ithout Eaton, Murrieta would have missed the majority of the job applicants who applied for employment at GM Electrics."

Given this kind of arrangement, job applicants would reasonably believe that Eaton could speak and act on matters concerning the Respondent's application procedures and that her statements about the Respondent's handling of job applications would likely reflect company policy. Thus, we find that Eaton had apparent authority relative to the Respondent's application process.[6]

We further find that the Respondent violated Section 8(a)(1) with respect to the following statements by Eaton during and after her telephone conversation with Murrieta at the Respondent's office on December 2. On that day, several union members, including Carl Ivie, sought job applications from Eaton in response to the Respondent's newspaper advertisement for journeymen electricians. While they were filling out their applications, Eaton received a telephone call from Murrieta. Her comments were overheard by the men, who were also aware that Murrieta was the telephone caller. Ivie and Tilmont testified about Eaton's remarks, while Murrieta related his end of that conversation.[7] We note that the testimony of these witnesses is consistent and that Murrieta did not deny the essential elements of either Ivie's or Tilmont's accounts.[8]

Ivie testified that while Eaton was on the phone he "told her to tell [Murrieta], I'd worked for him previously, and to tell him my name and see if he had room, or if he'd hire me." After telling Murrieta that there were applicants at the office, Eaton said, "Carl [Ivie] wanted me to tell you that he's applying for a job." Ivie and the others observed Eaton listening on the phone for awhile. She then said, "I know he's union. They're all union." Eaton continued talking to Murrieta and never explained to the job applicants what she meant by her remarks about their union affiliation.

Murrieta testified that when he spoke with Eaton on the telephone that day

> she told me that several members of the union were there. I think she told me about Carl Ivie. I said, "He's union isn't he?" I was surprised. I had no idea that they could apply to a non-union shop. She goes, "Yeah" as to all about that. That was the extent of the conversation.

We note that the applicants only heard Eaton's comments and observed her reaction, and neither they nor Eaton were told Murrieta's explanation for his statement about Ivie's union status. In this context, we find that Eaton's remarks—"I know he's union. They're all union."—implied that union job seekers would be treated adversely by the Respondent in the application process. We find that such statements are coercive and have a reasonable tendency to interfere with employee rights under the Act. See *Pioneer Hotel & Gambling Hall*, 276 NLRB 694, 700 (1985) (where a supervisor in a nonunion company told an applicant that he did not believe that the applicant could be hired because of his active union status).

Our dissenting colleague, like the judge, finds no coercion in Eaton's statement for essentially the following reasons. First, Murrieta's remark about the applicants' union affiliation was "justified" because of the Union's past refusal to allow Murrieta to hire his father, also a union member. Second, Eaton's response was a "natural reaction to Murrieta's remarks." Finally, even if the applicants perceived Eaton's statement differently, her remark does not reveal antiunion animus, but only surprise. In our view, none of these reasons withstands scrutiny.

Here, the union applicants only heard Eaton's remarks and never heard Murrieta's remark or perceived any surprise on his part. Equally important is the absence of any testimony or contention that Eaton's remarks, which were the only statements actually overheard by the union applicants, conveyed any surprise. Thus, the applicants could reasonably believe that Eaton's unexplained comments, which immediately followed the request of a job for Ivie, meant that union status may not be favorably linked to Murrieta's hiring decisions.[9]

[6] In this connection, we reject the judge's implication that Eaton's duties must be the same as those tasks performed by Beryl Dyer, the secretary found to be an agent in *Diehl Equipment Co.*, 297 NLRB 504 (1989), in order for Eaton to be considered an agent for purposes of Sec. 2(13). Furthermore, we do not rely on the judge's description of Dyer's duties. Dyer kept the employer's books, handled payroll, typed letters, answered telephones, and performed general clerical duties. See *Diehl*, supra at 506 fn. 15. Like Eaton, Dyer worked at a desk in the employer's office where she distributed and collected job applications and talked to the job seekers who could reasonably believe that she had some apparent authority relative to the employer's application process. Both Eaton and Dyer surmised that an applicant was a union member. However, Eaton went further and instructed the applicant in how to complete his application by telling Solano to write "non-union" at the top of his application.

[7] Eaton never testified about her or Murrieta's telephone comments. Although she was extensively questioned about other December 2 events by Respondent's own counsel, Eaton was never asked to give her version of this critical telephone conversation.

[8] Although the judge discredited Tilmont on other specific matters, we note that Tilmont's testimony on this point is virtually identical to Ivie's credited testimony.

[9] Even assuming that our dissenting colleague's speculation about the motivation behind Murrieta's comments were correct, we would still find a violation of Sec. 8(a)(1). The Union's policies regarding whether or not its members can apply for employment at nonunion employers are internal matters that are not the Respondent's concern.

In finding no violation, our dissenting colleague relies on what Murrieta meant by his statement, "He's union isn't he?" However, there is no indication from the record that Eaton even knew about Murrieta's explanation for discussing the applicants' union affiliation. When Murrieta mentioned Ivie's union affiliation to Eaton, he never told her why he was doing so or that his past failed efforts to hire his father had anything to do with the current situation. Thus, during this conversation, Murrieta's "justification" based on his belief that union members could not work for a nonunion company was not openly discussed with Eaton. So, in the words of our dissenting colleague, Eaton's "natural reaction to Murrieta's remarks" could have nothing to do with Murrieta's father or any belief about where union members could work. Rather, Eaton's statement was simply triggered by Murrieta's heightened interest in an applicant's union status for reasons unknown to Eaton. In these circumstances, Murrieta's focus on union status, as voiced by Eaton in front of the applicants, thus clearly conveyed the message that such status may be a stumbling block to hiring that individual.

Finally, our dissenting colleague appears to premise a finding of no coercion based on Murrieta's motive or what may have been in his mind. Such reasoning based on the supervisor's motive or intent in making the statement has no relevancy in an 8(a)(1) context. The test to determine if a supervisor's statement violates Section 8(a)(1) is whether under all the circumstances the supervisor's remark reasonably tends to restrain, coerce, or interfere with the employee's rights guaranteed under the Act. It is well established that this test does not depend on motive or the successful effect of the coercion. See *El Rancho Market*, 235 NLRB 468, 471 (1978); *NLRB v. McCullough Environmental Services*, 5 F.3d 923, 930 fn. 5 (5th Cir. 1993). Therefore, it is irrelevant that Murrieta did not intend to coerce employees. In any event, Murrieta's motive can provide no excuse for Eaton's conduct.

Accordingly, for all the above reasons, we conclude that the Respondent violated Section 8(a)(1) based on Eaton's telephone remarks overheard by the applicants on December 2.

Also, on December 2, while Eaton was still on the telephone talking to Murrieta that morning, James Solano came into the office. Eaton testified that she saw Tilmont and the union applicants briefly talk to Solano. After Tilmont's group left, she gave Solano an application and asked him if he was "union." Although he was a union member, Solano answered no. Eaton then told him to write "non-union" at the top of his application. Solano completed his application as instructed and then submitted it to Eaton. Eaton claims that she asked about Solano's union support because she had just seen Solano speak to the union applicants and Tilmont. Solano was later hired by the Respondent.

We find that Eaton coercively interrogated Solano as to his union membership. This interrogation took place while Solano was in the office that day applying for employment with the Respondent. Eaton never once told Solano the reason for, or the purpose of, her inquiry into his union support. She never gave him any assurance that no reprisals against him would be taken for support of the Union. Rather, her further instruction to write "non-union" at the top of his application conveyed the message that her inquiry into his union support was not harmless chatter. In these circumstances, Solano could reasonably fear that any affirmation of his union support would affect his job prospects.[10] Therefore, we find that the Respondent violated Section 8(a)(1). See *Adco Electric*, 307 NLRB 1113, 1116–1117 (1992).

3. The Respondent, a small-sized electrical contractor in Ventura, California, advertised in November and December that it wanted to hire journeymen electricians. On December 2, José Cortez,[11] Richard Fukutomi, Carl Ivie, Pete Richardson, Albert Shotwell, and Tom Vint went with David Tilmont, the union organizer, to the Respondent's office to apply for work. At Tilmont's instruction, the men wrote either "Union Member" or "Volunteer Organizer" at the top of their applications. On December 5, John Schimp, while wearing his union hat and coat, also applied for work at the Respondent's office. At Eaton's request, he wrote "Union Member" at the top of his application. None of these men were ever interviewed or hired by the Respondent.

The General Counsel alleged that the Respondent discriminatorily denied employment to Fukutomi, Ivie, Richardson, Schimp, Shotwell, and Vint because of their union affiliation. Denying these charges, Murrieta testified that these men were not considered for hire for lawful nonunion-related reasons.[12] The judge dis-

Thus it would still be reasonable for the applicants to conclude that Murrieta was not in fact concerned about whether the Union would "allow" them to work for him, and thus to conclude that the Respondent might treat their applications adversely because of their union affiliation.

[10] Our dissenting colleague finds no coercion in Eaton's question and directive to Solano. He views her conduct as justified because she "reasonably wanted to know if Solano wished to be part of Tilmont's group." Once again, our dissenting colleague has improperly relied on what may be the purpose or motive underlying Eaton's actions, which is an irrelevant factor in a coercion analysis for violations of Sec. 8(a)(1) of the Act. See *El Rancho Market*, supra; *NLRB v. McCullough Environmental Services*, supra.

[11] Cortez was not included in the complaint allegations, and the General Counsel seeks no remedy with regard to him.

[12] In sec. IV of his decision, the judge incorrectly stated that Shotwell was denied employment because he "failed to write down a desired salary" on his application form. However, Murrieta testi-

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missed the 8(a)(3) allegations for lack of a prima facie case. In particular, the judge found critical the absence of any evidence of union animus toward the alleged discriminatees or against the Union generally.

In view of Eaton's 8(a)(1) conduct on December 2, we reverse the judge's finding of no prima facie case. Eaton's interrogation of Solano and her telephone remarks indicating adverse treatment of union applications clearly show union animus. Also present here are the other elements that, combined with the proof of animus, make out a prima facie case that hostility to union activity or affiliation was a motivating factor in an employer's failure to hire: union activity, employer knowledge, and timing, and the availability of jobs for the applicants.[13] Therefore, we find that the General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the Respondent's failure to consider Fukutomi, Ivie, Richardson, Schimp, Shotwell, and Vint for employment and to offer at least some of them employment in available jobs. See *Wright Line*.[14]

We also find that the judge's analysis (JD 138) of the Respondent's asserted reasons for rejecting the applications of those six employees did not employ the correct standard for assessing a *Wright Line* defense. A respondent cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. Accordingly, we shall remand this part of the case to the judge to determine, pursuant to the Board's test set forth in *Wright Line*, whether the Respondent demonstrated that it would have refused to consider the union applicants for jobs and would have failed to hire any of them in the absence of protected conduct.

fied that he rejected Shotwell because of an unfavorable job reference.

[13] The existence of jobs for at least some of the applicants was shown by the evidence that, as noted, the Respondent had advertised for journeymen electricians, that the alleged discriminatees were journeymen electricians, and that the Respondent in fact hired two electricians in addition to Solano after the alleged discriminatees had applied. Regarding the relevance of proof of existence of jobs in refusal-to-hire and refusal-to-consider cases, see *Casey Electric*, 313 NLRB 774, 774–775 (1994). See also *B E & K Construction Co.*, 321 NLRB 561 (1996). Even if one or more of the applicants cannot be matched to jobs, a refusal to consider violation may be found as to them. See *B E & K*, supra.

[14] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). In finding that the General Counsel met his initial burden under *Wright Line*, we do not rely on the judge's inaccurate description of the Board's holding in *Bay Control Services*, 315 NLRB 30 (1994). See particularly, 315 NLRB 30 fn. 2 of the Board's decision. In addition, we do not rely on the judge's statement that a salting case constitutes "a somewhat artificial fact pattern," which appears in the first paragraph of sec. IV of his decision.

ORDER

This proceeding is remanded to Administrative Law Judge James M. Kennedy for the purposes of (1) determining, on the basis of the existing record, whether the Respondent satisfied its *Wright Line* burden, and (2) determining an appropriate remedy for any violation found in this regard.

Thereafter, pursuant to the applicable provisions of Section 102.45(a) of the Board's Rules and Regulations, the judge shall prepare and issue a supplemental decision containing findings of fact, conclusions of law, and a recommended supplemental Order in regard to the issue remanded herein. Following service of such Supplemental Decision and Order on the parties, the provisions of Section 102.46 of the Board's Rules shall be applicable.

The issuance by the Board of an Order remedying the unfair labor practices found in this proceeding is held in abeyance pending completion of the action encompassed by this remand.

MEMBER HIGGINS, dissenting in part.

I would adopt all of the judge's dismissals of the complaint's 8(a)(1) and (3) allegations. In my view, even assuming arguendo that the Respondent's secretary, Cecily Eaton, was an agent of the Respondent, her remarks did not violate Section 8(a)(1), and they do not support a finding of antiunion animus on the part of the Respondent.

In brief, the evidence shows that several Union applicants were in the Respondent's office when Eaton was speaking on the phone with the Respondent's owner (Murrieta). Eaton told Murrieta that Carl Ivie (one of the applicants) was applying for a job. Murrieta responded to this, and then Eaton said "I know he's Union. They're all Union." After the phone conversation, Eaton asked applicant Solano whether he was Union. He replied that he was not, and Eaton told him to write "non-Union" at the top of his application.

My colleagues conclude that Eaton was the agent of the Respondent, that her remark violated Section 8(a)(1), and that the remark furnishes proof of animus to support an 8(a)(3) violation. More specifically, my colleagues find that the remark implied that union job seekers would be treated adversely in the hiring process. There is absolutely no evidence to support this finding. Eaton's remarks neither express nor imply this view.[1] Further, the evidence that *does* exist supports a wholly different interpretation. In this regard, I note that Murrieta had recently tried to hire his own father,

[1] Thus, *Pioneer Hotel & Gambling Hall*, 276 NLRB 694, 700 (1985), cited by my colleagues, is wholly inapposite. In that case, the employer agent expressed the view to the applicant that the applicant would not be hired because of his active union status. In the instant case, Eaton expressed no such view to the applicants.

a union member. However, the Union would not permit the father to work for the Respondent, a nonunion company. Thus, Murrieta would naturally express surprise that union members were applying for jobs. Even if Eaton was wholly unaware of the reason for Murrieta's remark, her response to Murrieta was simply a natural reaction to Murrieta's remarks. In these circumstances, I would not find that this normal conversation amounted to coercive conduct. And, even if the remark were an 8(a)(1) violation (because the employees may have perceived the remark differently), the remark surely does not reveal an antiunion animus on the Respondent's part so as to support an 8(a)(3) violation. Rather, it reveals only surprise that union members were applying for a job at the Respondent's nonunion company.

Similarly, Eaton's question and directive to Solano shows no animus. In this regard, I note that Union Organizer Tilmont directed the other applicants to write down their union membership status. Solano entered the office while the other applicants were there, and they greeted each other. Eaton reasonably wanted to know if Solano wished to be part of Tilmont's group. Surely, in these circumstances, her remarks were not coercive.

As Eaton's remarks were noncoercive and lawful, they did not violate Section 8(a)(1). Accordingly, the remarks demonstrate no animus and lend no support to the General Counsel's prima facie case on the 8(a)(3) allegations. Thus, like the judge, I find that the General Counsel established no prima facie case. I would adopt the judge's dismissals.

Ann L. Weinman and *Anne White, Esq.*, for the General Counsel.
Janet A. Lawson, Esq., of Ventura, California, for the Respondent.
David N. Tilmont, Business Manager, of Ventura, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me in Los Angeles, California, on July 17–18, 1995, on an amended complaint issued by the Regional Director for Region 31 of the National Labor Relations Board on April 17, 1995. The charge and amended charge were filed by the International Brotherhood of Electrical Workers, Local Union 952, AFL–CIO (IBEW or the Union) on December 23, 1994, and February 27, 1995. The amended complaint alleges that Greg Murrieta d/b/a GM Electrics (Respondent) committed violations of Section 8(a)(3) and (1) of the National Labor Relations Act.

Issues

The principal issues are whether or not Respondent unlawfully interrogated, threatened, and refused to hire nine job applicants because of their union affiliations. They are: Daniel DeMinico in early November 1994, a group of seven IBEW journeymen on December 2, 1994, followed by John Schimp on December 5, 1994.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Both the General Counsel and Respondent have filed briefs which have been carefully considered. Based on the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admitted he is a sole proprietorship with an office and place of business in Ventura, California, where he is engaged as an electrical contractor in the building and construction industry. At the hearing Respondent further admitted that he annually provides services valued in excess of $50,000 directly to business enterprises within the State of California, which themselves meet one of the Board's jurisdictional standards other than the inflow or outflow standard. I find, therefore, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admitted at the hearing that the Union is a labor organization within the meaning of Section 2(5) of the Act, and I so find.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Greg Murrieta was an active IBEW union member from the winter of 1980 until 1989. Like his father, Murrieta went through the IBEW apprenticeship program, and earned his livelihood through the IBEW. Thereafter, Murrieta became a union electrical contractor. Murrieta continued to pay union dues after becoming a contractor until he filed for bankruptcy in 1993. He operates GM Electrics, a small business which employs, on average, two journeymen electricians and two apprentices. Murrieta is the sole supervisor.

Starting in 1987, the International Brotherhood of Electrical Workers, AFL–CIO, adopted a "salting policy" where members in good standing could work for nonunion companies. Murrieta well remembers the pre-1987 IBEW culture of prohibiting its members from working for nonunion companies. Even under the current policy, union members have to seek approval from the Union to participate. David Tilmont, Local 952's organizer, would ordinarily be the person to approve such placements. The union members who work under this policy receive no salting benefit other than being employed, but are obligated to seek to organize such a business. Murrieta, however, was ignorant of the policy.

Murrieta filed for bankruptcy sometime during the first half of 1993. I infer from the circumstances that the Bankruptcy Court dissolved the IBEW collective-bargaining agreement, and discharged all debts connected to this agreement. Since then, Respondent has been a nonunion contractor, and no longer offers medical or dental benefits to its em-

ployees. Including outstanding fringe benefits, liquidated damages and attorneys' fees, and based on General Counsel's Exh. 2 as well as Murrieta's testimony, Respondent through the bankruptcy process discharged over $100,000 in debts owed to IBEW fringe plans and its members. Tilmont published these facts in the IBEW's newsletter.

Since being discharged in bankruptcy, Murrieta has wanted to hire his father, who remains an IBEW member. Murrieta's father worked for him in 1993, when he was a union signatory, but it continued to be Murrieta's understanding, through discussions with Tilmont about rehiring his father and as well as knowledge acquired through his previous lengthy union affiliation, that he could not hire union members unless he was a signatory to the IBEW collective-bargaining agreement.

B. *IBEW's November Contacts*

Fred Young is an IBEW journeyman electrician. Young saw a GM Electrics' newspaper advertisement, which was run in early November, seeking an experienced journeyman.[1] On November 2, 1994, Young filed a job application with GM Electrics. He did not mention his union membership, although he had worked for Respondent in the past as an IBEW journeyman. Cecily Eaton, GM Electrics' secretary and the only person in the office, informed him that GM Electrics would contact him later. A man, who Young says failed to identify the company he was calling for, called Young a few days later asking him to come in for an interview. Since Young had filled out several applications, he thought the call was from another potential employer. He went to the other employer's place of business to be interviewed. Once Young realized his mistake, he called GM Electrics the same day to ask for another interview. He left a message on the answering machine, but never received a reply.

Another IBEW journeyman, Daniel DeMinico, saw the advertisement for a journeyman in the Thousand Oaks News Chronicle in the beginning of November, 1994. This advertisement prompted him to contact GM Electrics. DeMinico faxed his resume to Respondent. It described DeMinico's union apprenticeship and showed him to be an IBEW member in good standing. Yet it aroused some curiosity because it also showed that he had not completed the IBEW apprenticeship and was working for nonunion businesses. Both of these latter items are inconsistent with good standing as an IBEW constitutional member.[2]

DeMinico and Murrieta spoke by phone the next day. According to DeMinico's version, Murrieta noted DeMinico's nonunion experience, the unfinished apprenticeship and his union membership. Regarding DeMinico's union affiliation, he says that Murrieta asked, "I don't know how to say this any other way, but are you union?" DeMinico replied, "I've been working nonunion as you can see by my resume." DeMinico says Murrieta said that if he found out DeMinico was lying about his union affiliation, he would fire DeMinico for lying. DeMinico says he asked Murrieta why he wanted to know about his union affiliation, and he says Murrieta responded, "I had a falling out with the union; I am not going to hire any union people."

Murrieta testified that he discussed the IBEW apprenticeship as it related to DeMinico's background and type of education, i.e., the extent of his electrical construction training. According to Murrieta, DeMinico mentioned that he had not completed the IBEW apprenticeship. Murrieta also denied ever stating to anyone that he was not going to hire union personnel.

DeMinico testified that he and Murrieta discussed his qualifications at an in-person interview the following day. Both men testified that DeMinico arrived in a truck owned by his current Employer, GB Electrics. DeMinico testified that he was making approximately $20 per hour at GB Electrics, which included use of the truck (although he admits he wasn't supposed to use the truck for personal business). Murrieta testified that they discussed wages, and DeMinico asked for a starting salary of $22 per hour. Eaton, who DeMinico remembers being present, testified that she overheard DeMinico mention a starting salary of $22 an hour. She further testified that Murrieta made a face, as if to say "that's a lot of money to ask for." Oddly, DeMinico said he did not discuss an hourly wage with Murrieta, but asserts he would have worked for $16 an hour if he had also gotten use of a vehicle and a medical/dental plan. He testified that he was looking for more stable, long-term employment than what GB Electrics provided.

DeMinico further testified that Murrieta informed him GM Electrics was getting ready to start some work and still needed to hire three people, and that he should be hearing from Murrieta shortly. DeMinico avers he called Murrieta a day or two later to see if Murrieta had made any hiring decisions; Murrieta stated he had not made any decisions yet. Murrieta added that he was getting ready to start an out-of-county job in about 2 weeks. Although DeMinico left messages on two other occasions, he never heard back from Murrieta.

Murrieta explained that he decided not to hire DeMinico for two reasons: First, he was unimpressed with DeMinico's having driven his employer's truck to interview with him. He thought that was "tacky." Second, he thought DeMinico's request for a $22 hourly wage was too high. He was only hiring at $16 to $18 per hour. In this regard, I specifically reject DeMinico's claim that they did not discuss wages. Eaton's corroboration of Murrieta's version is persuasive. Moreover, I do not doubt that Murrieta had reservations about DeMinico's honesty. He had seen the misuse of the truck and the resume contained some badly explained oddities. I, too, have reservations about his reliability, mainly as a witness. I am not at all persuaded that the remainder of DeMinico's testimony regarding the supposed policy not to hire union members or the amount of additional needed hires is believable.

In addition to Young and DeMinico who are IBEW journeymen, James Gustafson, Ed Yunker, and Leslie Smith also applied for employment due to the November round of advertisements. Murrieta hired Gustafson and Yunker, and paid them $15 and $16 per hour respectively. Gustafson was later fired, because customers complained about his work.

[1] The advertisements in November and December were similar. The November ad reads: "ELECTRICAL—Journey Man Exp. In All Phases Of Electrical. 10 yrs. min. exp. [telephone number]." The December ad reads: "ELECTRICIANS—Journeyman min. 10 yrs. apprentice min. 2 yrs. Call [telephone number]." In each case the suggestion from the language is that one journeyman position was available.

[2] The resume (Jt. Exh. 1(b)) does not appear to be complete. The factual recitation here is extrapolated from DeMinico's testimony.

Murrieta testified that Yunker worked on the temporary, out-of-county, and prevailing wage jobs off and on, and is still working for him at a wage of $16 per hour.

C. *IBEW's December Contact*

IBEW journeyman James Solano saw the advertisement for an experienced journeyman on December 1, 1994. He called Respondent's office and made an appointment to fill out an application at 9 a.m. the following day. Solano then called David Tilmont, the IBEW organizer, and informed him that he was going to apply for work at GM Electrics. The parties stipulated that Tilmont had previously approved of Solano's not disclosing his union affiliation when applying at nonunion shops; Tilmont testified that he suggested that Solano use "fictitious references." The parties also stipulated that Solano had done this at least forty times in the past. Tilmont told Solano he might take a few men down to GM Electrics before 9 a.m. in order to fill out applications.

Tilmont testified that he organized seven men to go and apply for employment at GM Electrics: Tom Vint, Carl Ivie, José Cortez, Richard Fukutomi, Pete Richardson, Fred Young, and Albert Shotwell. Murrieta denied that Young was a part of this group in his testimony, because he could find no application form for Young dated that day. Tilmont testified that he and these seven applicants arrived at GM Electrics on December 2, 1994, at 8:30 a.m., and that Cecily Eaton was the only person in the GM Electrics office. Tilmont introduced himself to Eaton as the IBEW union organizer, and introduced the other men as union members and journeymen wiremen. Ivie testified that a 2-year-old boy, whom he believed to be Murrieta's son, was with Eaton in the office.

Tilmont testified that Eaton passed out applications to the seven men. He instructed the applicants to write either "Union Member" or "Volunteer Organizer" at the top of the applications' first page. He says Eaton told him that GM Electrics had so much work they were turning work down, and that they had more work than they could handle. According to Tilmont, Eaton said they had tried to hire a month earlier, but "got nothing but a bunch of weirdos."

Tilmont testified that while Vint, Ivie, Cortez, Fukutomi, Richardson, Young, and Shotwell were filling out the applications, Eaton received a phone call. Eaton spoke into the hand-held phone, saying, "I have a bunch of applicants here now." Ivie testified that he asked, "Is that Greg?" Eaton nodded yes. Ivie told Eaton, "Tell Greg that Carl Ivie's here applying."

Eaton relayed the message, saying, "Carl wanted me to tell you that he's here applying for a job." Ivie and Tilmont testified that, after listening for Murrieta's response, Eaton stated, "I know he's union. They're all union." The seven men turned in their applications to Eaton while she was still on the phone. Solano and Tilmont testified that as Tilmont and the seven applicants left, they greeted Solano as he walked in. Eaton testified that Solano and the eight men conversed briefly while she was still on the phone.

Eaton testified that because she had seen them talking, she thought Solano knew the eight men. She gave Solano an application, and, acting on her assumption that he knew them, asked him if he was union. Solano answered that he was not union. Eaton—following the practice instituted by Tilmont—instructed Solano to write "Non-union" on the top of his application. Solano testified that Eaton wanted him to write "Non-union" on the top of the applicatio,n because "she had to keep his application separate from the other guys that were in before." Solano completed the application, and turned it in to Eaton.

Tilmont testified that Murrieta called him around 10 a.m. on December 2, 1994. According to Tilmont, Murrieta expressed his interest in hiring Young, Vint, and Ivie, but added, "I don't want any problems. Things are going good now." Tilmont informed Murrieta that the men would do a good job, but would talk to the other employees about the Union on their own time. Murrieta asked, "If I hire these guys, how do I pay them?" Tilmont answered, "Just pay them like you would any other employee." Murrieta asked about fringe benefits. Tilmont responded, "To my knowledge, you're now a nonunion contractor, and I don't believe you offer any fringe benefits, so that's not really an issue at this point, unless you want to get together and discuss a collective bargaining agreement."

Murrieta's version of the context and substance of this conversation is very different. He testified that he was surprised to see IBEW members applying at his business. According to Murrieta, his primary reason to contact Tilmont was to see about clearing his father to work for him. Murrieta asked: "Is it possible for my dad to work with my company again?" Murrieta avers that Tilmont said it would not be a problem but that Murrieta would need to be a signatory to the union agreement first. Murrieta, who wanted to hire his father, set a date to meet with Tilmont. Murrieta had to cancel, and never rescheduled.

Solano testified that he called Murrieta later on December 2, 1994, to see if Murrieta had reviewed his application. Eaton informed Solano that Murrieta had not, and that Murrieta would contact him. Murrieta called Solano back and they met in person at 4:15 p.m. Murrieta eventually did hire Solano.[3] Murrieta testified that one of his employees later notified him that Solano was an IBEW member. Because of this, Murrieta decided to check Solano's references, which turned out to be false. There is no evidence in the record that Murrieta later harassed Solano about his union affiliation. Moreover, Murrieta did not discharge Solano when he discovered the false references.

Tilmont testified that after Solano informed Murrieta of apprentices' right to full prevailing wage on California prevailing wage jobs, Tilmont hand-delivered a letter to GM Electrics notifying Murrieta of Solano's union affiliation. Murrieta promptly corrected his apprentices' pay.

Murrieta says he hired Solano, because GM Electrics had a contract to perform electrical work in the second phase of the Ventura County West Annex project. Solano worked for GM Electrics until late January 1995 when phase two was completed. Murrieta told Solano that he intended to hire him for phase three of the same project. Solano testified that he called and checked a couple of times and but Murrieta said phase three of the project had not started yet. Murrieta testified that two months elapsed before weather permitted phase three to start. Since Solano had not called recently, Murrieta

[3] On December 3, Respondent hired another journeyman, Scott Korecky, at $16 per hour. He was a friend of Yunker who had been hired in November and who had recommended him.

says he figured Solano by then had found other employment and did not recall him.[4]

Finally, IBEW journeyman John Schimp applied at GM Electrics at approximately 8:15 a.m., on December 5, 1994, 3 days after the group of seven union members had applied. Schimp also mentioned that a small child was present as he spoke with Eaton. In addition to listing his previous employers as all being union contractors, and his resume referencing his union affiliation, Schimp was wearing a union hat and coat,[5] and asked, "Is there any problem with my being union?" Eaton, still following Tilmont's practice, asked Schimp to write "Union Member" at the top of his application, which he did. There is no evidence in the record as to whether Schimp was interviewed. In any event, Schimp was not hired.

IV. ANALYSIS AND CONCLUSIONS

As the parties readily recognize, this is a "salting" case, a somewhat artificial fact pattern. It is not an ordinary organizing case, nor is it a situation where employees have been fired, because they exercised their Section 7 right to organize a union. Salting is a tactic created by several construction unions in response to the growth of the nonunion construction business. It is a tactic which in some situations may have legitimacy, particularly where it tends to expose discriminatory hiring policies. One such case which I decided is *Ultrasystems Western Constructors*, 310 NLRB 545 (1993).[6] See also *Sunland Construction*, 309 NLRB 1224 (1992), and *Fluor Daniel, Inc.*, 311 NLRB 498 (1993). Another case which I decided, illustrative of salting which did not have a legitimate purpose, was *Bay Control Services*, 315 NLRB 30 (1994), where the facts demonstrated that the union's aim was not to expose an illegal hiring practice, but to trap an otherwise innocent employer into committing unfair labor practices which it would not otherwise have committed. The Board adopted my recommended dismissal. It is sometimes difficult to discern what the salting union is attempting to accomplish. Nonetheless what I said in *Bay Control Services* still seems proper. There I expressed a concern regarding the credibility of union officials and their followers who participate in such tactics. I said:

> I think it is fair to conclude that the Union's efforts here have been designed to either illuminate evidence of wrongdoing on the part of Bay, Inc. and BCS or to trap them into committing an act which is a provable violation of Section 8(a)(3) and (1). I certainly have no problem with the Union attempting to obtain legitimate employment for its membership. Furthermore, I think it is appropriate for a union aggressively to seek to represent such employees once they have been so employed. Finally, I also think it is appropriate for a union to pursue the rights of the employees it represents under the Act. In the event that an employer is in fact engaging in violations of the Act, a union should bring them to the attention of the Board so that they may be appropriately dealt with. *However, I am not so certain that it is appropriate for a union to lay traps for employers who are otherwise behaving lawfully. If a union does so, then one must also view carefully the verities and genuineness of the individuals who are engaging in that activity.* [Emphasis added. 315 NLRB 30, 35.]

Here, too, it is especially appropriate to carefully scrutinize the verities and genuineness of the individuals who are engaging in that activity.

The proper starting point for analysis is not November 1994 when DeMinico applied for employment, but a year earlier when Murrieta exercised his legal right to declare bankruptcy. I find that Murrieta's successful avoidance of over $100,000 in obligations under the IBEW collective-bargaining agreement is an event which colors all the actions by the union officers and its members. Particularly, I find that Tilmont, who orchestrated both Solano and the group of applicants, had covert intentions regarding GM Electrics. He even understated the amount Murrieta discharged in bankruptcy, downplaying it to $35,000. Yet, Tilmont, more than anyone, would know the actual amount, as he was responsible for publishing the news of Respondent's bankruptcy in the IBEW newsletter. Furthermore, Tilmont euphemistically reported in this newsletter that GM Electrics "declined to resign" a collective-bargaining contract, when in fact the bankruptcy court had nullified it. During his testimony, Tilmont was resistant to admitting that Murrieta's filing bankruptcy avoided the Union's contract. Indeed, he preferred to present Respondent as someone the Union hardly knew and hardly cared about; witness the diminution of the discharged debt to a near negligible figure.

I find Tilmont's testimony contrived in several respects. For example, he testified that Eaton told him GM Electrics had so much work they were turning work down, and they had more work than they could handle. This statement is improbable. Eaton is so inexperienced she is unlikely to have had any knowledge about the level of business. She certainly was not involved in sales and had no input regarding manpower needs. Tilmont's testimony here is without doubt embellishment. He further testified that Eaton said they had tried to hire a month earlier, but "got nothing but a bunch of weirdos." The fact that Murrieta hired Yunker and Gustafson from the first pool of applicants refutes this flippant testimony. Tilmont further testified that Murrieta said he was more interested in hiring Young, Vint, or Ivie, men Murrieta had qualms about, and downplays Murrieta's interest in hiring his own father. Tilmont also made it seem as if there was just a misunderstanding about Murrieta wanting to hire his father, when it is more likely that Tilmont was using Murrieta's father as a way to induce Murrieta to once again become a union contractor.

There is another instance in Tilmont's testimony which smacks of a willingness to shade. By studied omission on direct examination, he made it seem as if Solano's entrance right before Tilmont's exit was just a simple coincidence. It was only on my questioning Solano that he testified that he had notified Tilmont of the opening at GM Electrics. And it was only on a stipulation suggested by the General Counsel resulting from my noting some inconsistent testimony that before making an application to GM Electrics Solano had

[4] The General Counsel does not allege Murrieta's failure to recall Solano to be a violation of the Act.

[5] Schimp not only advertised his IBEW connection by his apparel, his resume noted his past union presidency and his current vice presidency. Such a show was probably unnecessary since Murrieta knew Schimp well enough.

[6] Enfd. in pertient part 18 F.3d 251 (4th Cir. 1994).

made over 40 applications at nonunion shops in a covert way, and Solano had discussed this process with Tilmont. All these characterizations by Tilmont ring of secretiveness, and if anything illuminate Tilmont's probable hidden motive: If GM Electrics did not re-sign a union contract, Tilmont wanted to burden GM Electrics with so much litigation and backpay awards as to put Murrieta out of business.

I also discredit Young's testimony as unreliable. Young's memory is so poor he had to rely on a writing to remember his address. The General Counsel claims that Young filed two applications with Respondent, the first in November and the second in December. Yet, no December application could be found and Respondent vehemently asserts Young was not with the group of seven on December 2, 1994. His entire direct examination had to be led and he seemed to be answering rotely. Frankly, I do not believe his testimony can be relied on here. Only Tilmont says he was present; there is no other corroboration. Even so, for purposes of this analysis I shall assume his presence.

A fundamental corollary to the National Labor Relations Act is that job applicants are included in the term "employees," and thereby protected in their right to be union members. As such, a job applicant cannot be refused employment because of his union affiliation. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185–186 (1941). Further, for purposes of hiring, the term "employee," as used in the National Labor Relations Act, does not exclude paid union organizers. *NLRB v. Town & Country Electric*, 116 S.Ct 450 (1995). The applicants here are therefore entitled to nondiscriminatory consideration for hire under the Act. See, inter alia, *H. B. Zachry Co.*, 319 NLRB 967 (1995). This is true whether or not they are paid by the Union for their salting efforts.

The elements required to support a prima facie showing of discriminatory motivation under Section 8(a)(3) are: union activity; employer's knowledge of the employees' union activity; animus or hostility toward employees' union activity; and a causal connection between employees' union activity and employer's discriminatory conduct, whether an actual refusal to hire or a refusal to consider. The General Counsel has the burden of making this prima facie showing. *Wright Line*, 251 NLRB 1083 (1980).

In presenting her prima facie case of wrongful motive, counsel for the General Counsel showed that all the applicants had engaged in union activity, principally deliberately allowing themselves to be seen as union members. The qualifications DeMinico faxed to Murrieta as a part of the application process disclosed that DeMinico was an IBEW Local 952 member in good standing. Tom Vint, Carl Ivie, José Cortez, Richard Fukutomi, Pete Richardson, and Albert Shotwell, at least, all announced themselves as members, enhancing that status by writing that they were also union organizers. I shall assume Young, if he was there, did something comparable. Similarly, Schimp engaged in union activity by having exclusively worked for union signatories, and by appearing at the office in full union regalia. Of course, with respect to Ivie, Young, and Schimp, their membership was not news to long-time member and signatory contractor Murrieta. By virtually the same evidence, the General Counsel has shown Respondent was well aware of the applicants' union membership and the organizing intentions of the seven. Murrieta agrees that he reviewed all the applications.

However, counsel for the General Counsel has failed to prove Respondent's hostility toward hiring union members or against the Union generally.[7] She argues on several fronts. Noting DeMinico's testimony that Murrieta had supposedly said he had "had a falling out with the Union," she references the bankruptcy proceeding as the probable reason. However, there is nothing improper about seeking protection under the Bankruptcy Act. And, if one does so to the detriment of creditors, including employees, and one recognizes the creditors' dismay, nevertheless it does not follow that describing that dismay as a "falling out" is a statement of union animus.

Later, she argues animus by pointing to the December 2, 1994 treatment of the seven applicants by Eaton contending she (1) interrogated applicants regarding their union affiliation; (2) threatened that Murrieta would not hire job applicants whose applications indicated their affiliation with the Union; and (3) implied that applicants who were members of, or supported, the Union would be treated adversely in the job application process. These theories of union animus involving Eaton fail for several reasons, not the least of which is the spare testimony on those subjects.

First, however, counsel for the General Counsel has failed to prove that Eaton was Respondent's agent at least for the purpose of imputing her putative unfair labor practices to him. She relies on *Diehl Equipment Co.*, 297 NLRB 504 (1989), as support for finding Eaton to be an agent. However, the facts here do not begin to approach those in *Diehl*. Eaton had a very restricted range of authority. She adequately handled the straightforward timekeeping, but when it came to other matters such as billing customers, she only contributed her typing abilities, typing the amounts owed as calculated by Murrieta on preprinted invoices. She then typed the addresses on the envelopes and mailed them. Eaton did not even open the mail. When it came to ordering supplies, she ordered materials as authorized by Murrieta. When it came to writing letters, Eaton, who did not even know what the word "compose" meant, only typed letters as dictated by Murrieta.

As Schimp and Ivie testified, on December 2 and 5, Eaton was directing much of her attention toward Murrieta's son, a 2-year-old toddler. Further, Eaton testified that Murrieta was in and out of the office, visiting jobsites and potential customers. This would suggest that Eaton's main role at the office was as the means for Murrieta to be able to offer regu-

[7] I do note, but distinguish *H. B. Zachry Co.*, 319 NLRB 967 (1995), a similar case where the employer's conduct was found to be inherently destructive. There, however, a policy had been invoked, the so-called "extraneous information policy," which the employer argued lawfully allowed it to nullify job applications which had "union organizer" written on them. The applications even contained a warning that unrequested information would lead to automatic disqualification. The Board found the only business justification Zachry could articulate for the policy was to prevent applicants from proving without a doubt that Zachry had knowledge of their prounion sentiments. However, the case does not apply here. Murrieta had no policy in place which deterred employees from proving they were exercising their Sec. 7 rights. He simply treated this entire situation on an ad hoc basis. In that circumstance, the General Counsel has correctly recognized that this is not an inherently destructive type of case. This is not to say that an antiunion screening policy, if proven, would not have the appearance being inherently destructive.

lar business hours and simultaneously manage his personal and business affairs. Without Eaton, Murrieta would have missed the majority of the job applicants who applied for employment at GM Electrics.

Unlike *Diehl*, supra, Eaton did not examine the applicants' completed applications and make conclusions about applicants' previous employers being union signatories. Moreover, while Eaton arranged the distribution and collection of application forms and may have mentioned Respondent's hiring needs, she did not delve into any concerns which an applicant would consider central to a hiring determination, nor did she negotiate wages or starting dates. It is a common practice for management to delegate rudimentary information gathering to less skilled employees, and then to independently analyze the data received from the process: handling applications is such a case.

Dyer, the secretary found to be an agent in Diehl, had far more responsibility than Eaton. Dyer had worked for her employer for 9 years, and performed both accounting and clerical tasks with little supervision. Eaton is a young woman, apparently in her early twenties. In November and December 1994, the time of the incidents here, she had worked for Respondent for only a little over a year.

Moreover, the applicants did not treat Eaton as if she had any authority for hiring purposes. Ivie and Young, as former employees at GM Electrics, clearly knew Murrieta made all the hiring decisions. Indeed, when Ivie realized Eaton was speaking with Murrieta on the phone, he bypassed Eaton, telling her he wanted Murrieta to know that he was there applying for a job. Also, Ivie and Young most likely knew of the closely supervised relationship between Murrieta and Eaton.

Organizer Tilmont also knew well before December 2, 1994, that Murrieta was the only person at GM Electrics with the authority to hire employees. Tilmont clearly knew DeMinico and Young had applied for employment at GM Electrics in November[8] for he decided on the December 2 approach, because he knew neither had been hired and that Murrieta had at least interviewed and negotiated with DeMinico. Second, Tilmont had earlier negotiated with Murrieta about GM Electrics' re-signing the IBEW contract. Murrieta, who was inquiring about hiring his father, asked Tilmont if he would be able to hire union labor and Tilmont replied he could not unless he signed a collective-bargaining contract. Finally, later on December 2, 1994, Murrieta—not Eaton—contacted Tilmont in order to ask if he could hire his father now, since Tilmont seemed to be willing to let him hire union labor. Certainly Tilmont never thought Eaton had any position of responsibility.

Even Solano did not assume Eaton had any authority in the hiring process. When Solano called GM Electrics to follow up his application, Solano asked Eaton if "Greg" had reviewed the application. Eaton, reinforcing and not contesting this assumption, informed Solano that Murrieta had not reviewed Solano's application, and that Murrieta would call Solano back after he had reviewed it. Further, Murrieta—not Eaton—later interviewed Solano.

These facts simply do not support a finding of agency within the meaning of Section 2(13) of the Act. I am compelled to find that Eaton was not GM Electrics' agent here. Furthermore, even if she was, her response to Tilmont's lead was not a coercive act as defined by Section 8(a)(1). Specifically, see *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985), for the appropriate test relating to the treatment of open and active union supporters, as these were.

The substance of Eaton's statements did not amount to interrogation of, implied threats aimed at, or adverse treatment toward job applicants regarding their union affiliation. In fact, Eaton did not even initiate the practice of asking job applicants to write their union affiliations on submitted applications; David Tilmont and the seven men did that. As Eaton testified, the only motive she showed in furthering this practice when she asked Solano and Schimp to write either union or nonunion on their applications was an interest in uniformity in the information she collected, something the Union had led her to think desirable.[9] Eaton had seen Solano talking with Tilmont and the seven men, and despite Solano's denial, had correctly assumed he was one of them. He just didn't give her the answer she expected. Three days later, when Eaton asked Schimp to note his union membership on the application, he was wearing a union hat and coat, and had asked her if his being union was a problem, she merely assumed he wanted to be considered in the same light as his colleagues.

As Eaton testified, she had worked at GM Electrics for little over a year by December 2, 1994. She had little experience with hiring practices, but saw seven men disclose their union affiliation in writing and mistook their desire to disclose that information for a common hiring practice. After having only four men apply in November, seeing seven men, at Tilmont's direction, write down their union affiliation in concert seemed like overwhelming consensus that it was the

[8] The testimony stated:

A. (Mr. Tilmont) . . . . [W]e had information from the prior application process that GM was screening applicants, and we wanted somebody to be able to be hired. We wanted to find out if that was, indeed, the case.

Q. Would that prior complaint be DeMinico?

A. Yes.

Q. Did Fred Young complain?

A. Fred did not complain. Knowing that GM had prior knowledge of Fred, I just made the assumption that hey, there's two union members, he did not hire them, this is what it looks like is happening to me.

[9] The testimony stated:

Q. (By Ms. Lawson) Did you ask him [Solano] to write nonunion on his application?

A. (Ms. Eaton) Yes, I did.

Q. Why was that?

A. Because I'm not real familiar with the union, and I assumed that if he was speaking with them and they had all wrote it on there, why shouldn't he write whether or not he was with them. I'm not real familiar with that stuff, so I thought I'd ask him.

Q. So is it your testimony then, that you only asked him because the other people had done it?

A. Right. And I didn't know if that was customary. If you're with them you write it, I don't know.

Q. Had you ever discussed this with Greg before?

A. No.

Q. Had Greg ever told you to treat applications that came in marked union differently from other applications?

A. No. They all went in the same file.

appropriate thing to do. Thus, under the rule of *Rossmore House*, supra, her behavior could not be coercive.

And, Eaton's statement to Murrieta on the phone: "I know [Ivie's] union, they're all union," was not an implied threat of any kind. Eaton only conveyed to Murrieta information which Tilmont had directed Vint, Ivie, Cortez, Fukutomi, Richardson, Young, and Shotwell to write on their applications. Similarly, it is clear that she was responding to Murrieta's surprise that union members were applying for work with him. He well knew such applications were contrary to the IBEW's longstanding rule prohibiting them from doing so. Insofar as agency is concerned, it is more likely that Eaton, because of Ivie's prompting, acted as the seven men's agent in conveying their union membership information over the telephone to Murrieta, not Murrieta's agent for relaying a coercive remark. Her statement to Murrieta here does not demonstrate animus in any way, either hers or Murrieta's. It was not a threat against union applicants nor did it imply that union applicants would be treated adversely.

Counsel for the General Counsel next argues that Eaton stated to Solano that she kept union applications separate from nonunion applications. However, in this battle of recollections, I find Eaton's testimony to be the more credible. First, Solano was not honest in his application for employment. Second, the applications were not in fact segregated. She put them all in the same file for Murrieta and he reviewed them all. See fn. 9, supra. Third, Solano is clearly seeking to bolster the Union's general attack on Respondent.[10]

Counsel for the General Counsel claims Respondent violated Section 8(a)(1) by coercively interrogating DeMinico, and bootstraps that to a finding of animus. However, I see no indication of union animus here either. Murrieta's questions had the legitimate purpose of trying to understand DeMinico's assertion that he was an IBEW member, who had not completed the IBEW apprenticeship, yet had worked only at nonunion businesses. The inconsistency is what bothered Murrieta about DeMinico's resume and what prompted Murrieta to ask DeMinico about the extent of his training and his union membership, a fact which DeMinico had already revealed in his resume.[11]

Murrieta's statement that he had a falling out with the Union and couldn't hire Union anymore was grounded in truth. It is unnecessary to repeat my earlier findings about this remark in a bankruptcy context as being noncoercive. Moreover, if Murrieta really said anything about being unable to hire union labor, it was not because he would discriminate against them, it was because Tilmont had told him he could not hire them and because he was aware of the longstanding IBEW culture which prohibited the practice. But I think DeMinico is distorting here, and I do not credit him.

Given the odd background which DeMinico described himself as having, DeMinico's testimony that Murrieta said he would fire DeMinico for lying if it turned out that DeMinico was actually a union member does not result in an 8(a)(1) violation. First, DeMinico's testimony was in response to a leading question. Then, from the context in which Murrieta supposedly made the statement, it seems probable Murrieta was more concerned about a prospective employee's general truthfulness than whether he was lying about the Union. Moreover, I cannot fully credit DeMinico's version of this conversation here. Murrieta's testimony seems to ring more true. On balance, I find that Murrieta did not violate Section 8(a)(1).

Finally, counsel for the General Counsel seeks to prove animus by arguing that on or about December 2, 1994, Respondent, acting through Greg Murrieta, created the impression to job applicants that union membership or support would be viewed adversely in the application process. She specifically relies on Tilmont's testimony about the telephone conversation in which Murrieta supposedly told him said that he did not want any employees to "stir things up" because he did not "want any problems." First, I have previously discredited Tilmont with respect to this conversation and there is no real reason to credit him now. I think it is quite clear that the Union has an institutional bias against Respondent and its officials cannot really be trusted to objectively recount facts related to him. In fact, my earlier observation about the Union's purpose, that if it could not bring him back into the fold, it wished to burden him with litigation and backpay so as to drive him to financial ruin, is in some measure supported by Union Vice President Schimp's belated arrival on the scene. He was clearly part of the scheme, dressing in full IBEW regalia. It almost seems that he was dressed to join a party. Apparently he had been unable to join the group on December 2, but I infer that he had learned of Tilmont's "success" that day and wanted to position himself so that he, too, could become an additional backpay claimant. The Union's bias is clear.

[10] Solano's testimony smacks of rehearsal. First, there were so few applications, there would be no point in segregating them. Second, the seven had segregated themselves by what they had written at the top. Third, this kind of testimony has become so commonplace in salting cases that it has now become some sort of mantra to be chanted whenever there is a suspicion of an illegal screening practice. Recently, in *Bay Control Services*, supra, an IBEW witness seems to have perjured herself in giving false testimony regarding supposed segregation of applications.

[11] The General Counsel cites *Adco Electric*, 307 NLRB 1113 (1992), and *United L-N Glass*, 297 NLRB 329 fn. 1 (1989), as support for an unlawful interrogation in a job interview context. I do agree that an applicant may fear any answer he may give regarding that subject as observed by the Board in *United L-N Glass*. Yet, I do not think Adminstrative Law Judge Linton in *Adco Electric* intended to make job interviews a special circumstance where the quantum of proof is lessened. The proper view seems to be that taken by the Board in *Mosher Steel*, 220 NLRB 336 (1975), a prestrike case, a circumstance which is at least as sensitive as a prehire interview. There the Board said that questions about employee strike intentions were not per se unlawful, but had to be judged based on all the relevant circumstances. See also *Bay Control Services*, supra at 43, which applied *Mosher* to a combined prehire and prestrike fact pattern. Clearly questions about union training are entirely relevant, for union apprenticeship programs are among the best training grounds available. They are a good measure of competence. A discussion which begins with that topic can lead noncoercively into employment experience (including working for union contractors) and union background including membership. Such innocent and noncoercive conversations occur in the construction industry daily. It is for that reason that the Board wishes to avoid the per se approach which the counsel for the General Counsel seems to be suggesting and asks that an inquiry be made into the surrounding circumstances so the context of such a conversation is clear.

Further, there is at least some affirmative evidence that Respondent did not harbor union animus, but was relatively neutral on the issue. When Murrieta discovered that Solano was an IBEW member, triggering a background check which revealed Solano's false references, he did nothing. He did not harass him in any way. Murrieta did not even seek to terminate Solano's employment. Instead, he offered to keep him on during the project's third phase. Apparently what concerned him most was the level of performance which Solano gave him. Thus, Solano's quality of work overrode the fact that he was affiliated with the IBEW. Moreover, when Tilmont sent his letter announcing Solano's intentions and when Solano complained about the apprentice pay on prevailing wage jobs, Murrieta responded without rancor. A display of neutrality such as this tends to undermine any other claim of union animus. Cf. *Sun Coast Foods*, 273 NLRB 1642, 1644 (1985).

Accordingly, I find that the General Counsel has failed to prove Respondent's union animus.

Turning to the actual treatment of the applications, I conclude first that DeMinico's union connection was not a factor in Murrieta's not hiring him. Two nondiscriminatory reasons overrode any inclination Murrieta had to consider DeMinico's job application. Murrieta believed it was inappropriate for DeMinico to drive his current employer's truck on personal business, particularly using the truck to seek employment elsewhere. If DeMinico was willing to misuse his current employer's equipment in such a way, he reasoned, DeMinico would be willing to misuse Murrieta's equipment, too. Second, Murrieta, who was willing to pay a $16–$18 per hour on nonprevailing wage jobs, would not meet DeMinico's proposed starting salary of $22 per hour.

The General Counsel has also failed to show a causal connection between the applicants' union membership and Respondent's declining to hire Schimp, Fukutomi, Ivie, Pete Richardson, Shotwell, Vint, and Young. A nexus to a specific job is necessary in order to prove discrimination here; GM Electrics needed to replace one journeyman electrician (Gustafson who was not working out) at a $16–18 per hour, and add one who would also serve as a journeyman electrician at the prevailing wage of $33.68 per hour on the county job. He filled the openings with Korecky and Solano. The General Counsel has not shown that any of these eight was more qualified than these two. Certainly she has not shown that there were more openings.

In any event, Murrieta's reasons for declining the applications of Schimp, Fukutomi, Ivie, Richardson, Shotwell, Vint, and Young all withstand scrutiny. Murrieta had a recollection which cast doubt on Schimp's trustworthiness; Schimp, on a jobsite many years before, had suggested that Murrieta steal drill bits. Young, who had missed an appointment a month earlier, did not seem reliable to Murrieta. Murrieta had worked with Vint before, and thought him to be an unmotivated worker. He thought he saw Carl Ivie "flipping him off" at gas station in 1993 close to the time GM Electrics discharged its debt to the IBEW; GM Electrics owed Ivie benefits, which had been discharged as a result of the declaration of bankruptcy. Fukutomi, Richardson, and Shotwell failed to write down a desired salary; Murrieta believed if these three applicants did not know how much they were worth, it would be hard for GM Electrics to assess how much they were worth without a time investment. Murrieta thought it would be hard to negotiate with these three men without a touchstone as to worth.

The rebuttals offered by Schimp, Ivie, and Vint are unconvincing. Their recollections of what actually occurred were self-serving; who would admit to promoting theft, being crass, or being a slow worker? Murrieta's recollections may also be viewed as self-serving, but the hiring process always includes subjective factors which are nearly impossible to second guess. Such second guessing should not take place where the elements of a violation remain unproved.

To summarize, I find that the General Counsel has failed to provide sufficient credible evidence that Respondent violated the Act as alleged. Accordingly, I shall recommend that the complaint be dismissed in its entirety.

Based on the foregoing facts and analysis, I make the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The IBEW is a labor organization within the meaning of Section 2(5) of the Act.
3. The General Counsel has failed to prove by sufficient credible evidence that Respondent violated the Act as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The complaint is dismissed in its entirety.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.