Shaw, Inc., Rapid River Enterprises, Inc., S & R Cable, Inc., and Kimron Resources, Inc., a Single Employer and/or Joint Employer *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO *and* Local 1098, Laborers International Union of North America, AFL–CIO *and* Local 324, International Union of Operating Engineers, AFL–CIO. Cases 7–CA–37450(3), 7–CA–37450(4), and 7–CA–37450(5)

July 30, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND KIRSANOW

On September 18, 1997, Administrative Law Judge John H. West issued the attached decision. The Respondents filed exceptions and a supporting brief. On June 7, 2000, the Board issued an Order remanding the proceeding to the judge for further consideration under its decision in *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002). On March 23, 2001, following the submission of briefs by the General Counsel and the Respondents,[1] the judge issued the attached supplemental decision and order. The General Counsel and the Respondents filed exceptions and supporting briefs.

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

The Board has considered the decision, the supplemental decision, and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings,[2] and conclusions,[3] except as discussed below, and to adopt his recommended Order as modified[4] and set forth in full below.

I. SUPERVISORY STATUS OF FOREMEN

The judge found that Respondents' foremen, Ron Watson, Phil Fix, Rick Klis, and Gary Geister were supervisors under Section 2(11) of the Act. In reaching this conclusion, he cited their responsibility to assign tasks and direct employees at the jobsite, as well as their participation in determining employee discipline and rewards. The judge also found that these individuals engaged in various conduct that violated Section 8(a)(1). For the reasons described below, we reverse the judge's finding that the foremen were statutory supervisors and that they engaged in certain unlawful conduct.

A. Overview of Foremen's Duties

The Respondents' pipeline construction crews consist of varying numbers of laborers and/or roustabouts, operators, and welders, headed by a foreman.[5] The composition of the crews is determined prior to the start of each workday by one of the Respondents' operations managers or field supervisors,[6] with input from the foremen as to their manpower needs. Foremen drive their crew-

[1] The parties agreed it was unnecessary to reopen the record.

[2] The Respondents have 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 judge's findings.

[3] We adopt the judge's determination that Foreman Ron Watson's oral request to Supervisor Carl Steuer that he transfer Chad Drumb off his crew because he supported the Union violated Sec. 8(a)(1), because it took place in the presence of employee Jared Frank. We find it unnecessary to pass on the judge's further determination that Drumb's ensuing transfer violated Sec. 8(a)(3), however, because neither Drumb's pay nor other working conditions were affected and, thus, there would be no effect on the remedy if we were to find this violation.

In adopting the judge's conclusion that the Respondents unlawfully refused to hire certain union-affiliated applicants, we observe that the General Counsel did not except to the judge's failure to find that the Respondents also unlawfully failed to consider those applicants. In any event, the judge's failure to find this additional 8(a)(3) violation has no effect on the remedy.

Finally, we clarify and affirm the judge's determination that the relevant time period to be examined in calculating the number of available positions into which the applicant discriminatees could have been hired extends from May 15 through October 28, 1995. While there were more than sufficient openings (63) for the 3 applicants who restricted their search to laborer positions, there were only 7 operator positions available for the 10 applicants who sought both operator positions and laborer jobs. This is because two of the nine identified operator jobs filled during the relevant time period were specialized positions for which the discriminatees would not have qualified. Accordingly, we leave to compliance proceedings the determination of which 7 among the 10 operator/laborer applicants should be offered instatement into operator jobs and which others offered instatement into laborer positions.

[4] We have modified the judge's recommended cease-and-desist language to consolidate into a single paragraph the three threats made by Respondent Shaw's president, Ron Shaw, during a June 20, 1995 employee meeting, relating to the possibility of loss of work.

The judge stated that other considerations regarding the relief to be afforded the discriminatees may be addressed in compliance proceedings, citing *Dean General Contractors*, 285 NLRB 573 (1987), and *Ultrasystems Western Contractors*, 316 NLRB 1243 (1995). The duration of the backpay period shall be determined in accordance with *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007).

[5] The composition and number of employees on a crew depend on the type of job being performed; a crew may consist of as few as 2 to as many as 20 employees in various classifications. While crews often include welders, the record supports the Respondents' contention that welders are not hired directly by the Respondents, but rather are employed by subcontractors.

[6] At the time of the events of this case, Supervisor/Operations Manager Jim Robb usually drew up the daily crew rosters, assigning varying numbers of operators, fusers, or laborers as required by the crew's project.

members to jobsites in company trucks[7] and, if necessary, designate someone assigned to their crew to transport employees in additional trucks.

Once at the site, foremen are charged with ensuring the performance and completion of the Respondents' job. In carrying out this function, a foreman might tell a crewmember to run a loader, or bulldozer, or to pull pipe, inform welders how he wants the work done, or switch the task assignments of employees during the day. Foremen regularly work alongside and perform the same types of tasks as other members of the crew. Like other crewmembers, foremen are paid hourly, earning approximately 50 cents per hour more than operators and $5 per hour more than laborers. During a normal workday, the Respondents' field supervisors routinely visit the various jobsites, checking on progress and providing assistance in solving possible problems. When not on site, supervisors are readily accessible to foremen by radio or telephone as necessary. Foremen are provided corrective action notice forms (also referred to as writeup sheets) to document employee infractions, which may be used as bases for disciplinary action.

B. Supervisory Standard

The question is whether the Respondents' foremen meet the statutory test as set forth in Section 2(11) of the Act, which defines "supervisor" as

> any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

As the list of relevant factors is stated in the disjunctive, supervisory status is established if foremen possess any of the enumerated functions. *Oakwood Healthcare, Inc*., 348 NLRB 686, 687 (2006). In this case, a question is raised as to whether the putatively supervisory duties performed by the foremen involve the exercise of independent judgment. "[T]o exercise 'independent judgment' an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." Id at 8. Furthermore, "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company rules or policies, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." Id. The burden of establishing supervisory status falls upon the party asserting it, see id. at 3, in this case the General Counsel.

C. Analysis

Applying these standards, we find, contrary to the judge, that the foremen's authority is significantly circumscribed and that the General Counsel has failed to show that foremen exercise independent judgment in the performance of their putatively supervisory duties. Thus, we need not decide whether any particular duty was supervisory in nature.

1. Assignment/direction

Turning first to the evidence regarding the foremen's responsibilities to assign and direct employees, it shows that they perform essentially as jobsite lead persons, overseeing routine functions and following established prescribed practices. The evidence does not establish that they exercise independent judgment. Not only do most of the Respondents' projects involve tasks which are recurrent and predictable, but, as described below, they are also carried out in conformance with supervisors' specifications and oversight.[8]

2. Assignment

During the morning meeting at the start of each workday, foremen are given a sheet prepared by upper management, identifying the job they will be working on, listing the names of the employees assigned to their crews, and designating the truck(s) to be used on the job. Foremen assemble their crewmembers and travel with them to the jobsite in a company truck. They then carry out the day's assignment, working side-by-side with the other crewmembers, in accord with specifications given to them by supervisors during the morning meeting.

Because the day's job essentially determines the composition of the crew, a foreman's designation of which crewmembers will perform particular functions is often based on an employee's trade or known skills, and is, thus, essentially self-evident. For example, if an operator is part of a crew, he will operate the heavy equipment, a fuser will fuse plastic pipe, and a welder will handle

[7] The Respondents provide foremen with company pickup trucks to drive to and from work.

[8] The Respondents' operations manager, Greg Lucas, testified that before a new job begins, Supervisor/Operations Manager Robb goes to the site with the foreman to examine the area and go over the job plan. Robb points out the right of way where the pipe is to be placed and the wells into which the pipe will be attached. In addition, he identifies the parts and fittings that will be needed for the project, and even specifies where the pipe being installed should be situated before being placed underground. In addition, he alerts the foreman to potential problems. Once a job gets underway, Robb pays regular site visits to oversee and ensure its progress and to handle any unexpected problems that may arise.

metal pipe. Such assignments do not involve the exercise of independent judgment.[9]

Other assignments are based on an employee's readiness to carry out one of the less skilled tasks that compose the bulk of the Respondents' workload. As the Respondents' business involves an abundance of unskilled, laborer-type work, there are often multiple laborers on a crew. Because their duties tend to be somewhat repetitive and are often physically demanding, foremen routinely rotate laborers among those tasks to vary their work and equalize their burdens. Fix described this rotation as trying to keep employees from becoming "burned out" on a particular aspect of their work. Rotating essentially unskilled and routine duties among available crewmembers in this fashion does not involve the use of independent judgment and is not, therefore, indicative of supervisory authority.[10]

3. Direction

The foremen's role in directing the work of crewmembers is similarly limited. While working alongside the crewmembers, the foremen also oversee the accomplishment of the day's work, providing a degree of direction to ensure the work's completion. Such direction, however, is given in accordance with the Respondent's prior instructions.[11] Moreover, much of the work performed by the crewmembers is routine and repetitive; there is no showing that such work requires more than minimal guidance.[12] Accordingly, we find that the foremen's limited role in directing employees in the performance of routine tasks, pursuant to the Respondent's instructions, has not been shown to involve the use of independent judgment.[13]

Finally, such direction as the foremen do exercise is subject to close scrutiny by higher management. Record evidence shows that field supervisors or other members of the Respondents' management generally visit every jobsite at least once a day, checking on progress and providing guidance as needed.[14] Further, foremen have the means to contact and communicate with supervisors when they are not on site. Problems and questions about unexpected developments are directed to supervisors for them to handle. Thus, while the judge describes foremen as being "in charge" at the worksite, the evidence establishes instead that they serve as a conduit for carrying out the Respondents' assignments, and that the work is regularly monitored by individuals who have both the authority and responsibility to ensure its proper performance.[15]

4. Discipline

Similarly, the record fails to support the judge's conclusion that foremen exercise independent judgment in recommending discipline or have the authority effectively to recommend discipline. Watson testified that he completed a number of "writeup" sheets to memorialize incidents in which an employee failed to comply with the employee handbook.[16] Watson did not testify that he had discretion to decide which incidents to record, and the record does not establish whether the forms were part of

[9] Assigning employees according to their known skills is not evidence of independent judgment. *Volair Contractors, Inc.*, 341 NLRB 673, 675 fn. 10 (2004); *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 (1996).

[10] *Oakwood Healthcare*, 348 NLRB 686, 694 (work assignments made on the basis of equalizing workloads is routine or clerical in nature and does not involve exercise of independent judgment).

In this regard, the Respondents' foremen are similar to the lead persons in *Croft Metals, Inc.*, 348 NLRB 717, 721–722 (2006), whom the Board found not to be supervisors. Those lead persons, like the foremen, did not prepare employees' work schedules or assign them significant duties, but rather worked alongside them, performing the same types of tasks, and occasionally switched assignments and rotated tasks, but within an established routine, requiring the exercise of no real discretion. See also *Austal USA, L.L.C.*, 349 NLRB 561, 561–562, fn. 6 (2007)

[11] *Volair Contractors*, supra, 341 NLRB at 675 (no independent judgment in assigning or direction where job layout and task assignments were carried out pursuant to instructions from and blueprints provided by project superintendent).

[12] *Croft Metals*, supra, 348 NLRB 717, 722 (no supervisory status where exercise of lead persons' judgment in directing crews was described as "routine" and "employees generally perform the same job or repetitive tasks on a regular basis and once trained in their positions, require minimal guidance").

[13] We find that the judge erred in characterizing as evidence of the exercise of independent judgment an incident in which Watson, rather than either acknowledged supervisor, William Ancel or Steuer, "selected" Frank and "directed" him to drive them a short distance from the jobsite in the company truck. By focusing on two words rather than on the facts and circumstances being described, the judge exaggerated the import and significance of this event. Watson appears to have selected Frank because of his chance availability to carry out this immediate task rather than from any considered judgment of Frank's ability to handle the job. Calling on a readily available employee to perform a necessary mundane chore, simply to get it done, is not indicative of independent judgment under Sec. 2(11). See *J. C. Brock Corp.*, 314 NLRB 157, 158 (1994).

[14] The judge apparently based his findings with respect to how frequently supervisors appeared at jobsites solely on Fix's testimony, to wit: "Sometimes they'd come out every day. Sometimes they might not." Q. "How many days, for example, might they not come out?" A. "Maybe one or two." The judge took no account of testimony from Klis or Geister who both stated that supervisors regularly came to the sites several times during a typical workday; Klis stated that a supervisor would visit, "[t]wo, three times a day, maybe half a dozen times," and Geister described their visits as occurring "[p]eriodically throughout the day."

[15] In any event, being "in charge" does not establish that the foremen exercise supervisory authority. *Dean & DeLuca New York, Inc.*, 338 NLRB 1046, 1047 fn. 13 (2003).

[16] Both Klis and Geister testified that they never filled out these forms.

a formal disciplinary procedure.[17] Watson's understanding of the limitations of his authority is demonstrated by his description of having given a writeup to an employee who repeatedly failed to follow instructions. In the space for the corrective action to be taken for the offense he wrote "left to supervisor," although the handbook provided for termination. Watson's further testimony also establishes that he generally did not know what, if any, disciplinary action was taken pursuant to his writeups.[18] Thus, the record does not establish that the writeup forms played a significant role in the disciplinary process, or that Watson exercised discretion in determining whether to complete writeup forms.[19]

Fix testified that he was once involved in disciplining an employee. The incident involved two employees who, contrary to specific instructions, drove a company truck into a muddy area.[20] The truck became stuck and could not be driven out. Fix testified that he reported this incident to Supervisor Robb and that he and Robb decided to suspend the two employees for 1-1/2 days. Even assuming that Fix's participation in the decision with Robb amounted to an exercise of supervisory authority, this isolated incident—the only instance on this record in which any foreman exercised such authority—is insufficient to establish that the foremen were statutory supervisors.[21]

[17] Watson testified that he signed corrective action forms at the bottom where it says "Supervisor" because he is "there when it happens and somebody can't write it up that ain't there and sees what's going on."

[18] Watson testified that he once forwarded to Supervisor Robb a writeup regarding an employee who walked off the job. He noted on the form that the handbook called for discharge and added the words, "Recommending discharge." Watson testified that he never saw that employee working again, but that he does not know "if he ever got fired or just never come back."

[19] *Bon Harbor Nursing & Rehabilitation Center,* 348 NLRB 1062, 1064 (2006).

[20] Fix testified that before the two employees were sent into the area, he discussed logistics with Supervisors Robb and Lucas. They decided that a truck should not be driven into the "nasty, wet" area because of the likelihood of its becoming stuck. Fix then told the employees they were to walk, not drive.

[21] See, e.g., *Greenspan, D.D.S., P.C.*, 318 NLRB 70 (1995), enfd. mem. 101 F.3d 107 (2d Cir. 1996), cert. denied 519 U.S. 817 (1996) (isolated exercise of authority is insufficient to establish supervisory status); *Highland Telephone Cooperative*, 192 NLRB 1057, 1058 (same). Watson also testified that he has orally warned employees about job performance deficiencies. Such warnings are not part of the Respondents' disciplinary process and there is no evidence that they affected employees' employment status. Cautions of this sort, which have no impact on the employment status of the person being warned, are not evidence of disciplinary authority. *Heritage Hall*, 333 NLRB 458, 460 (2001).

5. Rewards

Contrary to the judge's further determination, the evidence fails to establish that foremen play a significant role in affecting employee pay raises. For example, when asked whether he could recommend raises, Watson replied only that he "can ask" a supervisor and that there were "quite a few" instances in which his requests for raises had not been granted. Geister testified that it was his practice to tell a supervisor if he thought an employee had been doing a good job and deserved a raise, but he did not know whether those employees later received pay increases. Geister also stated that if an employee came to him and asked for a raise, he would pass along that request, whether or not he believed the increase was warranted. Obviously, Geister exercised no independent judgment in making such recommendations. Thus, we are unable to conclude that the record supports a finding that the Respondents' foremen rewarded employees or effectively recommended that employees be rewarded.

6. Granting permission for early departure

Finally, the evidence shows that the foremen's discretion in permitting employees to leave work early is also sharply restricted. Fix and Klis stated that they could permit an employee to leave work shortly before the end of the workday, but that a request for more time off would have to be presented to the operations manager or supervisor.[22] Fix also testified that if an employee left 30 minutes before the day's end, he would fill out the employee's timesheet to reflect the early departure, ensuring that he would not be paid for time not worked. This evidence provides no support for finding that foremen exercised independent judgment or discretion in allowing employees to leave work early.[23]

Accordingly, for the reasons described above, we find no basis on which to conclude that the Respondents' foremen possess any characteristics of supervisory authority enumerated in Section 2(11) of the Act, and we reverse the judge's finding in this regard.[24]

[22] *Bowne of Houston,* 280 NLRB 1222, 1223 (1986) (assistant foreman who signed requests for time off held not a supervisor where shift manager gave final approval to the requests).

[23] See *L. Suzio Concrete Co*., 325 NLRB 392, 397–398 (1998), enfd. mem. 173 F.3d 844 (2d Cir. 1999) (exercise of limited discretion in allowing employees to leave early does not involve the use of independent judgment); *Azusa Ranch Market*, 321 NLRB 811, 812 (1996) (authority to allow employees to leave early on request is routine and and insufficient to confer supervisory status). See also *Sam's Club*, 349 NLRB 1007, 1014 (2007) (no independent judgment shown in permitting ill employee to go home).

[24] The judge also relied on the foremen's attendance at the daily morning meetings with acknowledged supervisors and their use of company trucks to travel between work and their homes as evidence of their supervisory status. Such secondary indicia do not establish 2(11) status in the absence of any primary indicia. *Sam's Club*, supra, 349

II. THE 8(A)(1) ALLEGATIONS

In view of our determination that the Respondents' foremen are not supervisors, we reverse the judge's findings that certain of their actions violated Section 8(a)(1). Thus, we dismiss allegations that following a June 20, 1995 meeting in which the possibility of unionizing was discussed, Fix and Klis separately unlawfully interrogated employees about their union sympathies. We also dismiss the allegation that Geister unlawfully created the impression of surveillance by telling employee Frank on July 24, 1995, that the Respondents' principal owner, Ron Shaw, was in town looking for the "union man."

In addition, we reverse the judge's finding that Klis violated Section 8(a)(1) by stating at the June 20, 1995 employee meeting that unionized employees had to provide their own transportation to and from jobsites and were not paid for such travel time. The judge found that because the Respondents' practice had been to transport employees on company time, Klis' statement was a threat that unionizing would cost employees this beneficial condition of employment. Unlike the above statements, Klis' remark was made in the presence of acknowledged supervisors who did not disavow it. Thus, even though Klis himself is not a supervisor, his remark is attributable to the Respondents. We find, however, that the credited evidence is insufficient to support a finding of a threat.

Employee Frank testified only that Klis said that on union jobs employees have to provide their own transportation to the jobsite and are not paid for drive time. Klis did not state that the Respondents' own practice would change, but rather only volunteered his apparent understanding about what the practice was on unionized jobs. Accordingly, there is no basis to find that these words reasonably tended to coerce employees.[25] See, e.g., *Center Service System Division*, 345 NLRB 729, 731 (2005). Thus, we reverse the judge's finding of a violation.[26]

Finally, we find it unnecessary to pass on the judge's 8(a)(1) finding based on Watson's statement about possible job loss, also made in the presence of supervisors at the June 20, 1995 employee meeting, because it is cumulative of other findings and would not affect the remedy.

ORDER

The Respondents, Shaw, Inc., Rapid River Enterprises, Inc., S & R Cable Inc., and Kimron Resources, Inc., a Single Employer and/or Joint Employer, Atlanta, Michigan, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening that the Respondents would lose work, reduce their work force, or that their employees would work fewer hours if they became represented by the Charging Party Unions, or any other union.

(b) Promising to look into the possibility of providing a better insurance plan if their employees were not represented by the Charging Party Unions or any other union.

(c) Promising employees the choice of a picnic, a bonus, or a jacket in order to dissuade them from supporting a union.

(d) Threatening that Respondent Shaw would close its doors if a union came in.

(e) Offering a monetary reward for employees to engage in surveillance of other employees' union activities and/or to report union adherents to the Respondents.

(f) Informing employees that union members would not be employed by the Respondents because of their association with Charging Party Operating Engineers, or any other union.

(g) Threatening union adherents with unspecified adverse action and violence.

(h) Informing employees that an employee was being reassigned from one work crew to another because of that employee's support for the Charging Party Unions, or any other union.

(i) Maintaining an overly broad rule prohibiting the distribution of literature on company property at any time.

(j) Failing and refusing to hire qualified job applicants seeking employment with the Respondents because of their membership in or affiliation with Charging Party Operating Engineers, Charging Party Laborers, or any other union.

(k) 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) Rescind the overly broad rule prohibiting the distribution of literature on company property at any time.

NLRB 1007, 1014; *Airport 2000 Concessions, LLC*, 346 NLRB 958, 968 (2006).

[25] There is no evidence of the context in which Klis made the remark, i.e., whether it was volunteered, made in response to a question, or on what basis he formed his understanding of any such practice.

[26] Contrary to her colleagues, Member Liebman would adopt the judge's finding of this violation. Klis' statement, was unequivocal: unionizing would result in less advantageous working conditions. There was no objective basis for this statement. See, e.g., *Systems West LLC,* 342 NLRB 851, 852 (2004). Moreover, the statement was made during a meeting that had been called by the highest level of management specifically to counter an incipient organizing effort, during which unlawful threats and promises were made, and in the presence of all supervisors and employees. Particularly in this context, Klis' remark was coercive.

(b) Within 14 days from the date of this Order, offer Danny McDonald, Michael Adrianse, William Nolan, Charles Bartholomew, Michael Bartholomew, David Beebe, William Boone, David DeVos, James Hooker, Robert Peters, Chad Chapman, Lee Wheeler, and Ronald Freel instatement into positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled had they not been discriminated against by the Respondents.

(c) Make Danny McDonald, Michael Adrianse, William Nolan, Charles Bartholomew, Michael Bartholomew, David Beebe, William Boone, David DeVos, James Hooker, Robert Peters, Chad Chapman, Lee Wheeler, and Ronald Freel whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire Danny McDonald, Michael Adrianse, William Nolan, Charles Bartholomew, Michael Bartholomew, David Beebe, William Boone, David DeVos, James Hooker, Robert Peters, Chad Chapman, Lee Wheeler, and Ronald Freel and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them 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 Atlanta, Michigan, copies of the attached notice marked "Appendix."[27] Copies of this notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondents' authorized representative, shall be posted for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents 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 Respondents have gone out of business or closed the facility involved in this proceeding, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since March 13, 1995.

(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 Respondents have 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 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 threaten that we would lose work, reduce our work force, or that our employees would work fewer hours if they became represented by a union.

WE WILL NOT promise to look into the possibility of providing a better insurance plan for our employees if they are not represented by a union.

WE WILL NOT promise employees the choice of a picnic, a bonus or a jacket in order to dissuade them from supporting a union.

WE WILL NOT threaten that Shaw, Inc. would close its doors if a union came in.

WE WILL NOT offer monetary rewards to employees to engage in surveillance of other employees' union activities and/or to report union adherents to us.

WE WILL NOT inform employees that we will not employ union members because of their association with a union.

WE WILL NOT threaten union adherents with unspecified adverse action or violence.

[27] 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 inform employees that another employee was being reassigned from one work crew to another because of that employee's support for a union.

WE WILL NOT fail and refuse to hire job applicants seeking employment with us because of their membership in or affiliation with a union.

WE WILL NOT maintain an overly broad rule prohibiting the distribution of literature by employees on company property at any time.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in their exercise of the rights listed above.

WE WILL rescind the overly broad rule prohibiting the distribution of literature on company property at any time.

WE WILL, within 14 days of the Board's Order, offer Danny McDonald, Michael Adrianse, William Nolan, Charles Bartholomew, Michael Bartholomew, David Beebe, William Boone, David DeVos, James Hooker, Robert Peters, Chad Chapman, Lee Wheeler, and Ronald Freel employment in the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled had we not discriminated against them.

WE WILL make whole Danny McDonald, Michael Adrianse, William Nolan, Charles Bartholomew, Michael Bartholomew, David Beebe, William Boone, David DeVos, James Hooker, Robert Peters, Chad Chapman, Lee Wheeler, and Ronald Freel, with interest, for any loss of earnings they may have suffered by reason of our unlawful refusal to hire them upon application.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusals to hire the above-named individuals, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

SHAW, INC., RAPID RIVER ENTERPRISES, INC., S & R CABLE, INC., AND KIMRON RESOURCES, INC.

Joseph P. Canfield, Esq., for the General Counsel.

Lisa Latart, Esq. and *Barry R. Smith, Esq. (Miller, Johnson, Snell & Cummiskey),* of Grand Rapids and Kalamazoo, Michigan, for the Respondent.

Mr. John Cobe, of Kalamazoo, Michigan, for Local 324, International Union of Operating Engineers, AFL–CIO.

Mr. Tom Boensch, of Saginaw, Michigan, for the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada AFL–CIO.

Mr. Eugene Barrett, of Saginaw, Michigan, for Local 1098, Laborers International Union of North America, AFL–CIO.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. The charge in Case 7–CA–37450(3) was filed by United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada AFL–CIO (Pipefitters) on August 16, 1995.[1] The charge in Case 7–CA–37450(4) was filed by Local 1098, Laborers International Union of North America, AFL–CIO (Laborers) on August 21. And the charge in Case 7–CA–37450(5) was filed by Local 324, International Union of Operating Engineers, AFL–CIO (Engineers) on September 13, and an amended charge was filed in this case on October 25. By Order issued by the Regional Director for Region 7 of the National Labor Relations Board (the Board) these cases were consolidated and a consolidated complaint (complaint) was issued on October 27, alleging that Shaw, Inc. (Shaw), Rapid River Enterprises, Inc. (Rapid), and S & R Cable, Inc. (S & R), as a single employer and/or joint employers[2] violated Section 8(a)(1) of the National Labor Relations Act (the Act) by (1) making various threats to the employees; (2) promising to look into the possibility of providing a better insurance plan if the employees were not represented by the above-described Unions;[3] (3) coercively interrogating employees regarding their union support or sympathies; (4) offering a monetary reward for employees to engage in surveillance of other employees' union activities and/or to report union adherents to the Respondents; (5) informing employees that union members would not be employed by Respondents because of their association with Charging Party Engineers, and that an employee was being reassigned to another work crew because of that employee's support for the Charging Parties; (6) creating the impression of surveillance of employees' union activities; and (7) maintaining a distribution rule which prohibits distribution of literature on Respondents' property at any time, and violated Section 8(a)(1) and (3) of the Act by refusing to hire or consider for hire specified qualified job applicants seeking employment with Respondents because of the applicants'

[1] Unless otherwise specified, all dates are in 1995.

[2] During the hearing the complaint was amended to include Kirmron Resources, Inc. (Kimron) as a Respondent. Also, on the last day of the hearing the General Counsel, in light of testimony given on the next-to-last day of the hearing, moved to amend the complaint to add par. 22(c) which alleges that Bill Ancel threatened the loss of work if the Union came in. The General Counsel pointed out that if Foremen Brian Allman and Roger Beaty are found to be supervisors, then ancel's statement would not violate the Act. The parties were advised that the motion would be ruled on in my decision.

[3] During the hearing counsel for the General Counsel's motion to amend the complaint was granted so that it is alleged that on or about June 20, 1995, at Respondents' Atlanta facility, Respondents by their Agent Ron Shaw, promised employees the alternative of choice between a picnic, a bonus, or a jacket in order to dissuade them from supporting the Union.

membership in or affiliation with the Charging Parties and by assigning a named employee to another work crew because of his support for the Charging Parties. Respondents deny violating the Act as alleged.

A hearing was held in Alpena, Michigan, on March 12–15, May 14–16, June 18 and 19, and August 20–22, 1996.[4] Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondents, including a separate brief filed by Kimron, I make the following

FINDINGS OF FACT

I. JURISDICTION

All of the Respondents' corporations maintain an office and place of business in Atlanta, Michigan, and Shaw, Rapid and S&R are engaged in the pipeline construction industry.[5] Kimron is commonly owned with Shaw, Rapid, and S & R, and Kimron is the employer of the employees used by the other three entities. The complaint alleges, the Respondents admit, and I find that at all times material, Respondents collectively have been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

With respect to paragraph 10 of the complaint, Respondents stipulate that Ron Shaw, Gregory Lucas, James Robb, Carl Steuer, and William Ancel are supervisors within the meaning of the Act.[6]

Joint Exhibit 1 is a two-page handwritten list of the applicant's names on the applications which Shaw, Inc. had in its files.

The parties stipulated that General Counsel's Exhibit 63, a classified ad reading as follows appeared in one of the local newspapers in February or March 1995:

> HELP WANTED: Excavator and dozer operators, Roustabout and pipe line foreman. Truck drivers. and general laborers. Must have clean driving record and be able to pass a drug test. Apply at: Shaw, Inc. M-32-33, Atlanta . . . .

On March 16, Danny McDonald, who was a member of the Engineers and who has 6 years' experience in pipeline construction, submitted an application at Shaw, Inc. (GC Exh. 23.) He lives in Ossineke, Michigan, which is about 40 to 50 miles from Atlanta. Subsequently he received a telephone call from Shaw, Inc. and he was interviewed by Lucas on March 23. Lucas had McDonald dig a ditch with an excavator and then fill it in with a bulldozer. McDonald testified that Lucas said that he did a good job; and that Lucas also said that jobs were on hold because of the frost laws and winter restrictions regarding the movement of heavy equipment or pipe on secondary roads, and that he would get back to McDonald in 2 or 3 weeks. When he did not hear from Lucas in that period McDonald telephoned and went to Shaw, Inc. "three times at least" and was told the jobs were on hold and to come back or call in 2 or 3 weeks. The last time he went to Shaw, Inc. was June 6. McDonald's application indicates that he took the Engineers' hazardous awareness training in 1991, 1992, 1993, and 1994. As noted below, Lucas testified that he did not recall saying anything to McDonald after the test.

On April 25, John Pacola, who is a business representative with the Engineers, telephoned Shaw, Inc., spoke with someone he identified as Kelly, and he told her that he was a heavy equipment operator and that he was looking for work. Pacola testified that when he asked Kelly if Shaw, Inc. was doing any hiring she said yes out of the Atlanta office only; that he asked her to send him an application; and that he subsequently received an application. Pacola made the telephone call after he became aware of an ad that Shaw, Inc. had placed in the Alpena newspaper looking for, inter alia, excavators and dozer operators.

Also on April 25, Rick Stemkowski submitted an application at Shaw, Inc. in Atlanta. Stemkowski, who is in the Pipefitters and is a pipefitter and welder, testified that at the time he was working as a pipefitter on a CO2 plant job that was near completion; that he and others who were working at the plant went to Shaw, Inc. to submit applications;[7] that on the top of his application he wrote voluntary union organizer (GC Exh. 27); that he did not fill out the driver's portion of the application because he was not applying for a truckdriver position; that he has experience in pipeline work; that he saw his brother Steve, Weeks, Deemer, and Jackowiak fill out and submit applications at Shaw, Inc. on April 25 (GC Exhs. 28, 29, 30, and 31), respectively;[8] that his brother is a welder and pipefitter, Weeks is a pipefitter, Deemer is a welder, and Jackowiak is an apprentice pipefitter; that he did not remember ever performing pipefitting or welding work for a nonunion company; and that he did not fill out the employment history portion of the application be-

[4] At p. 2309 of the transcript the parties agreed that the originals of GC Exh. 71, except 71(n), would be returned to Respondents and copies of the exhibits would be placed in the record. Respondents have forwarded copies indicating that the General Counsel inadvertently had the originals place in the record. The copies forwarded by Respondents are forwarded with the record so that the Board can physically remove the originals and forward them to Respondents.

[5] At the hearing, the parties stipulated that Respondents Shaw, Rapid river, and S & R (as noted above, Kimron was subsequently added by the General Counsel's motion to amend, which motion was granted over the objection of Respondents) constitute a single-integrated business enterprise and can be treated as a joint and single employer for purposes of the allegations contained in pars. 11 through 27 of the complaint herein only. The Respondents stipulated to this solely for purposes of this case and with the stipulation of the General Counsel and each Charging Party that it is limited to that purpose.

[6] Respondents further stipulates that Kim Shaw is the secretary/treasurer and a part owner of Shaw; that jeff Critchfield is vice president and part owner of S & R; and that Thomas Royce is treasurer and part owner of S & R. Respondents do not admit that these three aforementioned individuals are supervisors within the meaning of the Act.

[7] He rode with his brother Steve and Wayne Weesk. And he filled out his application with them and with others from the plant job, namely, Billy Deemer and Bob Jackowiak.

[8] The General Counsel subpoenaed the applications from the files of Shaw, Inc.

cause he believed that it related to the truckdriver portion of the application. Jackowiak testified that General Counsel's Exhibit 31 was his application for employment at Shaw, Inc.; that he rode to and from Shaw, Inc. on April 25 with John Hoos who filled out and submitted an application at that time (GC Exh. 32), which is dated April 25; that the brothers Stemkowski, Weeks, and Deemer were also present when he filled out and submitted his application; that he recognized Deemer's handwriting on his application (GC Exh. 30); that he left the employment history on his application blank because he had not been in the trade very long as a pipefitter; that the pipefitting job at the CO2 plant lasted for about 2 weeks after they applied at Shaw, Inc.; and that he wrote voluntary union organizer at the top of his application. Weeks testified that he has been a Pipefitter for 19 years; that he applied for a position at Shaw, Inc. on April 25; that at the time he was working at a CO2 plant in Gaylord, Michigan; that Jeff Bergkamp told him about the fact that Shaw, Inc. was hiring and that he should put union organizer at the top of his application; that there were four other Pipefitters present at Shaw, Inc. when he filled out his application (GC Exh. 29); that he put negotiable on the line which asked for rate of pay expected; that he did not fill out that portion of the application which he believed referred to applicants for a truckdriving position which included the employment record portion; that, as here pertinent, he has worked with steel and plastic pipe; that at the time he testified herein he was working on a job 200 miles from his home in Lincoln, which is 60 miles from Atlanta; that when the CO2 job was completed 3 weeks after he applied at Shaw, Inc. he was out of work for 5 months, his unemployment ran out and he did not receive a telephone call from Shaw, Inc.; and that in the 19 years that he has been in the Pipefitters he has never submitted an application to a nonunion contractor to perform pipefitting work. William Deemer testified that he is in Pipefitters Local 85 and is a pipefitter and welder; that when the CO2 plant job he was working on was rained out he went to Shaw, Inc. with a number of other individuals who were also working on the CO2 plant, which was nearing the end of the project; that he wrote voluntary union organizer on his application and he wrote negotiable on the line asking the rate of pay expected; that he did not fill out the "EMPLOYMENT RECORD" portion of the application because he believed that it referred to a truckdriver position; that he has a welding rig but he works about 50 percent of the time without the rig; that he has worked in other States and all over the State in Michigan; that he has worked on all types of pipe; that he telephoned Shaw, Inc. about 3 months after he applied for a position; and that he never heard from Shaw, Inc. and he has an answering machine. John Hoos testified that he is a member of Local 85 and a pipefitter with very little welding experience; that on April 25, 1995, he went to Shaw, Inc. when the job he was working on was rained out; that the job he was working on at the time he applied for a job at Shaw, Inc. was winding down and he was scheduled to be laid off within a matter of a few days; that he drove to Shaw, Inc. with Jackowiak; that the woman in the office at Shaw, Inc. gave them applications to fill out and she asked them for their driver's licenses; that he turned in his application (GC Exh. 32), to the woman; that he wrote voluntary union organizer on the application; that he did not fill out those portions of the application which he did not believe pertained to him;[9] that he was never called by Shaw, Inc. and he has an answering machine; that he has worked for a nonunion company before and he helped in an attempt to organize that company; that he has worked in various places in Michigan; and that he has worked with metal and plastic pipe and he fuses pipe.

Additionally on April 25, 1995, John Birgy, who is a member of the Pipefitters who was a welding certification, went to Shaw, Inc. to apply for a position. Birgy testified that he went with Bergkamp, who is a welder; that he asked the woman in the office at Shaw, Inc. if they had a project that was going to start and if they were going to be needing people and she replied, "yes"; that he and Bergkamp filled out applications and then turned them in to the woman in the office; that General Counsel's Exhibit 33 is the application that he filled out; that he went to Shaw, Inc. because the job he and Bergkamp were working on that day was rained out in the morning and the job only had a few more weeks of work for him; that he wrote voluntary union organizer on the top of his application; that he did not fill out that portion of the application under driving experience because it referred to a truckdriving job; that as he left Shaw, Inc.'s office the woman in the office said that they would be in contact; that he had an answer machine and they did not contact him; that he telephoned Shaw, Inc. on two different occasions[10] and the woman who answered the telephone in response to his questions said that the project was moving on and he would just have to wait to hear from them on his application; that he has fused plastic pipe before; that he has worked all over Michigan and in New York State; and that he thought that later in the day the rain stopped and he went to work at the CO2 plant; and that he did not complete the employment record potion of the application because he believed that it applied to a driver position. Bergkamp testified that he is a member of the Pipefitters and has been a welder for close to 20 years; that he operates his own welding rig; that on April 25, 1995, he applied for work at Shaw, Inc. when the job he was working on at the CO2 plant on Old State Road for Deever construction was rained out; that he went to Shaw,Inc. with Birgy; that he left part of his application (R. Exh. 4) blank because he believed that it applied to a regular full-time truckdriver; that he wrote voluntary union organizer at the top of his application; that regarding rate of pay he wrote negotiable; that the "EMPLOY-

[9] The application has a shaded area beginning at the bottom of the first page of the application. The first two lines in this shaded area read: "Driver Experience & Qualification, Answer the questions in this section only if applying for driver position." All of the next page is included in the shaded area. At the top of this page in the shaded area the following appears: "EXPERIENCE & QUALIFICATION (cont'd) answer the questions in this section only if applying for driver postion." The next page has only two main topic headings, namely, "MAINTENANCE EXPERIENCE & QUALIFICATIONS" and CLERICAL EXPERIENCE & QUALIFICATIONS." And the top of the last page of the application deals with "PLATFORM EXPERIENCE & QUALIFICATIONS." GC Exh. 71N is an original application form.

[10] July 19 and August 2.

MENT RECORD" portion of the application begins with the following:

> The U.S. Department of Transportation requires that driver applications show all employment for the last three years. Effective July, 1987 they must also show commercial driver employment for the seven years immediately preceding this year period. [Subsection] . . . 391.21(B)(10), (11)[;]

that this language did not play any role in his not filling out the "rest of the application"; that he never heard from Shaw, Inc. and he has an answering machine; that he was laid off at the CO2 plant shortly after applying at Shaw, Inc.; that the next job that he took was 150 miles from his home; that he did not believe that he went back to the CO2 plant that day after completing his application at Shaw, Inc.; and that he also did not complete the employment portion of the application because he wanted to be interviewed and because the person who referred him was going to talk with the people at Shaw, Inc. about his ability aa a welder.

Lucas, who is the operations manager of Shaw, Inc., testified that the welders which Shaw, Inc. uses work for Tara Energy which is Shaw's main customer; that Shaw gets them through Tara Energy; that Shaw, Rapid, or S & R do not pay the welders; and that when they need a welder they clear it with Tara Energy.

The applications of the employees hired after April 27 were received as General Counsel's Exhibits 65(a) through 65(ffff). Additionally, a list of employees hired after March 16 was received as General Counsel's Exhibit 67.

By letter dated May 1 (GC Exh. 26), Pacola requested Ron Shaw to open lines of communication with respect to Shaw, Inc. becoming a union contractor.

In early May 1995, Lee Wheeler, who is a member of the Laborers and worked on pipelines for about 4 years, filled out an application at Shaw, Inc. Wheeler testified that he indicated on the application that he was a member of the Laborers and that he was seeking scale wages, indicating the amount he desired; that when he turned the application back in the woman glanced over it and she did not ask for his driver's license or social security number; that the woman said that when anything breaks here, we'll get in touch with you; that he never heard from Shaw, Inc.; that he did not have a copy of his application; that he lives in Atlanta; that most of his work is within a 1 to 2 hours drive; that when he went to Shaw, Inc. he did not know that it was nonunion; that he never went back to Shaw, Inc. or telephoned it; and that he did not write "voluntary union organizer" on the top of his application. Neither Respondents nor the General Counsel had a copy or Wheeler's application.

Also in early May 1995, Ronald Freel, who is a member of the Laborers and had worked on pipelines for about 8 months at the time, applied for work at Shaw, Inc. He testified that the only thing he put on his application which would indicate that he was affiliated with a union was that he asked for "Union scale." After he completed the application he turned it into the women who worked at Shaw, Inc, and she asked for his driver's license and his social security card so that she could copy them. He never heard from Shaw, Inc. Freel lives in Hawkes, Michigan, which is about 30 miles from Atlanta. He was told by Laborers' business agent, Gene Barrett, that Shaw, Inc. was hiring and that it was a nonunion company. The only time Freel went back to Shaw, Inc. the company was closed. Neither Shaw, Inc. nor the General Counsel had a copy of the application. Freel testified that his wife is home most of the time and he did not receive a telephone call from Shaw, Inc.

On May 5, according to the testimony of John Cobe, who is an organizer for the engineers, he and representatives from the other trades[11] met to discuss having a demonstration at one of the gas producing companies that employs Shaw; and that there was no discussion about active direct organizing of the employees at Shaw.

On May 5, Pacola telephoned Shaw, Inc and spoke with Barbara who, in response to his question, stated that Shaw, Inc. was still hiring.

On May 8, Michael Adrianse, who is a member of the Engineers, went to Shaw, Inc. in Atlanta looking for work. He had contacted Pacola at the Engineers who sent him a classified ad Shaw, Inc. ran in the Alpena newspaper (GC Exh. 7), dated March 18. Pacola accompanied Adrianse, who was wearing a jacket with a union insignia on it, when he filled out the application at Shaw, Inc. (GC Exh. 8). Also, Adrianse wrote "voluntary union organizer at the top of his application. Steuer, a field supervisor for Shaw, Inc., asked Adrianse what type of equipment he operated and Steuer asked Adrianse for his current phone number and address.[12] Upon seeing the area code, Steuer said that Adrianse had come a long way looking for employment. Copies of his driver's license and his social security card were attached to his application, along with a copy of a card showing that he had gone through the Engineers' Hazmet training program. On cross-examination, Adrianse testified that he lives in White Cloud, Michigan; that Pacola told him that Shaw was a nonunion contractor; that he had 24 years of experience running excavators on pipeline work; and that someone looking at his application who knows the industry would probably be able to figure out that he worked on some union jobs. On redirect, Adrianse testified that it is not abnormal to go 235 or 300 miles away from your home to work; and that he never worked for a nonunion company before. And on recross Adrianse testified that when he traveled a long distance to a job it was of a definite duration and it was not indefinite permanent work. Pacola testified that he accompanied Adrianse to Shaw, Inc. on May 8; that Barbara at Shaw, Inc. responded yes when they asked her if Shaw, Inc. was hiring; that Steuer spoke to them and gave them his business card; that Steuer said that White Cloud to Atlanta was a long ways to drive to work; that Adrianse told Steuer that he could run an excavator and a bulldozer; that Adrianse wrote voluntary union organizer across the top of his application; that Steuer said that they would be hiring 2 or 3 weeks after the frost laws went off; that in 1995 the frost laws went off sometime after the third week in May; and that Adrianse was asked to give his driver's license and his social security card. Steuer testified that he did

[11] Cobe specified "the Teamsters, the UA, the Laborers and someone from the electricians' union . . . ."

[12] Steuer gave Adrianse a business card, GC Exh. 9.

not remember anyone filling out an application in May 1995 who was wearing a union jacket.

On May 10, Chad Chapman, who is a member of the Laborers and has worked on pipelines for the past 10 years, went to Shaw, Inc. and filled out an application. When he turned it in to the woman at the counter at Shaw, Inc. she told him that she needed his driver's license and social security card and that he had not filled the application out thoroughly and he should complete it. He went back to the lunch room and looked at the application again and made a copy of it using the copying machine in the lunchroom. He did not fill out those portions which he believed referred to driving a truck or being an operator. When he gave the application back to the woman in the office she indicated that she did not need his license or social security card since there was a meeting being held in the office which housed the copying machine. On the first page of his application (GC Exh. 10), Chapman wrote "union scale" where the application asks for the rate of pay expected. Also, he believed that he was wearing his union jacket with a union logo on it when he applied a Shaw, Inc. Chapman resides in Onaway, Michigan, which is about 25 miles from Atlanta.

On May 15 Adrianse telephoned Shaw, Inc. and was told that it still was not hiring. He never received a telephone call from Shaw, Inc.

Also on May 15, members of the Engineers, the Pipefitters, the Laborers and Local 190 of the Teamsters met at Coyles Restaurant at Houghton Lake, Michigna. to discuss an organizing campaign at Shaw. Cobe testified that eight of the members of his union, the Operating Engineers, completed applications for employment at Shaw in his presence at Coyles; that he reviewed the applications before they were signed; the applications were signed in his presence (GC Exhs. 2A through 2H)[13]; and that each of the applicants physically handed him back the application. After copying the applications, the eight members of the engineers, Cobe and two union business representatives went to Shaw at Atlanta. When they first walked in a secretary at Shaw asked them if they were there campaigning and Cobe told her that they were there to submit applications for employment.[14] One of the business representatives present had a video camera. Each of the eight applicants gave his application to the secretary. Lucas, the vice president and owner of Rapid, entered the room and when one of the applicants asked if they were going to be interviewed that day Lucas said no and the secretary said that they were still calling people back from layoff. The same secretary, identified as Barbara, also said that the applicants could call in every 30 days to keep their applications current. And Lucas, in response to a question, said that they would be hiring in about 4 weeks. Cobe testified that he then told Barbara that each of the applicants had written "voluntary union organizer" on the application; that the applicants were willing to work at any job at the rate of pay that they were paying their employees at the time; and that once the applicants were hired they were going to engage in organizing activity to organize Shaw's employees. Cobe also testified that the applicants were not asked for their driver's licenses or social security numbers. On cross-examination, Cobe testified that those who attended this meeting included representatives of the Engineers, the Teamsters, the Laborers, the UA, and the Plumbers and Pipefitters; that he told the applicants to put negotiable on the line of the application which asks for the rate of pay expected so as to avoid any reason for being rejected; that a number of the Engineers applicants indicated on their applications that they were formerly employed by Welded Construction, which has a labor agreement with the Engineers; and that generally members do not like to travel more than 60 miles to a permanent job. Boone testified that General Counsel's Exhibit 2(b) was his application; that he filled out the application in Coyles restaurant and went to Shaw, Inc. in Atlanta on May 15; that Lucas said that they would probably be hiring in 2 or 3 weeks; that he was instructed to put union organizer at the top of the application; that he did not recall that Cobe reviewed his application before he signed it; that he left the current employer portion of the application blank because he was receiving unemployment compensation at the time and there was no current employer; that he lived in Grayling which is near Atlanta;[15] and that he was told about Shaw's ad by a person who lives in Alpena. Hooker testified that he has been a member of the Engineers for 19 years and most of his experience has been in pipeline construction; that in Michigan he has worked up to 120 miles from his home; that he has worked in a number of States outside Michigan; that he went to Shaw, Inc. on May 15 to submit an application for employment; that Cobe helped him fill out the application at Houghton Lake;[16] that before going to Shaw, Inc., copies were made at Grayling; that he believed that Cobe carried his application (GC Exh. 2(a)), from Grayling to Shaw, Inc.; that the woman in the front office of Shaw, Inc. said that they were not hiring at the time; that he said to Lucas, "I understand that you have some work down the road . . . ." and Lucas replied, "[m]aybe in two or three weeks, we may be doing some hiring"; that when he asked about updating the application he was told it could be done over the telephone; that he was wearing a union hat when he was at Shaw, Inc.; that in his application he indicated that he was seeking an equipment operator or a laborer position; and that he had not worked a nonunion job in the last 19 years. Picola testified that he had copied the application which Shaw, Inc. had sent him and eight members of the Engineers filled them out at Coyles; that they were then copied at the Union's office at Grayling; that he, Cobe, Scully, and the eight applicants then went to Shaw, Inc.; that Hooker asked if Shaw, Inc. was hiring and a woman there

[13] Respectively, James Hooker, William Boone, William Nolan, charles Bartholomew Jr., Michael Bartholomew, David Beebe, David DeVos, and Robert Peters. William Scully, a business agent for the Engineers, testified from personal obersvation about the machinery which DeVos, Beebe, the Bartholomews, and Nolan can operate and about the training DeVos, Nolan, and Charles Bartholomew received in the Engineer's apprenticeship program.

[14] Members of the group were collectively wearing union hats, union belt buckles, and union jackets.

[15] It appears to be about 50 miles from Atlanta.

[16] More specifically, Hooker testified that Cobe told him to write "voluntary union organizer" at the top of the application, and to write "negotiable" where the application requests the rate of pay expected. Scully testified that he heard Cobe tell the applicants to put "union organizer" on ther applications.

said, "yes"; and that regarding the meeting at Coyles, he could not recall if Cobe first mentioned that the applicants should write "voluntary union organizer" on the top of their applications but that it was possible that Cobe did.

Additionally, on May 15 Richard Konieczny, who is a member of Pipeliners 798 out of Oklahoma and a welder who owns his own rig, filed an application with Shaw, Inc. He testified that when he applied at Shaw, Inc. he had been out of work for 18 weeks; that the secretary at Shaw, Inc. asked him for his drivers license and social security card when he gave her his application (GC Exh. 35); that he put negotiable on the line requesting the rate of pay expected; that he listed Pipeliners 798 as his current employer since he was referred out by Local 798; that while he welded pipe for another of the employers that he listed, Pioneer Contracting, Inc., Shaw, Inc. worked on another portion of the same pipeline; that he has worked in Ohio, Indiana, Illinois, and Pennsylvania; that he never heard from Shaw, Inc. and he has an answering machine; and that in the last 5 years he has not worked for a nonunion company or applied for work with a non-union pipeline contractor.

By letter dated May 19 (GC Exh. 3), Cobe advised Ronnie Shaw, the president of Shaw, Inc., as follows:

> On . . . May 15, 1995 eight members of the . . . Engineers made application for employment at your company. These eight . . . have experience . . . and are willing to work under the same terms and conditions which your have extended to other employees who are qualified in the trade.
>
> You will not be able to employ more qualified and productive employees in any labor market. Additionally, you can be assured that any protected activity in which these applicants may choose to engage following their employment by you will [be] conducted strictly within the guidelines established by Law and the National Labor Relations Board and will not interfere with their efficiency and productivity as an employee.
>
> Should you fail or refuse to fairly and nondiscriminatorily consider these applicants for employment, please be advised that we reserve the right to bring such failure or refusal to the attention of the National Labor Relations Board as violations of Section 8(a) (1) and (3) of the Act.
>
> If for any reason you refuse to accept these applicants or if you consider same deficient in any manner, please advise me immediately so that remedial action may be taken. Please feel free to contact these applicants through my office, the Grayling branch office, or the Freeland branch office.

On May 19, Brian Golden, who is a member of the Pipefitters and a welder, submitted an application to Shaw, Inc. (GC Exh. 34). He testified that he has worked on pipelines two or three times a year; that he has fused plastic pipe; that he was out of work when he applied at Shaw, Inc.; that he wrote union organizer at the top of the application because the union told him to do it; that he wrote "neg." on the rate of pay expected line because he wanted to see what kind of money he could get; that when he handed in the application the secretary looked it over and she said "fine"; that he has worked all over the State of Michigan and lives in Kalkaska, Michigan, which is about 70 miles from Atlanta; that he has worked nonunion jobs before, with the last one in the middle 1980s; that he has his own welding rig; and that when he submitted his application at Shaw,Inc. the secretary asked him for his driver's license and social security card and she made a copy.

When Chapman went back to Shaw, Inc. about 2 weeks after he submitted his application on May 10 the woman behind the counter, after leaving the counter to go to an office for a short time, told him that Shaw, Inc. was not hiring. Chapman, who has an answering machine, never heard from Shaw, Inc, after that.

By application dated May 23 (GC Exh. 22), Jared Frank sought a position with Shaw, Inc. He received a telephone call from Robb, who he understood to be a general foreman of Shaw, Inc., on June 14 and was hired as a laborer even though he did not have any experience in the pipeline construction industry.

Also on May 23, 1995, Ross Hart, who is in the Pipefitters Local 798 out of Tulsa, Oklahoma, and a welder, applied for a position at Shaw, Inc. (GC Exh. 49). He testified that he went to Shaw, Inc. with Mike Hage; that he was given the application form at an earlier union meeting at Houghton Lake and told to write "voluntary union organizer" on the top of the application; that he has a welding rig but he occasionally works inside a building for employers without his rig; that the secretary at Shaw, Inc. took his and Hage's application and asked for their driver's licenses and social security cards; that he did not fill out part of the application, "EMPLOYMENT RECORD," because he believed that it applied to someone applying for a truck driving job; that he never heard from Shaw, Inc. and he has an answering machine; that he was not employed when he went to Shaw, Inc.; that he has traveled out of state to work and in Michigan from Detroit to the Upper Peninsula; that his home in Mt. Pleasant, Michigan, is about 130 or 140 miles from Atlanta; and that he never telephoned Shaw, Inc. to check on the status of his application. Hage testified that he is a member of Pipefitters Local 798 and a welder; that he went to Shaw, Inc. with Hart and submitted an application for employment;[17] that he received the application form at a union meeting at Houghton Lake where he was told to and he did write voluntary union organizer on it; that after he gave his application to the woman in the office at Shaw, Inc. and she looked at the applications, she asked them for their driver's licenses and social security cards; that he never heard from Shaw, Inc. and he has an answering machine; that he lives in Gaylord, Michigan, and Shaw, Inc. advertised in the Gaylord newspaper for pipeline workers and foremen; that he has experience working with steel and plastic pipe; that he has his own welding rig; that he did not have a job when he turned in the application at Shaw, Inc.; that he never telephoned Shaw, Inc. after he submitted his application; and that in the last 5 years he has not applied at any other nonunion companies or written voluntary union organizer on any other application.

[17] Respondents alleged that no application was received from this individual.

On May 24, Hooker telephoned Shaw, Inc. and he was told that it was not doing any hiring. Subsequently, he telephoned Shaw, Inc. three times[18] and was told the same thing. He never received a telephone call from Shaw, Inc. His wife is home in the morning until noon and usually in the evenings. Hooker was referred by the Engineers to a union pipeline construction job in Manistee, Michigan, which is 70 miles from his home in Lake City, Michigan, on May 22 and he worked that job until November 29. Hooker testified that Atlanta is approximately 140 miles from his home; and that if Shaw, Inc. had offered him a job as a laborer, he would have taken it and lived in a trailer with his wife.

Lucas testified that Shaw, Inc. built a CO2 plant north of Vienna Corners, Michigan, during the summer of 1995 and the job lasted about 3 months; and that Shaw, Inc. used between two and six roustabouts, including laborers, on the job.

When Boone telephoned Shaw, Inc. about 2 or 3 weeks after he had submitted his application on May 15, 1995, he was told that if Shaw hired and if his application was still on file, Shaw, Inc. would contact him. Boone never received a telephone call from Shaw, Inc.

On June 5 Barrett, a field representative of the Laborers, attended a union meeting in Saginaw, Michigan. He had Business Manager Robert Polarski announce to those attending that if anyone wanted to fill out an application for Shaw, Inc. in Atlanta to see him. Barrett testified that during the meeting people came up to him and filled out an application at the table at which he was sitting; that after the applications were filled out he retained them (GC Exhs. 36 through 48)[19]; that he told those filling out applications to write "union organizer" at the top of the application; that part of the last page of the application is cut off but he did not know how this happened or when it happened; and that he knew the work record of some of those who filled out the applications on June 5, 1995. Jack Hartupee, who is the business manager of Laborers' Local 1098 out of Saginaw, Michigan, testified that he goes out on jobsites almost daily and he has seen members working; and that some of the members he has seen working are those included in General Counsel's Exhibits 36 through 48. Hartupee sponsored General Counsel's Exhibits 51, 52, and 53 for purposes of comparison with the signatures on the applications received herein as General Counsel's Exhibits 36 through 48.

On June 6, McDonald, as indicated above, went to Shaw, Inc. for the last time looking for work as an equipment operator. He was told by one of the secretaries, described as Barbara, to come back in 2 or 3 weeks. He was offered another job on June 8.

On June 8 Barrett took the 13 above-described applications to Shaw, Inc. He testified that he told the secretary in the office at Shaw, Inc. that he had applications from laborers; that the secretary looked through the applications and said that they were incomplete and she needed a copy of the applicants' driver's license and social security number; that he told the secretary that he was their field representative and that he could furnish any information needed for these applicants and he gave her his business card; that although pages two and three of the applications that he turned in were not completed and they were not signed at the end, the secretary did not say anything;[20] and that he did not contact any of the 13 applicants to indicate that they should provide work records, a social security card, or a driver's license for Shaw, Inc.

As indicated above, on June 14 Frank was offered a position with Shaw, Inc. He reported for work on June 15. He waited for his work assignment in the lunch room with about 75 other employees. A smaller group of individuals[21] met in a smaller room, described by Frank as the foremens' room, off the lunchroom. When they came into the lunchroom they assembled crews using the list of names they had. On his first day, Frank worked for Rapid, which Frank testified, does directional boring. On other occasions before he left Shaw, Inc. on August 23 he worked on Shaw, Inc. crews. Frank testified that Shaw, Inc. does pipeline work and he estimated that half the time he worked for Rapid and the other half of the time he worked for Shaw, Inc. He never worked for S & R.

On or about June 15, Timothy Hoffman began working for Shaw, Inc. He had submitted an application for employment with Shaw, Inc. on June 8 (R. Exh. 5), and Robb telephoned him and offered him a job. Hoffman had submitted an application to Shaw, Inc. earlier while he was incarcerated after being convicted of arson. Hoffman testified that Shaw, Inc. telephoned his mother and told her that the involved crime was too serious; that later when he was released and hired by Shaw, Inc. he told his foreman, Watson, that he had been incarcerated and had to report to his probation officer and Watson said he could ride with him because he also had to see the same probation officer; that he usually worked on Watson's crew; that he had no prior experience in this field; that before he submitted his application the second time he saw a couple of ads of Shaw, Inc., which ads ran a couple of weeks apart, seeking employees; that he also worked on the crews of Haren, Garcia, and others identified only as Gary and Phil; that he would be assigned to crews and such assignments would be specified on sheets of paper which the foremen had when they left the foremens' room and came into the breakroom each morning, i.e. (GC Exhs. 50, and 14(b) and (c)); that a company vehicle was used to transport the workers to the jobsites and the employees were paid from the time they showed up for work at the Atlanta facility; that two or three times a week a "boss other than . . . [his] foreman" would come to the jobsite and usually stay 10 or 15 minutes; and that when he operated a backhoe, a loader, and a dozer on Shaw, Inc. jobs he used this equipment to pull pipe which could have been done with a pickup truck.

[18] R. Exh. 2 lists subsequent telephone calls on June 7, 13, and 19.

[19] GC Exhs. 40 and 48 are not signed. The latter, purportedly the application of Gary Lee Watson, appears to have been drafted by the signer of GC Exh. 47, namely Gary's father, Gilbert Watson, right down to the same misspelling of "Freind [sic]" in response to the question on the first sheet asking who referred you.

[20] Most of the applications were signed on the first page.

[21] Frank described them as foremen and he indicated that this group consisted of Ron Watson, Rick Klis, Mark Haren, Lucas, Jim Robb, Carl Steuer, Gary Geister, Ancel, and Dan Garcia. Frank testified that Steuer and Robb have their own offices.

By letter dated June 16 (GC Exh. 4), Cobe advised Shaw as follows:

> Please continue to keep active the employment applications from members of the . . . Engineers your office currently has active in file from the . . . [eight above-described] members . . . .
>
> Please feel free to contact these applicants through our office.

On June 20, Frank attended a meeting in the break or lunchroom along with about 80 other people collectively from Shaw, Inc., Rapid, and S & R. Before this meeting Frank saw a meeting of foremen and others in the foremen's room.[22] When this group left the foremen's room they came into the breakroom and Ron Shaw addressed the employees, introduced himself and spoke of the pros and cons of Shaw, Inc. becoming a union shop. Frank testified that Ron Shaw asked the employees present what they thought about Shaw, Inc. becoming a union shop; that Ron Shaw said that if Shaw, Inc. became a union shop, it would lose nearly 70 percent of its work because Tara, which is a utility company which Shaw, Inc. works for, would not pay union pay scale; that Watson said that anyone hired in the last 6 months would probably lose their job; that Haren said that the employees might see a little increase in wages but they would lose that in union dues; that Klis said that on union jobs the employees have to provide their own transportation to the job site and they do not get paid for driving time;[23] that when one employee asked if the employees could get better health insurance Ron Shaw said that he would look into it and that the union insurance was terrible; that Ron Shaw said that if Shaw, Inc. became a union shop, he would have to cut his work force down to possibly 25 people and the union was basing their pay scale numbers on the fact that they did Federal and State work and since Shaw, Inc. did not do this work, it could not pay union scale; that Tara was being sold and the president and vice president of the company were forming their own company and Shaw, Inc. would be getting work from that company; that Ron Shaw said that even if the union was voted in they would have to "arbitrate" a pay scale with him and he would not pay a union pay scale; that Ron Shaw was present when Watson, Klis[24] and Haren made their statements; that after the meeting while at Shaw's Atlanta facility, Foreman Fix asked him and employee Mike Maynard what they thought of unions and they replied that they really had not thought about it too much; that later that same day Klis asked him what he thought of unions when he was riding with Klis in the Shaw, Inc. truck assigned to Klis; that Klis asked this question four or five times and Klis indicated that he had some experience with a union and it was bad and the employees should not get involved with a union; and that he made notes regarding what occurred on June 20, and he faxed them to Cobe (GC Exhs. 12, and 13(a) and (b)).[25] Hoffman testified that on the morning of June 20 Ron Shaw met with the foremen in the foremens' room and then Ron Shaw addressed the employees gathered in the breakroom waiting for their assignments; that Ron Shaw said that it was up to the employees whether to let a union in but if they did let a union in, a lot of people would not have a job and they would not get as many hours; that foreman Haren said the union "ain't worth a darn" and if the union got in, the employees would have to drive their personal vehicles to and from the jobsite;[26] that Ron Shaw and Robb were there when Haren made this statement; that Ron Shaw told those assembled that they would have to make a choice regarding bonuses, namely whether they wanted a picnic or a jacket but he did not include this in his affidavit to the Board; that he did not remember Ron Shaw saying that they would lose work; and that Watson did not speak during this meeting. Former Shaw, Inc. Foreman Fix testified that Ron Shaw said that Tara Energy told him that if Shaw, Inc. went union Tara Energy was not going to have Shaw, Inc. work for it because the union fees were too high; that Ron Shaw said that if the union came in (1) the people with more seniority would have work before we would because we wouldn't have any seniority; (2) while pay would increase considerably the employees would have to pay union dues; and (3) when there was work there would be a lot of work but there would not be as much year round work; that Ron Shaw, during this meeting, also talked about whether they were going to have a picnic, jackets or a bonus and that the choice would be made by signing a sheet; that someone asked about insurance and Ron Shaw said that he would look into it and try to improve it; that he did not recall asking anyone on his crew what they thought of the Union; and that problems with the insurance had been discussed before at the morning meetings. Klis testified that he was present for this meeting but he did not remember what was said; that he did not think that the opportunity to choose between a jacket, a company picnic or a bonus took place at this meeting but rather he believed that it occurred sometime after this meeting; that in the past Shaw, Inc. offered company jackets or company picnics; that he doubts that he drove anyone to a drug test on June 20; that he does not recall asking Frank what he thought of the union; that he did not say that employees would no longer receive travel pay or be paid for travel time if Shaw became a union contractor; that he was never offered a choice between a jacket, a picnic, or a bonus before; that he was never offered a choice involving a bonus before; and that he might have talked to Frank about the union but he did not remember and "[i]f we asked him maybe just sitting there at lunchtime talking about the union or something but as

[22] The group consisted of Ancel, Steuer, Robb, Klis, Watson, Geister, Fix, Haren, Lucas, and Ron Shaw.

[23] As noted above, at Shaw the Company provides the transportation to and from the jobsite and the employees were paid for the driving time.

[24] Frank's notes refer to a Rick K. (Rick Klis).

[25] GC Exh. 12 is the original notes. GC Exhs. 13(a) and (b) were the notes Frank typed after speaking to Cobe about the involved occurrences and his original notes of the occurrences of June 20. Frank's father-in-law, Boone, was one of the above-described individuals who applied for work at Shaw on May 15. Frank agreed to supply Cobe with information abou Shaw, Inc.

[26] Hoffman conceded that his affidavit indicates that he did not recall anyone saying that the employees would no longer be driven by Shaw trucks to the jobsite if the Union came in. Hoffman indicated that the affidavit was not correct on this point.

far as asking him, no I wouldn't." Shaw, Inc. Foreman Geister testified that it was not normal for Ron Shaw to address the employees en masse and the last time he spoke to the employees as a group was at the preceding years Christmas party; that the June 20 meeting was a meeting concerning becoming a union company; that some of the employees at the meeting indicated that they were not satisfied with the health insurance and Ron Shaw said that he would be looking into getting better insurance; that he did not remember anything else that was said at the meeting; that employee Gary Teats asked what would happen if the union came in and he responded to him; that he could not remember for sure when he was asked to make a choice between a jacket, a picnic or a bonus but this did not occur during the June 20 meeting; that Ron Shaw said that the reason they were meeting was to talk about the union; that to "[b]e honest with ya, I can't remember one thing he said about the union. And that's the honest truth"; that Ron Shaw may have said we may have to downsize; and that he was not positive that Ron Shaw said that they may have to downsize. Watson testified that he was present during this meeting; that Ron Shaw was talking about the union "wanting in"; that Ron Shaw said something about some people would be cut on jobs because it would take work from us in that Shaw, Inc. would not be able to underbid competitors; that Ron Shaw said that he was trying to get better insurance; that it was said that there would be higher wages; that he did not say that anyone hired within the last 6 months would lose their job if the Union was voted in; and that the choice between a jacket, a picnic, or a bonus was mentioned during this meeting and it was indicated that they were going to send out some papers for people to check off which they wanted. Rapid's supervisor, Ancel, testified that he was present during this meeting; that Ron Shaw said that the union was making its presence known and there was nothing that the company could do to stop the employees from taking a vote; that he did not really remember anything else that was said at that meeting; that he heard someone say that having the union is going to result in a higher scale and someone else saying that that does not mean lots of work but he did not know if any of the individuals speaking were supervisors or foreman; and that he remembered that Terra was not discussed at this meeting. Steuer testified that all that he remembered about this meeting which lasted 45 minutes to an hour was that Ron Shaw said there was nothing he could do if it came down to a vote and he, Steuer, told employees that generally, from his past experience, most unions do not pay travel time. Ron Shaw testified that he was prompted to conduct this meeting because they were having problems with their health insurance in that two employees were initially denied coverage; that both incidents occurred about 2 months before the meeting but although they were resolved, he was told 2 weeks before the meeting that the insurer's explanation was not clear; that during the meeting with the employees he explained that the insurance was in effect and that he was looking into other alternatives for insurance; that during this meeting the employees were asked if they wanted to have their picnic or jackets or a bonus; that the Company had earlier given jackets or picnics to the employees; that one of the employees asked him if they were going to be a union company and he replied that it was up to the employees; that someone asked his opinion on whether or not the Company would be union and he replied that most of their work is time and material work and most of the union jobs are bid jobs; that he did not specifically mention any primary customers; that he did mention that about 90 percent of their work was time and material versus bid work; that someone said at the meeting that operators in the union make $20 some an hour and he replied that could be possible if it was the prevailing wage on a federally funded job; that the meeting came to an end when it was opened to questions and different groups split off; and that he was aware that there were discussions but he did not recall what they were. Ron Shaw answered "no" to the following questions propounded by one of counsel for Respondent: did you say that (1) if the Company went union you would lose 70 percent of your work; (2) Terra would not hire you if you went union; (3) the work force would be cut down to approximately 25 employees; (4) Terra would not pay union scale; (5) Terra was being sold or a new company was being formed with Terra executives and your company would get all of the work; (6) wages with a union had to be arbitrated; and (7) you would not pay union wages. On cross-examination, Ron Shaw testified that he met with the employees as a group in December 1994, on June 20, 1995, and around Christmas in 1995; that the June 20 meeting, which lasted about 20 minutes, was held because two employees were told a month or two before the meeting that they were not covered by the health insurance program; that the purpose of the meeting was to assure the employees that they were covered by medical insurance; that he did not mention the union and the union only came up because an employee asked about it; that he did not say anything about how being union would affect the amount of work he would get; that Terra Energy is his major customer but Terra was not mentioned at all at the meeting; that no employee asked questions about health insurance; and that he did not talk at all about the size of the company and what might happen if the union succeeded. On redirect, Ron Shaw testified that he was aware of the insurance problem 2 months prior to the June 20 meeting. Subsequently, he testified that a week or two before the meeting his people could not figure out what was going on about the health insurance.

Frank kept a daily log which he forwarded to Cobe. The log for June 21, was received as General Counsel's Exhibit 14(a) and the list of employees and "foremen" referred to therein was received as General Counsel's Exhibit 14(b). Frank testified that he received the list from Fix; and that the list was the list which the foremen carried out of the foremens' room and which they used to assemble crews.

On June 27 Ancel came out to the job that Frank was working on. Frank testified that a new employe, Tony Wiacek, questioned Ancel about whether they were having union problems; that Ancel said that the union talk was getting out of hand; that Ancel said that Ron Shaw had personally told him that he would not go union, he would close the doors because he had already made his money; that Ancel also said that they suspected that there was a spy or informer or somebody working for the union at Shaw and he was offering a $200 reward to anybody that would turn him in; that he thought Ancel was joking so he did not include his remark in his daily log (GC

Exh. 16), until after he spoke with Cobe; and that the reference to the $200 was added on July 9, 1995. Wiacek testified that Ancel came to the jobsite the first day Wiacek worked for Shaw, Inc.;[27] that he had a conversation with Ancel; that Ancel asked him if knew any other operators; and that during this conversation Ancel did not say (a) what type of applications Shaw had on file, or (b) that Shaw was looking for operators but all they had were union applications. Waicek also testified that while he was talking with Ancel Jared Frank interrupted their conversation and Frank said that he used to be a union painter out in Pennsylvania and Frank was bragging about how much money he made working for that union. On cross-examination, Wiacek testified that counsel for the General Counsel was correct that he, Waicek, at the time he testified herein, drove a truck to Detroit early in the morning; that he did not remember speaking to counsel for the General Counsel; that he voluntarily quit Shaw;[28] and that Ancel said that he needed operators but he did not give Ancel any names because the operators he knew all had jobs. Subsequently, Waicek reiterated that Ancel did not say anything about the union during the two conversations he had with Ancel on these 2 consecutive days; that "[i]f anything was said to that effect to get him [Frank] going talking about it [the union] I never heard it"; and that it was just him and Ancel talking when Frank interrupted. Klis testified that he never heard anyone offer a reward for a union informer. Ancel testified that he did not remember having a conversation with anyone at this jobsite on June 27 and did not remember an employee named Anthony Wiacek. Ron Shaw testified that he did not go to the Shaw facility to look for a union man in July 1995 and he not did tell anyone that this was what he was doing; that he did not tell anyone that if the union was voted in he would close the doors of Shaw, Inc.; and that he did not offer a reward for a union spy and he did not tell anyone to say this.

On June 28, according to the testimony of Frank, Ancel came out to the job that he and Wiacek were working on and Frank overheard Ancel ask Waicek if he knew of anybody that had any friends that were looking for work as an operator. Frank testified that Waicek said he did not and he asked Ancel why; and that Ancel said that Shaw needed operators because the only applications that they had on hand were those of union members.[29] Waicek testified that on the second day that he worked for Shaw Ancel came to the jobsite and found an employee sleeping in a truck; that Ancel asked him how long the employee had been sleeping; and that during this conversation Ancel did not say (a) that Shaw would not go union; (b) that Shaw would close its doors; (c) that he was getting tired of union talk; and (d) anything about suspecting a union informer or about offering $200 for union informers. On cross-examination, Waicek testified that it was raining the second day when Ancel came to the jobsite. Ancel testified that he remembered finding employee Godin sleeping at this jobsite but he did not remember having a conversation with any other employee that day. Ancel answered "no" to the following questions propounded by one of counsel for Respondents: did you have any conversations about the union near the laborers who were working on the Iron Oxide project, did you ever say to those employees that you were getting tired of the union talk, did you ever say that at any time, did you ever say that Shaw had told you that Shaw, Inc. would not go union, were you told this, did you ever say that Shaw had made his money and he was just going to close the doors, did you ever say that Shaw suspected the there was a union informer, did he ever say that Shaw would pay $200 for someone finding a union informant,[30] did you tell someone that you were looking for operators because all you had on file were union applications from operators, did you know the status of applications that were in the file for operators, did you play any role in hiring operators, were you looking for another operator in the summer of 1995, did you ever offer a monetary reward for employees to watch other employees' union activity and did you ever tell anyone that they would not be employed by Shaw because of their association with the Union. Ancel also testified that when he was at the jobsite Rapid's two foremen at the time, Beaty and Allman, asked him, when they were alone, what he thought of the Union's presence. On cross-examination, Ancel testified that he was not sure if Shaw, Inc. needed operators when the Iron Oxide job was in progress; and that he told Beaty and Allman that the Union would only raise the cost of work, the work that is given to them might be put up for bids and if the Unions came in it might result in a loss of work. Steuer testified that he never heard Ron Shaw offer a reward for a union informant; and that he never made a statement like that to other employees.

On July 5, the following ad appeared in the Alpena News:

> MECHANIC REQUIRED duties; Shop foreman, heavy equipment experience, able to maintain preventative maintenance program. Send resume to Mechanic, 16860 M-32/m33, Atlanta, MI 49709.

On July 8 Frank, according to his testimony and his daily log (GC Exh. 19), operated a backhoe most of the day.

On July 10 Frank was in a truck with Steuer, Ancel, and Watson. Frank testified that he was working as a fuser when Watson, Steuer, and Ancel walked out of the woods and said that they needed to use the truck that Frank's crew had because they did not want to walk back through the woods to get their trucks; that he was recruited to ride with Steuer, Ancel, and Watson back to their trucks so that he could return the borrowed pickup back to his crew; that Watson, who was driving, said that he liked the four door pickup because he could load a lot of men in it for when the union came around; that he asked Watson why he would say that; that Steuer and Ancel replied with Ancel saying that they had a surprise for those union boys (Actually Ancel said those "mother fuckers") if they came back around and with Steuer saying that they had some "hungry

[27] Waicek knew Robb before he was interviewed by him (and Lucas) and hired at Shaw, Inc.; and he built Robb's house in 1991.

[28] When asked on cross "[a]re you doing any work for Shaw now?"he replied, "[n]o sir. Since I quit I have not talked to anybody that's worked for Shaw."

[29] Frank's daily log for June 28 was received as GC Exh. 17. Frank testified that the reference therein to Bill "(Quinlen?)" is Bill Ancel.

[30] This and similar inquiries included counsel asking were you told and did you say this at a particular location.

fuckers" for those union boys when they came back around; that he asked them what they would do when the union came back; that Watson said that if they put a picket line up, he would run "the fuckers" over; that he said that they would probably get fired for it; that Steuer said no, that "he would personally see to it that he would get a raise for doing it"; and that he made notes of the discussion (GC Exh. 20), and sent them with the daily log to Cobe. Watson testified that he remembered the involved truck ride; that he rode in the truck with Steuer, Ancel, and an employee who drove the truck; that with respect to what he talked about in the truck "[h]onestly, . . . [he did not] remember"; that they could have joked about the union during the truck ride; that he did not make any statement regarding what he would do with that truck and with union individuals; that he did not remember Ancel saying that "he would have a surprise for the mother-fuckers when they came back"; that he did not recall saying if the union individuals came back he would run them over; and that it is possible that he said this. Ancel testified that he, Steuer and Watson were at the Hay Meadow Pipeline project on July 10; that Watson directed one of his laborers, Frank, to give the three of them a ride in a pickup truck so that they would not have to walk back through the swamp to their trucks; that he believes that Frank drove the truck;[31] and that the ride only lasted 5 minutes. Ancel answered "no" to the following questions propounded by one of counsel for Respondents: did you have any discussions in that truck about the Union, did you say that you'd have a surprise for the "mother fuckers" when they came back, do you recall Steuer making any statement regarding what he would do to the union supporters, you don't believe Watson said that he would run over the union supporters, and do you remember Frank making any statements during that ride. Steuer testified that he believed that the laborer drove the truck; that he did not remember what conversation he had in the pickup truck; that he did not believe that the Union was discussed during the ride; that he did not say that Watson would get a raise if he ran over some union members and he did not remember Watson saying anything about trying to run over union members; that the ride lasted probably 10 minutes; and that while he remembered the ride he did not remember if anything was said.

According to his testimony, around July 11 Cobe returned to Shaw's shop premises to distribute handbills (GC Exh. 5) as the employees came to work. He was accompanied by Pacola, Scully and Ron Spiker of the Engineers, and Barrett and Ron Elliott of the Laborers. Cobe testified that they were on the public property right-of-way by the entrance to Shaw and he gave handbills to employees on their way to work; that he was wearing a jacket which had a 4-inch emblem "George Meany Center for Labor Studies" on the left breast area; and that Scully, Pacola, and Hooker had on Engineers jackets on that day and Hooker and Pacola were wearing Engineers hats. On cross-examination, Cobe testified that Skully was wearing an Engineers jacket when asked whether Pacola and Hooker had any other union insignia on; and that this was the only time he showed up at Shaw's facility to distribute union material before or after July 11. Cobe also testified that sometime before or after July 11 he had about three mailings to individuals who work for Shaw regarding the organizing campaign at Shaw.

On July 12 Frank telephoned Shaw, Inc. to indicate that he would be arriving late for work. He testified that Robb answered the telephone and told him to get in as fast as he could; that when he arrived at work approximately 20 minutes late, Robb told him "to go home and to come back to work on time tomorrow and maybe he would let me work"; and that he was not paid for the day.

By letter dated July 14 (GC Exh. 6), Cobe reiterated to Ronnie Shaw what he indicated in his above-described June 16 letter.

Around mid-July 1995, Hoffman was terminated after being hurt on the job and being under a doctor's care.

On July 24, according to the testimony of Frank, Shaw, Inc. Foreman Geister said that Ron Shaw was in town and he was looking for the union man. Frank's daily log for July 24, 1995 (GC Exh. 21), refers to Ron Shaw looking for "union man." The log also refers to Chad taking flyer and talking about union wages. Frank testified that the day after the Union passed out literature he overheard "Watson was complaining about Chad D. (Drumb) had stopped the day before and taken a flier from the Union and that previous day had been talking about wages laid out in it"; that he overheard Watson telling Steuer that he, Watson, did not want Chad on his crew because he felt that Chad was a union man; and that Steuer said that he would put Chad someplace else. On cross-examination, Frank testified that Kevin Hibner may have overheard part of the discussion about Chad Drumb. Geister testified that he did not tell employees about Ron Shaw looking for a union man; that he never specifically said that Ron Shaw was in town and he was looking for a union man; that he was never told that; that he never heard anybody else talking about looking for a union informer; and that he never heard anyone offer a $200 reward for a union informer; that employee Chad Drumb was on his crew; that he observed Drumb taking abuse from a foreman about his, Drumb's, support for the union; and that when Drumb took the handbill from the union handbillers on the way into work he, Geister, overheard Foreman Watson say, "[W]ell there's a union guy." Watson testified that he remembered Drumb; that Drumb worked on his crew; that he did not remember asking to have Drumb transferred off his crew and it was not possible that he did because Drumb was taken off his crew because they needed a fuser; that he did not recall asking Steuer to take Drumb off his crew; that the normal procedure to follow when he wanted someone removed form his crew was to speak to Steuer or Robb; that he never told any employees that someone was being assigned to another crew because they supported the union; that he never tried to have any employee transferred because he supported the Union; that he did not recall if he saw Drumb take a union handbill; and that he could not say how long after the union handbilling Drumb left his crew. Steuer testified that Respondent's Exhibit 21 shows the crew assignments for July 10 through the 14; that according to the assignment sheets, Drumb was on Fix's crew on July 10, 11, and 12; that Frank was on the off list for July 12, which means that he did not work on that day; that Drumb was on Watson's crew on

[31] Subsequently, he testified that the truck was driven by either Frank or Watson.

July 13 and Drumb was on Geister's crew on July 14; that he was not approached by Watson about reassigning Drumb to another crew; that he never told any employee that an individual was being reassigned from one crew to another because of his support for the union; and that never reassigned an employee because of his support for a union. Drumb testified that he worked for Shaw, Inc. from September 27, 1994, until December 26, 1995; that he did not believe that he was transferred off Watson's crew because of his union views; that he worked on Watson's crew after the summer of 1995; that it was a common practice to be transferred from crews; that in October 1995 he asked for and received a raise from $6.75 an hour to $7.25 an hour although the handbook indicates that the raise should have been up to $7.50 an hour; that he did take union literature when the union handbilled; and that no one commented about the fact that he took the union literature.

On August 22, when Frank returned to Shaw, Inc.'s facility from a jobsite he found his tires slashed. He telephoned Cobe and told him that he did not feel safe continuing to work at Shaw, Inc.

On August 23, Frank spoke to Robb about what happened the day before. Frank testified that he told Robb that he had just come from the police station where he had filled out a report on the incident; that Robb asked him if he had any enemies that he knew of and he replied that he did not; that Robb then said it looks like he did and maybe he "should go home and take the rest of the day off and think about what I was doing"; and that Robb was chuckling or laughing at him. Frank did not return to work at Shaw, Inc. Subsequently, he received job referrals from the Unions even though he was not a member.

Lucas testified that during the spring and summer 1995 he reviewed all of the applications that were received by the Company; that no one evaluated the applications before he did; that employees were hired by Shaw, Inc. in the spring and summer 1995; that he did not interview all applicants before making a hiring decision; that in spring 1995 when the frost laws were in effect it was a little slow and he did have operators take a practical test or give a demonstration of their ability behind the shop; that in 1995 he reviewed the applications for laborers positions and he passed on to Robb the ones he considered for hiring; that he reviewed the operator applications and separated them in terms of those he was interested in and those he was not interested in; that during spring and summer 1995 individuals were hired based solely on the information on their application; that Respondent's Exhibits 5 through 20 are the applications of people who applied for employment but were not hired; that he likes to hire people who live in the area around Atlanta because the employees work 12 to 13 hours a day year round; that when he hires an employee he hopes the individual will work for the Company on an indefinite basis; that it is important to have a potential employee recommended to him; that the employment record portion of the application is important to him because he looks for stability and the kind of money the applicant made with prior employers; that he does not contact applicants who have not filled out some portion of the application and ask them to complete it; that he noticed that all of the applications which were submitted by a business agent of the Laborers (GC Exhs. 36 through 48) had union organizer on the top of the application and he remembered determining that none of those applicants lived in the area, the applications were not the Company's normal application form, there were no previous employment records, he would not consider hiring these applicants and he put their applications in the folder not to hire; that, with respect to General Counsel's Exhibits 27 through 35 he reviewed those applications and determined that some live in the area, but Shaw, Inc. does not hire welders or someone skilled in pipefitting work and all of these applied for those positions; that he reviewed the applications received as General Counsel's Exhibits 2(a) through (h), which were those which were submitted the day a group came to Shaw, Inc. and videotaped, and he determined that those applicants lived too far from Atlanta and their employment records were not very stable; that he reviewed the application of Adrianse (GC Exh. 8) he did not remember meeting with this applicant, and he determined that he would not hire him because he lived in White Cloud which is about a 4-hour drive from Atlanta; that the fact that voluntary union organizer was written on the top of certain of the applications was not a factor in determining whether he was interested in the applicant; that he did not recall giving McDonald a test on March 16, 1995, but his application form (GC Exh. 23) shows that he gave McDonald a "1" on the test;[32] that "1" is the lowest one can do on the test[33] and he did not recall saying anything to McDonald after the test; that the "laborer" at the top of McDonald's application probably means that he asked him if he was interested in working as a laborer; that he has no specific recall of his decision not to hire Chad Chapman (GC Exh. 10); that during the period involved herein he hired a number of individuals,[34] some of whom were prior employees of Shaw, Inc. at its prior location in Kalkaska, Michigan[35]; that in mid-summer 1995, he had Robb hire a lot of the laborers and he, Lucas, was not sure if he reviewed all of the applications before the laborers were hired; that this practice ended in spring 1996; and that Robb did not interview laborers before they were hired. On Cross-examination, Lucas testified that he did not hire the applicants specified by the General Counsel[36] because collectively they had an unstable

[32] According to Lucas, McDonald received a "1" on the excavator and a "1" on the bulldozer.

[33] A "5" would be the highest score.

[34] Lucas specifically indicated roger Beatty, Keith Sharboneau, James Williams, Steve Scholl, Calvin Garns, Chris Caplan, Jay Weber, Shawn Barrie, Earl Smith (according to Lucas, Smith told him that he was in the Union); Larry Lipka (Lucas gave his application to Steuer to contact), Robert Johnson, and James Wilson (Lucas gave the application to Robb to contact).

[35] Scholl, Caplan (both Kalkaska and Atlanta), Weber, and Johnson.

[36] Chad Chapman (GC Exh. 10); Ronald Holmes (GC Exh. 36); Frederick Bublitz (GC Exh. 37); Jay Walsh (GC Exh. 38); Rod Givens (GC Exh. 39); Paul roe (GC Exh. 40); Richard Holmes (GC Exh. 41); John Meier (GC Exh. 42); Leonard Wixson (GC Exh. 43); Brian Libera (GC Exh.44); Joseph steudie (GC Exh. 45); Ronald Pols (GC Exh. 46); Gilbert Watson (GC Exh. 47); Gary Watson (GC Exh. 48); Ross Hart (GC Exh. 49); Jeff Bergkamp (R. Exh. 4); Rick Stemkowski (GC Exh. 27); Steve Stemkowski (GC Exh. 28); Wayne Weeks (GC Exh. 29); William Deemer (GC Exh. 30); Robert Jackowiak (GC Exh. 31); John Hoos (GC Exh. 32); John Birgy (GC Exh. 33); Brian Golden (GC Exh. 34); Richard Konieczny (GC Exh. 35); James Hooker (GC Exh. 2A);

work history, no previous employment was listed or the employment history is not fully filled out, the position sought is not specified, the rate of pay expected is not given or is too high, the application is not signed on the back, the applicant did not live close enough to the Atlanta area,[37] and Shaw, Inc. does not hire welders or pipefitters; that he lives in Gaylord which is about 32 miles from Atlanta, Ancel lives at Houghton Lake and Steuer lives in East Jordan;[38] that to his knowledge the only person hired without an application was Supervisor Joseph Ellie; that he was the one who decided to hire Keith Sharboneau (GC Exh. 65 I) and James Williams (GC Exh. 65N); that he usually does not look to previously submitted applications to fill jobs; that at the time of the hearing herein his file contained applications from 30 days back; that he would not look at all of the current applications and pick the person he felt was best qualified; that if he found a "good one" that was current he would hire him; and that the procedures have been changed so that applications are kept for 30 days only, they must be filled out in the office, a driver's license and a social security card must be provided, and the application can only be filled out during certain times of the day. On redirect, Lucas testified that he thought these changes took place "right around the first of the year" and subsequently, Lucas testified that the new procedures were posted in the reception area.

With respect to whether Watson, Klis, Fix, Haren, and Geister are supervisors, Frank testified that he worked on Watson's crew which did pipeline work for Shaw, Inc.; that Watson would tell him and other employees what work to do on the job; that he overheard Watson assign laborers to bulldozers and loaders; that he worked on Klis' crew and Klis assigned him jobs; that he overheard Klis assigning operators to operate equipment; that he has worked on Fix's crews which handle plastic and steel pipe; that Fix assigned him to work, including operating a bulldozer; that he overheard Fix assign both operators and laborers; that Watson, after talking with Steuer wrote up Kevin Hibner for smashing the side of a Shaw truck; that he worked on Haren's crews and Haren assigned him work; that he overheard Haren assign operators and welders to do certain jobs; that on one occasion Haren sent Jason Goden home for the day when Goden was sitting down and playing with a torch; that he has worked on Geister's crews; that Geister assigned him from one job to another and he overheard Geister assign tasks to laborers and operators; that the foremen told him that Robb and Steuer had the authority to discipline him; that the foremen, who had forms, could write the employees up; that he overheard Kevin Hawley ask Watson to leave work early and Watson immediately told him he could; and that Watson did not use his CB radio before telling Hawley that he could leave work early.

On December 15, Fix quit Shaw, Inc. He testified that he began working for the Company in February 1995 as a pipeline foreman; that he had fusers, operators and pipe stringers on his crew of between 4 and 12 employees; that he reported to Robb or Lucas; that he would be assigned a crew and when they got to the jobsite he would tell each person what to do while they were there for the day; that he could give employees written reprimands without first discussing the matter with Robb; that he had writeup sheets and if he was having a problem with somebody, he could talk to Lucas or Robb and decide whether to give the employee time off or put them on another crew; that he and Robb gave some employees time off when they did not follow instructions and they had to have the truck they were using pulled out after it got stuck; that he could give a reprimand without checking with anyone else; that Robb told him that if he was having a problem with someone he could send them home of give them time off but he would have to check with him or Lucas before doing that; that Robb gave him discipline slips to use in giving discipline; that it was his understanding that Robb decided which crew somebody would go on; that employees could work for Shaw, Inc. or Rapid or if the S & R people did not have enough work they would work on the pipeline or on a roustabout crew; that Lucas or Robb could come out to the job once a day but there were times when they skipped a day or two; that they would stay on the jobsite for 20 minutes to an hour if all was going all right;[39] that the other foremen were Watson, Haren, Klis, and Geister,[40] that the crew assignment sheet changed daily; that Ron Shaw told him that he would receive a 401(k) plan if he stayed with Shaw, Inc. long enough; that if he thought that an employee should be fired he would have speak with Lucas or Robb; that it was his recommendation that the employees who did not follow instructions and had to have their truck pulled out receive time off and Robb went along with the recommendation; that eventually his job was eliminated and he became a roustabout employee; that he made an effort when he was a foreman to see that the laborers worked equally by rotating them; that he never filled out a reprimand form; that if he had a technical problem in the field he would contact Robb and Robb would come out to the site and try to resolve the problem; that he did not have an office at Shaw, Inc.; that Robb had an office and Steuer and Ancel shared an office and these people had weekly meetings that he and the other foreman were not invited to; that he was paid by the hour and he received overtime for hours over 40; that he believed that "everybody" had the same health insurance but he really did not know; that he recommended against an employee getting a raise but he did not know if the employee received the raise; and that he could authorize an employee to leave the job early but if the employee wanted to take off for one half of the day he, Fix, would have to speak to Robb.

William Boone (GC Exh. 2B); William Nolan (GC Exh. 2C); Charles Bartholomew (GC Exh. 2D); Michael Bartholomew (GC Exh. 2E); David Beebe (GC Exh. 2F); David DaVos (GC Exh. 2G); Robert Peters (GC Exh. 2H); and Michael Adrianse (GC Exh. 8).

[37] Lucas testified that he tries to keep the circle that he does not go beyond within 1 hour of Atlanta.

[38] Houghton Lake appears to be approximately 75 miles from Atlanta and East Jordan appears to be between 50 and 60 miles from Atlanta.

[39] Lucas, who is the operations manager of Shaw, Inc., testified that Robb and Steuer would touch base with their crews in the field once or twice a day and they would remain at the jobsite for 10 minutes to 1 or 2 hours.

[40] Lucas testified that Foremen Klis, Geister, Watson, Haren, and Fix all have the same authority over employees and all perform about the same kind of work; and that the foremen tell the welders what they want done.

Klis, who as noted above is a foreman at Shaw, Inc., testified that before becoming a foreman he was an operator at Shaw, Inc,; that operators are eligible to participate in a 401(k) plan the same as foremen; that the foremen's health coverage is the same as that which the operators have; that as foreman his duties are "[j]ust make sure that everybody knows what they are doing all day long, make sure we got enough stuff to do for the next day"; that he can have from two to ten people on his crew depending on what his crew is doing that day; that as foreman he does not have authority to hire, fire, transfer employees from one crew to another crew, layoff, promote, or give raises; that he finds out who is assigned to his crew when Robb or Steuer gives him the list at the beginning of the workday; that he reports to Steuer and Robb; that Steuer and Robb come to the jobsite from two to six times a day and he can call them from the jobsite by radio; that when there are problems with employees in his crew he tells Steuer or Robb; that Robb and Steuer do not ask him what should be done to the employee in terms of discipline; that he has filled out an accident report involving an employee (GC Exh. 66(I);[41] that if an employee asks for time off he asks Robb or Steuer unless it involves only 30 to 60 minutes; that when he was hired Lucas was aware of the fact that he was a member of the Engineers Local 324; that he made $11.50 an hour as an operator for Shaw and he makes the same amount as a foreman for Shaw; that he has authorized employees to take a pickup truck home when they work late; that he does change assignments of members of his crew; that the one time when he had a problem with the production of an employee he spoke to the employee and when the employee did not "straighten up" he told Steuer; that he does not choose to carry corrective action notices in his truck; that when he went to work for Shaw he took a withdrawal from the union, he did not fill out any slip or card but he told his union representative who allegedly said he would take care of it; that he drives to the jobsites and he assigns another employee to drive; that he fills out his own time ticket and the time tickets for the employees on his crew; and that employees do not normally fill out their own time tickets but in a situation where he has left the job and an employee works all night that employee fills out his own time ticket. On rebuttal, Cobe sponsored General Counsel's Exhibits 77(a) through (e) which refer to Klis' union membership and the question of whether he withdrew from the Union.

Geister, who as noted above is a foreman at Shaw, Inc., testified that before becoming a foreman he was an operator at Shaw, Inc,; that he participates in a 401(k) plan; that he is covered under his wife's health insurance plan; that he does not have an office, is paid hourly and does not have authority to hire, fire, transfer employees from one crew to another crew, layoff, promote, or give raises; that he finds out who is assigned to his crew when Robb or now Joe Ellie gives him the list at the beginning of the workday; that the supervisors come to the jobsite periodically throughout the day and he can call them from the jobsite by radio; that when he has a problem with an employee he discusses it with the supervisors who handle the problem; that if employees ask for time off he tells them to speak to the supervisors; that he has filled out an accident report for workers' compensation; that supervisors ask him how an employee is doing when they are considering whether to give the employee a raise, "I mean they do take a certain amount of our input because we're out there with the workers every day"; that supervisors come out to the jobsite periodically throughout the day and it varies depending on the job; that Steuer comes out to the jobsite sometimes once a day and sometimes up to four times a day and he spends perhaps 2 hours a day; and that even when he is not asked he will tell supervisors if he thinks an employee is doing a good job and deserves a raise.

Watson testified that as a foreman he gets the same benefits that the rest of the "hands" get; that he is eligible for the 401(k) plan and he has health care; that he does not have an office, is paid hourly and does not have authority to hire, fire, transfer employees from one crew to another crew, layoff, recall, promote, or give raises; that he can make a recommendation to promote or give an employee a raise and he has recommended raises in the past; that he finds out who is assigned to his crew when Robb or now Ellie gives him the list at the beginning of the work day; that the supervisors come to the jobsite once or twice a day and he can call them from the jobsite by radio; that when he has a problem with an employee, he tries to talk to them and if that does not work, then he writes them up according to the Shaw handbook; that he signed the corrective action notice received as General Counsel's Exhibit 64(q) in the supervisor's box because he witnessed the occurrence and he did not talk to anyone before he filled out the form; that he signed on the line designated "Originated By" on the employee termination slip received herein as General Counsel's Exhibit 64(y) because Robb told him to fill out the form; that he filled out the corrective action notice received herein as General Counsel's Exhibit 64(nn) because Lucas told him to write the employee up for damaging a Shaw truck[42]; that he filled out and signed the corrective action notice received herein as General Counsel's Exhibit 64(pp) writing "[r]ule calls for discharge. Recommending discharge" after the involved employee walked off the job without permission and without telling anyone;[43] that he did not know if the employee who walked off the job was later fired or he just never came back; that he filled out and signed the corrective action notice received herein as General Counsel's Exhibit 64(vv) noting on the form "Left to Supervisor RW;"[44] that he filled out the pertinent portions and signed the corrective action notice received herein as General Counsel's Exhibit 64(ppp) because the involved employee was not doing what he was being told to do;[45] that he filled out part of the

[41] Klis signed the form in the box designated "Supervisor Signature" along with Robb. Klis testified that he also filled out an accident report for a Phillippe, whose last name he did not know.

[42] Watson signed the form in the supervisor's box.

[43] Watson signed the form in the supervisor's box.

[44] Watson signed the form in the supervisor's box.

[45] Watson wrote that the incident involved p. 15 of the handbook which refers to "[f]ailure to follow orders and or instructions of a supervisor or insubordination of any kind." In the corrective action section of the form Watson wrote "left to supervisor." Although Watson signed the form on the line for supervisor that word is crossed out and "Foreman" is written in. Watson testified that he asked the employee to lift the end of a pipe up into a fusing machine. Subsequently, Wat-

corrective action form received herein as General Counsel's Exhibit 66(xxx), crossed out "Supervisor" and wrote in "Foreman" on the line he signed, and drafted the form because the employee failed to follow orders and instructions;[46] that he has completed accident reports when someone is injured out on the job; that when an employe wants time off he decides whether he needs them and then he speaks to Steuer; that he did not testify that he can recommend promotions;[47] that he has asked that a number of employees receive a raise and he knew of quite a few who received raises; that sometimes the people he recommends for a raise did not receive one; that if an employee wants to take time off he speaks to Steuer; that he can let employees go home early; and that he makes a judgement call regarding whether someone is doing the best they can and if they are not he sometimes gives them a verbal warning. Watson also testified that every working morning he attends a meeting in the foremens' room where they discuss what is needed on the job, if they, the foremen, have spare men who cannot be put to work and should be taken off their crew and sometimes he names the person who should be taken off the crew, and he asks for extra people when he needs them and sometimes they are given to him and sometimes they are not. Accident reports where Watson signed in the supervisor signature box were received as General Counsel's Exhibits 68, 69, and 70.

Ancel, who is a supervisor of Rapid River for the directional drilling crew, testified that he is salaried; that he has an office in the Shaw, Inc. and Rapid River building; that he goes to the jobsites a minimum of once a day; and that the foremen who work under him can reach him by mobile phone, pager, home phone, and the radio in his truck.

Steuer, who indicated that he was currently employed at Kimron Resources as a field supervisor who primarily works for Shaw, Inc., testified that he receives a salary; that he did not receive any additional benefits when he became a supervisor; that he tries to spend 1 hour a day at the jobs that he supervises; that he shares an office with Ancel; and that when an employee wants to take a day off either the employee asks him or the foreman asks.

Drumb testified that when a foreman gives him instructions, as did Fix when Drumb was involved in getting a truck stuck, he tries to comply with the instructions.

Lucas testified that he, Duane Kundinger, Robb, and Kirk Parker have their own offices and Ancel and Steuer share an office.[48]

By letter dated July 31, counsel for the General Counsel advised Ronnie Shaw that the General Counsel intended to move to name Kimron Resources, Inc. as a single and/or joint employer with Shaw, Rapid, and S & R and to amend the involved consolidated complaint accordingly (GC Exhs. 59(a) though (c)).

Kundinger, who works for Kimron Resources (Kimron),[49] testified that Ron Shaw owns 70 percent of the stock in Kimron and his wife, Kim, owns the remaining 30 percent; that Ron Shaw owns 70 percent of the stock in Shaw and his wife owns 30 percent; that Ron Shaw owns 50 percent of Rapid, Lucas owns 45 percent of Rapid and he owns 5 percent of Rapid; that Ron Shaw owns 25 percent of S & R and Jeff Critchfield, Royce Thomas and Don Tinker each own 25 percent; that Kimron became active as a business corporation in January 1994; that he worked for Shaw, Inc. before he worked for Kimron; that the business purpose of forming Kimron was to make it easier to handle the administration of the labor pool, the pension plan and the billing of customers of Shaw, Rapid, and S & R; that Ron Shaw owns 33 percent of the stock in Skinner Corporation, 33 percent of the stock in Sunrise Equipment, Inc., and 100 percent of the stock in Alpine Rental (Alpine); that Kimron handles the preparation of the payroll checks for all of the employees of all of the aforementioned businesses, except for some part-time employees of Alpine; that since 1994 Kimron has been identified as the employer of record for purposes of State and Federal tax payments for all of the employees of all of these businesses with the exception of the aforementioned employees of Alpine;[50] that in January 1994 the Michigan Employment Security Commission, private insurance companies and worker's compensation insurance were requested to change their records to identify Kimron as the employer of record with respect to the employees of the aforementioned companies, except the part-time employees of Alpine; that Kimron does not have its own office or its own employees who work for it vis-a-vis Shaw, Rapid, or S & R; that Kimron utilizes the facilities of Shaw, Inc. and Kimron does not own its own equipment; that his salary is allocated between Shaw, Rapid, and S & R; that other than being the unified payroll name and managing fringe benefits, Kimron does not perform any service for any other company; that Kimron does not independently charge anything for the aforementioned service that it performs; that the payroll checks are written on Kimron but the funds are transferred from Shaw, Inc., Rapid, and S & R; that Kimron does not pay rent to Shaw, Inc.; that he and a payroll clerk, Candice Lucas, prepare the payroll checks and her paycheck is drawn on the account of Kimron; that this payroll clerk works under his direction alone; that the hours for Shaw, Inc, Rapid, and S & R are maintained by the foremen and they are submitted to Kimron by the supervisors; that Kimron prepares and forwards invoices to the customers of Shaw, Inc.,

son testified that he drafted GC Exh. 64(ppp) because the employee refused to stay and work late.

[46] Only the involved employee and Watson signed the form. In the corrective action taken portion of the form the following appears: "Sent Home Early, (1 Day w/o pay), up to supervisors's discretion." Watson testified that he was not sure who wrote this. Also, he did not know who wrote "Failure to follow orders and instructions" on the form.

[47] This contradicts testimony he gave earlier, as set forth above.

[48] Lucas sponsored a diagram of the Atlanta facility, R. Exh. 22.

[49] Kundinger testified that he also works for Shaw, Inc., Rapid, S & R, Sunrise Equipment, Inc., and Skinner Corporation; that he is the chief financial officer for Shaw, Rapid, and S & R; that he is an officer of Sunrise Equipment and owns 33 percent of the stock in that company; and that he is the treasurer of Shaw, Inc. and Rapid.

[50] The General Counsel introduced a number of documents, GC Exhs. 60(a) through (jj), which show Kimron to be the employer of record with respect to many, if not all, aspects of the employment of the involved employees. GC Exh. 60(n), which is dated "3/8/96" was signed by Watson in the box designated "Supervisor Signature."

Rapid, and S & R; that the customers pay Shaw, Inc., Rapid, and S & R; that the tax payments and unemployment allocation for the employees are paid by Kimron with funds transferred by the various entities; that Shaw, Inc. owns the equipment which Kimron utilizes; and that the personnel files are maintained by Kelly Latos who works under his direction and supervision and who is paid by Kimron with funds transferred from Shaw, Inc.

Counsel for the General Counsel introduced a number of documents relating to the issue of Kimron's status (GC Exhs. 66(a) through (jjjj)). He also indicated that some of the documents bear the signature of Watson and relate to the issue of his supervisory status under the Act.

The General Counsel introduced, as General Counsel's Exhibits 64(a) through (ttt), copies of corrective actions, reprimands, disciplines, and termination slips dated during the period from February 3, 1994, through February 23, 1996. Watson signed some of these documents as "Supervisor." It is noted that on one signed by Watson on January 5, 1996, the word "Supervisor" is crossed out and "Foreman" is written in. It is noted that what seems to be the signature of Robb appears just below the signature of Watson and this signature is dated "1/22/96." It is not apparent who made the change in the designation of "Supervisor." It is noted that on forms dated January 8, 1996 (GC Exh. 64(q)), and January 9, 1996 (GC Exh. 64(vv)) the designation of "Supervisor" was left on the form under Watson's signature. Watson signed one of the termination slips (GC Exh. 64(y)), on the line designated "Originated By" and dated his signature "6–30–95." What seems to be the signature of Robb appears on the line designated "Approved By" on the form. It appears that the involved employee voluntarily left Shaw, Inc. because he did not agree with a wage cut and being relieved of operator status.

The position statements of Shaw, Rapid, and S & R were received herein as General Counsel's Exhibits 74, 75, and 76, respectively. The General Counsel argues that there are inconsistencies between the position statements and the reasons given by Lucas for not hiring certain of the applicants.

B. Analysis

Before getting to the merits, certain procedural matters must be resolved. Respondents have filed a Motion to file a Reply Brief, submitting therewith a two-page brief the purpose of which is to correct two alleged mistakes in the General Counsel's brief. Counsel for the General Counsel then filed a Motion to Strike Respondent's Reply Brief and a Motion to Strike portions of Respondents' posthearing brief. Subsequently, Respondents filed a Motion to Strike General Counsel's Motion to Strike and a Response Thereto. The record has been reviewed and no reliance is placed on any proposed finding of fact which is not supported by the record. In view of this, there is no need to grant any of the motions and they all are denied.

As noted above, the parties have stipulated that Shaw, Rapid, and S & R constitute a single-integrated business enterprise and can be treated as a joint and single employer for purposes of the allegations contained in the complaint herein. Also as noted above, the General Counsel's motion to amend the complaint to include Kimron as a Respondent was granted. The General Counsel, on brief, argues that given the interrelationship of the operations of all Respondents, common management, common ownership, and financial control, and especially the centralized control of labor relations, it is clear that Kimron is a single employer with Shaw, Rapid, and S & R, *Canterbury Educational Services,* 308 NLRB 506 (1992); *Hydrolines, Inc.,* 305 NLRB 416 (1991); and *Glover Bottled Gas Corp.,* 275 NLRB 658 (1985). On brief, Kimron contends that it is not a joint or single employer with Respondents; that it does not meet the Board's jurisdictional amount; that the amendment was beyond the statute of limitations; that during the relevant time period, the summer of 1995, it was only the employer for payroll and tax purposes; that it does not have any income, profit, property, or employees of its own; and that it processes paperwork and the other entities make all of the decisions with respect to hiring, firing, disciplining, supervising, or directing the employees. As pointed out by the Board in *Hydrolines, Inc.,* supra at 417 :

> [t]he Board applies four criteria in determining whether separate entities constitute a single employer. These criteria are: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control. No one of the four criteria is controlling nor need all be present to warrant a single-employer finding. The Board has stressed that the first three criteria are more critical than common ownership, with particular emphasis on whether control of labor relations is centralized, as these tend to show "operational integration." *NLRB v. Al Bryant, Inc.,* 711 F.2d 543, 551 (3d Cir. 1983), and cases cited therein. "[S]ingle employer status depends on all the circumstances of the case and is characterized by absence of an 'arm's length relationship found among unintegrated companies.'" Id. Accord: *Hahn Motors,* 283 NLRB 901 (1983). [Footnotes omitted.]

As pointed out by the General Counsel, Kimron, Shaw, Rapid, and S & R are all engaged in a common business venture, they share the same space and support staff, Ron Shaw and his wife Kim own all of the stock of Kimron and Shaw and Ron Shaw owns 50 percent of Rapid's stock and 25 percent of S & R's stock, Ron Shaw is an officer of Kimron, Shaw, and Rapid River, and Kim is an officer of Kimron and Shaw. Ron Shaw has a high profile with regard to labor relations in all four entities in that he has approved wage increases and he spoke to the involved employees about the Union, Lucas, who reports to Ron Shaw, does all of the hiring for all of the entities, Robb makes out daily work schedules for Shaw, Rapid, and S & R, personnel files of the involved employees are maintained together under the direction and control of Kundinger with the assistance of an employee who is paid with funds transferred from Shaw, Kundinger is also the chief financial officer of Shaw, Rapid, and S & R and the treasurer of Shaw and Rapid, Kundinger checked on the insurance problems of the involved employees at the direction of Ron Shaw, Kimron's name appears on internal documents relating to employees of Shaw, Rapid, and S & R such as employment applications and reprimand forms, Kimron holds itself out as the employer of the involved employees to Federal and State agencies and the public at large, and Kimron's employee handbook which is closely

akin to Shaw's was reviewed for approval by both Kimron and Shaw personnel and is binding on the employees of Shaw, Rapid, and S & R. Respondents have set Kimron up as the employing entity. Even Steuer testified that he was employed by Kimron. Kimron pays the involved employees and it has become the employer of record. In these circumstances, the General Counsel has demonstrated that Shaw, Rapid, S & R, and Kimron constitute a single employer within the meaning of the Act.

The complaint alleges that named foremen[51] are supervisors within the meaning of the Act. On brief, the General Counsel contends that it is clear that Shaw's foremen are supervisors within the meaning of the Act in that they routinely issue both written and oral disciplines to employees on their own, when they discuss disciplinary matters with a superior, their version of the incidents were accepted without question and their recommendation followed, they allow employees to leave work early and take longer breaks, they use independent judgement and discretion in assigning work to employees, they receive higher wages and enjoy the use of a company truck not generally available to other employees, and the employees regard the foremen as their supervisors. Respondents, on brief, argue that the foremen do not perform any traditional assignment which would qualify them as supervisors within the meaning of the Act; that any secondary duties which they might perform are purely routine in nature and not sufficient to support supervisory status; that there is no direct evidence that any of the alleged foremen have independently hired or fired an individual or independently issued discipline; that the foremen work assignments are, at best, of a routine and nondiscretionary nature which require little or no independent authority; that foremen identify employee misconduct and bring it to the attention of the field supervisors; that, as Fix testified, the designation of those acting as operators and fusers was always made by Robb on the daily assignment sheet; that all foremen are paid hourly, making about 50 cents an hour more than operators and $5 more than laborers; that the superiors of the foremen are salaried; that foremen do not have offices; that foremen are provided with a company pickup truck but operators are occasionally provided with a pickup truck; that foremen do not have the authority to hire, fire, transfer employees from crew to crew, lay off employees, promote employees, give employee raises, or to independently issue discipline to employees; that what little discipline the foremen undertake is based on the handbook and done only after prior consultation with a supervisor; that with respect to time off, the foremen testified to nothing more than the routine and limited ability to allow employees to leave the site a half hour early when the work had been completed and there was no further need to have them on the site and even then the foremen routinely cleared the request with a supervisor; that while foremen would occasionally convey an employee's request for a raise or on their own identify a person who should receive a raise, no recommendations were sought from the foremen nor were any given; and that the foremen do not exclusively control the work performed by their crew in that they are closely monitored by supervisors who spend a significant amount of time at the work sites.

Section 2(11) of the Act defines "supervisor" as an individual who has

> [A]uthority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[52]

The statutory indicia quoted above are in the disjunctive and only one need exist to confer supervisory status on an individual if that power is exercised with independent judgment on behalf of management, and not in a routine or clerical manner. Individuals with statutory supervisory authority do not lose their status simply because they infrequently exercise their authority.

In my opinion the involved foremen are supervisors as that term is defined by the Act. They drive to and from work in company vehicles, a perquisite which is not enjoyed by the rank-and-file employees, except in unusual circumstances such as working very late and then the use of a company truck is authorized by a foreman or a superior.[53] Upon their arrival at work the foremen participate in a meeting in the foremen's room with Robb and they indicate to Robb what their manpower needs are, who they can do without that day if they have too many people on their crew at the time, and if they need additional people on their crew. Robb ultimately decides who will be on the crews and he drafts the assignment sheet which, among other things, indicates the makeup of the crews. Rank and file employees do not attend the meetings in the foremens' room. After the foremen round up their crews they go to the jobsite. Watson testified that he drives one truck and he assigns an employee to drive a company truck which, among other things, is used to transport employees to the jobsite. Once at the jobsite the foreman tells the employees what to do on the job, sometimes assigning laborers to use the bulldozer or a loader, telling operators what to do and, according to Lucas, telling the welders what he, the foreman, wants done. The foremen has forms and could write an employee up for doing something wrong or for not doing something he was supposed to do. As Fix testified, he could give an employee a written reprimand without first checking with anyone. Also as Fix testified, Lucas or Robb could come to the job once a day but there were times when they skipped a day or two. Robb did not testify and although Lucas testified he did not specifically deny this testimony of Fix.[54] The foremen were left in charge at the

[51] Fix, Watson, Klis, and Geister. As noted above, Lucas testified that Foremen Klis, Geister, Watson, Haren, and Fix all have the same authority over employees and all perform the same kind of work.

[52] 29 U.S.C. subsec. 152(11) (1982).

[53] Watson alluded to past use of company vehicles by employees but he was unable to provide specifics. In view of his denial that he tesified that he recommended the promotion of employees when he did I am hesitant to rely on this unsupported assertion.

[54] It is noted that while Klis testified that Steuer and Robb come to the jobsite from two to six times a day, former Shaw employee Hoffman, who worked on the crews of Watson, haren, Garcia, Geister, and

jobsite. They were responsible for seeing that the crews were accomplishing what was expected. The supervisors who had offices at the Shaw facility performed a planning, agenda, oversight and troubleshooting function in that they visited the site to make sure things were progressing as they planned and expected. If there was a problem that the foreman did not feel confident handling, he could contact the supervisors at the office in their trucks or at home. As Watson initially testified he did recommend promotions. Watson and at least one other foremen testified that they recommended raises for employees and as Watson testified, quite a few received raises. The foremen let employees leave the jobsite early. In one instance, Watson recommended that an employee be discharged for walking off the job without permission. The employee did not come back to work at Shaw. And when Ancel testified about the above-described July 10 truck ride he testified that Watson "directed" one of his laborers to accompany them so that he could drive the truck back. On brief, Respondents indicate that Watson "selected" Frank. Ancel and Steuer were present. Their supervisory authority is admitted by Respondents. Yet neither one of them directed Frank to accompany them. It was foreman Watson who "directed" Frank to accompany them and return the truck. The foremen exercise independent judgment on behalf of management and they do not function in a routine manner. Under the circumstances existing here the foremen, in my opinion, are supervisors.

Taking the last of the unfair labor practice allegations first, paragraph 27 of the complaint alleges that on or about March 13 and continuing to date, Respondents have maintained a distribution rule which prohibits distribution of literature on Respondent's property at any time. The General Counsel contends, on brief, that Respondents' no-distribution rule is obviously a violation because it forbids distribution anywhere on Respondents' property, *MTD Products, Inc.,* 310 NLRB 733 (1993). On brief, Respondents argue that no testimony was presented as to the rules unlawful enforcement, "[t]here was no evidence that employees were prevented from looking at literature during nonworking time," "the unions were allowed to distribute literature at Shaw's facility without harassment or interruption" and the fact that this policy was in Shaw's handbook long before the events at issue here prevents any inference that it constituted evidence of active antiunion animus during the summer of 1995. The following appears in Shaw's handbook (GC Exh. 11):

> . . . UNIONS
>
> SHAW, INC. firmly believes that in order to be successful, we must serve the needs of both our employees, and our customers.
>
> It is our firm belief that these goals can best be achieved in a non-union company.
>
> . . . .
>
> . . . SOLICITATION AND DISTRIBUTION GUIDELINES
>
> (a) Engaging in any form of solicitation or canvassing of any kind during working time at any company location or area is not permitted.
>
> (b) The distribution of literature on company property at any time is not permitted.

As pointed out by the Board in MTD Products, supra, a no-distribution rule such as the one involved here is, on its face, overly broad in that it is not restricted to working time and it, therefore, is presumptively unlawful, *Our Way, Inc.,* 268 NLRB 394 (1983). The Board has pointed out, however, that the employer can avoid the finding of a violation by showing through extrinsic evidence that its rule was communicated or applied in such a way as to convey an intent clearly to permit, as here pertinent, distribution during breaktime or other periods when employees are not actively at work. Respondents have not make this showing in that they failed to adduce any evidence that they told employees that distribution during nonworking time was permitted. Nor did Respondent show that it knowingly tolerated distribution by employees during nonworking time. The fact, as pointed out by Respondents, that there was no evidence that employees were prevented from looking at literature during nonworking time is not on point in that the rule in question speaks to employees distributing not employees reading. Respondents' assertion that the Unions were allowed to distribute literature at Shaw's facility without harassment or interruption also misses the point. Again, the rule speaks to employees distributing. Additionally, the testimony that the union business representatives were not on Respondents' property when they gave out handbills on July 11 was not refuted. As noted above, Cobe testified that they were on the public property right of way by the entrance to Shaw. Respondents have not shown that they knowingly tolerated distribution by employees in nonwork areas during nonworktime. Accordingly, in my opinion Respondents have failed to show that the rule meant anything other than what it says, viz., all distribution on company property at any time is prohibited. Respondents violated the Act as alleged in this paragraph of the complaint by maintaining an overly broad rule against distribution.

Paragraph 16 of the complaint alleges that on or about March 6, and continuing to date, Respondents have failed and refused to hire or consider for hire named qualified job applicants seeking employment with Respondents because of their membership in or affiliation with the Charging Parties. The General Counsel on brief, contends that Respondents' asserted reasons for refusing to hire any of the Engineers, Laborers, and Pipefitters who applied defy logic and are clearly disparate from the manner in which it treated other applicants; that while Respondents claim that the Engineers applicants lived too far from Atlanta to be considered, they hired Frank even though his application lists Pennsylvania as his residence; that when applicants, including McDonald, telephoned Shaw after submitting their applications they were given the "run around"; that Respondents' reliance on the fact that a portion of the application was not filled out by union applicants is misplaced for the form itself indicates that this portion should not be completed and applicants other than the union applicants were hired even though they did not complete the portion of the application in

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Fix, testified that two or three times a week a "boss other than . . . [his] foreman" would come to the jobsite and usually stay 10 or 15 minutes.

question; that Respondents manipulated and varied their stated hiring policies by holding union applicants to different standards than required of other applicants; that it is no accident that not one of the 40 union applicants who applied at Shaw was not hired; that Respondents will not hire anyone, no mater how skilled, no matter how qualified, no matter how experienced if the applicant is a member of a construction trades union; that the sheer numbers themselves evince a discriminatory motive, *Cedar Falls Health Care Center,* 276 NLRB 1300, 1302 (1985); that ignoring applicants with obvious experience and instead hiring employees whose work experience is at best only tangentially related to Respondents' work also adds an inference of illegal motive, *Shortway Suburban Lines, Inc.,* 286 NLRB 323, 326 (1987); that a prima facie case is established by the General Counsel proving (1) that the applicants were members of or supported a union and respondent had knowledge of this activity; (2) that the alleged discriminatees applied for employment; and (3) that Respondents had antiunion animus, *Lewis Mechanical & Metal Works,* 285 NLRB 514 (1987); that there is no doubt that Respondents knew the alleged discriminatees in this case were union members because most wrote voluntary union organizer on their applications and others, like Mcdonald and Chapman, wore clothing bearing union logos and/or their work histories established their union connection; and that here the General Counsel has made a strong prima facie case and with Respondents' weak, and shifting defense it is clear that the discriminatees were not hired by Respondents because of their union membership and anticipated activity, *United Technologies Corp.,* 310 NLRB 1126 (1992). Respondents, on brief, contend that the General Counsel has failed to establish a prima facie case of discrimination in that he has failed to prove that Shaw has any animus toward union applicants and he has failed to prove that the union members were bona fide applicants; that the General Counsel's failure to call the "applicants" to testify, especially in light of significant evidence that this is a manufactured case, prohibits a finding that these individuals were bona fide applicants; that the unions were responsible for devising a scheme intended to snare a law-abiding company in a trap and the orchestration of this scheme denies the individuals who participated in it the right to maintain they were not hired because of that scheme; that certain of the applicants are not bona fide because they did not complete their applications, they did not follow up on their applications and they did not participate in the hearing herein; that even assuming each applicant was bona fide, there was still no violation of the Act because the individuals hired, if any, were more qualified than the union applicants; that the Laborers use of an altered employment application omitting critical attestation as to the truth and agreement to abide by Shaw's rules and policies legally prevents the applications from being considered equal to others upon which hiring decisions were based; that such facially incomplete, often unsigned and altered applications should, as a matter of law, be found to be inadequate to find any inference of discrimination due to their rejection, *Flor Daniel, Inc.,* 311 NLRB 498 (1993); and *Waco, Inc.,* 316 NLRB 73 (1995); that the fact that the laborers also sought "scale" or $13.46 an hour when Shaw only pays $6 an hour is another legitimate reason for rejection;[55] that not only were the Laborers' applications incomplete but Barrett testified that he was notified of this when he submitted them; that not only are the laborer applicants not bona fide but they are also inferior to those applicants who were hired; that an employer can lawfully reject applicants who do not follow or comply with its legitimate hiring criteria; that it is only where the applications of those rejected are at least as good as those hired that any inference of discrimination arises; that there is no evidence that either Paul Gavin or Glen Huey applied and the General Counsel produced no application nor did he call either to testify that he had in fact submitted an application; that Chapman's application did not contain any reference to voluntary union organizer, Lucas did not see Chapman when he applied and the reference to "union scale" is not sufficient to infer knowledge of Chapman's union membership; that Shaw did not have an application for Wheeler, it cannot be liable for not hiring someone whose application it did not have for whatever reason so long as its absence was not intentional, it has not been shown that Shaw intentionally destroyed any application and Wheeler cannot pursue any remedy because he failed to contact Shaw to follow up on his application; that the omission of an employment record is conclusive evidence that the application was not complete and there was no discrimination in the Company's failure to hire; that the planned submission of incomplete applications calculated to cause rejection prevents these individuals from being considered bona fide applicants, *Bay Control Services,* 315 NLRB 30 (1992); that there was no discrimination with respect to the pipefitters and welders because Shaw did not hire either; that the welders and pipefitters were not seeking labor positions and even if they were, Shaw's policy against hiring overqualified applicants may be applied to welders and pipefitters regardless of their union affiliation; that there is no violation of Section 8(a)(3) for failing to consider or hire applicants when there were no job openings; that Shaw does not hire any welders; that given Shaw's long work hours, the driving time and the fact that Shaw's wages are half (or less) of the wages these operators receive on union jobs, there is no basis for a finding that they would have accepted long-term, indefinite duration employment as operators for Shaw; that Mcdonald was rejected because he did not operate the dozer or excavator at the skill level required by Shaw and for no other reason; that Hooker's contacts with Shaw were indisputably contrived in that where a skilled individual decides to abandon his skill in order to get hired for menial labor, the legitimacy of the offer must be questioned; that the operators hired by Shaw were more qualified than the union applicants; that Shaw considers more recent applications first; and that the absence of a letter from Cobe after July supports the conclusion that the operators were not interested in employment with Shaw after August 14 and any operator hired by Shaw after that date would not be similarly situated to the operators' applicants.

[55] *Wireways, Inc.,* 309 NLRB 245 (1992). The General Counsel speculated on brief that perhaps one of the reasons Shaw insists in its application form on the rate someone expects is to identify higher paid union members.

The General Counsel has established a prima facie case. As indicated by the Board in *Flor Daniel, Inc.,* 311 NLRB 498 (1993):

> In *Wright Line,* 252 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir.1981), cert. denied 455 U.S. 989 (1982), [Approved in *NLRB v. Transportation Management, Corp.,* 462 U.S. 393 (1983).] the Board set forth its test for cases alleging violations of the Act turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivation factor: in the employer's action. The burden then shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved. Under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be based on the Board's review of the record as a whole. [Footnotes omitted.]

Most of the applications at issue contained the words voluntary union organizer or words to that effect. Those which did not were submitted under circumstances which would put the Respondents on notice that the applicant was union affiliated. Not one of the 40 applicants at issue was offered a position. Respondents' union animus is established by the conclusions reached above and below. Respondent offered what it claims are business justifications for not hiring the 40 involved applicants. According to the person who made the decisions,[56] Lucas, McDonald was not hired because he scored low in the test he was given. On the one hand, we have McDonald testifying that, after the test, Lucas said that he did a good job.[57] On the other hand, we have Lucas initially testifying that he did not recall saying anything to McDonald after the test. Then Lucas testifies that he probably asked McDonald if he was interested in working as a laborer. Lucas does not specifically deny telling McDonald that he would get back to McDonald in 2 or 3 weeks. In its position statement (GC Exh. 74), Shaw, Inc. took the position that "[w]ith regard to . . . McDonald, Shaw had no knowledge of his union affiliation." On brief, Respondents state, "[w]hile he did not complete the application, he did attach to his application a complete and professionally prepared resume. This resume indicated his experience with the operating engineers." Also, Respondents do not deny that each time that McDonald telephoned and went to Shaw, Inc. to inquire about the status of his application he was told come back or call in 2 or 3 weeks. McDonald's testimony is credited. He lived within the area prescribed by Lucas, there could be no reasonable concerns with the way he filled out his application, and so according to Lucas here he went beyond the application and location and applied a subjective test to this applicant. Other operators were hired after McDonald submitted his application.[58] One, Keith Sharbeneau, submitted an application after McDonald and the employment history portion of the application (GC Exh. 65(1)), reveals little about this applicant vis-à-vis McDonald's rather thorough resume. But on brief, Respondents argue that Sharbeneau, who lives about 15 miles further form Atlanta than McDonald, was not hired on that basis alone. Rather, according to Respondents on brief notations on his application demonstrates that he was given a subjective test on the excavator and bulldozer and he was the one who scored the "4" and the "5," respectively. Lucas testified that the numbers were his grade scale and "yes" it appeared that Sharbeneau applied in March and he gave him a test as well. Strangely when he testified later that same day, just 28 pages later in the transcript,[59] he answered, "I can't remember," when the General Counsel asked, "[d]o you remember if you tested anybody other than . . . McDonald." It appears that Shaw took another approach in that according to General Counsel's Exhibit 67, which is a list of those hired by Respondents which list was provided to the General Counsel by Respondents, Waicek is listed as a laborer. Yet he testified that he was promised that he would be an operator, Indeed after working for 2 days as a laborer he was given a dozer to operate. He left on July 10 when he was informed that he would have to go back to doing laborer's work. Boone, who lives about 50 miles from Atlanta, was not hired because, according to the testimony of Lucas, Boone wrote negotiable on the rate of pay requested line and Boone worked at one job for 8 months and he worked at another job for 5 months. Boone's application indicates that he left both of these jobs because there was a lack of work. And the lack of work occurred in December on one of the jobs and in November on the other job listed.[60] Surely a reasonable person in this line of work would understand that outside work slows down in the winter. Surely a reasonable person would not hold against an applicant that over which the applicant has no control. There was no reason other than Boone's union affiliation for not considering him for hire.

Respondents stress the importance of the location of the applicant's residence in terms of its proximity to Atlanta. It is noted that of the 40 applicants the application of the one who lives in Atlanta, Wheeler, is missing, the application of another who lives 30 miles from Atlanta, Freel, is missing, the application of another who lives in the same location as Lucas, Hage—who lives in Gaylord, is missing, and Lucas testified that he had no specific recall of his decision not to hire Chapman, who

[56] As noted above, except for a period beginning in mid-summer of 1995 when Robb decided which laborers to hire, Lucas made all of the diecisions with respect to who was hired. Robb did not testify at the hearing herein.

[57] McDonald testified that he was sure after looking at his affidavit to the Board, which was given 5 months after the conversation, that Lucas said a good job and not a fairly good job as McDonald had earlier testified.

[58] On brief, Respondenets cite one other instance where an operator, according tonotations on his application, GC Exh. 65(i), was given a test on the excavator and the dozer. The notation on the application reads "EXC-4, DOZER-5." As noted above, Lucas gave McDonald the lowest possible score on both the excavator and the dozer.

[59] Tr. 2374 and 2402.

[60] As pointed out by Respondents, there is an overlap in the dates for the two jobs listed.

lives about 25 miles from Atlanta.[61] As noted above, Wheeler testified that he indicated on the application that he was a member of the Laborers and that he was seeking scale wages, Freel testified that he indicated on his application that he was seeking "Union scale," Hage testified that he wrote voluntary union organizer on his application, and Chapman, who believed that he was wearing a jacket with a union logo on it when he submitted his application, also wrote "union scale" on the line asking for the rate of pay expected.[62] Shaw, Inc., not only did not consider for hire these 39 applicants[63] it appears that it took those measures which it believed were necessary to obviate the need to even consider those applicants who resided close to it. It is too much of a coincidence to have all of these applications, the applications of those who live close to it disappear. The record contains testimony of not only the applicants but, in the case of Hage, the testimony of someone who saw Hage submit the application to Shaw, Inc. In these circumstances the witnesses who testified that they submitted the applications which Respondents now claim that they do not have are credited.[64]

While it appears that Respondents do not hire welders, Lucas did testify that he considers operator applicants for laborer's positions. No explanation was given why he did not accord the same treatment to the involved pipefitter and welder applicants.

Certain of the language in the application form is ambiguous if not misleading. In these circumstances, the fact that certain of the applicants did not fill out portions of the application is understandable. In my opinion Respondents violated the Act as alleged in the involved complaint in refusing to hire or consider for hire Danny McDonald, Michael Adrianse, John Birgy, Jeff Bergkamp, John Hoos, Wayne Weeks, Rick Stemkowski, Steve Stemkowski, Robert Jackowiak, William Deemer, Michael Hage, Richard Konieczny, Brian Golden, Ross Hart, William Nolan, Charles Bartholomew, Michael Bartholomew, David Beebe, William Boone, David DeVos, James Hooker, Robert Peters, Chad Chapman, Lee Wheeler, and Ronald Freel. These applicants are bona fide applicants. Respondents have not shown that they had a business justification for refusing to hire or consider for hire these 25 job applicants. Respondents have failed to meet their *Wright Line* burden of demonstrating that they would have taken the same action in the absence of the union affiliation of these 25 applicants.

The Barrett group of applications (GC Exhs. 36 through 48), concern me for a number of reasons. First, in my opinion one of the applications was filled out by someone other than the individual who purportedly filled out the application. This places in issue the credibility of Barrett who testified that the individuals filled out the applications in his presence. Second, Barrett was told when he submitted the applications that they were not complete and he did nothing,[65] Third, the copy of the application form used was missing a portion of the normal application form used by Respondents. And fourth, most of the applicants in this group did not sign the certification at the bottom of the application. In these circumstances I do not believe that Respondents violated the Act in refusing to hire or consider for hire the Barrett group of applicants for, in my opinion, Respondents had a business justification for refusing to consider these applications.

Paragraph 18 of the complaint alleges that on or about June 20 Ron Shaw threatened that if their employees became represented by the Charging Parties, Respondents would lose work, Respondents would reduce their work force and employees of Respondents would work less hours, and he promised to look into the possibility of providing a better insurance plan and the alternative of a choice between a picnic, a bonus, or a jacket in order to dissuade the employees from supporting the Charging Parties. On brief, the General Counsel contends that all of Respondents' witnesses except Ron Shaw agreed that the June 20 meeting was about the Unions; that even Ron Shaw finally admitted the union was discussed at the meeting as were the adverse effects of a union on Shaw, Inc.'s business; and that Respondents violated the Act when Ron Shaw threatened that Respondents would lose work and Terra would not pay union scale, he made an implicit promise to provide better insurance, he threatened to cut the work force, he implicitly threatened that Shaw, Inc. would not get Terra work if the employees were union, he threatened futility by indication he would not pay union scale, and he promised employees a jacket, a picnic, or a bonus at the meeting. Respondents, on brief, argue that health insurance was the reason the meeting was called; and that no one but Frank recalled Ron Shaw saying that Terra had been sold and Shaw, Inc. would be getting all their work or saying anything about arbitrating with the union or about Shaw, Inc. refusing to pay union scale.

In my opinion, Respondents violated the Act as alleged in paragraph 18 of the complaint as amended. Respondents argue that no activity took place prior to June 20 that would lead Ron Shaw to address employees about possible unionization other that the submission of applications. As noted above, some of the applications had voluntary union organizer at the top. Picola wrote Ron Shaw requesting him to open the lines of communication with respect to Shaw, Inc. becoming a union contractor.

Additionally, Cobe had written Ron Shaw advising him that, among other things, if Shaw, Inc. failed or refused to fairly and

[61] After looking at chapman's application, GC Exh. 10, Lucas testified that Chapman had an unstable past work history in that of the three employers that Chapman listed, he worked for two for 1 month each and he worked for the third for 3 months. The application indicates that this laborer in all three instances was laid off.

[62] The case cited by Respondents on brief for the proposition that using "union scale" is not sufficient to infer knowledge of union affiliation, *B E & K Construction Co.,* 321 NLRB 561 (1996), is distinguishable for there the Board pointed out that it was agreeing with the administrative law judge in that proceeding because in that case wage rates were not a clear guide in that a union contractor was paying less than two union employers in the same area.

[63] Actually in my opinion there are 39 applications in that Gary Watson did not fill out an application.

[64] Since Gavin and Huey did not testify and since no one testified about them submitting applications, there is no evidence of record upon which to conclude that they did in fact submit applications.

[65] Some of the applications are not signed on the line which certifies that the application was completed buy the applicant and that all entries on it and information in it are true and complete to the best of the applicant's knowledge.

nondiscriminatorily consider the May 15 applicants for employment, he would bring this to the attention of the Board. And on June 16 Cobe wrote Shaw requesting him to continue to keep active the employment applications of named members of the Engineers. The only barometer of why Ron Shaw held the meeting on June 20 that we have available is what Ron Shaw said at this meeting and what he may have said at the foremens' meeting immediately preceding his meeting with the employees en masse. As set forth above, Frank testified that Ron Shaw introduced himself and spoke of the pros and cons of Shaw, Inc. becoming a union shop, employee Hoffman testified about Ron Shaw making statements about the ramifications of unionization, former Foreman Fix testified about Ron Shaw talking about the ramifications if a union came in, Foreman Geister testified that the meeting was a meeting concerning becoming a union company and Ron Shaw said that the reason that they were meeting was to talk about the Union, and Watson testified that Ron Shaw was talking about the union "wanting in." Ron Shaw had not held an en masse employee meeting since the preceding Christmas and he would not hold another en masse employee meeting until Christmas 1995. Ron Shaw did not hold the June 20 meeting to take 80 employees' time to tell them that there were some problems 2 months ago with the medical insurance, he did not know why they occurred but the employees should not be concerned. Respondents argue that nothing about unionization happened which would have motivated Ron Shaw to hold a meeting on June 20 to discuss unionization. More accurately, nothing about medical insurance had occurred at that time which would have motivated Ron Shaw to take worktime of 80 employees to discuss medical insurance. The problem with the two employees occurred months before and the nonexplanation of the insurer was given weeks (or possibly one week according to Ron Shaw) before. Perhaps the foremen, in testifying that the purpose of the meeting was to discuss the union, were relying not only on what they heard in the meeting with the 80 employees but also on what Ron Shaw said to them in the foremen's room before he addressed the employees that morning.

Paragraph 18(a) alleges that at the June 20 meeting with the employees Ron Shaw threatened that Respondents would lose work if their employees became represented by the Charging Parties. Respondents argue that this allegation is founded on the uncorroborated testimony of Frank, except for the corroboration regarding Ron Shaw saying that Terra would not give Shaw, Inc. "as much work" because the union fees would be too high. Fix testified that Ron Shaw said that Terra said if Respondents were unionized, Terra was not going to have Shaw, Inc. work for it. Fix also testified that Ron Shaw said that if Shaw, Inc. became unionized, there would not be as much year round work. Ron Shaw's testimony about the purpose of the meeting is not credited. His testimony about not saying anything about the Union affecting the amount of work is not credited. Ron Shaw was not even capable of conceding that he discussed Terra Energy at this meeting notwithstanding the fact that it is Shaw, Inc.'s major customer and at least two witnesses testified that he discussed Terra at this meeting. Ron Shaw threatened a loss of work. He also threatened a reduction in the work force [par. 18(b) of the complaint]. Ron Shaw's denial on this point is not credited. Frank's testimony is credited on this point. As noted above, Hoffman testified that Ron Shaw said that if they let the union in a lot of people would not have jobs, Geister testified that Shaw may have said we may have to downsize, and Watson testified that Ron Shaw said something about people would be cut on jobs because it would take work from us in that Shaw would not be able to underbid competitors, And finally, Hoffman's testimony that Ron Shaw said that the employees would work less hours [par. 18(c) of the complaint] if Respondents became unionized is credited. Ron Shaw was not a credible witness and if he had specifically denied saying this, his denial would not be credited. But it does not appear that he specifically denied this testimony.

Respondents argue that speculation as to the reaction of a third party to the Company's unionization is explicitly permitted, *NLRB v. Gissel Packing Co.,* 395 U.S.575 (1969); *Goodyear Tire & Rubber,* 312 NLRB 674, 700 (1993); *J.M.A. Holdings,* 310 NLRB 1349, 1354, 1359 (1993). As set forth above, Ron Shaw testified, as here pertinent, that someone at the meeting asked his opinion on whether or not the company would be union and he replied that most of their work is time and material work and most of the union jobs are bid jobs; that he did not specifically mention any primary customers; that he did mention that about 90 percent of their work was time and material versus bid work; that he did not say anything about how being union would affect the amount of work he would get; and that Terra Energy was not mentioned at this meeting. Ancel, an admitted supervisor of Respondents, testified that he remembered that Terra was not discussed at this meeting. So on the one hand, Respondents now argue that Ron Shaw did not mention a third party. On the other hand, since to this extent it suits their needs, Respondents, in effect, argue that if the statements were made, they referred to Terra which is the third party.[66] This is the argument notwithstanding the fact that Respondents do not concede on brief that a third party was even mentioned by Ron Shaw. Consequently, one must wonder if a party is precluded from asserting such a defense when it denies the basis of such a defense. In other words, how can one conclude that the prediction was "carefully phrased on the basis of objective fact to convey the employer's belief as to demonstrably probable consequences beyond his control," *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969), when the employer is incapable of admitting that the statement was made? Respondents violated the Act as alleged in paragraphs 18(a), (b), and (c) of the complaint.

Paragraph 18(d) of the complaint alleges that Ron Shaw promised to look into the possibility of providing a better insurance plan if their employees were not represented by the Charging Parties. Respondents argue, on brief, that Frank is the only witness to make the connection between the discussion of insurance and the union; that the employer is free to explain its benefits and suggest that the union could not do better, *Atlantic Forest Products,* 282 NLRB 855 (1987); and that when no

[66] At p. 96 of their brief, Respondents indicate "[a] violation of 8(a)(1) only occurs if the company has control over the 'threatened' act. Ron Shaw has no control over whether or not Terra continued to contract with Shaw."

cards had been signed and no petition for an election had been filed the employer is free to tell employees that it will look into making changes in benefits or to even increase or improve insurance benefits, *Troxel Co.,* 301 NLRB 270 (1991). Frank, Geister, and Watson testified about Ron Shaw telling the assembled employees that he would look into getting better insurance. Picola's May 1 letter to Ron Shaw was an attempt to have Shaw, Inc. take the first steps to become a union contractor, Additionally, a number of individuals had submitted applications to Shaw, Inc. indicating that they were voluntary union organizers. And as Respondents indicate at page 95 of their brief "[i]t is undisputed that the Operators' submission [a group of eight applications which were headed with voluntary union organizer], accompanied by all its pomp and circumstance [including the use of a videotape camera], made quite a splash." As noted above, as Foreman Geister testified, the purpose of the June 20 meeting was to talk about the Union and as Foreman Watson testified Ron Shaw was talking about the Union coming in. In these circumstances, it was a violation of the Act for Ron Shaw to indicate to the assembled employees that he would look into getting better insurance. *Troxel Co.,* supra, is not on point for there the effort to obtain improved insurance benefits was embarked upon long before the advent of the union and continued on an unbroken course of action which indicated that the implementation would have taken place at the scheduled time notwithstanding the Union. Respondents violated the Act as alleged in paragraph 18(d) of the complaint.

Paragraph 18(e) of the complaint alleges that on or about June 20 at Respondents' Atlanta facility, Respondents by their agent, Rom Shaw, promised employees the alternative of choice between a picnic, a bonus or a jacket in order to dissuade them from supporting a union.[67] Respondents, on brief, argue that the Company had offered jackets and picnics to the employees in the past and there is absolutely no testimony that the reference to the choice of bonus, jacket or picnic was related in any way to the Union. As noted above, Foreman Geister testified, the purpose of the June 20 meeting was to talk about the Union and as Foreman Watson testified Ron Shaw was talking about the Union coming in. In these circumstances, Ron Shaw violated the Act when for the first time he offered a bonus. Respondents violated the Act as alleged in paragraph 18(e) of the complaint.

Paragraph 19 of the complaint alleges that on or about June 20 Watson threatened that employees hired within the previous 6 months would lose their jobs if the employees became represented by the Charging Parties. As noted above, Frank testified that Watson said at the June 20 meeting that anyone hired in the last 6 months would probably lose their job and Watson denied making this statement. The following appears on page 2157 of the transcript herein:

> Q. [BY COUNSEL FOR GENERAL COUNSEL] Now you [Watson] said that you can recommend promotions. Have you done that?
>
> MS. LATARTE: Your Honor, I don't believe that he ever said that. I believe it's a mischaracterization of his testimony.
>
> THE WITNESS: I've never said I can recommend it.

The following, which covers testimony given earlier the same day, appears on page 2123 of the transcript:

> Q. Do you [Watson] have any authority to promote employees?
>
> A. No. I can make a recommendation, is all.

Frank's testimony on this point is credited.[68] As concluded above, in my opinion the involved foremen are supervisors.[69] Respondents violated the Act as alleged in paragraph 19 of the complaint.

Paragraph 20 of the complaint alleges that on June 20 at Respondents' facility Klis threatened that Respondents' employees would not receive pay for travel time to a job site or be provided transportation to jobsites if the employees became represented by the Charging Parties, and he coercively interrogated employees regarding their support for the Unions. As noted above, Frank testified that Klis said that on union jobs the employees have to provide their own transportation to the job site and they do not get paid for driving time. At the time Respondents were providing company transportation to and from the jobsite and the employees were paid for the driving time. Foreman Haren did not deny Hoffman's testimony that he, Haren, said the Union "ain't worth a darn" and if the union got in, the employees would have to drive their personal vehicles to and from the johsite. Hoffman's testimony is credited on this point. There is no evidence of record that anyone, other than Steuer himself, heard the sanitized version of this threat that Steuer allegedly uttered. Frank's testimony is credited. Klis' denial must be weighed in the light of the fact that at least one other foreman was making basically the same threat. Perhaps the points to be made were formulated in the foremens' room before the meeting with the assembled employees. This is something totally within the control of the Respondents and to threaten to take it away if the Respondents become unionized is a violation of the Act. On the one hand, we have Frank testifying that Klis asked him what he thought of unions and Klis saying that he had some experience with a union and it was bad. On the other hand, we have Klis testifying that he does not recall asking Frank what he thought of the Union, he might have talked to Frank about the Union but he did not remember and "[i]f we asked him maybe just sitting there at lunchtime talking about the Union or something, but as far as asking him,

[67] The General Counsel's motion to amend the complaint in this regard was granted because what Ron Shaw said during this meeting with employees was already a subject of the complaint and in view of the fact that there was a continuance Respondents had sufficient time to prepare for this matter.

[68] The fact that Hoffman did not hear Watson making this statement could be due to the fact that Hoffman was not in a position in the room where he could hear what Watson said.

[69] As the General Counsel points out on brief, absent a finding that the foremen are supervisors, their statements remain violation of the Act because they were all made in the presence of Ron Shaw and other admitted supervisors, who never attempted to refute or disavow the illegal conduct, *A.M.F.M. of Summers County,* 315 NLRB 727 (1994).

no I wouldn't." "Wouldn't" and shouldn't do not add up to "did not." Klis equivocated, his testimony is not credited. Frank's testimony on this point is credited. At page 103 of their brief Respondents argue that such questions are of a general nature and implied absolutely no threat and "Frank, an undercover union organizer, obviously was not bothered by the question." The cases cited by Respondents are not on point in that it was not shown that Frank initiated this conversation, Frank was not an open and active union supporter, and this interrogation occurred after a meeting at which Respondents demonstrated their antiunion animus. The test is not a subjective one. Rather the question is whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with the rights guaranteed by the Act. *Blue Flash Express,* 109 NLRB 591 (1954). I conclude that it did. Respondents violated the Act with this interrogation. Klis, in my opinion, is a supervisor.[70] Respondents violated the Act as alleged in paragraph 20 of the complaint.

Paragraph 21 of the complaint alleges that on or about June 20 Fix coercively interrogated employees regarding their union sympathies. On the one hand, we have Frank testifying that after the meeting while at Shaw's facility Fix asked him and employee Mike Maynard what they thought of Unions. On the other hand, we have Fix testifying that he did not recall asking anyone on his crew what they thought of the Union. Frank's testimony is credited. Fix does not specifically deny that he engaged in the conduct at issue. The best that Fix could come up with was that he did not recall such conduct. Counsel on both sides of this issue chose to ask the question in terms of recall. Notwithstanding the fact that one of the counsel for Respondents tried to equate something not happening with the witnesses best recollection that it did not occur such is not the case. To fully remove the possibility, the witness could have been asked, "[D]id you engage in this conduct." If the witness answers, "no," then we have an unequivocal denial. If the witness answers in terms of recall, then we still have him conceding that it is possible that such conduct occurred but he does not recall it when he is testifying. Fix, a supervisor, engaged in the unlawful interrogation.[71] For the reasons given in the next preceding paragraph such conduct violates the Act. Respondents violated the Act as alleged in paragraph 21 of the complaint.

Paragraph 22 of the complaint alleges that on or about June 27 Ancel threatened (1) employees that Respondent Shaw would close its doors if a union came in, and (2) offered a monetary reward for employees to engage in surveillance of other employee's union activities and/or to report union adherents to the Respondents. As noted above, the General Counsel has moved to amend the complaint to include an allegation that Ancel threatened Beaty and Allman, if they are not supervisors, with the loss of work it the Unions came in, The motion, which was made on the last day of the hearing herein, is based on the prior day's testimony by Ancel on direct that Beaty and Allman asked him what he thought of the union's presence, which testimony was followed up by the General Counsel on cross-examination, eliciting the above-described alleged Ancel response. Since I have concluded that the involved foremen are supervisors, the General Counsel's motion is denied. The remaining allegations in this paragraph are based on the testimony of Frank. Such testimony is credited. Ancel testified that he did not remember having a conversation with anyone at the involved johsite in June 27 and he did not remember an employee named Waicek. Ancel also denied saying on June 28 that Shaw would close its doors or anything about suspecting a union informer and offering $200 for union informers. The allegations in the complaint regarding these matters speak to June 27 and not June 28. Ancel's testimony about June 27, and his denial about closing and a reward is not credited. His attempt to bolster Ron Shaw's denial regarding mentioning Terra during the June 20 meeting hurt his credibility.[72] And his "do not remember" testimony regarding (1) his June 27 conversation and (2) Waicek is not credible. Waicek remembers having a conversation with Ancel on June 27, the first day Waicek worked for Respondents. As pointed out by the General Counsel on brief, the testimony of Waicek, who was called by Respondents, does support the specifics of Frank's testimony that he approached them while they were talking, that Ancel stated that Shaw needed operators and Ancel asked Waicek if he knew of any operators. But notwithstanding Waicek's testimony, this occurred on June 28. Waicek did testify that during his June 28 conversation with Ancel he did not say that Shaw would close its doors and Ancel did not offer a reward to anybody who would turn in a union informer. This occurred on June 27. Denying that it occurred on June 28 serves no valid purpose. If Waicek's testimony were to be interpreted to mean that Ancel as alleged in the complaint did not make these statements on June 27, then his testimony is not credited. Waicek asked Ancel about the union. Ancel may not have known about Waicek's connection to Robb and Ancel may have overreacted to the question. After he had an opportunity to check with Robb or Lucas he had a candid conversation with Waicek the next day regarding operators. Or possibly Ancel knew Waicek's connection to Robb on the first day and therefore he was willing to be candid with him. Frank's testimony regarding what occurred on June 27 is credited. Respondents violated the Act as alleged in paragraph 22 of the complaint.

Paragraph 23 of the complaint alleges that on or about June 28 Ancel informed employees that union members would not be employed by Respondents because of their association with the Charging Party Operating Engineers. Frank testified that he overheard Ancel ask Waicek if he knew of anybody who was looking for work as an operator, Waicek say no and ask Ancel why, and Ancel say that Shaw needed operators because the only applications that they had on hand were those of union members. Ancel denied this conversation. While Waicek testified that Ancel did tell him that he needed operators, as noted above, he described this conversation as occurring on June 27 and he testified that Ancel did not say anything about the union

[70] Id.
[71] Id.

[72] It does not appear that his situation on June 20 was the same as Hoffman's in that Ron Shaw was addressing all of the employees and the foremen, when they apparently spoke to certain employees, may not have been heard by all of the employees.

in either the June 27 or 28 conversation. As Chief Judge Hand pointed out in *NLRB v. Universasl Camera Corp.,* 179 F.2d 749, 754 (2d Cir. 1950):

> It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all.

Waicek's testimony, to the extent that he testified that he had a conversation with Ancel about Shaw needing operators, is credited. Such a conversation occurred. Waicek did not appreciate the significance of his concession to the General Counsel on this point. Waicek's testimony about nothing being said about the union in the conversation is not credited. Waicek appreciated the significance of such a concession. Frank's testimony regarding this allegation of the complaint is credited. Ancel was not a credible witness and to the extent that the testimony of Waicek could be relied on it supported Frank. Although Frank did not initially take this threat seriously the test is not a subjective one but rather an objective one. Respondents violated the Act as alleged in paragraph 23 of the complaint.

Paragraph 24 of the complaint alleges that on or about July 10 Ancel, Watson, and Steuer threatened union adherents with unspecified adverse action and violence. As noted above, Watson testified that he did not recall saying if the union individuals came back he would run them over but it is possible that he said this (anything is possible). Ancel testified that he did not *believe* that Watson said he would run over union supporters. And Steuer testified that he did not *remember* Watson saying anything about trying to run over union members. Frank testified that Watson said he would run the "mother fuckers" over. So on the one hand, we have unequivocal testimony and on the other hand, we have Watson testifying that it is possible that he said it and the best his two fellow supervisors can assert is that they do not believe or remember that which Watson testifies it is possible he said. Frank's testimony is credited. The conversation occurred exactly as described by Frank. To the extent that the three supervisors denied engaging in conduct which violates the Act, their testimony is not credited. Respondents violated the Act as alleged in paragraph 24 of the complaint.

Paragraph 17 of the complaint alleges that on or about July 12, Steuer and Watson assigned employee Drumb to another work crew because of his support for the Charging Parties. Foreman Geister testified that he observed Drumb take abuse from a foreman about his, Drumb's support for the union; and that when Drumb took the handbill from the union handbillers on the way to work he, Geister, overheard Watson say, "well there's a union guy." Watson testified that he did not recall if he saw Drumb take a union handbill. Also he testified he did not *remember* he did not *recall* and it *was not possible* the he asked Steuer to have Drumb transferred off his crew but Steuer or Robb would be the person to speak to about this. Frank testified that after Drumb took the union handbill he talked about union wages. Frank did not work on July 12. It appears that he is mistaken about his dates. As pointed out by Respondents' records, Drumb worked on Watson's crew on July 13 and he worked on Geister's crew on July 14. Respondents' records show that Frank did work on July 14 and, therefore, he would have been there on the morning of July 14 to overhear what Watson said about getting Drumb transferred off his, Watson's, crew. The complaint reads on or about July 12. Respondents violated the Act as alleged in paragraph 17 of the complaint.

Paragraph 25 of the complaint alleges that on or about July 12 Steuer and Watson informed employees that another employee was being reassigned to another work crew because of that employee's support for the Charging Parties. While Watson and Steuer testified that they never told any employees that someone was being assigned to another crew because they supported the union, an employee or employees overhearing Watson asking Steuer to have Drumb reassigned on the morning of July 14 because he felt Drumb was a union man accomplishes the same thing. Respondents violated the Act as alleged in paragraph 25 of the complaint.

Paragraph 26 of the complaint alleges that on or about July 24 Geister created the impression of surveillance of employees' union activities. As noted above, Frank testified that Geister said that Ron Shaw was in town and he was looking for the union man. Geister testified that he did not tell employees about Ron Shaw looking for a union man and that he never specifically said that Ron Shaw was in town and he was looking for a union man. I have relied on certain of the testimony of Geister above and to some this may mean that, therefore, this Geister testimony must be credited or my reliance on other of his testimony will be undermined. As pointed out above, in *NLRB v. Universasl Camera Corp.,* 179 F.2d 749, 754 (2d Cir. 1950), Chief Judge Hand wrote:

> It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all.

Within weeks of this statement (August 22) Frank found his tires slashed while he vehicle was parked at Shaw's facility. Frank testified that when he told Robb, Robb (a) asked him if he had any enemies that he knew of; (b) said that it looks like he did and maybe he should go home and take the rest of the day off and think about what he was doing; and (c) was chuckling or laughing at him. Robb did not testify and, therefore, Frank's testimony regarding this conversation is not challenged. If one concludes that this means that by August 22 Respondents determined that Frank was the union informer, then the question is when did Respondents initially make this determination. Did Respondents make this determination before the above-described July 10 truck ride? Did Respondents make this determination before Ancel's June 27 and 28 statements? Were Respondents supervisors, without considering the legal ramifications, attempting to rattle Frank? It is not necessary to resolve these matters. I find Frank to be a credible witness. Geister was not willing to concede wrongdoing on his part. Geister's denial is not credited. As concluded above, in my opinion Geister is a supervisor. Respondents violated the Act as alleged in paragraph 26 of the complaint.

CONCLUSIONS OF LAW

1. The Respondents are employers engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondents violated Section 8(a)(1) of the Act by:

(a) Threatening that Respondents would lose work if their employees became represented by the Charging Parties.

(b) Threatening that Respondents would reduce their work force if their employees became represented by the Charging Parties.

(c) Threatening that Respondents would work less hours if their employees became represented by the Charging Parties.

(d) Promising to look into the possibility of providing a better insurance plan if their employees were not represented by the Charging Parties.

(e) Promising employees the alternative of choice between a picnic, a bonus, or a jacket in order to dissuade them from supporting a union.

(f) Threatening that employees hired within the previous 6 months would lose their jobs if the employees became represented by the Charging Parties.

(g) Threatening that Respondents' employees would not receive pay for travel time to a jobsite or be provided transportation to jobsites if the employees became represented by the Charging Parties.

(h) Coercively interrogating employees regarding their support for the Unions.

(i) Coercively interrogating employees regarding their union sympathies.

(j) Threatening employees that Respondent Shaw would close its doors if a union came in.

(k) Offering a monetary reward for employees to engage in surveillance of other employee's union activities and/or to report union adherents to the Respondents.

(l) Informing employees that union members would not be employed by Respondents because of their association with the Charging Party Operating Engineers.

(m) Threatening union adherents with unspecified adverse action and violence.

(n) Informing employees that another employee was being reassigned to another work crew because of that employee's support for the Charging Parties.

(o) Creating the impression of surveillance of employees' union activities.

(p) Maintaining an overly broad rule that prohibits the distribution of literature on company property at any time.

4. The Respondents violated Section 8(a)(3) and (1) of the Act by:

(a) Failing and refusing to hire or consider for hire certain qualified job applicants seeking employment with Respondents because of their membership in or affiliation with the Charging Parties, namely Danny McDonald, Michael Adrianse, John Birgy, Jeff Bergkamp, John Hoos, Wayne Weeks, Rick Stemkowski, Steve Stemkowski, Robert Jackowiak, William Deemer, Michael Hage, Richard Konieczny, Brian Golden, Ross Hart, William Nolan, Charles Bartholomew, Michael Bartholomew, David Beebe, William Boone, David DeVos, James Hooker, Robert Peters, Chad Chapman, Lee Wheeler, and Ronald Freel.

(b) Assigning employee Drumb to another work crew because of his support for the Charging Parties.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Except as found herein, Respondents otherwise have not been shown to have engaged in conduct violative of the Act as alleged in the complaint.

REMEDY

Having found that Respondents engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and that they take certain affirmative action set forth below to effectuate the policies of the Act.

It having been found that the Respondents unlawfully failed and refused to hire or consider for hire certain qualified job applicants seeking employment with Respondents because of their membership in or affiliation with the Charging Parties, namely Danny McDonald, Michael Adrianse, John Birgy, Jeff Bergkamp, John Hoos, Wayne Weeks, Rick Stemkowski, Steve Stemkowski, Robert Jackowiak, William Deemer, Michael Hage, Richard Konieczny, Brian Golden, Ross Hart, William Nolan, Charles Bartholomew, Michael Bartholomew, David Beebe, William Boone, David DeVos, James Hooker, Robert Peters, Chad Chapman, Lee Wheeler, and Ronald Freel, it is recommended that Respondents offer them employment and make them whole for any loss of earnings they may have suffered by reason of the Respondents' discriminatory refusal to consider them for hire

Other considerations regarding the remedy and the specifics of the relief granted must wait until the compliance stage of the proceeding as indicated in *Dean General Contractors*, 285 NLRB 573 (1987). See also *Ultrasystems Western Constructors,* 316 NLRB 1243 (1995).

Upon the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended[73]

ORDER

The Respondents, Shaw, Inc., Rapid River Enterprises, Inc., S & R Cable, Inc., Kimron Resources, Inc., a Single Employer and/or Joint Employers, Atlanta, Michigan, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening that Respondents would lose work if their employees became represented by the Charging Parties.

(b) Threatening that Respondents would reduce their work force if their employees became represented by the Charging Parties.

(c) Threatening that Respondents would work less hours if their employees became represented by the Charging Parties.

[73] 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.

(d) Promising to look into the possibility of providing a better insurance plan if their employees were not represented by the Charging Parties.

(e) Promising employees the alternative of choice between a picnic, a bonus, or a jacket in order to dissuade them from supporting a union.

(f) Threatening that employees hired within the previous 6 months would lose their jobs if the employees became represented by the Charging Parties.

(g) Threatening that Respondents' employees would not receive pay for travel time to a jobsite or be provided transportation to jobsites if the employees became represented by the Charging Parties.

(h) Coercively interrogating employees regarding their support for the Unions.

(i) Coercively interrogating employees regarding their union sympathies.

(j) Threatening employees that Respondent Shaw would close its doors if a union came in.

(k) Offering a monetary reward for employees to engage in surveillance of other employee's union activities and/or to report union adherents to the Respondents.

(l) Informing employees that union members would not be employed by Respondents because of their association with the Charging Party Operating Engineers.

(m) Threatening union adherents with unspecified adverse action and violence.

(n) Informing employees that another employee was being reassigned to another work crew because of that employee's support for the Charging Parties.

(o) Creating the impression of surveillance of employees' union activities.

(p) Maintaining an overly broad rule that prohibits the distribution of literature on company property at any time.

(q) Failing and refusing to hire or consider for hire certain qualified job applicants seeking employment with Respondents because of their membership in or affiliation with the Charging Parties, namely Danny McDonald, Michael Adrianse, John Birgy, Jeff Bergkamp, John Hoos, Wayne Weeks, Rick Stemkowski, Steve Stemkowski, Robert Jackowiak, William Deemer, Michael Hage, Richard Konieczny, Brian Golden, Ross Hart, William Nolan, Charles Bartholomew, Michael Bartholomew, David Beebe, William Boone, David DeVos, James Hooker, Robert Peters, Chad Chapman, Lee Wheeler, and Ronald Freel.

(r) Assigning an employee to another work crew because of his support for the Charging Parties.

(s) 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) Rescind Respondents overly broad rule that prohibits the distribution of literature on company property at any time.

(b) Make whole Danny McDonald, Michael Adrianse, John Birgy, Jeff Bergkamp, John Hoos, Wayne Weeks, Rick Stemkowski, Steve Stemkowski, Robert Jackowiak, William Deemer, Michael Hage, Richard Konieczny, Brian Golden, Ross Hart, William Nolan, Charles Bartholomew, Michael Bartholomew, David Beebe, William Boone, David DeVos, James Hooker, Robert Peters, Chad Chapman, Lee Wheeler, and Ronald Freel for any losses they may have suffered by reason of the Respondents' discriminatory failure and refusal to hire or consider for them hire because of their membership in or affiliation with the Charging Parties. Offer those employee applicants who would currently be employed but for the Respondents' unlawful refusal to hire or consider them for hire, employment positions for which they applied or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would been entitled if they had not been discriminated against by the Respondents.

(c) 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.

(d) Within 14 days after service by the Region, post at its Atlanta, Michigan facility the attached notice marked "Appendix."[74] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondents' authorized representative, shall be posted by the Respondents 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 Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(e) 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 the Respondents have 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 threaten that we would lose work, reduce our work force, or work less hours if you became represented by United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO; Local 1098, Laborers International Union of North America, AFL–CIO; and Local 324, International Union of Operating Engineers, AFL–CIO.

WE WILL NOT promise to look into the possibility of providing a better insurance plan if you were not represented by

[74] 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."

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO; Local 1098, Laborers International Union of North America, AFL–CIO; and Local 324, International Union of Operating Engineers, AFL–CIO.

WE WILL NOT promise you the alternative of choice between a picnic, a bonus, or a jacket in order to dissuade you from supporting a union.

We Will Not threaten that employees hired within the previous 6 months would lose their jobs if you became represented by United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO; Local 1098, Laborers International Union of North America, AFL–CIO; and Local 324, International Union of Operating Engineers, AFL–CIO.

WE WILL NOT threaten that you would not receive pay for travel time to a jobsite or be provided transportation to jobsites if you became represented by United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO; Local 1098, Laborers International Union of North America, AFL–CIO; and Local 324, International Union of Operating Engineers, AFL–CIO.

WE WILL NOT coercively interrogate you regarding your support for the Unions.

WE WILL NOT coercively interrogate you regarding your union sympathies.

WE WILL NOT threatening you that Shaw, Inc. would close its doors if a union came in.

WE WILL NOT offer a monetary reward for you to engage in surveillance of other employee's union activities and/or to report union adherents to us.

WE WILL NOT inform you that union members would not be employed by Respondents because of their association with the Charging Party Operating Engineers.

WE WILL NOT threaten union adherents with unspecified adverse action and violence.

WE WILL NOT inform you that another employee was being reassigned to another work crew because of that employee's support for the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO; Local 1098, Laborers International Union of North America, AFL–CIO; and Local 324, International Union of Operating Engineers, AFL–CIO.

WE WILL NOT create the impression of surveillance of your union activities.

WE WILL NOT fail and refuse to hire or consider for hire certain qualified job applicants seeking employment with us because of their membership in or affiliation with United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO; Local 1098, Laborers International Union of North America, AFL–CIO; and Local 324, International Union of Operating Engineers, AFL–CIO.

WE WILL NOT assign an employee to another work crew because of his support for United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO; Local 1098, Laborers International Union of North America, AFL–CIO; and Local 324, International Union of Operating Engineers, AFL–CIO.

WE WILL NOT maintain an overly broad rule that prohibits the distribution of literature by you on company property at any time.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our overly broad rule that prohibits the distribution of literature by you on company property at any time.

WE WILL make whole Danny McDonald, Michael Adrianse, John Birgy, Jeff Bergkamp, John Hoos, Wayne Weeks, Rick Stemkowski, Steve Stemkowski, Robert Jackowiak, William Deemer, Michael Hage, Richard Konieczny, Brian Golden, Ross Hart, William Nolan, Charles Bartholomew, Michael Bartholomew, David Beebe, William Boone, David DeVos, James Hooker, Robert Peters, Chad Chapman, Lee Wheeler, and Ronald Freel for any losses they may have suffered by reason of our discriminatory failure and refusal to hire or consider for them hire because of their membership in or affiliation with United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO; Local 1098, Laborers International Union of North America, AFL–CIO; and Local 324, International Union of Operating Engineers, AFL–CIO. Offer those employee applicants who would currently be employed but for our unlawful refusal to hire or consider them for hire, employment positions for which they applied or, if those jobs no longer exist, to 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 us.

SHAW, INC., RAPID RIVER ENTERPRISES, INC., S & R CABLE, INC., KIMRON RESOURCES, INC.

Joseph P. Canfield, Esq., for the General Counsel.

Peter J. Kok, Esq., Lisa Latart, Esq., Elizabeth Welsh Lykins, Esq., and *Barry R. Smith, Esq. (Miller, Johnson, Snell & Cummiskey, P.L.C.),* of Grand Rapids, Michigan, for the Respondents.

John Cobe, of Kalamazoo, Michigan, for Local 324, International Union of Operating Engineers, AFL–CIO.

Tom Boensch, of Saginaw, Michigan, and *Stephen L. Borrello, Esq. (Jensen, Gilbert, Smith & Borrello, P.C.),* of Saginaw, Michigan, for the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada AFL–CIO.

Eugene Barrett, of Saginaw, Michigan, and *Stephen L. Borrello, Esq. (Jensen, Gilbert, Smith & Borrello, P.C.),* of Saginaw, Michigan, for Local 1098, Laborers International Union of North America, AFL–CIO.

SUPPLEMENTAL DECISION

JOHN H. WEST, Administrative Law Judge. On September 18, 1997, I issued a decision in this proceeding concluding, as here pertinent, that the Respondents violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by failing and refusing to hire or consider for hire 25 named qualified job

applicants who sought employment with the Respondents because of the applicants' membership in or affiliation with the Charging Parties.[1]

On June 7, 2000, the National Labor Relations Board (the Board) issued an Order Remanding Proceeding to me indicating as follows:

> On May 11, 2000, the Board issued its decision in *FES*, 331 NLRB No. 20 [9], setting forth the framework for analysis of refusal-to-hire and refusal-to-consider violations. The Board has decided to remand this case to the judge for further consideration in light of *FES*, including, if necessary, reopening the record to obtain evidence required to decide the case under the *FES* framework.

On June 16, 2000, I issued an order directing the parties to submit a position statement regarding this matter. In his position statement counsel for the General Counsel contended that the evidence submitted during the trial in this proceeding satisfies the tests for finding a violation announced by the Board in *FES,* supra, and counsel for the General Counsel urged that an order issue instructing the parties to submit a supplemental brief on the question of whether the evidence presented at the trial satisfies the requirement of *FES,* supra. The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada AFL–CIO, and Local 1098, Laborers International Union of North America, AFL–CIO contended that the evidence already submitted is sufficient to find that the Respondents "violated all of the tests set forth in *FES*, supra."[2] And the Respondents, as here pertinent, argued that reopening the record is unnecessary since the extensive record in this matter already contains the information needed to render a decision under the *FES* criteria.

On August 17, 2000, I issued an order requiring the parties to submit a supplemental brief on the issues raised by *FES*, supra, as they relate to the proceeding at hand. In his supplemental brief counsel for the General Counsel points out that the Respondents placed advertisements for employees in local newspapers seeking "[e]xcavator & dozer operators, roustabout & pipeline foreman, truck drivers & general laborers . . . ." specifying only that applicants must have a "clean driving record, and be able to pass a drug test"; and that the Respondents hired 92 employees from May 1, 1995, through May 2, 1996. The General Counsel contends that this period is "a time period that reasonably encompasses that time period the discriminatees should have been considered for employment;"[3] that examples of the Respondents' hiring patterns are (1) Jarred Frank, who had no experience in the pipeline field, was hired as a laborer and also operated equipment; (2) Tim Hoffman who was hired as a laborer even though he was previously incarcerated, he was on probation, and had never before performed the type of work he did for the Respondents;[4] and (3) Anthony Wiacek, who was hired as an operator but worked as a laborer; that on his first day of work, June 28, 1995, Wiacek was told by Shaw's foreman, Bill Ansel, that he needed operators; that after Shaw, Inc. in March 1995 did not hire Danny McDonald, an operating engineer with 6 years of pipeline experience, because of his support for the Union, Shaw, Inc. hired 12 operators as operators and another 5 operators as laborers; that while Mike Adrianse, who applied at Shaw on May 8, 1995, worked as a laborer in the pipeline field for 19 years and could operate some of the pipeline machinery, he was not hired because of his support for the Union[5]; that the involved eight Operating Engineer Local 324 members who applied for employment at Shaw on May 15, 1995,[6] had years of experience as operating engineers, most had extensive experience working on pipelines and could operate the equipment used by Shaw, Inc., some had experience on directional drilling crews, and a number of the applicants testified that they would have performed any work that Shaw, Inc. had, including laborers'work; that none of the Operating Engineer Local 324 members who applied for work with the Respondents was hired because of their support for the Union; that the involved eight Pipefitter Local 636 members who went to apply for work at Shaw on April 25, 1995,[7] and the involved Pipefitting members who applied for work at Shaw in the last two weeks of May 1995[8] had many years of pipefitting experience and many worked on pipelines doing the same type of work as Shaw required but they were not hired because of their support for the Union; that 67 employees were hired after the last union affiliated applicant submitted his application on May 23, 1995; that most of the people hired were hired as laborers regardless of the position for which they had applied; that the Laborers Local 1098 members who applied[9] had done pipeline work before and they are not restricted in any manner in the type of work they can perform on nonunion jobs; that the Re-

[1] The remedy section of the decision contains the following:

> Other considerations regarding the Remedy and the specifics of the relief granted must wait until the compliance stage of the proceeding as indicated in *Dean General Contractors,* 285 NLRB 573 (1987). See also *Ultrasystems Western Constructors,* 316 NLRB 1243 (1995).

The compliance stage can be used to resolve the issues outlined in *Dean General Contractors,* supra, concerning the likelihood that the discriminatees would have been transferred to other worksites upon the completion of the projects in progress when the discrimination occurred.

[2] These Charging Parties contended that the General Counsel (a) established that the involved applicants met the proper experience or training relevant to the announced requirements for the positions, and (b) proved that (1) the Respondents were hiring at the time that the discriminatees made applications, and (2) antiunion animus was a factor for the discriminatees not being hired.

[3] GC Br. 6.

[4] While there is evidence of record that the Respondents were on notice regarding Hoffman's criminal background, it is noted that he answered "no" on his application to the question of whether he had been convicted of a felony. See R. Exh. 5 and GC Exh. 65QQ which both are identical copies of the same application.

[5] While at Tr. 110 Adrianse testified that he was told by John Picola about Shaw, Inc's ad in the newspaper and he found it and followed up on it, on cross-examination Adrianse testified at Tr. 125 that Picola sent him the ad sheet for his review and he, Adrianse, did not come upon the ad in the Alpena paper.

[6] William Nolan, Dave DeVos, Dave Beebe, Bob Peters, James Hooker, Mike Bartholomew, Charlie Bartholomew, and Bill Boone.

[7] Rick and Steve Stemkowski, Wayne Weeks, Billy Deemer, Robert Jackowiak, John Hoos, Jeff Bergkamp, and John Birgy.

[8] Richard Konieczny, Brian Golden, Michael Hage, and Ross Hart.

[9] Ron Freel, Chad Chapman, and Lee Wheeler.

spondents attempted to establish that the discriminatees would not have been hired even if they did not support or were not affiliated with the Unions by claiming that the discriminatees were not hired because of low test scores, they lived outside Shaw's geographical area, they did not sign employment applications, incomplete histories on applications, no salary was indicated on the applications, or they requested salaries outside of Shaw's range; that the Respondents did not attempt to establish that the discriminatees were not hired because there were no job openings or because they were not qualified to perform the work; that there is evidence of record suggesting that Shaw hired individuals who either provided nothing more than a name, address, and phone number, or who submitted applications after they were hired; that since the Respondents routinely hired operators to perform laborer's work, the operating engineer discriminatees could not be deemed unqualified to perform laborer's work, and the pipefitter discriminatees, especially those who indicated their willingness to perform other work, should be treated similarly.

In their supplemental brief, the Respondents argue that the General Counsel failed to establish a prima facie refusal to hire case under the *FES,* supra, framework; that the evidence does not establish that there were positions available for each applicant; that the mere fact that the Company hired other employees does not establish the General Counsel's burden of demonstrating that, for each applicant, there was an available position which corresponded to the Company's timing for hiring applicants or the skills needed for the position; that the General Counsel cannot meet its burden of proving that any of the alleged discriminatees who applied for welder/pipefitter jobs should have been hired in lieu of other applicants because no other applicants were hired for these positions; that no pipefitters were hired by the Company during the period covered by General Counsel's Exhibit 67, which outlines all the individuals hired by the Company, and the Company does not hire or employ welders; that the Company does not have to hire overqualified applicants, namely pipefitters and welders, for laborers positions, and Board law provides that an employer does not have to hire overqualified applicants, *Windemuller Electric, Inc.,* 306 NLRB 664, 680 (1992), enfd. in part 34 F.3d 384 (6th Cir. 1994); *Bay Control Services,* 315 NLRB 30 (1994); *Wireways, Inc.,* 309 NLRB 245, 246 (1992); *GM Electric,* 323 NLRB 125 (1997); that the Company had an abundance of labor applications during the relevant time period and, as a result, did not hire overqualified applicants for unskilled work; that the evidence submitted by the General Counsel does not establish that there was a specific opening for each of the 10 operator union applicants; that since seven operators were hired from March 16 through August 16, 1995, by the Company, even assuming that all ten applicants were qualified, only seven spots were available; that of the seven openings, two were for positions for which union applicants were not qualified, namely a directional drill operator position filled on May 1, 1995, and a spooling truck position filled by a rehire on August 7, 1995; that the relevant time period should not extend beyond August 16, 1995, because not one applicant was hired from March 1995 through April 1996 based on an application that was more than 3 months old, *Bay Colony Services,* 315 NLRB 30, 37 (1994); *AJS Electric,* 310 NLRB 121, 126 (1993); that the General Counsel failed to establish that the operator applicants met the objective criteria of the Company to justify their hire; that the General Counsel cannot establish that the union applicants had the qualifications to justify their hire over those who were hired; that even assuming that there were job openings available for welder/pipefitter applicants, which the Respondents deny, the applicants did not meet the objective criteria for filling the job since nine of these applicants failed to complete portions of the applications; that the application is not confusing; that the Board and the courts have clearly established that an employer can establish guidelines for the completion of applications and discard applications that do not conform to such guidelines, *TIC-The Industrial Co. Southeast, Inc. v. NLRB,* 126 F.3d 334 (D.C. Cir. 1997); *Wireways, Inc.,* 309 NLRB 245, 246 (1992); that one of the objective hiring criteria which the Respondents established was that the person had to live within one hour of the Company's facility; that the applicants who were hired as operators were hired because of superior qualifications, wage requests that were within the Company's wage scale, and applicants lived within the Company's geographic hiring area; that the fact that the labor union applications of Wheeler and Freel were missing at the time of the trial should not be held against the Respondents in light of the hundreds of other applications which were produced; that both Wheeler and Freel testified that they requested union scale wages on their applications; that Chapman also requested union scale wages and he did not complete his application as requested; that the Company had legitimate nondiscriminatory reasons for not hiring the union applicants even if the General Counsel can establish a prima facie case of discrimination, which is denied; that since the Respondents had an abundance of laborer applications they had a legitimate business justification for refusing to offer the welders and pipefitters positions as laborers; that the applications of those hired as laborers demonstrates that the Company did not offer laborer jobs to overqualified applicants; that the operator applicants either lived too far from the Respondents' facility, or their past wage history far exceeded the wages the Company could offer, or the applicants did not have stable employment histories; that Chapman was not hired because this 53-year old applicant listed only three previous jobs and, therefore, his employment history was poor; that the fact that Wheeler and Freel requested union scale wages alone would be a legitimate business justification for not hiring them; that the applicants who were hired were overall better qualified and met the Company's objective hiring criteria; that the General Counsel cannot establish a refusal-to-consider case because the Company was not accepting any applications for welder/pipefitter positions, and the operator and labor applications were rejected based on objective criteria and not antiunion animus; and that even if the General Counsel can establish a prima facie case, the Respondents have clearly offered legitimate nondiscriminatory reasons for not considering the applicants.

Analysis

In *FES,* supra at 12 and 14 of the opinion, the Board, as here pertinent, indicated as follows:

> 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 F2d. 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, 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. 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.
>
> . . . .
>
> 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. [Footnotes omitted.]

As noted in my above-described decision, the parties stipulated that General Counsel's Exhibit 63, a classified ad reading as follows appeared in one of the local newspapers in February or March 1995:

> **HELP WANTED**: Excavator and dozer operators, roustabout and pipe line foreman, truck drivers and general laborers. Must have a clean driving record, and be able to pass a drug test. Apply at: Shaw, Inc. M-32-33, Atlanta.

As here pertinent, the Respondents began hiring operators and laborers on May 1, 1995. The General Counsel contends that May 1, 1995, through May 2, 1996, is a time period which reasonably encompasses that time period the discriminatees should have been considered for employment. The Respondents argue that the relevant time period should not extend beyond August 16, 1995 "[b]ecause not one applicant was hired from March 1995 through April 1996 based on an application that was more than three months old . . . ." (R. Br. 9.) Contrary to the assertion of the Respondents, more than one person was hired during the 1995 season based on an application which was more than 3 months old. Indeed, one (see GC Exh. 65HHH) was hired based on an application which was 5 months and 13 days old. Accordingly, if one were to take the Respondents' approach, notwithstanding the fact that the Respondents' do not have a specific policy with respect thereto, the relevant period would end 5 months and 13 days after May 15, 1995, which is the date on which the last of the operating engineers submitted their applications to the Shaw, Inc.[10] In other words, if one were to take this approach, the relevant time period would end October 28, 1995. During this period the Respondents hired 9 operators and 63 laborers. So even if there is a question regarding two of the operator positions, which matter will be dealt with below, since (a) the Respondents hire operators as laborers; (b) most of the involved operator applicants indicated a willingness to accept a laborers position; and (c) some of nonunion affiliated applicants who were hired as laborers during the involved period sought operator positions, there was an opening for each and every one of the involved operator and laborer applicants.[11] Extending the period to the end of calendar year 1995 would add one operator and five laborer positions.

As here pertinent, the General Counsel has made a prima facie showing that the involved 10 operator and 3 laborer applicants have the necessary experience and qualifications.[12]

For the reasons specified in my prior Decision, the Respondents knew, as here pertinent, that the involved 10 operators

[10] Of the three applicants who specifically applied for the position of laborer, two testified that they submitted their applications in early May 1995 (the Respondents claim that the applications are missing) and the third, Chad Chapman, submitted his application on May 10, 1995. For the reason specified below, May 23, 1995, the date on which some pipefitter/welders submitted their applications to the Shaw, Inc., is not controlling.

[11] One of the operators who the Respondents hired during the involved period, Calvin Garms, was terminated. It was noted by the Respondents that he could be rehired as a laborer.

[12] See the discussion below regarding operator Danny McDonald. The applications of all of the operator applicants, except Charles Bartholomew show that the applicants have experience as an operator. Charles Bartholomew should be offered instatement to a laborer position.

and 3 laborers were affiliated with the involved Unions and there was significant antiunion animus which contributed to the decision not to hire the involved 10 operators and 3 laborers.

The General Counsel has made a prima facie case with respect to the involved 10 operators and 3 laborers. Therefore, the burden shifts to the Respondents to show that they would not have hired the applicants even in the absence of their union activity or affiliation.

As noted in my prior decision herein, the first of the involved applicants to apply at Shaw, Inc., McDonald, was given an operator's test. The Respondents did not demonstrate that there was any written policy requiring such a test or that such test had been given in the past as a matter of routine. When McDonald subsequently inquired about the position he was not told that he allegedly did poorly on the test. The first operator subsequently hired by the Respondents, Roger Beatty, was not tested. The next operator hired by the Respondents, Keith Sharbaneau, allegedly was tested but at one point the person who supposedly tested him could not remember it.[13] Then, as here pertinent, the Respondents went on to hire either seven or eight operators, depending on whether the October 28, 1995, or the end of calendar 1995 cutoff is used, and did not test any of them. Three of the 9 or 10 were allegedly rehires so it might be argued that the Respondents were already aware of their capabilities. Four of the 9 or 10 operators hired (depending on the cutoff date) were subsequently terminated by the Respondents. One, Calvin Garms, was terminated 6 days after he was hired and his termination slip (GC Exh. 65C), notes that he was "HIRED AS OPERATOR—DID NOT PERFORM WELL—WOULD HIRE AS LABORER." Garms had not worked for the Respondents in the past so he was not a rehire. Garms was not tested before he was hired.

The Respondents did not demonstrate that when they were hiring in May to October or December 1995 they compared the qualifications of the union affiliated applicants with those who they hired as they filled each of the involved positions. Comparisons based on alleged unwritten subjective criterion not specified in 1995 and now advanced by management is nothing more than a post hoc rationalization advanced in an attempt to avoid legal liability.[14] None of the involved union affiliated operator or laborer applicants was told in 1995 about any written or unwritten policy the Respondents allegedly had regarding the distance they lived from the Respondents' facility.

It is argued by the Respondents that the fact that the three union affiliated laborer applicants indicated that the rate of pay expected was "union scale" alone would be a business justification for not hiring these applicants. Lucas testified that because the Respondents have pretty much a certain rate scale that they start people out at, he likes to see a number on the rate of pay expected so that he can make sure that it is within the Respondent's scale. Notwithstanding this testimony, the Respondents hired a number of laborers who either left the rate of pay expected line blank or collectively wrote "neg," "fair," "open," "starting pay," "base," "starting rate," "negotiable," or "entry." One of these individuals previously held a job paying well in excess of what the Respondents normally pay laborers and another indicated that he expected a rate about 35 percent above what the Respondents normally pay.[15] Yet the Respondents hired them. Consequently, there must have been discussions and a meeting of minds on what the Respondents would pay. There were no such discussions with the union affiliated applicants. The union affiliated laborer applicants were discriminated against not because they indicated that they expected union scale but because "union scale" meant they were affiliated with the union. There were no discussions with the union affiliated laborer applicants to determine if they were willing to accept something less than what they indicated they expected. The Respondents have not demonstrated that they were working with a strict budget and had little or no flexibility with respect to what they could pay.

With respect to any alleged shortcoming on the part of union affiliated laborer applicant Chad Chapman in filling out his application, one need only review the applications of the laborers hired by the Respondents as found in General Counsel's Exhibit 65. The Respondents hired a number of laborer applicants who gave a lot less information than Chapman. Indeed Shaw, Inc. hired some and let them submit incomplete applications days after they were hired (see GC Exhs. 65Q and II) or on the day that they were hired (see GC Exh. 65DDDD).

The Respondents contend that two of the operator positions would not have been available to the union affiliated operator applicants because when Roger Beatty was hired as a directional drill operator on May 1, 1995, only Danny McDonald had submitted an application to the Respondents, and McDonald admitted that he had never operated a directional drilling machine. Also the Respondents argue that Jay Webber was rehired on August 7 to operate a spooling truck, a highly specialized job which none of the union affiliated applicants were qualified to perform. If one accepts the contentions of the Respondents regarding Beatty and Webber, there were still seven or eight operator positions available depending on the cutoff date. The remainder of the union affiliated operator applicants could have been hired as laborers, a position which many indicated a willingness on their applications to accept.

[13] It is noted that McDonald's application is dated March 16, 1995, Sharbaneau's application is dated March 20, 1995, and Beatty's application is dated May 1, 1995.

[14] The Respondents' witness Gregory Lucas, who is the operations manager for Shaw, Inc., testified that he likes to hire people who live in the area because the Respondents work 12 to 13 hours a day, 7 days a week year round.

[15] The application received as GC Exh. 65U shows that this applicant, who was applying for a laborer job, previously earned $18.95 an hour as a heavy equipment operator and he left the rate of pay expected blank. According to the note at the top of the application he was hired at $6 an hour. The application received as GC Exh. 65FFFF shows that this applicant, who was applying for "1. HEAVY EQUIPMENT, 2. MECHANIC WELDER" with a rate of pay expected of $8 per hour, previously earned $14.20 (apparently per hour) as a millwright. This applicant also had experience as a backhoe operator, and a heavy equipment operator. According to the note at the top of the latter application, the applicant was hired at $8 an hour which is $2 above what the Respondents normally pay for laborers. The former was terminated less than 2 months after he was hired and the latter was terminated 10 days after he was hired.

With respect to the union affiliated pipefitters and welders, none of them indicated on their applications that they were willing to take a laborers position. Accordingly, the Respondents have shown that they had a business justification for refusing to hire the union affiliated pipefitter/welders for such positions. This finding moots any remaining questions about incomplete applications.

Since the number of operator applicants exceeds the number of available jobs, which of the operator applicants would have been hired for operator jobs and which would have been hired for laborer jobs will be determined at the compliance stage.

CONCLUSIONS OF LAW

1. The Respondents are employers engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondents committed numerous violations of Section 8(a)(1) of the Act as set forth in my prior decision herein.

4. The Respondents violated Section 8(a)(3) and (1) of the Act by (a) refusing to hire certain qualified job applicants seeking employment with the Respondents because of their membership in or affiliation with unions, namely Danny McDonald, Michael Adrianse, William Nolan, Charles Bartholomew, Michael Bartholomew, David Beebe, William Boone, David DeVos, James Hooker, Robert Peters, Chad Chapman, Lee Wheeler, and Ronald Freel; and (b) assigning employee Chad Drumb to another work crew because of his support for the Charging Parties.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Except as found in this supplemental decision and in my prior decision herein, Respondents otherwise have not been shown to have engaged in conduct violative of the Act as alleged in the complaint.

REMEDY

Having found that the Respondents engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and that they take certain affirmative action set forth below to effectuate the policies of the Act.

Having found that the Respondents violated Section 8(a)(1) and (3) of the Act by unlawfully refusing to hire certain qualified job applicants seeking employment with the Respondents because of their membership in or affiliation with certain of the Charging Parties, namely Danny McDonald, Michael Adrianse, William Nolan, Charles Bartholomew, Michael Bartholomew, David Beebe, William Boone, David DeVos, James Hooker, Robert Peters, Chad Chapman, Lee Wheeler, and Ronald Freel, the Respondents must offer them instatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date they would have been hired to the date of a proper offer of instatement, less any interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

Other considerations regarding the Remedy and the specifics of the relief granted must wait until the compliance stage of the proceeding as indicated in *Dean General Contractors,* 285 NLRB 573 (1987). See also *Ultrasystems Western Constructors,* 316 NLRB 1243 (1995).

[Recommended Order omitted from publication.]