Solvay Iron Works, Inc. *and* Ironworkers Local 33.
Case 3–CA–23782–3

February 17, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On August 20, 2003, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] and to adopt the recommended Order as modified.[3]

[1] 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.

There are no exceptions to the judge's recommended dismissals or to his findings that the Respondent violated Sec. 8(a)(1) by interrogating employees about their union activities or membership, by telling employees that they should quit their jobs if they wanted to join the Union, and by creating the impression among the employees that their union activities were under surveillance.

We correct the judge's inadvertent misstatement at Sec. III,A,2, par. 1 of his decision, that the Respondent hired three or four field employees between July 15 and 31, 2002. In fact, the Respondent hired only one employee, Louis "Gabby" King, during that time period.

[2] In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by laying off Mark McKean, Chairman Battista finds it unnecessary to address whether the Respondent in fact experienced a slowdown in operations. Even assuming that such a slowdown occurred, and that the Respondent was motivated in part by the slowdown to lay off McKean, Chairman Battista finds, for the reasons stated by the judge, that the Respondent failed to satisfy its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), of establishing that it would have laid off McKean in the absence of his protected activity. As the judge explained, Supervisor Baker assured McKean that he would retain his job even if he did not take the certification test. See *L.S.F. Transport, Inc.*, 330 NLRB 1054, 1075–1077 (2000), enfd. 282 F.3d 972 (7th Cir. 2002). Moreover, Director of Operations Ormsby testified that work remained available for uncertified welders after August 26, 2002. At the time McKean was laid off, the Respondent's Spencerport jobsite was only 50 percent complete, it had just experienced a net loss of two employees, and the Respondent had three to five other active projects in the area. Accordingly, Chairman Battista would find a violation even if the Respondent's slowdown justification was not pretextual (i.e., even if it was a factor that was relied upon).

[3] We shall modify the judge's recommended Order to conform to the violations found. We shall substitute a new notice to conform to the new Order.

1. In adopting the judge's finding that the Respondent violated Section 8(a)(3) and (1) by refusing to hire Gary Swanson, we agree that the Respondent was not motivated by Swanson's misrepresentation regarding his name. The record demonstrates that this asserted justification was a pretext for discrimination. During Swanson's initial telephone interview, Swanson introduced himself to the Respondent's director of operations, Kelly Ormsby, as "Gary Norman," omitting his last name. Swanson testified that a few months before this telephone interview, Swanson had met with the Respondent's owner to discuss the Respondent becoming signatory to the Union's collective-bargaining agreement. Swanson omitted his last name during the telephone interview to avoid triggering the Respondent's memory that he was affiliated with the Union.

Two days later, Swanson interviewed with Sheila and John Maestri, introducing himself with his full name. Neither Sheila nor John Maestri asked Swanson about the discrepancy in names. Nor did they express any concern that he had lied about his name during his earlier conversation with Ormsby. Rather, the Respondent demonstrated at all times that it was motivated by union animus. Throughout the interview, John Maestri expressed concern about hiring a paid union organizer. Under these circumstances, we find that the Respondent was not motivated by Swanson's misrepresentation about his name in deciding not to hire him.[4]

2. The Respondent excepted to the recommended Order insofar as it requires the Respondent to reinstate Mark McKean with backpay. The Respondent argues that the record establishes that it made an offer of reinstatement to McKean 1 week after it laid him off. The Respondent elicited testimony to this effect after McKean had been discharged as a witness from the hearing. Because the issue of the reinstatement offer was not fully litigated before the judge, we reserve to the compliance stage the issue of whether such an offer was made and its effect on the remedy. See, e.g., *Baker Mfg. Co.*, 269 NLRB 794 fn. 2 (1984), enfd. in relevant part 759 F.2d 1219 (5th Cir. 1985); *William C. Schopovick & Co.*, 308 NLRB 1165 fn. 2 (1992). In reaching this conclusion, we emphasize that the General Counsel objected to the Respondent's introduction of evidence regarding the alleged offer of reinstatement. During the hearing, the General Counsel argued that evidence regarding any re-

[4] Because the Respondent was not motivated by Swanson's misrepresentation, Chairman Battista finds it unnecessary to address whether an employer may lawfully refuse to hire an applicant because he lied about his name to conceal the fact that he is a paid union organizer. Cf. *Hartman Bros. Heating & Air Conditioning v. NLRB*, 280 F.3d 1110, 1112 (7th Cir. 2002); *Micrometl Corp.*, 333 NLRB 1133 (2001).

instatement offer was not relevant at the merits stage and should be reserved for compliance. The judge did not rule on this objection. Under these circumstances, we find it appropriate to reserve the issue for compliance.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Solvay Iron Works, Inc., Syracuse, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Within 14 days from the date of this Order, offer Gary Swanson employment in the position for which he applied on July 15, 2002, or if such a position no longer exists, to a substantially equivalent position."

2. Substitute the following for paragraph 2(b).

"(b) Within 14 days from the date of this Order, offer Mark McKean full and immediate reinstatement to his former job if it has not already done so, or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other benefits, rights, and privileges previously enjoyed by him."

3. Substitute the attached notice for that of the administrative law judge.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you concerning your union membership or activities or those of your fellow employees.

WE WILL NOT tell you that you should quit your jobs if you want to join the Union.

WE WILL NOT tell you not to talk to union representatives during your work hours, including your breaks or lunchtime.

WE WILL NOT create the impression among you that your union activities are under surveillance.

WE WILL NOT discriminate against applicants affiliated with the Union by changing the Company's hiring procedure.

WE WILL NOT refuse to hire job applicants because they are affiliated with the Union.

WE WILL NOT lay off employees because of your union activities.

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

WE WILL, within 14 days from the date of the Board's Order, offer Gary Swanson employment in the position for which he applied on July 15, 2002, or if such a position no longer exists, to a substantially equivalent position.

WE WILL, within 14 days from the date of the Board's Order, offer Mark McKean full and immediate reinstatement to his former job if we have not already done so, or, if such a job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other benefits, rights, and privileges previously enjoyed by him.

WE WILL make Gary Swanson and Mark McKean whole for any loss of earnings and other benefits suffered as a result of the discriminations against them, less interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful refusal to employ Gary Swanson and within 14 days remove from our files any reference to Mark McKean's layoff and, within 3 days thereafter, notify the employees (applicants) in writing that this had been done and that it will not be used against them in any way.

SOLVAY IRON WORKS, INC.

Ron Scott, Esq., for the General Counsel.
Edward J. Sheats and *Elizabeth A. Genung, Esqs. (Melvin & Melvin, PLLC),* of Syracuse, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried in Syracuse, New York, on February 4 and 5, 2003, on a complaint dated November 27, 2002. The charge, as amended, was filed by Ironworkers Local No. 33 (the Union).

The complaint alleges that the Respondent, Solvay Iron Works, Inc., violated Section 8(a)(1) of the National Labor Relations Act (the Act) by: (a) telling an employee that he cannot engage in union activities if he is hired, (b) telling him that it would not employ him because he would engage in organiz-

ing activities, (c) interrogating employees about their union activities, (d) telling employees that they should quit their jobs if they want to join the Union, (e) telling an employee not to talk to the union organizer on the jobsite, including during breaktime, (f) telling an employee that he was known as a union informant, (g) telling an employee that by talking to union organizers the employee was causing problems at work, and (h) telling employees that they should not sign union authorization cards. The complaint also alleged that the Respondent violated Section 8(a)(1) and (3) of the Act by: (a) discriminating against employee-applicant Gary Swanson by changing its hiring procedures and refusing to hire Gary Swanson, and (b) by laying off its employee, Mark McKean.

The Respondent filed an answer, admitting the jurisdictional aspects of the complaint, but denying that it had violated the Act.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Syracuse, New York, is engaged in structural and steel fabrication and erection. With sales from its Syracuse, New York facility of goods, valued in excess of $50,000, directly to points outside the State of New York, the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

Solvay Iron Works, Inc., located in Syracuse, New York, is a structural steel and fabrication company, which in 2002 was in the process of constructing an elementary school building in Spencerville, New York. The Company is owned and operated by John Maestri, president, and his daughter, Sheila Maestri, executive administrator. Kelly Ormsby is the vice president and Bill Baker was the project foreman on the Spencerville School project. These individuals are admittedly supervisors within the meaning of Section 2(13) of the Act.

The supervisory or agent status of Paul Streeter, foreman, is contested. The General Counsel has requested that I reconsider my ruling made during the hearing that Streeter`s supervisory status had not been established. I have reexamined the record in this regard and adhere to my ruling. The burden of proving that an individual is a statutory supervisor rests with the party asserting it. *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). The record shows that Streeter possessed none of the indicia enumerated in Section 2(11) of the Act, except the authority to assign work or to direct the work of employees. In this regard the record suggests that the authority to assign work on the detail gang was routine in nature and more related to his expertise than to his exercise of independent judgments. *Millard Refrigerated Services*, 326 NLRB 1437 (1998). I find, however, that Streeter is Respondent's agent within the meaning of Section 2(13) of the Act. In his statements to the employees, Streeter held himself out as a representative of the employer. An example was his conversation with an employee, Mathew Stiles, on August 26, 2002, the day the Respondent laid off employee Mark McKean. Stiles testified as follows about his conversation with Streeter on the roof of the building (Tr. 173):

> What was said was, I asked him, Why did you lay off Mark McKean? Why was he laid off? And it was replied that we're slowing down on the jobsite and, he's lowest on the totem pole, so we had to let him go.

Moreover, Streeter admitted admonishing the two employees in August 2002, while they were working on the roof, that they could talk on their own time, but that now it was time to work. Keeping in mind Streeter's leading role on the jobsite in making assignments to the employees, he certainly conveyed to the employees the notion that he spoke on behalf of management and that he was their agent. *Albertson's Inc.*, 307 NLRB 787 (1992), enf. denied mem. 8 F.3d 20 (5th Cir. 1993); *Great American Products*, 312 NLRB 962 (1993).

A. The Alleged 8(a)(3) Violation for Discriminating Against Gary Swanson by Changing the Hiring Process and Refusing to Hire Him

On July 15, 2002, Gary Norman Swanson, the Union's business agent, applied for a job at the Spencerville project, though he was unaware of a specific job opening at the time. He spoke to Project Foreman Bill Baker who, after asking about his experience, told him to fill out an application and speak to either Kelly Ormsby or Sheila Maestri (Tr. 185). Swanson called Ormsby that day and introduced himself as Gary Norman, instead of disclosing his full name, in order to conceal his identity as a union organizer. He testified that he was concerned that John Maestri would recognize his name because they had met a few months earlier to discuss the Respondent's willingness to become a union signatory.

On the phone with Ormsby, Swanson recited his broad experience as an ironworker, as well as his welding skills. Ormsby was sufficiently impressed by the applicant's experience that he mentioned the possibility of a foreman's position. He suggested that Swanson start at the Spencerville school site for a week and, if he did a good job, they would discuss the foreman position over breakfast the next Saturday. After a brief discussion about pay rates and the necessary tools, Ormsby told Swanson to show up for work the next day at the Spencerville site. Ormsby admitted that he offered Swanson a job over the phone (Tr. 350, 372).

Towards the end of the conversation, Swanson, still as Norman, disclosed that he was a union organizer and asked if that would be any problem. According to Swanson, Ormsby said: "As long as you're not organizing a union with me," or indicating that would be fine with him as long as Swanson was not trying to organize (Tr. 235). Swanson explained that he intended to organize the employees; he wanted the job so he would be able to have daily contact with the employees and discuss the Union during the "off time, not during work time." Ormsby replied, "Well I've got a job, you show up to work at

Spencerville, fine" (Tr. 236). Later that day, Ormsby called Swanson back and left him a message telling him not to report to the project the next day but instructing him to go to the office to fill out the necessary paperwork before he could start (Tr. 239, GC Exh. 6 at 16–17).

Swanson tried to call Ormsby back but he had left the office. Instead, he spoke with Sheila Maestri who said that Ormsby had switched the call to her. She made an appointment for him to come to the office to fill out the application. Swanson asked if he had to come to the office because he was a union member. She said it did not make any difference, they just needed the paperwork filled out before he began working. They arranged for Swanson to come to the office and meet with her and John Maestri on July 17, 2002.

Swanson went to the office on July 17, where he filled out a job application using his real name. The receptionist took him into John Maestri's office, whereupon Swanson reminded Maestri that they had met a couple of months before. Maestri remembered him in connection with a union matter. They started to go over the application when Sheila Maestri entered the room. She made a copy of the application. John Maestri said, "Well how could I put you on," or "I couldn't possibly put you on." Swanson replied that he surely could, to which Maestri continued, "No, they'd put me in jail." Swanson then assured Maestri that "they wouldn't put you in jail." At that point Sheila Maestri said, "Put you on as what" (Tr. 249). Swanson explained that he would remain employed by the Union while working for the Respondent as an ironworker, and that he would try to organize the Company during breaks or nonworking time.

The entire meeting lasted about 20 minutes, initially discussing the possibility of Swanson's employment, and the rest of the meeting devoted to the possibility of the Respondent becoming a signatory for the Union. John Maestri said he would review the application and get back to him. Swanson did not recall being asked about his job qualifications during the interview. The Respondent never contacted Swanson in response to his application.

John Maestri did not testify. Sheila Maestri testified that the Company did not have a particular position open and that Swanson was not being interviewed for a specific job. When asked why Swanson was not hired, she testified as follows (Tr. 313):

> The man lied about who he was, he misrepresented himself. How can I trust an individual that the first statement out of his mouth is a misrepresentation? This is dangerous work, how can I trust someone that lies with the safety of the rest of my men, with the rest of my crews, with my customers? I can't do it, I can't work with someone like that. I did see on the application that he had not had any recent ironwork experience, he'd not been up in the air in like 15–well, I think more like ten or 12 years. The OSHA regulations change, I had no idea whether this man—I was not comfortable that this man was up to snuff.
>
> He was deceitful and arrogant.

She further testified that Swanson's union activity and affiliation had nothing to do with the decision not to hire him. Ormsby testified that if he had known that Swanson had not worked for 12 years he would not have hired him on the phone but would still have had him come in.

Maestri's testimony about the interview with Swanson was generally consistent with Swanson's testimony and with the transcript of a tape, received into evidence, which Swanson had made of the conversation. Her testimony conflicted, however, with statements made in her affidavit given October 7, 2002, relating to the account of her initial meeting with Swanson and when she first realized from his application that the names were different. According to her affidavit she "knew right then and there I would not hire him" (Tr. 331). A further discrepancy is whether Ormsby did or did not tell her that he wanted to hire Norman/Swanson (Tr. 332). In her testimony, Maestri attempted to explain the inconsistencies.

On August 16, Swanson had lunch with John and Sheila Maestri and Union Business Manager Mike Downy to discuss the Company becoming a union signatory. Swanson testified that the meeting was cordial and that Maestri said it was "cute" that he had applied for work.

B. The Respondent's Hiring Practices

According to her testimony, Sheila Maestri initiated changes in the Company's hiring policy as soon as she began working for the Respondent. She instituted these changes in September 2001. Prior to that, the hiring practices were haphazard, important papers or information was sometimes misplaced, and Ormsby was in charge of the hiring. She wanted to change the procedure, because she came from a "highly disciplined" profession, psychiatric nursing, where everything was thoroughly documented (Tr. 304–305). However, the new hiring policy was not reduced to a written document, but was communicated to Ormsby verbally. The policy is also not contained in the employee handbook, which Maestri had prepared. She testified that under the current hiring procedure a candidate fills out a job application, followed by a meeting with her as a preliminary screen. After this, the applicant may have a second or third interview with the head of the relevant department.

The new policy has not always been followed. Maestri identified at least four occasions where an employee was hired without following the procedure and stated that, "There may be more" (Tr. 337). One of them was Mark McKean who was hired in July 2002. Contrary to the policy, Ormsby hired him directly without Maestri's knowledge. Ormsby had failed to follow the new hiring policy in at least three other instances, yet 2 weeks before the hearing, he was promoted to vice president. He explained his reasons as follows (Tr. 351):

> I suppose I was pushing Sheila's buttons some more. I guess I wanted to see how far she'd take the policy, how far she'd take it with me. I guess I wanted to see how irritated she'd get if I hired another person outside the policy.

He testified that at some point she reminded him of the new procedure, when he decided to hire a certain applicant, and that he was then called into the office of John Maestri.

C. The Alleged 8(a)(3) Violation for Laying Off Mark McKean

In early July 2002, the Union's business agent, Michael Downy, urged Mark McKean, an unemployed ironworker and

member of Local 33, to apply for a job at the Respondent's Spencerville School project as a "salt." In that role, McKean would keep his union membership a secret and attempt to organize the employees as soon as he became an employee of the Company. McKean visited the jobsite and spoke to a foreman about a job. McKean testified that he was purposefully not wearing anything that could identify him as a union member. The foreman advised him to speak to Kelly Ormsby.

On July 9, 2002, McKean spoke to Ormsby by telephone and recited his experience as an ironworker. According to McKean, Ormsby did not ask if he was a certified welder. Ormsby testified that he not only asked McKean if he was certified, but that he also recalled McKean making a reference to "sitting on the bench," insinuating his union affiliation (Tr. 355–356).

I find McKean's testimony credible based on demeanor and McKean's consistent efforts to conceal his union affiliation, rather than let the Company on to his union background.

After discussing wages and a starting date, McKean reported to Bill Baker at the Spencerville project at 7 a.m. on July 10, 2002. He filled out the job application and other job-related papers a day or two later. Baker did not ask McKean if he was a certified welder. Following a brief demonstration of his welding skills, McKean worked for the Respondent as a laborer and a welder until he was laid off on August 26, 2002. He testified that welding made up about 20 percent of his job.

Several weeks after he began working for the Respondent, McKean confided in fellow employee Matthew Stiles that he was a union member. They discussed the benefits of union membership. Stiles worked for the Respondent from June 15, 2001, until October 2002, when he was terminated for being late for work.

Swanson began to visit the Spencerport jobsite during nonworktimes in July and August to distribute union literature, brochures, and packets of information. On August 19, 2002, Swanson also brought union authorization cards to the jobsite during the coffeebreak. Among the employees, only McKean and Stiles signed the cards and returned them back to Swanson in full view of Baker and Streeter. McKean estimated that Baker was about 30 feet away from them and that Streeter was within 5 feet of him. Stiles testified that Baker was standing 15 to 20 feet away facing them and that Streeter was standing next to Baker. Stiles testified that later that day Baker stopped him and asked if he or McKean were for the Union, and whether he had signed a card. Stiles replied that he was still considering the matter. Baker told Stiles that if he wanted to join the Union he should quit right now and join the Union (Tr. 145).

On August 22, McKean saw Baker walking around the site with Mike Otto, the general contractor on the project. They pointed at McKean while he was working. Later that day, Baker asked McKean if he was a certified welder. McKean replied that he was not. According to his testimony, no one from the Company had asked him that before.

That same day Baker called a meeting with all the employees at the site. He asked them if anyone had run into any union members recently. McKean responded and, fabricating a story to hide his union connection, said that he had seen Mike Downy at the grocery store the night before, and that Downy had asked him on that occasion if he was a certified welder and if other ironworkers on the job were certified welders. Baker told McKean that although he could not tell him not to talk to the Union, talking to the Union was "screwing things up around here" (Tr. 100). Later on the same day, Baker pulled McKean aside and privately asked how Downy could have picked him out. McKean said that the Union was probably watching the site with binoculars. Baker warned him to watch what he said "around these guys" (Tr. 101).

Stiles similarly testified that on August 22, when the general contractor had been on site, Baker asked him again if he or McKean were union and whether he had spoken to Swanson (Tr. 148). Stiles reply was, "No, I'm not union." Baker told Stiles not to talk to Swanson about the Union during working hours and to tell Swanson that he didn't know anything about the Union and to tell Swanson to talk to Baker about it (Tr.148–149). Stiles testified that Baker repeatedly asked if he and McKean were in the Union (Tr. 160).

The next day, during the morning of August 23, Baker made the statement to McKean in a joking manner, "I figured out that you were a union snitch" (Tr. 102). At the coffeebreak that day, Stiles testified that Baker asked him again about the Union and that Streeter said that by signing the authorization cards Stiles and McKean were "stirring up a bee's nest" (Tr. 158).

Baker informed the employees at that time that the Company was feeling pressure to have certified welders on the job, and that it was setting up a welding test for Saturday, August 24. Baker also set up a practice test, permitting McKean to practice welding for 6 hours. McKean testified that he wanted to keep his job, but that he did not feel ready to take the certification test. Baker agreed with his assessment, and said there would be other work for him to do if he did not take the test (Tr. 109). Stiles also did not take the certification test.

The next Monday, August 26, Baker informed McKean that he was laid off, mentioning seniority as a reason, but made reference the welding test. Stiles testified that half the building remained to be completed when McKean was laid off. No other employees were laid off at that time or within the next 2 months.

Ormsby testified that he had instructed Randall Yager, the field supervisor, to lay off McKean, because he did not take the certification test (Tr. 363). According to Ormsby, he instructed Yager, "Tell Mark–my exact words were 'Tell Mark that if he had come up here and took the test he'd still be working. I need certified welders out there.'" The job required certified welders and several had become available from another job that had just ended.

Field Supervisor Randall Yager testified that *he* made the layoff decision and that McKean's failure to take the certification test was a factor (Tr. 386, 393). According to Yager, McKean was offered to take the certification test on three occasions, the first time McKean was scheduled to take the test he failed to show up, McKean "outright declined" to take the second test because he was not interested and did not want to travel to the office (Tr. 386). Yager stated that he offered McKean a third opportunity to take the test, but that he "did not push the issue with him" (Tr. 391).

According to Yager, McKean was laid off, "Due to lack of work, lack of his certification, and a lack of flexibility to go to

the next project" (Tr. 385). Yager called him a week or so later to recall him back to work, but McKean called him back to say he was already working.[1] Yager testified that he knew of McKean's interest in the Union, but that it was not the reason for the layoff. Several days later, McKean returned to the site with Mike Otto and Swanson. They walked around the site while McKean pointed out several bad welds, some of which McKean had completed.[2]

III. ANALYSIS

A. Swanson

The General Counsel argues that, as alleged in the complaint, the Respondent changed its hiring practices and refused to hire Swanson on learning that he was a union member. The Respondent argues that it followed its standard hiring procedure and did not hire Swanson because he lied about his real name and did not have any recent ironwork experience.

1. Solvay violated the Act by changing its hiring process

An employer violates Section 8(a)(3) when it changes its hiring practice for a discriminatory reason. *Niblock Excavating, Inc.*, 337 NLRB 53, 64 (2001) (finding a violation where hiring policy was changed within days of receiving applications from union members); *Sommer Awning Co.*, 332 NLRB 1318, 1321–1322 (2000) (the hiring policy violated the Act where it was adopted to prevent union activity).

The record clearly shows that the Respondent changed its hiring process in midstream in direct response to Swanson's admission that he was a union organizer. I do not credit the testimony of Maestri and Ormsby that the Respondent changed the hiring process in the fall of 2001. Maestri's testimony and her affidavit were inconsistent. She blamed the inconsistencies on the pressure to sign the affidavit, the threat of a snowstorm, and the General Counsel's refusal to permit her to state the events in her own words. In subsequent testimony, Maestri retracted the excuse of an imminent snowstorm; she conceded that she was represented by an attorney during the process and had an opportunity to make corrections.

Moreover, Maestri's and Ormsby's versions appear implausible. Maestri testified that the hiring policy had not been followed with at least four employees and admitted there may have been more. Ormsby did not mention the requirement of an interview when he called Swanson to inform him not to report to work. Ormsby merely said that certain paperwork had to be completed. And when Swanson asked if he was required to come to the office on account of his union membership, Maestri only mentioned the paperwork, but not the requirement that each candidate had to be interviewed.

Even more unconvincing is the testimony of Ormsby to the effect that he repeatedly defied Maestri's instructions in order to "push her buttons," and then receiving a promotion. That the hiring police was never put in writing in spite of an apparent conflict between the top officials is inconsistent with her philosophy allegedly learned from her prior employment that everything should be documented.

Significant is the experience of McKean when he applied for work. McKean was hired on July 10, 2002, after visiting the jobsite the day before and speaking to the foreman. Mckean called Ormsby in the afternoon of July 9, and was told to report for work the very next day. He filled out the application on the job several days later. Neither Ormsby nor Maestri interviewed McKean.

The Respondent was about to follow a similar procedure with Swanson until it realized that he was a union organizer. At that point, the Company changed course and told him not to report for work on the following day but to report to the office to fill out documents and be interviewed. The change was clearly motivated by antiunion animus, in violation of Section 8(a)(3).

2. The refusal to hire Swanson

Although the Respondent had offered Swanson a job, based on his conversation with Ormsby, it is clear that he was not hired. When asked whether he offered Swanson a job, Ormsby unequivocally answered, "Yeah," and he testified: "I thought I offered him a job for the day . . . [to] try him out" (Tr. 350). The General Counsel submits that the Respondent refused to hire him because of his union background. This is particularly so, as pointed out by the General Counsel, because documentary evidence shows that the Company employed three or four field employees between July 15 and 31, 2002 (GC Exh. 20). Here, as in *Kamtech, Inc.*, 339 NLRB No. 18 (2003), the Respondent had decided to hire the applicant and to test his qualification, but changed course on learning of the applicant's union background. To establish a violation, the General Counsel has clearly met element (1) under the test established in *FES*, 331 NLRB 9 (2000). According to that decision, the General Counsel must show: (1) that the Respondent was hiring or had concrete plans to hire, (2) that the applicant had the experience or training relevant to the announced or generally known requirements of the positions for hire, and (3) that antiunion animus contributed to the decision not to hire the applicant. Id. at 12. If the General Counsel can establish these three elements, the burden shifts to the Respondent to show that it would not have hired the applicant even in the absence of union activity. Id.

The evidence clearly negates the Respondent's argument that Swanson was interviewed only, because the Company wanted to keep applications of potential employees on file. Moreover, based on demeanor and her inconsistent testimony discussed above, I cannot credit Maestri's testimony that Respondent was not hiring at the time.

The General Counsel has also established the second element that Swanson had the applicable experience and training. Hav-

[1] This is inconsistent with Ormsby who testified that McKean never called Yager back. (Tr. 367, 387.)

[2] While Respondent's brief states that "it is undisputed and unrebutted that while working on the project, Mr. McKean purposefully made bad weld" there was no evidence presented that McKean's poor welds were made on purpose. (R. Br. 24.) The Respondent did not present any evidence to suggest intentional sabotage. To the contrary, Ormsby asserted that every weld passed inspection. (Tr. 375.) The allegation that McKean was engaged in industrial sabotage is also undermined by the fact that McKean lives in the local school district and has a school-age child who will attend this school.

ing worked as an ironworker for over 20 years, he could have easily demonstrated his skills on the day he was told to come in. Though he had not worked in the field for 12 years, he was not dishonest when he described his work experience. The range of Swanson's experience clearly impressed Ormsby who testified that even if he had known that the experience was not recent, he may not have hired him over the phone, but he would still have been interested in Swanson and would "have him come in" (Tr. 354). Yet Ormsby called Swanson after his disclosure about the Union and told him not to report for work. The Respondent suggests that OSHA regulations have changed since Swanson last worked with his tools, but neither Sheila Maestri nor John Maestri questioned Swanson about his familiarity with the new regulations or mentioned his lack of recent experience in the interview.

With respect to the third element, I find that antiunion animus contributed to the decision not to hire Swanson. The Respondent obviously changed the hiring process on learning of Swanson's union membership. The circumstances, as well as other violations of the Act, are clear indications that the Respondent harbored antiunion animus.

Having found that the General Counsel has proved its prima facie case, the burden shifts to the Respondent to demonstrate that it would have taken the same action in the absence of any protected activity. The Respondent's argument is appealing that the Company would not hire someone who gave a false name during the application process. By disclosing only his first and second names, Swanson did not really give a false name, but he clearly misrepresented himself to hide his union identity. The Seventh Circuit has held that a salt may lie if the information would expose the applicant as a union member. See *Hartman Bros. Heating & Cooling, Inc. v. NLRB*, 280 F.3d 1110, 1112 (7th Cir. 2002), finding that a salt may lie on a job application if the lie concerns his status as a salt or union organizer, but not his job qualifications. There the court had this to say:

> The question presented by this case, left open in *Town & Country*, is whether a salt may lie to get a job. (The salt in *Beverly California Corp. v. NLRB*, 227 F.3d 817, 833–834 (7th Cir. 2000), had lied, but we made nothing of this fact.) We think that he may, at least if the lie concerns merely his status as a salt, union organizer, or union supporter and not his qualifications for the job . . . . A lie is about his union status or unionizing objective is not material, because, as *Town & Country* held, an employer cannot turn down a job applicant just because he's a salt or other type of union organizer or supporter. In other words, the fact that the applicant is a salt does not entitle the employer to infer that that he won't be a bona fide employee.

Here, the job applicant Swanson misrepresented his full identity by omitting his last name in order to hide his status as a union organizer, but, contrary to the Respondent's argument, he did not misrepresent his qualifications for the job. The Respondent could still have rejected him from permanent placement, had Swanson failed to prove his skills on the day he was asked to report for work. But the Respondent denied him that opportunity, because of union considerations and not for any other reasons, which I find were pretextual. I accordingly find a violation of Section 8(a)(1) and (3).

B. McKean

According to the General Counsel, McKean's layoff was substantially motivated by union activity, as indicated by management's coercive statements and conduct. The Respondent argues that it laid off its employee for business related reasons, first because McKean refused to take the welding test to become certified, and also because the project was slowing down.

In cases alleging violations of Section 8(a)(3), the General Counsel's burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), is to establish a prima facie case that union activity was the motivating factor in the employer's decision to lay off McKean. The General Counsel must show that McKean was engaged in union activity, that the Respondent was aware of this activity, and that the union activity was a motivating factor in the Respondent's actions. If this is established, the burden shifts to the Respondent to show it would have taken the same action in the absence of any union activity.

First, the record shows that McKean was engaged in union activity. He functioned as a union "salt," covertly trying to organize the employees. He recruited Stiles for the Union, he openly discussed the Union at coffeebreaks, and signed a union authorization card. McKean was in contact with the Union and admitted to Baker that he had alerted the Union about the lack of certifications among the welders at the site.

Second, the record also shows that the Respondent was aware of McKean's union activity. Yager admitted that he was aware of McKean's union activity. McKean signed a union authorization card on the site where Baker could easily have observed the activity. McKean also spoke positively about the Union at coffeebreaks. McKean was regarded as the union "snitch." Further, Baker was aware that McKean had brought up the certification issue with Downy and the Union.

Finally, I find that McKean's union activity was a motivating factor in the Respondent's decision to lay him off. Within days of his coming out as a union salt, his signing of the union card, and the unfolding of the certification issue, the Respondent retaliated against McKean. It is axiomatic that timing is often a good indication of an employer's true motive. He was the only employee singled out for layoff on the job, even though he was well regarded as a worker. The Respondent committed several other violations of the Act in the days prior to the layoff, which reveals the Respondent's antiunion animus. And a few days before the layoff, Baker had identified McKean as the union snitch.

I find that the General Counsel has made out a prima facie case, accordingly the burden shifts to the Respondent to demonstrate it would have taken the same action even without the union activity. The Respondent offered two reasons for the layoff, McKean's refusal to take the welding test and a slowdown in work.

With respect to the test, Baker corroborated McKean's testimony that he had been assured that his failure to take the test would not affect his employment adversely. It is also uncontested that only 20 percent of McKean's work consisted of

welding. Moreover, Yager's testimony is disingenuous that the layoff was prompted by McKean's refusal to take the test on three occasions. The tests were given on three consecutive Saturdays, the first on August 24. The layoff occurred already on August 26, so that the subsequent opportunities for testing could not have been considered in the decisional process and were totally irrelevant. I also doubt Yager's description of McKean's attitude with respect to the second and third tests.[3]

Unconvincing are the accounts of Ormsby and Yager, who both claimed individual responsibility for having made the decision to lay off McKean. Stiles, who also failed to take the welding test, did not suffer the same consequence. And McKean was initially told that seniority, not the certification, was the reason. These and other inconsistencies do not persuade.

The record similarly does not support the second justification, a slowdown in work. McKean gave a detailed estimate of the work in progress, which showed, in substance, that the project was only halfway completed. Stiles corroborated that estimate and rejected any idea that the work was slowing down at the time of the layoff. Moreover, according to the careful examination by the General Counsel of the Company's time entry reports showing the time and names of the field employees assigned to the project for August and September, the total work force had not decreased during the relevant times (GC Exh. 20–21). The other employees at the site remained employed until October or November. No other employees were laid off during the months following the August layoff. Indeed, Ormsby testified that the Respondent had three to five projects going on at the time, and he disagreed with the suggestion that there was no work for an uncertified welder at the time.

C. The 8(a)(1) Violations

Section 8(a)(1) of the Act makes it an unfair labor practice "to interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights. An employer violates this section when it makes statements that reasonably tend to coerce employees in the exercise of their protected rights, regardless of whether the statements do, in fact, coerce.

1. Ormsby's statement to Swanson on July 15, 2002

The General Counsel argues that Ormsby violated Section 8(a)(1) during his first telephone conversation with Swanson, because Swanson, as an applicant, and considered an employee under Section 2(3), was told that he could not try to organize the Company if hired. The transcript of the telephone conversation on July 15, 2002, revealed following exchange (GC Exh. 6):

> Swanson: I'm a union organizer, there won't be a problem with you will it?"
>
> Ormsby: As long as you're not organizing a union with me.
>
> Swanson: Oh, well that's why we do though.
>
> (laughing)
>
> Ormsby: Hey, what am I going to do? You need a job? You want to work?
>
> Swanson: Yeah
>
> Ormsby: I got work for you.
>
> Swanson: Okay.
>
> Ormsby: What conversations you guys have when you're working has got nothing to do with me. (9–10.)

According to the General Counsel, Ormsby conveyed the notion that Swanson could only work for the Respondent, so long as he did not organize the employees and refrained from union activity. *Sommer Awning Co.*, 332 NLRB 1318 (2000). The General Counsel may be correct if Ormsby's remark, "as long as you're not organizing a union with me," were considered in isolation. However, the entire conversation cannot be said to be coecive, nor the statement when considered in the context of the entire conversation. Ormsby negated the potentially coercive nature of his statement by saying that if Swanson wanted to work, he had work for him, and that whatever Swanson talked about with his coworkers was not of Ormsby's concern. Moreover, Ormsby's reference to "me," as opposed to the Company, makes the remark ambiguous. Under these circumstances, I dismiss this allegation of the complaint.

2. John Maestri's statement to Swanson on July 17, 2002

The General Counsel alleges that the Respondent violated Section 8(a)(1) during Swanson's job interview on July 17, 2002, with Sheila and John Maestri. The General Counsel alleges that John Maestri's statement, that he "couldn't possibly put on" a union organizer violated the Act. Maestri made the comment in response to Swanson's disclosure that he was a union organizer intent on organizing the Respondent's employees. I agree with the General Counsel that such a statement would ordinarily be considered coercive and in conflict with Section 7 of the Act. However, considering the surrounding circumstances and the offending statement in context, this scenario is comparable to that in *Colden Hills, Inc*., 337 NLRB 560 (2002). There, as here, the company official merely stated what he perceived to be legal. The statement, "I don't think that if you were a regular union worker that you'd even be able to work for our firm, 'cause usually, you're union, you can't work . . . for a company that's not union," was held not to be violative under circumstances similar to those here. The record shows the following exchange (GC Exh. 6, p. 27) (Maestri (J) and Swanson (GN)):

> J: How can you work for Solvay if you're a full time organizer?
>
> GN: Oh I can work for both of you.
>
> J: I'm surprised.
>
> GN: But I need the opportunity to speak with you also.
>
> J: Well, that's a joy I don't mind that. But I couldn't possibly put you on. How could I put you on?
>
> GN: Oh why not?
>
> J: I could go to jail.
>
> . . . .

[3] Adding to the unreliability of Yager's testimony is his assertion that McKean told Baker that he did not want to travel to the second test. Since McKean was already laid off, it is implausible that he had this conversation with Baker. Baker did not corroborate Yager's testimony and I find Yager's testimony is inconsistent with the facts and not credible.

J: He's going to organize my company; I can't put you on the payroll.

GN No?

J: Well, no, could I?

GN: Yeah, sure. Yeah.

J: How?

GN: As an employee.

J: They'd literally put me in jail.

GN: No they wouldn't. No they wouldn't.

J: This is flabbergasting. I never had situation like this before.

GN: Well, listen. I need the opportunity to speak with you also. If you didn't want to put me on I understand that.

J: I want to put you on.

In this conversation, Maestri appeared unlike a company official in authority intent on coercing or restaining a union applicant, instead Maestri conveyed his surprise, indicated his doubts about a novel situation, and admitted his confusion about the legality of hiring a worker and putting him to work while he remains employed in the dual role as full-time union organizer. The allegation should therefore be dismissed.

3. Baker's questioning employees about their union membership

The General Counsel argues that Baker's repeated interrogations of employees about being members of the Union is a violation of Section 8(a)(1). According to Stiles' testimony, during the week of August 19, 2002, Baker repeatedly, virtually on a daily basis, asked Stiles if he and McKean were members of the Union. On August 22, 2002, after the certification issue had arisen, Baker approached Stiles and asked whether he and McKean were union. On the same day, Baker called an employee meeting, and asked the assembled group if anyone had seen any union members recently. On August 23, 2002, during a coffeebreak, Baker asked if they (McKean or Stiles) were union. Baker's testimony was equivocal about the interrogations attributed to him. On this issue, I agree with the General Counsel, that Baker's conduct was coercive.

Interrogation of employees is not illegal per se. In determining if an interrogation violates Section 8(a)(1), the Board considers whether, under the circumstances, it reasonably tends to interfere with, restrain, or coerce employees. *Rossmore House*, 269 NLRB 1176, 1177 (1984); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). Baker asked at an employee meeting if anyone had spoken to union members. He said that speaking to the Union was "screwing things up" and repeatedly asked Stiles if he or McKean were in the Union. In the context of this coercive environment, this type of interrogation violates the Act. The Respondent's argument that Baker was stressed about the certification issue does not make the context less coercive.

4. Baker's statement to Stiles to quit if he wants to join the Union

The General Counsel alleges that Baker's repeated statements to Stiles that he should quit his job if he wants to join the Union are coercive. Stiles testified about a conversation on August 19, 2002, with Baker as follows (Tr.145): "He asked me if I signed the card and wanted to join the union, why didn't I just quit right now and join the union." Baker did not deny having made such a statement and admitted that he may have discussed the Union with Stiles.

It is unlawful for an employer to suggest that union supporters should quit their jobs, because such a statement implies that union activity is incompatible with further employment. *McDaniel Ford*, 322 NLRB 956, 962 (1997).

5. Baker's prohibition on talking to union members

The General Counsel alleges that Baker's prohibition on union talk during work hours or during breaktimes is overbroad and unlawful. Stiles credibly testified that Baker told him on August 22, 2002, while questioning him about Swanson, that he was not to talk to Swanson during work hours and to tell Swanson that Stiles didn't know anything if Swanson came up during breaks or during lunch. A prohibition on an employee's protected activity during "work hours" has been regarded as presumptively invalid and overly broad, as it could include an employee's own time, such as lunch periods. *Our Way, Inc*., 268 NLRB 394 (1983). The prohibition here leaves no doubt, as it included breaktimes. I therefore find a violation of Section 8(a)(1).

6. Baker calling McKean a"Union Snitch" on August 23, 2002

The General Counsel alleges that Baker's statement that he knew McKean was the "union snitch" created an impression among the employees that their union activity was under surveillance. McKean testified that on August 23, 2002, Baker said to him in a joking manner, "figured out that you were a union snitch" (Tr. 102–103). Again, Baker did not deny McKean's testimony. The fact that a statement was made in a joking manner does not negate its coercive nature. *Meisner Electric, Inc*., 316 NLRB 597, 599 (1995), citing *Ethyl Corp.*, 231 NLRB 431, 434 (1977). "It is well established that the coercive and unlawful effect of a statement is not blunted merely because interrogations of, warnings to, or disparaging statements about union adherents are accompanied by laughter or made in an offhand humorous way." A violation of Section 8(a)(1) has therefore been established.

7. Baker's and Streeter's statement that talking to the Union was causing problems at work

Finally, the General Counsel alleges that Baker's comment made to McKean after a meeting with the employees on August 22, 2002, was coercive: "I can't tell you not to talk to those guys, but doing so you're really screwing things up around here" (Tr. 100). While the statement was prefaced that McKean could not be prevented from talking to the Union, the sentence is coercive, according to the General Counsel, as an implied threat to punish protected activity. The General Counsel similarly challenged Streeter's statement to Stiles and McKean at a coffeebreak on August 23, 2002, that their signing union cards was "stirring up a bee's nest" (Tr. 158). Although these comments reflect the Respondent's hostility toward the employees' union activity, Section 8(c) of the Act provides that expressions of views without threats of reprisals or force or promise of benefit are not evidence of a violation. The record certainly does not show that any direct threats accompanied

these statements, nor is there any evidence of an implied threat. I therefore dismiss these allegations.

CONCLUSIONS OF LAW

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

2. Ironworkers Local No. 33, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. By coecively interrogating employees about their union membership or activities, or about the union activities of others, the Respondent violated Section 8(a)(1) of the Act.

4. By telling employees that they should quit their jobs, if they wanted to join a union or sign union authorization cards, the Respondent violated Section 8(a)(1) of the Act.

5. By telling employees not to talk with union representatives during work hours, including breaks and lunchtime, the Respondent violated Section 8(a)(1) of the Act.

6. By telling employees that it knew the union informant, the employer created the impression that their union activities were under surveillance in violation of Section 8(a)(1).

7. By discriminating against an applicant affiliated with the Union and changing its hiring procedure, the Respondent violated Section 8(a)(1) and (3) of the Act.

8. By refusing to hire Gary Swanson, because he is affiliated with the Union, the Respondent violated Section 8(a)(1) and (3) of the Act.

9. By laying off employee Mark McKean because of his union activities, the Respondent violated Section 8(a)(1) and (3) of the Act.

10. The unfair labor practices affect commerce within Section 2(2), (6), and (7) of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Solvay Iron Works, Inc., Syracuse, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their union membership or activities or those of their fellow employees.

(b) Telling employees that they should quit their jobs if they want to join the Union.

(c) Telling employees not to talk to union representatives during their work hours, including their breaks or lunchtime.

(d) Creating the impression among the employees that their union activities are under surveillance.

(e) Discriminating against applicants affiliated with the Union by changing the Company's hiring procedure.

(f) Refusing to hire job applicants, because they are affiliated with the Union.

(g) Laying off employees, because of their union activities.

(h) In any like or related manner interfere with, restrain, or coerce 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) Offer Gary Swanson employment in the position for which he applied on July 15, 2002, or if such a position no longer exists, employment in a substantially equivalent position.

(b) Offer Mark McKean full and immediate reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other benefits, rights and privileges previously enjoyed by him.

(c) Make Gary Swanson and Mark McKean whole for any loss of earnings and other benefits suffered as a result of the discriminations against them, computed on a quarterly basis, less interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) Within 14 days from the date of this Order, remove from its files any references to the unlawful refusal to employ Gary Swanson, and within 14 days remove from its files any reference to Mark McKean's layoff and, within 3 days thereafter, notify the employees (applicants) in writing that this had been done and that it will not be used against them in any way.

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

(f) Within 14 days after service by the Region, post at its facility in Syracuse, New York, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 15, 2002.

[4] 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.

[5] 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."

(g) 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.