Air Management Services, Inc. *and* Sheet Metal Workers' International Association, Local No. 49, AFL–CIO. Case 28–CA–21378

August 29, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On April 16, 2008, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

ORDER

The National Labor Relations Board orders that the Respondent, Air Management Services, Inc., Albuquerque, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating job applicants regarding their union membership, affiliation, or activities.

(b) Threatening job applicants by informing them that it would be futile to apply for employment if they were members of a union;

(c) Threatening not to hire job applicants who are union members;

(d) Requiring job applicants to sign a declaration disavowing any union membership or affiliation as a condition of hire;

(e) Failing and refusing to hire job applicants on the basis of their union affiliation or activities;

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

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

(a) Within 14 days from the date of this Order, offer immediate employment to Dominic Baca, Kenneth Chavez, Patrick Lucero, and Richard Espinosa in the positions for which they applied, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any employees hired to fill the positions for which they applied.

(b) Make Dominic Baca, Kenneth Chavez, Patrick Lucero, and Richard Espinosa whole for any loss of earnings and benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire Dominic Baca, Kenneth Chavez, Patrick Lucero, and Richard Espinosa, and within 3 days thereafter notify them in writing that this has been done and that the re-

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

There are no exceptions to the judge's findings that the Respondent did not violate Sec. 8(a)(1) of the Act by: (1) creating the impression of surveillance in a telephone message left for applicant Dominic Baca; and (2) creating the impression of surveillance during a subsequent telephone conversation with Baca.

We adopt the judge's findings that the Respondent violated Sec. 8(a)(3) of the Act by refusing to hire applicants Dominic Baca, Richard Espinosa, Kenneth Chavez, and Patrick Lucero. We thus find it unnecessary to pass on the judge's findings that the Respondent also violated Sec. 8(a)(3) by refusing to consider these applicants for hire, because the remedy for any such violation would be subsumed within the broader remedy for the refusal-to-hire violations.

In adopting the judge's refusal-to-hire findings, we find that assuming arguendo the Respondent put forth evidence reasonably calling into question the applicants' genuine interest in working for the Respondent, under *Toering Electric*, 351 NLRB 225 (2007), the General Counsel established their genuine interest in employment by a preponderance of the evidence. We also find, in agreement with the judge, that the General Counsel satisfied his burden under *FES*, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002), of establishing antiunion animus. In so finding, however, we do not rely on the judge's statements that the Respondent, on two occasions, had created the impression that Baca's union activity was under surveillance. As mentioned above, the judge dismissed these impression-of-surveillance allegations, and there are no exceptions to these dismissals.

[2] In the remedy section of his decision, the judge inadvertently found that apprentice applicant Chavez would not have been hired prior to July 13, 2007, because the Respondent hired only two apprentices in January 2007 and did not hire a third apprentice in July 13, 2007. However, in his analysis of the refusal-to-hire allegations, the judge correctly found that the Respondent hired three apprentices in January 2007. We therefore correct this inadvertent error and find that Chavez would have been hired in January 2007.

[3] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

We shall modify the judge's recommended Order and substitute a new notice to include the Board's standard remedial language for the violations found.

fusal to hire them will not be used against them in any way.

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

(e) Within 14 days after service by the Region, post at its facility in Albuquerque, New Mexico, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 18, 2006.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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 coercively interrogate job applicants regarding their union membership, affiliation, or activities.

WE WILL NOT threaten job applicants by informing them that it would be futile to apply for employment if they were members of a union.

WE WILL NOT threaten not to hire job applicants who are union members.

WE WILL NOT require job applicants to sign a declaration disavowing any union membership or affiliation as a condition of hire.

WE WILL NOT fail and refuse to hire job applicants on the basis of their union affiliation or activities.

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

WE WILL, within 14 days of the date of the Board's Order, offer Dominic Baca, Patrick Lucero, and Kenneth Chavez instatement to the position of apprentice, and Richard Espinosa instatement to the position of journeyman, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed.

WE WILL make Dominica Baca, Patrick Lucero, Kenneth Chavez, and Richard Espinosa whole for any loss of earnings and other benefits suffered as a result of the discrimination against them with interest as provided by law.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusals to hire Dominic Baca, Patrick Lucero, Kenneth Chavez, and Richard Espinosa, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the refusals to hire will not be used against them in any way.

AIR MANAGEMENT SERVICES, INC.

[4] 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."

Liza Walker-McBride, for the General Counsel.
Mitchell S. Rubin, Esq., on brief.
Wayne E. Bingham, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge: This case arose from a salting[1] campaign conducted by Sheet Metal Workers' International Association, Local No. 49, AFL–CIO (Union or Local 49) that involved Air Management Services, Inc. (Respondent or AMS), a heating and air conditioning contractor that operates in the Union's geographic jurisdiction.

Based on the underlying unfair labor practice charge the Union filed on May 14, 2007, the Regional Director for Region 28 of the National Labor Relations Board (NLRB or Board) issued a formal complaint on July 31, 2007, pursuant to Section 10 of the National Labor Relations Act (the Act) alleging that Respondent violated Section 8(a)(1) by creating an impression of surveillance, coercive interrogations and threats, and that Respondent violated Section 8(a)(1) and (3) of the Act by refusing to consider for hire or to hire four applicants for employment. Respondent filed a timely answer denying the unfair labor practices alleged.

I heard this case in Albuquerque, New Mexico on November 14 and 15, 2007. All parties had the full opportunity to call and examine witnesses, to introduce relevant documentary evidence, and to argue procedural and substantive issues. After carefully considering the hearing record in light of my credibility determinations,[2] and the argument detailed in post-hearing briefs filed by the General Counsel and AMS, I have concluded that Respondent violated the Act, as alleged, based on the following

FINDINGS OF FACT

JURISDICTION

Respondent sells, installs and services heating and air conditioning equipment from its office and place of business in Albuquerque, New Mexico. Respondent admits that it meets the Board's jurisdictional standard for direct inflow of goods in interstate commerce. Respondent further admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Finally, Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

ALLEGED UNFAIR LABOR PRACTICES

RELEVANT FACTS

Background

Respondent maintains a construction department and a service department. This case involves the construction side installation department which installs heating and cooling equipment on site in ready-to-operate condition. The installation unit consists of foremen, lead person installers, journeymen, and apprentice sheet metal workers. It is headed by a project foreman. In late 2006, the position of project foreman was in transition. Luke Wanek was the outgoing project foreman. Ed Martinez had just been hired to take over as project foreman.

Top-Down Organizational Effort

Union business manager Raymond Diaz wrote to Respondent in May 2006 requesting a meeting to discuss the benefits of unionization. Although Respondent operates on a nonunion basis, in May 2006, Respondent's president, Dale Rechtenbach, met with Raymond N. Diaz, business representative of the Union, to discuss the advantages of operating on a unionized basis. Following their discussion, including talks about the union wage and benefit structure, no further meetings were scheduled.

Employment Advertisements

In December 2006, the relevant time herein, Respondent hired through advertisement in the Albuquerque Journal. When applicants appeared at Respondent's office, the receptionist provided an application and the appropriate test for the position. The completed application and test were given to President Dale Rechtenbach for review. After background checks, Rechtenbach graded the test and evaluated the application. Assuming a satisfactory background check, Rechtenbach then forwarded the construction applications to Martinez and Wanek. An interview was arranged if there was interest in hiring the applicant.

Respondent's unlicensed sheet metal installation employees are referred to as either journeymen or apprentices. Journeymen who possess a journeyman sheet metal license from the State of New Mexico Construction Industries Division (CID License) are referred to by Respondent as journeymen lead person installers.

After management discussions regarding the severe problems faced in finding qualified applicants during the spring and summer months, Respondent placed the following advertisement (First Advertisement) in the Albuquerque Journal beginning Sunday, November 26, and Sunday, December 3, 2006:

SHEET METAL
INSTALLER
Journeyman Lead Person Installer
needed for commercial projects.
Must have JSM License, valid
driver's license, no DWI's. 401K,
profit sharing, medical, dental, vision, top pay & benefits for top
people. Possible sign-on bonus.
Call or apply in person.
Air Management Services

[1] Salting is "the act of a trade union in sending a union member or members to an unorganized jobsite to obtain employment and then to organize the employees." *Tulatain Electric,* 312 NLRB 129, 130 fn. 3 (1993), enfd. 84 F.3d 1202, 1203 fn. 1 (9th Cir. 1996).

[2] The following factors inform my credibility findings: the opportunity to be familiar with the subjects covered in the testimony given, established or admitted facts, witness bias, testimonial consistency, corroboration, the strength of any rebuttal evidence, inherent probabilities, reasonable inferences available from the record as a whole, the weight of the evidence, and witness demeanor. Critical credibility resolutions are explained in more detail below.

8904 Adams NE 856-9250

Respondent continued the First Advertisement on Sunday, December 10, and Sunday, December 17, 2006, and, additionally, ran the advertisement below (Second Advertisement) on these Sundays:

SHEET METAL
INSTALLER
Journeyman and Apprentice positions available for commercial projects. 401K, medical, dental, vision, top pay and benefits for top people. Call or apply in person.
Air Management Services
8904 Adams NE 856-9250

President Rechtenbach explained that in the First Advertisement, by the term "JSM License," he was seeking applicants with the CID License. Rechtenbach did not recall receiving any applications in response to these ads. He explained that he was unable to refresh his recollection by reviewing any applications kept on file because there were none. Respondent has no written or unwritten policy on application retention. However, Rechtenbach testified that he habitually purges his files at the end of the year.

Respondent's Employment Application

At least from the time it advertised for employees in November and December, 2006 until shortly after April 10, 2007, Respondent used an employment application form containing the following four questions:[3]

> Are you now or have you ever been a member of the sheet metal workers labor union? ____ yes ____ no
> Are you now or have you ever been a member of the plumbers and pipefitters labor union? ____ yes ____ no
> Are you now or have you ever been a member of any labor union?
> ____ yes ____ no
> If yes, name of labor union _____
> Are you applying for employment for the purpose of recruiting employees for any labor union or to convert Air Management Services, Inc. to a union shop? ____ yes ____ no

Immediately above these questions, applicants are advised in bold print:

> All questions must be answered truthfully. Applicant will be immediately disqualified from consideration for employment or immediately terminated from employment if it is determined that the questions are not answered truthfully.

[3] Although Rechtenbach initially said he added the four questions to AMS's application form in early January 2007, an application dated November 26, 2006, contains the questions. GC Exhibit 10. Later, Rechtenbach agreed they could have been added as early as October 2006.

The Telephone Message

After reading AMS's advertisement in the Sunday, December 10, 2006, Albuquerque Journal, Local 49's youth-to-youth[4] organizer Dominic Baca called Respondent on Monday, December 11, 2006, to inquire about an employment application he submitted to Respondent in October 2006, as part of a salting campaign targeting Respondent.[5] He still heard nothing for another week so he filed another application around December 18. Both were covert applications meaning that he did not disclose any union affiliation. Shortly after filing the second application, Baca received a cell phone message from Rechtenbach stating that he did not want to become a union shop.

Rechtenbach admitted that he responded to an incoming message and left such a message. He asserted that he did so because his caller ID showed the incoming call originated from "Sheet Metal Workers U" and the caller asked about the status of an employment application. Rechtenbach returned the call to Baca's number as listed on the application but purportedly aimed his comments at Diaz, with whom he had discussed unionization in May 2006. Rechtenbach recalled stating that Respondent did not want to become a Union shop. However, after listening to a tape recorded version of the message, Rechtenbach agreed that he left the following message:

> You were here this morning about an application that you'd filled out, uh, the only problem is with your application—it's not really with your application. Uh, we're a nonunion sheet metal shop and we are going to stay that way. We have no interest in becoming a union sheet metal shop, so, um, anyway if you have any questions about that, you can call me back. Bye.

Rechtenbach recalled that this call occurred in October 2006, outside the 10(b) period. Baca said the call occurred on December 18, within the 10(b) period. Based on the corroboration provided for Baca's recollection, I credit him as to the timing of this call. Thus, Baca's cell phone records show that he received a call from AMS on December 18. GC Exhibit 13. Baca claimed that he played the message back for his superiors at Local 49, Diaz and business agent Espinoza, in order to seek guidance from them concerning it. They both corroborate Baca on this point and place his replay of the call in December. Although it might be possible technically for Baca to retain the call in his voicemail box from October to December so that he could have played it back after Espinoza joined the Local 49 staff in December 2006, I find that likelihood highly improbable as, by then, the message would have been quite stale for purposes of seeking advice regarding it and because other evidence shows that Baca faithfully reported on his salting activities in a very timely fashion. By contrast, Rechtenbach's recollection lacks corroboration. As his recollection on other ques-

[4] The Sheet Metal Workers' Youth-to-Youth Program has been fully described in prior Board cases. See, *Dial One Hoosier Heating & Air Conditioning Co.,* 351 NLRB 776 fn. 4 (2007) (citing *Ken Maddox Heating & Air Conditioning Co.,* 340 NLRB 43, 49 (2003); *Sommer Awning Co.,* 332 NLRB 1318, 1322 (2000).

[5] Baca served as the Local 49's youth-to-youth organizer from September 2006 until March 2007 when the job was rotated to another apprentice.

tions of significance was demonstrably inaccurate, I find it impossible to accord any degree of trustworthiness to his version of this critical matter where it conflicts with Baca's account.

As earlier noted, even though Respondent operates on a nonunion basis, in May 2006, Rechtenbach met with Local 49 business representative Diaz to discuss the advantages of operating on a unionized basis. Following their discussion, including talks about the Union wage and benefit structure, no further meetings were scheduled.

Baca's Return Call

When Baca returned the call, Rechtenbach asked him whether he was a union member or had any union affiliation. If so, Rechtenbach said, he would not hire him, and suggested applying with one of the several union contractors in the area. Baca denied that he was a union member or affiliation with a union, and told Rechtenbach he was not sure what Rechtenbach was trying to elicit. Rechtenbach then asked Baca if he knew Raymond Diaz or Richard Espinosa, Terry Farmer, or Jerry Arms.[6] Baca denied knowing any of them, and then asked Rechtenbach what a union was. Rechtenbach ended the conversation saying that someone would be in touch with him about an interview but Baca would have to sign a document stating that he was not affiliated with the union.

Rechtenbach did not specifically recall asking Baca if he was a member of the Union, asking if he was associated with any union activities, or asking if he was affiliated with the Union. Further Rechtenbach did not recall telling Baca that he would have to sign a document stating that he was not affiliated with the Union and, in the abstract, he specifically denied that he would have done that. Rechtenbach specifically denied that he told Baca that he would not hire a union member.

I find Baca's account of that the foregoing conversation more probable than Rechtenbach's account. Baca's account is largely consistent with the practice followed by AMS at the time as reflected in the portion of its employee application in use at the probes into the applicant's union affiliation and intentions concerning future union activity. Moreover, Rechtenbach's general recollection of this particular conversation appeared most uncertain.

The Employment Applicants

Dominic Baca

Youth-to-youth Union Organizer Dominic Baca completed an application for work with Respondent in October 2006 but was not called for an interview. After reading the Second Advertisements of December 10 and 17, Baca applied again on December 18. He noticed the four new questions concerning union affiliation on the application at this time. He responded "no" to all four questions although he candidly admitted that his answers were not true. At the time of this application, Baca was a third-period apprentice in the Union's program earning about $16 per hour. He did not have a CID License.

On December 20, Baca interviewed with Martinez and Wanek. Baca asked about the document he was supposed to sign disavowing any interest in the Union. According to Baca, they did not know anything about such a document. Baca was told that Respondent would be interviewing for the rest of the week and then would get back to him. Baca did not hear anything. When he called back in January, the receptionist told him that the positions were filled.

Although Rechtenbach testified that he never saw Baca prior to his testimony at this proceeding and neither Martinez nor Wanek recalled Baca's interview or his application, I nevertheless find that Baca completed an application with Respondent and interviewed with Martinez and Wanek. Entirely aside from the fact that Baca's demeanor in the course of his testimony conveyed a much more favorable impression than that of Respondent's witnesses, Rechtenbach emphasized that there are a lot of employees and he is not involved in the hiring process. Accordingly, it is not surprising that he could not recall Baca. Additionally, Baca does not assert that he dealt in person with Rechtenbach. Moreover, Baca did not ask for a copy of his second application when he completed it. The only copy was the one retained by Respondent and, as Rechtenbach explained, Respondent typically purges its files at the end of the year. Accordingly, no copy of any 2006 application was available at the time of hearing. Finally, Wanek did not recall any of the applicants or their applications. Wanek agreed that he did not recall the names of any applicants who were not hired. However, Baca's contemporaneous notes and his recollection of the application process convince me that his testimony concerning it is truthful.

Baca was in the union's apprentice program. At the time he applied with Respondent, he had completed 3 years of the program. He had prior work experience with Year-Out Mechanical before participating in the Union's Youth-to-Youth program from September 2006 to March 2007.

Kenneth Chavez

In late December 2006, probably on or about December 22, Union Member Kenneth Chavez visited Respondent's office seeking to file an application for employment. At the time of the hearing, Chavez had been in the Union's apprenticeship program for 1–1/2 years and a member of the Union for 2 years. Extrapolating, this would mean that Chavez had been in the union apprenticeship program for about 7 months in December 2006.[7] At the request of Baca, Chavez wore a shirt displaying a small union logo and a jacket with a small union logo on the front and a large union logo on the back. Chavez approached the desk and asked the man behind the counter if Respondent was accepting applications. The man said that Respondent was not accepting applications at that time. At the time of making the application, Chavez had been out of work for 2 or 3 days. Previously, he worked as a sheet metal worker. A few weeks after applying with Respondent, Chavez went to work for another industry employer.

[6] Although the record reflects that Diaz and Espinosa are officials of the Union, the identities of Arms and Farmer are unknown.

[7] Chavez earlier got as far as the middle of the second year of his apprentice program with the Union when he had to take a leave of absence due to a death in his family. When he returned from the leave, he had to start the program again at the beginning of the second year. Hence, but for the leave, Chavez would have been nearing the start of his third year at the time of the hearing.

Patrick Lucero

On December 22, 2006, Union Member and Third-Period Apprentice Patrick Lucero visited Respondent seeking to file an employment application. Lucero did not have a CID License at the time of his application. At the direction of Baca, Lucero wore union insignia on his shirt and jacket. Lucero entered through a side door and approached a man in a small office to the right of the side entrance. Lucero asked the man if Respondent was hiring and the man said that they were. He directed Lucero to the front desk. Lucero proceeded to the front desk and asked an older woman for an application form. The woman gave him a clipboard with the application on it. Lucero completed the application listing his prior union jobs. He also answered two of the four questions regarding union membership in the affirmative. His negative answers were to the questions involving the Plumbers Union and the question regarding whether he was seeking to recruit Respondent's employees for the Union. Lucero completed the test, gave the completed application and test to the receptionist. She told him he would be contacted if Respondent was interested. Lucero said okay and left. Lucero never heard from Respondent and did not contact them to follow up.

Richard Espinosa

Business representative Espinosa completed his application for the position of journeyman lead person installer on December 19 or 20, 2006. At the time of his application, he had a CID License. Although he was not wearing union insignia, he revealed his prior employment with known union contractors. He answered yes to the question about membership in the Union, no to the question about membership in the Plumbers & Pipe Fitters' Union, yes to the question about membership in any union, and no to the question about applying for employment for the purpose of recruiting employees for a labor union or converting Respondent to a union shop. Espinosa completed the test questions and returned the completed test and application form to the receptionist. The receptionist said she would give the application to "Ed" and, in response to Espinosa's request for an interview, the receptionist said that everyone was in a meeting.

On the following day, Espinosa had an interview with Martinez and Wanek. During the interview, Wanek commented on Espinosa's prior experience with union contractors. At the end of the interview, Martinez said Respondent would be hiring after the first of the year and would let Espinosa know one way or the other. Hearing nothing from Respondent, Espinosa contacted Respondent on January 3 or 4, 2007, but was unable to talk to Martinez directly. Although Espinosa left his name with the receptionist, he was not called. Martinez did not recall interviewing Espinosa or receiving his application. Rechtenbach testified that he never saw Espinosa prior to their testimony at this proceeding.

Prior to becoming business representative for the Union in December 2006, Espinosa worked for various union contractors in Los Alamos. He revealed all of his employment history on his application form. Espinosa testified that he would have taken a job with Respondent had one been offered.

Hiring

From November 26, 2006, through July 13, 2007, Respondent hired thirteen individuals either as "licensed journeyman lead person installer," "journeyman sheet metal installer," or "apprentice sheet metal installer." These are the terms utilized in Respondent's First and Second Advertisements. The position of "journeyman lead person installer" required a CID License. The positions of journeyman and apprentice sheet metal installers did not require a CID License. Five individuals were hired as apprentices. Three unlicensed individuals were hired as journeymen. Four licensed journeymen were hired, and the remaining individual was either a licensed or unlicensed journeyman. The record does not reflect the experience, if any, of 10 of the 13 successful applicants.

Dominic Calmelat was hired as an apprentice on November 27, 2006, at $16 per hour. His application reflects 5 years' work experience. From 2001 to 2004, he was employed as a plumber/pipe fitter. From 2004 to 2006, he was employed as an apprentice for Premier Mechanical, a heating and cooling company. He responded "no" to all questions asking about union membership or affiliation. He correctly answered seven of sixteen general test questions and four of sixteen heating and cooling questions. In May 2007, Calmelat's hourly wage was increased by $2.

The application of Aaron Soriano, who was hired as an apprentice on December 20, 2006, shows that he held three prior installer jobs. A total of 4 years' service is reflected for these jobs. Soriano received a certificate for completing a specialized program involving the installation of "Firemaster Grease and Air Ventilation Duct Work Systems" and he was certified as a universal installer by the Esco Institute.[8] Soriano answered all union affiliation questions in the negative. Soriano correctly answered ten of sixteen general test questions and three of sixteen heating and cooling questions.

Cipriano Mondragon was hired as an apprentice on January 15, 2007. Mondragon's application stated, in answer to Respondent's questions, that he was a member of the Union but did not plan to organize Respondent's employees. Mondragon correctly answered twelve of the sixteen general test questions and four of the sixteen heating and cooling questions. The portion of his application listing prior experience was not entered in evidence.

Finally, on July 13, 2007, Ramon Munoz was hired as a licensed journeyman sheet metal worker. His application indicated 4 years experience in sheet metal installation. He correctly answered eleven of sixteen general test questions and eight of the sixteen construction department test questions correctly. Aside from his CID license, Munoz also had a certificate for completing an OSHA Construction and Safety course.

Salting Correspondence

On January 3, 2007, Rechtenbach received a letter from Diaz stating, in relevant part,

[8] There is no explanation for the applicability of these certificates to the work of AMS. Likewise, there is no explanation for the time differential between the two. Soriano received the Firemaster certificate in September 2007 and the Esco Institute certificate in December 1993.

> I have sent numerous members of Local 49 to apply for employment with your company, Air Management Services, Inc. We have compiled numerous NLRB Unfair Labor Practice violations in your hiring procedures in which your hiring personal [sic] have committed. I would like the opportunity to discuss these violations with you at your earliest convenience.

By letter dated April 10, 2007, Diaz informed Rechtenbach:

> We have gathered information on your company and have found multiple labor violations. To file NLRB charges against your company would be a long drawn out process, and would not be in anybody's best interest. In order to avoid this we are requesting to sit down with you to create a working relationship and discuss the benefits of being a union contractor, and how if we work together we can do it better.

The letter concluded that if Diaz did not hear from Rechtenbach by close of business Thursday, April 12, 2007, Diaz would have no other choice than to pursue NLRB charges. In response to this letter, Rechtenbach removed the four questions from the employment application.

Analysis and Conclusions

Alleged Independent Violations of Section 8(a)(1)

Section 8(a)(1) of the Act provides that 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." Section 7 of the Act provides,

> Employees shall have 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, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [of the Act].

Employment Application Questions—Alleged Coercive Interrogation

In general, interrogation of an employee regarding the employee's union membership or sympathies is held unlawful when it "reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act." *Blue Flash Express,* 109 NLRB 591, 593 (1954); see also *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985); *Medcare Associates, Inc.,* 330 NLRB 935, 940 (2000) ("whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.").

The tendency to restrain or interfere is judged in light of surrounding circumstances such as the employee response, the purpose in questioning employees, whether assurances were given that no reprisals would take place, and whether the questioning occurred in an atmosphere of hostility to union organization. *Blue Flash Express,* supra, 109 NLRB at 593–594; see also *Bourne v. NLRB,* 332 F.2d 47, 48 (2d Cir. 1964) (per curiam), setting forth five criteria for evaluation of the lawfulness of isolated interrogation of an employee, as follows: (1) background of employer hostility and discrimination, (2) the nature of the information sought, (3) the identity of the questioner, (4) the place and method of interrogation, and (5) the truthfulness of the employee's reply.

Examination of the surrounding circumstances leads me to conclude that Respondent's application questions reasonably tended to restrain and interfere with employee Section 7 rights. I note in particular that the questions were aimed at all applicants for employment. Moreover, the questions were set forth on an employment application without any identifiable legitimate purpose and with a warning of dire consequences if not answered truthfully. The reasonable inference to be drawn from questioning under these circumstances was that the information was being sought in order to determine whether to hire the applicants. Although I am cognizant that there was no pattern of employer discrimination at the time of these employment applications, I note Respondent's admitted hostility to the Union. I am, accordingly, persuaded that under all the circumstances, the questions reasonably tended to restrain and coerce applicants for employment. In addition to my independent analysis of the surrounding circumstances in this case, I also note precedent that a requirement that salting applicants disclose their union membership on their employment application has been held to violate Section 8(a)(1) of the Act. *Richard Mellow Electric Contractors Corp.,* 327 NLRB 1112, 1113 (1999) ("requiring applicants to disclose their union membership reasonably tended to interfere with, restrain, or coerce employees in the exercise of rights protected by Section 7 of the Act.").

Telephone Message of December 18, 2006—Alleged Threat of Futility and Alleged Impression of Surveillance

The General Counsel alleges that Respondent's message threatened employee-applicants by informing them it would be futile to apply for employment with Respondent if they were members of the Union and created an impression with employee-applicants that their union activities were under surveillance by Respondent.

An employer who tells salting applicants they are wasting their time in applying for a job because the employer is happy operating on a nonunion basis violates Section 8(a)(1) of the Act. *Tradesmen International,* 351 NLRB 399 fn. 4 (2007) (cited by General Counsel). Rechtenbach's message stated, in relevant part, "we're a nonunion sheet metal shop and we are going to stay that way." The instant facts are indistinguishable from those in *Tradesmen,* supra, and I find that Respondent violated the Act accordingly.

The General Counsel also alleges that Respondent's message created the impression that employee-applicants' union activities were under surveillance.

> The test for whether an employer unlawfully creates an impression of surveillance is whether under the circumstances, the employee reasonably could conclude from the statement in question that his protected activities are being monitored. *Mountaineer Steel, Inc.,* 326 NLRB 787

> (1998), enfd. 8 Fed.Appx. 180, 2001 WL 431487 (4th Cir. 2001). The Board does not require that an employer's words to an employee reveal on their face that the employer acquired its knowledge of the employee's activities by unlawful means. See *United Charter Service,* 306 NLRB 150, 151 (1992).

Sam's Club, 342 NLRB 620 (2004). Based upon my finding that Rechtenbach's caller ID revealed a union hall phone had been used to leave the message, I find no creation of an impression of surveillance.

> Telephone Conversation of December 18, 2006—Alleged Coercive Interrogation, Impression of Surveillance, and Threats

In response to the above message, Baca returned Rechtenbach's call. The General Counsel alleges that Respondent violated Section 8(a)(1) during this telephone conversation by interrogating Baca about his union membership, created an impression that Baca's union activities were under surveillance, threatened Baca that Respondent would not hire union members, and threatened Baca by telling him that to be considered for employment he would have to complete paperwork affirming that he was not affiliated with any labor organization.

Having credited Baca's testimony regarding this conversation, I find that Rechtenbach asked Baca if Baca was a member of the Union or had any union affiliation. I find this question would reasonably tend to restrain or interfere with an employee's Section 7 right. The only purpose in asking such a question of an employment applicant is to utilize such information in making a hiring decision. Respondent's hostility toward the Union has already been noted.

Regarding the General Counsel's allegation of creation of the impression of surveillance, I find that Baca could not have concluded that his protected activities were under surveillance due to use of a union hall phone in leaving the message about his employment application.

I find further that Respondent threatened not to hire union members. A direct statement of intent to discriminate against job applicants on the basis of their union membership has a reasonable tendency to restrain and coerce employees in the exercise of their Section 7 rights. *Eastern Energy Services,* 349 NLRB 554, 558 (opinion of Member Kirsanow at fn. 1) (2007); *SKC Electric, Inc.,* 350 NLRB 857, 874 (2007) (violative to tell employees that employer will avoid hiring union sympathizers).

Similarly, a requirement that a job applicant sign a declaration disavowing any union membership or affiliation as a condition of hire reasonably tends to restrain and coerce employees in the exercise of Section 7 rights. *Eddyleon Chocolate Co.,* 301 NLRB 887 (1991) (relied upon by General Counsel) (prospect of working under unlawful "yellow dog" contract raised at job interview as a condition of hire is unlawful).

Alleged Violations of Section 8(a)(1) and (3)

Alleged refusal to hire Baca, Espinosa, Chavez, and Lucero

In order to establish a discriminatory refusal to hire violation in the salting context, the General Counsel must show[9]

> (1) the applicant's actual interest in employment, if this is challenged by the employer;[10]
> (2) "that the respondent was hiring or had concrete plans to hire at the time of the alleged unlawful conduct,"[11]
> (3) "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;"[12] and
> (4) "that antiunion animus contributed to the decision not to hire the applicants."[13]

On the record as a whole, I find that Respondent has not raised the genuineness of the four alleged discriminatees' interest in employment. Moreover, were there such evidence, I would further find that the General Counsel has shown by a preponderance of the evidence that the four alleged discriminatees were genuinely interested in employment with Respondent and, thus, maintained their status as "employees" as defined in Section 2(3) of the Act:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . .

In the salting context, an employer may put the genuineness of the applicant's interest into question "through evidence that creates a reasonable question as to the applicant's actual interest in going to work for the employer." [14] As the Board explained in *Toering Electric Co.*, [15]

> In other words, while we will no longer conclusively presume that an applicant is entitled to protection as a statutory employee, neither will we presume, in the absence of contrary evidence, that an application for employment is anything other than what it purports to be. Consequently, once the General Counsel has shown that the alleged discriminate applied for employment, the employer may contest the genuineness of the application through evidence including, but not limited to the following: evidence that the individual refused similar employment with the respondent employer in the recent past; incorporated belligerent or offensive comments on his or her application; engaged in disruptive, insulting, or an-

[9] Consistent with the allocation of burden of proof set forth in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[10] *Toering Electric,* 351 NLRB 225, 234 (Sept. 2007).

[11] *FES (A Division of Thermo Power),* 331 NLRB 9, 12 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002).

[12] Id.

[13] Id.

[14] *Toering Electric,* supra at 234 (footnote omitted).

[15] Id.

> tagonistic behavior during the application process; or engaged in other conduct inconsistent with a genuine interest in employment. Similarly, evidence that the application is stale or incomplete may, depending upon the circumstances, indicates that the applicant does not genuinely seek to establish an employment relationship with the employer.

Counsel for General Counsel asserts that Respondent did not call into question the genuineness of the alleged discriminatees' interest in going to work. Counsel is correct that Respondent did not present any of the evidence that the Board set forth as examples of lack of genuine application; i.e., there is no evidence that any of these applicants refused similar employment with Respondent, no evidence of belligerent or offensive comments in the application process, no evidence of disruptive, insulting, or antagonistic behavior during the application process, and no evidence of conduct inconsistent with a genuine interest in employment.

Nonetheless, I note that one of the four alleged discriminatees, Espinosa, was cross-examined about the seriousness of his intention of working for Respondent, if offered a position. This issue was raised no doubt because the witness was a union business agent. I find that Respondent's cross examination of one of the applicants about the seriousness of his application is insufficient to raise an issue of the genuineness of the application. Moreover, were there sufficient evidence to raise the issue, I find that the General Counsel has shown by a preponderance of the evidence that the alleged discriminatees were genuinely interested in working for Respondent.

If the employer puts at issue the genuineness of the applicant's interest through evidence that creates a reasonable question as to the applicant's actual interest in working for the employer, the General Counsel must prove by a preponderance of the evidence that the applicant was genuinely interested in seeking to establish an employment relationship with the employer. As the Board explained,

> Assuming the employer puts forward such evidence, the General Counsel, to satisfy the genuine applicant element of a prima facie case of hiring discrimination, must then rebut that evidence and prove by a preponderance of the evidence that the individual in question was genuinely interested in seeking to establish an employment relationship with the employer. Thus, the ultimate burden of proof as to the Section 2(3) status of the alleged discriminatee-applicant rests with the General Counsel.

The applications were timely, complete, and were made under circumstances indicating that the applicants were genuinely seeking work. No disrespect was shown by the applicants. I note specifically that Chavez and Lucero had recently been laid off from prior employers and were in need of employment. Moreover, I find that Espinosa was seeking employment and would have been able to accommodate the field work despite the fact that he was employed as a business representative with the Union. The Board has found in similar circumstances that employment as a business representative does not indicate a lack of genuine desire for employment with a contractor. See, *Cossentino Contracting Co.,* 351 NLRB 495, 495 (2007). Moreover, I note that Espinosa's field experience was recent. He left field work approximately 20 days prior to applying with Respondent.

Having found that the four alleged discriminatees were employees within the meaning of Section 2(3) of the Act, I turn to the remaining elements of a discriminatory refusal to hire analysis. I find that General Counsel has proven that Respondent was hiring or had concrete plans to hire in December 2006, at the time the four alleged discriminatees applied or attempted to apply for employment with Respondent. Thus, the record reflects that Respondent was advertising for "journeyman lead person installer" with a CID License beginning November 26, 2006. Further, Respondent began advertising for journeyman and apprentice sheet metal installers on December 10, 2006. These advertisements represent concrete plans to hire.

Finally, I note that Respondent had actually begun hiring. Respondent hired one apprentice in November 2006, another in December 2006, and three more apprentices in January 2007. Respondent hired one licensed journeyman in January 2007 and another journeyman who may or may not have been licensed, also in January 2007. Thus, I find that Respondent had concrete plans to hire and was, in fact, hiring during the relevant period.

I find that General Counsel has shown that the four alleged discriminatees possessed the experience and training relevant to the announced or generally known requirements of the positions for hire. Thus, business representative Espinosa applied for the journeyman lead person installer position. The record reflects that Espinosa possessed recent field experience and the required CID license. Thus, I find that the General Counsel has satisfied the requirement of proving that Espinosa had the experience and training relevant to the announced requirements of the position of "journeyman lead person installer."

Similarly, I find that the General Counsel has shown that Baca and Lucero, who applied for work as apprentices or unlicensed journeymen, possessed the experience and training relevant to the announced requirements for journeyman and apprentice positions as advertised on December 10, 2006. No specific amount of experience was suggested in either the First or Second Advertisement. Both Baca and Lucero, who applied for unlicensed journeyman positions, were third-period apprentices in the Union's program and had ample industry experience working in sheet metal installation for prior employers.

On requesting an application for employment on or about December 22, 2006, applicant Chavez was told by an unidentified man behind the counter that Respondent was not hiring. Chavez was wearing Union insignia at the time. Although applicant Chavez was denied the opportunity to complete an application form, I find that Respondent manipulated its hiring process to avoid a known union salt. Had Chavez been allowed to do so, his qualifications and training were satisfactory for the announced journeyman and apprentice positions as advertised on December 10, 2006.

In determining whether antiunion animus led to the decision not to hire the four alleged discriminatees, I find that Respondent knew or suspected the union affiliation of the four and that Respondent exhibited antiunion animus. Thus, I note that Lucero, Chavez, and Espinosa were "overt" salts, i.e., their union affiliation was obvious from their answers to the applica-

tion questions and from Chavez's and Lucero's union insignia. Further, Baca's union affiliation was suspected by Rechtenbach who voiced suspicion of Baca's union affiliation and sympathies during their December 18, 2006, phone conversation. Denial of an employment application to Chavez, in the face of current advertisements for employment, also exhibits union animus.

Moreover, Respondent exhibited antiunion animus by inserting the four coercive questions into the employment application, leaving the telephone message for Baca stating that it would be futile to apply if Baca was affiliated with the Union and implying that Baca's union activities were under surveillance, coercively questioning Baca regarding his union affiliation and sympathies during the telephone conversation, giving further impressions that Baca's union activity was under surveillance, stating that Respondent would not hire union sympathizers, and requiring a signed document stating that Baca was not affiliated with the Union in order to process an employment application. Consequently, I find that General Counsel has shown by a preponderance of the credible evidence that antiunion animus contributed to the decision not to hire the four alleged discriminatees.

Respondent asserts that it hired known union members and thus, did not exhibit antiunion animus. Indeed, the record indicates that Respondent hired an apprentice whose application indicated he was a member of a plumbers union. On July 13, 2007, Ramon Munoz was hired as a licensed journeyman sheet metal worker. His application did not reveal his union affiliation but Rechtenbach testified that Munoz told him that he was a member of the Union. Respondent's assertion is unavailing. As in *Hi-Tech Interiors,* 348 NLRB 304 fn. 4 (2006), this evidence does not negate the record evidence of animus.

Respondent did not present evidence that the alleged discriminatees did not have the skills or qualifications it was seeking regardless of their experience and training. Moreover, Respondent did not seek to prove that those who were hired had superior qualification and would have been hired over the union applicants even in the absence of union affiliation. These were Respondent's burdens to shoulder. See, *FES,* supra, 331 NLRB at 13–14. Absent such evidence, I find that Respondent unlawfully refused to hire the four union applicants.

Alleged Refusal to Consider for Hire

The General Counsel bears the burden of showing the following elements in order to establish a discriminatory refusal to consider for hire:

> (1) "that the respondent excluded applicants from the hiring process;"[16]
> (2) "that antiunion animus contributed to the decision not to consider the applicants for employment."[17]

The four alleged discriminatees were excluded from the hiring process while at the same time, Respondent considered and hired other employees. As found above, this resulted from the discriminatees' known or suspected union affiliation. Thus, I find that the General Counsel established the required elements of the initial *FES* burden of refusal to consider for hire.

Respondent's Defense for Refusal to Hire and Refusal to Consider

Once the General Counsel has shown a discriminatory refusal to hire, or a refusal to consider for hire, the burden shifts to Respondent to show that it would not have hired the applicants even in the absence of their union activity. *FES,* supra, 331 NLRB at 12, 15. No evidence shows that the applicants were not qualified for the positions. Further, the record does not establish that the applicants' qualifications were inferior to those of the individuals hired. For ten of the thirteen employees hired between November 27, 2006, and July 13, 2007, there is absolutely no evidence regarding their experience and training. It is Respondent's burden to show that the alleged discriminatees did not possess adequate qualifications or that it hired individuals with superior qualifications. *FES,* supra, 331 NLRB at 12.

Based solely on years of experience, it may be assumed that employees Camelot, Soriano, and Munoz[18] were better qualified than the three apprentices Baca, Lucero, and Chavez.[19] However, this does not excuse failure to hire or to consider for hire these three for other apprentice or unlicensed journeyman positions. Accordingly, I find that Respondent refused to hire or consider for hire Baca, Lucero, and Chavez because of their union activity or affiliation. Similarly, a licensed journeyman was hired on January 16, 2007. No qualifications or experience for this employee was presented by Respondent. Therefore, I find that Respondent refused to hire or consider for hire Espinosa only because of his union affiliation.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By its coercive interrogation of employees, its threat of futility in making an employment application, its threat that applicants affiliated with the Union would not be hired, and its demand that an applicant for employment sign a document disavowing the Union, the Respondent violated Section 8(a)(1) of the Act.
4. By failing to hire or consider for hire Dominic Baca, Kenneth Chavez, Patrick Lucero, and Richard Espinosa because of their union affiliation, the Respondent violated Section 8(a)(1) and (3) of the Act.
5. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and

[16] *FES,* supra at 15.
[17] Id.

[18] The evidence shows Camelot had 5 years' experience; Soriano, 4; Munoz, 4.
[19] Baca and Lucero were third period apprentices and Chavez had been in the apprenticeship program for 1-½ years.

desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent unlawfully discriminated against the named job applicants by refusing to hire or consider them for hire, the four applicants here are entitled to instatement and a make whole remedy. Respondent shall immediately offer instatement at rates paid to the individuals hired by Respondent for positions to which they applied or for which they would have been qualified to perform or, if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges and, if necessary, terminating the service of employees hired in their stead.

Turning to the exact dates that Respondent would have hired the four union applicants, absent discrimination, I make the following observations. The objective evidence of years of experience is the only evidence with which to analyze the order of hiring. Although there is evidence of past work experience for three of the thirteen whom Respondent hired, there is no comparative evidence for the four union applicants. All that is known of their years of experience is that three of them were trained in the union apprentice program for certain amounts of time (Baca, 3 years; Lucero, 3 years; and Chavez, 1–½ years) and that Espinosa possessed a CID license and had prior unspecified years of field experience. Nevertheless, years of experience, when available, has been utilized as the sole and only available factor for making the instatement determination.

Further, there is only one piece of evidence regarding the years of experience actually required by Respondent for the position of journeyman lead person installer. That is with regard to successful applicant Munoz who possessed 4 years experience. Similarly, there is little evidence regarding years of experience required for the apprentice position and no evidence regarding the journeyman position. This lack of evidence is due, no doubt, to Respondent's having purged its files prior to receipt of the subpoena duces tecum which requested this information. In any event, all that can be deduced is that two individuals whom Respondent hired as apprentices, Calmelat and Soriano, had 5 and 4 years of experience, respectively. From this evidence, I deduce that Baca, Lucero, and Chavez may only be considered for apprentice positions. Their experience was less than that of Calmelat and Soriano, two successful applicants. Finally, as to Union Applicant Espinosa, whose years of experience is unknown, it is impossible to conclude that he would have been hired over the successful applicants who possessed a CID license. Because it was General Counsel's burden to show Espinosa's years of service, he cannot be considered for the journeymen lead person installer positions. Accordingly, he will be considered for the journeymen positions only.

Utilizing these facts and inferences, I find that applicant Soriano would have been hired on December 20, 2006, rather than Union Applicant Baca because of Soriano's lengthier experience. However, I find that Baca would have been hired on January 15, 2007, the date that apprentice Mondragon (unknown length of experience) was hired. I also find that Union Applicant Lucero would have been hired on January 16, 2007, the date that applicant Beltran (unknown length of experience) was hired as an apprentice. I find that Union Applicant Chavez would not have been hired prior to July 13, 2007, because no further apprentices were hired through that time. I find that Union Applicant Espinosa would have been hired either by January 29 or February 5, 2007, when Shawn Miller and Jeremy Herrera were hired as unlicensed journeymen. The table below shows the applicant and hiring chronology, and the basis for my determinations:

Applied	Hire Date	Name	Experience	Position
11/26/2006	11/27/2006	Calmelat	5 years	Apprentice
12/20/2006	12/20/2006	Soriano	4 years	Apprentice
12/18/2006	01/15/2007	Baca	3 years	Apprentice
01/09/2007	01/15/2007	Mondragon	Unknown	Apprentice
12/22/2006	01/16/2007	Lucero	3 years	Apprentice
12/22/2006	Unknown	Chavez	1.5 years	N/A
Unknown	01/16/2007	Boone	Unknown	Apprentice
Unknown	01/16/2007	Light	Unknown	Journeyman Lead Person
Unknown	01/29/2007	Miller, S.	Unknown	Unknown Level Journeyman
Unknown	02/05/2007	Herrera	Unknown	Journeyman
12/19 or 20, 2007	01/29 or 02/05/2007	Espinosa	Unknown	Journeyman
Unknown	04/29/2007	Moore	Unknown	Journeyman Lead Person
Unknown	04/30/2007	Urban	Unknown	Journeyman
Unknown	06/04/2007	Florez	Unknown	Journeyman Lead Person
Unknown	06/27/2007	Miller, L.	Unknown	Journeyman
07/05/2007	07/13/2007	Munoz	4 years	Journeyman Lead Person

If during the compliance stage, it becomes clear that Chavez would have been hired at some date after July 13, 2007 (the cut off date for information in this record), or information about the length of experience for those hires that is currently unknown becomes available, then his date of hire applying consistent criteria may be determined.

Respondent shall also make the four applicants involved here whole for any earnings lost by reason of the discrimination against them. Because the named job applicants are union salts, the duration of their backpay periods and continuing entitlement to an offer of instatement shall be determined in accordance with *Oil Capitol Sheet Metal,* 349 NLRB No. 118 (2007). Backpay shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest computed as provided in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]