Arrow Flint Electric Company, Inc. *and* Local Union 948, International Brotherhood of Electrical Workers, AFL–CIO. Case 7–CA–35675

August 27, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On September 28, 1994, Administrative Law Judge John H. West issued the attached decision. The General Counsel filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found, inter alia, that James Dotson is not an ''employee'' under Section 2(3) of the Act, and thus, that the Respondent did not violate Section 8(a)(3) and (1) by discharging him. For the reasons stated below, we reverse.

The Respondent is a small electrical contractor that performs services primarily for residential customers. In February 1994, the Respondent placed a help wanted ad in the local newspaper seeking applications from licensed journeyman electricians. Among those who responded to the ad were James Dotson and three other applicants from whom the Respondent's owner, Charlotte Howard, requested resumes. On receipt of the resumes, Howard checked some of the references and then set up interviews with the four applicants.

Specifically with respect to Dotson, Howard contacted Bob Labelle at Rojall Manufacturing, listed on Dotson's resume as his most recent employer. Labelle confirmed that Dotson had been employed as an electrician at the small, nonunion, family-owned business from 1981 to February 1994, that he was a capable and competent electrician, and that the company reluctantly laid him off because it did not have enough work for him. Howard also made several attempts to contact Sather Electric, also listed on Dotson's resume, but was unsuccessful.

After interviewing all four applicants, Howard hired Dotson. According to Howard, she chose Dotson over the other candidates because he lived in the local Flint area and because she felt he needed the job more than the others. In that regard, Howard testified that, during his interview, Dotson told her he was unemployed with a wife and four children and that, although his wife was working as a waitress, his family had no health insurance.[2]

On February 11, Dotson reported to the Respondent's facility at approximately 7:45 a.m. for his first day on the job. Before he left his car, Dotson started a small, hidden tape recorder with a microphone that resembled a ball point pen in his pocket. According to the transcript of that recording, Dotson completed some paperwork and Howard introduced him to some of the other employees.

Immediately after the introductions, Dotson asked Howard whether it ''would be a problem if . . . I discuss with the gentlemen while we're before work and during lunch about joining the union.'' Howard replied that ''[t]here may be a serious problem'' and that, as far as she was concerned, the Respondent was a nonunion shop. When Dotson said that the Respondent did not have to remain nonunion, Howard replied that ''[i]t does have to stay that way because financially we will close down if it doesn't stay that way.''[3]

After a short exchange, Howard terminated Dotson. Dotson then gave his union business card to employee Don Webber, who was leaving that day for a leave of absence, and told him to ''call because I think we can do something for you, OK?'' The business card identified Dotson as an organizer for Local 948. Howard ended the exchange stating, ''I know what you're doing, you were planted to come down here and you're going to run back and you're going to file charges.''

During the trial, Dotson testified that he had lied on his resume in order to get the job. Dotson said he listed jobs he never had and did not list other jobs that could have identified him as a member of the Union. Dotson also testified that he never worked for Rojall Manufacturing, but had arranged with Bob Labelle at Rojall to lie to prospective employers on his behalf.

The judge found that the Respondent did not violate Section 8(a)(3) and (1) when Howard terminated Dotson. Noting the Board's decisions in *Sunland Construction Co.*, 309 NLRB 1224 (1992), and *Ultrasystems Western Constructors*, 310 NLRB 545 (1993), in which the Board found unequivocally that paid union organizers are statutory employees entitled to the

[1] The General Counsel 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.

In adopting the judge's findings, we do not rely on his observations in the first paragraph of fn. 19 of his decision concerning the wisdom of the General Counsel's decision to pursue this case.

[2] Howard told Dotson that after 90 days she could offer him either a single health insurance policy or $150 per month with which he could purchase family coverage.

[3] No exceptions were filed to the judge's finding that, by this statement, the Respondent violated Sec. 8(a)(1).

protection of the Act, the judge nevertheless apparently relied on contrary court decisions[4] to find that Dotson was not an employee under Section 2(3) of the Act.

In this regard, the judge found that Dotson had no intention of working for the Respondent. Rather, the judge found, on the basis of Dotson's actions in lying on his resume, arranging for Labelle to lie for him to Howard, wearing a hidden recorder, and engaging in what the judge described as an ''in your face confrontation'' with Howard before he started work, Dotson's intent was only to create an unfair labor practice and file a charge.[5]

The General Counsel excepts to the judge's finding that Dotson is not an employee under Section 2(3) of the Act. The General Counsel argues that the judge's reliance on circuit court decisions that are contrary to established Board precedent is misplaced and that the judge is bound by the Board precedent. The General Counsel contends that that precedent is unambiguous[6] and requires reversal. We agree.

In *Sunland Construction Co.*, supra, we specifically rejected the Fourth Circuit's analysis in *H. B. Zachry v. NLRB*, supra, which excluded paid union organizers from the protection of the Act because their employment is of limited duration.[7] The judge apparently attempts to distinguish *Sunland* by finding that Dotson did not intend to work for the Respondent *at all*. Contrary to our dissenting colleague, we do not agree that the evidence supports such a finding.

It is undisputed that Dotson applied for an electrician position with the Respondent and that he was hired. It is further undisputed that Dotson showed up for work at 7:45 a.m. on February 11, prior to the workday, and that he filled out the necessary paperwork. There is no contention that Dotson was not prepared for work, or that he resisted the assignment to work with employee Harburn that day. The only significant event that occurred was his inquiry whether there was a problem with his discussing union membership with his coworker before work and during lunch, an inquiry solely regarding activity clearly protected by the Act.

Dotson testified that he intended to remain in the Respondent's employ as long as his position made for ''fruitful'' contacts with electricians who perform residential services.[8] According to our dissenting colleague, a contrary intention—that Dotson intended only to become a discriminatee—is suggested by the fact that Dotson lied during the application process in order to get hired and announced his interest in soliciting union membership to Howard immediately on reporting to work his first day. We find no merit in our colleague's contention that Dotson's inquiry was inconsistent with an intent to work for the Respondent and that his employee status may be negated by a judge's speculation that he had no intent to work. Not only is this unsupported by any overt indication that Dotson was incapable of or resistant to working that day, but the confirmation of whether Dotson actually intended to carry out his stated intent of working was rendered impossible by the Respondent's misconduct in discharging him.[9] It is at least as plausible that Dotson, a union organizer, would continue to work for the Respondent in order to attempt to organize its work force.

In sum, the purported ''credibility finding'' on which our colleague relies is not a finding concerning testimony about events that actually happened, but merely the judge's speculation about what would have happened had the Respondent not terminated Dotson's employment on learning of his intent to engage in protected activity on nonworktime. We find such a substitution of speculation for evidence especially unwarranted when the absence of evidence is attributable to the party who would profit from the speculation.

We find, therefore, that Dotson was an employee entitled to the protection of the Act and that the Respondent violated Section 8(a)(3) and (1) by discharg-

[4] *H. B Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989); *NLRB v. Elias Bros. Big Boy Inc.*, 327 F.2d 421 (6th Cir. 1964). The judge acknowledged that three other circuit courts have agreed with the Board's position. See *Wilmar Electric Service Inc. v. NLRB*, 968 F.2d 1327 (D.C. Cir. 1992); *NLRB v. Escada (USA), Inc.*, 970 F.2d 898 (3d Cir. 1992), enfg. 304 NLRB 845 (1991); and *NLRB v. Henlopen Mfg. Co.*, 599 F.2d 26 (2d Cir. 1979). The United States Supreme Court recently resolved the conflict. See fn. 7, below.

[5] The judge further stated that, if Dotson were found to be an employee under the Act, he would not be entitled to backpay because, through Dotson's deceit involving Bob Labelle, Howard was prevented from discovering the resume fraud before her personal interview with Dotson.

[6] E.g., *Sunland Construction Co.*, 311 NLRB 685 (1993); *Electro-Tec, Inc.*, 310 NLRB 131 (1993); *Ultrasystems Western Constructors*, 310 NLRB 545, 546 (1993), enf. denied 18 F.3d 251 (4th Cir. 1994); *Sunland Construction Co.*, 309 NLRB 1224 (1992); *Willmar Electric Service*, 303 NLRB 245 (1991), enfd. 968 F.2d 1327 (D.C. Cir. 1992); *Oak Apparel*, 218 NLRB 701 (1975).

[7] The Supreme Court recently endorsed the Board's position that paid union organizers who apply for jobs are ''employees'' under the Act. *NLRB v. Town & Country Electric*, 116 S.Ct. 450 (1995).

[8] Our dissenting colleague concedes that this testimony, if credited, would have placed Dotson within the holding of *Town & Country*.

[9] The Respondent may have been justified in discharging Dotson if Dotson had indeed refused or failed to perform the job for which he was hired. Instead, the Respondent never gave him a chance to perform that job, and discharged him because of his stated intent to organize its employees. Whether or not the Respondent had any justification for discharging, Dotson because of an asserted unwillingness to perform the job, however, has nothing to do with whether he is an ''employee'' protected by the Act; as the Supreme Court confirmed in *Town & Country*, he does enjoy that protection. Our dissenting colleague concedes, as he must, that Dotson's deceptions had nothing to do with his discharge, and in fact the Respondent discharged Dotson for an unlawful reason. It is for that reason that we are compelled to find a violation of the Act, and to leave it to further proceedings to determine the effect of Dotson's deceptions, which the Respondent learned about later, on his right to reinstatement and backpay as a remedy for the unlawful discharge.

ing him, because he expressed a desire to speak to fellow employees about the Union on nonworktime.[10]

AMENDED REMEDY

Having found that the Respondent unlawfully discharged Dotson, we shall leave to the compliance stage of this proceeding the question of what effect, if any, Dotson's deceit during the hiring process should have on the remedy. The Respondent will then have an opportunity to establish when it became aware of Dotson's misconduct and to show whether this would have provided grounds for termination based on a preexisting, nondiscriminatory company policy. See *Escada (USA), Inc.*, 304 NLRB 845 at fn. 4 (1991); *John Cuneo, Inc.*, 298 NLRB 856, 857 at fn. 7 (1990).

AMENDED CONCLUSION OF LAW

Insert the following as Conclusion of Law 3 and renumber the remaining paragraphs accordingly.

''3. Respondent violated Section 8(a)(3) and (1) of the Act by discharging Dotson for engaging in or attempting to engage in union activity.''

ORDER

The National Labor Relations Board orders that the Respondent, Arrow Flint Electric Company, Inc., Mt. Morris, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees for engaging in or attempting to engage in union activity or other protected, concerted activity.

(b) Interfering with and impliedly threatening employees by suggesting there would be a problem if employees discussed the Union on nonworktime.

(c) Threatening employees with plant closure if the Charging Union successfully organized Respondent.

(d) Conveying to its employees that it would be futile for them to select the Charging Union as their collective-bargaining representative by telling employees that the Respondent was a nonunion shop, that is how it will stay, employees do not want a union shop and the Respondent would not operate as a union shop.

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

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

(a) Within 14 days from the date of this Order, offer James Dotson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make James Dotson whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the amended remedy section of this Decision and Order. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Mt. Morris, Michigan facility copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 14, 1994.

(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.

MEMBER COHEN, dissenting in part.

I do not agree with my colleagues that James Dotson was an employee under the Act. Rather, I would adopt the judge's fact finding, based on credibility resolutions, that Dotson never intended to work for Respondent. Accordingly, unlike the bona fide employees in *NLRB v. Town & Country*, 116 S.Ct. 450 (1995), Dotson was not entitled to the protection of the Act.

[10] See *Sunland Construction Co.*, supra; *Ultrasystems Western Constructors*, supra; *Willmar Electric Service*, supra.

[11] 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.''

As found by the judge, Dotson's sole purpose was to become a discriminatee. To this end, he engaged in a course of deception designed to trick the Respondent into believing that he was interested in working for Respondent. On being hired, he would state his intention to organize. He hoped that he would then be promptly discharged.

This deception began with Dotson's lying about material matters on his resume. Thus, Dotson omitted from his resume the fact that he was a full-time employee elsewhere.[1] Dotson also failed to list several employers for whom he had worked, and falsified the length of his employment with another company. He did this in an effort to conceal his union affiliation. In addition to this concealment and misrepresentation, Dotson affirmatively lied on his resume by saying that he had worked for Rojall Manufacturing, a nonunion electrical company. Indeed, at Dotson's inducement, Rojall furthered the subterfuge by misrepresenting to the Respondent that Dotson had been employed there for 12 years as an electrician.

As found by the judge, Dotson next advanced his deception by lying to the Respondent in his job interview. Dotson fabricated a story that he was an experienced unemployed electrician who—with his wife and four children—subsisted solely on Dotson's unemployment compensation and his wife' earnings as a waitress. Dotson further lied in the interview by saying that he did not have any health insurance.

The Respondent hired Dotson because of his ''hard luck'' story that he had no job and no health insurance. Dotson arrived for work with a concealed tape recorder. Almost immediately, he told Respondent that he intended to talk to employees during lunch about joining the Union. Respondent then discharged Dotson before Dotson performed any work.

Dotson testified that he intended to work for the Respondent, albeit while organizing for the Union at appropriate times and places, and that he intended to remain with the Respondent until the organizing drive was completed. That testimony, if credible, would have placed Dotson within the holding of *Town & Country*. However, the testimony was discredited, and there is no basis for overturning the credibility resolution.[2]

My colleagues assert that the judge's credibility determination—that Dotson never intended to work for the Respondent—should be disregarded as ''speculative.'' I disagree. The judge carefully weighed the evidence—including the falsified documents and Dotson's testimony, Dotson's mendacity during his employment interview, and his covert attempt to ''record'' a violation—before finding that Dotson never intended to work for the Respondent. Thus, I rely on the credibility resolutions of the judge who heard the evidence. My colleagues reject these credibility resolutions and substitute their own assessment of the evidence. This is directly contrary to well-established policy. That policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence shows that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

In sum, this case represents both a misuse and an abuse of the *Town & Country* principle. The individual there intended to work; Dotson did not. The distinction is obvious and dispositive. I would therefore dismiss the allegation concerning Dotson.[3]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge you for engaging in or attempting to engage in union or other protected concerted activity.

WE WILL NOT interfere with and impliedly threaten you by suggesting that there will be a problem if you discussed Local Union 948, International Brotherhood of Electrical Workers, AFL–CIO, on nonwork time.

WE WILL NOT threaten you with plant closure if Local Union 948, International Brotherhood of Electrical Workers, AFL–CIO successfully organized this Company.

WE WILL NOT convey to you that it would be futile for you to select Local Union 948, International Brotherhood of Electrical Workers, AFL–CIO as your collective-bargaining representative by telling you that the Company is a nonunion shop, that is how it will stay, employees do not want a union shop and the Company would not operate as a union shop.

[1] Dotson worked for the Union.

[2] The judge found that Dotson was ''fraudulent'' and that he lied at the hearing.

[3] I recognize that Respondent fell into Dotson's trap by discriminatorily discharging Dotson. I do not condone Respondent conduct. However, in my view, the purpose of the Act is to protect real employees from discrimination; the purpose of the Act is not to play a game of ''gotcha.''

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 from the date of the Board's Order, offer James Dotson full reinstatement to his former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make James Dotson whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

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

ARROW FLINT ELECTRIC COMPANY, INC.

Linda Hammell, Esq., for the General Counsel.
Alaw D. Penskar, Esq. (Smith, Harris & Goyette) of Flint, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. On a charge filed on March 14, 1994,[1] by Local Union 948, International Brotherhood of Electrical Workers, AFL–CIO (the Union), a complaint was issued on April 21 alleging that Arrow Flint Electric Company, Inc. (Respondent) violated Section 8(a)(1) and and (3) of the National Labor Relations Act, by collectively interfering with and impliedly threatening employees by suggesting there would be a problem if employees discussed the Charging Union; by threatening employees with plant closure if the Charging Union successfully organized Respondent; by conveying to its employees that it would be futile for them to select the Charging Union as their collective-bargaining representative; by telling employees that Respondent was a nonunion shop, that is how it would stay, that employees do not want a union shop, and that Respondent would not operate as a union shop; and by discharging its employee James Dotson. Respondent denies violating the Act.

A hearing was held in Grand Blanc, Michigan, on July 13. On the entire record[2] in this case, including my observation of the demeanor of the witnesses, and consideration of the oral argument made by the counsel for the General Counsel at the end of the hearing, and a brief filed by Respondent on August 25, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Michigan corporation with an office and place of business in Mt. Morris, Michigan, has been engaged as a commercial and residential electrical contractor in the construction industry. The complaint alleges, Respondent admits, and I find that at all times material Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Charlotte Howard is the owner and president of Arrow Flint Electric Company, Inc. Respondent was incorporated December 31, 1992. Howard testified that she is the sole director, officer, and shareholder in Respondent.

Prior to Respondent's incorporation Howard was the office manager at Flint Arrow Electric.[3] She neither had any ownership interest in nor was she a director or an officer of Flint Arrow Electric, which commenced operating in February 1992. Depending on the season Flint Arrow Electric had between four to seven employees, including Howard. Its electricians, who did mostly residential work, were members of Local 948. Howard testified that Flint Arrow was owned by Ardonne Company, which in turn was owned by Don Resnick; that she did not know if there was a collective-bargaining agreement between Flint Arrow and the Union, but as office manager she typed union reports and forwarded union dues to the Union. The employees were Don Webber, Dennis Harburn, Paul Young at times, and Steve Gibbs. Howard could not recall if Paul Kalakay was on the dues deduction list.

According to Howard's testimony in October 1992, Resnik told the employees that he was going to close the Company down because the Company was losing money in that it could not do residential service calls and pay union scale. On cross-examination, Howard testified, although in her opinion the payment of union rates had caused Flint Arrow to fold, it was not fair to say that Resnik told the employees he was closing the Company because he could not pay union rates; that Flint Arrow was doing mostly residential work; and that Flint Arrow's employees knew that the Company was losing money; and that it was closing. Howard further testified that no one would merge with Flint Arrow Electric or take the Company over because the liabilities exceeded the assets. To avoid being unemployed[4] and seeing the electricians unemployed she agreed to take over the Company with the understanding that the electricians would cooperate fully with her; that she told the electricians that her house was on the line; that she took over the Company with the understanding that the guys would give a little bit; that it was understood by those involved at the time that the Company was going to

[1] Unless indicated otherwise all dates are in 1994.

[2] The General Counsel's unopposed motion to correct the transcript, dated September 2, is granted and received in evidence as G.C. Exh. 5.

[3] Before that she was employed at another electric company for 7 years.

[4] Howard testified that she desperately needed her paychecks. Her husband passed away in 1986 and she was putting her daughter through college. Howard also has two sons with the oldest being 39.

be nonunion;[5] that the terms of the purchase agreement called for a small down payment with a monthly payment of principal and interest; that she expected to have to make these payments for over 10 years;[6] that there are no other owners and no other person holds an interest in Arrow Flint; that when she founded Arrow Flint it had five or six employees; that Respondent does residential work and some rewiring of commercial buildings damaged by fire; and that Respondent is not big enough to handle the wiring of a new office building. Arrow Flint employed all of Flint Arrow's employees; originally operated out of the same rented facility Flint Arrow used; used the same equipment Flint Arrow used; used basically the same suppliers Flint Arrow used; and worked with some of the same general contractors Flint Arrow worked with.

On February 4 Respondent placed an ad in the Flint Journal (G.C. Exh. 2) that reads as follows: ''ELECTRICIAN—Licensed Journeyman's only. Call 313–687–2568 Mon-Fri 8–6 p.m.''

One of Respondent's employees, Webber, wanted to take a few weeks off and Howard was looking for a temporary replacement.[7] Also, she wanted to hire another permanent employee because Respondent was busy. Approximately 20 people responded to the above-described ad. Howard had them forward their resumes and then she chose four to come in for a personal interview. Howard testified that during the telephone conversation, when she asked the four to come in for an interview, she told them that Arrow Flint was a small, nonunion, electrical contractor and it could not offer the benefits a bigger company could.

Dotson responded to the above-described ad and forwarded his resume (R. Exh. 1) that is attached as Appendix A. [Omitted from publication.]

Howard testified that before she conducted her personal interview of Dotson she telephoned Rojall Manufacturing that Dotson listed on his resume, indicating that he worked for the Company from 1981 to February 1994.[8] According to Howard's testimony the contact person Dotson listed for Rojall Manufacturing, Bob Labelle, told Howard that Dotson did work for Rojall Manufacturing; that Dotson was a capable competent electrician; that Dotson was dependable; that he hated to lay off Dotson after 12 years of employment but Labelle ''didn't have the work to keep him busy''; and that Rojall, which is a small, family-owned business, was nonunion.[9]

After making about 30 telephone calls to the companies listed on their resumes, Howard interviewed the four applicants about February 9 and 10. Each of the interviews lasted for 30 to 45 minutes. Howard wanted to hire someone from the Flint area. Dotson lives in Clio, Michigan, which is in the general Flint area. On February 9 Howard interviewed Hoyt Brookins and he started to work for Respondent on February 10.[10]

Howard testified that she chose Dotson over the other two people she interviewed because he was local and she felt that he needed the job the most. According to Howard's testimony Dotson told her he was without a job and he had four children. Regarding the February 10 interview with Dotson, Howard also testified that when she asked Dotson if his only income was from unemployment he said that his wife waitressed tables in an establishment known as Frank and Lou's; that when she asked him about health insurance Dotson said that he did not have any; that she told Dotson that after 90 days she could offer him a single person policy or, if he did not want that, she would give him a check for $150 a month so that he and his wife could purchase their own health insurance; that she learned about Dotson's wife, her employment, the four children, and the lack of health insurance from the questions she asked him; that she told Dotson she would pay him $10 an hour on a 30-day trial basis and at the end of the 30 days, if it worked out, she would put him on as a permanent employee and raise his pay to $11 an hour; that she offered both Brookins and Dotson $10 an hour to start and both started pursuant to a 30-day trial period;[11] and that when she offered Dotson $10 an hour and indicated that it was for a time period of 30 days he said that was fine.

On cross-examination Howard testified that if Dotson had disclosed to her during his interview that he was currently employed by Local 948 she would not have hired him because he did not need the job and, there were two other men out there who needed the job, and if Dotson was already employed he did not need the job; that she thought that Dotson needed the job more than the two other applicants who she interviewed because they did not have four children at home (Dotson's wife waitressed tables and he had no health insurance); that she could not remember if she asked Dotson if he needed health insurance or if he had health insurance; that Dotson did say that he would like to earn $13 an hour; that she would hire a Local 948 member if he had the qualifications and wanted to work on her terms, and they could talk about the Union, as long as they did not harass her employ-

[5] Howard testified that Flint Arrow's employees, namely, Paul Kalakay, Webber, and Harburn ''along with a couple of other ones'' asked her to take over the Company so that they could have a job, ''they said we don't care about a union do away with it, the Union has never done anything for us''; that the employees told her to drop the Union, because it would save her some money; and that all of the employees told her they had no interest in the Union.

[6] Howard testified that she has the purchase agreement with Resnick as president of Ardonne Company; that the purchase price of the Company was $140,000; that she pays interest plus as much as she can on principal monthly; that at the time of the hearing the interest was a little over $1000 a month; that the agreement specifies an interest rate of 12 percent but does not obligate her to pay the entire amount within a specified period of time; that the amount owed is payable in monthly installments of at least $3000 a month; that she is not related to Resnick; and that she signed the purchase agreement with Resnik on the last day in 1992 in his office in Southfield, Michigan.

[7] Howard testified that when she hired Dotson he was not temporarily replacing Webber.

[8] Howard testified that she telephoned several times during an afternoon, night, and morning and she ''could never get a hold of anybody'' at Sather Electric Co., which was the only other electrical company listed on Dotson's resume. She did not call the only other employer listed on Dotson's resume, K-Mart stores, because the stock clerk experience would not have been relevant to her.

[9] Labelle made this statement after Howard indicated that Arrow Flint was a small nonunion electrical contractor.

[10] Brookins was still with Respondent at the time of the hearing.

[11] Howard testified that after 2 weeks she gave Brookins a raise and made him a permanent employee because he proved to be an excellent, competent electrician. After he worked for Arrow Flint for 90 days Brookins began receiving a check for $150 a month even though his wife's health insurance policy covered him.

ees; that it was important to her for financial reasons that Arrow Flint remain nonunion; that when she fired Dotson she did not at that time know that he was on the union staff as a paid employee; that when she fired Dotson she had no knowledge that Dotson had not worked for Rojall Manufacturing; that if there was anything inaccurate about Dotson's resume she did not know it at the time; that she could not remember if the two applicants who were interviewed but not hired had any children; and that up to the time of the hearing she only let go two employees, namely, Dotson and Rice. On redirect Howard testified as follows:

> Q. Okay. Therefore, there must be another reason why Mr. Dotson's no longer employed with your company as a consequence of the actions that were undertaken on February 11th. What's that reason?
>
> A. It didn't take long to figure out that he was there for one reason. If he truly wanted that job, he would have gone out on the job, he would have worked a week or two, and then he would have approached these guys. He wouldn't have done it before he even started a job.
>
> Q. Well, assuming he had the right to do it at the time he did it, was there anything in the way he did it, based on your review of the transcript this morning, refreshing your recollection of the events of that morning, that you found to be violative of our own employees' rights?
>
> A. Yes, I did.
>
> Q. What was that?
>
> A. I didn't feel, after they told him they weren't interested in this, I don't feel he had the right to stand there and pursue it.
>
> Q. And do you further believe that, although he never did go out on any of these job sites, that, had he done so, he would have continued this kind of activity?
>
> A. I feel, yes, he would have.
>
> Q. Now, whether you're right or wrong about that belief, was that belief, in fact, in the calculus you made that morning when you asked him to leave?
>
> A. Yes, it was.

And on recross Howard testified as follows:

> Q. Why did you fire him?
>
> A. Because I didn't feel that he hired in there to go to work for me. He came in there for one reason and that was obvious.
>
> Q. And the reason was to unionize?
>
> A. Yes. The reason was to unionize.
>
> Q. Okay. So
>
> A. Had it not been, he would have worked.
>
> . . . .
>
> Q. Right. Right. And during that time what did he do or say that—The conversation was already about the subject that he'd brought up, talking about the union. What did he do or say that made you conclude that he didn't want to work, but he wanted just to unionize?
>
> A. I've been around enough new employees to where I know how they act when they're interested in a job. He was not interested in a job.

On further redirect Howard testified as follows:

> Q. Would you have had any objection if it we're Mr. Dotson's second day or eighth day or twentieth day or hundredth day, if he lasted that long, talking about a union with your other employees?
>
> A. No.
>
> . . . .
>
> Q. And, if during those—even during those first 30 days Mr. Dotson had decided at some . . . [point] to strike up conversations with these other gentleman about a union, you know, during their lunch breaks or evenings or what-have-you, would you have found that to be wrongful behavior?
>
> A. No. Had he came to me and set down and said, Charlotte, Ms. Howard, or whatever, I want to form a union here, I'd had said fine, get the guys together, have a meeting, take a vote, get it resolved.
>
> . . . .
>
> Q. And did you think that, based on the 15 months you'd been with this other small, fairly close-knit group of men who had indicated to you, as you've testified, what their interest was or lack of interest in a union was, that Mr. Dotson's behavior would be a serious problem vis-a-vis working together with these gentlemen?
>
> A. They probably would have refused to work with him.
>
> Q. In fact, did any of them ever tell you that, that there would, in fact, be such a problem?
>
> A. They would have preferred not to work with him.
>
> Q. Have they told you that?
>
> A. Yes.
>
> Q. And are the statements made by Mr. Harburn, for example, that we have a transcript of an indication of that lack of interest of a union and, perhaps, some indicia of what you meant by a serious problem?
>
> A. Yes. They are much more strong than what Mr. Harburn stated that morning.

Subsequently Howard testified that no one from the Union ever indicated to her that there was a question about whether or not Arrow Flint was a successor to Flint Arrow; that she did not know if Respondent would have survived being Union, ''[t]his was the whole reason the other one went down''; that she would not have taken over the Company had she known there would be a problem; that she has never had a problem if the Union wanted to take a vote among the employees; and that Respondent does not have any policy with respect to its employees working at other jobs when they are not working for Respondent.

At the time Dotson was offered employment, Respondent employed the following electricians: Harburn, Brookins, Webber, Martin Rice, and Paul Kalakay. As noted above Harburn, Kalakay, and Webber were employees of Flint Arrow and had been with Respondent since the start of the Company. Rice had been with Respondent about 2 weeks.[12]

[12] Howard subsequently fired Rice when he took a company truck and instead of showing up at a jobsite at 8:20 a.m., he showed up at 12:30 p.m. Because the truck Rice was operating had certain materials for the job, another of Respondent's electricians at the jobsite could not work until Rice showed up. Howard also found a $400 tool of Respondent's in Rice's own truck.

Dotson showed up at Arrow Flint's facility at 7:45 a.m., on February 11. Unbeknownst to Howard, Dotson had a tape recorder on his person with the microphone hidden in an object that looked like a ballpoint pen. A tape recording (G.C. Exh. 4) and a transcript of a portion of the tape recording (G.C. Exh. 3) were received. They cover what occurred when Dotson showed up on February 11. The transcript is attached as Appendix B. [Omitted from publication.] As here pertinent, after filling out paperwork, Dotson was introduced by Howard to certain of Respondent's employees. On being told that he was going to work with Harburn that day and with Harburn, Brookins, and Webber present, in addition to Howard, the following transpired:

> JIM DOTSON: All right, I hope there's not a problem if a, I discuss with the gentleman while we're before work and during lunch about joining the union.
>
> CHARLOTTE: There may be a serious problem.
>
> . . . .
>
> CHARLOTTE: Well, as far as I'm concerned this is a non-union shop. That's the way the guys were hired.
>
> JIM DOTSON: Well, I know, but that doesn't mean that it has to stay that way, and I need to talk to the guys about that.
>
> CHARLOTTE: It does have to stay that way, because financially we will close down if it doesn't stay that way.
>
> JIM DOTSON: Well, I still can talk to the guys about it and see what they think and . . . and . . . .
>
> CHARLOTTE: I was under the impression I told you, when I hired you, that this was a non-union shop.
>
> JIM DOTSON: I understand that it is. That doesn't mean that I can't talk to the guys, and I know it's a non-union shop, but I can still talk to the guys about forming a union.
>
> CHARLOTTE: No.
>
> DENNY: Not interested.
>
> JIM DOTSON: Well, but I want to talk to the guys. You know, I'm not asking to talk to you about it.
>
> CHARLOTTE: Okay, you might not be happy here then,
>
> JIM DOTSON: Well, I think I would be.
>
> CHARLOTTE: . . . as an employee.
>
> JIM DOTSON: No, I . . . I don't have a problem with doing the work. You know, that's not a problem at all. Just during my own time, during lunch or before work, you know, I'd like to talk to you, if you've got a Journeyman's license, you know, I'd like to talk about the union, see what, you know, see how you feel about it. See what I can do for you.
>
> CHARLOTTE: OK, Why don't we just terminated this employment right now.
>
> JIM DOTSON: You're firing me because I want to talk . . . it's not even 8:00 o'clock yet. I haven't even went to work.
>
> CHARLOTTE: I just . . . You're not going to be happy here, under the circumstances. And I'm not going to be happy with you. And the guys don't want to hear about unions. They've already been that route.
>
> . . . .
>
> CHARLOTTE: No, I just . . . You walked in here like that, you were told it was non-union. This is the way that I intended to stay . . . and because I will not run a union shop.
>
> JIM DOTSON: And I can't talk to the guys.
>
> CHARLOTTE: No, as far as I'm concerned there's nothing to talk about. They've already told you. Don is leaving today. Denny has told you he is not interested.
>
> DENNY: Not interested.
>
> CHARLOTTE: I think that should be enough right there.
>
> JIM DOTSON: Well, he's leaving today but that doesn't mean he's not interested. Do you have a journeyman's license?
>
> DON: Yes.
>
> JIM DOTSON: Well, Why don't I . . . my ABC [Union business] card [which indicated that he was a union organizer]. Give me a call OK, because I think we're, we can do something for you, OK. Good luck on your new job.
>
> DON: Thank you, Jim.
>
> CHARLOTTE: Well, yes I do. This is why I told everybody when I hired them it was a non-union shop, that I did not intend for you to come in here to . . .
>
> JIM DOTSON: And talk about a union.
>
> CHARLOTTE: And try to . . . . No, since they already . . . . If they wanted to talk about the union they could. They're free people.
>
> JIM DOTSON: Well, that's what I'm asking to do.
>
> CHARLOTTE: They don't want union shop and I'm not having one. So, I mean, you know.
>
> JIM DOTSON: So you're going to let me go because I just want to talk to these guys.
>
> CHARLOTTE: We are not going to be happy the way it is and I know what you're doing, you were planted to come down here and you're going to run back and you're going to file charges.

Dotson testified that he received his journeyman electrician's license from Michigan in 1980; that from 1980 on he worked for 20 or 30 electrical contractors; that he has been a member of the Union since 1980; that he has a B.S. degree in biochemistry from the University of Michigan; that in November 1992 he joined the staff of the Union as an organizer; and that, as here pertinent, he submits applications to nonunion companies as part of his effort to organize employees. Regarding the possibility of holding two jobs at the same time, Dotson testified as follows:

> Q. Do you have any understanding with your local union as to salary or wage, benefit arrangements in the event that you become employed by a contractor in the field?
>
> A. We haven't had too much opportunity, but, yes, we have. I receive a salary of 44 hours a week.
>
> Q. From which group?
>
> A. From the IBEW.
>
> Q. And would salary continue in the event that you become employed by a contractor?
>
> A. Yes.
>
> Q. Would you be expected to make any kind of periodic reports to your local union while you're in the employ of a contractor?
>
> A. Yes.

Q. Would there be, necessarily, any limit in the term of your employment with a contractor in the event that you become employed?

A. No.

Q. Who would that be up to?

A. That's up to me.

Q. And the contractor?

A. Well, certainly and the contractor.

Dotson also testified that when he saw Respondent's above-described ad he telephoned Respondent and spoke with Howard who asked him to send in his resume; that Howard interviewed him on February 8 at 2 p.m.; that during the interview Howard told him what kind of work Respondent did; that he asked for $13 an hour and Howard told him he would start at $11 and work up; that he showed up at Respondent's facility on February 11 at 7:45 a.m.; that before entering Respondent's facility he turned on a tape recorder he had on his person with a microphone hidden in what looked like a ballpoint pen that he had in his pocket; that the tape recorder was turned off after he left Respondent's facility that morning; that the tape of what was said that morning at Respondent's facility (G.C. Exh. 4) is authentic; that at one point as he was talking with Howard, Harburn, Brookins, and Webber on February 1 he handed his business card to Webber; that the business card has the IBEW local on it and under his name it says organizer; that at no time before he left Respondent's facility on February 11 did he ever tell anyone that he was on the Union's staff; and that as of the time that Howard stated for the first time that he was terminated he had not identified himself as a union organizer or as a union employee. On cross-examination he testified that his 1993 income from the Union was $54,246 and he did not receive income from any other employer in 1993; that his resume does not include his employment with the Union; that while he indicated on his resume that he worked for Rojall Manufacturing from 1981 to February 1994, this was not a true statement because he never worked for that company;[13] that it is awfully hard to get hired at a nonunion company so he submits a false resume to eliminate his union background; that he made arrangements with Labelle of Rojall Manufacturing in September 1993 to lie about Dotson working for that company; that while his resume indicates that he worked for Sather Electric Co., from 1976 to 1981 he actually worked for that company on and off from 1968 until 1979; that he did not tell Duane Sather, the contact person at Sather Electric Co., that Dotson listed on his resume that the resume would not be accurate; that while he worked at K-Mart from 1972 to 1973 he put from 1972 to 1974 on his resume; that he did not include his B.S. degree in biochemistry on his resume ''because a prospective non-union residential company would find it strange. . . . [and] may question . . . the truthfulness of the rest of the resume, because of it''; that the telephone number on his resume is his home telephone number; that while he worked for 20 or 30 electrical contractors after he received his journeyman license, none of them were included on his resume, because they would indicate to a nonunion company that he had a union background; that Sather Electric Co., is a union contractor; that he filed a charge with the National Labor Relations Board in January 1994 against TMI on facts similar to those in this case (the involved Region of the Board refused to issue a complaint and no appeal was filed); that during his interview Howard agreed to pay him $11 and she told him that after 30 days there would be an increase in pay; that Howard did not say that there would be a trial period of no more than 30 days; that he asked for $13 an hour and when Howard offered him $11 an hour he accepted; that he did not tell Howard that he had a wife and several small children who needed insurance coverage and he desperately needed this job; that he did tell Howard that he was married; that he does not deny telling Howard that he had four small children; that his youngest child was only months old at the time of the interview; that he denies he told Howard that he was in desperate need of a job and one of the reasons was he needed to provide health insurance coverage for his family; that he turned the tape recorder on February 11 before he entered Respondent's facility because he anticipated commencing a conversation with either Howard or some of her employees that morning about unionizing; and that he was aware of the existence of Arrow Flint as a nonunion Company prior to answering the ad.

Subsequently Dotson testified as follows:

By Judge West:

Q. With respect to your employment at this Local 948, do you have health insurance?

A. Yes, I do.

Q. What, if anything, had you planned to do regarding that health insurance, if you had worked beyond 90 days for the Respondent?

A. I don't know what the legality is. I, probably, would have turned it down.

Q. Would have turned—

A. Hers.

Q. —the Respondent's health insurance down?

A. Right. You know, I don't know what the legality is. I, probably, would be, but, yeah.

. . . .

Q. When you applied for this job, was it your intent to work indefinitely for this company if you were made an offer?

A. When I was given the offer, it would have been to work as long as I found as I found that I was doing something fruitful. Meeting new men. That's my prime goal. Talking to their men about unions, but meeting other people. There's a lot of residential wiremen out there and I don't have a good handle on getting an opportunity to speak to them, because they—you know, it's short-term jobs. I have trouble finding them, so—but the guys that are in that market, that do that market, that do that kind of work, residential, kind of have some kind of society. They're a close-knit group and you can get to know more people that way.

Q. So you would have continued to work at this company as long as it was fruitful?

A. Fruitful, yes.

Q. And fruitful means as long as you can continue to make contacts with other non-union employees?

A. That's correct.

[13] The copy of the resume Dotson sent to Howard reads 1981 to September 1993.

Q. Okay. And, once things dried up as far as making contacts with other non-union employees, your intent would have ceased then?

A. Yes.

B. *Contentions*

In lieu of a brief the counsel for the General Counsel, as here pertinent, made the following oral argument at the end of the hearing:

> MS. HAMMELL: Your Honor, the Board has recently spent a great deal of time re-thinking the issue of whether paid union organizers are statutory employees who are entitled to the full protection of the Act and the Board has decided that they are statutory employees who are fully entitled to Section 7 rights and I would cite in that regard *Sundland* [sic] *Construction Company*, 309 NLRB 1224, a 1992 case; *Town and Country Electric*, 309 NLRB 1250, a 1992 case; *Escada U.S.A., Inc.* . . . reported at 304 NLRB 845, a 1991 case, enforced at 970 F.2d 898, 140 LRRM 2872, Third Circuit, 1992; *Willmar Electric Service*, 303 NLRB 245, a 1991 case, enforced 968 F.2d 1327, also, at 140 LRRM 2745, a D.C. Circuit, 1992 case.
>
> . . . .
>
> Often these cases, Your Honor, come up in the context where a Respondent employer has discriminatorily—
>
> JUDGE WEST: In fairness, there have been other circuits that have not gone along with the Board, is that correct?
>
> MS. HAMMELL: Yes. The—
>
> JUDGE WEST: The Sixth and the Fourth?
>
> MS. HAMMELL: The Fourth and the Sixth disagree with the Board. I think it's the second, the third, and the D.C. Circuit agree.
>
> JUDGE WEST: And the most recent case is out of the Fourth Circuit, March of 1994?
>
> MS. HAMMELL: Well, yeah, but they're on—they have been on record since Zachary as being against.
>
> JUDGE WEST: They refused to reconsider [Zachry in] this most recent 1994 decision. We're sitting in the Sixth, isn't that correct?
>
> MS. HAMMELL: We are sitting in the Sixth Circuit.
>
> JUDGE WEST: Yes.
>
> MS. HAMMELL: That's correct. I mean—
>
> JUDGE WEST: And the Sixth has a 1964—
>
> MS. HAMMELL: The reliance for this case is a 1964 case. Obviously, the composition of the Circuit Court has changed. The times have changed. I don't know whether this is a case that's going to come before the U.S. Supreme Court or not eventually, because the circuits are, obviously, split. I remind Your Honor, of course, that we at the NLRB are bound by the Board's law and the Board has been quite firm in its policy with respect to this issue ever since *Oak Apparel* or, perhaps, even before *Oak Apparel*, that paid union organizers are entitled to full statutory rights. So there's really no division among—within the Board that I know of as to this issue.
>
> By Ms. Hammell:
>
> As I was saying, often the cases come up in the context where the Respondent employer has discriminatorily refused to hire a paid union organizer. In this case, we would submit that the unfair labor practice was much more stark and had a much greater chilling effect on other employees' statutory rights.
>
> First, consider that the genesis of this very Respondent employer is somewhat suspicious. We are not alleging in this particular case that this Respondent has a duty to bargain with 948. However, the circumstances of the transfer are unusual. The terms of the purchase agreement do not appear to be your normal arm's length transaction. We have no knowledge as to the communications that went on between Mr. Resnik and the union, what the union was told or not told with respect to the transfer. It may be, it's not at issue here, but it may be that, in fact, this Respondent employer is a successor with a duty to recognize Local 948.
>
> We offer these facts only to show the flavor of this case and to establish—I think Ms. Howard's testimony resoundingly established—that the whole idea behind the founding of the company of which she is the sole shareholder, officer, and director, is to operate non-union.
>
> Mr. Dotson was hired by Respondent. Indeed, there is no issue as to whether he was an employee. Respondent admits in its answer to complaint paragraph 8 that it discharged ''its employee,'' James Dotson and he had just been introduced to his fellow employees when in front of these three other electricians, as well as Ms. Howard, Mr. Dotson asked rhetorically whether it would cause a problem if he talked about the union on his own time. I say rhetorically because, under the Act, Mr. Dotson has a right to do the very thing that he was asking Ms. Howard about and he did not need her permission. However, to be open and above board about the process, he did announce to her his intention of talking to [sic] the union to make it clear that that was something in which he was going to be engaging.
>
> Had Ms. Howard not said, on, you may not talk about the union, there will be a serious problem, there would have been no further discussion and Mr. Dotson would have gone on to his assignment, as any eager first day employee would have done. The only reason there was an ensuing conversation was that Ms. Howard's reaction was a rather emphatic, no, you may not talk about the union on your own time to my employees, there will be a serious problem, should you do so. So any lack of alacrity that Mr. Dotson displayed was caused entirely by the fact that right away Ms. Howard abridged his statutory rights and those of her other employees.
>
> During this conversation, Ms. Howard not only terminated Mr. Dotson—rather three times, in fact, as, I think, the transcript will show—but did so immediately upon confirming that he really wanted to talk about the union on his own time to her employees.
>
> Now note that at the time Ms. Howard terminated Mr. Dotson she was not aware that he was an employee of the union, she was not aware that there was anything about his employment background or work history or personal circumstances different from what she already

was told about the same. In fact, by her own admission, the reason that she let him go was that he stated that he intended to organize her employees or wanted to talk about the union to her employees and she interpreted that to mean an intent to organize her employees.

We submit that she had no basis whatsoever for inferring that he did not intend to work for her. He never said any such thing and he never did anything to give rise to a reasonable suspicion that he would not be a competent employee for her. In fact, her protestations were to the contrary. He said he would be happy to work for her. He wanted to work for her. He did not intend to cheat her. He was interested in working in the residential area. She had received no complaints from any employees about him.

Obviously, Ms. Howard equated his expression of an interest in talking about the union to fellow employees with an interest in organizing them. She then took the leap in equating an interest in organizing her employees with an incompatibility with service to her as an employee. There was no basis for her to suspect that Mr. Dotson would be disloyal to her or would prove to be incompetent. In fact, she disavowed any such conclusion. She had no reason to suspect that he was not as competent as he portrayed himself to be and, in fact, there's no record evidence that he was anything other than a perfectly competent licensed electrician. Any such information that Ms. Howard may have acquired about alleged misrepresentations on his resume were acquired well after Mr. Dotson was terminated.

The Board has said in the *Escada* case, at Footnote 4, and I quote: ''The judge's recommended remedy requires the Respondent to provide reinstatement and back pay to discharged employees Neal Visno. The Respondent contends that neither is appropriate, because it would not have hired Visno had it known that he falsified his job application by stating that he was unemployed, although he actually worked for the union. At most, the Respondent submits Visno may be entitled to back pay from the date of his discharge to the date it learned of the falsification.'' And I continue in quoting the Board here. ''We leave to the compliance stage of this proceeding the question of what effect, if any, the falsification should have on the remedy. The Respondent will then have an opportunity to establish when it acquired knowledge of Visno's asserted misconduct and to show whether this would have provided grounds for termination, based on pre-existing, non-discriminatory company policy.'' The Board then quotes a John Cunio case.

. . . .

We would submit that this approach should be followed here. There can be no argument that Ms. Howard discharged Mr. Dotson based on any misconduct or misrepresentations in a resume or in an oral interview, because any misrepresentations which she learned about, she learned about well after his discharge.

Any representations he made, we would also submit, were limited and quite innocuous. They certainly don't deprive Mr. Dotson of his—as a matter of law—of his reinstatement rights. We can't litigate this issue here, but we would submit that puffing goes along with employees all the time. I mean you may—you may in a resume not accurately describe the scope of your authority or all of your duties. In fact, in some senses, Mr. Dotson underestimated or misrepresented by underestimating his length of his experience in the field and the depth of his knowledge of electrical work.

What this case really boils down to is the discharge of an admitted employee by an admitted supervisor within minutes of his first appearance on the job, almost immediately upon his expression of interest in talking about the union on his own time to fellow employees.

I think the record is really clear and the facts here are really essentially undisputed. Mr. Dotson's testimony, I think, was unusually forth right and his detailed account of the conversation on February 11th is backed up completely by the tape and the transcript. The tape was something which Ms. Howard even vouched for. She had no quarrel with the representations in Mr. Dotson's account of the February 11th conversation, either.

In contrast, I think that Ms. Howard's testimony was quite tailored, was in response to almost uniformly leading questions by counsel, it appeared that she was willing to agree to anything that Mr. Penskar was offering for her. She got things wrong even in minor details. For instance, she rather emphatically stated that she placed the newspaper ad on the Saturday prior to Mr. Dotson's being hired, when the newspaper ad clearly states that it ran on February 4th, which is a Friday.

. . . .

The record shows that Mr. Dotson clearly had the bona fide occupational qualifications to do the work of the journeyman electrician. Nowhere in this record does Ms. Howard dispute that and nowhere has Respondent, indeed, raise any contention to the contrary. Ms. Howard fired him merely for saying that he wanted to talk about the union on his own time. She announced to her employees that there would be a serious problem if Mr. Dotson talked about the union on his own time. She said the company had to stay non-union because she would close down if it didn't. She told all the employees assembled that the company was non-union an she intended it to stay that way.

As Your Honor does well know, the standard for evaluating these alleged 8(a)(1) statements—that's 8(a)(1) statements, for the record—is an objective one based upon whether the statements would reasonably tend to interfere with the exercise of Section 7 rights. It doesn't matter how employee's interpreted them. It doesn't [matter] what in her heart Ms. Howard meant. It's whether the statements could reasonably tend to interfere with the exercise of Section 7 rights. I don't think anyone could hear those statements and not conclude that those statements interfered with the exercise of Section 7 rights; particularly, as they were uttered in the process of her firing an employee for merely stating that he wanted to talk about the union on his own time.

In this case, this particular employer really needs to be educated about what the Act involves. It's obvious that Ms. Howard thinks the Section 7 rights stop because she picked up a company with the intention of

running it non-union and she thinks that she is respecting her employees' rights by prohibiting someone from talking to her employees about the union.

I think that this case meets even the standard which is expressed in, I believe it is, former member Ratabaugh's [sic] concurrence in the *Sundland* [sic] case. Your Honor raised some questions that go to that, in fact, and that is whether the company has a non-discriminatory policy against moonlighting. It is obvious on this record that this company does not have any such policy. Ms. Howard made it clear that she would not mind it if an employee were employed elsewhere in some other capacity. It's clear that the only reason that Ms. Howard fired Mr. Dotson was because he expressed an interest in talking about the union on his own time to his fellow employees. That violates the Act.

On brief Respondent argues that Dotson's surreptitious recording of his conversation with Howard violates the Federal wiretap statute and, therefore, the cassette and the transcript should not have been received in evidence; that Dotson's sham ''employment'' should be adjudged outside the scope of the Act because he never intended to remain at Arrow Flint after his organizational efforts were completed; that the record in the instant case is strikingly similar to the facts in *H. B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989), in which the court noted that ''it would be disingenuous to say that [the union organizer] was a job applicant in the ordinary sense of the word. [He] was not in search of a job; he already had and would continue to have that. [He] was looking for entry to the [employer's premises] in order to fill his duties as an organizer''; that in *NLRB v. Elias Bros. Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964), a waitress receiving $15 a week as a union representative while working at a restaurant was not considered a bona fide employee of the restaurant under the Act; that the United States Supreme Court has stated that the Act ''does not require that the employer permit the use of its facilities for organization when other means are readily available.'' *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); that Respondent's management has not engaged in any conduct that would restrict union representatives from using other means of organization besides infiltration; that as the Fourth Circuit pointed out in *Zachry*, supra, to allow a union organizer to solicit and organize on Respondent's property because he was claiming entrance as a ''job applicant'' would render ineffective the protection offered employers in the *Babcock* decision; that Dotson's elaborate scheme (complete with lies, a false resume, and union operatives masquerading as former employers eager to furnish positive work and character references for a man they had in reality never seen) to gain employment in order to improperly use Respondent's time and property as a forum for furthering union objectives should not now be legitimized in this forum; that even a Board decision finding a union representative to be an ''employee'' under certain circumstances noted that if an applicant ''seeks only temporary employment in order to organize, and withholds from his employer the fact that he seeks only temporary employment, a different result might follow.'' *Sears, Roebuck & Co.*, 170 NLRB 533 (1968); that to consider Dotson's ''employment'' anything but a complete sham would disregard his admitted intention and allow the Union to accomplish through misrepresentation and trickery what it could not through truth and upfront efforts at organization—that is, the use of Arrow Flint's facilities for organization, despite the availability of other means; that Respondent's dismissal of Dotson on the grounds of his falsified resume was nondiscriminatory and did not violate the Act; that Dotson's actions were merely a wrong that met with the appropriate action by Howard for as pointed out by the Board in *Sunland Construction Co.*, 309 NLRB 1224, 1230 (1992), ''[i]f the organizer violates valid work rules . . . the organizer lawfully may be subjected to the same nondiscriminatory discipline as any other employee''; that it is clear, on these facts, that Dotson's activities, whether protected or not, were not the basis for the discharge; that, however, even if these activities were the basis for Dotson's discharge, the presence of a legitimate business reason, Dotson's numerous fraudulent material misrepresentations and omissions of fact during the interviewing process, formed a legitimate business basis for his discharge; and that, therefore, regardless of whether Dotson's activities are deemed protected or not and, furthermore, regardless of whether Howard fired him for his unionizing activities, which Howard and Arrow Flint vehemently deny, the presence of a legitimate business reason for Dotson's discharge overrides any such finding.

C. *Analysis*

As noted above Respondent argues that the above-described tape recording and transcript should not have been received in evidence. As is obvious from their inclusion above, I disagree. My ruling stands. The Board has held that in circumstances similar to the one involved here, surreptitiously recorded conversations and the transcript thereof are admissible if they are properly identified and authenticated. *Nanticoke Homes*, 261 NLRB 736 (1982), *East Belden Corp.*, 239 NLRB 776 (1978), and *Plasterers Local 90 (S. Ill. Builders)*, 236 NLRB 329 (1978).

The Board holds that paid union organizers who seek jobs with employers are, like other applicants, ''employees'' within the meaning of Section 2(3) of the Act and it is a violation of Section 8(a)(3) and (1) of the Act for an employer to refuse to consider them for hire. *Ultrasystems Western Constructors*, 310 NLRB 545 (1993). The U.S. Court of Appeals for the Fourth Circuit refused to enforce the Board's Order in *Ultrasystems*, 18 F.3d 251 (1994), and citing its prior decision in *H. B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989), the court held that a union organizer who intends to remain under the employ of his union while working for an employer and who intends to use his employment for the employer for furtherance of his union employment loses the protection that the Act provides to a bona fide applicant for employment with the employer.[14]

[14] The court refused to revisit *Zachry*, supra, in light of the later decision in *Willmar Electric Service v. NLRB*, 968 F.2d 1327 (D.C. Cir. 1992), holding that one who is employed simultaneously by a union and a company is an ''employee'' as defined by the Act, and reserving ''to another day'' when union ties under such arrangement create a risk of disloyalty sufficient to justify the company's refusal to hire the applicant, cert. denied 113 S.Ct. 1252 (1993). At least two other U.S. courts of appeals agree with the Board, *NLRB v. Escada (USA), Inc.*, 970 F.2d 898 (3d Cir. 1992), enfd. mem. *Continued*

As here pertinent in *NLRB v. Elias Bros. Big Boy Inc.*, 327 F.2d 421 (6th Cir. 1964), the court held that a waitress, who contacted the Union shortly before she applied for her job with the employer and who received $15 a week from the Union to cover certain expenses she incurred in order to be able to speak to employees during her organizing efforts, was not a bona fide employee within the intent of Section 2(3) of the Act (29 U.S.C. § 152(3)), and she therefore was not entitled to reinstatement and backpay under the provisions of the Act.[15]

As set forth above, Respondent, on brief, argues that Dotson's sham employment should be adjudged outside the scope of the Act because he never intended to remain at Arrow Flint after his organizational efforts were completed and as indicated in *Sears, Roebuck & Co.*, supra, which, according to Respondent, is a Board decision that found a union representative to be an employee under certain circumstances but noted that if an applicant ''seeks only temporary employment in order to organize, and withholds from his employer the fact that he seeks only temporary employment, a different result might follow.'' This quote was taken from footnote 3 of the trial examiner's decision. The Board in footnote 1 of its decision in that case stated, ''[i]n view of our determination herein, we find it unnecessary to pass upon the 'comment' and statements of the Trial Examiner expressed in fn. 3 of his decision.'' Moreover, in *Sunland Construction Co.*, 309 NLRB 1224 (1992), the Board concluded as follows:

> The Board in *Oak Apparel* [218 NLRB 701 (1975)] rejected the argument that the discharged union organizers were not ''employees'' because they did not intend to remain in the respondent's employ beyond the period required for organization.[25] The Board found it immaterial for purposes of Section 8(a)(3) whether the discharged organizers sought permanent employment with the respondent. Permanency of employment, the Board held, was relevant for election purposes, but was unrelated to the issue of ''employee'' status. Id. at 701, citing *Phelps Dodge Corp. v. NLRB*, supra [313 U.S. 177 (1941)], 313 U.S. at 192; *Dee Knitting Mills, Inc.*, supra [214 NLRB 1041 (1974)]. To hold otherwise, concluded the Board, would result in employers discriminating ''with impunity against temporary or casual employees who are not includable in any bargaining unit.'' Id. Since *Oak Apparel*, the Board consistently had held that paid union organizers are statutory employees entitled to the Act's protection.[26]

[25]The Board also rejected the contention that the paid organizers in *Oak Apparel* were not employees because the union directed their organizational activities and controlled their employment through compensation.

Escada (USA), Inc., 304 NLRB 845 (1991), and *NLRB v. Henlopen Mfg. Co.*, 599 F.2d 26 (2d Cir. 1979), that respectively, a paid union organizer intern for whose salary and benefits a foundation reimbursed the union and a ''student'' organizer for the union who was being paid $50 a week while she was organizing, in addition to the salary she was receiving from the employer, are ''employees'' protected by the Act.

[15] As noted above, this case was tried in Michigan that is in the Sixth Federal Judicial Circuit.

[26]*Anthony Forest Products*, supra, 231 NLRB at 977–978; *Lyndale Mfg. Corp.*, 238 NLRB 1281 fn. 3 (1978); *Margaret Anzalone, Inc.*, 242 NLRB 879, 888 (1979); *Palby Lingerie, Inc.*, 252 NLRB 176, 182 (1980); *Pilliod of Mississippi*, 275 NLRB 799, 811 (1985); *Multimatic Products*, 288 NLRB 1279, 1313, 1316 fn. 226 (1988).

In my opinion notwithstanding that portion of Respondent's argument on brief that is described in the next preceding paragraph, Howard had some appreciation of what was happening. As noted above, at the end of the February 11 exchange she said to Dotson, after he gave his business card to Webber, which business card indicated that he was a union organizer for Local 948, ''You're going to run back and you're going to file charges''[16] She testified, ''[i]f he [Dotson] truly wanted that job, he would have gone out on the job, he would have worked a week or two, and then he would have approached these guys. He wouldn't have done it before he even started a job.''

Dotson lied about material facts in his resume. Dotson lied during his interview with Howard. Dotson arranged to have someone else lie about Dotson's resume. And, in my opinion, Dotson lied while under oath at the trial.

During oral argument the counsel for the General Counsel, as noted above, contended as follows: ''to be open and above board about the process, he [Dotson] did announce to her [Howard on February 11] his intention of talking . . . [about] the union to make it clear that that was something in which he was going to be engaging.'' Up to this point in time Dotson's conduct was anything but ''open and above board.'' His conduct up to this point can only be described as fraudulent.[17] Also when Dotson decided to be, according to the counsel for the General Counsel, ''open and above board'' on February 11 he surreptitiously had a tape recorder running. Such conduct does not quite square with being ''open and above board.'' Perhaps the argument is that there are degrees of being ''open and above board'' and Dotson was ''more or less'' ''open and above board'' or at least he was more ''open and above board'' than he had been in his past dealings with Howard. But for the tape I would be hard pressed to credit anything this man said. And even with the tape recorder running Dotson continued to lie for in my opinion the declarations he made about wanting to work while only he knew the tape recorder was running were nothing more than self-serving declarations. Dotson was trying to make a case and he was aware of the elements required.

As set forth above, on direct, Dotson testified that there would not necessarily be any limit on the term of employment and it would be up to him and the contractor. Subsequently in response to my questions, Dotson testified that when Howard made the offer it was Dotson's intent to work for Respondent only as long as it was ''fruitful'' or, in other words, as long as he could continue to make contacts with nonunion employees. Obviously, the ''fruitful'' could end well before any organizing drive at Respondent was over or it could go beyond that point. Whether there was originally even a need for an organizing drive at Respondent is ques-

[16] The record was not developed regarding if and when Webber shared the business card with any of the others present at the February 11 meeting with Dotson.

[17] Howard relied on, among other things, the material misrepresentations in Dotson's resume and the prearranged material misrepresentations she was told by Labelle of Rojall Manufacturing in measuring Dotson against other applicants and in offering him employment.

tionable in view of the fact that Respondent may have been the successor to the unionized Flint Arrow.

In dealing with people there is the old saw that normally actions speak louder than words. In dealing with Dotson, in my opinion, the only reliable approach is to examine his actions. Dotson was not being ''open and above board'' on February 11 when he turned on his hidden tape recorder before entering Respondent's facility and then engaged in his ''in your face'' confrontation.[18] Dotson was not acting like a man would who intended to be around until the end of the any organizing drive at Respondent. Dotson was not even acting like a man who intended to be around long enough to make ''fruitful'' contacts at Respondent and at jobsites. Dotson was engaged in an attempt to make a case. He did not succeed in the TMI attempt in January 1994. The instant proceeding represented his next attempt. Dotson intended to create a situation and he intended by turning the hidden tape recorder on before he created the situation to use the results.

In my opinion Dotson never intended to work for Respondent. He intended only to ''get his foot in the door'' by whatever means necessary, create a situation, and then take advantage of the result of the situation he created. Accordingly, in my opinion Dotson was not an ''employee'' under the Act and not entitled to the protection of the Act.[19]

Paragraph 7 of the complaint alleges that Respondent violated Section 8(a)(1) of the Act when Howard, on February 11, said: (a) there would be a problem if employees discussed the Charging Union; (b) stated financially Respondent would close if it did not remain a nonunion shop; and (c) conveyed to its employees that it would be futile for them to select the Charging Union as their collective-bargaining representative. Respondent violated the Act as alleged in paragraph 7 of the complaint for even if the employees and Howard reached a full understanding regarding what caused Respondent's predecessor to close and unionization in 1992 before Howard bought the Company, one of the employees present during the February 11 meeting, Brookins, started work the day before, it was not shown that he worked for Respondent's predecessor and therefore he did not participate in what occurred in 1992.[20]

On these findings of fact, and on the entire record considered as a whole, I make the following

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act when Howard on February 11 said: (a) there would be a problem if employees discussed the Charging Union; (b) stated financially Respondent would close if it did not remain a nonunion shop; and (c) conveyed to Respondent's employees that it would be futile for them to select the Charging Union as their collective-bargaining representative.

4. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent did not otherwise violate the Act in the manner alleged.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

---

[18] In my opinion the exchange can be described as ''in your face'' because Dotson was in effect telling Howard to her face and not by actions he took sometime after he was hired that he was not who she thought he was. At one point Dotson gave out his union organizer's business card at this meeting. By the end of the meeting Howard predicted that he would, as he did, file a charge with the Board.

[19] This conclusion takes into consideration the fact that Respondent admitted in its response to the complaint of the Board's Region 7 that ''the averments of 8 of the *Charging Union's Complaint* as they are true.'' (Emphasis added.) The response speaks to what occurred. Obviously the full legal ramifications of the word ''employee'' were not resolved by the response. In her oral argument the counsel for the General Counsel pointed out that the U.S. circuit courts of Appeals are split on whether a union organizer is an ''employee'' under the Act and perhaps this is a case that might end up before the United States Supreme Court. Albeit counsel for the General Counsel advanced the argument, there is no proof in this record that the purchase by Respondent was anything other than ''open and above board,'' or at arm's length and therefore one should consider whether this is the type of case that should be pursued, regarding a union organizer being an employee, when one balances what was done here with what may be at financial risk because of the cost of defending this action, namely, a small closely held corporation, five or six jobs, an elderly widow's home, and a young lady's college education (if she is still in college).

This is not a case of ''resume fraud'' to obtain a job. Rather, this is a case of ''resume fraud,'' among other things, by Dotson to get his ''foot in the door'' so that he could create a situation and use the results thereof. Accordingly, *Escada (USA), Inc.*, supra, is not on point. There the organizer, who endeavored to be discreet, worked for the employer for about a month. In fn. 4 of its decision there the Board concluded that the false statement in his job application about being unemployed when he actually worked for the union should be left for the compliance stage to determine what effect, in any, it would have on the remedy. Common sense would dictate that in a situation such as the one at hand it is not necessary to examine company policy. No reasonable employer would retain someone who engaged in the kind of conduct Dotson engaged in. So even if it were to be found that he was an ''employee'' under the Act, he would not, in my opinion, be entitled to reinstatement. And regarding backpay, if he were found to an ''employee'' under the Act, there should be none. Dotson's arrangement with Labelle precluded Howard, who acted in a reasonable manner in terms of verifying the information on the resume, from discovering the ''resume fraud'' before Dotson's personal interview. Dotson should suffer the consequences of his actions.

[20] Regarding Howard's ''financially . . . would close'' statement, there was no showing that Respondent advised Brookins that it was based on objective facts that conveyed Howard's belief about demonstrable probable consequences beyond Respondent's control *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).