UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AMERICAN BACKFLOW & FIRE PREVENTION, INC.

and **Cases 13–CA–285856**
13–CA–296614
PLUMBERS LOCAL 130, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL–CIO **13–CA–305278**
13–CA–313981

and

SPRINKLER FITTERS LOCAL 281, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL–CIO

Elizabeth S. Cortez and *Francis Copp Wellin, Esqs.*,
for the General Counsel.
Michael Holmes, Bernard Burdzinski, Esqs., and *Cynthia Sauter*
for the Respondent.
Keith R. Bolek, April H. Pullium, and *Sumbul I. Alam, Esqs.,*
for the Charging Party.

DECISION

STATEMENT OF THE CASE

G. REBEKAH RAMIREZ, Administrative Law Judge. This case was tried in Chicago, Illinois, on June 3, 4, and 5, 2024. Plumbers Local 130, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO (Local 130) filed the initial charge in Case 13–CA–285856 on November 8, 2021, and amended charge on January 6, 2022; the initial charge in Case 13–CA–296614 on May 26, 2022, and amended charge on June 14, 2022, and February 17, 2023; and the initial charge in Case 13–CA–305278 on October 14, 2022, and amended charge on February 17, 2023. Sprinkler Fitters Local 281, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO (Local 281) filed the charge in Case 13–CA–313981 on March 14, 2023. The General Counsel issued a consolidated complaint on March 7, 2023, and an order further consolidating cases and a second consolidated complaint on August 28, 2023 (the complaint). Respondent timely filed an answer in which it denied all alleged violations of the Act.

The General Counsel alleges that American Backflow & Fire Prevention, Inc. (Respondent or the Company) violated the National Labor Relations Act (the Act) when it:

(a) On about July 9, 2021, refused to consider for hire or hire Thomas Jennrich and Philip Roknich, and about January 12, 2022, refused to consider for hire or hire Michael Laskarin;

(b) On about January 12, 2022, changed its website to indicate it was not hiring employees for bargaining unit positions;

(c) Since about June 27, 2022, displayed and maintained a sign prohibiting unions on the door of the main entrance of its facility;

(d) Since about June 27, 2022, changed its hiring practices by refusing to accept and maintain hard–copy paper applications for bargaining unit positions;

(e) Since about December 2021, discontinued its past practice of conducting annual performance appraisals in about December of each year, and issuing performance–based pay increases by about March of the following year;

(f) During the 6 months prior to the filing of the charge in Case 13–CA–305278, transferred bargaining unit work to nonunit employees, supervisors and/or managers;

(g) Since about late-August 2022, changed its past practice of granting wage increases of $5 to bargaining unit employees for obtaining trade certifications or licenses;

(h) Since about March 13, 2023, has failed and refused to bargain collectively with Local 130 and Local 281 (together the Unions); and withdrew its recognition of the Unions on March 13, 2023.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and the Unions,[2] I make the following:

[1] The transcript and exhibits in this case are generally accurate. During my review of the record, I found transcript errors where corrections are warranted, although none are material: on pg. 591, line 18, and pg. 593, line 14, "certification" should be "decertification"; pg. 632, lines 8 and 9, "UOP" should be "ULP"; pg. 642, line 5, "way" should be "weight."

[2] The transcript and exhibits in this decision are referenced as follows: "Tr." for transcript, "Jt. Exh." for joint exhibit, "GC Exh." for General Counsel's exhibit, "CP Exh." for Charging Party's exhibit, and "R. Exh." for Respondent's exhibit. The post hearing briefs are referenced as "GC Br." for the General Counsel's brief, "CP Br." for the Charging Party's brief, and "R. Br." for Respondent's brief. Although I have included several citations in this decision to highlight particular facts or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather on my review and consideration of the entire record of the case.

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent has been a corporation, with an office and place of business in Wauconda, Illinois, and has been engaged in the business of installing and repairing backflow, plumbing, and fire line safety inspection equipment. In conducting its operations during the 12 months prior to August 28, 2023, Respondent purchased and received goods valued in excess of $50,000 from points outside of the state of Illinois. Accordingly, Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

In addition, Respondent admits, and I find that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is a family–owned business that was originally established by Dan Harbut's father. Harbut is the current owner and president. (Tr. 418, 606, 614.) He lives in Arizona and travels to Respondent's facility in Illinois (the Wauconda facility) as needed to oversee the business. (Tr. 655.) Respondent has a second facility in or near Phoenix, Arizona. (Tr. 421.) David Loes has been the operations manager at the Wauconda facility since October 2016. (Tr. 557.) Loes reports directly to Harbut. (Tr. 558.) Loes' responsibilities include hiring, firing, and granting wage increases to employees. (Tr. 559.) At all material times, Stephanie Heffner has held the position of office manager for Respondent. (GC Exh. 32.) Cynthia Sauter has been Respondent's labor relations consultant and lead negotiator since January 2021. Respondent admits that Harbut, Loes, Heffner, and Sauter have been supervisors and/or agents of Respondent for purposes of Section 2(11) and 2(13) of the Act.

In addition, Respondent admits that the following individuals are Section 2(11) and 2(13) supervisors within the meaning of the Act: Thomas Grubbs, plumbing division manager, Kaden Harbut,[3] IT manager, James Hermann, backflow division manager, David Larcombe, fire suppression division manager, Joshua Quintana, fire sprinkler division manager, and Ramon Quintero, fire alarm division manager.

In mid–2020, Local 281 Organizer William Hincks and Local 130 Union Organizer Paul Rodriguez began a campaign to represent employees in Respondent's backflow/plumbing and fire sprinkler divisions. (Tr. 29–30, 39.) According to documents obtained by Hincks from the Office of the State Fire Marshal, as of June 2020, Respondent had two main divisions, the backflow and plumbing division, and the fire division. Respondent had a backflow and plumbing manager, with 7 employees reporting to him (five backflow technicians, one plumbing apprentice, and one journeyman plumber, including 2 open positions). Respondent had a fire division manager and fire division assistant manager, with 13 employees reporting to them (five

[3] Kaden Harbut is Dan Harbut's son. (Tr. 80–81.)

fire sprinkler technicians, five fire division apprentices, 2 fire extinguisher/ansul technicians, and one fire alarm technician,[4] including 3 open positions). (GC Exh. 2.) Eventually, eleven employees signed authorization cards. (Tr. 157–159, CP Exh. 1.)

On April 22, 2021, the Unions filed a joint petition for an election with the Board seeking to represent Respondent's plumbers, sprinkler technicians, and backflow technicians.

B. Issues prior to Unions' certification

1. May 2021: Respondent fires backflow manager Jennifer MacDonald

At the time the joint petition was filed, Respondent's backflow division manager was Jennifer MacDonald. MacDonald had been hired as a backflow plumber in 2011 and had been promoted to management in 2019. She supervised about five to six backflow technician plumbers and two to three plumbing apprentices in 2021. MacDonald credibly testified that on about April 23, 2021, Respondent's human resources manager at the time, Carrie Goldstein, told her that MacDonald was going to be fired "as a sacrificial lamb" to show that no one is safe in response to the Unions' petition for an election. (Tr. 261–262, 264.) Goldstein did not testify, and she no longer works for Respondent.

MacDonald testified that on May 7, 2021, Loes called her and asked that she help get the Unions' petition pulled, that things were getting costly, and he knew she could help him. (Tr. 267.) MacDonald also testified that on May 14, 2021, Loes asked her to bring her truck into the facility. She assumed that she was getting fired and called Dan Harbut to ask him if that was the case. Harbut told her that he could not believe that she had not known about the Unions. This was MacDonald's last day working for Respondent. She was handed her termination the following Monday, May 17, 2021. (Tr. 268, 281.) Shortly after, MacDonald was approached by the Unions and was hired as an organizer. (Tr. 284.) During cross-examination, MacDonald was asked if she had assisted the Unions in organizing employees while she was still a member of Respondent's management. MacDonald credibly denied she did so. (Tr. 287.)

I note that MacDonald's termination is not an alleged unfair labor practice and that the General Counsel only seeks to show union animus with her testimony. I find MacDonald was a credible witness. She took time to respond to questions and provided details about the conversations she had with Goldstein, Loes, and Harbut. On the other hand, I do not credit Loes' testimony about the reasons MacDonald was terminated. Loes testified that MacDonald's employment ended because "towards the end, she needed to go home every day early, she came in late, so I just made the decision that she wasn't doing her job anymore, and I talked to her about it. It didn't seem to matter. So, I let her go." (Tr. 569.) I find Loes' testimony self-serving, and untrustworthy. I also note that his testimony was not corroborated by any documentary evidence or any other witness. Harbut did not testify about MacDonald's termination and/or the phone conversation she alleged having with him. Therefore, MacDonald's testimony about her conversation with Harbut is uncontroverted

[4] At the time of the hearing, the fire alarm employees were represented by Production Workers of America, Local 707 (Local 707). Local 707's representation started a short time after the Unions in this case were certified. (Tr. 45.)

2. May 2021: Respondent tells Lyndon Leisher during an interview that it is looking for "nonunion workers"

On about May 21, 2021, Local 281 union member Lyndon Leisher was contacted by phone by Adam Hughes, a recruiter with EPR Recruiting. Hughes asked Leisher if he was interested in applying for a job with Respondent. Leisher said that he was, and Hughes set up an interview. (Tr. 292.)

On May 29, 2021, Dan Harbut interviewed Leisher, by phone, for a fire sprinkler and alarm inspector/repair technician position. Leisher testified at the hearing that he had a union job at the time of his interview, but he told Harbut during the interview that his current job was at a nonunion facility. Leisher credibly testified that Harbut told him that was good to hear, that he was looking for nonunion workers, that there was an election coming up, but he was 100 percent sure that the Unions would not be voted in. (Tr. 293–294, 308–309.) Harbut sent Leisher a job offer that same day. (GC Exh. 19.) Leisher's start date was set for June 14, 2021. (Tr. 297.) Harbut did not testify about Leisher's interview or job offer.

3. June 2021: Unions win election

The Board–conducted election was held on June 9, 2021. (Tr. 40.) It is undisputed that the eligibility voter's list had 14 employees in the following classifications: journeyman plumber, plumber apprentice, fire sprinkler technician, fire sprinkler technician (NICET II), fire sprinkler apprentice, fire sprinkler/ansul technician, and ansul apprentice. In addition, the parties agreed that three individuals would vote subject to challenge. (GC Exh. 32.) The tally of ballots showed that of the approximately 18 eligible voters, 9 votes were cast for the Unions, 5 votes were cast against, with 2 challenged ballots, a number insufficient to affect the results of the election. (Tr. 40–41; GC Exh. 31.)

4. June 2021: Respondent tells Leisher that he can start as a "nonunion" employee

On June 14, 2021, Leisher sent an email to Harbut and Loes stating, in pertinent part, "I have found out that the employes voted yes for the union, I have always been nonunion and as I mentioned in my interview, I do not want to be union. . . Unless there is something that changes with the whole union thing or you can guarantee that I will not have to be in the union, for now I have decided to stay at my current job." (CP Exh. 21.) After sending the email, Leisher received various voice messages from Adam Hughes. (Tr. 292, 303–305.) Leisher kept the recordings of these voice messages. On the voice messages, Hughes stated that Harbut wanted to talk to Leisher. In one of the messages, Hughes stated that Harbut shared with him that the "alarm side is nonunion, that the sprinkler side is the one that had the vote, and it's still not actually going through, but worst case scenario, the alarm side is still open. . ." (CP Exh. 22.) Leisher eventually agreed to talk to Harbut.

Harbut and Leisher spoke on the phone on June 15, 2021. According to Leisher, Harbut told him not to worry about the Union, that he had let go of one of the prounion employees and it would be determined if other employees would keep their jobs, and that he would get Leisher working with an antiunion apprentice. Leisher stated that he was not interested in the job.

According to Leisher, Harbut told him that Harbut would have to show that he was bargaining with the Union, that he would never agree to any of the terms, and after a year he would have a re–vote. Leisher then told Harbut that he was nervous to go work there as a sprinkler technician, and Harbut offered to change his title to alarm technician to get him around the Unions. Leisher said he would think about it, but they did not talk again. (Tr. 298–299.)

At the hearing, Leisher testified that he is not employed by the Unions. He testified that he told Harbut he was declining the job offer because of the union to "gain information" on the Company, which he then shared with Union Organizer Hincks. (Tr. 310.) Harbut did not testify about this phone conversation with Leisher. I credit Leisher's uncontroverted testimony.

5. June 2021: Unions are certified

On June 22, 2021, the Board certified Local 130 and Local 281 as the joint exclusive collective-bargaining representatives of the employees in the following appropriate unit:

> All full–time and regular part–time journeymen and apprentice fire sprinkler technicians, fire sprinkler/ansul technicians, plumbers, and backflow technicians employed by the Employer at its facility located at 111 Kerry Lane, Wauconda, Illinois.

(GC Exhs. 31–32.) On June 25, 2021, the Unions sent a letter to Respondent proposing that negotiations be scheduled starting on July 6, 2021. (GC Exh. 4.)

C. July 2021—Unions go on strike

On July 6, 2021, the Unions began an unfair labor practice strike.[5] (Tr. 44.) The record does not include much information about the strike. Hincks testified that 10 bargaining unit employees participated in the strike, including Gerald Wettstein (the only employee left in the unit by the time of the hearing). (Tr. 163.)

D. Evidence related to failure to consider for hire or hire Thomas Jennrich and Philip Roknich

Two days after the strike started, on July 8, 2021, Hincks took a photograph of a big banner that Respondent placed on the side of the building at the Wauconda facility displaying, in all capital letters, "Now Hiring, Plumbing, Backflow, Sprinkler Technicians" and a phone number. (GC Exh. 3.) Hincks also found that Respondent had job postings for three openings for backflow tester/ repair technicians posted on the online job search website, Indeed.com. (CP Exh. 5.)

[5] I take judicial notice of *American Backflow & Fire Prevention, Inc*., 373 NLRB No. 71 (2025) (*American Backflow*) which issued after the hearing in this matter. I will discuss this decision below but note that the complaint in that case alleged, among other things, that on July 6, 2021, Loes told employees that it would not negotiate with the Union, that it would be futile for them to select the Union as their bargaining representative and threatened that it would replace the Union by selecting its own collective-bargaining representative.

On the same day, at the direction of Hincks and Union Organizer Rodriguez, Thomas Jennrich, Philip Roknich, and approximately 20 union apprentices went to the Wauconda facility to apply for work. Jennrich and Roknich are full-time plumbing instructors at the Joint Apprenticeship and Training Program (JATP) for Local 130 and have been for more than 10 years. (Tr. 315, 334.) They were not and are not employed by the Unions. The men went to the front door of the Wauconda facility and formed a line. Someone from Respondent's office told them to wait outside and gave them job applications. The men were all wearing union shirts. Jennrich and Roknich submitted their applications shortly after. (Tr. 316–320, 336–341; GC Exh. 29.)

On July 9, 2021, Jennrich and Roknich received separate emails from Loes stating that they would not be considered for a job because their resume and/or application were "incomplete." Loes ended the email by asking that they not apply again "for at least 12 months."[6] (GC Exhs. 21 and 23.) A review of Jennrich's application and resume reflects that the application was complete except for his available start date and hourly salary desired, which were left blank. He also left blank whether he was currently employed but his resume indicated his current employment. (GC Exh. 20.) Roknich's application is also complete except for that he missed to initial and sign page five of the application. (GC Exh. 22.) Both applications list their current employment with the JATP.

At the hearing, both Jennrich and Roknich stated that at the time they applied to work for Respondent, they could not have worked two full-time jobs and would not have accepted a job offer if one was offered by Respondent. (Tr. 331–332, 347–348.)

E. July—September 2021: Hires

The joint stipulation of facts entered into evidence reflects that between July and September 2021, Respondent hired six bargaining unit employees.[7] (GC Exh. 32, par. 6.)

Name	**Position**	**Hire date**	**Separation date**
Carl Schermer[8]	plumber journeyman	July 14, 2021	July 16, 2021
Brandon Johnson	fire sprinkler technician	July 31, 2021	November 30, 2021
Patrick McCormick	fire sprinkler apprentice	August 8, 2021	September 4, 2021

[6] I note that in an email dated February 10, 2022, Cynthia Sauter, Respondent's labor consultant, in response to an inquiry by a Board agent, stated that Respondent did not hire Jennrich and Roknich because if would have been "a conflict of interest" due to the fact that the Unions were on strike at the time. (Tr. 452; GC Exh. 34.)

[7] The record also reflects the hiring of Octavio Medina on May 24, 2021. Medina was still employed by Respondent at the time of the hearing and his application shows that he left blank his certifications and entire employment history. (GC Exh. 38.)

[8] Schermer's job application reflects that he was a "walk-in," and that he indicated "see resume" in place of completing his application's education, employment history and certification/licenses sections. (GC Exh. 37.)

Name	Position	Hire date	Separation date
Brian King[9]	fire sprinkler technician	August 30, 2021	September 10, 2021
Daniel Kowaleski[10]	fire sprinkler apprentice	September 21, 2021	February 8, 2022
Brian Malek	plumber journeyperson	September 27, 2021	February 8, 2022

Of these employees, only Brian Malek was called as a witness at the hearing. Malek's testimony will be discussed below. Hincks testified that he also observed Kaden Harbut, the owner's son, come into work at the Wauconda facility during the strike.[11] (Tr. 68–69.)

The record also includes evidence that on July 9, 2021, Loes sent an email to an applicant named Scott Poole, stating that Loes had received and reviewed his application and resume, but that he was looking for a plumbing and backflow manager, not a technician. Loes asked Poole to let him know if he was interested in the manager role. The email does not state that the applicant should not apply for 12 months. (CP Exh. 28.)

F. August 2021: Strike ends

On August 10, 2021, Hincks sent an email to Respondent with an unconditional offer to return to work from the striking employees. (GC Exh. 5.) The strike ended shortly thereafter. (Tr. 44–46.)

G. September 2021—December 2021: Brian Malek[12]

1. September 2021: Malek's interview

In late–September 2021, Brian Malek, a Local 130 member, was directed to apply for a job with Respondent by Union Organizer Rodriguez. Malek went online to the job search engine Indeed.com and found job openings with Respondent. When he clicked on a link to apply, he was directed to Respondent's website. (Tr. 372, 401.) The website had a "now hiring" statement, and he was able to fill out an online job application. The online application asked that he indicate when he could start, his salary requirements, and to attach his resume. Once he submitted the

[9] King's job application reflects that he was a "referral," and stated "see application on Indeed" in lieu of filling his employment history. (GC Exh. 36.)

[10] Kowaleski's job application reflects that he had previously worked for Respondent and his employment history was left blank. (GC Exh. 39.)

[11] During an October 2021 bargaining meeting, Hincks asked why Kaden Harbut was not on an organization chart provided by Respondent, and Loes told him that they would not discuss Kaden's employment because he is the owner's son and is a minor. Kaden was 17 or 18 years old in 2022. (Tr. 80-81, 519; GC Exh. 6.)

[12] The parties stipulated that they met in person to bargain on September 7 and 8, October 28 and 29, November 29 and 30, and December 22, 2021. (GC Exh. 32.) Hincks was the Unions' lead negotiator, accompanied by Local 281 President Brian La Roche, Local 130 Organizer Paul Rodriguez, Local 130 Union Representative Patrick McCarty, and two bargaining unit employees. For Respondent, attorney Jonathan Sutton was the lead negotiator and was accompanied by Loes and by Respondent's office manager, Stephanie Hefner. (Tr. 55–57.)

online application and his resume, he received a message that stated, "message has been sent." Malek kept print screens of the website, online application, and sent message. (GC Exh. 27.) A review of Malek's resume reflects that he has over 18 years of plumbing experience and has a plumbing license. The resume makes no reference to any union affiliation. (GC Exh. 33.)

Malek followed up his online application with an in-person visit to Respondent's facility on September 23, 2021. There he met with Loes. Loes directed him to a conference room where there were piles of application forms. Loes gave him an application and he filled it out right then. Loes then conducted an impromptu interview. At some point during the interview Loes said that the Company was having issues with the Unions, and said that he probably should not ask, but asked Malek what was his "politics/political preference." Malek replied that he was conservative minded. Loes told him that the Company's employees had voted for the Unions, and they had lost approximately 20 employees because of problems with the Unions. (Tr. 376–378.) Malek was offered a job and started on September 27, 2021. (Tr. 371; GC Exh. 32.)

Malek also testified that on about September 27, 2021, he met with Dan Harbut for what he called a job interview. According to Malek, it started out as a standard interview but at some point, Harbut told him that they were having issues with the Union, and he wanted to know what Malek's feelings were about the Union. Malek replied that he felt like unions in general helped uphold nonunion wages but that he was not particularly interested in being part of a union. (Tr. 391–392.)

2. October 2021: Malek is shown union supporter's job application

About 2 weeks after being hired, Malek was in the office when Loes commented that the Union had "sent a guy over to apply for a job." Malek asked how Loes knew, and Loes told him to look for himself. Loes showed him the job application of Cameron Smith, which had a business card from a union attached to it. Loes told Malek to look at the cover page of Smith's application. The cover page stated that Smith will "help fellow workers know their rights under the National Labor Relations Act" and "inform the workers about the benefits of forming a union." (GC Exh. 35.) Office Manager Jennifer Heffner came in and Loes showed her the application too. Malek testified that Heffner said why would the Union think we would hire this guy, and Loes said "exactly, and besides we already have a plumber who does not have a backflow certification," referring to Malek. (Tr. 379–381.)

Heffner was not called as a witness. Loes did not testify about Malek's interview or about discussing Smith's application with him, therefore Malek's testimony is uncontroverted. Loes testified that he did not know that Malek was a union supporter when he was hired, but that about a week after being hired, he saw Malek coming through the entrance door of the facility, where Respondent has a camera, wearing a union hat and quickly taking it off. Loes testified that he did not talk to Malek about the hat or his union support. (Tr. 572.)

3. November 2021: Unions file charge in Case 13–CA–285856

The Unions filed the unfair labor practice charge in Case 13–CA–285856 on November 8, 2021, alleging that Respondent had refused to hire and/or consider hiring Jennrich, Roknich, and 19 other individuals, who were eventually not named in the complaint. (GC Exh. 1 (a).)

4. December 2021: decertification petition posted on bulletin board

In early–December 2021, Malek received an email from Loes that was sent to all employees with the subject line "Bulletin Board." The email states:

> All, please check the bulletin Board [sic] right outside of the entrance to the office from the employee entrance. That is where we put pertinent information for the employees to review. Currently there is a form that an employee posted that is requesting signatures. This is not mandatory to sign, so review and sign if you so choose to. Any employee may sign if they want to, or not. Again, this is not a management request but coming from one of your fellow employees.

(CP Exh. 24.) Malek went to the bulletin board and took a picture of the posting. The posting stated "To whom it may concern, We, the current and active employees of American Backflow and Fire Protection, state in writing, that we no longer wish to be represented by the unions of 130 and 281. Please cease further actions on our behalf." The statement was signed by seven individuals, including admitted Section 2(11) Managers Joshua Quintana and Jim Hermann, office staff Courtney Zimary, and Fire Alarm Technician Jess Vallor—none of which are bargaining unit employees.[13] The form was signed on December 7 and 8, 2021.[14] (CP Exh. 23.)

5. December 2021: comments at Christmas party

Respondent had a company Christmas party sometime before December 25, 2021. Malek attended the party. He testified that the Company held a "white elephant" gift exchange. When it was Heffner's turn to pick her gift, she said she wanted to speak first and stated that she was grateful for all employees' hard work, with all the union problems, we will kick the "fucking union's ass." (Tr. 382–384.) Heffner was not called as a witness although she is still employed by Respondent. No witness controverted Malek's testimony concerning Heffner's comment.

6. January 2022: Malek told he may be called by NLRB

Sometime in January, Malek was in a company car driving Loes to Respondent's facility when Dan Harbut called Loes. Malek testified that Harbut told him that the NLRB would probably call him to ask how he was hired. Malek explained that he had applied online and in person, and Harbut told him not to tell the NLRB that he had applied online because "that would screw us." (Tr. 387–388.) At the time Malek was wearing a bright yellow beanie hat with the Local 130 logo on it. (Tr. 396.) Neither Loes nor Harbut controverted Malek's testimony about this conversation.

[13] The bargaining unit employees that signed the notice were Gerald Wettstein, Chuck Tyche, and Lindsay Bouffard.

[14] The Union filed another unfair labor practice charge in Case 13–CA–288185 on December 28, 2021 alleging, among other things, that Respondent had posted or allowed a decertification petition to be posted on its bulletin board and solicited employees to sign it. This charge is addressed in *American Backflow*.

H. Evidence related to failure to consider for hire or hire Michael Laskarin

1. December 2021: job openings and hires

Documentary evidence shows that in December 2021, Respondent posted job openings on Indeed.com. On December 1, 2021, job applicant Aleksandar Visnjic received an automatic email in response to submitting his resume on Indeed.com stating "fire sprinkler opening," "reply to this email," "we need fire sprinkler techs and/or managers", "many open positions, email me back if interested." (CP Exh. 25.) On the same date, Hincks also found on Indeed.com a job opening for the Wauconda facility for backflow tester/ repair technicians. (GC Exh. 7.) Respondent also had a job posting for backflow tester/ repair technicians for "immediate need" at a job search engine called Lensa. The job was originally posted on December 8, 2021, and the posting expired on January 5, 2022. (Tr. 94; GC Exh. 9.)

Respondent hired Adam Leslie as a fire sprinkler apprentice on December 21, 2021. (GC Exh. 32, par. 6.)

2. January 2022: Michael Laskarin's job application

On January 12, 2022, Michael Laskarin, a plumbing instructor for the Indiana State Pipes Trade Association, visited Respondent's facility to apply for a job. Earlier that day, he had visited Respondent's website and had seen that there was a "hiring now" message on the Company website. He went to Respondent's facility wearing a face mask and a black hoodie with a union logo on it stating, "Plumbers Local 210." (GC Exh. 24.) Laskarin filled out an application in person and handed it in. His application states that he is applying for a plumber and backflow tester job, that he is available to start the next day, and that he had heard about the Company from the Unions. He listed his work experience and plumbing licenses and stated that while employed he "would support my fellow employees to ensure they are represented" and "plan on picketing before work, on lunch or after work to ensure" employee rights are met. (Tr. 350–355; GC Exh. 25.)

On the same day, Loes sent Laskarin an email stating that he had reviewed his qualifications, found him to be "highly qualified but we currently do not have a need for a Plumber, Backflow tester at this time." Loes ended the email by stating that the application would be kept on file. (GC Exh. 26.)

At the hearing, Laskarin credibly testified that he would have accepted a job if one was offered. (Tr. 359.) He explained that at the time of his application he was a part–time night instructor and could have worked a full–time job for Respondent. (Tr. 362–364, 367–369.)

I. January 2022—Respondent changes website to "not hiring"

Starting in January 2022, Cynthia Sauter, president and CEO of Burdzinski & Partners, Inc., a labor relations consulting company, replaced Sutton as Respondent's lead negotiator during bargaining. (Tr. 58–59; GC Exh. 32.) Sauter was hired by Respondent to help with labor relations matters, negotiations, and defending the Company from unfair labor practice charges.

(Tr. 451.) Legal Counsel Keith Bolek began representing the Unions as lead negotiator in January 2022. (Tr. 57.)

Shortly after Laskarin attempted to apply for work, the Unions noticed that Respondent's website was changed to state: "Note: not hiring Fire Sprinkler, Fire Alarm, or Plumbers currently at Illinois location, please call for other positions available." (CP Exhs. 7–8.)

During a bargaining meeting on January 24, 2022, Bolek asked Sauter if Respondent was hiring or had plans to hire. According to Hincks, Sauter stated that Respondent was not hiring. Bolek asked Sauter why Respondent's website was changed to state that it was not hiring. Sauter replied that there were unfair labor practice charges pending, that she was not looking to be a witness again, and that she had advised Respondent to state this on its website. (Tr. 89–90.) Sauter was called as a witness but was not asked about Hincks' testimony concerning what she said at the bargaining table or the changes to Respondent's website. Therefore, Hincks' testimony is uncontroverted.

Harbut testified that Respondent changed the website in mid–January 2022 after Respondent received an unfair labor practice charge that alleged "that we were hiring where we didn't hire somebody." He further explained that Sauter asked him where this came from, and he "tracked it down to that website, which doesn't say we're hiring, it says we're hiring, but it doesn't say we're hiring for plumbers," "it didn't give any clear direction on who we were hiring for." (Tr. 421.) Harbut explained that the website was designed to take applications online, but it turned out that feature was not working, even when it would appear it was working. (Tr. 420.) Harbut stated that he thought the website "could be a little misleading." When asked if it was his decision to change the website, Harbut testified "I consulted with Cindy [Sauter] because I didn't want to have any more ULPs. I didn't want any more, you know, I'm trying to, you know, make sure that we're in compliance," "it was a joint effort." (Tr. 422.) When asked why he changed the website, Harbut further testified that "I was working the best I could to make sure that we weren't doing anything wrong with the labor law. You know, I—this is pretty new to me and I just want to make sure that . . . if it doesn't say you're hiring a plumber, you're not hiring a plumber, but I could see where someone says, hey you know what, maybe because they are hiring, they're hiring a plumber . . . I didn't want to mislead anybody or—or, you know, have any more issues. All my intentions were good." (Tr. 634–635.)

Hincks testified that later in the year, about mid–2022, he went back to Respondent's website and noticed that all dropdown boxes to apply online had been eliminated. (Tr. 178–179, CP Ex. 8).

J. February 2022: four bargaining unit employees resign

It is undisputed that Respondent lost four bargaining unit employees in February 2022. Brian Malek, who was a journeyman plumber, resigned on February 8, 2022. (Tr. 371.) Daniel Kowaleski, who was a fire sprinkler apprentice, also resigned on February 8, 2022. Mike Lilla, who was a journeyman plumber, also resigned in February. Adam Leslie, who was a fire sprinkler apprentice, resigned on February 28, 2022. (Tr. 534–536.)

K. April 2022—informal settlement agreement

On April 26, 2022, the Acting Regional Director for Region 13 of the Board approved an informal settlement agreement in Case 13–CA–288185. Among other things, the settlement agreement required Respondent to: (1) post and read a notice to employees at the Wauconda facility; (2) remove from its bulletin board the posting from December 2021 seeking to decertify the Unions; (3) if requested by the Unions, meet at reasonable times and intervals and bargain in good faith with the Unions; (4) agree to the certification year being extended to January 24, 2023; (5) commit to a bargaining schedule of no less than four bargaining sessions per month, with each session lasting at least eight hours; and (6) provide the Union with information it requested in November 2021. The settlement agreement also contained what is commonly known as a "default judgment" provision stating that if Respondent did not comply with the terms of the settlement agreement, the General Counsel would file a motion for default judgment on the allegations of the complaint, which would be deemed admitted. Respondent was required to comply with the settlement agreement by May 12, 2022. (Jt. Exh. 1.)

L. June 2022: "Not hiring" notice and "No–union" sign

On June 27, 2022, Jonathan Riley went to Respondent's facility to apply for a job. Riley testified that he is employed by the Illinois Pipetrades Association. (Tr. 415.) When Riley arrived at Respondent's entrance, he observed that there was a letter posted on the front glass door that stated in red print:

> "ABFP is <u>not</u> hiring any positions for Plumbing, Backflow, Sprinkler, Suppression at this time. If this sign is posted, we are not hiring and there is no need to apply. Please check back at a later date if you still would like to apply and this notice is not posted. Thank you, ABFP Management."

(GC Exh. 28.) To the right of the front door, on a glass wall, Riley also observed there was a round white sticker on the wall depicting the word "UNION" in black with a diagonal slash over it in red (the "no–union sign"). Right by the no-union sign there was a notice stating that the door is unlocked from 7 a.m. to 5 p.m. Monday to Friday, with instructions to "use phone in the entry to gain access."

Riley went into the lobby and rang a button to call Human Resources. A woman picked up the call and he told her that he wanted to apply for a job. She asked him if he had seen the posting outside that said they are not hiring. He told her that he still wanted to apply. A woman came out, said her name was Sarah Davies,[15] and gave him an application. He took the application while wearing a union hat and shirt. He filled out the application and came back to the office. When he called back, Davies told him that she was told "by the higher ups" not to accept any applications at this time. Riley asked if he could leave his application so it would be on file, and she said no, they're really strict on this policy and not taking any applications at this time. Riley

[15] In its answer to the complaint, Respondent admitted that Davies was Respondent's receptionist and/or human resources representative and was an agent of Respondent within the meaning of Sec. 2(13) of the Act.

left his application and never heard back from Respondent. (Tr. 407–413.) Davies was not called as a witness, and no other witness testified about Riley's attempt to apply for work.

Riley reported to Hincks that Respondent had the no-union sign on its front entrance door and sent Hincks photographs he took. Hincks went to Respondent's facility and observed first–hand the no-union sign about a dozen times. Hincks took pictures of the sign on November 18, 2022, and saw it again a handful of times afterwards. (Tr. 111–113, 115; GC Exh. 12.)

Concerning the no-hiring notice posting, Harbut testified that he thought it was posted at the same time as when Respondent changed its website to indicate that it was not hiring for bargaining unit positions. (Tr. 634.)

Concerning the no-union sign, Loes only testified that he had no idea who put the no–union sticker on the Respondent's main entrance door. (Tr. 571.) Harbut testified that the front door where the no-union sticker was found is not used by employees and that no one uses it other than for deliveries. He testified that employees use a side door to come into the facility, and that side door does not have any signs. (Tr. 609–61; R. Exh. 1.) No other witness testified that the front door is not used, and I do not credit Harbut's testimony in this respect. Clearly, the front door is used as demonstrated by the fact that Respondent posted a no–hiring notice on it and has a camera and doorbell installed on the door. Notably, neither Loes or Harbut testified that the no-union sign had been removed from the main entrance door, and Respondent did not submit a photograph of the door either.

M. June—July 2022: notice readings

In relation to the settlement agreement in Case 13–CA–288185, Respondent had agreed to read a Board notice to employees. Respondent had also agreed that it would announce to employees that their attendance at the meeting where the reading of the notice would take place was mandatory. (Jt. Exh. 1.) In June 2022, the parties scheduled a notice reading at Respondent's facility. Hincks was in attendance for the Unions. Sauter, Loes, and Heffner were present for Respondent. There were only two employees present at the meeting, one of which was Gerald Wettstein. According to Hincks, he asked why there were no other employees in attendance and Sauter replied that Respondent had advised employees that this was a "mandatory union meeting." Hincks also testified that he heard Loes ask Wettstein something to the effect of "you didn't slip anything on, any posting or notice on the bulletin board, because that's why I have to do this in the first place." A Board agent was supposed to be present for the notice reading via Zoom, but something happened that the Board agent could not attend. Therefore, the meeting was cancelled. Hincks heard Wettstein state, this is "fucking bullshit, I won't come to another one." (Tr. 214–215.)

Another notice reading meeting was scheduled for July 2022.[16] Hincks was present for the Unions again and Sauter was present via Zoom. A Board agent was also present via Zoom.

[16] Hincks testified that as of the date of the hearing, Respondent and the Unions had entered into three informal settlement agreements with the Board. The first two also involved a notice reading and those happened prior to June 2022. The third notice reading is the one that was cancelled concerning 13–CA–288185. (Tr. 254–255; Jt. Exh. 1.)

No employees were present this time. Sauter advised Loes to go find any of the employees. According to Hincks, Loes went out and came back with Wettstein who handed Hincks and Loes a piece of paper. Wettstein stated "I'm not sitting in on this shit." The paper was a letter signed by five bargaining unit employees stating that they did not recognize the Unions as their bargaining representatives. (CP Exh. 19.) Loes started to read the letter aloud, but Hincks interrupted him and said that they were there to read a notice. Neither the letter nor the notice to employees was read. (Tr. 215–217.)

N. Evidence regarding discontinued annual performance appraisals and related pay increases, and changes to certification–based increases.

1. Past Practice

According to Respondent's employee handbook, which predates the Unions' organizing campaign, the Company's policy is to conduct employee performance evaluations every year. The handbook also states that salary increases and/or bonuses are granted based on performance evaluations, as well as market conditions. (GC Exh. 5, p. 8–9, 18.) Hincks testified that employees informed him that Respondent indeed conducted annual performance appraisals and awarded annual raises. (Tr. 125–126.) Former plumber backflow manager Jennifer MacDonald similarly testified that employees received performance evaluations annually. MacDonald stated that she would work with Loes to evaluate employees annually.[17] (Tr. 262–263.) Loes corroborated MacDonald's testimony and testified that, with managers' input, he was the sole decision maker on how much of a wage increase employees would receive in a given year. (Tr. 559.) Loes stated that performance–based wage increases were usually granted around March every year, but that raises were not guaranteed. (Tr. 560.) The annual wage increases could be between $1 and $3 per hour. (Tr. 561.) Loes also acknowledged that Respondent referenced this policy in employee job offers. (Tr. 475–478; GC Exh. 42.)

In addition, Respondent's past practice had been to grant wage increases of $5 per hour when employees obtained work related certifications such as NICET certifications.[18] (Tr. 127–128, 262, 561; GC Exhs. 30, 43) In an undisputed email dated February 5, 2020, Respondent informed employees that once they finished NICET sprinkler training and passed the test, they would receive a $5 per hour increase when they reached Level II and another $5 per hour increase when they reached Level III. (GC Exh. 43) In another undisputed email dated February 6, 2020, David Loes explained to fire technicians that some employees were hired at a higher wage rate based on their skillset with the expectation that they would get NICET certifications as soon as possible. The Company would not raise the wages of those employees once they got NICET

[17] MacDonald also testified that raises were not granted every year, and that she recalled a period of 6 years when she did not get a raise. She stated she received a raise in 2016. (Tr. 279–281.) MacDonald was hired in 2011, and she did not provide a time frame for when she did not get a wage increase.

[18] NICET is an acronym for National Institute for Certification in Engineering Technologies, which is an organization that provides certification programs related to, among other areas, fire sprinkler systems. NICET has certification levels I, II, and III. Level I requires 6 months' experience, Level II requires 2 years of experience, and Level III requires 5 years of experience. (Tr. 126–127, 137–138.)

certifications. However, Loes explained that for those employees who started at a lower rate, the Company offered a $5 per hour increase each time the employee obtained a sprinkler Level I, II, and III certification. This email also stated that alarm techs did not have NICET certification requirements, so their raises would be on a "case by case basis," and the same applied to suppression techs. (GC Exh. 30.) At the hearing, Harbut also testified that employees were eligible for $5 per hour wage increases for NICET certifications. (Tr. 427.)

2. Respondent does not conduct performance appraisals in December 2021 or related increases in March 2022

Notwithstanding the above past practices, the Unions learned in September 2022 that bargaining unit employees had not received wage increases in accordance with the above policies. By email dated September 28, 2022, in response to an information request made by the Unions, Respondent provided a list of current bargaining unit employees with their corresponding hire dates, current wages, previous wages, and reasons for their wage increase. (GC Exh. 15.) The list reflected six unit employees. Three employees (Allen Lee, Eric Gaspers, and Gerald Wettstein) had not received an annual wage increase in 2022—and all three had been hired for over a year. The other three employees on the list had received wage increases as follows:

- Lindsay Bouffard, journeyman fire sprinkler, was making $22 per hour in June 2021. She received a $5 increase to $27 per hour on April 22, 2022 and another increase of $13 per hour to $40 per hour on September 3, 2022 for obtaining a "certification."

- Charles Tyche, fire/sprinkler NICET III, was making $34 per hour in June 2021. He received a $6 increase to $40 on September 17, 2022 for obtaining a "certification."

- Octavio Garcia, apprentice NICET I, was making $21 per hour in June 2021. He received a $5 increase on April 22, 2022 to $26 per hour for obtaining a "certification."

Additionally, Respondent stated that "regarding the Unions request for employee performance appraisals for 2021–2022, none such exist." (Tr. 468; GC Exh. 15.) The Unions requested that Respondent explain why Bouffard and Tyche had received increases in excess of the $5 per hour certification–based increase. Sauter responded in writing stating that Bouffard's increases were granted because she advanced "2 levels" and Tyche had passed his NICET III exam and increases "are at the Employer's discretion." (GC Exh. 15.)

Hincks credibly testified that Respondent never notified the Unions that it had stopped granting annual increases or had stopped performing annual performance reviews. (Tr. 145.) Likewise, Hincks credibly testified that Respondent did not notify the Unions or bargain with the Unions prior to granting an increase of more than $5 per hour to Bouffard and Tyche for passing a certification. (Tr. 148–151.)

At the hearing, Loes admitted that the last performance reviews Respondent had performed had been in December 2020, with corresponding wage increases in March 2021. (Tr. 477–478.) He also admitted that Respondent stopped granting annual performance–based

increases after the Unions were elected. (Tr. 478.) However, when Respondent's counsel asked Loes if the "process" of providing wage increases had stopped, Loes testified "it's never stopped." (Tr. 560.) Loes then testified that he "set up" performance reviews when he first got hired and when Respondent hired a Human Resources (HR) manager, she took over the process but she "pretty much let it go from that point forward." He said that the HR manager left right after the Unions were elected. (Tr. 576.) Loes' testimony is evidently contradictory. Either the performance review process never stopped, or the HR manager dropped the ball and did not continue it. Either way, it is undisputable that Respondent did not perform performance reviews, nor did it grant performance–based increases after the Unions were voted in.

Concerning the $5 per hour certification–based increases, Loes testified that Tyche got a $6 per hour increase instead of $5 increase because of "retention" and because he wanted Tyche to get to $40 per hour. (Tr. 563.) Loes also testified that Bouffard's raise of $13 per hour was because he wanted her to be at the same level as Tyche. (Tr. 563–564.) Loes acknowledged that he wanted to keep them both "happy." (Tr. 579–582.) Notably, Loes also acknowledged that by the time of the hearing (less than two years after the September 28, 2022 report with employees' hourly wages), all employees' wages had increased. According to Loes, Tyche went from $40 per hour to $52 per hour, Bouffard went from $40 per hour to $50 per hour, Wettstein went from $40 per hour to $50 or $52 per hour, and Gaspers went from $38 per hour to $52 per hour. (Tr. 579–583.) Loes was asked to explain what Tyche and Bouffard had done that resulted in additional wage increases beyond their September 2022 raises. Loes testified that Tyche had obtained more "licenses" and that both of them had "done a great job." (Tr. 586.)

O. Evidence regarding transferring bargaining unit work to nonunion employees, supervisors, and/or managers

1. The bargaining unit's decrease after Unions' certification

The evidence regarding the composition of the bargaining unit is not in dispute. The bargaining unit went from 14 bargaining unit employees prior to the Unions' certification in June 2021 to five bargaining unit employees by at least October 2022, a 64–percent reduction in the number of employees represented by the Unions. (Compare GC Exh. 31, stipulation of facts, par. 3, showing 14 bargaining unit employees with GC Exh. 17, showing 5 bargaining unit employees.) During the same time period, Respondent's management team went from three to four managers. This fact is also undisputed.

The parties stipulated that from January 2021 to March 2023, the Unions asked Respondent at least once a month during bargaining whether Respondent was hiring, and Respondent always replied no, it was not hiring. (GC Exh. 32, par. 15.)

Respondent's hiring plans, or lack thereof, were also the subject of many information requests made by the Unions. As early as August 12, 2021, in response to the Unions' initial information request prior to commencing bargaining, Respondent provided an organizational chart reflecting 17 bargaining unit employees under three managers (one backflow and plumbing manager, and two fire division managers). (GC Exh. 5.) Then in October 2021, Respondent provided the Unions with an updated organizational chart reflecting 17 bargaining unit employees (13 active employees and four open positions). (GC Exh. 6.) In January 2022,

Respondent provided the Unions with yet another updated organizational chart that reflected *no* open positions and only 10 bargaining unit employees. The chart showed three managers: backflow and plumbing manager, fire sprinkler I&T manager, and fire division suppression manager. (GC Exh. 8.) As discussed above, starting in January 2022, Respondent announced a no–hiring policy for bargaining unit employees—as reflected by changes on its website and the no–hiring notice on its main entrance.

By email dated May 19, 2022, the Unions asked Respondent if it had hired new bargaining unit employees or was seeking applicants for new positions. Respondent replied that the last bargaining unit employee hired was fire sprinkler apprentice Adam Leslie on December 21, 2021, it had no hiring plans, and there were no open positions. (GC Exh. 10.) On June 16, 2022, the Unions asked again if Respondent had hired or was hiring for any bargaining unit positions. The Unions also asked if Respondent had hired "anyone" with a plumbing license. Respondent again replied that it had not hired and was not hiring for any bargaining unit position. However, it stated that it had hired Thomas Grubbs as its new plumbing "manager." (GC Exh. 11.) Grubbs was hired in May 2022. (Tr. 478.) The Unions asked if Respondent's backflow manager, James Herman, was still employed and Respondent replied that Herman was still employed as the "backflow manager." (Id.) In August 2022, Respondent provided another updated organization chart. This time it reflected only six bargaining unit employees and four manager roles. The manager roles were backflow division manager, plumbing division manager, fire sprinkler I&T manager and fire division suppression manager. (GC Exh. 13, CP Exh. 20.) By September 28, 2022, Respondent still had six bargaining unit employees. (GC Exh. 14, 15.) By at least October 17, 2022, the bargaining unit was down to five employees. (CP Exh. 17.) From October 2022 through at least March 6, 2023, the bargaining unit continued to only have five bargaining unit employees. (CP Exh. 17.)

At the hearing, Respondent's president Dan Harbut was asked why the number of bargaining employees had decreased and he stated that employees had resigned. He went on, "I didn't realize really, you know, you know, we didn't—I didn't know what was going on, but there was—the company was becoming more efficient…" (Tr. 636–637.) Harbut did not explain how the Company became more efficient other than to state that they did "more work with less people." (Tr. 638.) Harbut continued to state that he ran some Profit and Loss (P&L) reports "today," "because I couldn't understand how we were doing better than we were with less people." (Tr. 639.) Respondent entered into evidence the P&L reports for 2020, 2021, 2022, and 2023. (R. Exhs. 2–5.) The reports are all dated June 5, 2024, the day of the hearing. The reports show that in 2020 Respondent had a net loss of $580,977 and in 2021 a net loss of $110,347. In 2022, Respondent had a net income of $696,913 and in 2023 a net income of $186,832. After looking at these reports, Harbut was asked if the reduction in employees harmed the business. Harbut testified that "it actually helped it. I would never [sic] thought." (Tr. 650–651.) Harbut stated that he thought Respondent was "perfectly staffed right now." (Tr. 650.)

I do not give much weight to the P&L reports because they were admittedly printed the day of the hearing and were not relied upon by Respondent in making any business decisions, whether or not to hire bargaining unit employees or to assign bargaining unit work to nonunit employees. Furthermore, the net loss in 2020 was impacted by the COVID–19 pandemic during which Respondent shut down for at least 2 weeks, and is thus, an outlier year. (Tr. 616, 661.) The P&L reports also reflect line items related to Respondent's Arizona's operations, which has

nothing to do with this matter (see, for example, line items for "health insurance Arizona," references to "Gold Dust" and "Mexico call center"). Thus, the P&L reports are not a reliable source of information to explain Respondent's no–hiring decision.

2. Significant bargaining unit work was assigned to managers

At the same time that the Unions were requesting information about the composition of the bargaining unit as discussed above, they were also requesting information that would reflect who was performing the bargaining unit work. On February 1, 2022, Respondent provided the Unions with a spreadsheet setting forth the bargaining unit employees' work assignments from January 1, 2019, through January 20, 2022. (Tr. 186.) The Unions introduced an excerpt of this spreadsheet into the record containing work assignments from January 1, 2021, through the end of January 2022. (CP Exh. 10.) The Unions made an additional information request regarding bargaining unit work assigned to non-bargaining unit employees including managers from January 1, 2021, through June 2022. (CP Exhs. 11–12.) Respondent provided the Unions with a spreadsheet with 247 pages of information showing all work orders assigned to its managers. (CP Exh. 13.) The Unions then requested information showing work performed by bargaining unit employees during the same time period and Respondent provided the information in a similar spreadsheet with 174 pages of information. (CP Exh. 14–16.)

The evidence from Respondent's spreadsheets demonstrates that its managers have frequently been assigned to work on orders that involve bargaining unit work. However, after June 2021, managers' work on orders involving bargaining unit work drastically and significantly increased. This data was corroborated by Jennifer MacDonald, Respondent's former backflow manager, who testified that she and other managers, would regularly work approximately 10 hours a week out in the field with bargaining unit employees, but that after the union campaign, her schedule was fully out in the field. (Tr. 274–275, 289.)

According to Respondent's spreadsheets, Fire Division Suppression Manager David Larcombe's assignments to work orders that involved bargaining unit work increased significantly after the Unions' certification, as summarized below:

No. of Work Orders*	**2021**	**2022**	**% Increase**
January	29	75	159%
February	29	55	90%
March	47	91	94%
April	28	59	111%
May	31	84	171%
June	29	45	55%
July	63		
August	53		
September	25		
October	94		
November	68		
December	65		

*Assigned to Larcombe. (CP Exh. 13.)

The backflow and plumbing managers' data also shows a drastic increase in bargaining unit work assigned to these managers. Thus, the data for Jennifer MacDonald, backflow and plumbing manager from January 2021 through May 14, 2021, James Herman, backflow and plumbing manager from August 2021 through May 2022 and backflow manager from May 2022 through June 2022, and Thomas Grubbs, plumbing manager from May 2022 through June 2022, is summarized below:

No. of Work Orders*	**2021**	**2022**	**% Increase**
January	27	133	393%
February	22	97	340%
March	16	140	775%
April	23	159	591%
May	47	253	438%
June	0	351	
July	0		
August	140		
September	212		
October	200		
November	169		
December	145		

*Assigned to backflow and/or plumbing managers. (CP Exh. 13.)[19]

Finally, the data for fire sprinkler I&T manager Joshua Quintana also shows that his work on orders involving bargaining unit work increased significantly after the Unions were certified as summarized below.

No. of Work Orders*	**2021**	**2022**	**% Increase**
January	26	40	54%
February	28	52	86%
March	24	58	142%
April	30	55	83%
May	25	54	116%
June	30	34	13%
July	46		
August	39		
September	32		
October	44		
November	41		
December	46		

*Assigned to Quintana. (CP Exh. 13.)

[19] There is also evidence of 19 work orders dated between May 2022 and September 2022 where Hermann and Grubbs were assigned to perform bargaining unit work together. No bargaining unit employee was assigned to work alongside them. (CP Exh. 36.)

At the hearing, David Loes acknowledged that when he provided an affidavit to the Board in December 2022, he stated that the reason more work was performed by managers was because Respondent had hired a new manager, Thomas Grubbs. (Tr. 482.) Both Loes and Harbut testified that managers have always worked in the field. (Tr. 478–479, 567, 616.) Respondent entered into evidence samples of work orders from 2018 through 2024 showing bargaining unit work orders assigned to managers Quintana, Larcombe, Hermann, MacDonald, and Grubbs. (R. Exhs. 6–10.) Respondent did not offer any explanation for why it divided the backflow plumbing manager position into two management positions.

3. Bargaining unit work was also assigned to nonunit employees

Additional substantial evidence was entered into evidence concerning bargaining unit work being assigned to nonunit employees, specifically alarm technicians. For instance, the Unions entered into evidence a group of 34 work orders dated between April 7, 2022 and November 21, 2022, reflecting instances where bargaining unit work was performed by alarm technicians Jessica Vallor and/or Michael De Jesus. (Tr. 498–499.) Most of the work orders reflect Vallor and/or De Jesus assigned to work alongside managers Joshua Quintana and/or David Larcombe performing bargaining unit work that included fire sprinkler system inspections, fire extinguishers inspections and testing, fire sprinkler system repairs, and fire suppression system inspections. A few orders show Vallor assigned to work with Kaden Harbut and/or Dan Harbut, too. Four of the work orders from November 2022, show Vallor working alone on bargaining unit work. (CP Exh. 30.) Another group of seven work orders in evidence reflect bargaining unit work assigned to fire alarm technicians Jacob Woods and Jonathen Claude. (Tr. 505.) The work orders, dated between August 5, 2022 and September 15, 2022, reflect Woods and/or Claude assigned to work with manager Larcombe, Dan Harbut, and/or Kaden Harbut, on fire sprinkler systems and other bargaining unit work (although a few work orders also include fire alarm work). (CP Exh. 31.) Another group of five work orders dated between April 14, 2022, and September 27, 2022, show De Jesus working alone, alongside a manager, and/or alongside Woods on bargaining unit work. (Tr. 508–509; CP Exh. 32).

Aside from assigning bargaining unit work to alarm technicians, many work orders in evidence show that Respondent also assigned bargaining unit work to the Company's president Dan Harbut and his son Kaden Harbut. For instance, a group of 17 work orders in evidence show Dan Harbut, David Loes, and/or Kaden Harbut assigned to work alongside bargaining unit employees and/or a maintenance mechanic Robert Paniello between February and November 2022. Paniello was also assigned to perform bargaining unit work. (Tr. 511–513; CP Exh. 33.) Another group of seven work orders dated between June and October 2022, were serviced by Dan and Kaden Harbut alone, or with a manager, with no bargaining unit employees present at all. (CP Exh. 34.) Another group of nine work orders dated between June and November 2022, show David Loes performing bargaining unit work with Kaden Harbut or one of the managers. (CP Exh. 35.)

The last group of work orders entered into evidence reflect that work previously performed by bargaining unit employees in 2020 and 2021 was assigned to managers in 2022. This evidence is summarized below and was confirmed by Respondent's operations manager David Loes. (Tr. 521–532.)

- In 2020 and 2021, bargaining unit employee Brian De Bruin performed annual backflow inspections for Lippert Townhomes. In 2022, the work was performed by Hermann and Grubbs. (CP Exh. 37.)
- In 2020 and 2021, De Bruin performed annual backflow inspections for the Property Solutions Group. In 2022, the work was performed by Hermann and Grubbs. (CP Exh. 38.)
- In 2020 and 2021, De Bruin performed annual backflow inspections for the Burbank City Hall. In 2022, the work was performed by Hermann and Grubbs. (CP Exh. 39.)
- In 2020 and 2021, De Bruin and bargaining unit employee Gerald Wettstein, respectively, performed annual backflow inspections for the Burbank Fire Department. In 2022, the work was performed by Hermann and Grubbs. (CP Exh. 40.)
- In 2020 and 2021, De Bruin performed annual backflow inspections for the Simon's Restaurant. In 2022, the work was performed by Hermann and Grubbs. (CP Exh. 41.)
- In 2020 and 2021, De Bruin performed annual backflow inspections for the Volkswagen of Orland Park. In 2022, the work was performed by Hermann and Grubbs. (CP Exh. 42.)

At the hearing, David Loes was asked about the above work orders and the reasons why nonunit employees were assigned bargaining unit work. Loes testified that alarm technician Jessica Vallor had "recently" started to work on fire suppression work, which is bargaining unit work, because she had been "certified recently," wanted to "better herself" and "wanted to ride along because she was interested." (Tr. 497–499, 502.) When asked about fire alarm technician Michael De Jesus, Loes focused on one work order stating that De Jesus "was just dropping off a fire extinguisher." When asked why De Jesus was asked to do this work and not a bargaining unit employee, Loes replied that he would "have to ask a CSR" (customer service representative). Loes became increasingly annoyed during this line of questioning. He testified that Kaden Harbut was doing bargaining unit work although he is the "IT manager" because Kaden is a certified sprinkler but "you," referring to the Unions' counsel, "would not let him in the unit." He stated that he "occasionally" was also assigned to work on bargaining unit work "to help out." Harbut testified that Kaden grew up in the family business and is also technically savvy, so that is why Kaden is the IT manager and also a licensed plumber and sprinkler, and suppression tech. (Tr. 618–621.)

P. Disaffection letters

Starting on October 17, 2022, through March 6, 2023, the Union received at least 20 letters from the remaining five bargaining unit employees employed at the Wauconda facility stating, in pertinent part, that "we do not recognize union locals 130 and 281 as our bargaining agents . . . we furthermore demand that they cease and desist any and all further action on our behalf."[20] (GC Exh. 17.)

[20] The letters were signed by Gerald Wettstein, Lee Allen, Linsday Bouffard, Octavio Medina, and Chuck Tyche. (GC Exh. 17.)

Respondent called bargaining unit employee Gerald Wettstein as a witness. Wettstein was hired as a plumber and has been with the Company for 5 years. (Tr. 589–590.) He testified that he initially supported the Unions and went out on strike. However, he stated that he does not support the Unions any longer and has filed 16 to 18 decertification petitions. He stated that the five employees in the bargaining unit had also filed decertification petitions and signed letters to the Unions telling them that they do not want representation. (Tr. 591–593, 601.) Wettstein testified that he did not support the Unions because "they don't represent us, they want to put American Backflow out of business, and they want to see Dan and Dave in handcuffs." (Tr. 596.)

Q. Respondent cancels bargaining and withdraws recognition

The joint stipulation of facts reflects that in 2023, the parties met for bargaining on January 26 and 27, February 17, 20, and 21, and March 7, 2023. The parties had agreed that their next bargaining meeting would be on March 28, 2023. (GC Exh. 32.)

By letter dated March 13, 2023, Loes provided the Unions with notice that Respondent "immediately withdraws recognition" of the Unions as the exclusive collective-bargaining representatives of the bargaining unit at its Wauconda facility. Loes also stated that Respondent was cancelling all scheduled meetings and any other obligations with the Unions. Attached to the letter were the 20 letters that the Unions had received from employees between October 2022 and March 6, 2023. (GC Exhs. 16–17.)

R. Evidence related to 2023—2024 hires

The General Counsel moved into evidence the job applications of five individuals who were hired by Respondent post withdrawal of recognition. (Tr. 664–667.) Respondent did not provide the hire dates of these individuals, but the dates can be approximated based on the dates of the applications. Thus, this evidence reflects that the following individuals were hired in the following bargaining unit positions:

- Gabriel Nickels: hired about June 13, 2023 as a backflow technician.[21]
- Jesus Coy: hired on about July 21, 2023 as an apprentice plumber.[22]
- Alexander Visnjic: hired on about October 13, 2023 as a fire sprinkler technician.[23]
- Cameron Spreitzer: hired on about November 27, 2023 as a fire sprinkler apprentice.
- Eduardo Zamudio: hired on about April 25, 2024 as a fire sprinkler technician.

(GC Exh. 45.) None of these applications reflect any union affiliation. Aside from the above five new employees, Respondent's most recent organizational chart as of the date of the hearing reflected another new hire:

[21] Work orders in evidence reflect Nickels working alongside other bargaining unit employees or alone in July 2023. (CP Exh. 47.)

[22] Work orders in evidence reflect Coy working alongside other bargaining unit employees in July and August 2023. (CP Exh. 43.)

[23] Work orders in evidence reflect Visnjic working alongside other bargaining unit employees in October 2023. (CP Exh. 45.)

- Jordan Pell: hired sometime in January 2024 as a fire division apprentice. (CP Exh. 48.)[24]

Respondent's most recent organizational chart also reflected that Heffner continued to be its office manager, Kaden Harbut its IT manager, James Hermann its backflow manager, Thomas Grubbs its plumbing manager, Ramon Quintero its fire alarm manager, Joshua Quintana its fire sprinkler I&T manager, and David Larcombe its fire division suppression manager. There are nine bargaining unit employees in the organizational chart. (CP Exh. 48.) Loes testified that this organizational chart was still valid as of the last day of the hearing. (Tr. 545.)

S. Board finds Respondent failed to comply with the April 2021 settlement agreement

On June 25, 2024, the Board issued its decision in *American Backflow* and found that Respondent failed to comply with the settlement agreement in Case 13–CA–288185 and granted the General Counsel's motion for default judgment. The General Counsel argued in that case that Respondent breached its obligations under the settlement agreement when it withdrew its recognition on March 13, 2023, and cancelled all future bargaining sessions with the Unions, because Respondent relied on tainted decertification petitions. Importantly, the General Counsel asserted that the decertification petitions were tainted because they were filed at a time when there remained unremedied unfair labor practices—specifically, those alleged in the instant matter. Respondent asserted that it did not rely on the decertification petitions filed between October 7, 2022, and March 6, 2023, to withdraw recognition of the Union. The Board stated that Respondent could only withdraw recognition "if it had objective evidence of the Union's loss of majority support," pursuant to *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 725 (2001). The Board then held that Respondent failed to proffer the evidence, if any, it had relied on to support its withdrawal of recognition. Accordingly, the Board granted the motion for default judgment and found all the allegations in the complaint to be true.

III. DISCUSSION AND ANALYSIS

A. Credibility Findings

In making credibility determinations, all relevant factors have been considered, including the context of the witnesses' testimony, their interests and demeanor, whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. Credibility findings need not be all–or–nothing—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. See *Daikichi Sushi*, 335 NLRB 622, 623 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), reversed on other grounds 340 U.S. 474 (1951). To the extent that credibility issues arose in this case, my credibility determinations are detailed in the Findings of Fact above.

[24] Work orders in evidence reflect Pell working alongside other bargaining unit employees in January and February 2024. (CP Exh. 46.)

B. Did Respondent violate the Act by displaying and maintaining an anti–union sign on the door of the main entrance of its facility?

The General Counsel alleges that it is a violation of Section 8(a)(1) of the Act for Respondent to display and maintain an anti–union sign on the door of the main entrance of its facility. Respondent argues that there is no evidence that Respondent posted the anti–union sticker, and that even if it is assumed it did, "bluntly, the Respondent is allowed to disfavor the Union and express this view." In addition, Respondent argues that there is no evidence that any employee viewed this sticker. (R. Br. at 20.)

Applicable Law

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. Section 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities." 29 U.S.C. §157. The test for evaluating whether there has been a violation of Section 8(a)(1) is an objective one, i.e., whether, under the totality of the circumstances, the employer's statement or conduct would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Multi–Ad Services*, 331 NLRB 1226, 1227–1228 (2000); *Sage Dining Services, Inc.*, 312 NLRB 845, 846 (1993). In making this evaluation, the Board does not consider the employer's motive or whether the coercion succeeded or failed. *American Freightways Co., Inc.*, 124 NLRB 146, 147 (1959).

Analysis

The record clearly established that Respondent had an anti–union sticker displayed on its main entrance door from at least June 27, 2022, to November 18, 2022. Furthermore, Respondent made no effort in showing that the antiunion sticker has been removed. In fact, Respondent presented a photograph of a side door of its facility showing no sticker, instead of showing a recent photograph of the main entrance. Thus, the sticker is presumably still posted on Respondent's main entrance. It is also undisputed that the sticker was right by a notice to job applicants posted by Respondent conveying that it was not hiring.

The Board has held that an employer violates the Act by displaying an anti–union sticker on a door used by applicants for employment. *Richard Mellow Electric Contractors Corp.*, 327 NLRB 1112, 1113 (1999). In that case, similar to the instant matter, the sticker was a round see–through sticker containing the word "UNION" with a diagonal slash over it, posted at eye level, on the glass door leading to the main office. The Board concluded that applicants for employment could reasonably conclude from this decal that they would not be hired if they were members of a union. I similarly find that here Respondent violated Section 8(a)(1) of the Act by displaying and maintaining the antiunion sticker on the door of its main entrance because applicants for employment would reasonably conclude that they will not be hired if they are members of a union. As the Board stated in *Richard Mellow*, it is irrelevant that, as the Respondent asserts here, there is no evidence that any individual in fact was deterred by the no-union sticker. Id. at fn. 9.

C. Did Respondent violate the Act by refusing to consider for hire or hire Thomas Jennrich, Philip Roknich and Michael Laskarin?

The General Counsel alleges that Respondent, in violation of Section 8(a)(3) and (1) of the Act, refused to consider for hire or hire Jennrich, Roknich and Laskarin for open positions for which they were qualified, and that Respondent did so because of these applicants' association with the Union. Respondent argues that it was not hiring and had no concrete plans to hire for the positions that these individuals applied for, and that in any case, these applicants would not have accepted a job if offered. (R. Br. at 24.)

Applicable Law

It is well settled that job applicants have Section 7 rights under the Act, even if they are union organizers or may be salts. In *NLRB v. Town & Country Electric, Inc.*, the Supreme Court, noting the considerable deference afforded to the Board's interpretation of the Act, affirmed that the Board could lawfully construe the Act's definition of "employee" to include paid union organizers. 516 U.S. 85, 94–95, 98 (1995). As such, union organizers that apply for employment may not be discriminated against in hiring because of their union affiliation.

In *FES*, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002), the Board set forth the analytical framework for both refusal–to–consider and refusal–to–hire allegations. To establish a refusal–to–consider violation, the General Counsel must show (1) that the respondent excluded applicants from a hiring process; and (2) that union animus contributed to the decision not to consider the applicants for employment. To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

Once the General Counsel satisfies the initial burden of showing by a preponderance of the evidence that the employee's union activity was a motivating factor in respondent's adverse action, the burden will shift to the respondent to show that it would not have considered the applicants and/or hired the applicants even in the absence of their union activity or affiliation. The respondent does not meet its burden merely by showing that it had a legitimate reason for its action; it must persuasively demonstrate that it would have taken the same action even in the absence of the protected conduct. If the respondent's proffered reasons are pretextual—either false or not actually relied on—discriminatory motive may be inferred "that the [real] motive is one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference." *Pro–Spec Painting, Inc.*, 339 NLRB 926, 949 (2003), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). See also *Intertape Polymer Corp*., 372 NLRB No. 133, slip. op. 7 (2023) (where the Board found that

circumstantial evidence of discriminatory motive may include, among other factors, the timing of the action in relation to the union or other protected conduct; contemporaneous unfair labor practices; shifting, false, or exaggerated reasons offered for the action; failure to conduct a meaningful investigation; departures from past practices; and disparate treatment of the employee.)

The *FES* framework was modified by the Board in *Toering Electric Co.*, 351 NLRB 225 (2007). The Board explained that in salting cases, the General Counsel bears the ultimate burden of proving an applicant's genuine interest in seeking employment. This burden has two components: 1) that there was an application for employment; and 2) that, if the employer contests the applicant's actual interest in employment, the General Counsel must prove by a preponderance of the evidence that that the applicant was genuinely seeking to establish an employment relationship with the employer. 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.

1. Analysis of the refusal–to–hire and refusal–to consider allegations concerning Jennrich and Roknich

a. The General Counsel's prima facie case

The General Counsel has established the initial elements of a discriminatory refusal–to–hire claim. The General Counsel established that Respondent was hiring or had concrete plans to hire at the time that Thomas Jennrich and Philip Roknich applied for jobs. On July 8, 2021, the same day that they applied, Respondent had a big banner on the side of its facility stating that it was hiring plumbing, backflow and sprinkler technicians, and had a job posting for three openings for backflow technicians on Indeed.com. Respondent did not dispute this evidence at the hearing. Further, the record undisputably shows that Respondent hired a plumber journeyman on July 14, 2021, a fire sprinkler technician on July 31, 2021, and a fire sprinkler apprentice on August 8, 2021—all within a month after the applications of Jennrich and Roknich were received by Respondent.

The General Counsel also established that Jennrich and Roknich had experience and training relevant to the position of plumber. Both applicants are licensed plumbers with decades of relevant experience. Respondent did not dispute their qualifications.

The General Counsel also established the third element of the prima facie case – that union animus contributed to the decision not to consider for hire or not to hire Jennrich and Roknich. The record is replete with Respondent's union animus. Animus is demonstrated by Respondent's disparate treatment of Jennrich's and Roknich's job applications. Respondent stated that they would not be considered for a job because their resumes and/or applications were incomplete. However, the record clearly shows that other applicants' resumes and applications were similarly "incomplete," and those applicants (with no union affiliation) were hired. See, for example, the applications of Octavio Medina, Carl Schermer, Brian King, Charles Tyche, Daniel

Kowaleski, and Eduardo Zamudio. (GC Exhs. 36–41, 45.) Moreover, Respondent instructed Jennrich and Roknich not to apply again for at least 12 months, while it appears no other applicant received a similar instruction. See, for example, the email to applicant Scott Poole. (CP Exh. 28.)

Union animus is also reflected in the numerous unfair labor practices the Board found in *American Backflow*, which included multiple 8(a)(1) statements, allowing a decertification petition to be posted on Respondent's bulletin board (which was signed by admitted 2(11) supervisors), soliciting employees to sign said decertification petition, and failing to bargain with the Unions. Additional union animus is reflected in the unfair labor practices found in the rest of this decision, which will be discussed below, including but not limited to, evidence that Respondent displayed an antiunion sticker on its main entrance door, changed its website to "not hiring" in response to employees' union activities, kept a strict no-hiring stance after other union applicants tried to apply for open jobs, even after the bargaining unit shrank to less than half its size, significantly transferred bargaining unit work to nonunit employees and managers, and unilaterally made changes to the terms and conditions of unit employees.

Additionally, union animus is reflected in Respondent's uncontroverted statements to Lyndon Leisher, that the Company was looking for nonunion workers, and that even though the Unions had won the vote, Respondent could hire him in a non-bargaining unit role to go around the Unions. Additional union animus is also reflected in Respondent's statements to Manager Jennifer MacDonald that she would be fired as the sacrificial lamb in response to the Unions' petition, and that she should help Respondent get the petition "pulled." In addition, animus is reflected in Respondent's uncontroverted statements to Brian Malek asking about his union views during his interview process, telling Malek that Respondent would not consider the job application of a prounion job applicant, Heffner's statement that Respondent would "kick the fucking union's ass," and instructing Malek to not tell the NLRB that he applied for his job online. Although the above evidence of union animus was not alleged in the complaint, the Board has consistently held that antiunion statements may be relied on as background evidence of animus even if they were not unlawful. *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 781 (2013).

I also find that the General Counsel established the elements of a discriminatory refusal–to–consider claim. I find that the email Respondent sent to Jennrich and Roknich rejecting their applications establishes that Respondent excluded them from the hiring process for pretextual reasons, given the fact that other applicants with no union affiliation, with similar job applications were interviewed and hired. Thus, I make an inference that union animus was the real reason why Respondent did not consider their job applications. Further, as already discussed, there is ample evidence of Respondent's union animus in this case.

b. Respondent's burden of proof[25]

[25] The General Counsel and the Unions argued in their briefs that Respondent failed to carry its burden to show that it was privileged to deny Jennrich and Roknich employment because it would have been a conflict of interest to hire them while there was an ongoing strike under the Board's holding in *Sunland Construction*, 309 NLRB 1224, 1230 (1992), and *Aztech Electric Co.*, 335 NLRB 260, 265 (2001). (GC Br. 15, CP Br. 52–53.) As noted by the General Counsel, there is no evidence that Jennrich and Roknich were paid union organizers, and therefore, there

Respondent argues that Jennrich and Roknich had no intention of accepting a job if one would have been offered. At the hearing, both applicants testified during cross-examination that they would not have been able to work two full-time jobs at the time that they submitted their job applications. They also admitted that they would not have accepted a job offer from Respondent if one was offered. Thus, Respondent argues that Jennrich and Roknich did not have a genuine interest in becoming employed when they applied.

The General Counsel argues that Jennrich and Roknich furnished complete applications and resumes and did not engage in any disruptive or unorthodox behavior during the application process. The General Counsel recognized that Jennrich and Roknich testified that they would not have taken the job if offered but argues that this was "years later" and that the evidence demonstrates Respondent rejected these applicants without knowing or even suspecting that the applicants did not want the jobs. (GC Br. at 16.) However, pursuant to *Toering Electric*, once the employer has placed at issue the genuineness of the applicant's interest in employment, the General Counsel bears the burden of proving by a preponderance of the evidence that the applicant in question was genuinely interested in seeking to establish an employment relationship. An employer's motivation for making an alleged discriminatory hiring decision does not become relevant until the General Counsel satisfies her burden of proof as to the applicant's statutory employee status. Id. at 234. Applying these principles, I find that Jennrich and Roknich were not genuine job applicants.

The General Counsel and the Unions argue that the Board should overrule *Toering Electric*. (GC Br. at 21–26, CP Br. at 58–60.) The position of the administrative law judge is to follow current Board law. It is not the place of the administrative law judge to make or alter existing law or policy—this role lays solely with the Board. See, e.g., *Western Cab Co.*, 365 NLRB 761, 761 fn. 4 (2017); *Pathmark Stores Inc.*, 342 NLRB 378, 378 fn. 1 (2004).

Under current Board law, I recommend that the refusal–to–hire allegations concerning Jennrich and Roknich be dismissed. However, I find that the General Counsel has proven the refusal–to–consider allegations. Respondent clearly excluded these applicants from its hiring process based on their union affiliation, and Respondent did not show that it would not have considered them even in the absence of their union affiliation.

2. Analysis of the refusal–to–hire and refusal–to consider allegations concerning Laskarin

a. The General Counsel's prima facie case

The General Counsel established all the elements to find a discriminatory refusal–to–hire claim concerning Laskarin. The General Counsel established that Respondent was hiring or had concrete plans to hire at the time that Michael Laskarin applied for a job as a plumber on January 12, 2022. Laskarin testified uncontroverted that Respondent's website indicated that it was hiring on the same day that he applied. He applied for a job by filling an application in person. At no time was he told that Respondent was not hiring—not when he was handed a blank application

is no conflict of interest to address. Additionally, Respondent did not raise this argument in its brief, and therefore this defense is deemed waived.

to complete and not when he handed the application back. In addition, the evidence shows that Respondent had job postings on Indeed.com and Lensa in December 2021 for fire sprinkler and backflow technicians and that Respondent hired a fire sprinkler technician on December 21, 2021. Further, within a month of Laskarin's application, Respondent lost two journeymen plumbers, thus creating two openings for Laskarin.

The General Counsel also established that Laskarin was qualified for a plumber and backflow tester job. Respondent does not dispute that Laskarin was qualified. In fact, Respondent's rejection email to Laskarin stated that he was "highly qualified."

Finally, the General Counsel established that Respondent acted with union animus. The evidence reflects that shortly after receiving Laskarin's application, Respondent changed its website to indicate that it was not hiring fire sprinklers or plumbers. Hincks uncontrovertibly testified that on January 24, 2022, Sauter explained that she advised Respondent to make that change on the website because there were "unfair labor practice charges pending." Notably, Sauter did not tell the Unions that Respondent was not hiring because it did not need additional employees, but rather that it was not hiring because the Unions had filed a charge alleging that Respondent had failed to hire or consider for hire union applicants. I find that Respondent's entire not–hiring stance that started shortly after Laskarin applied for work in January 2021 and did not end until after Respondent withdrew its recognition from the Unions in March 2023 had nothing to do with its actual hiring needs and was based on union animus. For instance, instead of hiring replacements when Respondent lost four bargaining unit employees in February 2022, Respondent created a new manager position that did not exist prior to the Unions' organizing campaign and hired Thomas Grubbs, a plumber, for the new manager position in May 2022. In June 2022, Respondent doubled down on its message that it was not hiring for bargaining unit positions by posting a letter on its front door, which also happened to display an antiunion sign, and all the while, Respondent was transferring significant bargaining unit work to nonunit employees, supervisors, and managers, as will be discussed more fully below. Additional evidence of union animus was covered above, but it is noteworthy to highlight that just a few weeks prior to Laskarin's application, Respondent encouraged employees to sign a decertification petition that was posted on its bulletin board.

In any case, the Board has long held that hiring need not take place in order to find an unlawful refusal to consider union applicants for employment. *FES*, 331 NLRB at 15, citing *Shawnee Industries, Inc.*, 140 NLRB 1451, 1452–1453 (1963), enfd. denied on other grounds, 333 F.2d 221 (10th Cir. 1964). Likewise, hiring need not take place to find a discriminatory refusal to hire if the General Counsel can show that the employer had concrete plans to hire and then decided not to hire because job applicants were known union members or supporters. *FES*, at 12, fn. 7. Based on the foregoing, I find that Respondent had concrete plans to hire at the time Laskarin applied for a job, that Laskarin was qualified for the job he applied for, and that Respondent did not consider him for hire and/or hire him based on union animus.

b. Respondent's burden of proof

Respondent argues that I should not credit Laskarin's testimony that he would have accepted a job if one was offered to him because he had the "exact same circumstance as Jennrich and Roknich." Respondent did not submit any evidence in support of this assertion. Regardless,

the evidence clearly reflects that Laskarin did not share the same circumstances as Jennrich and Roknich. He was not a long-time full-time instructor but instead was a part-time night-time instructor. He credibly testified that he would have taken a job, if one was offered and he would have been able to work both jobs, if needed. Therefore, I find that Respondent violated the Act when it failed to consider for hire and/or hire Laskarin.

D. Did Respondent violate Section 8(a)(3) and (1) of the Act by changing its hiring practices when it indicated on its website that it was not hiring for bargaining unit positions and when it refused to accept or maintain hard–copy paper applications for bargaining unit positions?

The General Counsel alleges that Respondent violated the Act when on about January 12, 2022, it changed its website to indicate that it was not hiring employees for bargaining unit positions, and then since at least June 27, 2022, changed its hiring practices by refusing to accept and maintain hard-copy paper applications for bargaining unit positions. In its answer to the complaint, Respondent admitted changing its website and changing its hiring practice of accepting paper applications but denied that it engaged in this conduct because applicants and employees engaged in union and other protected activity. In its brief, Respondent implies that these were facially neutral employer policies. (R. Br. at 25.)[26]

Applicable Law

Under Section 8(a)(3) of the Act it is unlawful for an employer "by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization." The framework for analyzing alleged violations of Section 8(a)(3) is *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F,2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus. Circumstantial evidence of discriminatory motive may include, among other factors: the timing of the action in relation to the union or protected conduct; contemporaneous unfair labor practices; shifting, false or exaggerated reasons offered for the action; failure to conduct a meaningful investigation; departures from past practices; and/or disparate treatment of the employee. *Intertape Polymer Corp.*, 372 NLRB No. 133, slip op. 6–7 (2023).

If the General Counsel establishes a prima facie case, the burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in the absence of such activity. *Wright Line*, 251 NLRB at 1089. The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade, by a preponderance

[26] In reviewing Respondent's brief, the legal argument section where these allegations are discussed is incomplete. Respondent's brief, pg. 25, ends mid–sentence and although the table of contents states that there should be a pg. 26, there is no pg. 26 in the brief filed with the Division of Judges. Despite this issue, I have considered all evidence Respondent submitted regarding these allegations in reaching my conclusions of law.

of the evidence, that the adverse action would have taken place absent the protected or union activity. *Northeast Center for Rehabilitation*, 372 NLRB No. 35, slip op. at 1–2, fn. 5 (2022).

Analysis

1. Changing website to "not hiring"

The record has uncontroverted evidence that Respondent's website displayed a "hiring" notice prior to January 12, 2022. In this regard, Brian Malek testified uncontroverted that in late–September 2021, he submitted an online application on Respondent's website, where the website clearly stated, "Now Hiring." (GC Exh. 27.) The evidence reflects that Respondent was hiring for bargaining unit positions because Respondent had job postings on Indeed.com and Lensa in December 2021. Laskarin also testified uncontroverted that he visited Respondent's website on January 12, 2022, and saw that the website still stated, "Now Hiring." Right after Laskarin submitted an in–person application, which was received, reviewed, and rejected by Respondent, the Unions noticed that Respondent changed its website to indicate, "Not hiring fire sprinkler, fire alarm or plumbers currently at Illinois location. . ." (CP Exhs. 7–8.) Hincks testified that when the Unions asked for an explanation for this change, Sauter told them that that she had advised Respondent to change the website given that there were unfair labor practice charges pending. Sauter was called as a witness and did not controvert Hincks' testimony. Harbut's testimony about the change to the website did not contradict Hincks either.

I find it problematic that Respondent changed its website right after receiving the job application of Laskarin, an overt prounion job applicant, and right after the filing of an unfair labor practice charge concerning other prounion job applicants. Further, Respondent acknowledged to the Unions that indeed the change was in response to union activity, i.e. the filing of charges. The Board will find a violation of Section 8(a)(3) and (1) of the Act when an employer posts a "not hiring" sign in response to union activity. *Pan American Electric, Inc.*, 328 NLRB 54 (1999). Accordingly, I find that the General Counsel has established a prima facie case. Respondent knew that union applicants were attempting to apply for open jobs, and it made this change in direct response to the Unions' actions. Respondent did not carry its burden in showing that it would not have made this change absent union activity.

2. Changing hiring practice by not accepting hard–copy job applications

With regard to changing its hiring practices by refusing to accept hard–copy applications, I similarly find that Respondent violated the Act. See, e.g., *Niblock Excavating, Inc*., 337 NLRB 53 (2001) (employer violated Sec. 8(a)(3) and (1) of the Act by changing its policies regarding not accepting employment applications and how long applications were retained after union applicants attempted to apply for work.) Jonathan Riley testified uncontroverted that Respondent's receptionist/ human resources representative gave him an application and then told him that she could not accept his application based on the new "policy" posted on the main entrance door stating that Respondent was not hiring for plumbing, backflow, sprinkler, and suppression at this time. Notably, the no-hiring notice was posted right by the no-union sign that was discussed above. The only Respondent witness that testified about this policy was Harbut, who stated that the no-hiring policy was posted probably at the same time as when the website changed. Respondent changed its website in response to the filing of unfair labor practice charges.

Therefore, I can infer that Respondent posted the no-hiring policy and stopped accepting hard-copy applications for the same reason. Respondent has not demonstrated that its no-hiring policy, including not accepting hard-copy paper applications, would have taken place absent union activity.

I reject Respondent's assertions that changes to its website and/or to its hiring practice of accepting hard-copy job applications were part of facially neutral policies. See *Sommer Awning*, 332 NLRB 1318, 1329 (2000) (employer violated Section 8(a)(3) and (1) of the Act when it changed its hiring policy regarding employment references because, although the change was neutral on its face, the evidence established it was made in response to union activity.) The evidence here clearly establishes that Respondent changed its hiring practices in response to union activity, including that union applicants were attempting to apply for open jobs and the Unions filed unfair labor practice charges. Therefore, I find Respondent violated the Act as alleged.

E. Did Respondent violate Section 8(a)(3) and (5) of the Act by changing its past practice of conducting annual performance appraisals and issuing performance–based pay increases?

The General Counsel alleges that Respondent changed its past practice of conducting annual performance appraisals and issuing pay increases based on those appraisals in retaliation for employees' union activities, and without prior notice to or affording the Unions an opportunity to bargain with respect to these changes. Respondent denied these allegations in its answer to the complaint. In its brief, Respondent acknowledged that it last conducted annual performance reviews in December 2020 and asserts these ended when its HR manager left in 2021. Additionally, Respondent asserts that not all employees received annual pay raises, and that it had good reasons to grant increases to two employees in 2022. (R. Br. 14–15.)

Applicable Law

Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees. 29 U.S.C. §158(a)(5). It is well settled that an employer violates Section 8(a)(5) if it changes terms and conditions of employment that are mandatory subjects of bargaining without providing the union representing its employees with prior notice and the opportunity to bargain. *NLRB v Katz*, 369 US 736, 743 (1962). Merit increases are a mandatory subject of bargaining. Id. at 745. Evaluations have the potential to affect the wage rate an employee might receive and therefore are also a mandatory subject of bargaining. *Wendt Corp*., 369 NLRB No. 135 (2020), and *Weyerhaeuser NR Co.*, 366 NLRB No. 169 (2018), citing *Saginaw Control & Engineering*, 339 NLRB 541 (2003). A wage increase program constitutes a term or condition of employment when it is an "established practice. . . regularly expected by the employees." *Mission Foods*, 350 NLRB 336, 337 (2007), citing *Daily News of Los Angeles*, 315 NLRB 1236, 1239 (1994).

An employer violates Section 8(a)(3) and (1) of the Act by delaying annual performance reviews and consequently depriving unit employees of their pay increases when it does so motivated by antiunion animus. *Wendt Corp*., 369 NLRB No. 135, slip op. at 5 (2020). See, also, *United Rentals, Inc.*, 350 NLRB 951 (2007) (employer violated Section 8(a)(3) when it

suspended annual performance evaluations and pay raises) and *Regional Home Care, Inc.,* 329 NLRB 85 (1999).

Analysis

With respect to the 8(a)(5) allegation, I find, contrary to Respondent's assertions, that the General Counsel carried her burden in establishing that Respondent had a past practice of performing annual performance reviews which led to pay raises for bargaining unit employees. To establish the existence of a past practice, a 'practice' must occur with such regularity and frequency that employees reasonably expect it to continue or reoccur on a regular or consistent basis. *Sunoco, Inc.*, 349 NLRB 240, 244 (2007). In this regard, the evidence established that Respondent's handbook referenced a policy of conducting annual performance appraisals and related annual pay raises, that Respondent referenced this policy in its job offers, and that employees expected an annual performance review with a related annual pay raise. Significantly, Respondent's witnesses acknowledged this past practice. Thus, the evidence established that prior to the Unions' certification, Respondent had a policy and a history of conducting annual performance reviews in December of every year that could lead to $1 to $3 per hour raises granted in March of the following year.

In addition, the uncontroverted evidence established that annual performance reviews and corresponding annual increases were not performed in December 2021 and March 2022. I find Respondent's proffered reasons for discontinuing this practice pretextual. Loes' testimony in this regard was contradictory. Loes testified that the HR manager took over the performance appraisal process from him and then "let it go," implying that this happened because she was careless and not because she left the Company. Yet at another point in his testimony he testified that the wage increases were up to him, with manager input, and that the process "never stopped." In any event, Respondent admitted that it did not notify the Unions, nor did it provide the Unions with an opportunity to bargain about the fact that it stopped conducting performance evaluations in December 2021 or granting pay increases based on those evaluations in March 2022.

It is well settled that an employer has the duty to proceed as it would have done had a union not been on the scene. *Wendt Corp.* at 34, citing *KDEN Broadcasting Co.*, 225 NLRB 25, 26 (1976). Therefore, Respondent had the duty to continue with its past practice of performing annual performance evaluations in December 2021 and issuing performance-based pay increases in March 2022. Instead, Respondent abruptly stopped evaluating bargaining unit employees and stopped granting employees pay increases based on performance evaluations. By this conduct, Respondent violated Section 8(a)(5) and (1).

With respect to the 8(a)(3) allegation, I also find that Respondent violated the Act as alleged. As is discussed in other parts of this decision, the record here has substantial evidence of union animus. Moreover, Respondent provided pretextual reasons for not conducting annual performance reviews after the Unions were certified. When the Unions requested copies of employees' 2021 performance appraisals, Respondent stated that "none such exist." Notably, when the Unions asked Respondent to explain how employees would be able to get a wage increase if the Company was not performing annual reviews, Respondent replied "the terms of the CBA require a performance appraisal be completed once the document is executed." Thus, Respondent did not mention the departure of its HR manager as being the issue, but instead

unilaterally determined that no performance appraisals and/or related wage increases would occur until after the parties executed a CBA. Based on the foregoing evidence, including that the reasons given for Respondent's actions are pretextual, I find that Respondent failed to show that it would have taken the same actions even in the absence of its employees' union activity. *Wendt Corp.* at 5, citing *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). Therefore, I find that Respondent violated Section 8(a)(3) as alleged.

F. Did Respondent violate Section 8(a)(5) of the Act by transferring bargaining unit work to nonunit employees, supervisors, and/or managers?

The General Counsel alleges that as Respondent lost bargaining unit employees, rather than replacing them, it gave their work to a new manager and to other nonunit employees, supervisors and managers, without bargaining with the Union. (GC Br. at 38.) Respondent asserts that managers have always worked in the field, more managers performed field work because more managers were employed, and that this past practice has not resulted in any employee losing work hours. (R. Br. at 11.)

Applicable legal standard

The General Counsel establishes a prima facie violation of Section 8(a)(5) when she shows that the employer made a material and substantial change in a term of employment without negotiating with the union. The burden then shifts to the employer to show that the change was is some way privileged (e.g. consistent with established past practice). *McClatchy Newspapers, Inc.*, 339 NLRB 1214, 1214 (2003).

The transfer of bargaining unit work to managers or supervisors is a mandatory subject of bargaining. *Regal Cinemas, Inc.*, 334 NLRB 304, 304 (2001). It is well settled that an employer must notify and offer to bargain with a union about the removal of bargaining unit work before it may assign such work to newly created supervisory positions. *Presbyterian University Hospital*, 325 NLRB 443, 443, (1998), enfd. mem. 182 F.3d 904 (3d Cir. 1999) citing with approval *Hampton House*, 317 NLRB 1005 (1995) (employer violated the Act by unilaterally transferring work from the bargaining unit). Just because an employer has a past practice of, for example, subcontracting certain work, the employer may not unilaterally subcontract as much bargaining unit work as it chooses. *Presbyterian University* at 444. The Board will find a violation when an employer unilaterally transfers work to nonunit employees, even if the General Counsel does not show that there was a reduction in the amount of work performed by unit members. *Goya Foods of Florida*, 347 NLRB 1118, 1120 (2006). See *Exxon Research & Engineering Co.*, 317 NLRB 675 fn. 2 (1995) (no requirement that the unit must lose something before the Board will find an unlawful unilateral change to working conditions). The bargaining unit is adversely affected whenever bargaining unit work is given away to nonunit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit. *Overnite Transportation Co.*, 330 NLRB 1275, 1276 (2000).

Analysis

It is undisputed that the bargaining unit went from 14 employees to five employees within about 16 months after the Unions were certified. It is also undisputed that despite losing more

than half of its unit employees, Respondent decided not to hire any bargaining unit employees from January 2021 until 2023, after withdrawing its recognition to the Unions. Further, after losing two plumbers from the bargaining unit in 2022, Respondent did not replace them but instead created a new "plumber" manager role. Respondent did not offer a reason for creating the new plumber manager position. Respondent did not provide an explanation for its decision to not hire any bargaining unit employees either, other than to assert that it was more efficient. However, Respondent's assertions of being more efficient are not credible. Respondent never asserted such to the Unions during bargaining nor was there any evidence to substantiate that Respondent engaged in any productivity efforts. Instead, the record evidence established that Respondent assigned a substantial amount of work orders that would have regularly been assigned to bargaining unit employees to its managers and to other nonunit employees. Therefore, the evidence clearly shows that Respondent's so–called efficiency was achieved solely by transferring bargaining unit work to managers, alarm technicians, mechanics, and others, like Dan and Kaden Harbut.

While it is true that Respondent's managers frequently worked out on the field with bargaining unit employees prior to the election, the evidence shows that managers would work alongside bargaining unit employees, not that they would supplant them. The record evidence clearly and indisputably established that as the bargaining unit shrank, bargaining unit work assigned to managers drastically and significantly increased. For example, the fire division suppression manager (Larcombe) averaged 32 work orders a month from January through June 2021. His average doubled to 61 work orders a month from July through December 2021, and 68 work orders a month from January through June 2022. Work orders assigned to the backflow and plumbing managers (MacDonald, Hermann, and Grubbs) show an average of only 23 work orders a month from January through June 2021. However, the evidence shows a massive increase to an average of 144 work orders a month from July through December 2021, and 188 work orders a month from January through June 2022. The fire sprinkler I&T manager's (Quintana) average work orders per month also show an increase from an average of 27 work orders a month from January through June 2021, to 41 work orders a month from July through December 2021, and 48 work orders a month from January through June 2022. These numbers show that Respondent clearly shifted its past practice of how much bargaining unit work it assigned its managers.

Further, there is no evidence that Respondent had a past practice of assigning bargaining unit work to alarm technicians, mechanics, and/or to Dan and Kaden Harbut. And yet, the record evidence indisputably shows that Respondent assigned more than a de minimis amount of bargaining unit work to these nonunit employees. Respondent's actions in transferring a substantial amount of bargaining unit work to nonunit employees made it possible for it to drastically reduce the bargaining unit and in doing so, it impaired the unit's integrity. See *Duke University*, 315 NLRB 1291, 1297–1298 (1995) (following an election, the employer failed and refused to fill bargaining unit positions as unit employees left employment and instead hired part–time employees who were outside the unit. The Board held that "hiring people outside the unit to do [unit] work does impair the unit's integrity.")

Respondent does not dispute that it did not notify the Unions or otherwise offer to bargain with them about assigning bargaining unit to nonunit employees. Accordingly, I find that Respondent violated Section 8(a)(5) and (1) of the Act by transferring bargaining unit work to

nonunit employees and managers, without affording the Union an opportunity to bargain about its decision to transfer such work.

G. Did Respondent violate Section 8(a)(5) of the Act by changing its past practice of granting wage increases of $5 per hour for obtaining trade certifications or licenses?

The General Counsel asserts that Respondent changed its past practice of granting wage increases of $5 per hour to bargaining unit employees after they obtained certifications or licenses. Specifically, the General Counsel objects to the wage increases granted to unit employees Linsday Bouffard and Chuck Tyche that exceeded $5 per hour after they obtained additional certifications. (GC Br. at 71.) Respondent argues that the wage increases granted to Bouffard and Tyche were provided to "ensure they did not lose employees because some other companies were paying higher" and "in no way deviated from the Company's (specifically Loes') policy regarding providing increases or how they are determined." Respondent also argues that there was no evidence that either employee viewed the increases "as an attempt to interfere with or coerce them in their choice on union representation." (R. Br. at 19–20.)

Applicable legal standard

The applicable legal standard concerning violations of Section 8(a)(5) have been previously discussed in section D above.

Analysis

The evidence clearly demonstrated that Respondent had a past practice of granting $5 per hour increases after an employee obtained an additional certification or license. This past practice was documented in at least two emails Respondent sent to unit employees and was corroborated by Respondent's owner Harbut and operating manager Loes. In September 2022, Respondent informed the Unions by email that Bouffard and Tyche had received increases of more than $5 per hour for obtaining a certification. Bouffard received an increase of $13 an hour and Tyche an increase of $6 per hour. Despite Respondent stating in writing that these increases were granted because the employees obtained additional certifications, at the hearing Loes explained that he granted these employees more than the $5 per hour increase because of retention concerns, to get them to $40 per hour, and to keep them "happy." Respondent failed to provide evidence that it had previously deviated from granting just the $5 per hour increase to employees that obtained additional certifications. It is undisputed that Respondent did not notify the Union or offer to bargain about this change in past practice. Accordingly, I find that Respondent violated Section 8(a)(5) and (1) of the Act by changing its past practice of granting $5 per hour increases for obtaining additional certifications or licenses.

H. Did Respondent violate Section 8(a)(5) of the Act by failing and refusing to bargain collectively with and withdrawing its recognition from the Unions?

The General Counsel argues that Respondent withdrew its recognition from the Unions on the basis of tainted decertification petitions, which Respondent could not rely on as objective evidence of a loss of majority support pursuant to applicable Board law. (GC Br. at 74–75.) Respondent asserts that it had an obligation to withdraw its recognition to the Unions "due to the

almost 20 letters received from all bargaining unit employees and the decertification petition as submitted by the bargaining unit employees." (R. Br. at 22.)

Applicable Legal Standard

Case law provides for several modes of analysis for determining the legality of employer withdrawals of recognition based on disaffection petitions. An employer's withdrawal of recognition can be deemed unlawful because, for example, the withdrawal of recognition occurred during the certification (or extended certification) year when the union's presumption of majority support is irrebuttable; because the disaffection petition was tainted by the employer's unfair labor practices; or because the employer failed to show that the union had, in fact, lost the support of the majority of the unit employees at the time the employer withdrew recognition. *J.G. Kern Enterprises, Inc.* 371 NLRB No. 91 (2022). It is well settled that an employer may not avoid its duty to bargain if its own unfair labor practices cause the union's loss of majority support. *Goya Foods*, supra at 1121 and *AT Systems West, Inc.*, 341 NLRB 57, 59 (2004). However, not all unremedied violations will preclude a lawful withdrawal. The unremedied unfair labor practices must be of a character as to either affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself. *AT Systems West*, supra at 59–60. In *Master Slack Corp.*, 271 NLRB 78, 84 (1984), the Board considered four factors in determining whether there was a causal relationship between an employer's unfair labor practices and a subsequent petition for decertification: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. It is the objective evidence of the commission of unfair labor practices that has the tendency to undermine the union, and not the subjective state of mind of the employees. *AT Systems West*, supra at 60.

Analysis

It is undisputed that Respondent withdrew its recognition of the Unions on March 13, 2023. Respondent asserts that it withdrew recognition based on the 20 letters received by bargaining unit employees. The first of these letters was signed on October 17, 2022, and the last one was signed on March 6, 2023. Notably, the majority of these letters (14 out of 20) were filed during the extended *Mar–Jac* period that ended on January 24, 2023. Therefore, Respondent could not rely on these 14 letters to withdraw its recognition. The remaining six letters were filed at a time when there were multiple unremedied unfair labor practices. Therefore, whether Respondent was privileged to withdraw recognition based on these six letters will depend on whether the unremedied unfair labor practices tended to undermine bargaining unit support for the Unions.

Here, the unfair labor practices I have found in this case, and those found by the Board in its decision in *American Backflow*, which issued after the hearing in the instant matter, occurred prior to and simultaneously with the filings of the disaffection letters. With regard to the Board decision, Respondent signed a settlement agreement in April 2022 to remedy a multitude of unfair labor practices that started in July 2021 and continued through December 2021 (which included several statements that violated Section 8(a)(1), the unlawful posting of a decertification petition

and related unlawful assistance to employees in decertifying the Unions, a failure to provide information requested by the Unions, and a failure to meet with the Unions for bargaining). Respondent was provided until May 12, 2022, to comply with the terms of the settlement agreement. The Board stated that it received no evidence concerning Respondent not meeting its obligations under the settlement agreement except for by withdrawing recognition from the Unions. *American Backflow*, slip. op. at 4, fn. 5. However, by May 2022 Respondent had already committed new unfair labor practices as discussed in this case.

Among the new unfair labor practices, Respondent maintained a no–hiring stance from January 2021 until right after its withdrawal of recognition, which caused the bargaining unit to shrink dramatically all while Respondent unlawfully transferred a significant amount of bargaining unit work to managers and nonunit employees. The unlawful transfer of bargaining unit work continued, unremedied, up until the withdrawal of recognition. Respondent unlawfully failed to provide performance appraisals and performance–based increases which unit employees expected to receive in December 2021 and March 2022 respectively. Then, in September 2022, just a month prior to the first of the disaffection letters, Respondent broke with its past practice of granting union employees $5 per hour increases for obtaining new certifications and licenses and granted two of the remaining six employees in the unit, a $13 per hour and $6 per hour increase, respectively. Notably, these two employees had signed the decertification petition that Respondent unlawfully allowed to be posted at its facility in December 2021.

Further, I find that the nature of the unfair labor practices described above would naturally have a detrimental and lasting effect on employees. As has been demonstrated in this case, Respondent changed its hiring process in a number of unlawful ways, starting by more closely scrutinizing the job applications and resumes of prounion job applicants and refusing to hire and/or to consider for hire those applicants, and then enacted a hiring freeze, despite losing more than half of its bargaining unit to resignations and/or attrition. Respondent made these changes known to its unit employees as demonstrated by the no-hiring notice on its website and on its main entrance, which also displayed a no-union sign. Respondent also ceased accepting any hard-copy job applications. Then, Respondent unilaterally ceased performing annual performance appraisals and granting annual wage increases to unit employees, followed by unilaterally providing certification–related wage increases above its $5 per hour past practice to two known anti–union employees. The withholding of expected wage increases is a hallmark violation that has a detrimental and lasting effect on employees reinforcing the connection between loss of pay and union support. *Wendt Corp.*, 371 NLRB No. 153 (2022), slip. op. at 5, citing *Overnite Transportation Co.*, 333 NLRB at 134. The Board and the courts will find a decertification petition tainted where the employer's unilateral changes involve "bread–and–butter issues" like wage increases that lead employees to seek and gain union representation in the first place. *Wendt Corp.* slip op. at 6. Further, the Board has stated that the pernicious effect of an employer's unilateral conduct is intensified where the union is bargaining, as here, for its first contract on the employees' behalf and thus has no reserve of historical employee alliance. *Wendt Corp.*, slip op. at 7.

In addition, Respondent shamelessly transferred a significant amount of bargaining unit work to its managers and nonunit employees on a continuing basis up until it withdrew recognition from the Unions. The unlawful unilateral removal of unit work to newly appointed supervisors, resulting in a diminished bargaining unit has a detrimental and lasting effect on

employees. *Wendt Corp.*, slip. op. at 5. Notably, Respondent started hiring again for unit positions right after withdrawing recognition, sending a clear message to any remaining unit employees that its hiring freeze was a direct result of its antiunion strategy.

The effect of Respondent's unlawful conduct here would naturally have a significant impact on employees' morale, organizational activities, and membership in the Unions. Unit employees saw their ranks shrink significantly, while Respondent brazenly transferred unit work to a newly created manager position, to other managers and to nonunit employees. Further, the unilateral changes concerning employees' wage increases would naturally impact employees' confidence in the Unions, especially considering that the Unions were bargaining for a first contract. Accordingly, I find that the unit employees' disaffection from the Unions is reasonably tied to Respondent's unfair labor practices.

Respondent presented the testimony of one of the five unit employees that signed the decertification petitions. This employee was a union supporter that went out on strike in July 2021 and experienced the one year and eight months long unfair labor practices committed by Respondent prior to it withdrawing recognition. Although this employee expressed that he no longer supported the Unions based on his personal beliefs, his reasons for signing a decertification petition "[do] not negate the factors supporting the finding of a causal relationship between the respondent's unlawful conduct and the employee' expression of disaffection." *Hillhaven Rehabilitation Center*, 325 NLRB 202, 205 (1997), enf. in part, 178 F.3d 1296 (6th Cir. 1999). Further, employee disaffection is determined based on an objective analysis, and not the subjective state of mind of the employees. *AT Systems West*, supra, at 60.

Based on the foregoing, I find that Respondent's unremedied unfair labor practices tainted the disaffection letters/decertification petitions. Consequently, Respondent could not rely on those decertification letters/petitions to lawfully withdraw its recognition from the Unions. Therefore, I find that Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing its recognition from the Unions, and further violated Section 8(a)(5) and (1) by refusing to bargain with the Unions since March 13, 2023.

IV. CONCLUSIONS OF LAW

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

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

3. Respondent violated Section 8(a)(1) of the Act by displaying and maintaining a sign prohibiting unions on the door of the main entrance of its facility since about June 27, 2022.

4. Respondent violated Section 8(a)(3) and (1) of the Act by: (a) refusing to consider Thomas Jennrich and Philip Roknich for employment since July 9, 2021, and Michael Laskarin since January 12, 2022; and (b) by refusing to hire Michael Laskarin since January 12, 2022.

5. Respondent violated Section 8(a)(3) and (1) of the Act by: (a) since about January 12, 2022, changing its website to indicate it was not hiring employees for bargaining unit employees;

and (b) since about June 27, 2022, changing its hiring practice of accepting and maintaining hard–copy paper applications for bargaining unit employees.

6. Since June 9, 2021, the Unions have been the joint exclusive collective-bargaining representatives of the following appropriate unit:

> All full–time and regular part–time journeymen and apprentice fire sprinkler technicians, fire sprinkler/ansul technicians, plumbers, and backflow technicians employed by the Employer at its facility located at 111 Kerry Lane, Wauconda, Illinois.

7. Respondent violated Section 8(a)(3), (5), and (1) of the Act by: (a) since about December 2021, unilaterally discontinuing its past practice of conducting annual performance appraisals in about December of each year; and (b) unilaterally discontinuing its past practice of issuing performance–based pay increases of between $1 and $3 by about March every year.

8. Respondent violated Section 8(a)(5) of the Act by transferring bargaining unit work to nonunit employees, supervisors, and/or managers.

9. Respondent violated Section 8(a)(5) of the Act by, since about late August 2022, changing its past practice of granting wage increases of $5 to bargaining unit employees for obtaining trade certifications or licenses.

10. Respondent violated Section 8(a)(5) of the Act by, since about March 13, 2023, withdrawing recognition from, and failing and refusing to bargain with the Unions as the exclusive collective–bargaining representative of the unit.

11. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices at its Wauconda, Illinois facility, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

A. Standard Remedies

The Respondent shall be ordered to cease and desist from failing and refusing to consider for hire or hire individuals because of their union membership, affiliation, or activities. Furthermore, the Respondent, having discriminatorily refused to hire Michael Laskarin, shall be ordered to offer him instatement and make him whole for any loss of earnings and other benefits he may have suffered as a result of the unlawful discrimination against him. Respondent will also be ordered to remove from its files any references to the refusal to consider for hire Thomas Jennrich, Philip Roknich, and Michael Laskarin. Backpay for Laskarin shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River*

Medical Center, 356 NLRB 6 (2010). The duration of the backpay period shall be determined in accordance with *Oil Capital Sheet Metal*, 349 NLRB 1348 (2007). In accordance with the Board's decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), the Respondent shall compensate Laskarin for any direct or foreseeable pecuniary harms incurred as a result of the unlawful adverse actions against him, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Respondent must also make whole all unit employees for any loss of earnings they may have suffered as a result of Respondent unilaterally discontinuing its past practice of conducting annual performance appraisals in December of each year and issuing performance–based pay increases of between $1 and $3 by the following March. The General Counsel requested in the complaint that Respondent be ordered to grant a performance-based pay increase of $2 per hour, based on the average of its past practice of granting between $1 and $3 per hour annual increases. The General Counsel did not include this request in her post hearing brief. Therefore, I will order a make whole remedy of between $1 and $3 per hour for failing to issue performance-based increases.

The General Counsel requested in the complaint that Respondent be ordered to make whole the bargaining unit employees who obtained certifications since April 17, 2022, by granting them a certification-based pay increase of $5. In its post–hearing brief, the General Counsel requests that Respondent be ordered to grant all bargaining unit employees who obtained certifications at any time since April 17, 2022, a $6.50 pay increase. (GC Br. at A–49.) The General Counsel did not explain why Respondent should be ordered to grant certification–based pay increases of $6.50 per hour instead of $5 per hour. Therefore, I decline the General Counsel's request to order Respondent pay bargaining unit employees a certification–based pay increase beyond the $5 per hour. Respondent shall also be ordered to reinstate its past practice of issuing certification-based pay increases of $5 per hour.

When an employer has unlawfully transferred bargaining unit work to managers, supervisors, and/or nonunit employees, the Board's usual practice is to order the employer to cease and desist from transferring bargaining unit work, without notice to and bargaining with the union, restore the status quo ante, rescind any unilateral changes, and make whole unit employees for any loss of wages or other benefits they may have suffered as a result of the unlawful transfer of bargaining unit work. See, e.g., *Goya Foods*, supra at 1124–1125. *Presbyterian University Hospital*, supra at 444. *Overnite Transp. Co.*, supra at 1277, *Duke University*, supra at 1291.

The General Counsel additionally requests that Respondent be ordered to restore the bargaining unit to 15 positions, and that the Unions be allowed to select the individuals that will fill those bargaining unit positions. (GC Br. at A–48.) The Unions also request that Respondent be ordered to restore the bargaining unit by hiring qualified employees selected by the Unions. (CP Br. at 85–93.) Neither the General Counsel nor the Unions cited any Board precedent to support this specific remedy. I have not found any case where the Board has ordered an employer to hire unidentified individuals selected by a union in order to restore a unit. In *Duke University*,

supra at 1291, the judge there found that respondent had unilaterally changed working conditions by removing work from bargaining unit employees while at the same time ceasing to hire unit employees and causing the unit to shrink. The judge ordered respondent to restore the status quo ante, and the Board, in adopting the judge's order, emphasized that "the status quo ante remedy includes restoration of the unit to what it would have been without the unlawful changes." The Board further held that the respondent's unfair labor practices, particularly its unilateral decision to cease hiring unit employees and instead hire nonunit employees, were the direct and proximate cause of the diminution of the unit's ranks from 13 employees to 7. However, the Board did not order the respondent to restore the unit to 13 but stated that the respondent would be permitted to introduce evidence at the compliance stage of the case regarding the appropriateness of the restoration portion of the remedy. Id. Based on the foregoing, I am declining to grant the General Counsel's and the Unions' requests. Respondent shall rescind the unilateral changes it made by transferring bargaining unit work to nonunit employees, supervisors, and/or managers, shall restore the status quo ante by restoring the unit to where it would have been without the unilateral changes, and make unit employees whole for any loss of wages or other benefits they may have suffered since April 14, 2022, as a result of the Respondent's unilateral changes.

Backpay for unit employees who did not receive performance–based wage increases and/or certification–based wage increases, and unit employees who were harmed by the unilateral transfer of bargaining unit work shall receive backpay computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Consistent with *Thryv, Inc.*, supra, Respondent shall also compensate the affected unit employees for any direct or foreseeable pecuniary harms incurred as a result of the unlawful unilateral changes. Compensation for those harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In addition, Respondent shall further compensate unit employees who did not receive performance–based wage increases and/or certification–based wage increases, unit employees who were harmed by the unilateral transfer of bargaining unit work, and Laskarin, for the adverse tax consequences, if any, of receiving a lump–sum backpay award, and file with the Regional Director for Region 13, within 21 days of the date that the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award(s) to the proper calendar year for each employee, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). Respondent shall also, within 21 days of the date the amount of backpay is fixed by agreement or Board order, file a copy of each backpay recipient's W–2 form reflecting the backpay award.

The General Counsel requests an affirmative bargaining order as a remedy for Respondent's unlawful withdrawal of recognition. As set forth in *Caterair International*, 322 NLRB 64, 68 (1996), an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective–bargaining representative of an appropriate unit of employees." Further, an affirmative bargaining order with its temporary decertification bar is an appropriate remedy for an unlawful withdrawal of recognition. *Regency House of Wallingford, Inc.*, 356 NLRB 563, 568–569 (2011). In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*,

209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Building Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, supra, the court summarized its requirement that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: '(1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." Id. at 738.

In examining the facts of this case under the three-factor balancing test outlined by the U.S. Court of Appeals for the District of Columbia Circuit, I find that an affirmative bargaining order is warranted.

First, an affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's withdrawal of recognition and resulting refusal to bargain with the Union for a first collective–bargaining agreement. Moreover, as previously discussed, Respondent transferred a significant amount of bargaining unit work to nonunit employees and managers, while ceasing to hire unit employees, causing the unit to shrink dramatically. An affirmative bargaining order, with its related decertification bar for a reasonable time, will allow the Union time to reestablish its representative status with the unit employees, especially since Respondent will also need time to restore the unit to its status quo ante. A bar to decertifying the Unions will not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. Requiring Respondent to bargain with the Unions for a reasonable period of time will allow unit employees time to fairly assess for themselves the Union's effectiveness as a bargaining representative.

Second, an affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. It removes the Respondent's incentive to delay bargaining in the hope of discouraging support for the Union. Providing this temporary period of insulated bargaining will also afford employees a fair opportunity to assess the Union's performance in an atmosphere free of the Respondent's unlawful conduct.

Third, a cease-and-desist order, alone, would be inadequate to remedy the Respondent's withdrawal of recognition and refusal to bargain with the Union because it would allow another such challenge to the Union's majority status before the taint of the Respondent's previous unlawful withdrawal of recognition has dissipated. Allowing another challenge to the Union's majority status without a reasonable period for bargaining would be particularly unfair in light of the fact that the litigation of the Union's charges took several years and, as a result, the Union needs to reestablish its representative status with unit employees. Indeed, permitting a decertification petition to be filed immediately might very well allow the Respondent to profit from its own unlawful conduct. I find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

For all the foregoing reasons, I find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violations in this case. In order to provide

employees with the opportunity to fairly assess for themselves the Union's effectiveness as a bargaining representative, the bargaining order requires the Respondent to bargain with the Union for a reasonable period of time. See, e.g., *Vincent/Metro Trucking, LLC*, 355 NLRB 289, 290 (2010), and *Regency House*, supra.

B. Special Remedies

The General Counsel seeks a broad cease and desist order, and that Respondent be required to post a notice to employees and an explanation of employee rights poster for an extended period of 120 days. Further, the General Counsel requests that Respondent be ordered to: email the notice and explanation of employee rights to all current employees, and copy and mail the notice and explanation of employee rights to all former employees since July 9, 2021; send all of its supervisors, managers, and owners at its Wauconda facility to attend an NLRA training; have owner Dan Harbut or operations manager David Loes personally sign the Board's notice to employees and explanation of employee rights; hold a meeting during working hours to read the notice to employees, to be read by Harbut, or in the alternative, by a Board agent in the presence of Harbut; agree to a bargaining schedule with the Union and provide monthly progress reports to the Regional Director; and allow that a duly-appointed Board agent enter the Respondent's facility for a period of 120 days to determine that Respondent is in compliance with the notice posting, distribution and mailing requirements. The Unions joined the General Counsel in requesting the above special remedies. (CP Br. 78–82.) The Unions also request that Respondent be ordered to duplicate the notice and explanation of employee rights for distribution at the notice reading to employees, supervisors and managers in attendance, that the Unions be permitted to have two representatives present (one from each Union), and that the Union representatives be allowed to record the notice reading. (CP Br at 82–84.)

As a general matter, the Board has determined that a broad cease and desist order and other additional "extraordinary" remedies are appropriate where a respondent "is shown to have a proclivity to violate the Act" or "has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Noah's Ark Processors*, LLC, 372 NLRB No. 80, slip op. at 4 (2023). The Board has found extraordinary remedies warranted where a traditional remedial order is inadequate because a respondent's unfair labor practices are "so numerous, pervasive, and outrageous" that additional relief is necessary to fully ameliorate the violations' coercive effects." See, e.g. *River City Asphalt*, 372 NLRB No. 87, slip op. at 13, (2023)

I decline the General Counsel's and Unions' requests for a broad cease and desist order and additional special remedies such as the posting and distributing of the explanation of employee rights and requiring training for management. I find that the special remedies set forth below are sufficient to effectuate the purposes of the Act at this time. See *Starbucks Corp.*, 373 NLRB No. 33 (2024), slip op. at 1, fn 3 (Board declined to order explanation of rights remedy citing *HTH Corp.*, 361 NLRB 709, 713 (2014), for the proposition that the explanation of rights is warranted where the rights of many employees have been broadly suppressed for an extended period of time and in numerous ways. Board also declined a broad cease and desist order in that case.)

I agree that a notice reading is warranted in this case. Reassurance to employees that their rights under the Act will not be violated is particularly important in light of the widespread nature of an employer's unfair labor practices, the small size of the unit, and the participation of high–ranking management officials. *Gavilon Grain, LLC*, 371 NLRB No. 79, slip op. at 1–2 (2022). In particular, I find that a notice reading is appropriate here because of the numerous and serious unfair labor practices involved in this matter and in the matter recently decided by the Board in *American Backflow*, supra, which include, among other violations, threats by high–ranking officials, the posting of a decertification petition and solicitation to unit employees to sign it by high–ranking officials, the decision to freeze all hiring in response to employees' union activity, followed by unilateral changes to hiring practices and employees' conditions of employment – including wage increases and the significant transfer of bargaining unit work to nonunit employees and managers. I find that a public reading of the notice is necessary in these circumstances to allow employees to "fully perceive that the Respondent and its managers are bound by the requirements of the Act." *Gavilon Grain*, supra. Thus, Respondent shall hold a notice–reading meeting during work time at its Wauconda facility, at a time scheduled to ensure the widest possible attendance, in the presence of a Board agent and an agent of each of the Unions, if the Unions so desire. Owner Dan Harbut shall read the notice, or at Respondent's option, be present for its reading by an agent of the Board.

Based on evidence that during a previous notice reading, Respondent's operating manager made disparaging remarks about the process and attempted to read a decertification petition, I find it appropriate to require Respondent to distribute a hard copy of the notice to all employees, supervisors, and managers in attendance at the notice reading. In addition, given the extensive transfer of unit work to managers, Respondent is required to have its supervisors and managers attend the reading of the notice. See *Spike Enterprises, Inc.*, 373 NLRB No. 41, slip op. at 13–14 (2024). It is critical for employees to see Respondent's supervisors and managers, especially those managers who directly committed unfair labor practices, at the notice–reading meeting to have increased confidence that they will all respect employees' Section 7 rights going forward. Further, distribution of the notice to everyone at the notice reading will allow those, who desire, to follow along to themselves as it is being read aloud. *Spike Enterprises*, Id.

Regarding the posting of the notice, I find that an extended 120–day posting period is warranted here. The Board exercises broad remedial authority to impose additional remedies "required by the particular circumstances of a case." *UPMC Presbyterian Hospital*, 366 NLRB No. 185, slip op. at 7, citing *Ishikawa Gasket America*, 337 NLRB 175, 176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004). In *UPMC*, the Board extended the posting period to 120 days based on the wide–ranging violations found in that case and the fact that several of the violations occurred during the 60–day notice posting period for allegations of prior unlawful conduct that had been informally settled. The Board noted that the "occurrence of violations during that posting period demonstrates the inadequacy of the standard notice–posting period as a deterrent of future unlawful conduct." *UPMC*, supra. Here, the wide–ranging violations include changes in hiring practices to avoid hiring union applicants, unilateral changes to employees' conditions, including by cancelling annual wage increases and transferring unit work to others, and finally withdrawing recognition from the Unions. Moreover, on the heels of signing a settlement agreement in April 2022, that included a 60–day notice posting, Respondent posted a no-hiring notice on the main door of its facility, which also displayed a no–union sign. During the next 60 days, Respondent created a new plumbing manager position and continued to significantly transfer unit work to

nonunit employees and managers.[27] Therefore, Respondent shall post the notice to employees for 120 days at its facility in Wauconda, Illinois, in all locations where notices to employees are routinely posted, including in employee breakrooms and on the bulletin board.[28]

Regarding the distribution of the notice, I will follow the Board's customary practice requiring Respondent to distribute the notice electronically by any methods that Respondent customarily uses or has used to communicate with employees, including by text and group chat. Respondent is also required to mail copies of the signed notice to all employees employed by Respondent at any time since July 9, 2021, the date that Respondent committed its first unfair labor practice in the instant case. I find that a notice mailing will reach individuals who might not otherwise see the posted notice but who were affected by Respondent's unfair labor practices. *Hiran Mgmt., Inc.*, 373 NLRB No. 130, slip op. at 2 (2024), and *Omni Excavators, Inc.*, 373 NLRB No. 18, slip op at 4 (2024). This is especially so because here the evidence shows that the unit went from 14 to five employees during this period of time, and that many employees left their employment during the time that Respondent was engaged in its unlawful conduct.

I find that an order requiring Respondent to agree to a bargaining schedule with the Unions and provide monthly progress reports to the Regional Director is warranted. As stated above, the Board in *American Backflow* found that at various times from June 2021 through December 2021, Respondent refused to meet at reasonable times and intervals with the Unions. Although Respondent bargained with the Unions in 2022, it continued to commit unfair labor practices, which as discussed above, included posting a no-hiring notice on its website and main entrance in response to employees' union activities, discontinuing its annual performance appraisals and corresponding performance-based wage increases, and transferring bargaining unit work to nonunit employees and managers, without notice to and/or bargaining with the Unions, and finally withdrawing its recognition from the Unions. Therefore, Respondent shall agree to a bargaining schedule with the Unions and provide monthly progress reports to the Regional Director. See *Omni Excavators*, supra at 3 (ordering respondent to comply with a bargaining schedule and progress reports to remedy unlawful conduct) and *All Seasons Climate Control, Inc.*, 357 NLRB 718, 718 fn. 1 (2011) (same).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[29]

ORDER

[27] I take judicial notice that the parties previously signed an informal settlement agreement in Cases 13–CA–276549 et al, which also included a 60–day notice posting requirement that lasted from January 2022 through March 31, 2022. Respondent engaged in unfair labor practices during this posting period as well (i.e., unilaterally ceasing to conduct performance appraisals and wage increases and changing its website to not–hiring in response to union activity).

[28] The parties' April 2022 settlement agreement indicated that the Respondent would post the notice in that case in the employee break rooms and on the bulletin board. (Jt. Exh. 1.)

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

Respondent, American Backflow & Fire Prevention, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Displaying and maintaining a sign prohibiting unions on the door of the main entrance of its facility.

b. Refusing to consider for hire or refusing to hire job applicants because of their union membership, affiliation, or activities.

c. Discriminating against employees for supporting the Unions by changing its website to indicate it is not hiring bargaining unit employees, by changing its hiring practice of accepting and maintaining hard-copy paper applications for bargaining unit employees, and by discontinuing its past practice of conducting annual performance appraisals in about December of each year, and of issuing performance-based pay increases of between $1 and $3 by about the following March every year.

d. Unilaterally changing the terms and conditions of employment of its unit employees.

e. Withdrawing recognition from the Unions as the collective-bargaining representatives of employees in the unit of all full-time and regular part-time journeymen and apprentice fire sprinkler technicians, fire sprinkler/ansul technicians, plumbers, and backflow technicians employed by the Employer at its facility located at 111 Kerry Lane, Wauconda, Illinois.

f. Failing and refusing to bargain in good faith with the Unions.

g. In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

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

(a) Remove any sign prohibiting unions on the door of the main entrance of its facility.

(b) Within 14 days from the date of this Order, offer immediate employment (instatement) to Michael Laskarin, in the position for which he applied, or, if such position no longer exists, to a substantially equivalent position.

(c) Make Michael Laskarin whole for any loss of earnings, other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the refusal to consider for hire Thomas Jennrich, Philip Roknich, and Michael Laskarin, and the refusal to hire Laskarin, and within 3 days thereafter, notify them in writing that this has been done, and that the refusal to consider them for hire and/or hire them will not be used against them.

(e) Compensate Michael Laskarin for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 13, within 21 days from the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(f) Make whole unit employees for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms they may have suffered as a result of Respondent's unlawful unilateral actions, including by discontinuing annual performance evaluations since December 2021 and related performance–based wage increases of between $1 and $3 per hour since March 2022, and by discontinuing certification–based wage increases of $5 to bargaining unit employees, as set forth in the remedy section of the decision.

(g) Compensate employees who did not receive their annual performance–based wage increases and/or certification–based wage increases, for the adverse tax consequences, if any, of receiving a lump–sum backpay award, and file with the Regional Director for Region 13, within 21 days from the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(h) Make whole unit employees for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, they may have suffered since April 14, 2022, as a result of the Respondent's unilateral transfer of unit work to nonunit employees, supervisors, and/or managers, as set forth in the remedy section of the decision.

(i) Compensate employees who suffered loss of earnings and other benefits due to the unlawful transfer of bargaining work, for the adverse tax consequences, if any, of receiving a lump–sum backpay award, and file with the Regional Director for Region 13, within 21 days from the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(j) File with the Regional Director for Region 13, within 21 days from the date the amount of backpay is fixed, either by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of the W–2 forms reflecting the backpay awards for all employees receiving backpay in this case.

(k) 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.

(l) Rescind the unlawful unilateral transfer of unit work to nonunit employees, supervisors, and/or managers, and restore the status quo ante by restoring the unit to where it would have been without the unilateral changes.

(m) Upon the Union's request, rescind the unilateral changes made, including the discontinuation of annual performance appraisals and performance-based increases of between $1 and $3 per hour and of granting certification-based increases of $5 per hour.

(n) Recognize and, on request, bargain in good faith with the Unions as the exclusive representative of the Respondent's employees in the following appropriate unit with respect to wages, hours, and other terms and conditions of employment, for the period required by *Mar–Jac Poultry Co.*, 136 NLRB 785 (1962), and, if an agreement is reached, embody it in a signed document:

> All full–time and regular part–time journeymen and apprentice fire sprinkler technicians, fire sprinkler/ansul technicians, plumbers, and backflow technicians employed by the Employer at its facility located at 111 Kerry Lane, Wauconda, Illinois.

(o) Within 14 days from the date of this order, Respondent will agree to a bargaining schedule with the Unions and to provide monthly progress reports to the Regional Director for Region 13.

(p) Within 14 days after service by the Region, post at its Wauconda, Illinois facility, copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 120 consecutive days in conspicuous places, including in employee breakrooms, on the bulletin board, and 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 addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the

[30] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID–19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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."

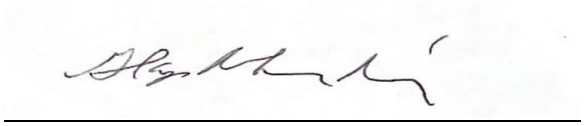
Respondent customarily communicates with its employees by such means. The Respondent shall also duplicate and mail, at its own expense, a copy of the notice to all current and former unit employees employed by Respondent at any time since July 9, 2021.

(q) Hold a meeting or meetings during working hours at its Wauconda, Illinois facility, scheduled to ensure the widest possible attendance of bargaining unit employees, at which the attached notice to employees marked "Appendix" will be read to employees by Respondent's owner Dan Harbut, or at the Respondent's option, by a Board agent in the presence of Harbut, the Respondent's supervisors and managers, and, if the Unions so desire, a representative of each Union. A copy of the notice to employees will be distributed by a Board agent during these meetings to each bargaining unit employee, supervisor, and manager in attendance before the notice is read.

(r) Within 21 days after service by the Region, file with the Regional Director for Region 13 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 complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., February 27, 2025.



G. Rebekah Ramirez
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize or bargain collectively with Plumbers Local 130, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO (Local 130) or Sprinkler Fitters Local 281, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO (Local 281), as the exclusive collective–bargaining representatives of the employees in the following appropriate unit (the bargaining unit):

> All full–time and regular part–time journeymen and apprentice fire sprinkler technicians, fire sprinkler/ansul technicians, plumbers, and backflow technicians employed by the Employer at its facility located at 111 Kerry Lane, Wauconda, Illinois.

WE WILL NOT display and/or maintain a sign prohibiting unions on the door of the main entrance of our facility.

WE WILL NOT refuse to hire job applicants or refuse to consider for hire job applicants because of their membership in, or activities in support of Local 130 and/or Local 281, or any other labor organization.

WE WILL NOT change our website to indicate that we are not hiring for bargaining unit positions.

WE WILL NOT change our hiring practices by refusing to accept and maintain hard–copy paper applications for bargaining unit positions.

WE WILL NOT discontinue conducting annual performance appraisals in about December of each year and issuing performance–based pay increases of between $1 and $3 by about March every year.

WE WILL NOT change your terms and conditions of employment without first affording the Unions notice and an opportunity to bargain.

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

WE WILL recognize and bargain in good faith with Local 130 and Local 281 as the exclusive collective-bargaining representatives of the employees in the bargaining unit.

WE WILL bargain in good faith with Local 130 and Local 281 as the exclusive collective-bargaining representatives of the employees in the bargaining unit for a reasonable period of time, and if agreements are reached, embody those agreements in a signed collective-bargaining agreement.

WE WILL remove any sign prohibiting unions on the door of the main entrance of our facility.

WE WILL within 14 days of the date of this Order, offer immediate employment to Michael Laskarin, in the position for which he applied, or if such position no longer exists, to a substantially equivalent position.

WE WILL make Michael Laskarin whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered because we failed to hire him, with interest.

WE WILL make you whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms you may have suffered resulting from our discontinuation of annual performance evaluations since December 2021 and related performance-based wage increases of between $1 and $3 per hour since March 2022, and our discontinuation of certification-based wage increases of $5 per hour.

WE WILL make you whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms you may have suffered as a result of our unilateral transfer of unit work to nonunit employees, supervisors, and/or managers.

WE WILL compensate Michael Laskarin and any bargaining unit employee that is being made whole, for the adverse tax consequences, if any, of receiving a lump-sum backpay award and **WE WILL** file with the Regional Director for Region 13, within 21 days of the date that the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

WE WILL file with the Regional Director for Region 13, within 21 days of the date that the amount of backpay is fixed, either by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of the corresponding W–2 forms reflecting the backpay awards.

WE WILL, within 14 days from the date of this Order, remove from our files all references to the failure to consider for hire Thomas Jennrich, Philip Roknich, and Michael Laskarin, and the failure to hire Laskarin, and **WE WILL**, within 3 days thereafter, notify them in writing that this has been

done and that the failure to consider for hire and/or hire them will not be used against them in any way.

WE WILL restore the bargaining unit to where it would have been without the transfer of unit work to nonunit employees, supervisors, and/or managers.

WE WILL upon request by the Union rescind all unilateral changes we made, including by reinstating annual performance appraisals, related performance-based increases and certification-based increases.

AMERICAN BACKFLOW & FIRE PREVENTION, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret–ballot elections to determine whether employees want union representation, and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

NLRB Region 13
Dirksen Federal Building
219 South Dearborn St., Ste 808, Chicago, IL 60604
(312) 353-7570, Hours: 8:30 a.m. to 5:00 p.m.

The Board's decision can be found at https://www.nlrb.gov/case/ 13-CA-285856 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 120 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (312) 353-7570.