UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 01-1337, 01-1448

FLUOR DANIEL, INC.,
Petitioner/Cross-Respondent,
v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,
and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, AFL-CIO,
Intervenor,

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 995, AFL-CIO,
Intervenor,

UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, PLUMBERS & STEAMFITTERS LOCAL UNION NO. 198, AFL-CIO,
Intervenor.

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

This case is before the Court on the petition of Fluor Daniel, Inc. ("the Company") to review, and the cross-application of the National Labor Relations Board to enforce, a Board order against the Company. The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 151, 160(a)) ("the Act"). The Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)); the Company conducts business within this judicial circuit. The Board's Decision and Order issued on March 2, 2001, and is reported at 333 NLRB No. 57. (D&O 1-31, A ___.)[1] The Board's order is final under Section 10(e) of the Act (29 U.S.C. § 160(e)).

The Company filed its petition for review on March 12, 2001. The Board filed its application for enforcement on March 29, 2001. Both filings were timely; the Act places no time limit on the institution of proceedings to enforce or review Board orders. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Plumbers and Steamfitters Local Union No. 198 ("Plumbers"), International Brotherhood of

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1 "A" references are to the appendix. "D&O" references are to the Board's decision and order. "Tr" references are to the transcript from the hearing before the administrative law judge. "GCX," "CPX," and "RX" references are to the exhibits of the Board's General Counsel, the Unions (charging parties before the Board) and the Company (respondent before the Board), respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Electrical Workers, Local Union No. 955 ("IBEW"), and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO ("Boilermakers") have intervened on behalf of the Board (the Intervenors were the charging parties before the Board, and in this brief they are collectively referred to as "the Unions").

ORAL ARGUMENT STATEMENT

The Board believes that oral argument would be helpful to the Court in the instant case. The Board suggests that 15 minutes per side would be sufficient for the parties to present their views.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board's uncontested unfair labor practice findings are entitled to summary affirmance.

3. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a) (3) and (1) of the Act by refusing to hire or consider for hire 120 employee applicants because of their support for and activities on behalf of the Unions.

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by the Unions, the Board's General Counsel issued a consolidated complaint, alleging that the Company violated Section 8(a) (3) and (1) of the Act (29 U.S.C. § 158(a) (3) and (1)). (GCX

1, A___.) After a hearing, the administrative law judge issued a recommended decision and order sustaining most of the allegations. (D&O 18-31, A __.) The General Counsel, charging parties Boilermakers and Pipefitters, and the Company each filed exceptions to the judge's decision. (D&O 1, A __.)

Before ruling on the exceptions, the Board issued its Decision and Order in *FES (A Division of Thermo Power)*, 333 NLRB No. 20 (2000) ("*FES*"), in which it reconsidered the standards applicable in refusal-to-hire cases. The Board then invited the parties here to file supplemental briefs addressing whether, in light of *FES*, it was necessary to reopen the record. The General Counsel, the Company, and the Plumbers filed supplemental briefs; the Board concluded that the current record was sufficient. (D&O 1 n.1; A___.) On March 2, 2000, the Board issued its Decision and Order, finding, in substantial agreement with the administrative law judge, that the Company violated Section 8(a)(3) and (1) of the Act. The Board adopted, with modifications, the judge's recommended remedial order. (D&O 1-31; A __.) The Board's findings are summarized below.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Company's Labor-Relations Policies, Its Corporate-Level Hiring Protocol, and Project-Level Recruiting Procedures

The Company is engaged in industrial engineering, construction, and maintenance projects throughout the United States. (D&O 2, 18; RX 122, A ___.) The Company is a nonunion subsidiary of Fluor Corporation, a holding company that also has a unionized subsidiary, Fluor Constructors. (D&O 2, 19; Tr 3175 (Glover), 5359 (Bordages), 5533-36 (Schroeder), RX 122, A ___.) On rare occasions, when required by a contract, the Company has hired a unionized workforce; typically, however, the Company staffs its projects with nonunion employees. (D&O 2& n.10 18-19; Tr 5614-15 (Schroeder), (Martinez), 5807-09 (Harris), 6309-31, 6169, 6317, 6431 (Martinez), A ___.)

The Company's written hiring policies articulate a preference for hiring craftsmen who have previously been "certified" by the Company through an in-house program. The hiring protocol provides that applications remain active for 60 days. (D&O 1-3, 2 n.7, 19, 25; Tr 1208, 1269-72 (Gourley), 3113 (Glover), 5379-81, 5458-59 (Bordages), 5596, 5604-05, 5639 (Schroeder), CPX 12, RX 128, A___.) At each project, the Site Manager and the Human Resources ("HR") Director are responsible for establishing the "craft staffing plan" based on

manpower projections and employee requisitions from craft superintendents. (Tr 1156-58, (Gourley), 2897, 2944 (Glover), 4002-03, 4010-15, 4023-24, 4041 (Strickland), 5376, 5343-44 (Bordages), GCX 4, CPX 12; A ___.)

B. At Palo Verde, the Company Pledges To Maintain a Nonunion Workforce, and at Exxon, It Modifies Its Job Application and Hiring Policies To Avoid Recruiting Union Applicants; the Unions Encourage Their Members To Apply for Work at Both Projects as Voluntary Union Organizers

In early 1993, the Arizona Public Service Company ("APS"), which oversees utility companies in that state, opened bidding on a contract to service and maintain the Palo Verde Nuclear Generating Station outside Phoenix, Arizona ("Palo Verde"). (D&O 3, 20; A___.) Palo Verde provides electric power to consumers. It was built by Bechtel Corporation, which had also maintained the plant under successive contracts with APS using a unionized workforce. (D&O 2, 20;Tr 606-07, 617-18 (Deen), A___.)

In May, the Company, in preparing to bid on the Palo Verde contract, conducted a survey of wages in the Phoenix area. The Company published a report of the survey's findings, stating that the Company's "greatest risk" of hiring union craftsmen would come from hiring local metal trades craftsmen. The report stated that the Company would therefore rely on other parts of the country to find "open shop," i.e., nonunion, metal craftsmen with nuclear experience. It concluded,

however, that the Company would find a sufficient number of nonunion craftsmen in other trades locally. (D&O 3, 20, 22; Tr 1217-18 (Gourley), CPX 93, A___.)

In June 1993, the Company submitted the winning bid to APS on the Palo Verde contract. In a document called the Palo Verde Nuclear Project Staffing Plan, which was part of its bid, the Company stated that its "workforce has historically rejected [union] representation," and that operating nonunion would guarantee that employees would be "loyal" to APS and the Company, rather than to unions. The Company noted that if it could not adequately staff the job through its nationwide pool of craftsmen, it would recruit other nonunion workers. The Company added that, on numerous occasions, it had transitioned from a predecessor's "union shop" to an open shop, and that it would work with APS to do the same at Palo Verde. It acknowledged the value to APS of a workforce with nuclear experience, and represented that it would canvass Bechtel's employees for workers with acceptable skills and "philosophies." (D&O 3 & n.17, 20; CPX 13, Tr 1211-13, A ___.)

Also in 1993, the Company submitted the winning bid on an Exxon refinery project in Baton Rouge, Louisiana, to rebuild a coker plant that had been destroyed by fire. On December 1, prior to commencing work on that project, Ed Martinez, the Company's Senior Industrial Relations Specialist, issued a memorandum to the project's HR Director, Bill Austin. In that document, Martinez stated that the

recommendations contained therein were "to protect [us] from unfair labor practice charges," and that it was "essential that these criteria be strictly adhered to." He detailed the "preferential hiring plan" for staffing the project in the following order of preference: "1) company certified, 2) company experienced, and 3) other." He also directed recruiters at Exxon to reduce the time during which applications were considered active from 60 to 30 days. (D&O 3 24 25; Tr 6156, 6185 (Martinez), GCX 30, A ___.) Martinez did not consult with HR Vice President David Bordages for those modifications to the Company's hiring protocol, as he was required to do. (D&O 3 & n.18, 26; Tr 6252, 6279-80 (Martinez), 5494-95, 5510 (Bordages), CPX 12, A ___.)

Once the Unions learned that the Company had won the Palo Verde and Exxon bids and was recruiting for those projects, they encouraged their members to apply for work and to serve as voluntary union organizers ("VUOs") at both sites. Participation in the organizing effort was uncompensated, except for three lead organizers: IBEW's Kenny Russell and Pipefitters' Jeff Armstrong at Exxon, and Boilermaker's Gary Evenson at Palo Verde. Participants agreed to discuss the benefits of union representation with other employees. ((D&O 3, 4, 19, 20, 24, 27, 28; Tr 641-42 (Deen), 983-8, 993-944 (Evenson), 4222-24, 4362-66 (Russell), 4399, 4404-05, 4540, 4634-36, 4698 (Armstrong), A___.)

C. Exxon

1. At Exxon, the Company begins "open-recruiting" to staff the project; openly union electricians apply; the Company hires none

By late December, the Company began recruiting for skilled craftsmen for the Exxon job, after it had exhausted its "nationwide pool" of craft workers with company-experience. The Company thereupon implemented "open recruiting." (D&O 4; Tr 2935, 3090-92, 3154 (Glover), 5861-62 (Harris), A___.) Recruiters posted job notices and advertised in local newspapers for "qualified' craftsmen, including electricians, pipefitters and ironworkers. Neither the posted notices nor the ads listed any specific requirements for hire. Although the Company did not anticipate significant hiring in most of the posted trades for another 3 months, recruiters accepted applications to create a reserve of qualified applicants to draw from during "peak" times. By January 19, 1994, recruiters had accepted about 700 applications. (D&O 4 & n.22, 13; Tr 2935, 3090-92, 3154 (Glover), 4046, 4058 (Strickland), 5962-66, 6086 (Austin), GCX 58, 59, 73, A ___.)

On January 19, a group of 10 union journeymen electricians, led by Organizer Russell, visited the Company's office and applied for the posted electricians' jobs. The application forms stated that applications were valid for "60 days," and contained six lines on which the applicants were required to list "all previous employment." (RX 82, 83, 85, 96, 100, Tr 3557, 3578 (Gauthreaux), A ___.)

The 10 electricians, all of whom wore union insignia on their clothing, listed extensive employment histories in the construction and industrial electrical field, mainly with union contractors. Under "training," each listed his 4-year union electrician's apprenticeship. Some listed additional qualifications. Where the form asked, they listed union wage scales as the desired pay, union officials as references, and some also wrote that they were Voluntary Union Organizers ("VUOs"). (D&O 4, 6, 24, 27; Tr 2890 (Glover), 3548-49, 3551-52, 3588, RX 82 (Gauthreaux), 3652, 3654, 3660-61, RX 83 (Goetzman), 4124, 4127, RX 80 (Cooks), 4225-27, 4236, 4318, 4368, RX 100 (Russell), 4725-26, 4733-36, GCX 125, RX 97 (Pitchard), 4755, 4761, RX 95 (Penny), 4781-85, 4789-90, RX 85, (Guarino), 4830-35, GCX 96 (Perrualt), A___.)

In the group's presence, Recruiter Rhonda Glover reviewed their completed applications. She did not mention that the Company required the applicants to list at least 42 months of craft experience. Applicant Earnest Perrault asked if his application was "okay." Glover said she would be in touch. She permitted three other applicants to attach resumes and other supplemental information containing complete job histories to their applications. One (Organizer Russell) indicated on his application that he was a paid union organizer. (D&O 5, 6, 24, 27; Tr 2865-66, 2890-91, 3040-41, 3047, 3050 (Glover), 3554, 3586-87 (Gauthreaux), 3661-64, 3687 (Goetzman), 4132-44 (Cooks), 4235 (Russell), 4833-35, 4837(Perrault), RX

80, 83, 100, GCX 106, 112, A___.) Another (Roland Goetzman) asked Glover if the information on his application was "sufficient." She did not respond. The next day, the Company took down the poster advertising for electricians. (D&O 4; Tr 3662-64 (Goetzman), 4237, 4312-13, 4319, 4236 (Russell), 4792, 4798-99 (Guarino), A___.) For nine more months, however, it continued to place newspaper advertisements for electricians, and to accept applications and hire electricians. (Tr 4238-39 (Russell), RX 121, pp. 26-35, A ___.)

On January 25 and 26, 2 groups consisting of 4 and 5 IBEW members, respectively, applied for electrician positions. They wore union insignia, and on their applications they listed craft-related training. For previous employment, most listed extensive construction and industrial electrical work experience, mainly with union contractors. They also listed union wage scales and union references, and some wrote that they were VUOs. (D&O 4, 24; RX 66, 69, 71, 72, 73, 81, 92, 94, 98, GCX 65, A ___.)

Recruiter Glover permitted three of the VUOs to submit resumes with their applications. One 9-page resume showed that the applicant (Joseph Aycock) had over 27 years of experience in electrical construction maintenance. It also showed that he had worked for several contractors on projects at the Exxon refinery, including on the construction of a coker unit. Two of the applicants who submitted resumes (Aycock and Ricky Achord) included copies of their Louisiana

electrician's certificates, apprentice council electrician's certificates, and IBEW apprenticeship certificates. One 5-page resume showed that the applicant (Wallace Goetzman) had 30 years of electrical trade experience. (Tr 3626-29, 3640-48, RX 66 (Achord), 3662-62 3652, 3660-61, RX 66, GCX 85 (Goetzman), 4961-63, 4966-67, RX 69 (Aycock), A ___.)

Recruiters reviewed the nine applications in the applicant's presence without any comment about the sufficiency of the craft experience listed. They did not inform the applicants that their applications, which reflected that they were valid for 60 days, would in fact expire after 30 days. (D&O 13; Tr 2794-95, 2797, 2802-03, (Fletcher), 3634-36, 3650 (Achord), 4968 (Aycock), 4989, 5000 (Long), A___.) The recruiter who reviewed Wallace Goetzman's application did not respond when asked if the information he furnished "was sufficient." (Tr 3662-63 (Goetzman), A ___.)

Five days later, the Company began hiring additional electricians. In the first month alone, it hired 21 nonunion electrician and many more thereafter. It did not hire any of the 19 union-affiliated applicants who wrote "VUO" or otherwise indicated union affiliation on their applications. (Tr 5921-22, 6109, 6113-14 (Harris), RX 121(B), pp.27-28, A ___.)

2. Union pipefitters and boilermakers apply in response to job postings; The Company hires none

Also in January, the Company began recruiting craftsmen with ironworking skills in anticipation of a projected peak need in February. About the end of January, Pipefitter Organizer Armstrong overheard Recruiter Glover on the telephone telling potential applicants that the Company needed pipefitters and welders. (Tr 4692-93, 4674 (Armstrong), 5861-62 (Harris), CPX 62, 64, RX 115, 116A ___.) Pipefitters and boilermakers routinely performed ironwork, which generally required less skill than pipefitting. Also, boilermakers, pipefitters and ironworkers generally work together on "composite crews," performing overlapping tasks. (D&O 7 n.34; Tr 1959-60 (Bauche), 2189-90 (Breaud), 2539, 2541 (Hughes), 2741-42, 2749-51 (Lewis), 3501 (Kelly), 4694 (Armstrong), A ___.) The Company's radio advertisement for pipefitters sought pipefitters with 3-1/2 years' experience and "combination pipe welders with heliaric and stick processing experience." (GCX 73, A __.)

On February 1, Organizer Armstrong and 14 union members, including six other pipefitters and eight boilermakers, applied for posted ironworkers' jobs. (Tr 3285-87 (Wilson), 1946-48, 1953 (Bueche), 2133-36, 2161, 2177 (Breaud), 2300-02, 2316-17, 2343-44 (Ross), 2545-47 (Hughes), 2702-06, 2735 (Lewis), 3212-16 (Greer), 3387-88, 3404 (Blalock), 3486-87 (Kelly), 3720, 3724, 3736-37 (Burns), 3910 (Ford), 4407-08, 4411, 4632 (Armstrong), A ____.) While they were in the

office, Recruiter Glover told them that the Company was not hiring ironworkers. (Tr 3390, 3406-05 (Blalock), A ___.) Moments later, another recruiter told nonunion applicants who were also in the office that the Company was hiring ironworkers. (Tr 3724 (Burns), A ___.)

The 15 union applicants nevertheless filed applications listing skills that were similar to or more advanced than those outlined in the Company's structural ironworker position description. The skills listed in the position description included ironworking, welding, rigging, pipefitting, blueprint reading, industrial drafting, and construction maintenance. (Tr 2721 (Lewis), 3399 (Blalock), 3506-10, 3512, 3535-40 (Kelly), 3731 (Burns), CPX 25, RX 67, 70, 74, 75, 78, 84, 86, 88, 90, 91, 93, 99, A ___.) Upon reviewing the application of Organizer Armstrong, who had listed his pipefitting work history, Recruiter Teri Wilson told him that he needed to show "ironworker experience." Armstrong replied that pipefitters did all ironworking tasks, and he specifically asked Wilson if he should redo his application to identify the jobs where he had performed ironwork. Wilson said, "No, this is okay, that is fine." (D&O 7 n.34; Tr 4422, 4461, 4652, GCX 45 (Armstrong), A ___.) All 15 applicants listed union officers as references. Organizer Armstrong wrote that he was a "paid union organizer," and seven other members of the group wrote that they were VUOs. One member of the group, boilermaker James Bueche, had company certification from previous employment

with the Company. (D&O 5 n 27, 24, 25; Tr 1939-41, 1962-63, 1986 (Bueche), RX 67, 70, 74, 75, 78, 84, 86, 88, 90, 91, 93, 99, A ___.) Two others, pipefitters Billy Breaud and Eugene Ford, had previously worked with Fluor Constructors--the Company's unionized sister subsidiary. Applicant Ford told Recruiter Glover about his "Fluor" work history and gave Glover his resume. (Tr 2149-50, 2163-64 (Breaud), 3912-14, 3933-34 (Ford), GCX 104, A ___.) Breaud, who had also obtained welding certificates while working at the Exxon site for another subcontractor, told a recruiter that he had "been tested for Exxon." At the recruiter's instruction, Breaud added the welding certificates to his application. The recruiter "looked over" Breaud's application and said it was "okay." (Tr 2138-39, 2145-46, 2158-59, 2193-94, 2196 (Breaud), A ___.)

Beginning on February 2, the Company began hiring numerous ironworkers. (Tr 5898-97 (Harris), RX 121(B), pp.53-54, A ___.) On February 8, 9, and 11, Organizer Armstrong visited the Company's office and inquired about the status of his February 1 ironworker application. Recruiter Wilson told him that she did not have any jobs available, and that the Company would begin hiring ironworkers in some weeks. Meanwhile, Armstrong learned that the Company had reduced the active period for applications from 60 to only 30 days. On March 16, Armstrong visited the Company's office again and asked Recruiter Wilson for permission to "update" his application. She denied his request, stating that he could not do so

because the ironworker position that he had originally applied for was no longer posted. (Tr 4428-39 (Armstrong), CPX 47-50, A ___.)

3. The Pipefitters Union files an unfair labor practice charge against the Company; the Company experiences a shortage of qualified craftsmen and subcontracts out work

On March 31, the Pipefitters filed unfair labor practice charges with the Board against the Company, alleging discriminatory hiring practices. By letter dated that same day, the Board's Region 15 office notified the Company of the charge. (Tr 4450 (Armstrong), GCX 1(a)-(b), A____.)

On April 19, Organizer Armstrong and five union members went to the Company's office seeking work. Armstrong applied for a posted "pipefitter helper" position; the others applied for posted "rebar helper" positions. For the first time, recruiters instructed the openly union applicants that they needed to show 42 months of relevant experience for craft positions, and 6 months for helper positions. Each applicant sought a helper position and isted more than 6 months experience. (D&O 5 n.26, 6 n.31, 8, 25; Tr 2204-06, 2238-39 (Broussard), 2357-62, 2377-78, 2396, 2398 (Elkins), 3426-29, 3796 (Strother), 4443-49, 4677 (Armstrong), 4855-58, 4865-66, 4885-91 (Johnson), GCX 47(c), CPX 51 A ___.) On his application, Armstrong wrote "union organizer pipefitter," and attached his apprenticeship and valve maintenance training certificates. A recruiter told

Armstrong not to call the office, and that if he were hired she would call him. (Tr 4611, 4674, 4693, GCX 51, (Armstrong), A ___.)

On May 10, the Company was administering craft certification tests. Organizer Armstrong and three other union pipefitters went to the Company's office seeking to be tested and to apply for work. Armstrong learned that at least one applicant without company experience had been tested that day. Recruiter Glover told Armstrong's group that the Company was testing only applicants with company experience. She did not allow Armstrong's group to take the test or to apply for work. (D&O 7 n.34, 25, Tr 2827-32, 2843-50, 2855 (Wooten), 3950-51, 3957, 3960, 3969 (LeBlanc), 4445-47, 4617, 4620-21, 4678 (Armstrong), GCX 77, RX 118, A ___.)

By the end of July, the first anticipated completion date for the project passed. Staffing problems evolved into a major concern, because the project suffered from a high turnover rate and a lack of qualified electricians, pipefitters, welders and ironworkers. (Tr 5807-09, 5876-77, 5909-15 (Harris), 6079-85 (Austin), RX 115, A ___.) On August 9, the Company subcontracted with three nonunion contractors to complete work on the pipefitting, welding and electrical aspects of the project. One subcontractor employed 100 pipefitters, who worked until the project ended in December. Another hired about 20 pipefitters who worked 10-hour shifts, 6 days a week. (D&O 27; Tr 5849-57, 5917-20, 5922-23,

(Harris), A ___.)

4. The Company hires two union activists with the stated intent of avoiding the issuance of an unfair labor practice complaint; it threatens to fire organizer Russell

In August, Senior Industrial Relations Representative Martinez instructed Recruiter Glover that the Company would improve its chances of avoiding an unfair labor practice complaint if the Company could show that it had hired some union-affiliated applicants. (D&O 5, 26; Tr 3193 (Glover), 6270-72, 6275-76 (Martinez), A___.) On August 29, three union electricians, including Charles Dame, applied for a job in response to a company newspaper ad for electricians. (D&O 4 n 23, 25; Tr 1996-99, 2103, 2106-07, 2114-15, RX 104 (Dame), 2414-17, 2443-46, 2499-2500, 2458-59, RX 79 (Clary), 2655-60 (Browning), RX 105, A ___.) Later that day, Glover telephoned Dame at home and asked him to return to the office and amend his application to show 42 months of job experience. On August 30, Dame completed a new application and the Company hired him. (D&O 5, 26; Tr 1989, 1999, 2001-05, GCX 51 (Dame), 3193 (Glover), GCX 51, RX 105, A ___.)

Also on August 30, two IBEW members, including Organizer Russell, applied for an electrician position. The next day, Recruiter Glover telephoned Russell and offered him a job. Russell and a group of about 25 newly hired nonunion electricians reported for work that same day. One of them, Elmer Kun,

told Russell that he had bee hired without submitting an application. (D&O 4 n 23, 5, 25; Tr 3591, 3595 (Aucion), 4239-42, 4245-49, 4336-38 (Russell), GCX 115, RX 68, A ___.)

On August 31, VUO Browning returned to the Company's office and inquired about the status of the application for electrician he had filed 2 days before. Recruiter Glover told him that his application was "not good" because it did not show that he had 42 months of experience. On August 29, Browning had filled in the six lines for previous employment on the application. On August 31, he pointed out to Glover that the form did not provide adequate space for him to list 42 months of experience. He asked for an additional sheet and permission to amend his application. Glover refused, stating that the application "was a legal document and [can't] be altered." Browning then asked if he could file a new application. Glover said, "No," adding that "the Company was no [longer] accepting applications." (Tr 2663-69 (Browning), A ___.) From that day until October 18, the Company accepted applications from and hired 50 applicants, all nonunion, for electrician jobs. (RX 121(B), pp.32-35, A ___.)

Shortly after the Company hired Organizer Russell, Company Supervisor Clint Bamber told a group of employees that he felt they had "a right to know" whom their coworkers were. He said that the hiring office must not have known what it was doing, because Russell was a union business agent. Bamber added that

he wanted to get Russell on his crew so that he could "get rid" of him. (D&O 7 n. 37, 28; Tr 5031-35, 5043, 5049-51 (Albritton), 4396-97 (Stip), A___.)

5. The Company extends its newspaper advertising drive, sends out mailgrams to inactive former employees, and offers per diem and travel incentives

By September, with the project's second anticipated completion deadline past, the work still lagged by about 3 months. The delay resulted from a lack of qualified craftsmen. The Company advertised extensively in local and out-of-state newspapers and on the radio, for qualified craftsmen. (D&O 27; Tr 5878, 5911-19 (Harris), 6270-73, 6347 (Martinez) GCX 73, RX 105, 106, A ___.) On September 21, it sent out 11,000 mailgrams seeking pipefitters and welders, and on September 30, it sent out 9,218 mailgrams went out seeking pipefitters. On October 7, another 3,300 mailgrams sought electricians. Most of those mailgrams were sent to former employees who had not worked with the Company in 10 years. In addition, it offered per diem and travel incentives to craftsmen living beyond a 100-mile radius of the Exxon site. (D&O 5 & n.28, 27; Tr 5911-16, 5918-19, 5876-78 (Harris), GCX 73, RX 133, A ___.)

In all of 1994, the Company hired 2,800 employees at the Exxon site, including 193 electricians, 229 ironworkers, 505 pipefitters, 256 pipefitter helpers, and 270 pipe welders. (D&O 13 n.84; RX 121(B), Section 5 14-17, 19, A ___.)

6. The Company interferes with union activist Dame's ability to gain employment with a subcontractor

After he had been hired, VUO Dame complained to management about several workplace safety concerns, including a noxious gas emission that caused employees to feel nauseated and breathless. On October 6, Foreman Chuck Robinson told Dame to "quit fucking up." (D&O 7, 28; Tr 2010-49, 2094-50, 2109-11 (Dame), A ___.) Shortly thereafter, Dame joined Organizer Russell in an asserted unfair labor practice strike protesting the Company's failure to hire union-affiliated applicants. While Dame was on strike, a subcontractor at the Exxon site hired him. Dame was unable to start that job, however, because the Company refused to surrender his Exxon-issued security badge, which he needed to get access to the site. (D&O 8, 28; Tr 2055-66 (Dame), A ___.)

D. Palo Verde

1. The Company begins open recruiting at Palo Verde; former Bechtel unionized employees apply; the Company hires none

In June 1994, the Company took over the Palo Verde contract and predecessor Bechtel accordingly laid off of most of its employees at that site. When the Company began open recruiting for craftsmen, many of the Bechtel employees met with Boilermakers' Paid Organizer Gary Evenson to discuss applying for work with the Company as VUOs. (D&O 8, 20-21; Tr 981-83 (Evenson), CPX 54, A ___.)

The Bechtel employees had extensive experience working at Palo Verde during refueling "outages" and other maintenance of the nuclear power generator. (D&O 8, 20-21; Tr 102 (Smith), 362-63 (Fern), 572, 578 (Allen), 606 (Deen), 759-60 (Starkel), 787 (Boyd), 888 (Cooper), 904-05 (Brubaker), 956 (Veich), 918-19 (Sexton), 981-83 (Evenson), 1133-34, 1141 (Naccarato), 1332 (Pariga), 1367 (Troester), 1370, 1379 (Bradley), 1549 (Richards), 1569, 1581 (Howlier), 1585, 1597-98, (Padilla), 1780-82, (Chaney), 1889 (Walsh), 1867 (Hafeli), 1888-89 (Walsh), A ___.) In a "regular" outage, the reactor is "totally de-stack[ed] . . . for refueling." Palo Verde had two outages a year. The regular outage occurred annually in August. (D&O 4 n.19; Tr 276, 332 (Horlacher), 617-18 (Deen), A ___.)

All the Bechtel employees had obtained security clearances from APS after extensive investigations into their backgrounds. They were trained in APS procedures and had "Independent Worker" status, which permitted them to perform hazardous work unsupervised inside the nuclear reactor's "containment shell." (Tr 1283-39, GCX 33, 34 (Cash), 1257-59 (Lumley), 120-21 (Smith), 169 (Logue), 222 (Wood), 271-73, GCX 17 (Horlacher), 369-70 (Fern), 571-72 (Allen), 620-22 (Deen), 768 (Starkel), 793-94 (Boyd), 910-12 (Brubaker), 929 (Sexton), 1139-40 (Naccarato), 1344, 1340-45 (Pariga), 1362-64 (Troester), 1389-90 (McQuarrie), 1391 (McQuarrrie), 1400 (Spiller), 1420-21, 1453-55 (Linda Hayes), 1475 (Ken

Hayes), 1484-85, GCX 44 (Cull), 1517 (Patton), 1586-87 (Padilla), 1601-02 (Kasdoff), 1700 (Powell), 1783 (Chaney), 1793-94 (Arias), 1871 (Hafeli), A ___.)

The Bechtel employees who worked on the core outage crew had experience in removing the reactor's head and disassembling the system, inspecting its components, repairing and reinsulating, and reinstalling the entire system in reverse order. (Tr 168-69 (Louge), 271 (Horlacher), 492-93 (Garnica), 804-05 (Boyd), 905 (Brubaker), 956 (Veich), 1550-51, 1555 (Richards), 1595 (Padilla), 1782 (Chaney), 1806-07 (Tyler), 1867-70 (Hafeli), A___.) Those on the core maintenance crew performed tasks such as welding or replacing cracked, worn, or damaged parts, and insulating materials in the reactor. They also maintained the control rod assemblies, the coolant pumps, the radiation waste tank system, the containment shell and penetration sleeves, the fuel transfer tube, the pool liner, the spent fuel storage racks, the attached steam generators, and related equipment. (Tr 40-41 (Smith), 363 (Fern), 572, 581 (Allen), 606-07 (Deen), 888 (Cooper), 918-19 (Sexton), 1367 (Troester), 1420-12, 1453-55 (Linda Hayes), 1475 (Ken Hayes), 1516-17 (Patton), 1611 (Kasdorf), 1789 (Chaney), 1792 (Arias), 1806-07 (Tyler), 1879 (Hafeli), A___.)

On June 15, approximately 2 months before the August outage, Mark Smith, a welder, visited the job site seeking work. Smith was not wearing union insignia. Craft Recruiter Leonard Wallace told Smith the Company would need welders

"very soon." (D&O 9, 20, 23; Tr 30-32, 36-39 (Smith), A ___.) The next day, Smith, along with Organizer Evenson and 18 other former Bechtel employees visited the Company and applied for jobs as welders. (D&O 20; A ___.) The group displayed union insignia, and the majority wrote "voluntary union organizer" on their applications; Evenson wrote “paid union organizer.” Most of the applicants listed their extensive Palo Verde histories with Bechtel and their experience at other nuclear and non-nuclear facilities. Several attached documents to their applications reflecting their Independent Worker status and APS security clearance. (D&O 8 n. 41, 9, 20; Tr 44-50, 105, 120-21, 137 (Smith), 171-74, 178, RX 1 (Logue), 266-71 (Horlacher), 364-70 (Fern), 609-14 (Deen), 920-22, 948 (Sexton), 958-59, 968-69, 975 (Veich), 1137-39, 1143, 1146 (Naccarato), GCX 3, 8, 9, 19, A ___.) Recruiters told applicant William Deen that the Company was "staffing up for the mid-cycle outage that would take place in "about two weeks." (Tr 645-46 (Deen), A ___.)

At about that same time, a recruiter told boilermaker Josef Woods that the Company was accepting applications for “mechanics” position. (Tr 223-24, 243 (Woods), A ___.) Woods submitted an application listing his Palo Verde experience, and indicated that he was a VUO. The Company never contacted Woods. (D&O 22; Tr 203-06, 214-15 (Ray), 227-28, 241 (Woods), A ___.) Later in June, 33 additional former Bechtel craft workers applied for work with the

Company. They listed their Palo Verde histories and other relevant employment experience on their applications. For training, many listed their 4-year apprenticeship and relevant APS training and certificates. (D&O 8 n.41, 21; Tr 561-62, 564-67, 592-94, 597-600 (Allen), 759-69, 779, 786 (Starkel), 788,793-98, 804 (Boyd), 889-99 (Cooper), 904-14 (Brubaker), 1332-33, 1339-54 (Pariga), 1357-59, 1362-65, 169 (Troester), 1370-80 (Bradley), 1384-93 (McQuarrie), 1396-1403 (Spiller), GCX 4, 10, 12, 34, 35, 36, 38-40, 43, RX 9, A ___.) The Company never hired any of the openly union members who applied for work in June.

2. The Company refuses to allow 26 VUOs to apply, but permits 55 nonunion applicants to apply and hires them; it also hires two VUOs who conceal their union affiliations

On June 27, Organizer Evenson and a group of 25 openly union members in various crafts arrived at the Company's recruiting office to apply. (Tr 1470-71 (Hayes), A ___.) Some members of the group were still working for Bechtel at the facility on that day. Craft Recruiter Dean Hamerick barred the group from entering the recruitment office, stating that the Company was no longer accepting applications. (D&O 9 n. 42, 10, 21; Tr 229-36 (Woods), 1419-25, 1430-31, 1453-53 (Linda Hayes), 1477-82, 1492-95 (Cull), 1513-19, 1522-27, (Patton), 1549-58 (Richards), 1568-73 (Howlier), 1584--98 (Padilla), 1599-1606 (Kasdorf), 1692-95, 1722-23, 1768 (Powell), 1780-85 (Chaney), 1790-99 (Arias), 1805-16 (Tyler), 1867-73 (Hafeli), 1888-93 (Walsh), A___.)

Organizer Evenson referred to a notice posted outside the office, which stated that applications would be accepted on Tuesdays. He asked Recruiter Hamerick if the group should return the next day, Tuesday, to apply. Hamerick replied, "No," adding that the project was “staffed up” and did not “need any more applications.” (Tr 1017 (Evenson), 235 (Woods), 332 (Horlacher), Tr 974-76 (Veich), 1421-22, 1535 (Patton), 1573 (Howlier), 1816 (Tyler), A ___.)

That same day, the Company accepted applications from and hired 55 nonunion applicants. (D&O 10, 21; Tr 1159, 1168-69 (Gourley), 1014, 1020 (Stipulation), RX 121(C), A___.) Those hired included both former company-employees and "off-the-street" applicants with no standing in the scheme of hiring preferences. (D&O 10; Tr 1170-71, 1278-79 (Gourley), RX 121(C), A ___.) Half were in carpenter classifications, numerous others in unskilled utility positions. Several metal trades applicants, both preferenced and off-the-street, were hired into non-mechanical classifications. For example, one millwright was hired as a carpenter. Ten or more of the preferenced employees were hired for crafts in which they had not been certified and had no experience. Some of the off-the-street applicants lacked relevant experience. (D&O 10 n.51, 21; Tr 1121-25, 1159 (Gourley), GCX 121(C), CPX 15, A___.) Recruiters invited other nonunion applicants to check back in case of no-shows. Several did, and on June 28 and 29, the Company hired 13 more. (D&O 10, 21; Tr 1056-57 (Stipulation), 1316-17

(Gourley), CPX 15, RX 121(C), A___.)

In mid-July, shortly before the scheduled outage, recruiters stepped up their recruiting of craftsmen, including pipe welders, mechanical operators and ironworkers. They sent job notice correspondence to numerous local, state, and private employment offices and technical schools. They also placed ads in out-of-state newspapers. (D&O 20-21; Tr 1205-06 (Gourley), 5442-43, CPX 54, 78 (Bordages), A ___.) They hired numerous nonunion applicants who responded to the advertisements. They hired none of the 52 union members who had applied for those or similar positions earlier in June. (D&O 20-21, 27; RX 121(C), A ___.)

In mid-August, boilermakers Smith and Horlacher applied again, without revealing their union membership. The Company hired them as welders. (D&O 9, 23; 54-57 (Smith), 279-81, 308 (Horlacher), GCX 4, A ___.) At that same time, the Company hired five nonunion welders, two of whom told Smith that they had no previous nuclear work experience. (Tr 58-60, 65-66 (Smith), A ___.) Of the five new hires, only Smith and Horlacher had current APS welding certificates and Independent Worker status. (Tr 75-78 (Smith), A ___.)

Also in August, Assistant Project Manager Larry Chestnut, HR Manager Don Koza, and Craft Recruiter Collins told new hires Smith and Horlacher that the Company needed more welders and jumpers with nuclear experience and asked them for referrals. (D&O 9, 23; Tr 74-75, 79, 82-83, (Smith), 284-85 (Horlacher),

A___.) HR Manager Koza told Holacher that the Company "would probably lose the [Palo Verde] contract if it could not find the needed jumpers and welders." (Tr 284-85 (Horlacher), A __.) Faced with its lack of skilled welders and jumpers, the Company canceled the August outage. (Tr 332 (Horlacher), 615-16 (Deen), 974-76 (Veich), 1559-60 (Richards), A ___.) At that time, all of the union members' applications were still active, because the first 60-day expiration period ended on August 17, the last on August 24. Twenty-four of the union members had applied for welder positions, and on their applications they had listed extensive welding and jumping work experience. The Company did not contact any of them. (D&O 9, 20-21; A ___.)

On September 1, boilermaker and applicant Curtis Veich, who had applied for a welder's job on June 16, telephoned the office to check the status of his application. The recruiter told Veich that his application had "expired," and refused Veich's request to "update" it or to reapply. (Tr 973-76 (Veich), A ___.)

On September 5, 1994, the Company issued a monthly work report, in which it noted that the project was staffed only 67 percent, was losing personnel, and that those who remained needed training. (D&O 24; CPX 27, Tr 2771, A ___.) On September 8, Supervisor Harry Sinclair told boilermaker Horlacher that the Company still needed jumpers "real . . . bad." (D&O 23; Tr 288-91 (Horlacher),

A ___.) Horlacher asked Sinclair why the Company had not hired more of the union members. Sinclair answered that Mechanical Supervisor Dale Adams had told him that the Company had not hired those applicants because they wrote "Voluntary Union Organizer" on their applications. (D&O 23-24; Tr 292, 349 (Horlacher), A ___.)

The Company issued three monthly work reports in November and December revealing that the Company had problems meeting its staffing needs at Palo Verde, particularly for "welders and pipefitters." They also showed that the project continued to be plagued by staffing problems, including untrained incumbent employees, high turnover, and no-show hires. (D&O 24; GCX 28, 29, 30, Tr 2773-75, A ___.)

3. The Company offers per diem incentives to workers from outside the area; it experiences critical shortages of experienced craftsmen

In January 1995, the Company offered a per diem stipend of $35 to craft employees who traveled more than 100 miles to work at Palo Verde for another outage. (D&O 10; Tr 816-18, 835-36 (Owen), 1161-62 (Gourley), A___.) The Company still did not hire any of the openly union applicants, the majority of whom lived and had worked in the Phoenix area. (D&O 24; A ___.)

On July 26, boilermaker and former Palo Verde employee Danny Garnica telephoned the Company seeking work as a welder, without revealing his union affiliation. Craft Recruiter Mike Owen asked Garnica if he had nuclear experience. Although Garnica had worked at Palo Verde during the annual outages since 1980, he replied that he had no nuclear experience, fearing that the truth would have revealed that he had worked for Bechtel and consequently disclosed his union background to Owen. Owen offered Garnica a job and invited him to come to the office to submit an application. (D&O 22; Tr 499-505, 510-15, 544 (Garnica), 828-29 (Owen), GCX 24, A ___.) The next day, Garnica and another union-affiliated applicant applied for jobs as welders. Both displayed union insignia and wrote VUO on their applications. Recruiter Owen told them he did not need welders anymore. (Tr 514, 520-21, 544 (Garnica), A___.)

One day later, boilermaker and former Bechtel employee Mark Winham telephoned the Company seeking work as a welder, without revealing his union

affiliation. A company agent told Winham that the Company needed welders and that Recruiter Owen would call him back. (D&O 10, 22; Tr 658-59, 666-67 (Winham), A___.) When Owen called an hour later, Winham stated that he had worked at Palo Verde for Bechtel, that he wanted to work for the Company, and that he would also like to "organize a little bit" for his union. Owen replied that he did not need welders at that time. (D&O 10, 22, Tr 660, 664, 667-70 (Winham), GCX 29, A___.)

Beginning in August, and continuing for the rest of the year, the Company was unable to meet its staffing needs, especially for experienced welders. Its workforce had poor craft training and poor knowledge of APS procedures, which required the Company to send its "preferenced" employees out for training to improve their skills. (D&O 10, 24; Tr 1275, 1280 (Gourley), A___.) To attract additional craftsmen, the Company increased the per diem it offered from $35.00 to $45.00;it continued to give travel allowances and rewards to employees, particularly welders, who traveled from outside the Phoenix area to work at the site. (Tr 5445 (Bordages), GCX 22, A ___.)

By January 1996, the Company had hired 962 craftsmen to fill jobs that were available at Palo Verde. (D&O 13 n.84; RX 121(C), A ___.) During that same month, the Company raised wages to attract and retain qualified employees. (D&O 10; A___.) The Company hired none of the openly union members. (RX

121(C), A ___.)

THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board found that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by coercively telling employees and applicants that it would not hire applicants who wrote "voluntary union organizer" on their applications, and by threatening employees with unspecified reprisals because they engaged in union activity. (D&O 14-15, 29-30, A ___.) The Board also found, in agreement with the administrative law judge, that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by refusing to hire job applicants because of their union affiliation. (D&O 14-15, 29-30. A ___.) The Board further found that the Company violated Section 8(a)(3) and (1) of the Act by failing and refusing to consider for hire five job applicants because of their union affiliation. (D&O 14-15, A ___.)

The Board's order requires the Company to cease and desist from the conduct found unlawful and from in any other manner interfering with, restraining or coercing employees or applicants for employment in the exercise of their statutory rights. (D&O 14, 29, A ___.) Affirmatively, the Board's order requires the Company to, among other remedies, offer the named discriminatees employment in the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions; permit them to be tested for company

certification in the craft for which they were unlawfully denied employment; and make them whole for any losses suffered because of the Company's discrimination against them. (D&O 14, 29-30, A ___.) The Board's order also requires the Company to make Charles Dame whole for any losses he suffered because of the Company's refusal to release his security badge to Exxon. (D&O 14, 30, A ___.) Additionally, the Board's order requires the Company to consider five discriminatees for future rebar-helper job openings in accord with nondiscriminatory criteria and to notify them, the Plumbers, and the Board of future openings for rebar-helper positions or substantially equivalent positions. (D&O 16, A ___.) Finally, the Board's order requires the Company to remove from its files any reference to its unlawful refusal to consider and refusal to hire the discriminatees and to notify them in writing that this has been done and that the Company's unlawful conduct will not be used against them in any way, and to post at all of its employment facilities subject to the jurisdiction of the Board, an appropriate notice to employees. (D&O 16, 30, A ___.)[2]

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[2] The Board deferred to compliance the determination of whether, absent the Company's refusal to consider the five rebar-helper applicants, the Company would have hired them for any job openings arising before or after the hearing, in which event the Company would have to offer those applicants employment and make them whole. (D&O 16, A ___.)

SUMMARY OF ARGUMENT

This case chronicles the Company's extensive history of discriminating against union activist applicants and employees to stop their organizing drives. The Company's main challenge to the Board's order is to fault credibility findings made by the administrative law judge and affirmed by the Board; because those findings are grounded in demeanor and other considerations, the Court should affirm them and the unfair labor practice findings based upon them.

Further, substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by denying employment to union-affiliated applicants because of their union support. As the Board found, the Company was hiring at the relevant times, and the discriminatees' experience and qualifications surpassed the Company's requirements. In addition, the evidence supports the Board’s inference of unlawful motive: among other things, the Board considered that the extreme disparity between the Company's treatment of the openly union and other applicants, the Company's prior unfair labor practices, the existence of corporate-level animus, the implementation of animus in the hiring decisions at the project level, the Company's threatening and coercive conduct, and company officials’ outright admissions.

The Board reasonably rejected the Company's proffered justifications for its refusal to hire the discriminatees, on the ground that those reasons were pretextual.

The Company's one legal argument of any significance is easily rebutted. The Board's finding that the Company unlawfully refused to hire the discriminatees is not, contrary to the Company's contention, inconsistent with the Court's decision in *NLRB v. Fluor Daniel, Inc*., 161 F.3d 953 (1998). As the Court stated there, in order to find a discriminatory refusal to hire, the Board must match job applicants with available jobs for which they were qualified. There can be little doubt on the credited facts that the General Counsel has proved the discriminatees were qualified to fill the Company's available jobs.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY AFFIRMANCE OF ITS UNCONTESTED FINDINGS

In its brief to the Court, the Company does not contest the Board's finding that it violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by coercively telling employees and applicants for employment that it would not hire applicants who wrote "voluntary union organizer" on their applications, and by threatening employees with unspecified reprisals because they engaged in union activity. Nor does the Company challenge the Board's finding that it violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by failing and refusing to consider for hire five openly union applicants for rebar positions because of their union affiliation. In addition, the Company also does not contest the Board's finding that it violated Section 8(a)(3) and (1) of the Act by refusing to release union activist Dame's Exxon security badge, thereby preventing him from obtaining work with another Exxon contractor.

By not contesting those violations, the Company has effectively abandoned the right to object to them. *NLRB v. Autodie Intern, Inc.*, 169 F.3d 378, 381 (6th Cir. 1999); *NLRB v. Valley Plaza, Inc.*, 715 F.2d 237, 240-41 (6th Cir. 1983). Accordingly, the Board is entitled to summary enforcement with respect to those

portions of its order addressing the uncontested findings. *Id.*[3] Moreover, the uncontested violations "do not disappear by not being mentioned in [the Company's] brief." *NLRB v. Talsol Corp*., 155 F.3d 785, 794 (6th Cir. 1998). Rather, they remain relevant to and shed light on the contested violations. *Id. Accord NLRB v. Clark Manor Nursing Home Corp*., 671 F.2d 657, 660 (1st Cir. 1982).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY REFUSING TO HIRE 120 EMPLOYEE JOB APPLICANTS BECAUSE OF THEIR SUPPORT FOR AND ACTIVITIES ON BEHALF OF THE UNIONS

A. Applicable Principles and Standard of Review

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer to discriminate against employees "in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." It is well settled that Section 8(a)(3)'s protection of employees against "discrimination in regard to hire" extends to applicants for employment. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941). *Accord NLRB v. Town & Country Electric, Inc*., 516 U.S. 85, 86-97

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[3] The finding, not contested in any event, is consistent with *NLRB v. Fluor Daniel, Inc*., 161 F.3d 953 (1998). The Court in *Fluor Daniel,* was concerned that refusal-to-consider discriminatees would get jobs and backpay. As the Board made clear

(1995); *NLRB v. Fluor Daniel, Inc*., 161 F.3d 953, 961 (6th Cir. 1998).[4] Accordingly, an employer violates Section 8(a)(3) and (1) of the Act by refusing to hire job applicants because of their union affiliation.[5] *See Town & Country Electric, Inc*., 516 U.S. at 87-88; *Kentucky General*, Inc. v. NLRB, 177 F.3d 430, 437 (6th Cir. 1999); *NLRB v. Aquatech, Inc*., 926 F.2d 538, 544-45 (6th Cir. 1991); *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 295-96 (6th Cir. 1985), *cert. denied*, 42 U.S. 1159 (1986).

In Section 8(a)(3) discrimination cases, the employer's motive is generally the critical question. The Board may rely on both direct and circumstantial evidence in determining an employer's motivation. *NLRB v. Link-Belt Co*., 311 U.S. 584, 602 (1941); *ITT Automotive v. NLRB*, 188 F.3d 375, 388 (6th Cir. 1999); *Birch Run Welding & Fabricating, Inc. v. NLRB*, 761 F.2d 1175, 1179 (6th Cir. 1985). Common indicators of improper motive in hiring are the employer's disparate treatment of union-affiliated applicants (*see NLRB v. Fluor Daniel, Inc*., 161 F.3d 953, 974 (6th Cir. 1998)), and false explanations for its actions. *Kentucky General*,

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in *FES*, in response to *Fluor Daniel,* that is not so. As shown above, the only remedy these five got is to be "considered," in a nondiscriminatory manner.

[4] The statutory term "employee" includes both unpaid and paid union organizer job applicants. *NLRB v. Town & Country Electric, Inc.*, 516 U.S. at 86-97. *Accord NLRB v. Fluor Daniel, Inc*., 161 F.3d at 961.

[5] A violation of Section 8(a)(3) is also a "derivative" violation of Section 8(a(1), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their statutory rights. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Inc. v. NLRB, 177 F.3d 430, 437 (6th Cir. 1999); *Ultrasystems Western Constructors, Inc. v. NLRB*, 18 F.3d 251, 255-58 (4th Cir. 1994); *E & L Transport Co. v. NLRB*, 85 F.3d 1258, 1271-72 (7th Cir. 1996).

Because motivation is a factual question, the Board's findings are "conclusive" if supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)). Accord *NLRB v. United Insurance Co*., 390 U.S. 254, 260 (1968). A reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). *Accord Allentown Mack Sales & Services, Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998). Moreover, the Board's legal conclusions may not be disturbed so long as they are "reasonably defensible." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496-497 (1979). In addition, the administrative law judge's credibility resolutions are entitled to great weight. *See Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1297 (6th Cir. 1988).

In *NLRB v. Transportation Management Corp*., 462 U.S. 393, 400-03, the Supreme Court approved the test for determining unlawful motivation articulated by the Board in *Wright Line, a Division of Wright Line, Inc*., 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 89 (1st Cir. 1981), *cert. denied*, 455

U.S. 989 (1982). The allocation of burdens of proof under that test requires the Board's General Counsel to first show that protected activity was a motivating factor in an employer's decision to discriminate against an employee. Once that is established, a violation of the Act will be found unless the employer demonstrates as an affirmative defense that it would have made the same decision in the absence of any protected activity. *See, e.g., NLRB v. Fluor Daniel, Inc*., 161 F.3d 953, 965 (6th Cir. 1998).

B. The Elements of a Refusal-to-Hire Violations Under *FES*

Although the Board has consistently applied *Wright Line* in both "refusal- to-hire" cases, nonetheless, as this Court has recognized, those types of cases raise issues not found in the typical discriminatory discharge case. *NLRB v. Fluor Daniel, Inc*., 161 F.3d 953, 965-68 (6th Cir. 1998). In response to this Court's decision in *Fluor Daniel* and views expressed by other courts, the Board, in *FES (A Division of Thermo Power)*, 331 NLRB No. 20 (slip op. at 4-7), 2000 WL 627640, *10 (2000) ("*FES*"), specifically refined the *Wright Line* test in the refusal-to-hire context. As we now show, the Board's allocation of burdens of proof in *FES* represents a reasonable application of the statutory prohibition of Section 8(a)(3) to this class of cases, and is therefore entitled to deference. *See NLRB v. Transportation Management Corp*., 462 U.S. 393, 401-03 (1983).

In *FES*, the Board held that to prove an unlawful refusal to hire, and thereby obtain an employment and backpay remedy, the General Counsel must prove, at the hearing on the merits, that (1) the employer was hiring, or had concrete plans to hire, employees when it refused to hire the applicants at issue; (2) the rejected applicants met the employer's publicly announced or generally known objective criteria for the positions for which they applied, to the extent that those requirements are nondiscriminatory, objective, and quantifiable, or that the employer had not uniformly adhered to such criteria or that the criteria were pretextual or had been pretextually applied; and (3) union animus contributed to the decision not to hire the applicants. *Id.* at 4, 11-12. Once those facts are shown, the employer must prove that it would not have hired the applicants even in the absence of their union activity or affiliation. *Id.* at 7.

In cases arising in the construction industry, if the project at which the discriminatees sought employment has been completed, the General Counsel may defer to a subsequent compliance proceeding the determination whether the discriminatees, if hired, would have been transferred to other worksites, and are therefore entitled to employment at those locations. *Id. 9. See also Dean General Contractors*, 285 NLRB 573 (1987).

C. The Board Reasonably Concluded that the Company Refused to Hire 120 Applicants Because of Their Union Affiliations and Activities

1. The General Counsel established a violation under *FES*

Applying the standard set forth in *FES*, the Board reasonably concluded (D&O 11-14, A ___) that each element of a discriminatory refusal-to-hire violation was established. Thus, the record shows conclusively that the Company was hiring and had job openings for the named discriminatees who applied or were refused the opportunity to apply for jobs at the Exxon and Palo Verde sites; that they had the experience and qualifications to perform the jobs; and that the Respondent's union animus contributed to the decision not to hire the applicants. As we now show, the record amply supports those findings.

a. The Company was hiring

With respect to *FES* element No.1 ("the employer was hiring"), the Board found (D&O 4, 8, 20, 24, A ___) that during relevant times, the Company was conducting an "open recruiting" campaign at both projects for workers in the discriminatees' crafts, or with their skills. Thus, at the Exxon site, the discriminatees applied, beginning in January, in response to the notices of job openings posted by the Company. Although the Company discontinued onsite posting for some of the crafts, it kept advertising in newspapers and elsewhere for craftsmen with those skills. And actually hired numerous nonunion craftsmen. (RX 121(B), A ___.)

Likewise, the Palo Verde discriminatees applied or attempted to apply for jobs in response to the Company's local and national recruitment campaign. Thus, on June 16, the first group of discriminatees applied for posted "welder" positions. The other 61 discriminatees, who applied or attempted to apply during the period June 20 to 27, also did so in response to company solicitations for their specific crafts. During the 60-day periods following their applications, the Company hired numerous others into the relevant crafts. (Above, pp. 21-33.)

The statements of recruiters and other company officials, both at the time and at trial, also reveal that the Company was desperately hiring in the discriminatees' crafts during the active periods of their applications. Exxon Project Manager David Harris admitted at trial that the often futile search for qualified electricians, welders, and pipefitters continued and worsened over time. By August 9, faced with missing its second completion deadline, the Company realized it could no longer staff the project with skilled craftsmen and it subcontracted with three nonunion contractors to complete electrical, pipefitting, and welding work. Although 2 of the subcontractors hired a total of 120 pipefitters, who worked 10-hour shifts, 6 days a week, subcontracting failed to furnish sufficient labor to fulfill the Company's contractual obligations. And, as the search for sufficient labor foundered, the Company undertook a massive recruitment drive--using advertising, tens of thousands of mailgrams (most sent to former employees who had not

worked for the Company in over 10 years), and financial incentives--to attract craftsmen with the same skills possessed by the 40 discriminatees. As the Board observed (D&O 6, 13), the discriminatees' applications remained, languishing, in the Company's inactive file, in some cases rendered inactive only by the Company's surreptitious reduction by half of the duration of the active period. (Above, pp. 8, 9-21.)

Similarly, at Palo Verde, there was a chronic need for craftsmen with the discriminatees' skills and experience during the period before and after the cancelled August outage. Recruiters repeatedly told applicants that the Company "needed" and was "hiring" employees for the craft positions. Project Manager Gourley testified that a shortage of skilled craftsmen already loomed in mid-July, when he reported to the site. Grouley also admitted that he and recruiters orchestrated an expansion of the recruitment drive by running newspaper ads, and sending job opening notices to numerous organizations. (Above, p. 54)

By mid-August, with the outage imminent, company officers, including Assistant Project Manager Chestnut, informed an employee that the Company needed "welders and jumpers with nuclear experience." (Tr 54-57, 82-83 (Smith), A ___.) At that same time, HR Director Koza told another employee that the Company was "hurting" for men, particularly "qualified boilermakers." Perhaps the most compelling evidence of the Company's desperation is Koza's admission to

employee Holacher that the Company would "probably lose the [Palo Verde] contract" if it could not find more qualified jumpers and welders. (Tr 284-85 (Horlacher), A __.) The cancellation of the August outage was due at least in part to the Company's inability to find sufficient skilled craftsmen. (Above, pp. 38, 44.)[6]

b. The VUOs were qualified

Substantial evidence also supports the Board's finding (D&O 11-14, A ___) that the second element of *FES* was satisfied, in that the approximately 120 discriminatees were well qualified and experienced for the positions that they sought. The Company does not contest that finding, because it cannot, given the record. (Above, pp. 9-33.) On average, the Exxon discriminatees had 20 to 30 years of employment experience and training in the crafts for which they applied. (D&O 6, A ___.) Some had worked as crew foremen in their crafts and were members of their respective unions' board of examiners for craft journeyman certification. In addition, many, particularly the pipefitters, boilermakers, and ironworkers, had worked on "composite crews" where crew members routinely

[6] Monthly work reports issued in September, November, and December show the extent of Palo Verde's "recurring staffing problem." The first 60-day active application period of the union applicants expired on August 17, the last on August 25. Like their counterparts at Exxon, the Palo Verde recruiters did not consider those applications when seeking solutions for the site's staffing shortage. (CPX 27-30, A ___.)

performed all aspects of the work, even work that technically fell outside their own trade. (Above, p. 13.)

As to the 52 Palo Verde discriminatees who applied, and the 26 who were refused the opportunity to apply, their extensive employment histories at that very nuclear facility made them preeminently qualified for the positions that they sought. Almost all had worked servicing and maintaining that facility from its very construction until the Company's acquisition of the contract from Bechtel. Indeed, when they applied with the Company, several of the discriminatees were still employed at the plant, and they applied, or attempted to apply, for the same jobs that they were or had been performing. Moreover, those former Bechtel employees had APS and security clearances, unsupervised access to perform hazardous work in the nuclear reactor's containment shell. Many had worked on both the core maintenance crew and the outage refueling crew, and were skilled in the respective requisite tasks. Both at Palo Verde and at other nuclear facilities, many had worked as crew foremen in their crafts. One had been a project superintendent responsible for the work of various craftsmen. Many were members of their respective unions' board of examiners for craft journeyman certification. (Above, pp. 23-28.) One was a certified teacher for a union's apprenticeship program at a community college. (Tr 1570, 1576-77 (HOWLIER), GCX 43, 45, A ___.) Thus, as the Board concluded (D&O 8, 11), the Palo Verde

union applicants were "clearly" a ready-made workforce, and except for its antipathy to their union affiliation, the Company's failure to hire them is inexplicable. *NLRB v. Fluor Daniel, Inc*., 161 F.3d 953, 970 (6th Cir. 1998).

Conversely, the record shows that many of the craftsmen actually hired by the Company were lacking in requisite skills and experience. Monthly work reports for Palo Verde show that a lack of sufficient training and orientation in APS procedures was a "recurring problem" for the Company's workforce, and that over 50 percent had no prior nuclear work experience. (CPX 27-30, Tr 1275, 1280 (Grouley), A ___.)

Company officials admitted, and the documentary evidence shows, that the union applicants' skill and experience level were equivalent to, if not higher than, the Company's own preferenced craftsmen. Giving preference to those inadequately trained employees for this particular work in itself justifies an inference of unlawful motivation. That inference is particularly warranted, where, as here, the Company incurred substantial financial costs associated with advertising, mailgrams, per diem and travel allowances, plus the hidden cost associated with the Company's inability to conduct the fall 1994 outage due, in part, to a lack of qualified craftsmen. (Above, pp. 20-21, 28-30, 43-44.) Indeed, cancellation of the outage suggests the Company was more interested in a nonunion workforce with the correct "philosophies" than it was in performing the

job on time and in a quality manner.

c. The Company's union animus

The Company is admittedly a nonunion employer, opposed to the unionization of its employees. As the Board noted (D&O 1-2 & n.6, 12, A ___), the instant case is the third in a series of cases involving the same employer. Thus, in *Fluor Daniel I*, 304 NLRB 970 (1991), *enforced*, 976 F.2d 744 (11th Cir. 1992), the Board found that the Company discriminated against 13 job applicants at a project in Georgia. In *Fluor Daniel II*, 311 NLRB 498 (1993), *enforced in part, remanded in part*, 161 F.3d 953 (6th Cir. 1998), the Board found that the Company discriminated against 55 union-affiliated job applicants at a project in Kentucky. The Court affirmed the Board's theory of the violation but remanded the case for determination of whether specific vacancies existed that the discriminatees could fill. The Board has accepted the remand. Additional allegations, known as *Fluor Daniel IV*, are pending trial before the Board. (D&O 1-2 & n.6, 12, A ___.)

In this case, there is no question that the Company knew of the union sympathies of the discriminatees. All of them either appeared at company offices in groups displaying union insignia, or called company offices inquiring about work disclosing their union affiliation. Their submitted applications further publicized their union affiliations and, in most cases, their organizational intentions.

Company documents plainly indicated that high-ranking corporate officers harbored union animus, and that the Company refused to hire the discriminatees because of it. Thus, as the Board noted (D&O 12, A ___), corporate hiring policy required that recruiters deny hiring preferences to the unionized employees of Fluor Constructors, or to the Company's own direct-hire employees on union jobs. (Tr 3120, 3173-75 (Glover), 5647-51 (Schroeder), A ___.) The Board also found (D&O 2, 9, 11) that the Company's corporate-level union animus underlay its labor posture at Palo Verde. Well before it submitted its bid on the Palo Verde contract, the Company stated in a published wage survey of the Phoenix area (CPX 93, A ___) that it intended to rely on other parts of the country to find "open shop" metal and mechanical craftsmen, and that it would avoid hiring in those crafts locally because doing so would presented its "greatest risk" of hiring unionized craftsmen. The Company's Palo Verde Staffing Plan, which contains its successful bid to APS, also reflects union animus at the highest level. (GCX 13, A ___.)

The evidence of corporate-level union animus in hiring practices at the Exxon site tells a similar story. Senior Industrial Relations Specialist Martinez admitted that he recommended reducing the active application period from 60 to 30 days, to further the Company's antiunion policy of not hiring union activists. (Tr 6309-10, 6317, A ___.) Such a general bias toward unions is a “highly significant factor” in determining motive. *J.R. Lallier Trucking v. NLRB*, 558 F.2d 1323, 1385 (8th Cir.

1977). The Company also admits (Br 8) that it limited the active application period at the Exxon project "partly because salting activities by union members were anticipated." Palo Verde Project Manager Grouley admitted that the Company "vowed to avoid" the unionization of its employees. (Tr 1177, 1209, A ___.) At that same site, Supervisor Sinclair told employee Horlacher that the Company had not hired the discriminatees because they had written "voluntary union organizer" on their applications. Supervisor Bamber, at the Exxon site, told a group of employees that the hiring office had erred in hiring Organizer Russell and he wanted Russell assigned to his crew so that he could get rid of him. (Above, p. 20.)

The Board further found (D&O 12, A ___) that the recruiters' heavy reliance on the Company's national pool of former employees--including undesirable ones--shows animus. As the Board noted (D&O 5, A ___), the Company hired seven former employees with known criminal convictions, whom it had terminated for cause. Meanwhile, recruiters ignored the discriminatees' applications, all of which contained facially impressive qualifications. The Board was well warranted in finding (D&O 5-6, A ___) that the Company gave hiring preference to some former employees only because of their perceived attitudes toward union organizing.

In sum, the foregoing evidence demonstrates the existence of job openings, the employees' qualifications, and the Company's union animus. The burden then shifted to the Company to prove that it would not have hired the discriminatees even in the absence of union animus. As shown below, it failed to meet that burden.

2. The Company's defenses are unmeritorious

The Company first claims (Br 9, 24, 34) that the discriminatees did not apply when positions were available. The short answer to the Company's contention is that the union applicants applied or sought to apply during the Company's open recruiting campaign, conducted only when positions, which the Company intended to fill were available. And, as demonstrated above, the Company hired throughout the period when the discriminatees' applications were active. (Above, pp. 9-44.)

Nor is there merit to the Company's next contention (Br 9, 24, 34, 38-39), that when positions became available, the discriminatees' applications were rendered inactive by the expiration of the 30-day hiring period at Exxon and the 60-day period at Palo Verde. The reduction of the 60-day active application period to 30 days at Exxon was in contravention of the Company's operative hiring protocol. Industrial Relations Specialist Martinez, who recommended the reduction, had no authority to change that rule, and he concededly did so only to impede union activities. (Tr 6185, 6246-51, GCX 30, A ___.) Other company

officials, however, denounced the active period change as antithetical to the Company's goal of recruiting qualified craftsmen. (Tr 5393, 5401, 5466, 5494-97, 5510 (Bordages), 5597, 5609-10 (Schroeder), 6067-69 (Austin), A ___.) Thus, although Martinez' 30-day recommendation issued on December 1, the Exxon recruiters did not begin to apply it until January 19, 1994, when the first openly union applicants submitted their applications. (Above, pp. 8-21.)

Likewise, there is no merit to the Company's contention (Br 19) that the applications expressly stated that they would be active for only 30 days. The Company relies on discredited (D&O 6, A ___) testimony to support that contention. Credited (D&O 6, A ___) testimony shows that when the discriminatees submitted their applications, the forms indicated that they were valid for 60, not 30, days, and that recruiters did not instruct the discriminatees otherwise. (Tr 2307 (Ross), 2702 (Lewis), 2797 (Fletcher), 3219, 3234-35 (Greer), 3455 (Blount), 3494 (Kelly), 3557, 3578 (Gauthreaux), 3636 (Achord), 3666 (Goetzman), 3738-39 (Jeffrey Burns), 4204 (Braud), 4537 (Armstrong), 4763 (Penny), A ___.)

It is true that at the hearing the Company offered the discriminatees' applications with a handwritten alteration of the 60-day period to 30 days. In light of record evidence that the forms were facially valid for 60 days when the applicants applied, however, the appearance of a handwritten "30" on the forms

gives rise to the strong inference that the Company altered the forms for litigation purposes. (D&O 6, A ___.) Moreover, as the Board found (D&O 6, A ___), there is no evidence suggesting that the applications of non-activist applicants were altered without their knowledge. Accordingly, under the principles of *FES*, the Company failed to meet its burden of proving that the 30-day rule at Exxon was generally known.[7]

Equally unavailing is the Company's contention (Br 33) that there were no available jobs at Exxon during the active period for the discriminatees' applications. A review of the Company's "Craft Employment Requisitions" (GCX 78) reveals that the project needed workers in all of the discriminatees' crafts when their applications were active.

The Board also found abundant evidence of deviations in the Company's hiring practices in favor of nonunion applicants. At Exxon, the Company hired 27

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[7] The Company relies (Br 36) on *Kelly Construction of Indiana, Inc*., 333 NLRB No. 148, Slip. op., p.1 (2000), where the Board held that a neutral, uniformly applied hiring policy need not be openly promulgated or widely disseminated to be lawful. There, however, the Board found that the employer had met its burden of showing that its hiring criteria were uniformly applied and that the alleged discriminatees did not meet them. That decision cannot reasonably be viewed as inconsistent with the holding in this case, that the employer bears the burden of proof with respect to its unannounced 30-day criterion.

nonunion applicants more than 30 days after they applied, and an additional 29 even before they applied, for a total of 56 craft journeymen. (RX 121(B), A ___.) The Company now argues (Br 37 & n.11) that 27 breaches out of 2,800 hires at Exxon is "de minimis." To the contrary, 40 discriminatees were denied employment because the Company applied the 30-rule change to exclude them. Forty discriminatees is hardly de minimis.

As to Palo Verde, the Board found (D&O 9, A___) that the Company ignored its 60-day rule with respect to every discriminatee at that site. Thus, in mid-August 1994, when the discriminatees' June 16- 27 applications were still less than 60 days old, the Company was faced with an imminent maintenance outage: it needed welders and jumpers with nuclear experience, and contemplated losing the APS contract. Yet, the Company did not contact any of the discriminatees and, by September, when the applications had already expired, Supervisor Sinclair explained to employee Smith that the Company had not hired the discriminatees because they had written "VUO" on their applications. *See NLRB v. Globe Products Corp.*, 322 F.2d 694, 695, 696 (4th Cir. 1963).

There is no merit to the Company's argument (Br 13, 19, 17) that the Board erred in finding that its failure to hire the discriminatees was unlawfully motivated because, at Palo Verde, it hired 94 former Bechtel employees--including 3, VUOs who did not reveal their union affiliation before being hired--and, at Exxon, it hired

2 known union activists. At Palo Verde, the Company was desperately in need of craftsmen with nuclear experience. And, as the Board found (D&O 9, A ___), the Company has not shown that any of the 91 nonactivists former Bechtel employees presented indicia of union activity beyond presumed membership inferred from their employment with Bechtel. Moreover, about one-fourth of the 91 were hired in utility classification unskilled positions; the Company's concern was having to deal with the craft unions.

Nor does it help the Company's case to refer (Br 17) to its hiring of activist Danny Garnica at Palo Verde. The Board found (D&O 22, A ___) that, when Recruiter Owen offered Garnica a welder's job over the phone, 1995, Garnica did not reveal, and Owens did not know of, Garnica's union affiliation. The Board juxtaposed (D&O 10, 22, A ___) Recruiter Owen's treatment of Garnica with his treatment of openly union applicant Winham, and found a blatant example of discrimination against applicants who revealed union activism. Thus, one day after Owens hired Garnica, Winham phoned the office and spoke to someone who told him that the Company needed welders and that Recruiter Owens would speak to him. Within an hour, Owen called and Winham told him about his Bechtel work history, and that he wanted to work for the Company and do a little union organizing. Owens promptly told Winham that the Company did not need welders. (Above, pp. 30-31.)

At Exxon, the Company's hiring of union activists Russell and Dame was, admittedly a defensive ploy, to discourage the issuance of an unfair labor practice complaint by the Board. (Tr 3193 (Glover), 6270-72, 6275-76 (Martinez), A ___.) That the Company hired a minimal number of activists does not disprove unlawful motivation in its refusal to hire the discriminatees. *See NLRB v. Centra, Inc.*, 954 F.2d 336, 374 (6th Cir. 1992); *Hyatt Corp. v. NLRB*, 939 F.2d 361, 375 (6th Cir. 1995).

The Company also contends (Br 19, 38-40) that the Board erred in discounting its "preference system" defense, which the Company asserts required selection of employees for hiring based on evidence of relevant experience. But the experience and qualifications of the Palo Verde discriminatees cannot be reasonably challenged. Moreover, the Company's inflexibility in applying the preference rules to union supporters is in stark contrast to its relaxed attitude when hiring purportedly "preferenced" applicants with no known union affiliations. Thus, through November 1, 9 journeymen were hired before they applied, 2 after their applications expired, and 88 off-the-street journeymen hired had less than the requisite 42 months of craft experience. Further, over 700 nonunion applicants were considered for crafts other than those for which they applied.

The Company's own evidence contradicts its claim that it filled the Palo Verde jobs with qualified, preferenced employees. Thus, Recruiter Owen testified

that the preferenced employees were in fact incapable of performing their work, because fewer than 5 percent had Independent Worker status. (Tr 848-49 (Owen), A ___.) According to Owen, the remaining 95 percent of the employees who were not genuinely experienced were, in fact, "a burden" on the Company's operations. They could work only outside the controlled areas, and "had to be escorted everywhere" on the job. (Tr 850-51 (Owen), A ___.) In addition, the Company was forced to incur major costs having its hires trained in APS procedures. Further, APS had to run extensive, time-consuming background investigations on every one of the Company's hires, who had not worked at Palo Verde, before issuing them security clearances. In contrast, all the discriminatees had the indispensable Independent Worker status and APS security clearances. The gravity of the economic cost to the Company based on its refusal to hire the genuinely experienced discriminatees is borne out most strikingly by the fact that it had to cancel the scheduled outage due to a lack of qualified craftsmen. (Above, pp. 28, 45.) There is no evidence on the record that a scheduled outage had ever before been canceled at that nuclear facility.

There is no merit to the Company's related claim that the Exxon discriminatees lacked the minimum 42-month craft experience requirement. As noted, those discriminatees on average possessed 20 to 30 *years* of experience in their individual crafts, and the majority provided the Company with evidence to

that effect either on their applications or on supplemental resumes and other documents. And, as the Board found (D&O 6, A ___) the application form was vague at best about the alleged 42 months requirement, and recruiters did not reveal it to the discriminatees at the opportune time. Thus, when some discriminatees whose applications did not reflect 42-month experience asked if what they had written was sufficient, recruiters reviewing their applications indicated that their applications were "okay," or simply said nothing. Thereafter, when some of the discriminatees called the Company to inquire about the status of their applications, the recruiters reviewed their applications on the phone again without mentioning that they lacked the requisite 42 months. Not until the shortened 30-day active period for the applications had expired did the recruiters inform some applicants that their applications failed to satisfy experience requirements. And then, recruiters refused the request of every discriminatee who asked to redo his application to reflect his actual experience. (Above, pp. 14, 19.)

For example, on August 31, Recruiter Glover told discriminatee Kelly Browning that his 2-day old application was “not good” because it did not show that he had 42 months of craft experience. Browning asked for an additional sheet and permission to expand his application. Glover refused, stating that the application was "a legal document" that could not be altered. Browning then asked if he could file a new application. Glover said, "No," adding that the Company

was no longer accepting applications. (Above, pp. 19-20.) On three occasions Recruiter Wilson told Organizer Armstrong, a pipefitter by trade, that his application was okay but that no work was available. On a fourth visit, on March 13, Wilson told Armstrong that he could not update his by-then-expired application. (Tr 4422, 4438-39, 4652 (Armstrong), A ___.)

Most damaging to the Company's 42-month-experience defense are the admissions its top officials. Both Vice President of Construction Schroeder and HR Senior Site Manager Austin, who were responsible for establishing the Exxon site's craft staffing plan, acknowledged that the type of work that had to be done at Exxon did not require company-certification, nor did it require walk-in applicants to have 42 months' experience. Thus, Austin admitted that there was no 42-months requirement at the site, and that he never told recruiters to exclude applicants with less than 42 months of experience, only that applicants should list their craft experience. (Tr 6008-10, 6047-56, 6974-75 (Austin), A ___.) Schroeder also testified that field work during union apprenticeship counted as requisite craft experience. (Tr 5661, 5903-06 (Schroeder), A ___.) Moreover, as the Board noted (D&O 5 n.25, A ___), both Austin and Vice President Bordages testified that recruiters were instructed to tell applicants, at the time they applied, that if something was wrong, ask them questions, and get any needed clarification, about work experience. (Tr 5407-08 (Bordages), 6008-10, 6974 (Austin), A ___.) As

discussed above, the recruiters at Exxon did not apply those instructions to the discriminatees. (Above, pp. 10-19.)

And, as in Palo Verde, the Board found (D&O 5, A ___) that at Exxon, the Company routinely made exceptions to its hiring rules in favor of preferenced applicants, although the Company's hiring protocol did not exempt preferenced employees from compliance with application procedures and minimum employment standards. In contravention of that protocol, however, recruiters hired former employee applicants who did not have 42 months of craft experience, who had been certified in crafts other than the ones they were hired for, who had never submitted applications or whose applications had expired, or who were considered for crafts other than those they applied for. (Above, pp. 23-32.)

The Company's reliance (Br 34-35) on *Fluor Daniel, Inc. v. NLRB*, 161 F.3d 953 (6th Cir. 1998), is misplaced. There, the Court held that in order to find a discriminatory refusal to hire, the Board must match job applicants with the available jobs for which they were qualified. Here, the Board expressly found that the administrative law judge conducted appropriate "job matching," finding that that the discriminatees were qualified to fill the Company's available jobs. Moreover, the Board also found (D&O 13, A ___) that the number of positions ultimately filled by the Company in each of the discriminatees' job categories far

exceeded the number of discriminatees. In short, the Board concluded on substantial evidence that the discriminatees were matched with the available work.

Equally without merit is the Company's claim (Br 31-32) that the General Counsel failed to sustain his evidentiary burden to show that the discriminatees were "available" for work. The Company asserts (Br 31, A ___) that *FES* requires that the General Counsel show that the discriminatees were actually available for work when openings in positions for which they qualified became available. *Starcon, Inc*., 2001 Lexis 450 (June 27, 2001), on which the Company relies, however, is simply an administrative law judge's decision, not yet reviewed by the Board and therefore of no precedential value. *See W. F. Bolin Co. v. NLRB*, 70 F.3d 863, 873 (6th Cir. 1995) (*citations omitted*) ("the ALJ's findings are not binding on the Board"). *FES* itself includes no such requirement.

Throughout its brief, the Company, without so advising the Court, makes other claims based on administrative law judges' decisions that have either been disavowed or completely reversed by the Board. Thus, the Company cites at length (Br 8-9) from an administrative law judge's decision in *Ippli, Inc*., 321 NLRB 463, 465 (1996), criticizing the goals of the union's salting program in that case. However, the Company completely fails to cite to the Board's expressed finding in that very case that the judge's discussion was "irrelevant" to the Board's ultimate holding in that case. *Id.* at 463 n.1. In any event, the legitimacy of

"salting" is now beyond question. *See NLRB v. Town & Country Electric, Inc*., 516 U.S. 85 (1995); *NLRB v. Fluor Daniel, Inc*., 161 F.3d 953 (6th Cir. 1998).

Finally, the Company argues (Br 43-44) that the Board erred in crediting the testimony of Organizer Evenson, a key witness at the Palo Verde site, because in *Irwin Industries, Inc*., 1996 NLRB Lexis 666 (Sept. 16, 1996), the Board had allegedly found Evanson to be "a known perjurer," who "filed frivolous unfair labor practice charges, falsified evidence, and committed perjury in a 1993 organizing effort similar to this matter." It is unlikely that the Company was unaware that its claim was based on the judge's finding, which the Board expressly reversed. Thus, in *Irwin Industries, Inc*., 325 NLRB, 796, 797 n.7 (1998), the Board stated, "We do not agree with the judge that the unfair labor practice charges related to the three employees [including Evenson] were frivolous and knowingly false. Nor do we agree with the General Counsel that there is evidence of abuse of the Board processes with respect to [the relevant] testimony. . . . There is no showing that the [Evenson] created any fraudulent evidence." *Id.*

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Court should enter judgment denying the petition for review and enforcing the Board's order in full.

_____
CHARLES DONNELLY
Supervisory Attorney

_____
JOAN E. HOYTE
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570
(202) 273-2986
(202) 273-2943

ARTHUR F. ROSENFELD
General Counsel

JOHN E. HIGGINS, JR.
Acting Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

AILEEN A. ARMSTRONG
Deputy Associate General Counsel

National Labor Relations Board

November 2001

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