Toering Electric Company and Foster Electric, Inc. *and* Local Union No. 275, International Brotherhood of Electrical Workers, AFL–CIO. Cases 7–CA–37768, 7–CA–39093, and 7–CA–39205

September 29, 2007

DECISION AND ORDER REMANDING

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN SCHAUMBER, KIRSANOW, AND WALSH

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." The protection of this provision has been extended to applicants for employment.[1] Consequently, an employer can violate Section 8(a)(3) by refusing to hire or to consider hiring an applicant because of union considerations.

In many instances, there is no question that an individual who applies for work with an employer does so pursuant to a good-faith interest in accepting a job if offered on acceptable terms. However, in some cases, it is apparent that alleged applicants have no such interest. In this case, we address such behavior under the standard adopted by the Board in *FES* for determining whether there has been a discriminatory refusal to hire or consider for hire.[2] First, we define an applicant entitled to statutory protection against hiring discrimination as someone genuinely interested in seeking to establish an employment relationship with the employer. Second, we impose on the General Counsel the burden of proving under *FES* that an alleged discriminatee meets this definition.

Requiring that the General Counsel prove an applicant's genuine interest in securing employment is essential to the effective administration of the Act. Our decision today will insure that only those for whom Congress intended statutory protection as actual or potential employees will receive it. As discussed below, the Board's experience has shown that in some hiring discrimination cases, particularly those involving "salting" campaigns, unions submitted batched applications on behalf of individuals who were neither aware of the applications nor interested in employment opportunities with the employer. In other cases, individuals submitted applications but were not interested in obtaining employment with the employer. Their applications, sometimes accompanied by conduct plainly inconsistent with an intent to seek employment, were submitted solely to create a basis for unfair labor practice charges and thereby to inflict substantial litigation costs on the targeted employer. The absence of a clear and consistently applied requirement that the General Counsel must prove an applicant's genuine interest in securing employment has opened the door to these abusive tactics. By imposing this requirement under *FES*, we shall prevent those who are not in any genuine sense real applicants for employment from being treated by the Board as if they were.

Background Facts

International Brotherhood of Electrical Workers President Jack J. Berry announced the Union's "salting"[3] campaign targeting nonunion employers in a 1987 videotaped speech urging local unions to join him in "driv[ing] the non-union element out of business." With this goal in mind, the International Union issued a Construction Organizing Membership Education Training (COMET) manual that provided guidance to local unions for conducting salting campaigns. The COMET program, which has been approved and utilized by all member unions of the Building and Construction Trades Council, includes discussion of many traditional organizational strategies and tactics. However, it also emphasizes the alternative strategy of imposing such costs on a nonunion employer as will cause it to scale back its business, leave the salting union's jurisdiction entirely, or go out of business altogether. A key tactic for implementing this economic strategy in the COMET program is the filing of unfair labor practice charges at every opportunity. These charges serve two express functions: (1) they impose on charged nonunion employers the immediate and often substantial expenses of defending themselves in legal proceedings; and (2) they provide the premise for disruption of the nonunion employer's work force and production through a series of declared unfair labor practice strikes.

As part of recommended salting campaigns, the International Union's Policy on Inside Construction Organizing (Organizing Policy) requires local unions to respond to blind newspaper advertisements to assure that "suffi-

[1] *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185–186 (1941).

[2] *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002). On October 8, 1997, Administrative Law Judge Arthur J. Amchan issued his original decision in this case. On June 7, 2000, this case was remanded to the judge for further consideration in light of the Board's decision in *FES*, supra. The judge subsequently issued the attached self-contained decision on September 29, 2000, which incorporates the factual findings made in 1997 and applies the *FES* framework to those facts.

[3] Salting has been defined as "the act of a trade union in sending a union member or members to an unorganized jobsite to obtain employment and then organize the employees." *Tualatin Electric*, 312 NLRB 129, 130 fn. 3 (1993), enfd. 84 F.3d 1202, 1203 fn. 1 (9th Cir. 1996). As further discussed below, however, a salting campaign's immediate objective may not always be organizational, and the role of an individual "salt" who applies for work may not always be to obtain employment.

cient numbers of replies [are] submitted to make a prima facie case of statistical discrimination." Minutes of a March 1994 meeting of Local Union 275, International Brotherhood of Electrical Workers, AFL–CIO (Local 275 or the Union), indicate that it was implementing the International's Organizing Policy by going to area temporary employment agencies and "load[ing] them up with applications."

Also in 1994, Toering Electric became a target of Local 275's salting campaign. Its alleged refusal to hire or consider union-affiliated individuals that year generated several unfair labor practice charges.[4] In July and August 1995, to settle these allegations, Toering Electric offered jobs to six Local 275 members but all six failed to show up for work. Other Local 275 members received backpay awards pursuant to the settlement agreement. Local 275 boasted in its March 1995 newsletter that its salting campaign "put a big hurt" on Toering Electric's business.

Local 275 again targeted Toering Electric in June 1996[5] when organizer James Jendrasiak twice mailed, in response to a blind help-wanted newspaper advertisement, his resume and the resumes of three additional local union members to Toering Electric.[6] Jendrasiak solicited these resumes during union meetings for use in the salting campaign. In his cover letter to Toering Electric, Jendrasiak identified all four applicants as registered apprentices or journeymen and the local Union as the source of the resumes.

After the advertisement appeared in the newspaper again in July, Jendrasiak resubmitted the four resumes he sent in June, along with the resumes of 14 other Local 275 journeymen and apprentices. Fellow union organizer James Leenhouts gave Jendrasiak 12 of these 14 resumes from a file of resumes collected for salting purposes.[7] Of the 18 resumes submitted by Jendrasiak, 5 contained no work history dates,[8] another 5 were stale,[9] and 1 resume was from Local 275 member Spofford, who did not accept a 1995 job offer tendered by Toering Electric under the settlement agreement. Jendrasiak determined that only four of the Local 275 members whose resumes he received from Leenhouts had authorized the use of their resumes to respond to blind help-wanted advertisements as part of the Union's campaign.[10]

It is undisputed that Toering Electric did not hire any of the individuals whose resumes it received from Local 275. According to Dennis Van Wyk, Toering Electric's office manager, a bid proposal submitted in the summer of 1996 prompted the blind help-wanted advertisements. There was no immediate need for electricians. Although Van Wyk testified that he did consider the resumes, the fact that they were stale and incomplete led him to conclude that the individuals were not interested in employment. Van Wyk also testified that by late 1996, when Toering Electric was awarded the contract on which it had bid in the summer, its existing employees were available to begin work on the project, eliminating the need for new hires.

Judge's Decision

Respondent Toering Electric argued before the judge that the General Counsel failed to establish that the 18 individuals for whom the Union submitted resumes in June and July 1996 were truly seeking employment with the Respondent. According to the Respondent, the Union submitted their resumes as part of a "salting" campaign to manufacture unfair labor practice charges and to enmesh the Respondent in Board litigation, thereby imposing costs that would eliminate any competitive advantage the Respondent enjoyed over union contractors. In such circumstances, the Respondent argues that these individuals lack statutory employee status and are not entitled to protection against discrimination in hiring based on their union activity.[11]

[4] The Union attempted to organize Toering Electric in the early 1980's and lost a Board-conducted election.

[5] All dates hereafter refer to 1996, unless otherwise indicated.

[6] The three other applications were for Patrick Cosgrove, Bernard Hamstra, and Richard Newville. Toering Electric received the two separate packets of resumes on June 10 and 27.

[7] These 12 resumes were from Gary Becklin, Mark Butzow, Jeffrey Engel, John Fekken, Wayne Harris, Leonard Petznik, Raymond Rager, George Robinson, Douglas Scott, Leo Smith, Geralyn Spofford, and Daniel Watters. The other two resumes were Leenhouts' own and one that Jeffrey Stadt gave directly to Jendrasiak in response to his solicitation for resumes for use in the salting campaign.

[8] Resumes for Cosgrove, Jendrasiak, Scott, and Stadt did not contain any dates regarding their work histories, so it is impossible to determine when these resumes were prepared. Hamstra's resume also did not contain any dates regarding his work history, but it did indicate that he had taken educational courses as recently as 1996.

[9] Resumes for Becklin, Fekken, Petznik, Rager, and Spofford were between 1 and 6 years out-of-date. Resumes for Butzow, Engel, Harris, Leenhouts, Newville, Robinson, Smith, and Watter, however, did contain up-to-date work histories.

[10] According to Jendrasiak, he confirmed with Butzow, Engel, Leenhouts, and Robinson their authorization to use their resumes for salting purposes. Becklin, Fekken, Harris, and Rager testified that they had given their resumes to the Union to respond to blind help-wanted advertisements as part of the salting campaign. Leenhouts and Robinson testified that they knew their resumes were being used to respond to blind help-wanted advertisements but did not know that Jendrasiak submitted their resumes to Toering Electric.

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

The judge summarily rejected the Respondent's argument and found, among other things, that by refusing to hire any of the 18 union-affiliated individuals the Respondent violated Section 8(a)(3) and, derivatively, Section 8(a)(1).[12] The Respondent excepted to the judge's finding and renewed its argument that the 18 individuals were not genuinely interested in seeking employment and thus were not entitled to statutory protection.

Analysis

1. The scope of statutory protection against discrimination

In *Phelps Dodge Corporation v. NLRB*, the Supreme Court held that Section 8(a)(3)'s proscription against discrimination in regard to hire extends to discriminatory practices that affect applicants for employment.[13] In proceedings below, the Board had found, inter alia, that the employer violated the Act when it refused to reemploy two former employees because of their union affiliation. The Supreme Court affirmed, reasoning that "[d]iscrimination against union labor in the hiring of men is a dam to self organization at the source of supply." The Court explained that "such an embargo . . . was notoriously one of the chief obstructions to collective bargaining through self-organization" and that "the removal of such obstructions was the driving force behind the enactment of the National Labor Relations Act."[14] Thus, the Court found that the "prohibition against 'discrimination in regard to hire' must be applied as a means toward accomplishment of the main object of the [Act],"[15] i.e., to eliminate "disruptions to the free flow of commerce."[16]

Unlike most subsections of Section 8 of the Act, Section 8(a)(3) does not expressly limit its antidiscrimination protection to individuals who are employees within the meaning of Section 2(3).[17] Neither did the Supreme Court in *Phelps Dodge* recognize such a limitation in holding that Section 8(a)(3) applied to job applicants in that case. However, subsequent precedent makes clear that Section 8(a)(3) bars job discrimination only against individuals who meet the statutory definition of "employee" in Section 2(3). E.g., *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 88 (1995) (summarizing *Phelps Dodge* as holding that the "statutory word 'employee' includes job applicants").[18] The term "employee" is defined in Section 2(3) to include "any employee." Of course, this definition suffers from the problem inherent in defining a word in terms of that very same word. The result is that the Board and the courts have been left with the task of defining the word in ways that are consistent with the legislative purpose of the Act. It is primarily the Board's task to apply its labor relations expertise in interpreting Section 2(3) in a manner that comports with the general policies and purposes of the Act. *Town & Country Electric*, supra at 88–90; *Sure-Tan v. NLRB*, 467 U.S. 883, 891–892 (1984).

Obviously, to the extent that Congress specifically excluded certain categories of individuals from the definition of employee in Section 2(3), we must adhere to those exclusions. This does not mean, as the dissent suggests, that the broad scope of antidiscrimination provisions in Section 8(a)(3) dictates extending the protections of statutory employees to all other workers who are

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We adopt, in the absence of exceptions, the judge's recommended dismissal of the allegation that Respondent Toering Electric violated Sec. 8(a)(1) by coercively interrogating employee David Seger.

We shall modify the judge's recommended Order in accordance with our decision in *Ferguson Electric Co.,* 335 NLRB 142 (2001), and we shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

[12] In his supplemental decision, the judge stated that, pursuant to the Board's decision in *FES,* "once the General Counsel has established a refusal to consider violation, he must then show only that the respondent was hiring, or had plans to hire in order to establish a refusal to hire violation." Contrary to the judge's statement, *FES* requires proof 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 uniformly adhered to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination" to establish a refusal-to-hire violation. *FES*, supra at 12. This error does not affect our decision because the judge found, and we agree, that all the alleged discriminatees were qualified for the positions for which they applied.

Consistent with the views stated in *CCC Group, Inc.*, 341 NLRB 96 fn. 2 (2004), enfd. mem. 111 Fed. Appx. 714 (5th Cir. 2004), Member Schaumber would find that the General Counsel must prove that the alleged discriminatees met the actual qualifications for the position established by the employer. Member Schaumber agrees with his colleagues, however, that the alleged discriminatees here met the actual qualifications established by the Respondents.

[13] *Phelps Dodge*, supra, 313 U.S. at 185–186.

[14] Id. at 186.

[15] Id.

[16] Id. at 182 (citing Sec. 1 of the Act).

[17] For this reason, Judge Learned Hand stated that he would find 8(a)(3) violations for victims of discrimination on the basis of union affiliation or activity regardless of whether they were currently employed by the respondent employer. *Phelps Dodge Corp. v. NLRB*, 113 F.2d 202, 206–207 (2d Cir. 1940) (concurring opinion).

[18] The limitation of 8(a)(3)'s antidiscrimination protection to statutory employees is thus logically consistent and coextensive with the express protections provided in 8(a)(4)'s prohibition of discrimination against "employees" for filing charges or giving testimony under the Act and in Sec. 8(a)(1)'s prohibition of interference, restraint, or coercion of "employees" in the exercise of rights guaranteed in Sec. 7. Notably, the Supreme Court has held that "by its plain terms, thus, [Sec. 7] confers rights only on *employees*, not on unions or their nonemployee organizers." *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992). Consequently, the well-established doctrine that any violation of Sec. 8(a)(3) automatically constitutes a derivative violation of Sec. 8(a)(1) would be invalid unless Sec. 8(a)(3) was likewise limited to protecting statutory employees.

not specifically excluded. Our precedent is to the contrary. See, e.g., *Brevard Achievement* Center, 342 NLRB 982 (2004) (disabled workers having a primarily rehabilitative relationship with their employer are not statutory employees); *Brown University*, 342 NLRB 483, 488 (2004) (graduate student assistants are not statutory employees); *WBAI Pacifica Foundation*, 328 NLRB 1273, 1274–1275 (1999) (applicants for unpaid staff positions are not statutory employees).

In determining whether applicants are statutory employees, "as the Board has implicitly recognized, . . . the general policy of not discouraging employees from union activity by protecting applicants for employment does not justify protecting all applicants for employment." *E & L Transport Co. v. NLRB*, 85 F.3d 1258, 1267 (7th Cir. 1996) (citing *Pacific American Shipowners Assn.*, 98 NLRB 582, 596 (1952) (holding that nonemployee applicants for supervisory positions are not protected)).[19] Because the former employees in *Phelps Dodge* were clearly interested in reemployment with the employer, the Court had no occasion to consider whether an individual lacking any such interest would be entitled to the protections afforded a Section 2(3) employee. The Respondent's exceptions squarely present this issue, to which we now turn.[20]

We hold that an applicant for employment entitled to protection as a Section 2(3) employee is someone genuinely interested in seeking to establish an employment relationship with the employer. Simply put, only those individuals genuinely interested in becoming employees can be discriminatorily denied that opportunity on the basis of their union affiliation or activity; one cannot be denied what one does not genuinely seek. We further hold that the General Counsel bears the ultimate burden of proving an individual's genuine interest in seeking to establish an employment relationship with the employer.

[19] Accord: *Mapes Hotel*, 230 NLRB 61, 61 fn. 2 (1977) (finding that employer did not violate Sec. 8(a)(3) by refusing to hire Margaret Tuma because she was a "nonemployee applicant for a supervisory position").

[20] The dissent complains that we are addressing this issue without the benefit of briefs, oral argument, or a request to reconsider precedent. On the contrary, we view the Respondent's specific exceptions and supporting argument on brief as a request to reconsider precedent. Further, the arguments for and against a change in law are well known. See, e.g., *FES*, supra at 29–30 (concurring opinion of Member Brame); *Exterior Systems, Inc.*, 338 NLRB 677, 679–688 (2002) (separate concurring opinions of Members Liebman, Cowen, and Bartlett). Moreover, if a party has properly raised an issue before us, we are certainly free to change the law when deciding that issue without inviting additional argument. E.g., *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), affd. in part and reversed in part 268 F.3d 1095 (D.C. Cir. 2001); *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999).

Our holding today is neither revolutionary nor restrictive of the statutory rights of employees, and derivatively of unions, to engage in legitimate organizational or other protected concerted activities, including salting campaigns. Contrary to the dissent's protestations, our holding is consistent with statutory policy, Supreme Court precedent, and Board practice. It is also necessary to allay reasonable concerns that the Board's processes can be too easily used for the private, partisan purpose of inflicting substantial economic injury on targeted nonunion employers rather than for the public, statutory purpose of preventing unfair labor practices that disrupt the flow of commerce.

a. The requirement of an actual or anticipate economic relationship

The relationship between an employer and a putative job applicant who has no genuine interest in working for that employer is not the economic relationship contemplated and protected by the Act. The Board addressed this issue in *WBAI Pacifica Foundation*, supra, where, after examining and applying relevant Supreme Court precedent, the Board held that unpaid staff are not statutory employees. First, addressing the Court's agreement in *Phelps Dodge* and *Town & Country Electric* that applicants in those cases were entitled to statutory employee status, the *WBAI Pacifica* Board emphasized that "in each case where the Court found statutory employee status, there was at least a rudimentary economic relationship, actual *or anticipated*, between employee and employer." 328 NLRB at 1274 (emphasis added). "Thus," the Board added, "when the Court stressed the breadth of Section 2(3) in *Town & Country Electric*, that breadth was bounded by the presence of some form of economic relationship between the employer and the individual held to have statutory employee status." Id.[21] Similarly, "although the applicants [in *Phelps Dodge*] did not receive any form of compensation from the employer, they were seeking entry to wage-paying jobs and the discrimination against them had an adverse impact on those who were already wage earners." Id.

The Court's finding of Section 2(3) employee status in *Phelps Dodge* and *Town & Country Electric* was based on the core statutory policy of protecting employees' rights to organize and bargain in order to restore equality of bargaining power and thereby to prevent the disruption of commerce caused by labor disputes. As the Board

[21] As further discussed below, the Court in *Town & Country Electric* affirmed as "reasonable" the Board's holding that the paid union organizers at issue in that case qualified as statutory employees within the meaning of Sec. 2(3). That case, however, did not involve any issue concerning the paid organizers' genuine interest in obtaining work with the nonunion employer to whom they applied.

stated in *WBAI Pacifica Foundation*, "[t]he vision of a fundamentally economic relationship between employers and employees is inescapable." Id. at 1275; cf. *Brown University*, 342 NLRB at 488 (stating that Congress intended the Act to govern relationships that are fundamentally economic in nature); *Brevard Achievement Center*, 342 NLRB at 984–985 (stating that the Act contemplates a primarily economic relationship between employer and employee). Applicants with no genuine aspirations to work for the respondent employer are indistinguishable from WBAI Pacifica's unpaid staff in this respect. There is no economic aspect, actual or anticipated, to their relationship with the employer. Neither in the present nor in the future do they "depend upon the Employer, even in part, for their livelihood or for the improvement of their economic standards. They do not work [or intend to work] for hire and thus the Act's concern with balancing the bargaining power between employer and employees does not extend to them." *WBAI Pacifica Foundation*, supra at 1275. Thus, job applicants who lack a genuine interest in seeking an employment relationship are not employees within the meaning of Section 2(3). [22]

b. The statutory limitation on the Board's remedial authority

Our definition of the scope of Section 2(3) protection for applicants is also consistent with the remedial provisions of Section 10(c) of the Act. There is no provision in the Act for punitive remedies; instead, the Board's remedies are limited to effecting "a restoration of the situation, as nearly as possible, to that which would have obtained but for illegal discrimination."[23] The Seventh Circuit has stated that according "any relief" to individuals who would not have accepted a job even if it had been offered to them would be inconsistent with these principles:

> The National Labor Relations Act is not a penal statute, and windfall remedies–remedies that give the victim of the defendant's wrongdoing a benefit he would not have obtained had the defendant not committed any wrong–are penal. Suppose a salt would have spurned the employer's job offer had it been made, yet the General Counsel seeks backpay for him. If the backpay is awarded, the salt will get money that he would not have gotten had the employer rather than violating the Act offered him a job.[24]

The *Starcon* litigation itself underscores the necessity for requiring that the General Counsel prove, during the initial unfair labor practice stage of litigation, an applicant's genuine interest in securing a job. In *Starcon International v. NLRB*, 176 F.3d 948 (7th Cir. 1999), the court held that no affirmative remedy could be ordered for an alleged discriminatee unless the General Counsel proved at the hearing on the merits that he was available for and willing to accept a job offer from the respondent. Only 2 of 107 alleged discriminatees testified at the administrative hearing conducted pursuant to the court's remand instruction, and the judge found that the General Counsel failed to prove that any of those failing to testify were available for and willing to accept a job offer when vacancies arose. The Board affirmed the judge's finding under the law of the case established by the court, finding no need to decide whether the same result would follow independently from the application of *FES*.[25] There is no need to reach that issue in this case either. We agree, however, with the Seventh Circuit that limiting the scope of the remedy to the actual harm suffered is consistent with the remedial purposes of the Act. See, e.g., *Sure-Tan*, 467 U.S. at 900 (stating that a "backpay remedy must be sufficiently tailored to expunge only the actual and not merely speculative consequences of the unfair labor practices").

In our view, the policy expressed through the remedial provisions of Section 10(c) against windfall and punitive backpay awards further supports holding that only those job applicants who were actually deprived of employment opportunities by an employer's discrimination, i.e., those with a genuine interest in seeking to establish an employment relationship with the employer, are entitled to protection as statutory employees against hiring discrimination on the basis of union affiliation or activity.

c. The objective of generating unfair labor practice litigation

The Board's experience in deciding hiring discrimination cases confirms that the protections afforded statutory employees must be limited to job applicants who are genuinely interested in seeking to establish an employment relationship with the employer. As shown below, the absence of any limitation on the scope of protection for job applicants creates the real and unacceptable possibility of abuse of the Board's processes in efforts to

[22] The dissent contends that *WBAI Pacifica Foundation* is distinguishable because the applicants there were seeking entry to non-wage-paying jobs, while salts are applying for wage-paying jobs. We find the distinction unpersuasive as applied to salts who are not actually seeking entry to jobs. They, like the applicants for unpaid positions, do not contemplate any economic relationship with the employer. In fact, they do not contemplate any kind of working relationship.

[23] *New England Tank Industries*, 147 NLRB 598, 599 (1964) (quoting *Phelps Dodge*, supra, 313 U.S. at 194).

[24] *Starcon International v. NLRB*, 450 F.3d 276, 277–278 (7th Cir. 2006), enfg. 344 NLRB 1022 (2005).

[25] 344 NLRB 1022, 1023.

accomplish goals fundamentally inconsistent with the policies and purposes of the Act.

Under the current approach to hiring-discrimination allegations, the Board employs an implicit—and effectively conclusive—presumption that any individual who actually applies for a job is entitled to protection as a Section 2(3) employee. As a consequence, applicants have been accorded statutory employee status and have been alleged as 8(a)(3) discriminatees even when they have engaged in conduct clearly intended to provoke a decision *not* to hire them, or have engaged in antagonistic behavior toward the employer that is wholly at odds with an intent to be hired. Such conduct has included mocking a hiring official's Asian accent while soliciting workers to quit their jobs and work for a union contractor;[26] putting an arm around a hiring official's shoulder and threateningly stating that "you're messing with the union now";[27] entering an employer's office en masse to apply while videotaping the proceedings;[28] and making outrageous and defamatory statements about the employer at a public meeting.[29]

The automatic presumption of an applicant's genuine interest in employment with the employer is just as flawed in the absence of overt antagonism toward the targeted employer. This is particularly so in the situation of batched union applications. In some cases, there is reason to doubt that the submission of batched applications by a third-party union representative was authorized by the putative individual applicants. Even if authorized, there is reason to doubt that the applicants had any real interest in going to work for a nonunion employer. On the contrary, consistent with the International Union's policy directive in this case, those applications may be submitted for the sole purpose of creating "a prima facie case of statistical discrimination" upon which to base unfair labor practice claims. The same purpose may be ascribed to certain mass application efforts.[30]

Evidence in this case suggests that Local 275's salting campaign had this objective. In the words of then-IBEW President Berry, the campaign was motivated by the desire to "drive the non-union element out of business." Consistent with this goal, Local 275 filed several unfair labor practice charges against Toering Electric during the 1994 salting campaign. Toering Electric informally settled those charges by offering employment to six alleged discriminatees. Those individuals, however, rather than pursuing that employment (and organizing) opportunity, failed to show up for work. All of this supports the conclusion that the alleged discriminatees from the 1994 campaign were not interested in obtaining employment opportunities or in organizing Toering Electric's employees; instead, they were interested in "put[ing] a big hurt" on Toering Electric's business, as Local 275 later boasted in its March 1995 newsletter.

As mentioned, current Board law permits these cases to be litigated as potential unfair labor practices because statutory employee status is conclusively presumed from the mere submission of an application. In practice, this means that the issue of an applicant's genuine interest in employment can generally be raised only as an affirmative motivational defense by an employer claiming to have denied the applicant a job, or job consideration, because it knew or had a good-faith reason to believe that the applicant had no real interest in working for it.[31] Consequently, the General Counsel generally will not present evidence at the hearing of the applicant's genuine job interest. Any employer charged with 8(a)(3) hiring discrimination is put to the task and expense, at every stage of an unfair labor practice proceeding, of proving the applicant's lack of genuine job interest. In addition, the Board's resources may be devoted to extended litigation in cases where there was no actual loss of an opportunity for work because the putative applicants never intended to work. As a result, the resources of the federal government are used not to promote collective bargaining but to impose economic injury on designated salting targets.

We recognize that union salting campaigns may involve activity protected by Section 7 of the Act. Although some salts, paid or unpaid, may genuinely desire to work for a nonunion employer and to proselytize coworkers on behalf of a union, other salts clearly have no such interest. In this respect, the Seventh Circuit has expressed its view that a common aim of union salting campaigns is "to precipitate the commission of unfair labor practices by startled employers."[32] In our view

[26] *Exterior Systems,* 338 NLRB at 689–692.

[27] *Smucker Co.,* 341 NLRB 35, 38 (2004) (indicating that when the hiring official asked what that meant, the paid union organizer replied "you're a smart guy, you figure it out"), enfd. mem. 130 Fed. Appx. 596 (3d Cir. 2005).

[28] *Tann Electric,* 331 NLRB 1014, 1015–1016 (2000); see also *Progressive Electric, Inc.,* 344 NLRB 426, 432 fns. 2 & 7 (2005), enfd. 453 F.3d 538 (D.C. Cir. 2006).

[29] *American Steel Erectors,* 339 NLRB 1315 (2003).

[30] See, e.g., *Oil Capital Electric*, 337 NLRB 947, 947–948 (2002), where 20 of 21 salts who applied en masse had no relevant work experience.

[31] See, e.g., cases cited above in fns. 27–30; see also *Aztech Electric*, supra at 265 (holding that the respondent bears the defensive burden of proving that it knew an applicant's status as a paid union organizer and denied employment because of the union's allegedly unprotected salting strategy of generating unfair labor practice litigation).

[32] See *Starcon International v. NLRB*, 176 F.3d 948, 948 (7th Cir. 1999); *Hartman Bros. Heating & Air Conditioning. v. NLRB*, 280 F.3d 1110, 1112 (7th Cir. 2002), enfg. 332 NLRB 1343 (2000). See also *Aztech Electric Co.*, 335 NLRB 260, 274 (2001) (concurring Member

submitting applications with no intention of seeking work but rather to generate meritless unfair labor practice charges is not protected activity. Indeed, such conduct manifests a fundamental conflict of interests ab initio between the employer's interest in doing business and the applicant's interest in disrupting or eliminating this business.

In the *Jefferson Standard* case,[33] the Supreme Court recognized an employer's right to insist on employee loyalty and on a cooperative employee-employer relationship when it agreed with the Board that employees who distributed leaflets disparaging their employer's services had engaged in unprotected conduct for which they could lawfully be discharged, even though the objective of their leafleting—to extract bargaining concessions—was lawful. The Supreme Court stated that

> [t]here is no more elemental cause for discharge of an employee than disloyalty to his employer. It is equally elemental that the Taft-Hartley Act seeks to strengthen, rather than to weaken, that cooperation, continuity of service and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise.[34]

Our decision today is consistent with these principles. Clearly, employers are not to be immunized from lawful economic pressure resulting from labor disputes. However, there is a meaningful distinction between direct economic warfare between parties to labor disputes and the subversion of the Board's processes by one party for the objective of inflicting economic injury on the other. The Board does not serve its intended statutory role as neutral arbiter of disputes if it must litigate hiring discrimination charges filed on behalf of disingenuous applicants who intend no service and loyalty to a common enterprise with a targeted employer. Instead, the Board becomes an involuntary foil for destructive partisan purposes. The Congressional goal of industrial peace through the "friendly adjustment of industrial disputes" is not furthered by extending the Act's protections against hiring discrimination to such applicants.

We seek to discourage cases where unfair labor practice allegations of hiring discrimination are filed for this objective. We therefore believe that a change in law is warranted so as to better insure against it. We find that this result is better achieved by shifting the focus with respect to an applicant's genuine job interest from the employer's proof of a motivational defense to the General Counsel's proof that an applicant is entitled to the protected status of a statutory employee. Thus, we will abandon the implicit presumption that anyone who applies for a job is protected as a Section 2(3) employee. As more fully discussed below, we will impose on the General Counsel the burden of proving the applicant's genuine job interest.

d. "Tester" cases

To some extent, a union member who applies to a nonunion employer for a job in which he has no real interest is comparable to a "tester" in civil rights discrimination cases, i.e., "an individual who, without the intent to accept an offer of employment, poses as a job applicant in order to gather evidence of discriminatory hiring practices."[35] The Seventh Circuit has interpreted Title VII to afford standing to "testers";[36] other courts have rejected that interpretation of the scope of Title VII's coverage.[37] Whatever the merits of the "testers" debate in the context of Title VII, we find that it sheds little light on understanding the scope of the Act's protections against hiring discrimination. Although the two statutes have similar features and elements, in this respect they have distinct purposes and significantly different statutory schemes to accomplish them.

First, Title VII protects "individuals" from discrimination,[38] while only those individuals who are statutory "employees" are entitled to the protections of the Act.[39] Further, under Title VII, Congress authorized an aggrieved individual to act as a "private attorney general" and to pursue claims of employment discrimination by

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Truesdale's view that "in this case, . . . there is objective evidence that IBEW Local 441 regarded the filing of as many unfair labor practice charges as possible, without apparent regard for their merit, as a most effective weapon serving a destructive purpose unrelated to the organizing of nonunion work forces"). We do not, as the dissent suggests, view unfair labor practice charges filed by salting unions as inherently meritless. However, as discussed above, there is a reasonable basis for concern that a not insubstantial number of charges are filed without regard to their merit. Even if such charges are dismissed by the General Counsel during the investigative stage, an employer may be required to expend time and money in defending against them.

[33] *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464, 472 (1953).

[34] Id. at 472.

[35] *Kyles v. J.K. Guardian Security Services*, 222 F.3d 289, 292 fn. 1 (7th Cir. 2000) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 370, 374 (1982) (discussing testers in housing discrimination context)).

[36] *Kyles*, supra, 222 F.3d at 298–300.

[37] *Sledge v. J.P. Stevens & Co.*, 585 F.2d 625, 641 (4th Cir. 1978) (holding that tester does not have standing to complain of employer's refusal to hire on the basis of impermissible criteria because tester not seriously interested in job); *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1274 (D.C. Cir. 1994) (same); see also Michael Bowling, "The Case Against Employment Tester Standing Under Title VII and 42 U.S.C. § 1981," 101 MICH. L. REV. 235, 238 (2002).

[38] *Kyles*, supra, 222 F.3d at 295.

[39] Sec. 2(3); *Phelps Dodge*, supra, 313 U.S. at 185.

filing a charge with the Equal Employment Opportunity Commission and a civil action in court.[40] No equivalent provision exists in the Act, which vests exclusive prosecutorial authority in the office of the General Counsel.[41]

Second, Title VII sweeps far more broadly than the Act, prohibiting not only acts of discrimination, such as discriminatory refusals to hire, but also the *segregation* or *classification* of any individual on the basis of impermissible criteria.[42] Indeed, a key premise in the Seventh Circuit's holding in *Kyles* that testers have standing to sue was that Title VII "created a broad substantive right that extends far beyond the simple refusal or failure to hire."[43] The Act contains no comparably broad right. Hiring discrimination under the Act simply cannot occur unless the individual actually was seeking an employment opportunity with the employer. Thus, even assuming the Seventh Circuit has correctly interpreted Title VII, the same interpretation of antidiscrimination protection under the Act is not warranted.[44]

Finally, the court in *Kyles* addressed only the testers' *standing* to sue, not the merits of their Title VII lawsuit. Referring to the requisite proof of injury, the court opined that testers could show and be compensated for "humiliation, embarrassment, and like injuries," even if they had no actual interest in working for the employer. 222 F.3d at 300. Such injuries do not constitute "discrimination in regard to hire" under Section 8(a)(3), which requires proof that "an employee's *employment conditions* were adversely affected by his or her engaging in union or other protected activities." *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) (emphasis added).[45]

[40] 42 U.S.C. §§ 2000e-5(b) & (f)(1).
[41] Sec. 3(d).
[42] 42 U.S.C. §§ 2000e-2(a)(2).
[43] *Kyles*, supra, 222 F.3d at 298.
[44] Similarly, the Supreme Court's decision in *Havens,* supra*,* that testers had standing to sue under the antidiscrimination provisions of the Fair Housing Act is inapposite to our analysis. The Court's holding turned on the substantive right of testers to receive truthful information about available housing, irrespective of their actual interest in renting or purchasing housing. 455 U.S. at 372–375.
[45] See also *American Gardens Management Co.*, 343 NLRB 955, 956 (2004). The dissent contends that salts serve a legitimate "tester" purpose even if they do not intend to work for the targeted employer because the Board depends on outside individuals "to uncover and bring to the Board's attention unlawful discriminatory practices." We would point out that, even though applicants with no interest in employment cannot themselves be victims of discrimination, nothing in our decision precludes using evidence of an employer's animus against such applicants because of their union affiliation to contribute to a finding of unlawful discrimination against other salt applicants who do have a genuine interest in securing employment.

e. Town & Country Electric

To the extent that our decision today affects the salting activities of paid professional union organizers, it is consistent with the Supreme Court's decision in *Town & Country Electric*.[46] There, the Court agreed with the Board that paid union organizers are not a fortiori excluded from the Act's protection because of a division of loyalties between organizing for the union and working for the employer. In reaching this conclusion, the Court noted that a paid union organizer could be subject to the union's control as to organizing duties without forfeiting employee status because he would still be subject to the employer's control as to work duties. The Court also stressed that there was no evidence that the organizers in that case had engaged in acts of disloyalty or that their union had suggested, required, encouraged, or condoned impermissible or unlawful activity. Those assumptions, in our view, do not apply to the litigation-based salting campaigns discussed above.

The Court, moreover, did *not* hold that all individuals who submit an application must be considered statutory employees.[47] Nor did the Court restrict the Board's broad authority to interpret the scope of statutory protections for applicants, including paid union organizers. To the contrary, the Court characterized its narrow holding in the following terms: "We hold only that the Board's construction of the word 'employee' is lawful; that term does not *exclude* paid union organizers."[48] The Court expressly recognized that "[t]his is not to say that the law treats paid union organizers like other company employees in every labor law context," and it specifically declined to express any view on "whether or not Town & Country's conduct (in refusing to interview, or to retain, 'employees' who were on the union's payroll) amounted to an unfair labor practice."[49]

2. The modified *FES* framework

As previously stated, the Board has heretofore generally permitted litigation of an applicant's genuine interest in a job only in the context of an employer's effort to prove, as an affirmative defense, that it would have refused to hire or consider an applicant, even in the absence of union activity, because of the applicant's lack of interest. The burden of proof thus borne by respondent employers is difficult at best because the employer must prove not only the applicant's lack of interest but also that this lack of interest was the reason he was not hired. As a result, current Board law finds merit in this defense

[46] *NLRB v. Town & Country Electric,* 516 U.S. 85, 98 (1995).
[47] Id.
[48] Id. at 98 (emphasis added).
[49] Id. at 97–98.

only in the most extreme cases of overt behavior inconsistent with a genuine interest in securing employment.

We believe that, in light of the Act's overarching purpose, its remedial provisions, and the real and unacceptable possibility of abuse of the Board's processes in litigation-based salting campaigns, the General Counsel should bear the ultimate burden of proving an applicant's genuine interest in obtaining employment. As discussed above, the Congressional purpose embodied in Section 1 of eliminating industrial strife and encouraging the peaceful adjustment of labor disputes is not well served by enabling the use of the Board's processes as an economic weapon to, in the words of IBEW President Berry, "drive the non-union element out of business." Similarly, the remedial purposes of Section 10(c) of the Act are incompatible with awarding windfall backpay to job applicants who had no actual interest in working for the respondent employer and would not have accepted a job even if offered and applied only to precipitate unfair labor practices by the employer. We now hold, for all of the reasons stated above, that the General Counsel's burden of proof in all hiring discrimination cases includes the burden to prove that the alleged discriminatee was an applicant entitled to protection as a Section 2(3) employee, i.e., an applicant genuinely interested in seeking to establish an employment relationship with the employer.

This requirement embraces two components: (1) there was an application for employment,[50] and (2) the application reflected a genuine interest in becoming employed by the employer. As to the first component, the General Counsel must introduce evidence that the individual applied for employment with the employer or that someone authorized by that individual did so on his or her behalf. In the latter instance, agency must be shown.[51]

As to the second component (genuine interest in becoming employed), the employer must put at issue the genuineness of the applicant's interest through evidence that creates a reasonable question as to the applicant's actual interest in going to work for the employer.[52] In other words, while we will no longer conclusively presume that an applicant is entitled to protection as a statutory employee, neither will we presume, in the absence of contrary evidence, that an application for employment is anything other than what it purports to be. Consequently, once the General Counsel has shown that the alleged discriminatee applied for employment, the employer may contest the genuineness of the application through evidence including, but not limited to the following: evidence that the individual refused similar employment with the respondent employer in the recent past; incorporated belligerent or offensive comments on his or her application; engaged in disruptive, insulting, or antagonistic behavior during the application process; or engaged in other conduct inconsistent with a genuine interest in employment. Similarly, evidence that the application is stale or incomplete may, depending upon the circumstances, indicate that the applicant does not genuinely seek to establish an employment relationship with the employer.[53] Assuming the employer puts forward such evidence, the General Counsel, to satisfy the genuine applicant element of a prima facie case of hiring discrimination, must then rebut that evidence and prove by a preponderance of the evidence that the individual in question was genuinely interested in seeking to establish an employment relationship with the employer. Thus, the ultimate burden of proof as to the Section 2(3) status of the alleged discriminatee-applicant rests with the General Counsel.[54]

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[50] The requirement that the General Counsel must prove that an individual actually applied for a job is not new. See, e.g., *Bay Electric*, 323 NLRB 200, 202 (1997) (stating that the General Counsel did not meet his initial burden because he did not show that alleged discriminatee Ellis was an applicant).

[51] The fact that applications may be submitted in a batch is not, in and of itself, sufficient to destroy genuine applicant status, provided that the submitter of the batched applications has the requisite authorization from the individual applicants.

[52] Unless the employer has admitted an applicant's statutory employee status in response to a specific complaint allegation of such status, the matter can be raised and litigated at the unfair labor practice hearing.

Our dissenting colleagues argue that this approach will require the General Counsel to spend much time and resources preparing to litigate an issue which may never arise. We disagree. The General Counsel will have a conservation-of-resources incentive to investigate the bona fide applicant issue as soon as he receives a charge, for if the alleged victim does not qualify, the General Counsel will not have to continue the investigation, much less prepare a complaint alleging hiring discrimination. Moreover, as the Case Handling Manual notes, it is the General Counsel's general policy to solicit the charged party's position early in an investigation. See Secs. 10052.5, 10054.4. A charged party has every incentive to dispute an alleged discriminatee's genuine applicant status from the start, thus placing the General Counsel on notice that such status may be an issue in the case. If the General Counsel decides to issue a complaint, he may, as noted above, elect to specifically allege statutory employee status. A denial of such status by the respondent would afford clear notice to the General Counsel, well in advance of trial, of the need to prepare for litigation of the issue. Conversely, the failure to deny any such allegation would serve to limit the issues to be tried consistent with Sec. 102.20 of the Board's Rules and Regulations (any allegation not specifically denied or explained in an answer filed, unless the respondent states that he is without knowledge, "shall be deemed to be true and shall be so found by the Board, unless good cause to the contrary is shown.").

[53] Such evidence may also be probative of the employer's rebuttal burden under *FES*, as would the applicant's failure to apply in the manner lawfully required by the employer.

[54] Given this burden, Member Schaumber anticipates that charges filed solely for the objective of imposing litigation costs on a salting

We emphasize that proof of an applicant's genuine job interest is an element of the General Counsel's prima facie case under *FES*. Thus, if at a hearing on the merits, the employer puts forward evidence reasonably calling into question the applicant's genuine interest in employment, the General Counsel must prove the applicant's genuine interest by a preponderance of the evidence in order to prove that the applicant is an employee within the meaning of Section 2(3). An employer's *motivation* for making an alleged discriminatory hiring decision does not become relevant until the General Counsel satisfies his burden of proof on the applicant's statutory employee status. This is consistent with the extant *FES* test, under which proof of an employer's union animus in refusing to hire an applicant is irrelevant if the General Counsel fails to meet his initial burden of proving that the employer was hiring or had concrete plans to hire at relevant times, or that the alleged discriminatees had the relevant experience or training. See, e.g., *Bill's Electric, Inc.*, 350 NLRB 292, 295 fn. 14 (2007).[55] It is likewise consistent with the *Wright Line* test for allegations of discriminatory discharge and discipline, under which no violation will be found unless the General Counsel proves that an employer's antiunion discrimination affects statutory employees. See *Parker-Robb Chevrolet*, 262 NLRB 402, 404 (1982), review denied sub nom. *Automobile Salesmen's Local 1095 v. NLRB,* 711 F.2d 383 (D.C. Cir. 1983) (an employer may lawfully discharge a statutorily excluded supervisor for engaging in prounion conduct even though its motivation for the discharge was to cause employees to reconsider or abandon their own protected concerted activity).

3. Application of the new framework to this case

We recognize that the parties, when litigating this case, did not have the benefit of the guidance set forth in this opinion. In particular, the General Counsel was unaware of the burden placed upon him.

Given the current state of the record evidence on the issue of the June and July 1996 alleged discriminatees' status as applicants for employment, we think it prudent and fair to remand this case to the judge in order to apply to the facts of this case the new analytical framework set forth above for determining whether an individual applicant is an employee under Section 2(3).[56] Although there is some evidence in the record that suggests the alleged discriminatees' genuine interest in seeking employment, there is also evidence that suggests otherwise.

For example, although Rager testified that he would have considered taking a job with the Respondent if one were offered, he also testified that he was fully employed elsewhere and was not actively looking for work. Additionally, his resume was 6 years out of date. Harris similarly testified that he was fully employed elsewhere and was not actively looking for work. Cosgrove, Hamstra, Stadt, Scott, and Petznik did not testify, and their resumes were stale or incomplete. Although Jendrasiak testified that these five alleged discriminatees authorized the use of their resumes for salting and organizational purposes, he did not testify whether he was authorized to use their resumes for the purpose of obtaining work for them with Toering Electric. Smith, Spofford, and Watters also did not testify at the hearing. Thus, there is no evidence that these alleged discriminatees were genuinely interested in seeking an employment relationship with Toering Electric, that they indicated to anyone such an interest, or that they authorized, or even knew of, the Union's submission of their resumes to Toering Electric. Additionally, Spofford was offered a job by Toering Electric in 1995 but did not show up for work.

The General Counsel and the Respondent are entitled to an opportunity to adduce additional evidence relevant to the issue of whether the alleged discriminatees are Section 2(3) employees under the analytical framework set forth above. Therefore, we shall remand this issue to the judge for further factual development and consideration of this issue consistent with this Decision and Order.

4. Remaining issues

(a) Refusal to hire Jendrasiak in 1995

The judge found, and we agree, that the Respondents violated Section 8(a)(3) and (1) by failing to consider or to hire James Jendrasiak on about August 22, 1995 and on September 22, 1995.[57] Importantly, the Respondents did not challenge Jendrasiak's status as a genuine applicant on these occasions. Accordingly, under the framework set out above, because the General Counsel introduced Jendrasiak's applications and elicited testimony from Jendrasiak that he applied in a manner consistent with the Respondents' application procedures, and there is no evidence in the record to the contrary, we find that the General Counsel has met his burden of proving by a preponderance of the evidence that Jendrasiak was an

target will be screened out at an early stage of the Region's investigation.

[55] Thus, contrary to the dissent, we neither discard nor reorient the *FES* test.

[56] Our usual practice is to apply new rules not only "to the case in which the issue arises," but also "to all pending cases in whatever stage." *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958). We follow that practice here.

[57] Inasmuch as Jendrasiak was a salt, the duration of his backpay period and his continuing entitlement to an offer of instatement shall be determined in accordance with *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007).

applicant entitled to protection as a statutory employee on these occasions.

We adopt, for the reasons stated by the judge, his finding that Respondent Foster Electric violated Section 8(a)(3) and (1) when it refused to hire Jendrasiak in September 1995. The judge also found that Respondent Toering Electric violated Section 8(a)(3) and (1) when it refused to hire Jendrasiak in August 1995. In their exceptions to the judge's findings, the Respondents contend that the decision not to hire Jendrasiak in August 1995 was lawfully based on the following legitimate, nondiscriminatory reasons: (1) Jendrasiak lied on his application; (2) he had "terrible references"; (3) he failed to list work experience on the application he submitted to Toering Electric; and (4) his pay expectations were "way out of line." We reject the contention that Jendrasiak was disqualified by virtue of misrepresentations on his application for the reasons stated by the judge. We reject the Respondents' remaining contentions for the reasons that follow.

The Respondents contend that Jendrasiak was lawfully rejected because they received a "bad" reference for Jendrasiak from a prior employer. As more fully set forth in the judge's decision, in August 1995, union organizer Jendrasiak applied for work through American Careers, an employment agency, in response to an ad placed by David Toering, who was seeking journeymen electricians for both Toering Electric and Foster Electric. American Careers service manager John Williams subsequently interviewed Jendrasiak. During the interview, Williams called David Toering, who asked Williams to find out where Jendrasiak acquired the hours needed to become a journeyman and if any of his prior employers were union shops. When Jendrasiak either said "no" or avoided answering the question, he was sent to Toering Electric's offices.

While Jendrasiak was en route, Williams contacted one of Jendrasiak's prior employers, Kemco Electric, and discovered that it was, in fact, a union contractor. Williams immediately called David Toering and apprised him of this information. Toering told Williams to continue checking Jendrasiak's references.

When Jendrasiak arrived at Toering Electric's office, he was told that there had been a mistake and that he should call Williams. Thereafter, Jendrasiak filled out a Toering Electric application on which he indicated that he was a "voluntary union organizer." Toering told Jendrasiak that he had applied for a job with American Careers, not with his company. After Jendrasiak left, Toering called Williams and told him that he had had some bad dealings with "these guys," i.e., union members, in the past and did not want to interview Jendrasiak.

Although not mentioned by the judge in his decision, Williams testified that after Jendrasiak had left Toering Electric's office, Toering called him and asked him to continue checking Jendrasiak's references. Williams testified that one of Jendrasiak's prior employers, Mellema Electric, told him that Jendrasiak was "hired through union hall—very much a complainer—would never be hired back—just quit one day." Another prior employer checked by Williams, Spencer-Redner, indicated that Jendrasiak was a "good employee."

It is evident from the foregoing that the Respondents rejected Jendrasiak's application *before* they knew of the "terrible" reference from Mellema Electric. Accordingly, we reject the Respondents' contention that the reference in any way justifies their refusal to consider or hire him on August 22, 1995.

The Respondents' contention that they lawfully refused to consider Jendrasiak because his application with Toering Electric did not list prior work experience or previous employers is also without merit. It is undisputed that Jendrasiak provided this information to American Careers, and that American Careers faxed Toering Electric a copy of the application that Jendrasiak completed for American Careers. That document, which is part of the record in this case, lists Jendrasiak's prior employers. This information was incorporated by reference in the application that Jendrasiak subsequently completed at Toering Electric's office. Accordingly, Jendrasiak did not fail to provide the Respondents with information about his work history and prior employers at the time he applied for work.

The Respondents further contend that Jendrasiak would have been rejected because he sought wages in excess of those paid by the Respondents. The record evidence belies this contention. On the application he submitted to Toering Electric, Jendrasiak stated that he sought a wage of $18 per hour. The Respondents contend that this is far in excess of the $12 to $12.50 per hour that they pay starting journeymen. However, David Toering admitted that in April 1997 he hired John Haggerty, an out-of-state journeyman without a Michigan electrician's license, at a wage rate of $15.50 per hour even though the Respondents classified him as an apprentice because he did not have a license. Toering also admitted that the fact that an applicant has earned more from a prior employer has not excluded nonunion applicants from consideration by the Respondents, inasmuch as the Respondents hired David Segar as an apprentice electrician at a rate of pay much lower than he had received from prior employers.

As noted above, we have adopted the judge's finding that the Respondents' failure to consider or hire Jendra-

siak in August 1995 was motivated by his union affiliation. We rely on the direct evidence of unlawful motivation cited by the judge in his decision. In addition, having concluded that the Respondents' stated reasons for their actions are false, we find that the circumstances of this case warrant an inference that their true motivation was an unlawful motive that the Respondents wished to conceal.[58]

(b) Single employer/agency

For the reasons stated by the judge, we adopt his finding that the Respondents, Toering Electric and Foster Electric, are not a single employer. For the reasons that follow, as well as the reasons stated by the judge, we also adopt the judge's finding that David Toering, the president of both companies, and Dennis Van Wyk, Toering Electric's office manager, were agents of both Toering Electric and Foster Electric for the purpose of considering and hiring applicants for employment in 1995 and 1996.

The Board applies common law principles when examining whether a person is an agent of the employer.[59] Agency is established when there is actual, or express, authority to engage in the conduct.[60] Actual authority refers to the power of an agent to act on his principal's behalf when that power is created by the principal's manifestation to him. That manifestation may be either express or implied.[61] Agency may also be established by a showing of apparent authority, which results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question.[62]

Applying these principles to the facts of this case, we find, in agreement with the judge, that Toering and van Wyk were agents of both Respondents.[63] In support of this finding, the judge found as follows: (1) when placing an order for electricians with American Careers, a job placement agency, in August 1995, David Toering told American Careers Service Manager John Williams that he was seeking journeymen for both companies; (2) Foster Electric Office Manager Bruce Bartels testified that he always contacts van Wyk when Foster needs electricians; and (3) van Wyk testified that he handled the financial arrangements when Toering Electric lent employee William Brooks to Foster Electric. In addition to these facts, we note that David Toering was the president of both companies. The Respondents' common application form states that only the president of the company "has any authority to enter into any agreement for employment for any specific or indefinite period of time." Under all the circumstances of this case, we find that Toering and van Wyk had at least apparent authority to act on behalf of both Respondents for the purpose of considering and hiring applicants for employment in 1995 and 1996.[64]

AMENDED CONCLUSIONS OF LAW

1. By refusing to interview, consider, and hire James Jendrasiak on or about August 22, 1995, Respondents Toering Electric Company and Foster Electric, Inc. have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act

2. By refusing to consider for hire and hire James Jendrasiak on September 22, 1995, Respondent Foster Electric, Inc. violated Section 8(a)(3) and (1).

3. Respondents, through David Toering, did not unlawfully interrogate employee David Segar in September 1996 in violation of Section 8(a)(1) of the Act.

ORDER

A. The National Labor Relations Board orders that the Respondent, Toering Electric Company, Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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

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

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

(a) Within 14 days from the date of this Order, offer James Jendrasiak instatement to the position for which he applied on or about August 22, 1995, or, if that job no

[58] *Richard Mellow Electrical Contractors Corp*., 327 NLRB 1112, 1115 fn. 17 (1999).

[59] *Electrical Workers Local 98 (MCF Services)*, 342 NLRB 740, 741–743 (2004).

[60] Id.

[61] Id.

[62] Id.

[63] The Respondents admitted, in their answer to the complaint, that David Toering is an agent of Respondent Toering Electric.

[64] *Richmond Toyota,* 287 NLRB 130, 131 (1987) (vice president-general manager, who was in charge of day-to-day operations and was highest ranking official at its facility, had, at the very least, apparent authority to recognize union); *Diehl Equipment Co.,* 297 NLRB 504 fn. 2 (1989) (secretary-bookkeeper had apparent authority to provide information and answer questions relative to application forms where, inter alia, her job routinely involved handing applications to individuals and receiving completed applications from them).

longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he would have enjoyed.

(b) Make James Jendrasiak whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to its unlawful refusal to consider for employment and refusal to hire James Jendrasiak, and within 3 days thereafter notify him in writing that this has been done and that the refusal to consider him for employment and refusal to hire him will not be used against him in any way.

(d) 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.

(e) Within 14 days after service by the Region, post at its facility in Grand Rapids, Michigan, copies of the attached notice marked "Appendix A."[65] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent Toering Electric Company at any time since August 22, 1995.

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

B. The National Labor Relations Board orders that the Respondent, Foster Electric, Inc., Muskegon, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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

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

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

(a) Within 14 days from the date of this Order, offer James Jendrasiak instatement to the positions for which he applied on or about August 22, 1995, and September 22, 1995, or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he would have enjoyed.

(b) Make James Jendrasiak whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to its unlawful refusal to consider for employment and refusal to hire James Jendrasiak, and within 3 days thereafter notify him in writing that this has been done and that the refusal to consider him for employment and refusal to hire him will not be used against him in any way.

(d) 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.

(e) Within 14 days after service by the Region, post at its facility in Muskegon, Michigan, copies of the attached notice marked "Appendix B."[66] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and main-

[65] 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."

[66] 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."

tained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent Foster Electric, Inc., at any time since August 22, 1995.

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

IT IS FURTHER ORDERED that the allegations regarding Respondent Toering Electric Company's refusal to hire the 18 alleged discriminatees whose resumes were submitted to it by the Union in June and July 1996 are severed from this case and remanded to the administrative law judge for appropriate action as discussed above.

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

MEMBERS LIEBMAN and WALSH, dissenting in part.

Today's decision continues the Board's roll-back of statutory protections for union salts who seek to uncover hiring discrimination by nonunion employers and to organize their workers. The Board has recently acted to minimize the economic consequences for employers who discriminate against salts, by shifting the burden of proof to the General Counsel with respect to the length of the backpay period.[1] Now, the majority goes much farther.

Without the benefit of briefs, oral argument, or even a request to reconsider precedent, it legalizes hiring discrimination in some, perhaps many, cases involving salts, by requiring the General Counsel to prove that a job applicant was "genuinely interested in seeking to establish an employment relationship." Seven years ago, a full Board issued *FES*,[2] which provided clarity and consistency for parties litigating hiring-discrimination cases. That carefully considered framework is discarded by the majority. In its place, the majority reorients the focus in hiring-discrimination cases from employer motive to applicant intent, holding that applicants whose "genuine interest" cannot be established are not even statutory employees, and so may freely be discriminated against.

The majority's new approach is impossible to reconcile with the National Labor Relations Act, with its policies, and with Supreme Court precedent.[3] It refuses to recognize that Federal labor law permits employees to pursue their own economic interests in organizing, in eliminating antiunion discrimination, and in protecting the gains won by unionized workers, through means that have an adverse impact on employers—especially employers who break the law. The Board, with the approval of the courts, has long treated salting as a legitimate tactic. But that era seems to be ending.

Below, we explain how current law appropriately addresses the genuine-applicant issue. We then refute the majority's reasons for overturning the existing legal framework and demonstrate that the approach adopted by the majority is not permitted by the Act. Finally, we identify critical flaws in the new standard, even considered on its own terms.

I.

This case properly should be decided under the analytical framework established by the Board in *FES*, supra, to govern refusal-to-hire and refusal-to-consider violations under Section 8(a)(3) of the Act. Acting with the benefit of briefing from the litigants and various amici curiae, as well as oral argument, the *FES* Board set forth a comprehensive framework making clear the elements of a violation, the respective burdens of the parties, and the stage at which issues were to be litigated.

FES rests on two bedrock principles of labor law approved by the Supreme Court: First, applicants for employment—including salts who apply for employment as part of a union's organizing efforts—are statutory employees under Section 2(3), entitled to the Act's protection. See *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995) (unanimously approving Board's holding that paid union organizers who seek employment are statutory employees); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (approving Board's holding that applicants for employment are statutory employees). Second,

[1] *Oil Capitol Sheet Metal, Inc.,* 349 NLRB 1348 (2007).

[2] *FES,* 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002).

[3] We agree with the majority's findings that: (1) the Respondents unlawfully refused to consider and hire James Jendrasiak on August 22, 1995; (2) the Respondent Foster Electric, Inc., unlawfully refused to consider and hire Jendrasiak on September 22, 1995; and (3) the Respondents did not unlawfully interrogate David Segar in September 1996. No exceptions were filed to the judge's dismissal of the Segar allegation.

violations of Section 8(a)(3), which prohibits "discrimination in regard to hire," turn on the question of the employer's motive. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (approving Board's framework for analyzing discharge cases under Sec. 8(a)(3), as established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982)).[4]

In accordance with those principles, *FES* places the burden on the General Counsel, in a refusal to hire case, to show that the employer was hiring or had concrete plans to hire, that a union applicant had the relevant experience or training, and that antiunion animus contributed to the employer's decision not to hire the applicant. 331 NLRB at 12.[5] If the General Counsel carries that initial burden, the burden shifts to the employer to show "that it would not have hired the applicants even in the absence of their union activity or affiliation." Id. at 12.

The *FES* Board rejected the position of then-Member Brame, that the General Counsel should be required to prove that the applicant had a "bona fide interest in employment" with the respondent employer. Id. at 26–27 (concurring opinion of Member Brame). But *FES* left available affirmative defenses based on lawful employer motives.[6] Thus, the *FES* framework allows an employer to prove that, notwithstanding its antiunion animus, it honestly believed that the applicant was not interested in being hired, and that this was the actual reason he was not hired or considered.[7] (The majority repeatedly misstates this burden as requiring employers to prove that, in fact, the applicant lacked a genuine interest in employment.)[8]

Until today, the protection of the Act has extended to all applicants for paid employment, including union salts. Apart from statutory-employee status, which the Act grants very broadly,[9] there has been no other status, such as being a "genuine applicant," that must be established to claim protection. See, e.g., *Progressive Electric, Inc. v. NLRB*, 453 F.3d 538, 551–553 (D.C. Cir. 2006), enfg. 344 NLRB 426 (2005).[10]

Instead, the focus in hiring-discrimination cases has been on the motive of the employer. That focus is dictated by Section 8(a)(3). The ultimate question under that provision is whether the employer's rejection of an applicant was motivated by antiunion animus. It makes no difference whether the union applicant coveted the job, detested the job, or simply wished to test his employability and the employer's adherence to the law. Cases like this one illustrate that some employers simply maintain and enforce a policy of refusing to hire union applicants, without regard to an applicant's qualifications, let alone the extent of the applicant's interest in the job. The refusal to hire or consider a union applicant, solely because of his union affiliation, surely implicates the prohibition of Section 8(a)(3) against "discrimination in regard to hire." 29 U.S.C. §158(a)(3).

The Supreme Court has explained why this is so, in upholding the Board's view that job applicants are statutory employees:

> Discrimination against union labor in the hiring of men is a dam to self organization at the source of supply. *The effect of such discrimination is not confined to the actual denial of employment*; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which . . .

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[4] See also *Radio Officers' Union v. NLRB*, 347 U.S. 17, 42–44 (1954). As the Supreme Court has explained,

> The language of Section 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage [union] membership by means of discrimination.

Id. at 42.

[5] The *FES* Board also limited the remedial exposure of employers in the refusal-to-hire context by requiring the General Counsel to establish that there was at least one available opening for each applicant. Id. at 12.

[6] See id. at 12 fn. 6 (noting that decision does not affect precedent governing affirmative defenses).

[7] Cf. *Aztech Electric Co.*, 335 NLRB 260, 265 (2001) (finding that employer failed to prove that it relied on alleged "disabling conflict" of union salts in refusing to hire them, and rejecting employer's argument that salts were not statutory employees), enfd. in relevant part 323 F.3d 1051 (D.C. Cir. 2003). See also *Lackawanna Electrical Construction*, 337 NLRB 458 (2002) (employer was not entitled to introduce additional evidence with respect to "disabling conflict" defense where employer did not, in fact, rely on existence of supposed conflict in refusing to hire paid union organizers).

[8] Cf. *Doctor's Hospital of Staten Island, Inc.*, 325 NLRB 730 fn. 3 (1998) (establishing affirmative defense in Sec. 8(a)(3) discharge case did not require employer to show that employee "had *in fact* engaged in misconduct," but simply to show that employer "possessed a good-faith belief . . . that [the employee] engaged in misconduct and that belief was the motivating cause of the discharge").

[9] The Board historically has interpreted Sec. 2(3) of the Act to include "members of the working class generally." *Briggs Mfg. Co.*, 75 NLRB 569, 570 (1947). The Supreme Court consistently has upheld the Board's broad interpretation. See, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (upholding Board's determination that undocumented aliens are statutory employees and observing that the "breadth of §2(3)'s definition is striking: the Act squarely applies to 'any employee'"). See also *Phelps Dodge,* supra, 313 U.S. at 191 (observing, with respect to the Board's remedial authority under Sec. 10(c) of the Act, that "[t]o circumscribe the general class, 'employees,' we must find authority either in the policy of the Act or in some specific delimiting provision of it").

[10] See also *Contractors' Labor Pool, Inc. v. NLRB*, 323 F.3d 1051, 1061 (D.C. Cir. 2003) ("An employee does not lose his protected status *merely* because he is a salt. Rather, he may lose it if he engages in unprotected activity that emanates from disabling conflicts arising in connection with salting").

> is recognized as basic to the attainment of industrial peace.

Phelps Dodge, supra, 313 U.S. at 185 (emphasis added). Thus, the Act's aims are furthered by finding unlawful an employer's refusal to hire or consider an applicant because of his union affiliation, even where it cannot be established that an applicant would have accepted a job if offered.

The *FES* Board drew on the same underlying principle in holding that an employer violates Section 8(a)(3) when it refuses to consider an applicant because of his union affiliation, even if the employer is not hiring at the time. 331 NLRB at 16. Such a refusal sends the message to future applicants (and present employees) that they will be discriminated against based on their union activity and thereby deters them from engaging in such activity. Id.[11]

The Supreme Court has employed a similar analysis in rejecting the argument that, because the statutory definition of "employee" could be read to exclude a person who has "obtained other regular and substantially equivalent employment," the Board was powerless to order reinstatement of a discharged worker who had found another job. The Board's authority, the Court explained, was not "confine[d] . . . to the correction of private injuries." *Phelps Dodge*, supra, 313 U.S. at 192–193. Rather, the Board has authority to further "the central purpose of the Act, directed as that is toward the achievement and maintenance of workers' self-organization." Id. at 193.

Simply put, then, there is a compelling statutory interest in uncovering, redressing, and deterring hiring discrimination under the National Labor Relations Act, as under Title VII of the Civil Rights of 1964, where "tester" applicants have been held to have standing to bring hiring-discrimination claims.[12] That interest is promoted by adhering to the *FES* framework, and the principles that inform it, in dealing with the "genuine applicant" issue.

II.

The majority, however, breaks completely with established law, while insisting that it is merely modifying the *FES* framework and that its decision "is neither revolutionary nor restrictive of the statutory rights of employees." "Requiring that the General Counsel prove an applicant's genuine interest in securing employment," the majority asserts, "is essential to the effective administration of the Act."

That claim is mistaken, as we will show. The majority defends its decision to overturn the law as necessary to combat abuses associated with union salting campaigns. Its position, however, rests on three fundamentally flawed premises: (a) that unfair labor practice charges filed by salts are inherently "meritless"; (b) that "nongenuine applicants" engage in disloyal behavior, unprotected by the Act, by participating in salting campaigns; and (c) that the current *FES* framework does not adequately deal with such abusive application practices as may exist. Notably, the General Counsel, who is responsible for investigating unfair labor practice charges and for prosecuting complaints before the Board,[13] has never made such claims—and has never been asked for his views in this case.

A.

The law is clear that union salts who apply for work are statutory employees and that salting is protected, concerted activity under Section 7 of the Act, even if its aim is to provoke an unfair labor practice. See, e.g., *M J. Mechanical Services*, 324 NLRB 812, 813–814 (1997), enfd. mem. 172 F.3d 920 (D.C. Cir. 1998). That is the Board's established view, and it has been approved by the courts. As the United States Court of Appeals for the District of Columbia Circuit has observed, citing the Board's decisions, "even when a salting campaign is intended in part to provoke an employer to commit unfair labor practices, union organizers retain their status as

[11] A refusal to consider in such circumstances, the *FES* Board stated, is "just as discouraging, and just as obviously discrimination in regard to hire, as the legendary 'No Irish need apply' signs of decades past." 331 NLRB at 16.

[12] The Seventh Circuit has found "no support in Title VII for a requirement that a job applicant must have a bona fide interest in working for a particular employer if she is to make out a prima facie case of employment discrimination." *Kyles v. J.K. Guardian Security Services*, 222 F.3d 289, 300 (7th Cir. 2000) (holding that testers who pose as job applicants to gather evidence of discriminatory hiring practices have standing to sue). The federal agency charged with the enforcement of Title VII, the Equal Employment Opportunity Commission (EEOC), has adopted the position that fair-employment testers have standing. See, e.g., EEOC Notice No. N-915.002 ("Enforcement Guidance: Whether 'Testers' Can File Charges and Litigate Claims of Employment Discrimination") (May 22, 1996), 1996 WL 33161339, available at http://www.eeoc.gov/policy/docs/testers.html.

As cases like *Phelps Dodge* demonstrate, the majority gravely misunderstands the scope of the National Labor Relations Act in arguing that the Title VII tester cases have no relevance here. The Act is not significantly narrower than Title VII in terms of the persons it protects, given the very broad definition of statutory employees. Nor does the Act reach a narrower class of employer conduct. Sec. 8(a)(3) broadly reaches "discrimination in regard to hire," and every violation of Sec. 8(a)(3) violates Sec. 8(a)(1), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." See, e.g., *Waumbec Mills, Inc.*, 15 NLRB 37, 46 (1939), enfd. as modified 114 F.2d 226 (1st Cir. 1940) (holding that discriminatory refusal to hire violated statutory precursor to Sec. 8(a)(1)).

[13] See Sec. 3(d) of the Act, 29 U.S.C. §153(d).

employees." *Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1197 (D.C. Cir. 2003). Indeed, in another case, the District of Columbia Circuit sharply rejected an employer's argument that salts "were not truly seeking employment" and thus were not statutory employees. *Progressive Electric*, supra, 453 F.3d at 552.

Current law, then, is flatly contrary to the majority's apparent presumption that unfair labor practice charges filed by salts have no merit unless it can be proven that the salt would have accepted a job offer. To repeat what should be obvious: the merits of a charge—whether an employer engaged in antiunion discrimination—have no necessary connection to the applicant's interest in the job.

Any question as to the general "merit" of charges filed by salts should be put to rest by the overwhelming number of cases in which the Board has found refusal-to-hire and refusal-to–consider violations since the issuance of *FES*. It goes without saying that salts, whatever their own interest in employment, perform a critical function under the Act. Because the Act is not self-policing and requires a charge before a complaint may issue,[14] the Board is dependent on individuals outside the Agency to uncover and bring to the Board's attention unlawful discriminatory practices.[15]

B.

There is thus no basis for the majority's apparent assertion that a salt applicant who seeks to provoke an unfair labor practice—e.g., by applying to an employer who is hostile to unionization and willing to discriminate unlawfully against union members—is somehow "disloyal" and thus not entitled to the Act's protection.

To begin, there is certainly nothing disloyal per se about seeking to organize an employer's work force. "Protection of the workers' right to self-organization . . . furthers the wholesome conduct of business enterprise." *Phelps Dodge*, supra, 313 U.S. at 182. That an employer may be hostile to unionization makes no difference, as the Supreme Court explained in finding that salts are statutory employees:

> [O]rdinary union organizing activity . . . is itself specifically protected by the Act. . . . This is true even if a company perceives those protected activities as disloyal.

Town & Country Electric, supra, 516 U.S. at 95–96. The *Town & Country* decision also makes clear that unless a salting campaign is accompanied by acts of violence, sabotage, or other unlawful or indefensible conduct, there is no basis for claiming that it is statutorily unprotected—much less that salts, as a class, are not statutory employees. Id. at 96–97.

The Court's earlier *Jefferson Standard* decision, invoked by the majority, has no bearing here.[16] "Loyalty to their common enterprise," the phrase lifted from *Jefferson Standard* by the majority, is simply not a concern of the National Labor Relations Act, except in the most general sense. The centerpiece of the Act, rather, is Section 7, which guarantees employees the "right to self-organization, [and] to form, join, or assist labor organizations," as well as the right to "engage in other concerted activities for . . . mutual aid or protection." 29 U.S.C. §157.[17] And it should go without saying that protected concerted activity includes efforts that would necessarily cause economic harm to employers: strikes and boycotts are only the most obvious examples.[18] The majority, however, seems unwilling to acknowledge that the Act, which broke dramatically with the traditional common law of labor relations, "protects a wide range of concerted activity by employees, even though it may be in sharp conflict with the economic interests of individual employers or of employers as a class."[19]

Although salts may generate unfair labor practice litigation—subject, of course, to the General Counsel's sole authority to issue complaints in cases he concludes have merit[20]—it is the employers who are committing the un-

[14] See *NLRB v. Indiana & Michigan Electric Co*., 318 U.S. 9, 17 (1943).

[15] See Erlich & Grabelsky, *Standing at a Crossroads: The Building Trades in the Twenty-First Century*, 46 Labor History 421, 432 (2005) (discussing the effectiveness of salts in "exposing unlawful conduct on the part of non-union contractors who routinely discriminated against union members").

[16] The issue there involved public disparagement of the employer, by employees, in a mass-distributed handbill that made no reference to the existence of a labor dispute or to the employer's labor practices. *NLRB v. Electrical Workers*, Local 1229, 346 U.S. 464 (1953).

[17] In holding that paid union organizers are statutory employees, the Board has refused to "require 'some type of transcendent loyalty' on the part of an 'employee' to the employer" and has reaffirmed that employers cannot treat organizing activities as "disloyalty." *Town & Country Electric*, 309 NLRB 1250, 1257 fn. 35 (1992), revd. 34 F.3d 625 (8th Cir. 1994), remanded 516 U.S. 85 (1995).

[18] Concerted "activity that is otherwise proper does not lose its protected status simply because [it is] prejudicial to the employer." *NLRB v. Circle Bindery, Inc.*, 536 F.2d 447, 452 (1st Cir. 1976). For example, unions may seek to increase the work of union subcontractors at the expense of nonunion subcontractors. *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616, 625 (1975). Unions may also seek to "level the playing field" through vigorous enforcement of applicable laws against unorganized employers. See *Petrochem Insulation, Inc.*, 330 NLRB 47 (1999), enfd. 240 F.3d 26 (D.C. Cir. 2001), cert. denied 534 U.S. 992 (2001) (intervening in state environmental agency proceedings to oppose employer's permit requests).

[19] *Aztech Electric Co.*, supra, 335 NLRB at 269 (concurring opinion of Members Liebman and Walsh).

[20] See *NLRB v. Food & Commercial Workers Local 23*, 484 U.S. 112 (1987).

fair labor practices. One would think that *such* conduct would be the Board's chief concern.

C.

Finally, there is no sound basis for concluding that where salts do engage in misconduct during the hiring process, those abuses cannot be effectively addressed by the Board under the existing *FES* framework. The majority cites only four Board cases purportedly illustrating such misconduct—a paltry number, given that (by our count) over 170 hiring-discrimination cases have been tried before the Agency's administrative law judges since the issuance of *FES*.

None of the cases establish that, under current law, the Board is somehow compelled to find a violation of Section 8(a)(3) in circumstances where an employer has not, in fact, acted with a discriminatory motive in refusing to hire or consider union applicants. Indeed, one case cited by the majority provides an especially good example of how the current *FES* framework adequately deals with misconduct by salts. In *Exterior Systems*, 338 NLRB 677 (2002), the Board found that an employer lawfully refused to hire a group of union applicants because of their "disruptive" and "disrespectful" behavior. *Exterior Systems*, in turn, highlighted the "genuine applicant" issue addressed here—the Board's three panel members each proposed different resolutions, which did not affect the outcome of the case[21]—yet in the 5 years since the decision was issued, the General Counsel has never taken the position that the "effective administration of the Act" requires the change in Board law adopted today.

III.

Under the majority's position, if the General Counsel cannot prove that an applicant would have accepted a job offer from the employer, then the applicant is not a statutory employee. Thus, there can be no violation of the Act, and no remedy of any kind (not backpay, not instatement, not a cease-and-desist order), even if the employer's refusal to hire or consider the applicant was motivated solely by antiunion animus. By removing certain applicants from the scope of Section 2(3), the majority effectively decrees that such applicants are not entitled to any protection under the Act—not only under Section 8(a)(3), but also under Section 8(a)(1).[22] It is hard to imagine a view of the law more at odds with the National Labor Relations Act and its aims.

Not surprisingly, the majority's view rests on no real authority at all. Section 2(3) of the Act defining "employee," as historically interpreted by the Board with the Supreme Court's approval, provides no support for the majority. Nor does Section 8(a)(3), prohibiting hiring discrimination based on antiunion animus, as traditionally understood. The two provisions, taken together, make clear that the employer's motive, and not the applicant's intentions, is the proper focus in cases like this one. And despite the majority's claims, Section 10(c) of the Act, addressing the Board's remedial authority, has no bearing on whether the Act has been violated in cases like this one.

A.

The Supreme Court's *Town & Country* decision, upholding the position of the Board that paid union salts who apply for jobs are statutory employees, made plain that a "broad, literal interpretation" of Section 2(3) is consistent with the statutory text, with the purposes of the Act, and with the Court's decisions. *Town & Country Electric*, supra, 516 U.S. at 90–92. The majority's constrictive reading, in contrast, has no textual basis, frustrates the purposes of the Act, and amounts to an attempted end-run around *Town & Country* and *Phelps Dodge*.

The majority does not base its position on the text of Section 2(3). Instead, it suggests that that definition is circular, leaving the Board "with the task of defining the word in ways that are consistent with the legislative purpose of the Act." As we have shown, the purposes of the Act, as examined in *Phelps Dodge* and *Town & Country*, are frustrated, not furthered, by the majority's approach.[23]

Where Congress intended to exclude certain classes of individuals from the Act's coverage, it carved out a se-

[21] Member Liebman's concurring opinion in *Exterior Systems* advocated adherence to the *FES* framework, as we do again here.

[22] Our law is to the contrary. The Board has frequently found independent violations of Sec. 8(a)(1) where an employer has interfered with, restrained, or coerced applicants in the exercise of Sec. 7 rights. See *Centerline Construction Co.*, 347 NLRB 322 (2006) (employer violated Sec. 8(a)(1) by interrogating job applicants concerning their union affiliation); *Quality Mechanical Insulation*, 340 NLRB 798 (2003) (employer violated Sec. 8(a)(1) by threatening and photographing union applicants). The majority now gives employers an entirely free hand in dealing with those individuals not affirmatively proven to be genuine applicants, regardless of the employer's coercive behavior and its inevitable effect on other employees in exercising their Sec. 7 rights.

[23] If anything, the language of Sec. 2(3), on its face, cuts against the majority's interpretation here, by providing that the

> term "employee" shall include any employee, and *shall not be limited to the employees of a particular employer*, unless the Act explicitly states otherwise. . . .

29 U.S.C. § 152(3) (emphasis added). The majority denies statutory-employee status to any applicant for whom the General Counsel cannot establish any intention to create an employment relationship with a particular employer. In effect, then, the majority would limit statutory employees to "the employees of a particular employer"—a limitation that Sec. 2(3) expressly rejects.

ries of discrete exemptions and codified them in Section 2(3).[24] If Congress had intended to exclude "non-genuine" job applicants, it presumably would have done so. Indeed, the majority now creates a new exception that Congress has repeatedly declined to enact: The majority's genuine-interest requirement mirrors the language and purpose of numerous anti-salting bills that have failed to pass in Congress in the 12 years since the Supreme Court decided *Town & Country*.[25]

The Board's decision in *WBAI Pacifica Foundation*, 328 NLRB 1273 (1999), relied on heavily by the majority, provides no support for its position here. The issue there was whether the *unpaid* staff members of a nonprofit corporation that operated a noncommercial radio station were statutory employees who were properly included in a bargaining unit with paid staff. The Board found that they were not, "because there [was] no economic aspect to their relationship with the Employer, either actual *or anticipated*." Id. at 1275 (emphasis added). Unpaid staff "receive[d] no wages or fringe benefits" and worked for non-economic reasons. Id. Thus, the "Act's concern with balancing the bargaining power between employer and employees does not extend to them." Id. at 1276. The Board distinguished the Supreme Court's decision in *Phelps Dodge* by observing that

> although the applicants [in *Phelps Dodge*] did not receive any form of compensation from the employer, they were seeking entry to wage-paying jobs and the discrimination against them had an adverse impact on those who were already wage earners.

Id. at 1274. *WBAI Pacifica* is easily distinguishable from this case, for the same reasons that it was distinguishable from *Phelps Dodge*. This case centers on the discriminatory denial of access to wage-paying jobs, discrimination that has an obvious impact on other wage earners.

B.

The plain language of Section 8(a)(3), in turn, also refutes the majority's position. When an employer refuses to hire or consider an applicant solely because of his union affiliation, it is obvious that there has been "discrimination in regard to hire," in the words of the Act. 29 U.S.C. §158(a)(3). We do not understand the majority to suggest otherwise.[26] Obviously, an applicant's subjective interest in employment may be unknown or irrelevant to an employer whose policy is to refuse to hire union applicants and who acts on that basis.

Not long after the Act was passed, the *Phelps Dodge* Court explained that the statutory "prohibition against 'discrimination in regard to hire' must be applied as a means towards the accomplishment of the main object" of the Act: removing the "embargo against employment of union labor." 313 U.S. at 186. Permitting employers to discriminatorily refuse to hire union applicants is utterly contrary to that objective. But the majority does permit such discrimination, by disregarding an employer's unlawful motive and instead making an applicant's intentions, insofar as the General Counsel can prove them, decisive. There is no precedent for such an approach.

C.

Section 10(c) of the Act certainly does not support the majority's approach. The majority argues that awarding backpay to applicants who have been discriminated against is impermissibly punitive, unless the General Counsel can prove that they would have accepted jobs. The majority's solution to this supposed problem is to hold that there has been no unlawful discrimination at all and that no remedy at all is permitted, whether backpay, an offer of instatement, or a cease-and-desist order. In effect, the majority says that the Board is powerless to redress hiring discrimination. But It is far too late in the labor-law day, 65 years after the Supreme Court decided *Phelps Dodge*, to take that view.

That decision establishes that in cases of hiring discrimination, the Board has authority under Section 10(c) to issue a cease-and-desist order, to order instatement, and to award backpay. 313 U.S. at 187–188. As for backpay, the majority's concerns about windfalls and penalties are unfounded, given existing limits on remedies in cases like this one, as well as practical factors. First, under *FES*, instatement and backpay are ordered only if the General Counsel can establish that there was a vacancy for the applicant who was discriminated against. *FES*, supra, 331 NLRB at 14. Second, the discriminatee's backpay award will be reduced by his interim earnings and by any failure to mitigate. Id. at 15. In a case

[24] Sec. 2(3) expressly exempts several classes of workers from the Act's coverage: agricultural laborers, domestic servants, individuals employed by a parent or spouse, independent contractors, supervisors, and employees covered by the Railway Labor Act.

[25] See The Truth in Employment Act, H.R. 2670 and S. 1570, 110th Cong.(2007); H.R. 1816 and S. 983, 109th Congress (2005); H.R. 1793, 108th Congress (2003); H.R. 2800, 107th Congress (2001); H.R. 1441 and S. 337, 106th Congress (1999); H.R. 758 and S. 328, 105th Congress (1997). See also, *Rep. King Says His Anti-Salting Bill Would Combat Unfair Economic Weapon*, Daily Labor Report, June 22, 2005, at A-12 (Rep. Steve King explaining the bill by stating, "[I]f a job applicant's 'primary purpose' in seeking a job is to further the interests of another, then they are not a 'bona fide' applicant.").

[26] Rather, the majority's decision rests entirely on Sec. 2(3) and the premise that discrimination is permitted against a certain class of applicants because they are not statutory employees at all.

where a salt applicant had no intention of accepting a job if offered, it is presumably because he was already employed, at higher wages, in a unionized workplace. Those higher wages, of course, will offset any backpay award. As for instatement, an applicant who has no interest in actually working for the employer will presumably decline the required offer.

Starcon, Inc. v. NLRB,[27] the pre-*FES* judicial decision relied on by the majority to support its position that no relief is appropriate where the employer discriminates against a "non-genuine" applicant, ironically supports the opposite position. In that case, the Seventh Circuit upheld the Board's order requiring the employer to cease and desist from discriminating against union supporters and to post a notice to that effect. To the extent the court disagreed with the breadth of the Board's order, it did so *only* with regard to the affirmative relief granted to the individual discriminatees. Id. at 952. The court did not hold, or even suggest, that there should be no remedial relief provided to address the employer's discrimination. In fact, the court specifically held that, even in circumstances where there was no basis for ordering reinstatement and backpay for the applicant, "the Board would still be entitled to enter a cease and desist order to provide some assurance against a repetition of the violation." Id. at 951.

IV.

Putting aside whether current law should be revisited and whether the general approach adopted by the majority is permitted by the Act, the new standard is still flawed in several crucial respects: It fails to provide clear guidance with respect to determining an applicant's genuine status. It places an unfair burden on the General Counsel by allowing an employer to first raise the genuineness issue during the unfair labor practice hearing. And it will both spawn and prolong the course of litigation by creating a new fact-intensive defense.

A.

The majority's notion that an adjudicator can easily assess whether the applicant would have accepted employment, if offered, is at odds with reality. A salt's decision, like that of any other applicant, will often be dependent on a wide range of factors, including the terms and conditions of the offered employment, competing job offers, and personal considerations.[28]

In turn, the majority proposes a completely open-ended test for conduct that an employer may cite to contest the genuineness of an applicant: "conduct inconsistent with a genuine interest in employment." The examples provided by the majority of the sorts of evidence that an employer might offer are not simply vague, but arbitrary, inasmuch as they may have little bearing on an applicant's genuine interest in employment. For example, the majority mentions an applicant's inclusion of an "offensive" comment on an application. (Would the phrase "voluntary union organizer" qualify?) Evidence that an application is "incomplete" is of similarly dubious relevance, not least because the law is clear that an applicant is entitled to omit information precisely to avoid being discriminated against.[29]

Alarmingly, the majority provides no guidance at all for the General Counsel in meeting his "ultimate burden" of proving genuine applicant status under the new test. In failing to offer that guidance, the majority implicitly recognizes the near-impossibility of discerning an applicant's subjective mindset, and therefore of meeting the General Counsel's burden.

B.

The majority also errs by allowing an employer to first raise the genuineness issue during the unfair labor practice hearing. By that stage of the proceeding the General Counsel's investigation of the case will have ended, and memories will likely be dimmer, making the General Counsel's task of responding to the Respondent's defense more difficult. Under the majority's approach, the General Counsel will be compelled to prepare for litigation of this defense in all cases in order to ensure that a timely investigation can be conducted. This will substantially add to the General Counsel's burden in investigating allegations of unlawful hiring discrimination, and require the General Counsel to spend time and resources preparing to litigate an issue that may never arise.[30]

C.

Finally, the majority's new framework will almost certainly create or prolong litigation, and add to the parties' legal expenses, by complicating the *FES* standard and adding a fact-intensive defense to the employer's arsenal. The majority invites litigation regarding the genuineness of the applicant in virtually every salting case, ironically

[27] 176 F.3d 948 (7th Cir. 1999).

[28] In *Town & Country*, the Court made a similar point in response to the employer's argument that paid salts can be differentiated from other applicants (and therefore discriminated against) because they might quit unexpectedly, "leaving a[n] employer in the lurch. . . ." The Court observed that "the argument proves too much," because any other worker, too, might leave for "a better job" or have a "family [that] wants to move elsewhere." Supra, 516 U.S. at 96.

[29] See, e.g., *Winn-Dixie Stores*, 236 NLRB 1547 (1978). See also *Hartman Bros. Heating & Air Conditioning, Inc. v. NLRB*, 280 F.3d 1110, 1112–1113 (7th Cir. 2002).

[30] Discerning an applicant's state of mind will be complicated where years have passed since the application was initially submitted. Because more than 10 years have passed since the charges were filed in this case, it makes little sense to remand this case to the judge "for further factual development" of the genuine-applicant issue.

increasing the prospect that employers will be subject to even higher litigation costs.

V.

By any measure, today's decision represents a failure in the administration of the National Labor Relations Act. The majority unnecessarily overturns carefully considered precedent and implements an untenable approach that will not even accomplish the majority's professed goals. Worse, the Board now creates a legalized form of hiring discrimination, a step that would have been considered unthinkable by the *Phelps Dodge* Court when it held that the prevention of hiring discrimination against union members was "the driving force behind the enactment of the National Labor Relations Act." 313 U.S. at 186. Because we still believe that it is crucial to the Act's basic mandate to uncover and redress discrimination against union members, we dissent.

APPENDIX A

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 fail and refuse to consider for hire or refuse to hire applicants for employment on the basis of their union affiliation or activity or our belief or suspicion that they may engage in organizing activity if they are hired.

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

WE WILL, within 14 days from the date of the Board's Order, offer James Jendrasiak instatement to the position for which he applied on or about August 22, 1995, or if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges he would have enjoyed.

WE WILL make James Jendrasiak whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful refusal to consider for employment and refusal to hire James Jendrasiak, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the refusal to consider him for employment and refusal to hire him will not be used against him in any way.

TOERING ELECTRIC COMPANY

APPENDIX B

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 fail and refuse to consider for hire or refuse to hire applicants for employment on the basis of their union affiliation or activity or our belief or suspicion that they may engage in organizing activity if they are hired.

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

WE WILL, within 14 days from the date of the Board's Order, offer instatement to James Jendrasiak to the positions for which he applied on or about August 22 and September 22, 1995, or if such positions no longer exist, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges he would have enjoyed.

WE WILL make James Jendrasiak whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful refusal to consider for employment and refusal to hire James Jendrasiak, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the

refusal to consider him for employment and refusal to hire him will not be used against him in any way.

FOSTER ELECTRIC, INC.

A. Bradley Howell, Esq., for the General Counsel.
Peter J. Kok, Esq. and *Gary A. Chamberlin, Esq. (Miller, Johnson, Snell & Cummiskey, P.L.C.),* of Grand Rapids, Michigan, for the Respondent.

SUPPLEMENTAL DECISION

The Board's Remand Order

I issued my decision in this matter on October 8, 1997. On June 7, 2000, the Board remanded the case for further consideration in light of its decision in *FES,* 331 NLRB 9 (2000). On June 27, I invited briefs from the parties to address the *FES* framework as it applies to this case. Both parties have filed such briefs. Since the Board did not address the refusal to consider for hire violations found in my initial decision and the parties' supplemental briefs address these issues, I am issuing a new self-contained decision, which incorporates the findings made in 1997, and applies the *FES* decision to these facts.

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Grand Rapids, Michigan, on April 28–May 1, and on July 16 and 17, 1997. The charge in Case 7–CA–37768 was filed on October 12, 1995, the charge in Case 7–CA–39903 was filed on October 11, 1996 and the charge in Case 7–CA–39205 was filed on November 15, 1996. The complaint consolidating all three cases was issued on January 30, 1997.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent Toering, a corporation, is an electrical contractor with offices in Grand Rapids, Michigan. Respondent Foster, a corporation, is an electrical contractor with offices in Muskegon, Michigan. Toering and Foster, individually and separately, annually purchase and receive goods and materials valued in excess of $50,000 directly from points outside of the State of Michigan. Toering and Foster admit and I find that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Overview

The General Counsel alleges that Respondents, Toering Electric and Foster Electric are a single employer with the meaning of the Act. David Toering is the President and majority stockholder of both companies. The General Counsel alleges that on August 22, 1995, Respondents refused to interview and consider James Jendrasiak for hire, and refused to hire Jendrasiak because of his union affiliation and activities.

The General Counsel alleges that Respondents refused to interview and consider Mr. Jendrasiak for hire, and hire him on or about September 25, 1995, for the same reasons. In June, 1996, Jendrasiak, by then a full-time organizer, responded to newspaper advertisements on two occasions by submitting employment applications to Toering Electric for himself and three other union members. These resumes were received by Toering on June 10 and 27, respectively. On July 29, 1996, Jendrasiak responded to additional advertisements by resubmitting the four resumes along with 14 other resumes. Toering Electric received these resumes on August 3, 1996. Toering did not contact any of the 18 employees, including Jendrasiak. The General Counsel alleges that Respondents have refused to hire and/or consider for hire each of the 18 union members whose resumes it received because of their union affiliation and to discourage employees from engaging in protected union activity.

The Historical Relationship of Toering, Foster, and the IBEW

David Toering established Toering Electric Company, a commercial and industrial wiring firm in about 1973. Toering Electric does business primarily in the Grand Rapids area. David Toering owns 60 percent of the company's stock and his wife owns the remaining 40 percent. Aside from David Toering, the company's principal management officials are Ward Stahmer, operations manager, Dennis Van Wyck, office manager/accountant, Tom Powers, purchasing agent, and Cliff Pollema, estimator.

In 1989, David Toering purchased Foster Electric, an electrical contracting company, which had been in business for over ten years. Foster's office is in Muskegon, 50 miles west of Grand Rapids. Foster's business is primarily in the Muskegon area; however, at times Toering Electric and Foster have projects in close geographical proximity to each other. David Toering is president of both companies and owns 70 percent of the stock in Foster Electric. Fifteen percent of the remaining shares are owned by Bruce Bartels, Foster's office/operations manager. The other 15 percent of the stock is owned by Fred Fairchild, Foster's field superintendent/project manager.

David Toering is actively involved in the management of Toering Electric and Foster Electric. For example, David Toering makes the final decisions with regard to the 401(k) plans and group health insurance for both companies. Otherwise, the two firms do not have the same management and personnel.[1] Both companies loan and borrow electricians from each other but they also borrow and loan electricians from and to other nonunion contractors.[2] The charge for loaning an employee between Foster and Toering Electric appears to be substantially

[1] Bruce Bartels worked for Toering Electric from 1985–1990. In 1990 he bought the Foster stock of Shane Toering, David Toering's son. When Bartels went to work for Foster, Shane Toering went back to work with Toering Electric.

Foster's corporate secretary, Mary Broucek, works out of the offices of Toering Electric in Grand Rapids (Tr. 199).

[2] Toering has borrowed employees from DePree Electric Company, a contractor which has a relationship with the Christian Laborer's Association, a union not affiliated with the IBEW.

identical to the charges assessed other contractors.[3] When he is looking for electricians to hire, Foster's office manager, Bruce Bartels, generally checks with Toering's office manager, Dennis Van Wyck (Tr. 210).

Toering provides some degree of administrative assistance to Foster Electric. This is primarily in form of tax and other financial services from Dennis Van Wyck, Toering Electric's accountant/office manager. Van Wyck, for example, manages Foster's 401(k) plan and group health insurance. Toering Electric charges Foster for these services.

Toering and Foster are both nonunion and are members of the Associated Builders and Contractors (ABC). The IBEW attempted to organize Toering in the early 1980s and lost an NLRB election. In 1994, David Toering became aware that the IBEW had targeted his companies for a "salting" organizing campaign. In 1994, the IBEW filed unfair labor practice charges against Toering. These charges were settled and as a result Toering offered jobs to 6 union members in July and August 1995. Four of these never responded to the offer.[4] The other two were interviewed by Toering and sent for preemployment physicals. They were then told when they should start work but never showed up at the Toering jobsite. Other IBEW members received back-pay in the settlement.[5]

Jim Jendrasiak's August 22, 1995 Job Application to Toering Through American Careers

On Sunday, August 20, 1995, American Careers, a job placement agency, ran an advertisement in *The Grand Rapids* Press for journeymen and apprentice electricians in the Muskegon area. The ad did not divulge the name of the prospective employer. This ad was placed pursuant to contractual arrangements with David Toering, who told John Williams, the American Careers service manager, that he was seeking journeymen for Toering Electric and Foster.

Two days later, James Jendrasiak went to American Careers' office in Grand Rapids to respond to the advertisement. At the time Jendrasiak was a journeymen electrician. He was also an unpaid member of the executive board of Local 107 and a voluntary organizer. At about this time he had been laid off by his employer, Kemco Electric Company.

At American Careers, Jendrasiak filled out an application and then was interviewed by John Williams. His application listed his prior employers as Kemco, Mellema Electric, Reynolds Metals, and Spencer Redner. Jendrasiak also indicated that he had been self-employed from February 1994 to February 1995, which was not true.

Williams interrupted the interview to call David Toering. Toering asked Williams where Jendrasiak acquired the hours needed to become a journeyman. Williams went back to Jendrasiak who told him that he served his apprenticeship at Buist Electric and Spencer/Redner Electric companies. Williams called Toering again. Toering asked Williams if Jendrasiak had any union background and directed him to find out whether any of Jendrasiak's prior employers were ABC members.

Williams returned and asked Jendrasiak if any of the companies he worked at to get his journeyman's rating, such as Spencer/Redner, were union shops. Jendrasiak either said no or avoided answering the question. He did tell Williams that he did not think Spencer/Redner was an ABC member. Williams then arranged for Jendrasiak to be interviewed almost immediately by David Toering. While Jendrasiak was on his way to the Toering offices, Williams contacted Kemco and discovered that it was a union contractor. He immediately called Toering and apprised him of this fact. Toering told Williams to continue checking Jendrasiak's references.[6]

When Jendrasiak arrived at the Toering Electric offices, he was met by Dennis Van Wyck, Toering's office manager. Van Wyck told him that there had been some misunderstanding, that David Toering was not available and that Jendrasiak should call American Careers.

After talking to Williams, Jendrasiak filled out a Toering employment application on which he indicated that he was a "voluntary union organizer." David Toering called Williams back and told him that he had "some bad dealings with these guys before in the past and did not want to have to interview" Jendrasiak (Tr. 458–459). Before leaving Toering Electric, Jendrasiak had a brief conversation with David Toering, who told him he had applied for a job with American Careers, not with his company.[7] Jendrasiak had no contact with American

[3] However, in 1995, Toering loaned Foster the services of William Brooks, a temporary employee working for Toering through American Careers, an employment agency, without charging Foster anything. It did so without clearing the loan with American Careers (Tr. 242–244).

[4] One of these, Geralyn Spofford, is an alleged discriminatee in the instant case. See GC Exhs. 61r and R-75.

[5] It is not clear from this record whether the charges were filed by Local 275 in Muskegon or Local 107 in Grand Rapids, or both. The individuals mentioned in this record were Local 275 members. On July 1, 1996, Local 107 merged with Local 275, and ceased to exist as a separate entity.

[6] Williams called Buist Electric and found that it had no record that Jendrasiak had worked there. Jendrasiak testified that he worked at Buist through a labor broker, rather than directly for Buist.

[7] David Toering denied saying anything to Williams other than expressing disapproval of Williams' decision to send Jendrasiak to his office without first clearing it with Toering Electric. He testified that he also told Williams that he couldn't read the faxed version of the application filled out by Jendrasiak at American Careers. I credit Williams' testimony that he had telephone conversations with Toering while he was talking to Jendrasiak at American Careers' offices. I credit Williams' testimony that David Toering asked him to inquire whether Jendrasiak had worked for union contractors to acquire his journeymanship status and whether these companies were ABC members. I also credit Williams' statement that Toering told him he didn't want to interview Jendrasiak because he had had trouble with these guys (meaning the Union) before. Williams appears to have been a completely neutral witness with no reason to fabricate his testimony. Moreover, his testimony is corroborated by Jendrasiak and a surreptitious tape made by Jendrasiak of his conversations with Williams (GC Exhs. 54, 55). Respondent relies (Br. at p. 9) on the fact that on August 22, Williams told Jendrasiak that Toering's lack of interest in him had nothing to do with his union background. Williams' testimony at the hearing establishes just the opposite. Moreover, one would hardly expect Williams to tell Jendrasiak on August 22, about his conversations with David Toering.

The sequence of events described above does not precisely comport with the testimony of any one of the witnesses. I infer from the testi-

Careers after August 22. He was recalled to work by Kemco in early September 1995, and did not contact Toering Electric again until June 7, 1996. On September 11, 1995, Toering hired journeymen Robert Keeler and William Brooks, who had been working for it through American Careers since June 1995 (Tr. 572–575, GC Exh. 9).

I infer that David Toering was seeking employees for Foster, as well as for Toering Electric in the August 20 advertisement. I draw this inference because the ad mentioned the Muskegon area and because Toering told John Williams he was seeking employees for both companies. American Careers referred employees to both companies.[8]

Indeed, at the beginning of August, Foster employed Brian Kelly, who it mistakenly thought was a journeyman, through American Careers. On September 11, Kelly was put on the Foster payroll and still works for the company despite an apparent misrepresentation about his status. During the last week of August, Foster began employing Roland Dye, a master electrician as an independent contractor. Dye appears to have worked for Foster on a fairly regular basis through December 1995. Foster also borrowed apprentice electrician Kevin Boley from Toering from August 28 to September 22, 1995.

Jendrasiak's Application For Employment To Foster Through Staffing, Inc.

On September 10, 1995, Jendrasiak saw another advertisement in *The Grand Rapids Press.* The ad run by Staffing, Inc., another temporary employment agency, stated that a Muskegon area company had a need for a journeyman electrician and a third year apprentice electrician. The ad was placed pursuant to a verbal order from Judy Hall, an office clerical at Foster Electric, to Sandy Hammet, the human resources administrator at Staffing, Inc.

The next day Jendrasiak went to Staffing, Inc.'s office, filled out an employment application and was interviewed by Ms. Hammet. Jendrasiak's application listed his prior employment with three union contractors. Additionally, notes made by Hammet on the application indicate that Jendrasiak served his apprenticeship through the IBEW (GC Exh. 4(a)–(e)). Sometime later that month, Hammet faxed Foster a copy of Jendrasiak's employment application. She also arranged through Judy Hall for Jendrasiak to be interviewed at Foster.

Jendrasiak called Bartels on the afternoon of September 22. Bartels told Jendrasiak to meet him at a McDonald's restaurant on Tuesday, September 26. Shortly afterwards, Bartels called Sandy Hammet, who was not in her office. She returned the call that afternoon. Bartels told her that he wanted to cancel the interview. He said that Jendrasiak "being affiliated with the union was big trouble. Foster Electric is an open shop and it would be trouble to bring him in." (Tr. 21, GC Exh. 4(e).) Bartels did not ask Hammet to refer any other applicants.[9]

On Monday, September 25, a journeyman electrician, Ed Wezeman, an employee of another nonunion contractor, Ottawa Electric, reported to Foster's jobsite at the Port City Tool Company. Wezeman worked for Foster for 3 weeks, all but 2 days at the Port City Tool job. For Wezeman's services, Foster paid Ottawa $24.90 per hour. The week after Wezeman returned to Ottawa, Foster borrowed journeyman Ken Slot and apprentice Terry Terpening from Toering. Slot worked for Foster for 3 weeks and Terpening for 4 weeks (GC Exh. 6, R. 24). The record does not reflect the name of their jobsite. Another Ottawa employee, apprentice Matt Crum, worked for Foster for 6-1/2 days beginning September 25 (GC Exh. 44).

Bartels contends that on Friday, September 22, after he talked to Jendrasiak, Ottawa Electric called him and said that they had a journeymen and an apprentice that they could loan to Foster. Bartels contends further that he had tried to borrow the electricians he needed from other contractors without success before contacting Staffing, Inc. He states Ottawa told him they would look into the situation and their work load, but didn't get back to him until September 22.

I find Bartels' testimony in this regard to be completely unbelievable. It would be an extraordinary fortuitous turn of events for Ottawa to call just after he received the faxed application from Hammet indicating that Jendrasiak was almost certainly a union member. In order to persuade me that such an event occurred independent of the Bartels' realization that Jendrasiak was a union salt, Respondent would need much more than Bartels' self-serving testimony. It would at a minimum have to produce documentary evidence or sworn testimony from Ottawa Electric's management as to the circumstances by which Wezeman, who apparently was not available previously, suddenly became available for Foster's use on September 22. I infer that, upon realizing that Jendrasiak was a union salt, Bartels procured the services of the Ottawa employees so that he would not have to interview Jendrasiak or consider him for employment.[10]

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mony and the tape, that Williams told Toering that Jendrasiak had come to Kemco through the union hiring hall before Jendrasiak arrived at Toering's offices. If this were not the case Toering would have had no reason for not considering Jendrasiak for the positions available at Foster.

Although Respondent strongly objected to my receipt of the tape and a transcript made of the tape, they are clearly admissible. Indeed, it may have been reversible error to reject them, *Plasterers' Local 90,* 236 NLRB 329 (1978); *Fontaine Truck Equipment Co.,* 193 NLRB 190 (1971).

[8] Toering Electric loaned William Brooks to Foster in July, 1995, without approval from American Careers (GC Exh. 6, invoice 009157). This indicates that Toering Electric regarded employees working for it through that agency as being available to work for Foster.

[9] Bartels confirms that he called Hammet on Friday, September 22, the same day that he set up the interview with Jendrasiak. However, he testified that he spoke with Hammet on Monday, September 25, not the 22d. More importantly, he denied telling Hammet anything along the lines of "Jim Jendrasiak, union, big trouble" (Tr. 682). On cross-examination, Bartels testified that he did not discuss a union with Hammet over Bartels. There is absolutely no indication that Hammet has any interest in this case at all. She would have no motive for fabricating her testimony. Moreover, her testimony is supported by her contemporaneous note and by the fact that David Toering had expressed similar sentiments to John Williams of American Careers just 1 month earlier.

[10] Respondent's brief suggests this scenario makes no sense because Bartels already knew Jendrasiak was affiliated with the Union when he originally set up the interview. This it argues he knew from the application faxed by Hammet. However, Hammet's testimony is that she set up the interview with Judy Hall. It is possible that Bartels did not read

The Union's 1996 Salting Efforts

On June 6 and 20, 1996, Toering Electric advertised for journeymen and apprentice electricians in *The Grand Rapids Press*. These ads did not identify Toering (and are therefore referred to as "blind" ads). James Jendrasiak, who since January 1, 1996, had been a full-time organizer, responded to these advertisements. He sent the resumes of four union members; Patrick Cosgrove, Bernard Hamstra, Richard Newville, and himself, to a post office box. The first packet was received on June 10, the second on June 27. Neither Jendrasiak nor any of the other union members received a response to these submissions.

One month later, on July 28, Toering ran the advertisement again. On July 29, Jendrasiak resubmitted the 4 resumes along with 14 others.[11] These resumes had been submitted to the Union's organizers in response to solicitations for resumes to be used to respond to blind advertisements, and were kept on file. Toering received Jendrasiak's submission on August 3.

Jendrasiak's cover letter (GC Exh. 61(a)) stated that the applicants were registered electrical apprentices or had passed a Michigan's journeyman's examination. It stated that any protected activity that the applicants may choose to engage in would be conducted in accordance with guidelines established by the NLRB and would not interfere with the efficiency and productivity of the employees. The letter advised of the Union's right to file charges with the NLRB should the recipient refuse to nondiscriminatorily consider the applications and stated further, "If for any reason you refuse to accept this applicant or if you consider same deficient in any manner please advise me immediately so that remedial action may be taken."

Dennis Van Wyck, Toering's office manager, testified that he did not respond to the Union's submission because the resumes were xerox copies and not up-to-date. He stated this led him to believe that the applicants weren't interested in employment (Tr. 627). Respondents made no response to any of Jendrasiak's submissions. Toering Electric did not, as it routinely did in other instances, ask any of the Union applicants to supplement their resumes by filling out a Toering application form (See Tr. 625).

Many of the resumes were not current.[12] For some there is no way of telling when they were prepared. However, others clearly indicate fairly recent preparation. For example, the resume of Bernard Hamstra (GC Exh. 61(h)) indicates that he took a National Electrical Code course in 1996. John Fekken's resume (GC Exh. 61(g)) sets forth his work history through October 1995.[13]

Two of the resumes were from apprentices. The resume of Douglas Scott does not reflect that he has any experience as an electrician and appears to predate his apprenticeship (GC Exh. 61(o)).[14] However, one can easily deduce from the resume of Wayne Harris (GC Exh. 61(i)) that this applicant is an apprentice. The resume indicates that he has worked for three employers as an apprentice electrician from August 1994 to January 1996.

Toering Electric generally maintains a permanent workforce of between 30 to 35 employees. In peak periods of work it supplements this work force by a variety of means. It hires employees from temporary employment agencies, borrows employees from other nonunion contractors[15] and it some cases directly hires new employees. The summer of 1996 was one of these peak periods. Filling Toering Electric's needs was complicated by the fact that there has been a shortage of qualified electricians in western Michigan for the past 5 years.

From late June to mid-July Toering brought a number of new employees to its worksites, including the following:

Christian Karr, who worked for Toering from June 20 through at least June 28, through Troy Technical Services;

Kenneth Palm, a journeyman, who started working for Toering Electric on July 15;

Frank Inman, a Missouri journeyman, who worked from July 22-September 4, through Construction Services;

Justin Lake, a temporary employee, who worked from July 23-August 16;

Lance Pittlekow, a journeyman, who was borrowed by Toering from Associated Electric Co., on July 18. Pittlekow became a regular Toering employee in November;

Jim McCune, a journeyman, who started with Toering on July 12;

John Hagerty, who had a Virginia journeyman's license and was hired by Toering on July 16;[16]

Clint Zang, who worked 4 days as an independent contractor, beginning on July 29;

David Lamberts, a journeyman, who worked as an independent contractor for a week starting July 31;

Matt Hummel, who worked August 5 and 6, through the Talent Tree employment agency;

Josh Akin, who was hired as an independent contractor on August 3;

Two journeymen (Mike Boruta and Mike Wagner) and two apprentices (Joel Plaggemeyer and Rick Hop), that

Jendrasiak's application until after he talked to him. On the other hand, Bartels may have set up the interview at the same time that he was seeking a way out of having to consider Jendrasiak for employment.

[11] On July 1, 1996 Local 107 and 275 merged. Jendrasiak became an organizer for the new unified local. Jendrasiak obtained thirteen of the 14 new resumes from James Leenhouts, an organizer who worked for Local 275 before and after the merger. Two of the applicants besides Jendrasiak are full-time paid officials of the Union. They are James Leenhouts and George Robinson Jr.

[12] Toering's reliance of the lack of specificity with regard to the dates that the Union applicants worked for various employers is undercut by the fact that David Lamberts' application suffers from the same defect. Lamberts, who was hired by Toering on July 31, 1996, gave no indication as to when he worked for the employers listed on his employment application (GC Exh. 34).

[13] Fekken had worked for nonunion contractors as recently as 1995. Indeed, while working for one of them in 1994, he applied for work at Toering and was offered a job, which he did not accept. Throughout most of the fall of 1996, he was working for a union contractor in Battle Creek, a 2-1/2-hour drive from his home.

[14] However, Scott's resume does reflect a background in electronics; Jendrasiak's cover letter represents that the resumes are all from journeymen or apprentice electricians.

[15] See fn. 2.

[16] Hagerty did not start work for Toering Electric until August 19, 1996.

Toering borrowed from Classic Electric Company starting August 26, 1996 (GC Exhs. 25, 29). Boruta worked for Toering two weeks with overtime; Wagner worked 3 days; Plaggemeyer worked two weeks with overtime and Hop worked 36 hours for Toering (R. Exh. 30).

Toering did not do any direct hiring between August 3 and September 3, 1996. It explains this fact as being due to the delay in several large contracts, notably the wiring of the Big Rapids, Michigan high school and a job at Foremost Graphics Company. Toering bid on the Big Rapids project on June 18, a $1.8 million project. It expected that contract would be awarded in mid-July, but did not receive confirmation until August 1. It began working at Big Rapids on September 18. Toering expected to start work at Foremost Graphics in June or July. The contract for the project was not awarded until November. Due to these delays Toering was able to transfer some employees from projects completed in the summer to Big Rapids and Foremost Graphics.

On September 3, however, it hired Mike Baar, an apprentice with no prior work experience in the electrical wiring field, who applied for work on August 29. On September 29, Toering hired David Seger as an apprentice and on October 7, it hired John Baar, an apprentice with no prior experience in the industry.[17] On October 14, Toering borrowed journeyman Bob Nelson and four apprentices from Gelders Electric. It also borrowed journeyman Mason Miller and apprentice Dave Selby from Van Horne Electric at the same time for a two week period.

Toering Electric has a policy that employment applications are only valid for 30 days from receipt. This policy is stated at the top of the application. However, Toering has made exceptions to this rule and accommodations for applicants it desired. Kenneth Palm filed an employment application with Toering on April 10, 1996, and started work for Respondent on July 15. John Hagerty applied and was hired on July 16, but was allowed to report to work on August 19. Kolin Shoemaker applied for a job on November 3, 1996, and was hired in February 1997. Toering's reliance on this policy is a pretext to justify its discriminatory hiring practices. It does not constitute a nondiscriminatory basis for excluding the Union applicants from openings that occurred more than 30 days after their applications were filed.[18]

[17] On September 16, 1996, Foster hired Shane Bostrum, an apprentice.

[18] Respondent's explanation of these exceptions is as follows:

> In April, Palm knew he was going to be laid off by his employer and filled out an application. Toering agreed to hire Palm when the lay-off took effect. Although there is some suggestion that Palm was hired to work on the premises of his former employer, this job lasted only an additional three months. Palm also worked on the Foremost Graphics project in late 1996 and/or early 1997. Consistent application of the 30-day rule would seem to have required repeated applications by Kenneth Palm. Despite the understanding with Toering, it's possible that in the months between his original application and his lay-off, Palm may have decided to work elsewhere.

Analysis

Toering Electric Company and Foster Electric, Inc. are not single employers under the Act. However, David Toering and Dennis Van Wyck were acting as agents of both Toering and Foster in dealing with union job applicants in 1995 and 1996.

The General Counsel alleges that Toering Electric and Foster Electric are single employers. The significance of such a finding would be that both companies would be jointly and severally liable to remedy the unfair labor practices of the other, *Emsing's Supermarket,* 284 NLRB 302 (1984).[19]

The factors for evaluating whether two entities are a single employers are: (1) common ownership, (2) interrelation of operations, (3) common management, and (4) centralized control of labor relations matters, *Denart Coal Co.,* 315 NLRB 850 (1994). No single factor is deemed controlling. The Board has stated that the single-employer relationship is characterized by the absence of the arm's length relationship found among unintegrated companies. It has also stated that the fundamental inquiry is whether there exists overall control of critical matters at the policy level, *Emsing's Supermarket,* supra.

While in the instant case there is obviously an ongoing relationship between Toering Electric and Foster, I conclude that the degree of interrelationship is not sufficient to deem them to be a single employer. Aside from David Toering's involvement, the management of the companies is not substantially identical. On a day-to-day basis the companies are managed independently. Foster is managed by Bruce Bartels and Fred Fairchild; Toering by David Toering, Dennis Van Wyck, and Ward Stahmer. The two companies appear to operate largely as separate entities, often in different geographical markets, albeit in the same industry. While not all dealings between Toering and Foster appear to be arm's length (for example the loan of William Brooks), the two companies generally charge each other a market rate for services rendered.

At the time of the events in the instant case, David Toering and Dennis Van Wyck had some involvement in the hiring practices of Foster Electric. However, it appears that Foster retained a substantial degree of autonomy in its labor relations. For example, the record indicates that Bruce Bartels acted independently in failing to consider James Jendrasiak for employment on the basis of antiunion animus.[20]

As a practical matter the only implication of my failure to find Foster and Toering Electric a single employer is to make Toering Electric's assets unavailable to remedy the discrimination by Bruce Bartels, as an agent for Foster, against James Jendrasiak on September 22, 1995. Otherwise, both companies are liable because I find that David Toering and Dennis Van Wyck were acting as agents of both companies in discriminating against union applicants on the other occasions alleged in

[19] A closely related doctrine, "alter-ego," appears to be applied in instances where one company ceases doing business and a new company is started to continue the business of the defunct company, *Allcoast Transfer,* 271 NLRB 1374, 1378–1379 (1984).

[20] Foster apparently retained the services of Staffing, Inc. without the involvement of David Toering or anyone else at Toering Electric.

the complaint.[21] When David Toering placed advertisements in the newspaper in August 1995, through American Careers, he was clearly acting as an agent for Foster as well as Toering Electric. His refusal to interview and consider James Jendrasiak for employment is imputable to Foster as well as Toering Electric. Since Dennis Van Wyck is generally consulted by Foster whenever it looks for electricians to hire, I deem Van Wyck also to be an agent of both companies when dealing with job applicants.

While there is no direct evidence that Toering was seeking employees for Foster in the summer of 1996, I conclude that David Toering and Dennis Van Wyck were acting as agents for Foster at this point in time as well. Foster hired electricians in the fall of 1996 and the record indicates that Foster checked with Van Wyck whenever it needed to hire electricians. The decision of Toering and Van Wyck to exclude the Union applicants from consideration for employment with Toering, necessarily would have excluded them from any consideration for any positions with Foster of which they may have become aware.

On August 22, 1995, Toering Electric and Foster Electric violated Section 8(a)(1) and (3) in refusing to interview, consider and hire James Jendrasiak.

On August 20, Toering Electric placed an advertisement, through American Careers, in *The Grand Rapids Press* seeking journeymen and apprentice electricians. By virtue of the mention of the Muskegon area, I infer the ad was seeking employees for Foster as well as Toering. In response to the ad, James Jendrasiak went to American Careers, a temporary employment agency retained by Toering. John Williams, American Career's service manager interviewed Jendrasiak. Pursuant to David Toering's direction, Williams inquired as to Jendrasiak's union background.

After the interview, Williams sent Jendrasiak to Toering Electric's offices for another interview with David Toering. While Jendrasiak was in transit, Williams informed David Toering that Jendrasiak had worked through a union hiring hall. When Jendrasiak arrived he was told there was a misunderstanding and that he would not have an interview with David Toering. I conclude that the interview was canceled due to Toering's animus towards the IBEW.[22] This animus is established by Toering's directions to Williams during the interview.

David Toering had Jendrasiak fill out a Toering Electric application form. On it Jendrasiak indicated that he was a voluntary union organizer. Toering, in a subsequent call to John Williams, confirmed his animus towards the Union by telling Williams that he had had bad dealings with the Union previously and did not want to have to interview Jendrasiak.

Toering's assertion that Jendrasiak was not interviewed because Toering Electric didn't need any electricians is pretextual. David Toering was looking for employees for Foster, as well as for Toering Electric. At the time of Jendrasiak's visit, Foster was still looking for journeymen electricians, as evidenced by its subsequent employment of Roland Dye as an independent contractor, the advertisement it placed on September 10, its continued search for employees through Staffing, Inc. and other electrical contractors, and its borrowing of electricians from Ottawa Electric and Toering Electric in September and October, 1995.

In *FES*, the Board held that to a establish a discriminatory refusal to consider, the General Counsel must show that: (1) the respondent excluded applicants from a hiring process, and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. If this is established, the employer must show that it would not have considered the applicants even in the absence of their union activity or affiliation. To establish a discriminatory refusal to hire, the General Counsel must show: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirement of the positions for hire, or in the alternative that the employer has not adhered uniformly to such requirements, or that the requirements were pretextual or were applied as a pretext for discrimination; and (3) that anti-union animus contributed to the decision not to hire the applicants. If these elements are established the employer must show that it would have not hired the applicants even in the absence of their union activity or affiliation.

As a practical matter, once the General Counsel has established a refusal to consider violation, he must then show only that the respondent was hiring, or had plans to hire in order to establish a refusal to hire violation. If he seeks an affirmative backpay and instatement order he must also show there were openings for each of the applicants.

With regard to Jendrasiak's 1995 applications, I find that Respondents violated the Act both in August and September in refusing to consider Jendrasiak for hire and in refusing to hire him. In August, Toering and Foster, by David Toering, excluded Jendrasiak from the hiring process because of anti-union animus. Respondents have not established that it would have refused to consider him for employment in the absence of his union activity or affiliation.

Moreover, Foster, if not Toering Electric, had concrete plans to hire, at the time it declined to hire Jendrasiak due to his union activity and affiliation. Foster, in fact, did hire Roland Dye as an independent contractor, borrowed apprentice Kevin Boley

[21] Although the General Counsel's brief does not argue that Toering and Van Wyck were agents of both companies in dealing with job applicants, there is no denial of due process in so concluding because this issue was fully litigated. For example, Respondents had the opportunity to rebut John Williams' testimony that David Toering asked him to look for employees for Foster, as well as for Toering Electric. Van Wyck's role in referring available electricians to Foster is in the record through the testimony of Bruce Bartels, as well as through the invoice for William Brooks' services, about which Van Wyck was questioned by the General Counsel.

[22] Respondents cannot rely on the misrepresentations in Jendrasiak's application as justification its unwillingness to consider him for employment. First of all, they did not refuse to consider him for employment for making misrepresentations. Secondly, Foster's willingness to retain Brian Kelly despite his misrepresentation of his journeyman status, suggests that that it has a fair degree of tolerance for even more serious misrepresentations on the part of employees without a union background. Third, Respondent cannot rely on Jendrasiak's misrepresentations about his union affiliation because its inquiries in this regard violated the Act.

from Toering for a month and put Brian Kelly, who it mistakenly thought was a journeyman, on its payroll. It has thus been established that there was an opening for Jendrasiak had Respondents considered him for hire without discrimination. The advertisements placed by Foster on September 10, establish that Foster had plans to hire additional journeyman or third-year apprentices even after it obtained the services of Dye and Boley.

The fact that Kelly was already working for it through American Careers, does not establish that Foster would have hired Kelly, as opposed to Jendrasiak, had it not excluded Jendrasiak from the hiring process due to his union activity and affiliation. Similarly, the fact that Robert Keeler and William Brooks were already working on Toering jobsites through American Careers, does not establish that Toering Electric would have hired either of them, rather than Jendrasiak, had it not excluded him from the hiring process due to his union affiliation.

Respondent Foster violated Section 8(A)(1) and (3) by refusing to interview, consider and hire Jendrasiak in late September 1995.

Foster ran an advertisement for a journeyman and third-year apprentice on September 10 through Staffing, Inc. It is clear that well into the afternoon of September 22, when Jendrasiak set up his interview with Foster's operations manager, Bruce Bartels that Foster was still in the market for journeymen electricians.

Bartels called Sandy Hammet the same afternoon to cancel the interview. He told Hammet that Jendrasiak's relationship with the Union was big trouble. In light of this, I reject any notion that the sudden availability of electricians from Ottawa Electric, another nonunion contractor, was coincidental. I infer that when Bartels became aware of Jendrasiak's union affiliation, he contacted or recontacted Ottawa and took whatever measures were necessary to insure that Ottawa would make its employees available to Foster on September 25. I therefore conclude that Foster's refusal to interview and consider Jendrasiak for hire was discriminatory.

Further, the record establishes that Foster had an opening for Jendrasiak. It filled this opening with Ed Wezeman, an employee it borrowed from Ottawa Electric Company and Ken Slot and/or Terry Terpening, which it borrowed from Toering Electric. I therefore also find that Foster violated the Act in refusing to hire Jendrasiak in September 1995.

Toering Electric violated Section 8(a)(1) and (3) in failing to consider for hire and in refusing to hire any of the union members whose employment applications it received in June and August 1996

Toering Electric concedes that it received the two packets of resumes sent by Jendrasiak in June and the one mailed in July. It also concedes that it gave none of the employees whose resumes it received the slightest consideration. Toering asserts that it ignored these resumes because they were copies and not up-to-date (Tr. 627). Therefore, Dennis Van Wyck, Toering's office manager assumed the individuals were not interested in employment.[23]

I infer that the reason the resumes were ignored were that they were from Union salts and that therefore Respondent violated Section 8(a)(1) and (3) in ignoring them. While some of the resumes were out-of-date, others, such as those of Bernard Hamstra, John Fekken and Wayne Harris, were relatively current.[24] Moreover, Toering's failure to respond to Jendrasiak's request that he be informed if the resumes were deficient, is further evidence of discriminatory motive.

The General Counsel has established a refusal to consider violation in that Toering excluded the Union applicants from the hiring process because of the union activity and union affiliation. Respondent has not met its burden of showing that it would not have considered any of the applicants in the absence of these considerations.

The General Counsel has also established a discriminatory refusal to hire the 1996 applicants. Toering was hiring at the time it decided not to hire these employees. Each had experience and training relevant to the journeyman and apprentice electrician positions Respondent was hiring. The decision not to hire the union applicants was made on the basis of their union activity and affiliation. Respondent has not established that it would not have hired any of the applicants in the absence of these considerations.

In *FES*, the Board held that if the General Counsel seeks a backpay and instatement order, he must show that there were openings for the applicants. Where the number of applicants exceeds the number of available jobs, the compliance proceeding may be used to determine which of the applicants would have been hired for the openings. In applying this rule to instant case, I find that applicants James Jendrasiak, Patrick Cosgrove, Richard Newville, Bernard Hamstra, Wayne Harris, and Douglas Scott are entitled to backpay and an instatement order. In the compliance proceeding it must be determined which of the journeymen applicants, who first applied on July 29, 1996, would have been hired for the journeyman openings that occurred after that date.

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[23] R. Br. at p. 2 suggests that Toering was entitled to ignore these applications because the IBEW's salting campaign is intended to drive nonunion contractors out of business and to manufacture unfair labor practices, rather than to secure employment. However, Toering's witnesses did not testify that this was a factor in their decision to ignore the union resumes. Moreover, I infer that the IBEW has no interest in driving Respondents out of business if they become signatory contractors (See R. Exh. 83). As discussed herein, I believe that Respondents experience with Local 275 is too limited for it to make a blanket assumption that the Union's salts would not accept jobs if they were offered.

[24] Respondents suggest at pp. 37–38 of its brief that it was entitled not to take the union resumes seriously because none of the "applicants" took any individual initiative to seek work with Toering or filled out an adequate employment application. This ignores that fact that the ads placed in the *Grand Rapids Press* asked only that resumes be sent to a post office box. Toering could have contacted Jendrasiak and informed him that it would only consider those applicants who were willing to complete a company application form (assuming that is what it would have required for nonunion employees responding to the ad). He did not do so.

Jendrasiak, Cosgrove, Newville, and Hamstra applied to Toering two times in June. In July 1996, Toering hired the following journeymen electricians: John Haggerty, Lance Pittlekow, Jim McCune, Frank Inman, and Ken Palm. Thus, there was an opening for each of the applicants.

Wayne Harris and Douglas Scott were Union apprentices who applied for work with Toering on July 29. After that date, Toering hired the following apprentices: Matt Humell for 2 days, Joel Plaggemeyer and Rick Hop for 2 weeks and 1 week, respectively, Josh Akin, Mike Baar, David Seger, John Baar, the four apprentices from Dupree Electric and Dave Selby from Van Horne. The fact that some of these were hired more than 30 days after Harris and Scott applied does not rule out consideration of these openings in fashioning a remedy with regard to Harris and Scott. The 30-day rule was not consistently applied and Toering's reliance upon it is pretextual in this case.

The General Counsel concedes that the number of union journeymen applicants exceeds the number of openings for journeyman. Twelve union journeymen applied to Toering for the first time on July 29. After that date, Toering hired the following journeymen: David Lamberts, Mike Boruta and Mike Wagner (from Classic), Bob Nelson (from Dupree), and Mason Miller (from Van Horne). At compliance it must be determined which of the twelve union journeymen would have been placed in these positions. The fact that some of these positions lasted a very short time is relevant to the amount of backpay owed, not to whether Respondent refused to hire the applicants.

The General Counsel's Allegation that David Toering unlawfully interrogated David Seger with regard to union affiliation is dismissed.

At the commencement of the hearing the General Counsel moved to amend his complaint to allege that David Toering interrogated David Seger about his union affiliation in September 1996. I grant the motion and dismiss this allegation because that it rests solely on the testimony of Seger. I consider Seger's testimony, where uncorroborated, insufficiently reliable to support any factual findings.

CONCLUSIONS OF LAW

1. By refusing to interview, consider and hire James Jendrasiak on or about August 22, 1995, Respondents Toering Electric and Foster Electric have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

2. By refusing to consider for hire and hire James Jendrasiak on September 22, 1995, Respondent Foster Electric violated Section 8(a)(1) and (3).

3. By refusing to consider for hire and refusing to hire James Jendrasiak, Patrick Cosgrove, Bernard Hamstra, and Richard Newville, since June 10, 1996, Toering Electric Company has violated section 8(a)(1) and (3).

4. By refusing to consider for hire and refusing to hire the 18 union applicants, whose resumes were received on August 3, 1996, Toering Electric Company has violated section 8(a)(1) and (3).

5. Respondents, through David Toering, did not unlawfully violate section 8(a)(1) in interviewing David Seger in September 1996.

REMEDY

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

Having found that Toering Electric Company on one occasion, and Foster Electric Company on two occasions in 1995, violated Section 8(a)(3) and (1) by refusing to hire James Jendrasiak, it shall be ordered that he be offered immediate employment in the positions for which he applied and is qualified and that he be made whole for any earnings lost by reason of the discrimination against him, from the date of refusal to hire to the date of a bona fide offer of instatement.

Having found that in 1996, Respondent, Toering Electric Company, violated Section 8(a)(3) and (1) by refusing to hire James Jendrasiak, Patrick Cosgrove, Bernard Hamstra, Richard Newville, Wayne Harris, and Douglas Scott, it shall be ordered that they be offered immediate employment in a position for which they applied and are qualified, and that they be made whole for any earnings lost by reason of the discrimination against them, from the date of refusal to hire to the date of a bona fide offer of instatement.

Having found that Toering Electric violated Section 8(a)(3) and (1) by refusing to hire the employees named below, it is ordered that when it is determined in the compliance proceeding, which of them should have been hired for the available journeymen electrician vacancies, they shall be offered immediate employment in those positions and backpay.

> Gary Becklin, Mark Butzow, Jeffrey Engel, John R. Fekken, James Leenhouts, Leonard Petznik, Raymond Rager, George Robinson, Jr., Jeffrey Stadt, Leo Smith, Geralyn Spofford and Daniel Watters

If it is shown at the compliance stage of this proceeding that Toering Electric, but for its discrimination, would have hired any of these remaining discriminatees to jobs at other sites, it shall be ordered to make those individuals whole for the discrimination found and, if those positions no longer exist, to place them in positions substantially equivalent to those for which they applied. In all instances, backpay shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]