FES (a Division of Thermo Power) *and* Plumbers and Pipefitters Local 520 of the United Association. Case 5–CA–26276

May 11, 2000

DECISION AND ORDER REMANDING

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

The question presented by this case is whether the Respondent unlawfully refused to consider for employment and refused to hire nine applicants because of their union activity or affiliation.[1] The issues raised by the case, which are largely evidentiary and procedural, go to the most fundamental rights guaranteed by the Act. Protecting the exercise by workers of full freedom of association and self-organization is an express, central policy of the Act. See NLRA, Section 1. Unquestionably, the denial to employees of access to the work force because of their union activity or affiliation runs directly against this policy. The Board's treatment of allegations of discriminatory refusals to consider or to hire and its determination of related remedial issues is a measure of the Board's effectiveness in giving substance to the rights it is charged to protect.

On August 10, 1999, the Board held oral argument in this case to address questions concerning the treatment of refusals to consider and refusals to hire applicants for employment in violation of Section 8(a)(3) of the Act.[2] The Board set the following issues for oral argument:

1. What is the appropriate remedy for the finding of a discriminatory refusal to consider applicants for employment? What must the General Counsel establish in the hearing on the merits to obtain such a remedy? What may appropriately be left to compliance and which party bears the burden of proof at each stage?

2. What is the appropriate remedy for the finding of a discriminatory refusal to hire applicants for employment? What must the General Counsel establish in the hearing on the merits to obtain such a remedy? What may appropriately be left to compliance and which party bears the burden of proof at each stage?

The Board also asked the parties to address the following cases in connection with these issues: *Ultrasystems Western Constructors v. NLRB*, 18 F.3d 251 (4th Cir. 1994); *B E & K Construction Co.*, 321 NLRB 561 (1996), enf. denied 133 F.3d 1372 (11th Cir. 1997); *NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953 (6th Cir. 1998); and *Starcon, Inc. v. NLRB*, 176 F.3d 948 (7th Cir. 1999).

The Board has considered the decision and the record in light of the exceptions[3] and briefs, the oral argument, and the preargument and postargument briefs, and has decided to affirm the judge's finding that the Respondent unlawfully refused to consider nine union applicants for employment, but to remand this proceeding to the judge for further hearing concerning the discriminatory refusal-to-hire allegations.

I. BACKGROUND

In *Fluor Daniel, Inc.*, 311 NLRB 498 (1993), the administrative law judge found that the respondent violated Section 8(a)(3) by discriminatorily refusing to hire approximately 50 applicants who were volunteer union organizers. The respondent excepted, inter alia, to the judge's denial of its motion to require the General Counsel to specify the job positions that the respondent allegedly had unlawfully filled. The Board, however, adopted the judge's recommendations. It ordered the respondent to offer the discriminatees instatement[4] to positions for which they applied and deferred to the compliance stage the issue of whether appropriate job openings were available. The Court of Appeals for the Sixth Circuit refused to enforce the Board's order, disagreeing with the Board's analysis of refusal-to-hire cases. *NLRB v. Fluor Daniel,* supra, 161 F.3d 953. The court stated that there are two elements to an 8(a)(3) violation: antiunion animus and the occurrence of an action covered by the Act such as a discharge or failure to hire. The court con-

[1] On September 29, 1998, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

[2] The General Counsel filed a preargument brief. The Charging Party and the Respondent filed preargument and postargument briefs. Amicus curiae International Brotherhood of Boilermarkers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL–CIO (Boilermakers) filed preargument and postargument briefs. Amici curiae American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) and the Building and Construction Trades Department, AFL–CIO (Building Trades Department) filed joint preargument and postargument briefs. Amici curiae Associated Builders and Contractors, Inc. (ABC), the Chamber of Commerce of the United States of America (Chamber), and Independent Electrical Contractors, Inc. (IDE) also filed joint preargument and postargument briefs.

[3] The Respondent argues that the General Counsel and the Charging Party are precluded under the Board's Rules and Regulations from arguing that the Respondent discriminatorily refused to hire union applicants because they did not file exceptions to the judge's failure to find a discriminatory refusal-to-hire violation. We find no merit in this argument. The judge deferred the refusal-to-hire issue to the compliance stage for resolution. Thus, the judge recommended in the remedy section of his decision that the Respondent provide backpay to those whom it would have hired but for its unlawful conduct, with the determination to be made in compliance if the Respondent would have hired any of the nine discriminatees. Because the General Counsel and Charging Party prevailed on the merits of the discriminatory refusal-to-consider allegation, and the refusal-to-hire issue was expressly reserved for the compliance stage, we find that Sec. 102.46(b)(2) of the Board's Rules and Regulations, providing that any exception not urged shall be deemed to have been waived, does not preclude consideration of the refusal-to-hire allegation. See *Pay Less Drug Stores Northwest*, 312 NLRB 972 (1993) (where the judge found in favor of the General Counsel on one of his theories, he was not required to file exceptions to preserve another theory of liability advanced at the hearing), enf. denied on other grounds 57 F.3d 1077 (9th Cir. 1995).

[4] Because our decision addresses remedies for applicants for employment, we have used the term "instatement" (rather than the more familiar term "reinstatement"). An "instatement" remedy requires an employer to offer the discriminatees employment in the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions.

cluded that if an employer has no job openings, there can be no 8(a)(3) violation because no action covered by the statute has taken place. In short, there is no action "in regard to hire" as required by Section 8(a)(3). Consequently, the court found that the General Counsel must prove that there was an actual failure to hire to establish a refusal-to-hire violation. To do so, the General Counsel must match qualified applicants with available jobs as an element of his prima facie case. This must be done at the hearing on the merits where the respondent has the opportunity to meet its burden of showing that it would have made the same hiring decisions even in the absence of union activity or affiliation. The court disagreed with the Board's deferral of job matching to the compliance stage. "Determining the scope of an employer's liability in compliance proceedings seems to us counterintuitive, even backwards. Compliance proceedings are better focused upon remedial questions." Id. at 970.

In *Ultrasystems Western Constructors*, 310 NLRB 545 (1993), the Board found that the respondent violated Section 8(a)(3) by maintaining a hiring policy which screened job applicants to discover suspected union sympathizers and by refusing to consider 66 applicants because of their union sympathies. No findings were made about how many jobs were available and how many would have been filled by union applicants in the absence of discrimination. Although the administrative law judge's recommended order directed the respondent to make whole only those applicants who may have suffered losses by reason of the discriminatory refusal to consider them, the Board modified this order to direct backpay to all 66 applicants and instatement in positions for which they applied. On review, the Court of Appeals for the Fourth Circuit agreed with the Board that the respondent had discriminatorily refused to consider the 66 applicants. *Ultrasystems Western Constructors v. NLRB,* supra**,** 18 F.3d 251. The court, however, held that the Board exceeded its remedial powers by ordering backpay and instatement for all the discriminatees without regard to the availability of jobs. Id. at 259. The court observed that if there were only 10 openings, it would go beyond remedying the discrimination to order instatement of 66 applicants with backpay. The court held:

> The Board could neutralize the discrimination in screening by ordering consideration of the 66 applicants in some preferential manner on later jobs. And perhaps it also could order reinstatement with backpay for those found, in a compliance proceeding, to have been denied actual positions. Thus, a refusal to consider begets a remedy that the employer must consider, and when the refusal to consider also results in an actual refusal to hire, the refusal begets the remedy that the employer must hire those applicants who otherwise would have been hired. Id.

On remand, the Board directed that it be determined in compliance whether the respondent would have hired any of the applicants but for its unlawful refusal to consider their applications, and that those for whom such findings were made be offered immediate instatement and backpay. 316 NLRB 1243, 1244 fn. 7 (1995).

In subsequent cases, the Board followed the approach taken in its decision on remand in *Ultrasystems Western Constructors.* For example, in *B E & K*, supra, 321 NLRB 561, the Board found that there were seven applicants who were discriminatorily refused consideration for employment at a time when no job openings existed for them. The Board ordered that if the General Counsel showed in compliance that nondiscriminatory consideration would have resulted in the hiring of the seven applicants into positions equivalent to those for which they applied that became available subsequent to their applications, the discriminatees were to be offered backpay and instatement in current equivalent jobs.[5]

The Board followed the *Ultrasystems Western Constructors* approach again in *Starcon, Inc.*, 323 NLRB 977 (1997). In that case, the Board found that the Respondent violated Section 8(a)(3) by "refusing to hire or even consider" 80 applicants because of their intent to organize the Respondent's work force. Id. at 982. The Board ordered instatement and backpay for all 80 applicants and deferred to the compliance stage questions concerning the number of jobs that would have been available during the period of the discriminatory conduct**.** On review, the Seventh Circuit agreed with the Sixth Circuit in *Fluor Daniel* to the extent that it held that the employer must be allowed to show at the hearing on the merits that it would not have hired the discriminatees even in the absence of their union activity or affiliation. *Starcon, Inc. v. NLRB*, supra, 176 F.3d at 951. It disagreed, however, with the Sixth's Circuit's requirement that the General Counsel match qualified applicants with job openings as an element of his prima facie case for a refusal to hire violation. Instead, it held that the General Counsel must "at a minimum" establish in the unfair labor practice proceeding the number of union supporters who would have been hired had the respondent "not been actuated by hostility to unionization" (and it stated that the number could be as low as one). 176 F.3d at 951–952. It implied that establishing which particular applicants would have obtained which of the discriminatorily withheld jobs could be determined in compliance. The court agreed that there was substantial evidence of hiring violations, but because the General Counsel had not shown how many applicants had been the victims of a discriminatory refusal to hire, the court enforced only the cease-and-

[5] On review, the Eleventh Circuit did not reach this remedial issue as it found that substantial evidence did not support the Board's finding of a discriminatory practice. 133 F.3d 1372.

desist provision of the order and denied enforcement of the affirmative relief provisions.

II. POSITION OF THE PARTIES AND AMICI CURIAE

A. The General Counsel's Position

The General Counsel proposes that the Board adopt a new framework for analyzing cases of discriminatory refusals to consider or to hire applicants for employment. In cases where hiring has taken place, the General Counsel proposes no change from current Board precedent. However, in cases alleging a refusal to consider where no hiring has taken place, the General Counsel urges departure from the approach taken in *B E & K Construction*, supra, where the Board, having found a discriminatory refusal to consider, ordered that the General Counsel be allowed in compliance to show that subsequent job openings occurred and that the discriminatees would have been hired for those openings but for the unlawful conduct. The General Counsel contends that this approach amounts to the litigation of an unfair labor practice allegation at the compliance stage. He proposes, instead, that if a discriminatory refusal to consider has been established and no hiring has taken place, the remedy should be limited to a cease-and-desist order and an order to consider the discriminatees and to hire them if they meet the employer's nondiscriminatory standard. Where subsequent job openings arise, the General Counsel argues that the question of whether the openings were filled using lawful considerations should be the subject of a new charge alleging an actual refusal to hire the applicant.

B. The Charging Party's Position

The Charging Party argues that although both refusal-to-consider and refusal-to-hire allegations are present in this case, the better course is to analyze the case as a refusal-to-hire violation because there is evidence of actual hiring. The Charging Party further argues that the General Counsel established that union supporters applied at the time the Respondent was hiring and that the Respondent did not hire the applicants, in part, because of their union affiliation or support. In addition, the Respondent failed to show that it would not have hired the union applicants regardless of their union affiliation. The Charging Party contends that the General Counsel has, therefore, established a refusal-to-hire violation and that the Respondent should not be given a second chance at compliance to litigate the hiring issue.

C. The Respondent's Position

The Respondent urges the Board to adopt the approach of the Sixth Circuit in *NLRB v. Fluor Daniel, Inc.*, supra, which requires that to establish a prima facie case of discriminatory refusal to hire, the General Counsel must show that there was a specific job opening available for which the applicant was qualified and that antiunion animus was involved in the decision not to hire the applicant. The Respondent argues that the General Counsel failed to establish a violation here because he did not match applicants to available job openings.

D. The Boilermakers' Position

The Boilermakers urge the Board to find that the qualification of applicants should not be an element in the General Counsel's prima facie case for either a refusal-to-consider or a refusal-to-hire violation. The Boilermakers argue that only the employer ultimately possesses the information about whether an applicant is competent and meets the requirements for a specific job. It may be virtually impossible for the General Counsel to determine the specific qualifications the employer is seeking.

The Boilermakers also argue that where there is a refusal-to-hire allegation, that allegation should be addressed and resolved in the hearing on the merits. Where both refusal-to-consider and refusal-to-hire allegations are involved, the Board should determine whether the refusal to consider gave rise to a refusal to hire in the liability phase of the proceeding.

E. The AFL–CIO and Building Trades Department (AFL–CIO) Position

The AFL–CIO does not urge a departure from the Board's current treatment of refusal-to-consider and refusal-to-hire violations. It argues that the Board's holding that a discriminatory refusal to consider violates the Act regardless of the contemporaneous availability of positions is correct because Section 8(a)(3) reaches beyond the ultimate step of the hiring process and proscribes discrimination "in regard to hire." Further, such discrimination is likely to discourage union members from applying again when jobs might be available. The AFL–CIO also argues that compliance is an appropriate stage for determining if the applicant who was unlawfully refused consideration would have been hired in the absence of the unlawful conduct. It argues that the violation is the refusal to consider and a subsequent refusal to hire is the harm flowing from that violation. The AFL–CIO points out that compliance proceedings afford the parties full due process and are reviewable in the courts of appeals. Finally, the AFL–CIO argues that if no jobs are available and an instatement order is therefore not appropriate, the discriminatee should be granted preferential consideration for any further opening and the employer should be required to give notice to the discriminatee, the charging party and the General Counsel, of future openings.

F. ABC, Chamber, and IDE's Position (ABC)

ABC urges the Board to adopt the reasoning of the Sixth Circuit in *Fluor Daniel* that in order to establish a refusal-to-hire violation, the General Counsel must show that an employer with antiunion animus has denied specifically available job openings to each qualified alleged discriminatee. In this regard, ABC argues that there can be no violation of Section 8(a)(3) for refusing to consider

applicants, absent actual job openings for which such applicants would have been hired. It argues that all liability should be determined in the unfair labor practice proceeding and that compliance proceedings should be reserved only for the calculation of damages for those discriminatees who have been proven to have been discriminatorily refused available positions.

III. DISCUSSION AND ANALYSIS

We have given careful consideration to the arguments of the parties and the amici curiae and to the decisions of the Courts of Appeals for the Fourth, Sixth, and Seventh Circuits. We acknowledge that there has been some confusion over the elements of 8(a)(3) violations concerning refusals to hire and refusals to consider applicants for employment and the stage at which the employer may present its defense in these cases. Our decision today is designed to provide clarification. Through the framework set forth below, we give guidance to all parties litigating refusal-to-hire and refusal-to-consider violations by making clear the elements of the violation, the respective burdens of the parties, and the stage at which issues are to be litigated.[6]

A. Elements of a Discriminatory Refusal-to-Hire Violation

To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire,[7] at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.[8] Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity**.** In sum, the issue of whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits.

If the General Counsel meets his burden and the respondent fails to show that it would have made the same hiring decisions even in the absence of union activity or affiliation, then a violation of Section 8(a)(3) has been established. The appropriate remedy for such a violation is a cease-and-desist order, and an order to offer the discriminatees immediate instatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions, and to make them whole for losses sustained by reason of the discrimination against them.

This framework for analysis appropriately allocates the *Wright Line* burdens in a refusal-to-hire case. Thus, in a discriminatory discharge case, there generally is no question that the alleged discriminatee was in the employer's work force. The question centers on why he was removed from the work force. The General Counsel's burden, therefore, is to show that protected conduct was a motivating factor in the decision to discharge the alleged discriminatee. In contrast, the question in a discriminatory hiring case is why the applicant was not taken into the employer's work force. That question presupposes that there were appropriate openings in the employer's work force available to the applicant. In a discriminatory hiring case, therefore, the General Counsel must show that antiunion animus was a motivating factor in the decision not to hire, and that there was at least one available opening for the applicant. The showing of an available opening entails a showing that the applicant had experience or training relevant to the announced or generally known requirements of the opening. *GM Electrics*, 323 NLRB 125, 128 fn. 13 (1997) (the General Counsel showed availability of jobs for applicants by evidence that applicants were "journeyman electricians" who applied for "journeyman electrician" positions).

Our framework for applying *Wright Line* to discriminatory hiring cases adheres to Board precedent. See, e.g., *GM Electrics*, supra, and *Casey Electric*, 313 NLRB 774 (1994) (noting that the General Counsel established

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[6] Prior Board cases are overruled to the extent they are inconsistent with our decision today. In accordance with our usual practice, we shall apply our new approach not only "to the case in which the issue arises," but also "to all pending cases in whatever stage." *Deluxe Metal Furniture Co.,* 121 NLRB 995, 1006–1007 (1958).

Our decision does not address affirmative defenses to allegations of discriminatory refusals to consider or to hire applicants for employment and does not affect precedent governing such defenses.

[7] The General Counsel may establish a discriminatory refusal to hire even when no hiring takes place if he can show that the employer had concrete plans to hire and then decided not to hire because applicants for the job were known union members or supporters. See, e.g., *V.R.D. Decorating*, 322 NLRB 546, 551–552 (1996) (employer held to have discriminatorily refused to hire applicants where employer advertised for experienced commericial/industrial painters, received applications from known union members or supporters with experience in commercial and industrial painting, and delayed filling the advertised jobs in order to avoid making job offers to the union applicants).

[8] We do not address the nature of proof necessary to show antiunion motivation, because that was not an issue in this case. Rather, we adhere to existing law on that issue. Our concurring colleague, Member Brame, insists upon "direct evidence" of discriminatory motivation. In most cases where 8(a)(3) violations are found, the conclusion is inferred from all of the circumstances. We know of no case which eschews this approach, and we would not abandon it.

appropriate openings for applicants and that applicants for openings of electrician were experienced electricians). We realize, however, that there has been some confusion over the requirement that the General Counsel make an initial showing that applicants have experience or training relevant to the announced or generally known requirements of the positions for hire. Some of our past decisions have not included any reference to qualifications of the applicants in stating the elements of a refusal-to-hire violation. See, e.g., *Big E's Foodland, Inc.,* 242 NLRB 963, 968 (1979). We, therefore, clarify that the General Counsel must make this initial showing.[9]

The General Counsel's burden in this regard is limited to showing that the applicants met the employer's publicly announced or generally known requirements of the position, to the extent that these facial requirements are based on nondiscriminatory, objective, and quantifiable employment criteria. For example, if an employer announces a position requiring "two years of experience as a licensed electrician and outstanding skills in wiring," both objective and subjective criteria are involved. "Two years of experience as a licensed electrician" is an objective criterion. An applicant will know whether he meets that requirement. In contrast, "outstanding skills in wiring" is a subjective criterion based on the employer's judgment of skills. In such circumstances, the General Counsel meets his burden by showing that the applicants have 2 years of experience as a licensed electrician. Proof that the applicant does not meet the wiring skills qualification rests with the employer. Similarly, if there is any ambiguity in the employer's statement of requirements for the position or any suggestion that the requirements are not rigid (e.g., "two years preferred"), the burden is on the employer to show that the applicant failed to meet these imprecise qualifications. The employer may meet its burden by proving that the applicants did not have the skills or imprecise qualifications it was seeking, regardless of their relevant experience and training, or that others who were hired had superior qualifications, and that it would not have hired them for that reason even in the absence of their union affiliation or support.

Regardless of whether subjective or objective employment criteria are at issue in the position for which applicants apply, the General Counsel may show, in the alternative, that the employer did not uniformly adhere to the announced requirements, or that the requirements were, themselves, pretextual or pretextually applied. For example, assume that the employer's announced requirements for a position of electrician are 2 years' experience as a licensed electrician with at least 1 year of experience in commercial wiring. Assume further that the General Counsel shows that there are two applicants for this position. Applicant A has 2 years of experience as a licensed electrician, including 1 year of experience in commercial wiring. Applicant B has 2 years of experience as a licensed electrician, including 1 year of experience in residential wiring, and no experience in commercial wiring. Assume finally that the General Counsel shows: (1) the employer decided to hire B because he made a more favorable impression in the interview, even though A met the announced requirements and B did not; and (2) the employer reversed that decision and hired A when it discovered that B was a union supporter. In such a case, the General Counsel has met his burden on training and experience because he has made an initial showing that the announced requirements were applied as a pretext for refusing to hire a union applicant.

Another example of pretext involves the following scenario. The employer advertises for electricians with 2 years' experience in commercial wiring. The employer receives only one application. The applicant, who indicates union affiliation on the application, has completed an apprenticeship program for electricians working in the construction industry but has no experience in commercial wiring. The employer hires no one, even though the record shows that it has an immediate need for electricians.[10] Assuming the General Counsel can show antiunion animus in such a case, he has met his burden on training and experience by showing that the employee had relevant or equivalent experience and that the employer chose to hire no one even though it needed electricians. In other words, the General Counsel has made a showing that the announced requirements were applied as a pretext to avoid hiring a union applicant.

The evidentiary scheme discussed above is an appropriate allocation of the burdens. The applicants are in the best position to provide objective evidence about their training and experience. Thus, it appropriately falls to the General Counsel to show that the applicants met the objective employment criteria of the position at issue.[11] On the other hand, the employer alone knows the full range of its subjective and/or judgmental employment criteria. Further, the employer is in possession of the information about the

[9] Our dissenting colleague asserts that we have departed from *Wright Line.* However, as discussed above, there has been at least some degree of inconsistency and confusion in the application of *Wright Line* to "refusal-to-hire" cases. In our decision herein, we have simply sought to eliminate the inconsistency and confusion. Further, in doing so, we note that there is a difference between a discharge case and a refusal-to-hire case. In the former, the employee has been performing for the employer in the job. Thus, he presumptively meets the facial requirement for the job. In the latter case, this is not so.

[10] In our hypothetical, the record facts show that the employer has a need for electricians. We do not substitute our business judgment for that of the employer.

[11] According to our dissenting colleague, who cites Judge Posner's penguin hypothetical in the Seventh Circuit's *Starcon* decision, if an employer stated in his advertisement that penguins would not be hired, the General Counsel could establish his case, even if the applicant were a penguin. With due respect to our colleague, Judge Posner, and the Seventh Circuit, we believe that where such an objective and precise qualification is set, the General Counsel must show that the applicant meets that criterion or that the criterion is pretextual.

qualifications of the applicants it has hired. It is, therefore, appropriate that the burden fall to the employer to establish that the applicant did not meet its specific criteria for the position, was otherwise unqualified for the positions, or was not as qualified as those who were hired.

There has also been confusion and controversy about discriminatory refusal-to-hire cases where the number of applicants exceeds the number of job openings. As discussed earlier, the Sixth Circuit held in *Fluor Daniel* that there could be no violation of Section 8(a)(3) if there were no jobs available and that to establish a discriminatory refusal to hire, the General Counsel had to match each qualified applicant to an opening. The Seventh Circuit disagreed with this approach and held in *Starcon* that the General Counsel need only show that one applicant was discriminated against to establish a violation of Section 8(a)(3) warranting a cease-and-desist order. If, however, the General Counsel seeks a backpay and instatement remedy, then the General Counsel must show, at the unfair labor practice stage of the proceeding, how many of the applicants the employer would have hired had it not discriminated against union applicants.

We agree with the Seventh's Circuit's reasoning. Accordingly, we find that in cases involving numerous applicants, the General Counsel need only show that one applicant was discriminated against to establish a refusal-to-hire violation warranting a cease-and-desist order. If the General Counsel seeks an affirmative backpay and instatement order, he must show that there were openings for the applicants. Consequently, if, as here, there is evidence that the respondent has hired employees or had openings available, the General Counsel must show at the hearing on the merits the number of openings that were available, that the applicants had the training or experience relevant to the openings, and that antiunion animus contributed to the respondent's decision not to hire the applicants for the openings. Once the General Counsel makes this showing, the burden shifts to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. Proof of the availability of openings cannot be deferred to the compliance stage of the proceeding.

If the General Counsel is seeking a remedy of instatement and backpay based on openings that he knows or should have known have arisen prior to the commencement of the hearing on the merits, he must allege and prove the existence of those openings at the unfair labor practice hearing.[12] If he seeks such a remedy based on openings arising after the trial has begun or based on openings arising before the opening of the trial that he neither knew nor should have known had arisen, he may move to amend the complaint. If, however, the administrative law judge denies the motion, the General Counsel may seek that remedy in a new unfair labor practice proceeding based on a new refusal-to-hire complaint.[13] Alternatively, the General Counsel may contend, in a compliance proceeding, that discriminatees should be instated with backpay to openings arising during or after the hearing as a remedy for a refusal-to-consider violation. (See the next section below for a discussion of the refusal-to-consider violation.)

Where the number of applicants exceeds the number of available jobs, the compliance proceeding may be used to determine which of the applicants would have been hired for the openings. Assume, for example, that the General Counsel established at the hearing on the merits that the respondent had 10 openings, that 15 applicants had the experience or training relevant to the openings, and that antiunion animus contributed to the decision not to hire any of the 15 applicants for the openings. Assume further that the respondent did not meet its burden of showing that it would not have hired any of the 15 applicants even in the absence of their union activity or affiliation. In such circumstances, the General Counsel has established a refusal-to-hire violation. He has further established that a backpay and instatement remedy is appropriate for 10 of the applicants. The compliance proceeding may be used to determine which 10 of the 15 applicants must be offered backpay and instatement. The remaining five applicants would be entitled to a refusal-to-consider remedy. (See the discussion in the section that follows.)

In all other respects, the compliance proceeding for refusal-to-hire violations is limited to the precise calculations for the make-whole remedy. In cases arising in the construction industry, the compliance stage is also used to resolve the issues outlined in *Dean General Contractors,* 285 NLRB 573 (1987), concerning the likelihood that the discriminatees would have been transferred to other worksites upon the completion of the project at which the unlawful conduct occurred.[14]

In compliance proceedings, the General Counsel generally has the burden of establishing the damage that needs to be redressed in order to put the employee in the

[12] Thus, the parties may be assured that litigation of these issues will not be deferred to the compliance stage or to a subsequent proceeding. Providing closure of this nature serves the interests of sound administrative practice and fairness to the parties. See, for example, *Jefferson Chemical Co.*, 200 NLRB 992 fn. 3 (1972), where, in a different context, the Board imposed a similar limitation on the multiple litigation of issues that should have been presented in an initial proceeding. See also *Service Employees Local 87 (Cresleigh Management),* 324 NLRB 774 (1997), where the Board stated that sound administrative practice and fairness to respondents require that, wherever practicable, there be but a single hearing on all outstanding violations of the Act involving the same respondent.

[13] See *Maremont Corp.,* 249 NLRB 216, 217 (1980) (the General Counsel not precluded from litigating allegations in a subsequent separate proceeding where the General Counsel was informed of the subject of the allegations 6 days prior to the hearing in an earlier proceeding, moved to amend the complaint at issue in that proceeding to include the allegations, and was prevented from doing so by the administrative judge's denial of the motion).

[14] Member Hurtgen does not pass, at this juncture, on the validity of *Dean General Contractors,* supra.

position he would have been but for the respondent's unlawful conduct, *Mastro Plastics Corp.*, 136 NLRB 1342, 1346 (1962), enfd. in relevant part 354 F.2d 170 (2d Cir. 1963)**;** but there is a presumption that some backpay is owing when there is any unlawful deprivation of employment. *Intermountain Rural Electric Assn.*, 317 NLRB 588, 590 (1995), enfd. mem. 83 F.3d 432 (10th Cir. 1996). With respect to backpay, the General Counsel has the burden of showing that the backpay formula and amount is reasonable and that expenses incurred by the discriminatees should be offset against interim earnings. The respondent, however, has the burden of establishing elements that diminish its backpay liability such as the discriminatees' failure to mitigate. *Iron Workers Local 373 (Building Contractors),* 295 NLRB 648, 655 (1989).

B. Elements of a Discriminatory Refusal-to-Consider Violation

To establish a discriminatory refusal to consider, pursuant to *Wright Line*, supra, the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

If the respondent fails to meet its burden, then a violation of Section 8(a)(3) is established. The appropriate remedy for such a violation is a cease-and-desist order; an order to place the discriminatees in the position they would have been in, absent discrimination, for consideration for future openings and to consider them for the openings in accord with nondiscriminatory criteria; and an order to notify the discriminatees, the charging party, and the Regional Director of future openings in positions for which the discriminatees applied or substantially equivalent positions.[15]

If job openings arise after the beginning of the hearing on the merits, the General Counsel must initiate a compliance proceeding for the purpose of determining whether the discriminatees would have been selected for the openings in the absence of the proven discriminatory failure to consider them for employment.[16] The General Counsel must also initiate a compliance proceeding regarding openings arising before the commencement of the hearing on the merits that he neither knew nor should have known had arisen.[17] At the compliance proceeding, in carrying his burden of showing that the discriminatees would have been selected, the General Counsel would typically put on evidence showing that the discriminatees had the qualifications or training related to the announced or generally known requirements of the positions and that, given the time at which they had applied, their applications would have been reviewed when the opening occurred.[18] Once this is established, the burden will shift to the respondent to show that it would not have hired the discriminatees to fill those openings even in the absence of its earlier refusal to consider them on the basis of their union activity or affiliation. If the respondent fails to meet its burden, then the discriminatees must be offered the positions in question or, if those positions no longer exist, substantially equivalent positions, and be made whole for any losses suffered as a result of the respondent's unlawful conduct.

This framework for analysis of refusal-to-consider violations adheres to Board precedent. *B E & K Construction Co.*, supra, 321 NLRB 561. Further, for the reasons set forth below, we believe that this approach is appropriate notwithstanding the criticisms discussed in the background section above that there can be no violation of Section 8(a)(3) when no hiring is taking place and that the Board is improperly litigating issues of liability in a compliance proceeding that is confined to remedial issues.

1. A discriminatory refusal to consider may violate Section 8(a)(3) even when no hiring is occurring

The Board has long held that hiring need not take place in order to find an unlawful refusal to consider union applicants for employment.[19] However, the Sixth Circuit in *Fluor Daniel* and the Respondent have asserted that there can be no violation of Section 8(a)(3) when there are no jobs available. Their position is that Section 8(a)(3) only prohibits discrimination "in regard to hire" and there can be no such discrimination in the absence of hiring. We do not find this position persuasive.

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[15] Respondents will be required to provide such notification until the Regional Director concludes that the case should be closed on compliance.

[16] This procedure also applies in fashioning a remedy in compliance for a refusal-to-hire violation where the number of discriminatees exceeds the number of available openings. The General Counsel must initiate compliance proceedings to determine which of the discriminatees would have been hired to fill the available openings, and to determine if the remaining discriminatees would have been hired to fill any openings arising after the beginning of the hearing on the merits.

[17] The General Counsel also has the option of moving to amend the complaint to assert a refusal to hire as to these openings. See the preceding section. If the General Counsel does not move to amend, however, or if the motion is denied, the General Counsel must initiate compliance proceedings.

[18] Since the General Counsel is seeking to prove only the consequences of the refusal-to-consider violation—not a new discrimination violation—proof of animus is not part of his case in compliance. However, because there has been no showing in the hearing on the merits with respect to the hiring decision on the subsequent job opening, issues related to that hiring decision cannot be resolved against the respondent as an adjudicated wrongdoer. Instead, the General Counsel must prove that the discriminatees actually would have been selected for the opening in question, and that entails, at a minimum, showing that applications filed at the time the discriminatees applied would still be regarded as active when the opening occurred, had the respondent's normal nondiscriminatory practices been followed.

[19] See, e.g., *Shawnee Industries, Inc.*, 140 NLRB 1451, 1452–1453 (1963), enf. denied on other grounds 333 F.2d 221 (10th Cir. 1964).

A refusal to consider an applicant on the basis of union activity or affiliation has at least two independent consequences, either of which would warrant a remedy, given the purposes of the National Labor Relations Act. First, the refusal excludes applicants from the hiring process, whether or not job openings are available at the time of application. Such excluded applicants are then not within the pool of applicants for whom future jobs may become available. There is no question that an obstruction of this sort constitutes discrimination "in regard to hire" even if there are no job openings at the time it is imposed. Second, such a discriminatory refusal is a deterrent to employees' engaging in their right of self-organization. It is just as discouraging, and just as obviously discrimination in regard to hire, as the legendary "No Irish need apply" signs of decades past.

The Supreme Court has long recognized that discrimination against union labor in hiring has reverberations beyond the refusal to hire an individual employee. In *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), the Court emphasized that such discrimination was a serious impediment to the exercise of the right to organize. In holding that the 8(a)(3) proscription of "discrimination in regard to hire" extended to discriminatory practices towards applicants for employment, the Court relied on its understanding of the policies of the Act. It stated:

> Of compelling consideration is the fact that words acquire scope and function from the history of events which they summarize. We have seen the close link between a bar to employment because of union affiliation and the opportunities of labor organizations to exist and to prosper. Such an embargo against employment of union labor was notoriously one of the chief obstructions to collective bargaining through self-organization. Indisputably the removal of such obstructions was the driving force behind the enactment of the National Labor Relations Act. The prohibition against "discrimination in regard to hire" must be applied as a means towards the accomplishment of the main object of the legislation. [Id. at 185–186.]

The Court's basis for concluding that discrimination against union applicants was an impediment to organizing was as follows:

> Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. [Id. at 185.]

The *Phelps Dodge* Court was not faced with a refusal to consider union applicants where there were no job openings. However, the Court's rationale for finding that Section 8(a)(3) extends to applicants for existing openings applies with equal force to a situation where there are no immediate openings. Preventing union applicants from entering the pool of applicants for future job openings is as much an obstacle to collective bargaining through self-organization as is refusing to hire union applicants for current openings. In both cases, employees are cut off from entering the work force, currently or at a future time, where they can exercise the right to organize. In both cases, the discrimination undermines the principle of freedom of organization, which the Act envisions as a central means of attaining industrial peace.

For these reasons, we respectfully disagree with the Sixth Circuit and adhere to well-established Board precedent that an employer violates Section 8(a)(3) if it refuses to consider union applicants for employment even if there are no openings at the time of application.

2. The compliance proceeding for a refusal-to-consider violation is an appropriate forum for determining whether there was an actual job loss as a result of that refusal

When a job opening follows on the heels of a refusal to consider an applicant for positions of that kind, the question whether the applicant would have been offered that job had he been given nondiscriminatory consideration at the outset is a remedial issue appropriately determined in the compliance stage of the refusal-to-consider violation. As discussed above, one significant consequence of a discriminatory refusal-to-consider violation is the discriminatory denial of access to the pool of applicants for future openings. Because the fundamental purpose of Board remedies is to "undo the effects of [the] violations of the Act," *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953), it is appropriate to consider in compliance whether, had the applicant entered the pool at the time of application, he or she would have been hired for a job that subsequently opened up. If the General Counsel makes such a showing, then requiring that the job be offered to that applicant is a necessary part of the make-whole remedy.

By requiring that refusal-to-consider discriminatees be offered jobs in such circumstances, the Board does nothing more than exercise its statutory authority to make employees whole by "restoring the economic status quo that would have obtained but for the company's wrongful [action]." *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969). In this regard, restoring the status quo ante for the victims of discriminatory refusals to consider by requiring offers to them of subsequent openings which they would have filled had they been given lawful consideration for hire when they applied is analogous to requiring that victims of unlawful refusals to hire or unlawful discharges be offered the positions they would have occupied in the absence of the discrimination against them. *Hicks Oils & Hicksgas*, 293 NLRB 84, 87 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991) (reserving for compliance the determination of the particular jobs

that two probationary employees would have advanced into had they not been unlawfully discharged, with the particulars of reinstatement and backpay to be based on that determination); *Bailey Distributors,* 292 NLRB 1106, 1108 (1989), enf. denied in part on other grounds sub nom. *NLRB v. Browne*, 890 F.2d 605 (2d Cir. 1989) (in compliance, requiring reinstatement to, and backpay for, a driver position to which the employee who had been discriminatorily denied hire into helper position would have advanced absent the discrimination).[20] Those lines of precedent make clear that make-whole relief is not adequate if the victim of unlawful discrimination is not ultimately placed in the position he would have enjoyed had no discrimination occurred. See also *Operating Engineers Local 68 (Ogden Allied Maintenance Corp.)*, 326 NLRB 1 (1998) (discriminatee found not to have incurred a willful loss of interim earnings by refusing Respondent's offer to reinstate him to job held prior to discharge, where discriminatee's seniority would have earned him promotion to higher paying position absent unlawful discharge).

The Board has stressed that a compliance proceeding accords full due process to the parties. Thus, in *Perma Vinyl Corp.*[21] the Board determined in a compliance proceeding that the purchaser of the respondent was a successor with knowledge of the respondent's unfair labor practices. In concluding that the successor was responsible for remedying the respondent's unfair labor practices, the Board stated:

> Of course, no such adjudication of liability can be made without affording the bona fide purchaser a full opportunity at a hearing, after adequate notice, to present evidence on the question of whether it is a successor which is responsible for remedying a predecessor's unfair labor practices. The successor would also be entitled, of course, to be heard against the enforcement of any order issued against it. As has already been indicated, U.S. Pipe cannot validly claim that it was denied due notice and a fair hearing in this case. [Id. at 969–970.]

The Supreme Court approved the Board's compliance proceedings as a forum according due process to the parties in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). There, the Court stated:

> In this case, All American [the successor] has no complaint that it was denied due notice and a fair hearing. It was made a party to the supplemental backpay specification proceeding, given notice of the hearing, and afforded full opportunity, with the assistance of counsel, to contest the question of its successorship for purposes of the Act and its knowledge of the pendency of the unfair labor practice litigation at the time of purchase. [Id. at 181.]

IV. APPLICATION TO THE CASE AT BAR

The complaint in this case alleges both refusal-to-consider and refusal-to-hire violations. The judge found, and we agree, that the Respondent unlawfully refused to consider nine union applicants for employment.[22] Although there was evidence that the Respondent hired eight welder pipefitters, the judge found that the current state of the record was insufficient to determine whether the Respondent would have hired any of the nine union applicants, if it had considered them on a nondiscriminatory basis. Accordingly, he deferred to compliance the determination of whether any of the nine applicants would have been hired, absent the discriminatory refusal to consider. Under the framework we have set forth today, however, matters that can be litigated at the unfair labor practice stage, must be litigated at that stage and cannot be deferred to compliance. There was evidence in the record that the Respondent hired eight welder pipefitters. It should have been determined at the unfair labor practice hearing whether the Respondent's failure to hire the discriminatees for those positions constituted unlawful refusals to hire warranting backpay and instatement remedies. But, given the confusion in the law, as set forth above, which we have attempted to clarify today,

[20] The Second Circuit upheld the Board's finding that the discriminatee would have advanced from helper to driver in the normal course of events; it disagreed with the Board that the discriminatee was entitled to backpay at the drivers' rate during those portions of the backpay period when his license to drive large commercial trucks was suspended.

[21] 164 NLRB 968 (1967), enfd. sub nom. *United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968).

[22] The Respondent 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.

The Respondent correctly asserts that the judge erred in stating in fn. 6 of his decision that Bob McCubbin testified that FES hired Carl Knobb. The record shows that McCubbin testified only that FES interviewed Carl Knobb. The judge's error, however, does not affect his conclusion that the Respondent unlawfully failed to interview or consider any of the Local 520 applicants for employment.

In finding that the Respondent unlawfully refused to consider nine union applicants for employment, the judge concluded that the criteria by which the Respondent claimed to disqualify the union applicants do not exist in written form, are not strictly adhered to, and thus, in the circumstances of this case, appear to be post hoc justifications for disqualifying a union applicant or potential union organizer. We agree with this conclusion. Cf. *J. O. Mory, Inc.*, 326 NLRB 604 (1998) (no finding of pretext or disparate treatment of union applicants where wage comparison factor was part of established hiring policy applied in nondiscriminatory manner). We, therefore, find it unnecessary to rely on any of the judge's additional rationale concerning the "wage compatibility" criterion.

Because the judge did not reach the refusal-to-hire allegation, he did not consider the "wage compatibility" criterion as a defense to that allegation. Nevertheless, the issue of the criterion was fully litigated and the judge made the findings described above, which we have approved. Accordingly, the record may not be reopened on this issue. Any consideration of the criterion on remand must be confined to the facts as already found by the judge.

we shall remand the proceeding to the judge for the purposes of reopening the record and resolving this issue. If hiring occurred between the opening of the initial hearing in this case and the reopening of the hearing on remand, the General Counsel must also litigate the question of whether the ninth discriminatee would have been hired for any such subsequent openings in the absence of the discriminatory refusal to consider him.

ORDER

It is ordered that this proceeding is remanded to Administrative Law Judge Arthur J. Amchan for appropriate action consistent with his Decision and Order.

IT IS FURTHER ORDERED that the judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

MEMBER HURTGEN, concurring.

I agree with most of the majority opinion. However, in two respects, I have a somewhat different view.

1. My colleagues in the majority say that there can be a violation of Section 8(a)(3), in a "refusal-to-consider" case, even if there are no job openings at the time of application. By contrast, my concurring colleague says that there can be no 8(a)(3) violation unless there is a job opening at the time of application. In my view, the conflict is to be resolved on the basis of the statutory language of Section 8(a)(3). That is, the violation depends on whether there is "discrimination in regard to hire."

In order to illustrate my position on this issue, I shall assume a case in which there are no job openings at the time of application. If the employer has a hiring process (e.g., he normally files applications for future openings), and the employer refuses to do so for union adherents, then there is an 8(a)(3) violation. That is, there is discrimination "in regard to hire," i.e., in regard to the employer's hiring process.[1]

By contrast, if the employer has no such process (e.g., he simply turns away all applicants if there are no openings), there is no discrimination in regard to hire. There is no discrimination because the employer would also turn away nonunion applicants, and there is no "in regard to hire" because the employer has no hiring process.

I think that, in most cases, the employer has some hiring process. Thus, in most cases, I would find the 8(a)(3) violation. However, I believe that proof of a hiring process is essential to that violation.[2]

2. I agree with Member Brame's observation that "wage compatibility" is not necessarily a code word for a discriminatory refusal to hire union members. In the instant case, however, it was a pretext for such discrimination.

MEMBER BRAME, concurring.

The Board's decision today significantly revises our approach in 8(a)(3) failure-to-hire and failure-to-consider cases. These revisions represent a substantial improvement over the ambiguous and, in many respects, conflicting mandates of the Board's prior case law in this area. However, the majority's decision fails to fully address the reasons why the Board's prior approach in this area was unsatisfactory and, accordingly, does not provide sufficient guidance to parties, practitioners, and the Board's administrative law judges concerning the application of the new formulation. Accordingly, I am writing separately to set forth my view of the proper approach in cases of this type.

I. HISTORY OF *WRIGHT LINE*[1]

A. Background

The Board's consideration of allegations of discrimination in employment based on union support or activity is necessarily complex, as these cases involve the interplay of three separate sections of the Act: Section 8(a)(3) and (c) and Section 10(c).

Section 8(a)(3) provides, in pertinent part, that it is an unfair labor practice for an employer, "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The Supreme Court has stated that

> [t]he language of Section 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.[2]

Thus, proof of discriminatory conduct that is motivated by union animus is generally required to establish a violation of Section 8(a)(3): "In the absence of a showing of antiunion motivation, an employer may discharge an employee for a good reason, a bad reason, or for no reason at all. Whether other persons would consider the reasons assigned for a dis-

[1] If it turns out that the employer in this situation never has future openings, there would be no remedy of instatement and backpay.

[2] Even if there is no 8(a)(3) violation, there can nonetheless be an 8(a)(1) violation. In this regard, I agree with my colleagues that a refusal to consider union adherents sends an unlawful message to union-adherent applicants, even when there are no job openings. I would find that this message is an 8(a)(1) violation, and I would order the cessation of that conduct.

[1] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[2] *Radio Officers v. NLRB (A. H. Bull Steamship Co.),* 347 U.S. 17, 42–43 (1954).

charge to be justified or fair is not the test of legality under Section 8(a)(3)."[3] Indeed, the Supreme Court stressed this very principle in the seminal case upholding the constitutionality of the Act in 1937, by recognizing that the Act "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. . . . [t]he Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than . . . intimidation and coercion."[4]

The Act also requires the Board to give careful consideration to the evidence presented to establish union animus in support of an allegation of unlawful discrimination of employment. In particular, Section 8(c) provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." This clause was added to the Act by Congress in 1947 in order "to prevent chilling lawful employer speech by preventing the Board from using anti-union statements, not independently prohibited by the Act, as evidence of unlawful motivation."[5] As the First Circuit has observed:

> Dislike of unions is not uncommon among employers, and not only do principles of free speech permit it to be voiced, but so does section 8(c) of the Act. [Fn. omitted.] To use protected expression to build a case would seem to make the Act a trap. . . . Rather, the employer must have exhibited opposition not merely to the union, but to lawful activity by its employees in pursuit of their objectives."[6]

Further complicating matters, Section 10(c) provides, in pertinent part, that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause."[7] This section establishes a statutory requirement that an employer be relieved of backpay or reinstatement obligations in a discrimination case, where the employer would have taken the same action even if "the employer had not been influenced by his unlawful motives."[8]

B. The Board's Early Cases

Initially, the Board employed an "in part" causation test in deciding 8(a)(3) cases.[9] Ignoring the mandate of Section 10(c), the Board's test allowed the General Counsel to establish a violation of the Act by showing that a discharge was motivated merely "in part" by the employee's protected activities, even if the employer also relied on a legitimate business reason. Consequently, under this test "once hostility to protected rights is found, the inquiry ends and [an] employer's plea of legitimate justification is ignored."[10]

C. Court Rejection

The Board's "in part" test received a mixed reception in the courts of appeals. The First and Ninth Circuits generally required that the discriminatory motive be the primary reason for the challenged employment decision before an unfair labor practice finding would be sustained.[11] Other circuits applied the Board's "in part" test.[12] Still others applied tests which encompassed variations on the "in part" and "dominant motive" themes.[13] Regardless of the specific test applied, however, the courts generally recognized that the fundamental issue in 8(a)(3) cases is a determination of the cause of the challenged employer action. The courts also recognized that, in order to decide accurately the causation issue, it was important to consider both the evidence of unlawful motivation presented by the General Counsel as well as any evidence of a legitimate reason advanced by the employer to explain its actions.

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[3] *Borin Packaging Co.,* 208 NLRB 280, 281 (1974).

The Supreme Court has held that in certain cases an employer's conduct is so "inherently destructive" of Sec. 7 rights that an unlawful motive may be presumed and independent evidence of antiunion motivation is not required. See, e.g., *NLRB v. Erie Resistor Corp.,* 373 U.S. 221 (1963). No conduct of this character is presented in the typical hiring discrimination case under consideration herein.

[4] *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 45–46 (1937).

[5] *Holo-Krome Co. v. NLRB,* 907 F.2d 1343, 1347 (2d Cir. 1990), denying enf. to 293 NLRB 594 (1989).

[6] *NLRB v. Eastern Smelting & Refining Corp.,* 598 F.2d 666, 670 (1st Cir. 1979).

[7] As discussed more fully below, Sec. 10(e) also requires the Board's findings to be "supported by substantial evidence" as a condition of enforcement of its orders by the courts of appeals.

[8] *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 403 fn. 6 (1983).

[9] See, e.g., *Youngstown Osteopathic Hospital Assn.,* 224 NLRB 574, 575 (1976), enf. denied 574 F.2d 891 (6th Cir. 1978); *Erie Sand Steamship Co.,* 189 NLRB 63 fn. 1 (1971); *Tursair Fueling, Inc.,* 151 NLRB 270, 271 fn. 2 (1965); *Bankers Warehouse Co.,* 146 NLRB 1197, 1200 (1964).

[10] *Wright Line,* supra, 251 NLRB 1083, approved in *NLRB v. Transportation Management Corp.,* supra, 462 U.S. at 399–403, overruled in part on other grounds *Director, Office of Workers Compensation Programs, Dept. of Labor v. Greenwich Collieries,* 512 U.S. 267, 276–278 (1994).

In *Wright Line,* the Board recognized that its "in part" causation test did not reflect the requirements of the Act, particularly the mandate of Sec. 10(c) that the Board may not order the reinstatement of an individual who was discharged for cause. See 251 NLRB at 1088.

[11] See, e.g., *NLRB v. Fibers International Corp.,* 439 F.2d 1311 (1st Cir. 1971) (dominant motive test required by Act; "in part" test rejected); *Polynesian Cultural Center v. NLRB,* 582 F.2d 467, 473 (9th Cir. 1978) (improper motive must be dominant and moving cause).

[12] *Allen v. NLRB,* 561 F.2d 976, 982 (D.C. Cir. 1977); *NLRB v. Retail Store Employees Local 876,* 570 F.2d 586 (6th Cir. 1978), cert. denied 439 U.S. 819 (1978); *NLRB v. Gogin Trucking,* 575 F.2d 596, 601 (7th Cir. 1978); *Larlmer Press v. NLRB,* 568 F.2d 166, 173–174 (10th Cir. 1977).

[13] See, e.g., *Waterbury Community Antenna, Inc. v. NLRB,* 587 F.2d 90, 98 (2d Cir. 1978) (unlawful motivating factor must have been "but for" cause of discharge); *Edgewood Nursing Center v. NLRB,* 581 F.2d 363, 368 (3d Cir. 1978) (if employer puts forth justifiable cause for discharge, Board must find that employer's reason was a pretext in order to find a violation of the Act).

D. Adoption of Wright Line

In *Wright Line,* a wrongful termination case, the Board set forth an analytical framework for applying Section 8(a)(3) and (1) where the question presented is whether an employee's employment conditions were "adversely affected by his or her engaging in union or other protected activities and, if so, whether the employer's action was motivated by such employee activities."[14] The Board began by reviewing its prior decisions in 8(a)(3) cases and relevant courts of appeals decisions reviewing those cases, including those cited above. Acknowledging that no one test was uniformly accepted by the reviewing courts, the Board then turned to a pair of Supreme Court decisions addressing alleged violations of constitutional rights. In *Mt. Healthy City School District Board of Education v. Doyle,*[15] a public school teacher's contract was not renewed after he had publicized a change in the school district's dress policies. The school district stated that he was being discharged because of his public speech, and because he had used obscene language and gestures in the school cafeteria.

The Supreme Court rejected a lower court decision holding that the discharge violated the teacher's constitutional rights because it was admittedly based, at least in part, on the teacher's exercise of his First Amendment right of free speech. As the Supreme Court recognized:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.[16]

Consistent with these principles, the Supreme Court held that the proper test of causation was as follows:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" [fn. omitted] in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.[17]

The Supreme Court applied these principles in *Village of Arlington Heights v. Metropolitan Housing Development Corp.,*[18] a case decided the same day as *Mt. Healthy.* In *Arlington Heights,* the Supreme Court held that the plaintiffs had failed to establish that racial discrimination was "a motivating factor" in a local government's zoning decision, which had the effect of excluding a racially integrated development from the jurisdiction. Citing *Mt. Healthy,* the Supreme Court stated that:

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision. But in this case respondents failed to make the required threshold showing.[19]

Applying these principles in the context of the Act, the Board held that it would employ the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation:

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. [Fn. omitted.] [*Wright Line,* supra, 251 NLRB at 1089.]

[14] *Wright Line,* supra, 251 NLRB at 1083.
[15] 429 U.S. 274 (1977).
[16] Id. at 285–286 (quoted in *Wright Line,* supra, 251 NLRB at 1086).
[17] 429 U.S. at 287.
[18] 429 U.S. 252 (1977).
[19] 429 U.S. at 271 fn. 21 (quoted in *Wright Line,* supra).

E. Judicial Reception and Reformulation of Wright Line

Cases subsequent to *Wright Line* have made clear that the General Counsel has the burden of *proving* that antiunion sentiment was "a motivating factor" in the challenged employment decision. Thus, in approving the analytical framework established by the Board in *Wright Line* the Supreme Court in *NLRB v. Transportation Management Corp.*[20] interpreted the Board's decision as placing on the General Counsel "the burden of persuasion on the question of whether the employer fired [the discriminatee] at least in part because he engaged in protected activities."[21] The Court agreed with the Board that, once this showing was made, the Board could appropriately shift the burden of persuasion to the respondent to show that it would have taken the same action even in the absence of the protected activity. However, the Court approved this allocation of the burden of proof only because the General Counsel had previously established that "[t]he employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he [has] knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing."[22]

In *Director, Office of Workers Compensation Programs, Dept. of Labor v. Greenwich Collieries,*[23] the Supreme Court reaffirmed the importance of the requirement that the General Counsel bear the burden of proof, i.e., the burden of persuasion, that "antiunion sentiment contributed to the employer's decision." Only after this burden is met, could the Board properly "place the burden of persuasion on the employer as to its affirmative defense."[24]

In *Handy Andy, Inc. v. NLRB*,[25] the D.C. Circuit stated that, in light of the Supreme Court's holding in *Greenwich Collieries*, the language in the *Wright Line* formulation, which referred to the General Counsel's burden as one of establishing a "prima facie case" was no longer appropriate.[26] In *Manno Electric, Inc.,*[27] the Board effectively accepted the D.C. Circuit's position, stating that, under the *Wright Line* test

> [t]he Board has always required the General Counsel to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activities.[28]

Accordingly, the Board no longer refers to the General Counsel's burden as one of establishing a "prima facie case."

II. APPLICATION OF *WRIGHT LINE*

A. General Considerations

Wright Line, thus, established a framework for consideration of cases involving alleged discrimination in employment, but a framework is not a formula for deciding 8(a)(3) cases. In particular, the *Wright Line* framework does not establish the nature or quantity of evidence necessary to satisfy the burden of proof imposed on the General Counsel under *Wright Line*. That is one issue before the Board in this case.

The fundamental issue in all 8(a)(3) cases is whether the challenged adverse employment action would have taken place "but for" the protected activity. As the Supreme Court cautioned in the *Mt. Healthy* decision, "[a] rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision," goes too far, because it "could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing."[29] As discussed above, the burden of introducing the evidence needed to resolve the ultimate issue of "but for" causation is properly divided between the General Counsel and the respondent using the *Wright Line* framework. However, to meet his burden of proof in any 8(a)(3) case, the General Counsel must establish facts sufficient to allow the factfinder to conclude that union animus was a motivating factor in the challenged adverse employment action.

In some cases, the General Counsel will be able to meet his burden of proof by presenting direct evidence of discriminatory motivation.[30] The Board and the courts

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[20] 462 U.S. at 399–403.

[21] Id. at 400 fn. 5. The Court also stated that, once this showing was made, "proof that the discharge would have occurred in any event and for valid reasons amount[s] to an affirmative defense on which the employer carrie[s] the burden of proof by a preponderance of the evidence." Id. at 400. See sec. III, infra.

[22] *NLRB v. Transportation Management*, supra, 462 U.S. at 403.

[23] 512 U.S. 267, 276–278 (1994).

[24] Id.

[25] 53 F.3d 1334 (D.C. Cir. 1995).

[26] The Board's use of the term "prima facie case" to describe the General Counsel's burden of proof in *Wright Line* appears to have led to some confusion concerning the nature of the General Counsel's evidentiary burden. The term "prima facie case" is also used in Title VII disparate treatment cases decided using the analytical framework first set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). In that setting, the term "prima facie case" describes the evidence which a plaintiff must introduce in order to create a presumption that discrimination has occurred and then shift the burden of production (but not the risk of nonpersuasion) to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged employment action. Under the *McDonnell Douglas* framework, the risk of nonpersuasion does not shift. See generally *Walker v. Mortham,* 158 F.3d 1177, 1184–1185 and fn. 10 (11th Cir. 1998), cert. denied 120 S.Ct. 39 (1999).

[27] 321 NLRB 278 (1996).

[28] Id. at 280 fn. 12.

[29] *Mt. Healthy,* supra, 429 U.S. at 285–286.

[30] See, e.g., *Pan American Electric, Inc.,* 328 NLRB 54 (1999) (project superintendent stated that he would not take applications from union applicants and was trained in screening out union applicants); *Merit Electric Co.,* 328 NLRB 212 (1999) (employer admitted that it refused to hire applicants because they were union activists) (same).

have also held that "the Board may rely on circumstantial evidence presented by General Counsel in establishing that anti-union animus figured in the employer's actions, *provided that the circumstantial evidence is substantial and the inferences drawn therefrom reasonable.*"[31]

On the other hand, in deciding disparate treatment cases arising under Title VII of the Civil Rights Act of 1964, the Federal courts generally require the plaintiff to present direct evidence of discriminatory motivation before shifting the burden of persuasion to the employer in the manner contemplated by the Board's *Wright Line* decision.[32] This requirement is based on the controlling opinion of Justice O'Connor in *Price Waterhouse v. Hopkins,*[33] which recognized that, "in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision."[34] Circumstantial evidence, in contrast, may be an "indication of discrimination" but is not by itself sufficient to establish the existence of the evil Congress sought to prevent: an adverse employment decision caused by discrimination on the basis of a prohibited criterion.[35]

The Board has not had occasion to consider whether the Federal courts' rulings on the proof of causation in Title VII cases are applicable to the issue of causation in cases arising under Section 8(a)(3) of the Act.[36] In light of the consistent court approval of the Board's current practice of relying on circumstantial evidence to establish causation, for present purposes, I will assume that this is a permissible construction of the Act. However, as the Supreme Court has recognized in the Title VII context, unless all potential legitimate reasons for not hiring an applicant are eliminated from the case, circumstantial evidence alone is insufficient to establish that a union applicant would have been hired but for an employer's union animus.[37] Accordingly, the Board must carefully consider whether the particular circumstances of a given case are sufficiently compelling to establish that "[t]he employer is a wrongdoer; he has acted out of a motive that is declared [to be] illegitimate by the statute."[38]

Until today, the Board has failed to undertake this analysis in hiring discrimination cases. Rather, the Board appears to have simply imported into the hiring discrimination context an adapted version (or, more accurately, versions) of the evidentiary standard developed in discriminatory discharge cases. At no time has the Board explained why proof of these elements actually establishes that the applicant would have been hired but for his or her protected activities and that the failure to hire was motivated by unlawful antiunion discrimination. The Board's omission of this analytical task explains the Board's difficulty in obtaining court enforcement of its orders in hiring discrimination cases.

As explained below, the evidentiary threshold applied by the Board in discriminatory discharge cases is appropriate in that setting, because the circumstances of a discharge case in combination with the elements of proof required by the Board often are sufficient to support an inference of discrimination. Because the circumstances surrounding the hiring process are quite different, however, the evidentiary threshold must reflect those circumstances.

B. Discriminatory Discharge Cases

1. Elements of a discriminatory discharge violation

In the typical discharge case, the General Counsel can meet the *Wright Line* burden of proof by showing union or protected activity, employer knowledge, antiunion animus, and the adverse action.[39] This showing is sufficient to meet the General Counsel's burden because of the particular circumstances involved in a discharge case.

2. Evidence and inferences

In discriminatory discharge cases, whether the alleged discriminatee was in fact discharged is rarely disputed. Rather, the focus is on the employer's motivation. As noted

[31] *NLRB v. Instrument Corp. of America,* 714 F.2d 324, 328 (4th Cir. 1983) (emphasis added). See also *Jet Star, Inc. v. NLRB,* 163 LRRM 2977) (7th Cir. 2000) (same) (employer's discriminatory motive can be proved through circumstantial evidence); *ITT Automotive v. NLRB,* 188 F.3d 375, 388 (6th Cir. 1999) (direct evidence of unlawful motivation not required; animus may be inferred from all the circumstances); *Wright Line*, supra, 251 NLRB at 1083–1084 (same).

[32] See *Watson v. SEPTA,* 207 F.3d 207 (3d Cir. 2000) (same) (only plaintiffs who demonstrate with sufficiently direct evidence that an impermissible factor was a motivating factor are entitled to the shift in the burden of persuasion); *Taylor v. Virginia Union University,* 193 F.3d 219, 232 (4th Cir. 1999), cert. denied 120 S.Ct. 1243 (2000); *Day v. Johnson,* 119 F.3d 650, 654 (8th Cir. 1997), cert. denied 522 U.S. 1055 (1998) (in the absence of direct evidence, plaintiff must show employer's explanations were a pretext); *Fields v. New York State Office of Mental Retardation,* 115 F.3d 116, 122 (2d Cir. 1997) ("there must be either direct evidence of discrimination, or circumstantial evidence that is 'tied directly to the alleged discriminatory animus'") (citation omitted) (quoting *Ostrowski v. Atlantic Mutual Insurance Cos.,* 968 F.2d 171, 182 (2d Cir. 1992)); *Smith v. F. W. Morse & Co.,* 76 F.3d 413, 421 (1st Cir. 1996) (direct evidence is required to shift burden of proof). See generally *Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII,* 87 Cal. L. Rev. 983 (1999); Michael A. Zubrenski, Note, *Despite the Smoke, There Is No Gun: Direct Evidence Requirements in Mixed-Motives After Price Waterhouse v. Hopkins,* 46 Stan. L. Rev. 959 (1994).

[33] 490 U.S. 228 (1989).

[34] Id. at 276.

[35] Id.

[36] At least one commentator has suggested that they are. See *Modern Discrimination Theory and the National Labor Relations Act,* 39 Wm. & Mary L. Rev. 99, 126 fn. 142 (1997).

[37] *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978).

[38] *NLRB v. Transportation Management,* supra, 462 U.S. at 403.

[39] See, e.g., *New Otani Hotel & Garden*, 325 NLRB 928 (1998); *Columbia Distribution Services*, 320 NLRB 1068, 1071 (1996); *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991), enfd. mem. 988 F.2d 120 (9th Cir. 1993). Consistent with these principles, in *Wright Line* itself the Board found that the General Counsel met his burden of proof by presenting evidence of the respondent's knowledge of Bernard Lamoreaux's union support and activities, "considerable" antiunion animus directed toward Lamoreaux, the timing of the discharge, and disparate treatment of Lamoreaux, compared to other similarly situated employees.

above, it is, of course, axiomatic that "[i]n the absence of a showing of antiunion motivation, an employer may discharge an employee for a good reason, a bad reason, or for no reason at all. Whether other persons would consider the reasons assigned for a discharge to be justified or fair is not the test of legality under Section 8(a)(3)."[40] However, employers rarely, if ever, discharge an employee on a whim.[41] A discharge generally represents a significant change in the status quo. Thus, it is not unreasonable to expect an employer to be able to articulate a nondiscriminatory reason for the discharge decision. In addition, the fact that an individual has satisfied an employer's hiring criteria and worked for an employer for a period of time without incident supports an inference that the employee was qualified for the job he or she held. Moreover, the employer also has access to information concerning the employee's performance and conduct and thus has the ability to establish the existence of any justifications for the discharge, such as performance problems or misconduct.[42]

C. Hiring Discrimination Cases

1. Elements of a hiring discrimination case

The Board has, with court approval, applied the *Wright Line* shifting burdens of proof in cases involving an alleged discriminatory failure to hire or to consider an applicant for employment.[43] The courts have generally approved this use of the *Wright Line* framework in this setting.[44] However, the Board has failed to articulate a consistent legal standard by which to measure the General Counsel's burden of proof in these cases. Thus, in some hiring discrimination cases the Board has held that the General Counsel may establish "a prima facie case that hostility to union activity or affiliation was a motivating factor in an employer's failure to hire" by proving "animus, union activity or affiliation, employer knowledge, timing and the availability of jobs for the applicants."[45] In other cases, the Board has stated that

> the elements of a discriminatory refusal-to-hire case are the employment application by each alleged discriminatee, the refusal to hire each, a showing that each was or might be expected to be a union supporter or sympathizer, and further showings that [an] employer knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus.[46]

In general, however, the formulations previously employed by the Board appear to copy the standard for discriminatory discharge cases discussed above. Conspicuously missing from these formulations is any requirement that the General Counsel show that the applicants are in any way qualified for the job.[47] Likewise, the Board's formulation of the General Counsel's burden of proof has not specifically required proof of job availability. Rather, to the extent that this issue is addressed, the Board has appeared to view the issue of job availability as an affirmative defense on which the employer has the burden of proof.[48]

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[40] *Borin Packaging,* supra, 208 NLRB at 281.

[41] See also *Furnco Construction Corp. v. Waters,* 438 U.S. at 577:

> [W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when *all* legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not that the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race. [Emphasis added.]

Consistent with these principles, arbitrators place the burden of justifying a discharge on the employer, albeit pursuant to contractual "just cause" clauses. See, e.g., *J. E. Simplot Co.,* 103 L.A. 865, 867 (Tilbury, 1994) (in a discharge case, the burden is generally on the employer to prove the existence of wrongdoing).

[42] See McCormick, *Evidence* § 337 at 429 (4th ed. 1992).

The circumstances differ somewhat, however, in a reduction-in-force (RIF) case. In that setting, the issue is not why members of a protected class were discharged, or whether they were meeting normal performance expectations, but whether they were selected for the RIF for an unlawful reason. Accordingly, the courts have recognized that the showing required to establish liability must be tailored to the particular circumstances of a RIF. See, e.g., *Mitchell v. Data General Corp.,* 12 F.3d 1310, 1315 (4th Cir. 1993). See also *Goldtex, Inc. v. NLRB,* 14 F.3d 1008, 1014 (7th Cir. 1994) (allegations that particular employees were singled out for disparate treatment in an economically motivated RIF require "special attention," lest the Board improperly interfere with "the legitimate business judgments" of employers). As the Seventh Circuit observed in *Goldtex,* an employer's

> adoption of a performance-based, rather than a seniority-based, criterion for [layoff] is unlawful only if it operates as a pretext for discouraging union membership or dismissing employees who were active in their support for unionization. Otherwise, it is a perfectly legitimate attempt on the part of a company to shore up the performance of its work force in a time of economic stringency.

Goldtex, supra*,* 14 F.3d at 1014.

[43] See *Lewis Mechanical Works,* 285 NLRB 514 (1987) (recognizing that *Wright Line* is applicable to failure to hire cases), enfd. mem. 869 F.2d 1497 (9th Cir. 1989).

[44] See, e.g., *Starcon, Inc. v, NLRB*, 176 F.3d 948, 950 (7th Cir. 1999); *NLRB v. Iron Workers Local 46*, 149 F.3d 93, 102–103 (2d Cir. 1998); *NLRB v. Fluor Daniel, Inc.,* 161 F.3d 953, 965–966 (6th Cir. 1998); *Ultrasystems Western Constructors, Inc. v. NLRB*, 18 F.3d 251, 257 (4th Cir. 1994).

[45] *Pan American Electric, Inc.,* 328 NLRB 54, 55 (1999). See also *GM Electrics,* 323 NLRB 125, 128 (1997).

[46] *Big E's Foodland, Inc.,* 242 NLRB 963, 968 (1979). The Board has cited *Big E's Foodland* with approval in subsequent cases. See, e.g., *Grand Rapids Press*, 327 NLRB 393 (1998*); M. J Mechanical Services,* 324 NLRB 812, 816 (1997).

[47] But see *WACO, Inc.,* 316 NLRB 73 fn. 1 (1995) (the General Counsel did not meet his burden of proof where the alleged discriminatees lacked the experience required by the employer in its job advertisements).

[48] See, e.g. *Falcone Electric Corp.,* 308 NLRB 1042 fn. 3 (1992). But see *Delta Mechanical, Inc.,* 323 NLRB 76, 81 (1997) (the General Counsel did not establish prima facie case of discriminatory refusal to *consider* where the General Counsel did not establish that employer was hiring or had openings, and employer's policy was to accept applications only when it was hiring).

In *Irwin Industries,* 325 NLRB 796, 798 (1998), the Board dismissed allegations that an employer had discriminatorily refused to hire 30 "volunteer union organizer" applicants based on evidence that the employer had no openings at the time. The Board also noted that it was the employer's historical practice to hire on the basis of referrals, prior work experience with the employer, or continued and persistent efforts to obtain work after the

2. Evidence and inferences

The Board has compounded its failure to articulate a consistent legal standard in hiring discrimination cases by relying on inferences appropriate to a discriminatory discharge case. In so doing, the Board has failed to recognize that the circumstances in a typical alleged hiring discrimination case are quite different than those presented in a discriminatory discharge case.

Regardless of whether the evidence presented is direct or circumstantial, the courts have clearly instructed the Board that it must carefully consider the evidence presented by the General Counsel in order to determine whether he has satisfied his burden of proof and draw from that evidence only those inferences that are reasonable.[49] "'When the Board purports to be engaged in simple factfinding . . . it is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands.'"[50] "Courts performing substantial evidence review, therefore, must examine whether the Board considered all of the reasonable inferences compelled by the evidence in reaching its decision."[51]

The Board's error has been to uncritically treat a discriminatory discharge case like a hiring discrimination case. In the former, the employer has altered the status quo. Generally, the adverse action (termination, demotion, or other form of discipline) is acknowledged, and the hearing focuses appropriately on the motivation for the action. By contrast, in many refusal-to-hire cases, a heavily disputed issue is whether the employer even acted, that is, whether it reviewed the applications in issue. Any framework of analysis must account for the need to show that the employer took action with respect to the challenged applications and require evidence from which the factfinder can conclude that the applications would have been acted on favorably in the absence of protected activity. This requires, inter alia, proof of the existence of vacancies, hiring, and claimants having qualifications at least as good as those hired during the relevant period of time.[52] Only after such a showing can the Board properly shift the risk of nonpersuasion within the scope of the larger issue, as framed by the Supreme Court in *Mt. Healthy*. Indeed, in *Wright Line* the Board adopted the *Mt. Healthy* standard requiring proof by the General Counsel that the protected conduct was a "substantial" or "motivating factor" in the hiring decision. This necessarily requires an ultimate finding that but for the protected activity, the applicant would have been hired. Otherwise, any lower standard would improperly "place an employee in a better position as a result of the exercise of . . . protected conduct than he would have occupied had he done nothing."[53] Because of the Board's failure to recognize the enhanced showing required in failure to hire cases, the courts of appeals have often reacted strongly, especially when the Board's hidden presumptions results in such unjustifiable practices as awarding more jobs to union claimants than the employer had vacancies.[54]

The hiring process is inherently more subjective and often more hurried than a typical decision to discharge an employee, as the employer necessarily has less information about the skills and abilities of applicants than it does with respect to its current employees. The haste often inherent in the hiring process, especially in the construction industry where mass hiring situations are a frequent occurrence, leaves the employer less time to compare carefully all of the applications it receives and sometimes leads to hiring decisions based on seemingly small differences and on intuition, rather than on a forensic review of all of the evidence that could possibly be gathered.[55] Moreover, the hiring process does not exist unless there is an open position to be filled; absent proof of a job opening there can be no discrimination "in regard to hire," any more than there can be a discriminatory discharge without proof that an employee was, in fact, discharged.[56] Especially in a mass hiring situation, where an employer may receive hundreds of applications for dozens of openings, there is no basis for presuming that the employer even read any particular application, much less that the application was considered and rejected for discriminatory reasons. Moreover, because the typical applicant has no work history with the employer, there is no basis for inferring that he or she possesses the skills and experience required for the job.

D. Discharge and Hiring Cases Compared

Discharge cases thus "are entirely distinguishable from cases where applicants merely request jobs that may be nonexistent or for which they are not qualified. In the latter case, there is no assurance that a violation of the

submission of an application, and that none of the union applicants actively sought work with the employer after submitting their applications. However, the Board did not indicate whether these matters were part of the General Counsel's case, or an affirmative defense.

[49] *NLRB v. Instrument Corp. of America,* 714 F.2d 324, 328 (4th Cir. 1983).

[50] *Pirelli Cable Corp. v. NLRB,* 141 F.3d 503, 514 (4th Cir. 1998) (quoting *Allentown Mack Sales & Service v. NLRB,* 522 U.S. 359 (1998)).

[51] *Pirelli Cable Corp. v. NLRB,* id. Accord: *Sam's Club v. NLRB,* 173 F.3d 233 (4th Cir. 1999) (circumstantial evidence must be substantial); *Gibson Greetings v. NLRB,* 53 F.3d 385, 393 (D.C. Cir. 1995) (same).

[52] Of course, any backpay award requires that the General Counsel establish that the claimant was available for work for the period for which backpay is claimed.

[53] *Mt. Healthy City School District Board of Education v. Doyle*, supra, 429 U.S. at 285 (quoted in *Wright Line*, supra, 251 NLRB at 1086).

[54] See, e.g., *Ultrasystems Western Constructors, Inc. v. NLRB*, supra.

[55] See generally T. Sowell, *Knowledge and Decisions* (1996), Chs. 3 and 8, e.g. p. 172: "[T]he government substitutes its own decisions [for those of the market] in the form of more explicitly articulated knowledge, in either words or statistics. Articulation, however, can lose great amounts of knowledge. The continuously adjusting process of decision making through transient subjective estimates of prospects is not recorded or available in verifiable form to third parties." See also generally Polanyi, K, *The Tacit Dimension* (1966), e.g., p.3: "[W]e know more than we can tell."

[56] *NLRB v. Fluor Daniel,* supra, 161 F.3d at 967.

Act has occurred. In the former, a violation is much more likely"[57] In a discharge case, the issue is whether union animus caused the employer **to** discharge an employee. The occurrence of the challenged employment action (i.e., the discharge) is rarely in dispute. The only issue is the motivation behind that action.

In contrast, in a hiring discrimination case, the issue is whether union animus caused an employer **not to** hire an applicant. By finding that the General Counsel can meet his burden and establish a violation by showing animus, union activity or affiliation, and employer knowledge, the Board has in effect presumed that union applicants will be hired absent unlawful discrimination, solely on the basis of their having applied. Such a presumption does not accord with common sense, as applicants, union or nonunion, are not hired for many reasons, particularly lack of qualifications, or lack of vacancies, or both.

In sum, "it is more sensible to impose heavier burdens, in the form of a lighter prima facie case for the NLRB, on an employer who inherits an entire unionized labor force that it claims is inadequate when compared with an employer who merely turns down job applicants."[58] In the latter situation, the employer has "definite hiring needs and those needs should receive individualized treatment by the NLRB when proving its prima facie case at the liability stage of its proceedings."[59]

E. The Majority's Revised Standard

In these circumstances, today's decision is a substantial improvement over the Board's inconsistent and inadequate treatment of these issues in prior decisions. As the majority's decision makes clear, in a hiring discrimination case the General Counsel must show: (1) that the respondent was hiring or had concrete plans to hire at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. By requiring proof by the General Counsel of openings and qualifications at the liability stage, the majority's decision responds to the concerns expressed by the reviewing courts in *Fluor Daniel, Starcon,* and *Ultrasystems*. The dissent, however, fails to perceive that unless the General Counsel shows that a claimant meets the Respondent's bona fide qualifications, there is no reason to believe "that antiunion considerations contributed to the decision not to hire." (Emphasis added.)

The majority's discussion of the showing required with regard to applicant qualifications, in particular, appropriately recognizes the distinction between hiring discrimination and discriminatory discharge cases discussed above. As I understand the majority's holding, they would require the General Counsel to show that the alleged discriminatees in a hiring discrimination case met the employer's "objective" hiring criteria, and they would place on the employer the burden of establishing, as an affirmative defense, that the applicants were not hired because they did not meet any "subjective" criteria established by the employer. I agree with this allocation of the burden of proof with regard to qualifications, and I note that this requirement comports with the practice in other areas of the law, such as Title VII disparate impact cases, where the plaintiff must show that he or she met the basic qualifications for the position, but is not required to introduce evidence concerning his or her relative qualifications as compared to successful applicants as part of his or her initial showing.[60] Rather, once the plaintiff has met his or her burden, the employer is required to establish that it would not have hired the plaintiff in any event because the person chosen had superior qualifications.[61]

I am concerned, however, that the majority's discussion of the circumstances in which the General Counsel could met his burden of proof with regard to applicant qualifications by showing pretext may encourage the finding of violations in circumstances where the evidence does not support an inference of unlawful employer motivation and thereby violate the Supreme Court's proscription against "plac[ing] an employee in a better position . . . than he would have occupied had he done nothing."[62] The majority first cites a hypothetical case in which an employer reverses a decision to hire an applicant, who does not meet the basic qualifications of the job, when it learns that the applicant was a union supporter. While I agree that proof of such a series of events could support a finding of discrimination, I would not find that the General Counsel had met his burden of proof unless the totality of the circumstances established that it is more likely than not that the discovery of the applicant's union support caused the employer to change its mind.[63]

The majority's second hypothetical is even more problematic. The majority posits a case in which an employer advertises for electricians with 2 years of commercial experience and then refuses to hire the only applicant, an electrician who does not meet the employer's standards, but who indicates union affiliation on the application. Accord-

[57] Id. at 970.
[58] Id. at 971.
[59] Id.

[60] See generally *Walker v. Mortham,* supra, 158 F.3d at 1192–1193.
[61] Id. In my view, the distinction used in Title VII cases between the basic and relative qualifications for a position better captures the distinctions the majority appears to be drawing than the "objective-subjective" dichotomy which they have employed. Thus, the example they cite of a requirement that applicants have "outstanding welding skills" is, in fact, a relative qualification as an applicant can only be deemed "outstanding" in comparison with others.
[62] *Mt. Healthy,* supra, 429 U.S. at 285.
[63] For example, evidence that an initial decision to hire was overruled by a higher ranking official upon learning that the applicant was unqualified would diminish the weight of this circumstantial evidence as proof of discrimination.

ing to the majority, if the General Counsel can establish "anti-union animus," that is sufficient to meet his burden of proof with regard to qualifications as, by showing that the employer hired no one, "even though the record shows that it has an immediate need for electricians," the General Counsel would have established that the commercial experience requirement was a pretext.[64]

I would not find that the General Counsel had satisfied his burden of proof under the majority's hypothetical. The majority, in effect, infers discriminatory motivation from the fact that an employer (1) was hiring for positions for which the applicant was not qualified; (2) "needed" to hire workers in positions for which the applicant was qualified; and (3) had union animus. In deciding discrimination cases, however, the Board may not substitute its business judgment for an employer's—including a determination of how many employees the employer "needs."[65] Accordingly, and contrary to the majority, I would not find that a facially neutral hiring qualification (i.e., 2 years' experience as a commercial electrician) is pretextual simply because there is evidence in the record from which the Board, in hindsight, would find that the employer also "needed" workers who did not meet the employer's announced qualifications.[66] Unless the General Counsel presents additional evidence sufficient to show that, absent the claimants' protected activity, the employer would have hired applicants who did not meet its announced qualifications (e.g., direct evidence of discriminatory motivation in declining to offer employment because of protected conduct), I would not find a violation in these circumstances as in my view to do so would substitute the Board's business judgment for the employer's and unfairly penalize the employer for adhering to its announced standards.[67]

In sum, I would require the General Counsel to show that the applicant met the actual qualifications for the position established by the employer. In general, this would require proof that the alleged discriminatee met the announced or advertised qualifications for the job, unless the employer is shown to have applied lower standards in practice.

F. The Appropriate Standard for Hiring Discrimination Cases

Consistent with the foregoing discussion, in hiring discrimination cases, I would require the General Counsel to show, at a minimum: (1) that the respondent was hiring, or had concrete plans to hire; (2) that the applicants met the announced (or actually applied) qualifications for the position; and (3) that antiunion animus contributed to the decision not to hire the applicants, taking into account all of the circumstances in the case—those which support a finding of discrimination and those which suggest that antiunion animus was not a motivating factor.

In determining whether the General Counsel has shown that antiunion animus was a motivating factor, I would consider all of the relevant evidence presented in each case, including but not limited to the following:

- whether the alleged discriminatee actually sought work with the employer.

  In my view, a Section 8(a)(3) violation is not made out unless there is proof that the alleged discriminatee actually sought work with the employer. In most cases, this requirement will be satisfied by proof that the alleged discriminatee communicated to the employer his or her interest in obtaining employment, e.g. by submitting an employment application. Where the circumstances suggest that an alleged discriminatee did not have a bona fide interest in employment with the respondent, however, I would find that such evidence

[64] The majority fails to specify the type of evidence that would be sufficient, in their view, to show antiunion animus under their approach. As discussed below, I would evaluate alleged evidence of antiunion animus in light of its nexus, if any, to the alleged discrimination.

[65] See, e.g., *Hutson v. McDonnell Douglas Corp.,* 63 F.3d 771, 781 (8th Cir. 1995) ("[T]he employment discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or the fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination."). Accord: *DeJarnette v. Corning Inc.,* 133 F.3d 293 (4th Cir. 1998); *Ruiz v. Posadas de San Juan Associates,* 124 F.3d 243 (1st Cir. 1997).

I am particularly skeptical of any claim by the majority that the Board could determine that an employer's bona fide qualification requirements are not, in fact, necessary for the particular job. "How well one thing substitutes for another cannot be determined by how similar they are in physical characteristics, or indeed, by any purely objective criteria. Economists define substitutability in terms of people's subjective preferences as revealed by their overt behavior." T. Sowell, supra, at 49. Thus,

> [t]hird-party observers may dismiss product differences as negligible, just as they dismiss production cost differences as negligible. However, there is no "objective" measure of what is negligible. Something is negligible or not negligible to *someone.* In baseball, for example, the difference between a .250 hitter and a .350 hitter is only about one hit out of every three games, which might seem negligible to a casual onlooker, but that can be the difference between being sent back to the minor leagues and ending up in the Hall of Fame. [Id. at 208.]

[66] For the purpose of this discussion, I have assumed, as the majority does, that the General Counsel has established that the employer needs electricians without commercial experience. However, it is not clear to me how the General Counsel could establish the existence of such a "need" in a real case. To assume an abstract "need" for employees misunderstands the business world. See T. Sowell, supra: "*There is no such thing as objective, quantitative* '*need.*'" (Emphasis in original.) Moreover, an employer may intend to hire a given number of new workers, but that projection is necessarily contingent on the employer's current appraisal of economic conditions, demand for the employer's goods or services, the availability of applicants, skill levels, and price. R. H. Leftwich, *The Price System and Resource Allocation,* Ch. 13 (4th ed. 1970).

[67] Indeed, an employer who relaxed its hiring criteria after learning of an applicant's union affiliation, but failed to do so for those who were not affiliated with a union, could be charged with discrimination against nonunion applicants. Thus, the Act proscribes with equal force discrimination to discourage and to encourage union membership.

suggests that no "discrimination in regard to hire" has taken place.[68]

- whether the General Counsel has established that the employer's explanation for its hiring decisions was pretextual.

  To the extent that the General Counsel, as part of his case in chief, elicits from the employer an explanation for its decision not to hire an applicant, and then demonstrates that this explanation is false, such a showing would tend to support an inference that the real reason for the refusal to hire was an unlawful one which the employer wishes to hide.[69]

- whether the General Counsel has presented direct evidence of an unlawful discriminatory motivation.

- whether the General Counsel has presented evidence from which a factfinder could determine that the evidence of union animus presented by the General Counsel contributed to the alleged discrimination.

  Evidence, for example, of threats not to hire union adherents, by a hiring official, directed at an employee-applicant, would support a discrimination claim by that applicant in the event that he or she was not hired by the employer. Similar statements by individuals not involved in the hiring process, directed at individuals other than the alleged discriminatee, or remote in time from the events in question, in contrast, would be entitled to little if any weight.

G. Discriminatory Failure to Consider Cases

I am in general agreement with the majority's discussion of the evidence required to establish that an employer unlawfully failed to consider an applicant for employment in violation of Section 8(a)(3) of the Act, subject, of course, to the foregoing discussion concerning the burden of proof on the General Counsel. However, I am concerned that language in the majority's decision leaves open the possibility that a violation could be made out even in circumstances in which the employer was not hiring for legitimate, nondiscriminatory reasons. I perceive no warrant for the Board to find a violation of Section 8(a)(3) in those circumstances.

The essence of a failure to hire violation is proof that an applicant was not hired by an employer because of his or her union or other protected, concerted activities. As discussed above, implicit in a failure to hire violation is the existence of a job opening into which the applicant would have been hired in the absence of the unlawful discrimination against them.

A failure to consider violation, on the other hand, is established when the General Counsel shows that an applicant was discriminatorily excluded from an employer's hiring process.[70] This exclusion may result in a loss of employment in cases where the employer subsequently hires applicants and the alleged discriminatee would have been considered and hired absent the unlawful discrimination. In such cases, I agree with the majority that a violation of Section 8(a)(3) has been made out, and should be remedied.

In some cases, the alleged failure to consider will involve openings that existed prior to the commencement of the hearing. The majority's decision properly notes that, if the General Counsel knows or should have known of such openings, he must allege a failure to hire violation and prove the elements of the violation at the trial on the merits. However, it may also be the case that openings will arise after the commencement of the hearing for which the applicant would have been considered absent the unlawful discrimination. I agree with the majority that a violation of Section 8(a)(3) may be made out in those situations as well.

However, I would not find an unlawful failure to consider in violation of Section 8(a)(3), in situations where the employer would not have hired anyone, for nondiscriminatory reasons. In my view, a failure to consider allegation presumes the existence of an active hiring process.[71] Thus, an employer does not meaningfully "consider" anyone for employment unless the employer is hiring. There is, accordingly, no discrimination in regard to hire, proscribed by Section 8(a)(3), if an employer merely accepts or retains some applications, while discarding others, unless some of the applications sub-

[68] Examples of factors I would consider relevant in this connection include evidence that an application was submitted by a third party, allegedly on behalf of an alleged discriminatee, but without the "applicant's" knowledge or consent. Compare *Kyles v. J. K. Guardian Security Services,* 77 FEP 1473 (N.D. Ill 1998) (job testers not bona fide employees under Title VII). I would also consider relevant evidence of the alleged discriminatee's deportment during the application process, including evidence that a supposed applicant for employment engaged in rude or boisterous behavior inconsistent with an intent to obtain employment.

[69] See, e.g., *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466 (9th Cir. 1966). In assessing whether the General Counsel has carried his burden of proof, the General Counsel's evidence must, of course, be viewed in isolation, apart from evidence presented by the respondent. *Bali Blinds Midwest,* 292 NLRB 243 (1989). Consistent with this principle, I would consider pretext evidence as support for the General Counsel's case only if it is presented by the General Counsel as part of his case in chief. A finding that a respondent's asserted reasons are pretextual may warrant a finding of unlawful motivation, if supported by the surrounding facts, but does not, of course, require such a finding. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 515 (1993).

[70] See *Modern Electric Co.,* 327 NLRB 92 (1998). In *Modern Electric,* the Board found that the employer unlawfully refused to consider an applicant for an electrician position where the applicant's resume was not forwarded to the hiring official for discriminatory reasons. However, the Board dismissed an allegation that the employer unlawfully failed to hire the applicant for the position for which he was denied consideration, as the employer proved that it would not have hired the discriminatee even in the absence of his union activities.

[71] See *Delta Mechanical, Inc.,* supra.

mitted contemporaneously with those of the alleged discriminatees were considered for an actual opening.[72]

If an employer communicates to employees that it will not accept applications from union members, or will not accord them nondiscriminatory consideration for openings that may arise, however, I would find that the employer has thereby violated Section 8(a)(1), as such statements reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and I would order the employer to cease and desist.[73] No further relief would be ordered unless the employer subsequently hired from among the applications submitted contemporaneously with those of the alleged discriminatees.

An 8(a)(3) violation, on the other hand, with its concomitant remedies of backpay and reinstatement, where appropriate, requires proof not only of employer conduct which interferes with, restrains, or coerces employees in the exercise of their Section 7 rights, but of "discrimination in regard to hire." As discussed above, proof of a hiring process is an essential element of such a violation.

III. EMPLOYER AFFIRMATIVE DEFENSES

The courts have frequently criticized the Board's handling of employer defenses in 8(a)(3) cases. For example, the courts have rejected findings by the Board that an employer unlawfully disqualified applicants pursuant to a rule against "batched" applications[74] and nonresponsive information on applications,[75] and have rejected the Board's position that employee-applicants have a Section 7 right to put "union organizer" on their application.[76] The courts have also rejected findings by the Board that an employer unlawfully disqualified applicants pursuant to rules against photocopied applications[77] and dual employment.[78] It seems clear from the foregoing that the reviewing courts have not accepted the Board's assessment of employer affirmative defenses. I will not comment further, however, because these issues are not the subject of the Board's decision today.

IV. REMEDY AND COMPLIANCE ISSUES

Many of the concerns expressed by the reviewing courts with the Board's jurisprudence in this area relate to the remedies it has applied in cases where the Board has found a refusal to hire or to consider an applicant for hire. In particular, the courts have repeatedly chastised the Board for attempting to address in compliance proceedings issues which relate to the respondent's liability.[79] The majority's decision today represents a solid step forward in addressing these concerns by addressing each element of a hiring discrimination violation and by recognizing the necessity that the General Counsel show some evidence related to the applicants' qualifications.

I am, however, concerned that some of the presumptions employed by the Board in compliance proceedings improperly expand an employer's remedial obligations beyond those necessary to make discriminatees whole for the losses actually suffered as a result of the discrimination against them. The Board's usual remedy for an unlawful refusal to consider or to hire is to direct the employer to hire the discriminatee into the position for which he or she applied, or to a substantially equivalent position if the original position no longer exists, and to provide backpay for the entire period between the date of the discriminatee's application and the date of a valid offer of employment.[80] Where, as in the case of most construction industry employers, the discriminatee was hired for a specific project, the Board will presume that the discriminatee would have been transferred to subsequent projects and require backpay for those projects as well, unless the **employer** proves that the applicants would not have been transferred.[81] There is some logic to applying this remedy in discharge cases, where the respondent had an opportunity to evaluate the discriminatee on the job and in comparison with coworkers. There is, however, no basis for applying the presumption to failure to hire cases, for it forces the respondent to prove why it would not have transferred to future jobs an applicant whom it never hired and whose skills it has not observed.[82]

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[72] See *NLRB v. Fluor Daniel, Inc.,* supra, 161 F.3d at 967 ("It cannot be an unfair labor practice merely for an employer to harbor animus against union members for applying for jobs that do not exist").

[73] This is the true analogue, under the Act, to the "legendary 'No Irish need apply' signs of decades past" cited by the majority.

[74] *B E & K Construction Co. v. NLRB,* 133 F.3d 1372 (11th Cir. 1997), denying enf. to 321 NLRB 561 (1996).

[75] *Boilermakers (H. B. Zachry) v. NLRB,* 127 F.3d 1300 (11th Cir. 1997), denying enf. in pert. part to 319 NLRB 967 (1995).

[76] Id.

[77] *TIC-The Industrial Co. Southeast, Inc. v. NLRB,* 126 F.3d 334 (D.C. Cir. 1997), denying enf. to 322 NLRB 605 (1996).

[78] *Architectural Glass & Metal Co. v. NLRB,* 107 F.3d 426 (6th Cir. 1997), denying enf. to 316 NLRB 789 (1995). Compare *Little Rock Electrical Contractors,* 327 NLRB 932 (1999) (dismissing failure to hire allegation where employer applied nondiscriminatory rule against dual employment).

In my view, there is at least a possibility that, in some circumstances, an antidual employment requirement would be a qualification for a position and thus properly part of the General Counsel's case.

[79] See *Starcon, Inc. v. NLRB,* supra, 176 F.3d at 952 ("The scope of the order must be determined before the order is entered, not afterwards. . . . We can hardly do this when the order is as tentative, and its practical scope and operation as indefinite, as the order is here."); *NLRB v. Fluor Daniel, Inc.,* supra, 161 F.3d at 969 ("[d]etermining the scope of an employer's liability in compliance proceedings seems to us counterintuitive, even backwards"); *Ultrasystems Western Constructors, Inc. v. NLRB,* supra, 18 F.3d at 259 (recognizing that an issue which relates to liability "should not be omitted from consideration in the liability phase on the basis that it can just as easily be addressed in a compliance proceeding").

[80] See, e.g., *Casey Electric, Inc.,* 313 NLRB 774 (1994).

[81] Id. See also *Dean General Contractors,* 285 NLRB 573 (1987).

[82] Because the issue arises in the compliance context, the presumption also raises due-process concerns. Typically, the General Counsel's compliance evidence is presented by a compliance officer, whose summary of the evidence, combined with the presumption, completes the General Counsel's case. In many cases, the respondent is then left to make its defense without discovery or the benefit of cross-examining the discriminatees during the General Counsel's case.

"It is, of course, settled law that a presumption adopted and applied by the Board must rest on a sound factual connection between the proved and inferred facts."[83] As the Supreme Court explained more than 50 years ago in *Republic Aviation Corp. v. NLRB,*[84] "[l]ike a statutory presumption or one established by regulation, the validity [of a presumption adopted by the Board through adjudication], depends upon the rationality between what is proved and what is inferred."[85] And, "[w]here such a nexus is lacking, the presumption is invalid."[86] In particular, the Board, in adopting a presumption, "is not free to ignore statutory language by creating a presumption on grounds of policy to avoid the necessity for finding that which the legislature requires to be found."[87]

The Board's authority to remedy unfair labor practices is prescribed by the Act, which authorizes the Board to issue orders requiring the respondent "to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of [the Act]."[88] The Board's remedial orders should "make employees only whole, and not more, by 'restoring the economic status quo that would have obtained but for the company's wrongful [action]' . . . . The order in the first instance, even though general, must nevertheless be congruent with the scope of discrimination, so that its enforcement neutralizes the discrimination, and does not go beyond."[89]

Applying these principles, I have substantial doubts concerning the fairness of the Board's presumptions regarding an employer's reinstatement and backpay obligations in hiring discrimination cases. In the case of an employee who is unlawfully discharged in violation of Section 8(a)(3), it is reasonable to expect that the employee would have remained on the payroll, in the absence of the unlawful discrimination, and to provide for a commensurate award of backpay. Moreover, in the event that this presumption is inaccurate in a particular case, the employer is the party with the information relevant to the issue. Accordingly, it is not unfair to place on the employer the burden of rebutting the presumption.

The circumstances are quite different, however, in a case of hiring discrimination. There, the Board must project the future of an individual who never worked for the employer and has no work history with that employer to be evaluated. There is no basis for presuming that the applicant would have met the employer's requirements once hired, much less that the employee would have been transferred from one job to another over the subsequent months and years. This presumption is particularly inapposite in cases where an employer hires on a project-by-project basis, and does not retain a stable work force. Moreover, in contrast to the situation in a discharge case, the employer does not have access to any information concerning the applicant beyond whatever may be contained in their application.

For the foregoing reasons, I would not apply the *Dean General* presumption of continued employment in failure to hire or failure to consider cases. Rather, I would limit backpay and instatement remedies to the duration of the project as to which the unlawful discrimination occurred, unless the General Counsel can introduce evidence from which the factfinder can infer that the discriminatee would have been transferred to each claimed subsequent project.

V. SALTING ISSUES

The principles set forth above are, of course, applicable in all hiring discrimination cases. However, a substantial portion of the hiring discrimination cases at the Board involve union "salts"; individuals who seek employment at least in part for the purpose of organizing the employer. "Salting" has been defined as the practice of "having union members or organizers take jobs with open-shop contractors to organize workers, or to harass or disrupt contractor operations."[90] Consistent with these objectives, in at least some cases union organizers submit applications in the hope of being rejected so that they can file unfair labor practice charges with the Board and inflict legal expenses on the targeted employer in retaliation for its failure to recognize the union.[91] Concerns over these practices have led one administrative law judge to conclude that alleged discriminatees in cases before him were not bona fide applicants but instead had applied for the purpose of giving the union grounds for filing unfair labor practice charges.[92]

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[83] *NLRB v. Baptist Hospital,* 442 U.S. 773, 787 (1979) (questioning validity of presumption that solicitation activity outside of immediate patient care areas does not interfere with the delivery of patient care services).

[84] 324 U.S. 793 (1945).

[85] Id. at 804–805.

[86] *Painters Local 829 v. NLRB,* 762 F.2d 1027, 1034 (D.C. Cir. 1985), denying enf. to 267 NLRB 858 (1983), on remand 278 NLRB 319 (1986). See generally McCormick, *Evidence*, supra, § 347 at 476–479.

[87] *Painters Local 829 v. NLRB,* supra, 762 F.2d at 1034.

[88] 29 U.S.C. § 160(c).

[89] *Ultrasystems Western Constructors v. NLRB,* supra, 18 F.3d at 258–259 (quoting *NLRB v. J. H. Rutter-Rex Mfg. Co.,* 396 U.S. 258, 263 (1969)).

[90] Herbert R. Northrup, "*Salting" the Contractors' Labor Force: Construction Unions Organizing with NLRB Assistance*, 14 J. Lab. Res. 469, 471–473 (1993).

[91] For example, the International Brotherhood of Electrical Workers' salting manual states that the goals of a salting operation included: "[t]he addition of several high-priced, non-productive journeymen [attorneys] to . . . . payroll; [t]he exposure of [the employer] to substantial back pay and interest liability plus fringe benefit accruals, if any . . . [t]he eventual placement on the payroll and job of a substantial number of Local 934 member-organizers." See *Ippli, Inc.,* 321 NLRB 463, 469 (1996).

These tactics are especially useful in the construction industry because construction contractors are susceptible to "top-down" organizing pressures not permissible in other industries.

[92] See *Zeppelin Electric Co.,* 328 NLRB 452, 458 (1999); *M. J. Mechanical Services,* 324 NLRB 812, 825 (1997). See also *Sunland Construction, Inc.,* 309 NLRB 1224, 1246 (1992) (characterizing salting tactics as comparable to "blackmail").

I do not doubt that some employers unlawfully refuse to hire applicants, or to consider them for employment, because of their union activities or membership. Whenever such violations occur, they must be taken seriously as they deprive employee applicants of the full freedom of self-organization provided by the Act. However, there is no warrant for finding a violation of the Act, much less for imposing any remedial obligations on an employer, for failing to hire an individual who is not genuinely seeking employment. As long as parties appearing before the Board continue to employ these ill-advised tactics, the Board must take great care to insure that it is not "co-opted" by "organized labor interests" and draw only the appropriate conclusions required by the full context of each case which comes before it.

VI. APPLICATION OF CORRECT LEGAL STANDARD TO THE FACTS OF THIS CASE

I join the majority in affirming the judge's finding that the Respondent unlawfully failed to consider nine union applicants for employment and in remanding to the judge the issue of whether the Respondent unlawfully failed to hire the nine applicants. In finding that the Respondent unlawfully failed to consider the applicants, the judge, inter alia, rejected the Respondent's wage compatibility defense, wherein the Respondent asserted that it did not consider or hire the applicants because their applications indicated that they had previously worked for employers who paid wages significantly higher than the wage rate paid by the Respondent. The judge found that the Respondent's "wage rate criteria" were a post hoc rationalization for excluding union supporters from employment, based on evidence that the criteria did not exist in written form and credited testimony that they were not consistently applied. In agreement with the majority, I would adopt these findings.

The judge, however, also appears to have found that a wage compatibility defense is "a code word for Union or union organizer" and hence inherently illegitimate. Any such finding is, of course, erroneous as a matter of law.[93] Moreover, in light of the judge's failure to address the allegation that the Respondent unlawfully failed to hire the nine applicants for the eight welder pipefitter positions shown to have been open during the relevant period of time, which we are remanding to the judge, it seems clear that the judge could not have considered or decided, the applicability of the wage compatibility defense to that allegation. In these circumstances, I understand the majority's decision to contemplate that this defense, and any other affirmative defense, may be asserted by the Respondent in connection with the remand of this case.

MEMBER FOX, concurring and dissenting in part.

Although I agree with my colleagues as to the general framework set out in the majority opinion for analyzing and litigating refusal-to-consider and refusal-to-hire cases, I do not agree with their specification of the elements of proof of a refusal-to-hire violation insofar as it requires the General Counsel to establish not only that antiunion animus contributed to the decision not to hire the alleged discriminatees, but also that the applicants "had experience or training relative to the announced or generally known requirements of the positions for hire," or that these "announced or generally known" requirements were pretextual or not uniformly adhered to. In my view, this formulation suffers from two defects. First, it shifts to the General Counsel a burden which, under the *Wright Line* test approved by the Supreme Court in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983), should properly be borne by the employer, once it has been shown that the employer has acted out of an unlawful motive. Second, it seems to me likely to unnecessarily complicate the litigation of refusal-to-hire cases.

In *Wright Line*, 251 NLRB 1083, 1089 (1980), the Board announced that it would henceforth apply the following causation test in "all cases" alleging violations of Section 8(a)(3) or violation of Section 8(a)(1) turning on employer motivation:

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. *Once this is established, the burden will shift to the employer* to demonstrate that the same action would have taken place even in the absence of the protected conduct. [Emphasis added.]

As the Supreme Court stated when it approved the *Wright Line* test in *Transportation Management*, supra, once it has been shown that protected conduct was a motivating factor in the employer's discharge or "other adverse action" taken against an employee, it is appropriate that the employer bear the burden of showing that the adverse action would have occurred in any event:

> The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing. [462 U.S. at 403.]

Applying a *Wright Line* analysis to refusal-to-hire cases, the General Counsel should be able to make out a violation by showing that there was an actual refusal to hire—i.e., that the applicant applied for a position the employer was seeking to fill and was not hired for that position—and that antiunion considerations contributed to the decision not to hire. At that point, the employer having been shown to have "acted out of a motive that is declared illegitimate by the statute," he should not be able to escape liability unless he can show that for legitimate, nondiscriminatory reasons such as lack of qualifications he would not have hired the applicant even

[93] See *J. O. Mory, Inc.,* 326 NLRB 604 (1998); *Bay Control Services,* 315 NLRB 30 fn. 2 (1994); *Wireways, Inc.,* 309 NLRB 245 (1992).

absent the unlawful motive. As Judge Posner explained in his penguin hypothetical in *Starcon, Inc. v. NLRB*, 176 F.3d 948 (7th Cir. 1999), if a penguin wearing a button identifying himself as a voluntary union organizer applied for and was turned down for a job as a welder, and the General Counsel was able to prove that the employer would never hire anyone wearing a voluntary union organizer button, "this would be a classic mixed-motive case, and it would therefore be open to Starcon to prove that, in any event, it would never hire a penguin because penguins can't weld. But the burden of proving this would be on Starcon." Id., 176 F.3d at 948.

The problem with the majority's test is that the burden does not shift to the employer once the General Counsel has established the refusal to hire and "that antiunion animus contributed to the decision not to hire" (the third element of the majority's test). Rather, the burden remains on the General Counsel to *additionally* show that the applicant met certain "announced or generally known" qualifications for the position, or that those requirements were pretextual or were not uniformly adhered to. In other words, instead of the employer having to prove that under legitimate, nondiscriminatory criteria that it actually used for evaluating applicants, the alleged discriminatee would not have been hired, the General Counsel has to prove that the applicant met whatever announced or "generally known" requirements there may have been for the job, and these requirements are presumed to be those that the employer actually utilized unless the General Counsel can prove otherwise. This a significant departure from established procedures for litigating cases alleging violations of 8(a)(3), with potentially significant consequences for how such cases will be ultimately decided.

As the Supreme Court made clear in *Transportation Management,* what is at stake in the allocation of burdens under *Wright Line* is which side bears the risk that "the influence of legal and illegal motives cannot be separated." 462 U.S. at 403. Under *Wright Line*, that risk is properly placed on the employer, because he has been shown to have acted with an unlawful motive. If he is unable to come forward with evidence sufficient to persuade the factfinder that he would have taken the same action for lawful reasons, he cannot escape liability. Under the majority's formulation for refusal-to-hire cases, at least part of the risk of nonpersuasion is on the General Counsel rather than the employer. I see no reason for such a departure from the basic principles of *Wright Line* in refusal-to-hire cases.

I am not suggesting that under an analysis consistent with *Wright Line*, evidence of the applicant's qualifications for the job would never be part of the General Counsel's case. I recognize that in cases where there is no direct evidence of unlawful motive, and the General Counsel is relying on inferences drawn from other evidence to establish a violation, a showing by the General Counsel that the alleged discriminatees were in fact qualified for the positions for which they applied might well be necessary in order to convince the finder of fact that antiunion considerations were indeed a motivating factor in the decision not to hire. See, for example, *WACO, Inc.*, 316 NLRB 73, 76 fn. 9 (1995), in which the Board concluded that in light of the General Counsel's failure to adduce any evidence of antiunion animus and the judge's finding that the applicants lacked the qualifications sought by the employer, the General Counsel had failed to make out a prima facie case that the Respondent refused to hire job applicants because of their union affiliation. What I find objectionable, and contrary to *Wright Line*, is that under the majority's test, even where the General Counsel *has established* that union animus was a motivating factor in the failure to hire—even through direct evidence of unlawful motive—the General Counsel must additionally provide proof of the applicant's qualifications in order to establish a violation.

Contrary to the majority's assertion, their new formulation of the elements of a refusal-to-hire violation is not supported by Board precedent. The Board has previously stated that:

> the elements of a discriminatory refusal-to-hire case are the employment application by each alleged discriminatee, the refusal to hire each, a showing that each was or might be expected to a union supporter or sympathizer, and further showings that [an] employer knew of or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus.

Big E's Foodland, Inc., 242 NLRB 963, 968 (1979). See also, e.g., *Grand Rapids Press*, 327 NLRB 393, 396 (1998); *M. J. Mechanical Services*, 324 NLRB 812, 816 (1997). The Board has never said that the General Counsel must, *in addition to showing* that the employer refused to hire the applicant because of union animus, show that the applicant was qualified for the position. The cases cited by the majority as consistent with their new formulation—*GM Electrics*, 323 NLRB 125 (1997), and *Casey Electric*, 313 NLRB 774 (1994)—simply illustrate the point made above that the Board has relied on evidence that the applicants were qualified for the positions as support for a finding that their union affiliation was a factor in the decision not to hire them.

The Board adopted the *Wright Line* test for determining liability in 8(a)(3) cases in large part because various other tests employed by the Board and the courts had created widespread disagreement and controversy about the respective burdens of the parties in such cases, and how those burdens could be satisfied. My concern is that the majority's new formulation of the elements necessary to make out a refusal to hire, insofar as it departs from the *Wright Line* formulation, will once again significantly complicate the prosecution and adjudication of such cases, and lead to much unnecessary litigation over, for example, what are the "generally known" requirements for particular jobs, and what constitutes training or

experience "related to" such requirements. In accordance with *Wright Line*, I would adhere to the formulation of the elements of a discriminatory refusal to hire set forth in *Big E's Foodland,* supra, and similar cases. Accordingly, I dissent from the portion of the majority decision, which changes that test.

Steven L. Sokolow and *Patrick M. Devine, Esqs.,* for the General Counsel.

Thomas R. Davies, Esq. (Harmon & Davies, P.C.), of Lancaster, Pennsylvania, for the Respondent.

James L. Cowden, Esq. (Strokoff & Cowden, P.C.), of Harrisburg, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in York, Pennsylvania, on July 20, 1998. The charge was filed May 20, 1996,[1] and the complaint was issued December 29, 1997.

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

FINDINGS OF FACT

I. JURISDICTION

FES is a division of Thermo Power Corporation. FES has an office and facility in York, Pennsylvania, where it manufactures industrial refrigeration equipment. From this facility it annually sells and ships goods valued in excess of $50,000 to points outside the Commonwealth of Pennsylvania. FES 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 and that the Union, Plumbers and Pipefitters Local Union 520, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

On February 9, 1996, six union members applied for employment with FES, three more applied on March 29, and one member applied on April 24. None of these were contacted or interviewed by Respondent and none were offered employment. The General Counsel alleges Respondent refused to consider for employment and refused to hire these applicants in violation of Section 8(a)(1) and (3) of the Act because they were union members and because FES expected that these applicants would try to organize its employees. Respondent contends the applicants were not considered for nondiscriminatory reasons.

On or about January 15, 1996, Neil "Chip" Roche, Respondent's vice president for manufacturing, signed off on a company requisition request for the hiring of five welder/pipefitters who could pass a 1-G and 6-G weld test, as well as read and understand mechanical drawings. He signed off on a requisition request for three more experienced welder/pipefitters on February 19.

At or about the time of the first request, FES' construction division also decided to hire welder/pipefitters in anticipation of possibly receiving a contract to do work for Pocono Produce Company. On February 4, FES placed a classified advertisement for welders and pipefitters in the York, Pennsyvania, Sunday News.

On February 9, Terry Peck, the Local 520 business agent, accompanied five unemployed union journeymen to FES' office. They wore union hats and union jackets and filed employment applications. They also videotaped this process.

The FES construction division was not awarded the contract with Pocono Produce and apparently never hired anyone to fill the positions for which it advertised on February 4.[2] However, the union applications were also reviewed by Chip Roche, who decided not to interview or hire the union applicants. Roche was aware of the video taping by the Union on February 9, and discussed with other FES personnel the possibility of consulting with a labor attorney regarding these applications.

On March 27, the FES manufacturing department placed a classified ad in the York Daily Record, which stated:

> FES has immediate openings for WELDERS. The ideal candidate will be certified to build Pressure Vessels per ASME Section VIII and/or have experience building Carbon Steel Piping Systems per ANSI B31.5. If you have strong welding skills, FES will train you to work on pipe and vessels

FES ran an identical ad on March 29.

On March 29, Terry Peck returned to FES' office with journeymen John Ganoe and Brian Bathavic, who filed employment applications. Peck also submitted a resume for Thomas Bathavic III. Approximately 3 days later, one of the York newspapers ran an article about the difficulties faced by area employers due to a shortage of skilled labor. Roche, whose picture accompanied the article, was quoted as saying that FES might have to build a new plant outside of the York area due to a shortage of skilled labor, particularly welders. Roche was also quoted as worrying about where he was going to find 5 to 10 workers to man the expansion of a York area operation.[3]

Shortly after this article appeared, Union Business Agent Terry Peck called Roche. Peck told Roche that he had journeymen pipefitters and welders available. Roche replied that "he was not interested in the Union or what the Union could do for him or his company."[4]

Sometime during March, Terry Peck also responded to a newspaper advertisement placed by an employment agency, Personnel Express. Peck's application and that of two other individuals, who apparently weren't connected with the Union, were sent to FES. Roche's immediate subordinate, Bob McCubbin, interviewed the other two applicants, but not Peck. Finally, union journeyman Robert Stupp submitted an employment application directly to FES on April 23. He was never contacted by the Company.

FES filled all the positions covered by the January and February requisitions and the March advertisements. None of the employees hired had the qualifications set forth in the requisitions or advertisements; all of the union applicants had these qualifications. Respondent also dealt with its labor shortage by contracting out some of its fabrication work.

Analysis

Discrimination in refusing to consider applications for hire on the basis of union membership or activity is discrimination

[1] All dates are in 1996 unless otherwise indicated.

[2] The construction division hired two welder/trainees during the first half of 1996; the record does not indicate in what month they were hired, or whether their positions could have been filled by the union applicants.

[3] Roche confirmed that he told the reporter that he was having trouble finding welders.

[4] Peck's testimony regarding this conversation is unrebutted and thus credited.

in regard to hire within the meaning of Section 8(a)(3). Such discrimination is proved by showing that (1) the employer is covered by the Act; (2) that the employer at the time of allegedly illegal conduct was hiring or had concrete plans to hire; (3) that antiunion animus contributed to the decision not to consider, interview or hire an applicant; and (4) that the applicant was a bona fide applicant*, 3E Co*., 322 NLRB 1058, 1061–1062 (1997), *NLRB v. Ultrasystems Western Contractors*, 18 F.3d 251, 256 (4th Cir. 1994), enfg. in part, denying enforcement in part, and remanding *Ultrasystems Western Contractors [I]*, 310 NLRB 545 (1993), quoted in *Ultrasystems Westem Contractors [II],* 316 NLRB 1243 (1993). Pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), the General Counsel must show that antiunion sentiment was a substantial factor in the employer's decision. If he does so, the employer must prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.

In the instant matter, Respondent does not dispute that it was covered by the Act. The record also shows that it hired a number of employees soon after the union members applied for employment. The General Counsel has also established that the nine union members were bona fide applicants by proving that they were experienced welders and/or pipefitters, *3E Co*., supra at 1058 fn. 2 and 1062.

Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence, *3E Co*., 322 NLRB 1058, 1062 (1997). In this case, there is direct evidence of animus and discriminatory motivation. While Respondent was seeking new employees, Peck called "Chip" Roche and informed him that the Union had journeymen pipefitter and welders available with the qualifications mentioned in FES' employment advertisements. Roche responded by telling Peck he was not interested.

There is also indirect evidence from which I infer antiunion animus and discriminatory motive. Respondent advertised for skilled welders. When presented with applications from union members/voluntary organizers, who had such qualifications, FES decided to hire individuals who were significantly less qualified. Respondent's assertion that it prefers to hire individuals with basic skills and then train them "the FES way" is belied by the advertisements. These advertisements lead me to conclude that if individuals with the skills listed had applied for a job at FES and hadn't indicated that they intended to organize, they would have been considered for employment.

FES contends that it decided not to interview or contact any of the union applicants after determining that they were not a "good fit" for FES employment. The criteria it claims to have used consists of the level of effort put into their applications, whether their applications were complete, "wage rate compatibility" and stability in prior employment. I find these criterion to be pretexts for discriminatory hiring practices. The finding of such a pretext supports the inference of antiunion animus and discriminatory motive, *Fluor Daniel, Inc.,* 304 NLRB 970 (1991). The criteria by which Roche claims he disqualified the union applicants do not exist in written form and are not strictly adhered to. There is no evidence they were ever applied to any applicants other than the Local 520 "salts."[5] The criterion thus appear to be posthoc justifications for disqualifying a union applicant or potential union organizer. FES' disqualification of individuals for "wage rate incompatibility" is merely a code word for Union or union organizers.[6]

I therefore conclude that the General Counsel has met its prima facie case of proving that 9 of the 10 union applicants were not hired for discriminatory reasons. There is no evidence, however, that Respondent was aware that Robert Stupp, who applied on April 24, was a union member or organizer. I therefore dismiss the complaint with regard to Stupp. On the other hand, I infer that Respondent knew or suspected that John Ganoe, Brian Bathavic, and Thomas Bathavic were union organizers (or salts) from the fact that business agent Peck accompanied the first two to FES' office and submitted the latter's resume.

For many of the same reasons, I conclude that Respondent has not made out a legitimate affirmative defense.[7] For example, Respondent contends that it adopted its "wage compatibility" criterion as the result of its earlier experience in hiring several laid-off union employees from York International Company. FES contends that because these employees returned to work when recalled by York, it would never consider hiring employees who have made significantly higher wages elsewhere.

I find the testimony that FES adopted a nondiscriminatory hiring policy as the result of this experience not to be credible. It is hardly surprising that the York employees returned to York, when that company recalled them. I do not believe that their departure was unanticipated by FES.

If FES is concerned that union employees will leave for the first job available to them at union scale, it has alternatives to discriminating against them in employment. As the Supreme Court noted in *Town & Country Electric*, 116 S.Ct. 450, 457 (1995), "[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." Respondent has not pursued such solutions, but continues to hire its employees at will.

Finally, even if Respondent was unhappy with its experience with the York employees, that experience does not provide a sufficient basis for recognizing its "wage compatibility" criterion as a legitimate nondiscriminatory factor in considering job applicants. To do so would essentially allow Respondent to avoid hiring anyone who has ever been a union journeyman. Moreover, NLRA cases are replete with instances in which ex-union employees have chosen to work nonunion because, for example, they concluded that the nonunion employer provided steady, albeit lower wage employment. See, e.g., *M. J. Mechanical Services*, 325 NLRB 1098, 1106 fn. 20 (1998).

[5] There is also no evidence that Respondent inquired as to whether the union applicants would be willing to work at its wage rates, or whether any of them would not have been willing to work for FES at these rates.

[6] It is not even clear that this factor was applied in a consistent manner. Bob McCubbin testified that FES hired employee Carl Knobb, who worked for unionized sheetmetal employers. There is no indication as to whether Knobb was a journeyman or apprentice, but if he was a journeyman, he too probably suffers from "wage rate incompatibility." There is no indication that Knobb was going to try to organize Respondent's employees.

[7] Respondent in its brief notes that it received 88 applications from individuals seeking positions as pipefitters or welders during the period from June 1995 though May 1996, and hired very few of them. This provides no grounds for an affirmative defense in that there is no indication that any other applicants had comparable qualifications to those of the alleged discriminatees.

CONCLUSIONS OF LAW

By refusing to consider for hire applicants Brian Bathavic, Thomas Bathavic III, Brett Emerich, John Ganoe, Kevin Goodman, George Heckert, Terry E. Peck, David Wagner, and Richard Walker II, Respondent violated Section 8(a)(1) and (3).

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 nine applicants for employment, l shall order Respondent to consider them for hire and to provide backpay to those whom it would have hired but for its unlawful conduct.[8] In addition, if at the compliance stage of this proceeding it is determined that the Respondent would have hired any of these nine 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, Respondent shall hire those individuals and place them in positions substantially equivalent to those which they would have been hired for initially.

On these findings of fact and conclusions of law and on the entire record, l issue the following recommended[9]

ORDER

The Respondent, FES (a Division of Thermo Power), York, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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

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

(a) 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 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:

> Brian Bathavic, Thomas Bathavic III, Brett Emerich, John Ganoe, Kevin Goodman, George Heckert, Terry E. Peck, David Wagner and Richard Walker II.

(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 York, Pennsylvania facility, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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 February 9, 1996.

(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 the Respondent has taken to comply.

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.

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.

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[8] The current state of the record is insufficient to determine whether Respondent would or would not have hired any of the applicants, if it had considered them on a nondiscriminatory basis. Roche testified that the only reason he could find for not considering applicant John Ganoe was his "wage incompatibility." Respondent suggests it would not have hired Kevin Goodman because he had been fired from his last job and left it off his FES employment application. While the record suggests that Ganoe had superior qualifications to employees hired after he applied, Respondent will have the opportunity at the compliance stage to establish that it would not have hired him. However, it will bear the burden of proving that employees hired after the application dates of Ganoe and the other discriminatees had superior qualifications, *H. B. Zachry Co*., 319 NLRB 967, 968 (1995). The fact that Goodman had been fired by a previous employer does not necessarily mean that FES would not have hired him. Individuals who have been fired before are hired all the time, particularly when there is a labor shortage, even by employers who are aware of their prior employment record. With regard to the shortcomings of other Union applications (i.e., incomplete employment history), these appear to have been made a disqualifying factor on a very selective basis by FES.

[9] 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.

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

WE WILL 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:

Brian Bathavic, Thomas Bathavic III, Brett Emerich, John Ganoe, Kevin Goodman, George Heckert, Terry E. Peck, David Wagner and Richard Walker II.

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.

FES (A DIVISION OF THERMO POWER)