

Refrigeration Systems Company and Plumbers and Pipefitters Local 777. Case 34-CA-6849

August 23, 1996

DECISION AND ORDER

CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX

On March 27, 1996, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent 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 and to adopt the recommended Order as modified and set forth in full below.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Refrigeration Systems Company, Columbus, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to give applicants nondiscriminatory consideration for employment because of their membership in Plumbers and Pipefitters Local 777, or any other labor organization.

(b) Coercively interrogating employees about their union membership.

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.

In the last paragraph of sec. II.C.2 of the judge's decision, "House" should read "Mushena."

² We agree with the judge that the Respondent violated Sec. 8(a)(3) of the Act by unlawfully refusing to consider the five applicants for hire. We find that the Respondent is obligated to make whole those applicants it would have hired but for its unlawful refusal to consider their applications. Backpay will not be limited to the Rocky Hill job, but will include any amounts these discriminatees would have received on other jobs to which the Respondent would later have assigned them. Finally, if the Respondent would later have assigned any of these discriminatees to current jobs, it will be directed to hire those individuals and place them in positions substantially equivalent to those for which they applied at Rocky Hill. We leave to compliance the determination of these issues. See *Ultrasystems Western Constructors*, 316 NLRB 1243 (1995).

The Order, as modified, contains remedial provisions that are in accord with our decision in *Indian Hills Health Care Center*, 321 NLRB 144 (1996).

(c) Threatening to terminate employees because of their union activities.

(d) Stating that the Company was promulgating its disciplinary policy at the jobsite because of the employees' union activities.

(e) Demoting any employee because of the employee's union organizing.

(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) Make whole Robert Dutton, Michael Ford, Thomas Livingstone, Gregory Piryk, and Jon Shook for any losses they may have suffered by reason of the Respondent's refusal to consider them for hire in the manner described in this decision. Offer employment to any of them who would currently be employed but for the Respondent's unlawful refusal to consider them for hire in the positions for which they applied or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against by the Respondent.

(b) 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.

(c) Within 14 days after service by the Region, post at its facilities in Columbus, Ohio, and at all its current domestic jobsites, and mail to all former employees at its Rocky Hill, Connecticut jobsite and to the above-named employees, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 18, 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 employ-

³ 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."

ees employed by the Respondent at any time since December 15, 1994.

(d) 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to give applicants nondiscriminatory consideration for employment because of their membership in Plumbers and Pipefitters Local 777, or any other labor organization.

WE WILL NOT coercively question any employee about union membership.

WE WILL NOT threaten to terminate employees because of their union activities.

WE WILL NOT state that we announced our disciplinary policy at a jobsite because of union activities.

WE WILL NOT demote any employee because of the employee's union organizing.

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 make whole Robert Dutton, Michael Ford, Thomas Livingstone, Gregory Piryk, and Jon Shook for any losses they may have suffered by reason of our refusal to consider them for hire; and WE WILL offer employment to any of them who would currently be employed but for our unlawful refusal to consider them for hire in the positions for which they applied or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if we had not discriminated against them.

REFRIGERATION SYSTEMS COMPANY

Rick Concepcion and Thomas E. Quigley, Esqs., for the General Counsel.

Ronald L. Mason, Esq. (Emens, Kegler, Brown, Hill & Ritter), of Columbus, Ohio, for the Company.

Thomas M. Brockett, Esq., of East Hartford, Connecticut, for the Union.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. This case was tried in Hartford, Connecticut, on August 28 and 29, 1995. The charge was filed December 15, 1994¹ (amended January 26, 1995), and the complaint was issued January 30, 1995.

The Company, an Ohio nonunion refrigeration contractor, was unable to obtain state licenses for its regular employees to perform its pipefitting and welding work at the Rocky Hill, Connecticut jobsite. On November 6 it placed a newspaper ad for licensed welders and pipefitters, and again on November 20, but "Very few" employees applied.

On November 22, in response to the November 20 ad, five union members went with their Local 777 Business Agent Robert Musheno to the jobsite to apply for the jobs. Musheno introduced himself to Company Superintendent John House and said the men were licensed and qualified. House responded, "This isn't a union job." Musheno said, "You have an ad in the paper for people, and we're here to apply for a job." As House admitted at the trial, Musheno "said he had five hungry men that wanted to work."

House gave Musheno application forms and the men began filling them out. Later, when Musheno handed him the applications, House—without offering to interview any of the applicants and without even looking at the applications—turned the union members away by telling Musheno, "I'll get back to [you] later," which he failed to do. House claimed at the trial that "I don't know" his reason for not asking Musheno at the time if the applicants would take a welding test. His "normal practice" had been to interview and give welders a welding test without their first submitting an application. Although Musheno renewed the applications that day by mail, House never considered hiring any of the union applicants.

The primary issues are whether the Company, the Respondent (a) failed on and since November 22 to hire the five union members because of their union affiliation and, (b) unlawfully interrogated and threatened to terminate employees and engaged in other coercive antiunion conduct, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, has been engaged as a refrigeration contractor in the construction industry at its facility in Columbus, Ohio, and annually performs over \$50,000 in

¹ All dates are in 1994 unless otherwise indicated.

² By agreement of the parties (Tr. 550-551), the following missing parts of application files are received in evidence as G.C. Exh. 21: Forms I-9, W-4, IT-4, and CT-W of employees Walter Salo, Thomas Colwell, Walter Scovish, and Carl Garbe, as well as Colwell's school tax form, Scovish's second IT-4 form, and Garbe's signature page.

services outside the State. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Operating Nonunion*

Clayco Construction Company, a union general contractor in Missouri, bid the Cisco food storage plant in Rocky Hill, Connecticut as a nonunion contractor and engaged the non-union Company as the refrigeration contractor. (Tr. 360–361, 365, 420.)

The Company had intended to assign its regular employees to do the pipefitting and welding at the Rocky Hill jobsite. None of them, however, had a Connecticut license to perform the work and the Company failed in its efforts to have them licensed. Obviously to avoid hiring licensed union members and paying the union scale, it first engaged Agency, a local hiring agency, to refer licensed pipefitters and welders (to be paid \$18 an hour, without benefits). The union scale at that time was \$22.47 an hour, plus benefits, totaling \$31.92 an hour. (Tr. 264, 313, 376–377, 420–422, 491, 544, 557; G.C. Exh. 17, p. 10.)

Agency referred two employees, pipefitter/welder James Collins and pipefitter Carl Garbe. They had answered Agency's October 30 newspaper ad for licensed employees to work on a "3 month temporary assignment in Rocky Hill." The Company's jobsite Superintendent John House interviewed them, gave Collins a welding test, and hired them at the \$18 rate. They began work on Monday, November 7. On November 9, the third day of their employment, House informed Garbe that "he was getting rid of the Agency because they were paying them too much money" and if Garbe wanted to continue working he "would have to take a cut in pay from \$18 an hour down to \$16 an hour" (without medical benefits). Garbe agreed and submitted his written application as a pipefitter, but Collins (a "very accomplished welder") refused to work for \$16 an hour and quit. (Tr. 268–271, 276–277, 313, 319, 371–373, 376–378, 422–423; G.C. Exhs. 12, 18.)

Meanwhile House had informed the Company that "everybody was asking \$18 around here, and that I could . . . try and work them for \$16." The Company placed a November 6 newspaper ad for licensed welders and pipefitters, and House directly hired union pipefitter Walter Scovish on November 8 and nonunion pipefitter Monty Champagne on November 9. That week he gave nonunion welders Thomas Colwell and Rick Etheridge as well as Gregory Remy (an unrevealed member of a Canadian local) a welding test to be sent to its Columbus, Ohio lab for certification in an estimated 2 or 3 weeks. (Tr. 331–332, 378, 380–381, 385, 401, 423, 425–426, 491; G.C. Exhs. 13, 19–21.)

It is undisputed, as Garbe credibly testified, that House told him the job would last from [until] the end of February perhaps into March (about 4 months) and that House needed 9 or 10 fitters and welders for the job. Although normally "you work as a team, one fitter, one welder," House "said that he needed more welders than fitters." (Tr. 377–380.)

After getting an insufficient response to its November 6 newspaper ad to fill the need for 9 or 10 licensed employees,

the Company placed the ad a second time on November 20, but still "Very few" [nonunion] men applied. (Tr. 541–542; G.C. Exh. 8.) This second time, however, Union Business Agent Robert Musheno went to the jobsite with five unemployed union members to apply for the advertised jobs. As discussed below, House told Musheno "This isn't a union job" and turned the union applicants away by telling Musheno, "I'll get back to [you] later," which he failed to do. He did not even look at their applications and did not offer to interview any of them or give the welders a welding test.

On December 12 Musheno wrote President Robert Appleton a letter, advising that "Local 777 will be organizing your Company" and designating Carl Garbe "as a jobsite organizer." This was the Company's first notice that it had any union members on the job. Superintendent House admitted that "Until I was notified by Mr. Appleton, I didn't know I had any union people on my job *because that's* [sic] *was a nonunion contract* [emphasis added]." (Tr. 386, 446–448, 544; G.C. Exh. 16.)

B. *Coercive Antiunion Conduct*

1. Walter Salo's evidence

On December 13 Superintendent House employed non-union welder Walter Salo through the state unemployment office, not knowing that Salo had once sought union membership and wanted to join the Union. Like other employees, he was paid \$16 an hour as a temporary employee, working without benefits. (Tr. 17–19, 33, 53; G.C. Exh. 3; R. Exh. 13.)

Salo credibly testified that before work on December 15 (after President Appleton advised House about the union organizing), House took him "off to one side by myself" outside the job trailer and "asked me if *I was in the Union* [emphasis added]." Then shortly after lunch, outside the mechanical room, House "said that he had an organizer on the job, and he had to do something about *getting rid of the two union men* that were working, but he had to do it right and *be diplomatic about it* [emphasis added]." He named Garbe and Walter Scovish as the union members. (Tr. 22–24.)

At quitting time, in the presence of other employees, Salo asked House "if he wanted me to see if I could get ahold of some people that I knew that may be out of work, licensed men. And he said, fine, *just as long as they're not union* [emphasis added]." (Tr. 24, 47.)

On December 16, House handed Salo a copy of the Company's October 14, 1982 "Disciplinary Policy," which had already been signed by the three other nonunion employees, Monty Champagne, Thomas Colwell, and Richard Etheridge. The policy set out the Company's progressive discipline and concluded: "This policy is not meant to restrict the authority of our foreman and we wish to emphasize that a person is subject to immediate dismissal for a flagrant violation of policy." (Tr. 24–25; G.C. Exh. 4.)

Salo said he "wasn't really crazy about signing it" because of the provision for immediate dismissal without warning. In response, House "[t]old me not to worry about it, just sign it" because "*it didn't apply to me*, that it was just the *first step to get rid of the union problems*." (Emphasis added.) Salo signed it above where union members Carl Garbe and Walter Scovish later signed. (Tr. 25–26.)

After this conversation Salo told House he had a friend, an unemployed nonunion welder who was licensed and interested in going to work. House said, “[B]ring him in and we’ll give him a test.” The following day, Saturday, December 17 the friend, John Von Deck, followed Salo to the jobsite and Salo watched House give him a welding test. Then House “said he would have to send the weld test out for the testing at their laboratory, and he would let him know what the results were.” About 2 weeks later (after the Company was served on December 19 with a copy of the Union’s December 15 NLRB charge, alleging the unlawful refusal to hire five union members on November 22), House told Salo that “there was a freeze on and he couldn’t hire any people because of the problem with the Union.” (Tr. 27–29, 44; G.C. Exh. 1B; R. Exh. 15.)

Around December 17 or 18 Salo began reporting House’s conduct to Musheno “Because I didn’t agree with what was going on.” Musheno asked if he would tell the NLRB what he knew, and he did. Salo was strongly prounion. He came from a “strong union family” and had once sought union membership by signing the work book at the union hall “as the first step.” Although he did not participate in the organizing effort, Musheno sent the Company a letter on January 30, 1995, naming him as jobsite organizer “to give him some protection in case he was fired for any organizing activities.” After he was laid off about the second week in April, the Union permitted him—as it had permitted Garbe the previous August—to join, paying a \$100 (organizer’s) initiation fee instead of the customary \$1000 fee. Because he had a State welding license in Rhode Island, the Union soon referred him to a powerplant job in that State. (Tr. 30–32, 36–39, 44–46, 49–58, 244, 300–305, 346–348, 355, 405–407; R. Exhs. 1–3.)

2. Carl Garbe’s evidence

On November 22 when Musheno came to the jobsite with five union members to apply for jobs, House (as union member Garbe credibly testified) asked, “[I]f I was a member of the Union. And I asked him, ‘Why?’ And he said, ‘Because there is a union business agent on the job.’ And I told him, ‘No,’” because “I was afraid I would lose my job.” As found, House on that occasion told Musheno “This isn’t a union job” and turned the union applicants away by telling Musheno, “I’ll get back to [you] later,” which he failed to do. (Tr. 385–386.)

On December 15, before learning that Garbe was a union organizer, House treated him as if he were a leadperson, having him relay instructions to the other employees working on the rooftop, where most of the work was being performed. Although, as Garbe credibly testified, he was usually a few minutes late in arriving in the morning, House would go to the roof, “talk to me about the job, tell me what he wanted to do next, and . . . tell me to have other people do this or that, basically relaying orders through me,” and then “he would leave” the roof. (Tr. 379, 382–384, 402, 410–413.)

After receiving word on December 15 of Garbe’s organizing for the Union, however, “John House avoided me” and “would give me orders on my own job, what to do, but nothing more.” Then, under the newly promulgated disciplinary policy, House gave Garbe a written warning for his repeated tardiness. (Tr. 384–385, 413.) The warning is not alleged to be unlawful.

As indicated, the Company was served on December 19 with a copy of the Union’s December 15 NLRB charge, alleging the refusal to hire union members. After that, it did not pursue its plans “to get rid of” the two union members. It did not discharge either Scovish (who took a voluntary layoff in January 1995) or Garbe (who quit in March 1995 when the Union referred him to the Millstone Nuclear Power Plant after his name was reached on the Union’s work book, which Garbe had signed in October). (Tr. 370, 386–388, 457.)

3. Contentions and concluding findings

In the Company’s defense, Superintendent House claimed that he did not engage “in any conversations with the employees about the Union” after President Appleton informed him about December 15 that Carl Garbe was a union organizer and told him not to “talk a lot about the Union” and “just to mind my business and get the job done, and get in and get out.” He specifically denied that he talked to Walter Salo about the Union, that he threatened to fire anyone for engaging in union activity, or that he told Salo “that this policy did not apply to him” or that “this policy was only going to be used to get rid of” his union problems. He claimed that he never heard of a person named John Von Deck (although Von Deck’s December 17 application, with the first page filled out, is a company exhibit), that “Not that I know of” did he give Von Deck a welding test, and that he had no conversations with anybody who was recommending that he hire Von Deck as a welder. (Tr. 447–450, 493; R. Exh. 15.)

House did not specifically deny interrogating Garbe on November 22 about being a union member. He admitted that “I might have asked him, yeah, if he was union affiliated [when hiring him] because he had a license” and “Usually I don’t ask more than once.” (Tr. 546.) House claimed that he never gave Garbe directions to relay to the work force, that he always gave directions to the employees himself, and that he did not treat Garbe any differently before and after December 15 and did not demote him. (Tr. 450–451.)

The Company in its brief (at 23, 38–39) challenges Salo’s credibility, implying that the Union gave him favored treatment for being a witness at the trial, charging him only \$100 for an initiation fee and referring him soon afterward to a job (in Rhode Island). From their demeanor on the stand, however, I was impressed most favorably by both Salo and Garbe as being forthright, truthful witnesses. I credit their testimony and discredit House’s claims to the contrary. As discussed later, House appeared willing to fabricate any testimony that might help the Company’s cause.

I find that House’s interrogation of Garbe on November 22 (in the context of his turning away the five union applicants) and his interrogation of Salo on December 15 (in the context of his statement to Salo about “getting rid of the two union men” on the payroll and his statement—in the presence of other employees—that he wanted licensed men “just as long as they’re not union”) were obviously coercive, violating Section 8(a)(1) of the Act.

I also find that House’s statement to Salo that “he had to do something about getting rid of the two union men that were working, but he had to do it right and be diplomatic about it” was an unlawful threat to terminate employees because of their union activities, in violation of Section 8(a)(1).

I further find that House's statement to Salo—that the disciplinary policy with the immediate-dismissal provision did not apply to him (a nonunion employee), but was “just the first step to get rid of the union problems”—was informing him that the Company was promulgating the policy at the jobsite because of its employees' union activities. I find that the statement, by the superintendent, tended to coerce employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1).

Concerning the alleged demotion of Garbe about December 16, it is true that House had not formally promoted him to be a leadperson. I find, however, that before House learned that Garbe was a union organizer, House had been treating him as a leadperson, having him relay instructions to the other employees. I therefore find that House discriminatorily demoted Garbe from this informal leadperson position upon being informed of his union organizing, violating Section 8(a)(3) and (1).

In the Company's brief (at 39–40)—which it submitted before the Supreme Court rendered its decision in *NLRB v. Town & Country Electric*, 116 S.Ct. 450 (1995)—the Company contends that Garbe was not an “employee” protected by the Act and therefore that no company action taken against Garbe can be a violation. The Company bases the contention on the evidence that the Union “took care of” Garbe's health care benefits while he worked for the Company and while, at the same time, he “engaged in organizing efforts on the behalf of the Union, and maintained contact with Musheno.” (Tr. 306–307, 325–326, 344–345, 405, 415; R. Exh. 6.) The Court having ruled to the contrary, I reject the contention.

C. Failure to Hire Union Members

1. Shortage of licensed nonunion employees

As Superintendent House admitted, he wanted to hire licensed fitters and welders “as quickly as possible” and “get in and get the job done and get out.” (Tr. 498, 515.)

He began the project on November 7 with one pipefitter (Carl Garbe) and one pipefitter/welder (James Collins). As found, he stated he needed 9 or 10 fitters and welders to complete the project—in about 4 months—by the end of February or into March 1995 and needed more welders than fitters. On November 9, when he reduced the wages from \$18 to \$16 an hour, the one welder quit.

By November 22, after the Company placed the newspaper ads for licensed welders and pipefitters on November 6 and 20, House had employed only three of the 9 or 10 needed employees. All three were fitters, and two of them (Garbe and Walter Scovish)—without his knowledge—were union members who had Business Agent Musheno's approval to work on the nonunion job and who were in contact with him. The other fitter (nonunion employee Monty Champagne) also worked at the \$16 rate, without benefits. As found, the union scale was \$22.47 an hour, plus benefits, totaling \$31.92 an hour. House testified that several guys told him the union wage rates were \$28 and \$30 an hour. (Tr. 269, 272–274, 276, 331, 378–381, 386, 405, 423, 491.)

During the week of November 7, Gregory Remy and nonunion welders Thomas Colwell and Rick Etheridge visually passed House's welding test, but House did not receive the report of their successfully passing the lab test until No-

vember 23, when he began calling to determine if they were still available to work. He hired the three welders, not being aware that Remy was a member of a Canadian local. (Tr. 331–332, 401, 426–429, 438–439, 544; R. Exhs. 8–10.)

As found, House was unable to assign his unlicensed regular fitters and welders to perform the work; he was not calling the Union for the referral of licensed employees; and very few licensed nonunion employees had responded to the newspaper ads. Little progress was being made in meeting the 4-month goal for completing the job. Instead of being able to quickly hire 9 or 10 fitters and welders to perform the work at the \$16 rate, House found that there was a shortage of licensed nonunion employees available to work at that rate.

2. The Union's organizing effort

Many of the Union's unemployed members had seen the newspaper ads and were telephoning Business Agent Musheno about the Rocky Hill project. Previously, on other nonunion projects, Musheno had taken unemployed members to the jobsites when the contractors “were in a hiring mode” and had obtained employment for them. “[O]nce our members had gone to work for them, we have signed contractors that way.” (Tr. 272, 276, 278–281, 328.)

Upon seeing the Company's second newspaper ad on November 20, Musheno concluded that the Company could not get qualified nonunion employees and decided to have more union members “go down to the jobsite and apply for jobs.” He further “decided to take the members down there myself onto the jobsite, and put in applications and try to get my people hired.” (Tr. 276–279.)

As Musheno credibly testified, he wanted to make sure the Company knew he was a union business agent “[b]ecause my intent was to organize this company and this jobsite.” He knew where the jobsite was (one of the members who called him lived in Massachusetts and was unfamiliar with the area), and “I went in to make sure they got all the applications, and I just wanted to go onto the jobsite to see the job itself.” (Tr. 280–281, 562–563.)

On Tuesday morning, November 22, Musheno drove some of the unemployed members and met with seven of them near the jobsite. There they decided that he would go with five of them (Robert Dutton, Michael Ford, Thomas Livingstone, Gregory Piryk, and Jon Shook) and that the remaining two members (George Contos and David Foor) would follow about 30 minutes later. (Tr. 196–197, 282, 295–296, 364, 563–564, 572.)

Describing the qualifications of the five union members who accompanied him, House credibly testified (Tr. 281–282, 294):

[T]hey were excellent men who have worked on these type projects before. This isn't the first job [of this type] that's ever been built in the State of Connecticut, an ammonia system job, and these men have all worked on [projects like this]. They have either been foremen, superintendents, welders, steamfitters, [and they] fit right into the qualifications that were being asked for in the advertisements.

3. Five union members turned away

Upon arriving at the jobsite on November 22, Business Agent Musheno went into the general contractor's trailer, identified himself to Clayco Project Manager Jimmy Clay, and asked to see the person hiring for the Company. Clay called Superintendent House on the walkie-talkie and said that the business agent of the Pipefitters Union was there and wanted to talk to him. (Tr. 282–283.)

By the time House came to the construction trailer, union welders Contos and Foor had already arrived. House first walked up to Contos and Foor, who were standing in front of Foor's truck near the trailer, and told them "I've got to go talk to these guys first." House walked behind Foor's truck to where Musheno and the five union applicants were waiting, about 50 or 75 feet away. (Tr. 572–576.)

Musheno introduced himself, gave his business card to House, and said the five persons with him were licensed qualified people who "would like to fill out job applications." As Musheno further credibly testified (Tr. 283, 285):

[House] said, "This isn't a union job." I said, "It doesn't matter You have an ad in the paper for people, and we're here to apply for a job The men [are here] to go to work. They are available for work, and they will work under the same conditions as other people [are] working on the jobsite."

House recalled saying that "[O]ur company is not going to sign no union contract," and admitted that Musheno said, "[T]hese guys are hungry. They want to go to work." After obtaining the application forms, House returned and gave them to Musheno. The five union members began filling them out on the car hoods. (Tr. 283–284, 361–362, 431–433, 531.)

Meanwhile, House returned to Foor's truck and asked Foor and Contos "if we were *affiliated with the men over there* [emphasis added]?" Foor answered "no" for them. House then gave them the application forms and said, "[H]e wanted to look over [the] applications" after they filled them out. The two union members filled out their applications, went inside the trailer, and gave them to House. The Company produced Contos' but not Foor's application at the trial. (Tr. 562, 565–566; R. Exh. 14.)

House asked Foor and Contos there in the trailer if they were affiliated with any union. Foor falsely answered no. Contos answered yes and explained that "he had to eat, he had to work." House told him, "Well, you'd better stay over here [inside the trailer] until they leave so they don't see you." (Tr. 566.) House admitted that when Contos answered he was a union member, House asked him, "What's your union going to say about it?" referring to Contos' working on a nonunion job, and Contos answered that the Union "told me to take and look for my own work." I discredit House's denial that he asked Contos to stay in the trailer out of the sight of the Union. (Tr. 547–548.) I note that in its brief (at 33) the Company admits that House "warned Contos that perhaps he should hide from other union members and the union business agent."

While waiting for the five union members with Musheno to fill out their applications, House spent about 20 minutes in the trailer, interviewing Foor and Contos and telling them about the job and the welding test. He told them that "[I]f

we couldn't pass the welding test, he could put us on as fitters until we could pass the welding test." (Tr. 348–349, 567, 570–571.)

Foor and Contos waited in the trailer until Musheno left with the five union members. House promised to call Foor about the job, but "I never got a phone call." Foor (who lived in Massachusetts) did not learn until 2 days later that a State license was required. House gave Contos a welding test three times, but he failed the test each time. House then offered to hire him as a fitter, but Contos refused the offer. (Tr. 440–442, 567–568, 570, 577–578.)

In sharp contrast to his telling Foor and Contos, after learning that they were not with Musheno, that he wanted to look over their applications, then interviewed them and offered them welding tests, House turned away the five union members with Musheno—without offering to interview or to give a welding test to any of them and without even looking at their applications. (Tr. 285–286, 512, 552.)

House admitted that when Musheno handed him the five applications he said, "I'll get back to [you] later," which he failed to do. On the fifth page of each of the six-page application forms, under "For Personnel Department Use Only," House checked "No" after "Arrange Interview" and wrote after "Remarks": "They just came by with BA." (He was referring to Business Agent Musheno.) He testified that "I just put [the five applications] all in an envelope" and admitted that he did not give the applications "any serious consideration" for open positions after November 22. (Tr. 433, 435, 452–453, 559; G.C. Exhs. 5–7, 10–11.)

On cross-examination House was asked (Tr. 532), "What differentiates the group [of five union members, whom he did not offer welding tests, from Contos, whom he gave the test three times]?" House answered: "I don't know." House still had no explanation to give on redirect examination. He then testified (Tr. 551–552):

Q. [BY MR. MASON] . . . Why did you not ask Mr. Musheno if the individuals who applied would take a welding test?

A. *I don't know* at the time [emphasis added].

Although not admitted by the Company at the trial or in its brief, I find it obvious that House interviewed and offered union member Contos a welding test on November 22, but failed to either interview or offer a welding test to any of the five union members with Musheno, because Foor disassociated himself and Contos from Musheno.

House not only turned away the five union members by promising Musheno "I'll get back to [you] later," which he failed to do, but he also failed to respond to Musheno's renewal of the applications in a letter to him that afternoon. The letter read (G.C. Exh. 14; Tr. 291):

Let me introduce Mr. Jon Shook, Mr. Robert Dutton, Mr. Gregory Piryk, Mr. Thomas Livingstone, and Mr. Michael Ford. Each of these gentlemen have four or more years experience in the trade, are residents of this area, have passed a journeyman examination given by a duly constituted construction Local Union, have been certified as journeymen by a joint apprenticeship and training committee and are licensed by the State of Connecticut.

These applicants have filled out applications in response to your newspaper ad on November 22, 1994 at the jobsite and are willing to work under the same terms and conditions which you have extended to other employees who are qualified in the trade.

If for any reason you refuse to accept these applications, or if you consider same deficient in any manner, please advise me immediately so that remedial action may be taken. Please feel free to contact any of these applicants through this office.

4. Operating shorthanded

After November 22, the Company operated shorthanded in preference to hiring any of the five union members.

House hired the three welders (Colwell, Etheridge, and Remy) when he was informed on November 23 that they had passed the lab test. He was unable, however, before the Company placed a freeze on hiring, to employ a sufficient number of licensed fitters and welders who were nonunion—or who appeared to be nonunion from their applications—to fill his need for 9 or 10 fitters and welders. House stated there was a hiring freeze sometime after the Company was served on December 19 with a copy of the Union's NLRB charge, alleging an unlawful refusal to hire union employees. (Tr. 29, 426-429; R. Exhs. 8-10.)

Following the union members' response to its November 20 newspaper ad, the Company no longer placed any newspaper ads for licensed employees. House, however, succeeded in obtaining a nonunion welder (Salo) through the State unemployment office. House gave him a welding test on November 29 or 30 and hired him on December 13 upon being informed that he had passed the lab test. (Tr. 17-20; G.C. Exh. 3.)

On November 30, House hired pipefitter Richard Harrison, a union member who had worked on other nonunion jobs. Harrison concealed his union membership from House by listing on his application only nonunion employers and showing only the nonunion \$16 and \$18 wages he had been earning. House scheduled Harrison to start work on Monday, December 5, but Harrison advised House that Monday that he could not take the job because he was unable to find day care for his infant daughter. (Tr. 177-185, 188, 443-444; G.C. Exh. 9.)

On December 7, as the Company admits in its brief (at 9), welder Remy quit. House learned that day that Remy was a member of a Canadian local, which was forbidding him to work on the nonunion job. Evidently because Remy was not a member of the Union (Local 777), House did his best to persuade him to remain on the job, but Remy quit that same day. (Tr. 332-333, 383, 438-439.)

As found, House had told Garbe that he needed 9 or 10 fitters and welders and "more fitters than welders" (indicating the need of 5 or more welders). The departure of Remy left only two welders (Colwell and Etheridge) on the job from December 7 to 13, when House was able to hire Salo after learning that he had passed the lab test.

House continued his search for licensed employees, as revealed by his response to Salo's question on December 15, about whether House wanted him "to see if I could get ahold of some people that I knew that may be out of work, licensed men." As found, House answered, "Fine, just as

long as they're not union." Then on December 16, Salo told House he had a friend, an unemployed welder who was licensed and interested in going to work. House said to bring him in and "we'll give him a test." Salo did so on Saturday, December 17, and watched House give welder John Von Deck the welding test.

It was about 2 weeks later (around the first of January 1995), after the Company was served on December 19 with a copy of the Union's NLRB charge, that House told Salo that "there was a freeze on and he couldn't hire any people because of the problem with the Union." This placed a limit of three fitters and three welders and resulted in a continued shorthanded operation, undoubtedly causing a delay in the completion date.

5. The Company's defenses

a. For not interviewing or testing on November 22

As found, Superintendent House turned away the five union members when Business Agent Musheno submitted their applications to him on November 22, without offering to interview or give a welding test to any of them and without even looking at the applications.

Although House claimed (Tr. 498) that it did not matter to him "one way or the other whether or not these people were union or nonunion," he protested to Musheno that "This isn't a union job" and admittedly declared that "our company is not going to sign no union contract." As further found, Musheno stated that "You have an ad in the paper for people, and we're here to apply for a job," and that the men were licensed and qualified and were there to go to work under the same conditions as other employees.

House gave unpersuasive explanations for not following his "normal practice" of giving applicants an interview and offering to give a welding test to welder applicants, without their first submitting an application. (Tr. 497, 512.) He testified that the five union members "didn't talk to me. Not one of them came over to talk to me." None of them said, "Hey, here's my application." (Tr. 436.) He later testified (Tr. 531, 543):

[N]one of them talked to me direct. . . . [Musheno] just wanted applications. He was not representing nobody. He come and asked me for five applications. He said he had five hungry men that wanted to work. I give him five applications. He's the one that brought them back. They didn't bother to take and even come and talk with me.

. . . .

Well, I guess I'm not used to somebody coming up and having one individual take a whole group and not be able to talk to them all one-on-one, somebody that's not interested to come and check out.

I mean, if I filled an application out, I don't want somebody talking for me.

House admitted that If he had offered a test to the union applicants on November 22 and they had passed that test, "They would have been hired if they were to take the test." (Tr. 526-527.) But instead of interviewing the five union members and offering the welders a welding test, House

turned them away by telling Musheno, “I’ll get back to [you] later,” which he failed to do. (Tr. 433, 559.)

I find that House’s purported reasons for not following his “normal practice” of interviewing and testing applicants were obviously fabricated.

b. *For not hiring after November 22*

(1) Incomplete applications

One reason House gave for not considering the union members for open positions after November 22 was that the applications were incomplete. He claimed that he therefore believed—despite what Musheno had told him about the hungry union members wanting to go to work—that the applications were a hoax, not submitted because the union applicants were actually seeking work, but because they were merely laying the predicate for drawing unemployment compensation. (Tr. 362–367, 433–437, 453, 542.)

Yet when he wrote on the fifth page of each of the five applications an explanation to the personnel department of why the applicants were not interviewed or hired, House stated nothing about the applications being incomplete. He wrote only the following on each of them: “They just came by with BA”—indicating his concern about their appearing at the jobsite with the union business agent. (G.C. Exhs. 5–7, 10–11.)

Moreover, House testified that his primary interest in an application was to determine if the applicant was properly licensed. (Tr. 515–517.) He already knew that “all union guys usually are licensed” (Tr. 551), and Musheno told him that the five union members were licensed qualified people. (Tr. 283.) As found, House admitted that if he had offered the union applicants a welding test and they passed it, they would have been hired. (Tr. 526–527.)

Furthermore, as found, Musheno renewed the applications in a letter to House that same day, stating that “If for any reason you refuse to accept these applications, or if you consider same deficient in any manner, please advise me immediately so that remedial action may be taken.” House ignored and never answered the letter.

I find that this purported reason (incomplete applications) for not considering the union members for employment is another fabrication.

(2) Hiring freeze

House gave an inconsistent reason for not later offering employment to the five union members. This purported reason was that because of a hiring freeze, no jobs were available. This contention conflicts with House’s testimony (Tr. 453) that if the five union applicants had filled out their applications (on November 22), he would have called them for the positions that Harrison was hired to fill (on November 30) and Salo was tested for (on November 29 or 30) and hired to fill (on December 13).

Regarding a hiring freeze, as found, Superintendent House informed Salo about the first of January 1995 that he could not hire nonunion welder John Von Deck, whom House had given a welding test on December 17, because “there was a freeze on and he couldn’t hire any people because of the problem with the Union.” Between the date of the welding test and the announcement of the hiring freeze, the Company

had been served with a copy of the Union’s NLRB charge, alleging the unlawful refusal to hire union members.

When House was called as the only company representative or employee to testify as a defense witness, he agreed that there was a hiring freeze, but he claimed that it occurred weeks earlier. I find that his conflicting testimony reveals that this defense was fabricated.

House testified at one point that on November 25, the Friday after the November 20 newspaper ad for licensed welders and pipefitters appeared, Coordinator Michael Donnelly telephoned and said he had “a full staff, an equal three and three,” and that Donnelly had “jumped the gun” and *placed the November 20 newspaper ad by mistake*. (Tr. 510–511.)

As found, the three pipefitters were Champagne, Garbe, and Scovish (hired the week of November 7) and the three welders were Colwell, Etheridge, and Remy (hired after House was notified on November 23 that they had passed the lab test).

The obvious problem with this version of the Donnelly’s telephone call is that House continued seeking nonunion employees after November 25. He obtained Salo, a nonunion welder, through the state unemployment office and gave him a welding test on November 29 or 30. On November 30 House hired union pipefitter Harrison, believing him to be a nonunion employee. Then on December 15, after House hired Salo on December 13 to replace welder Remy who suddenly quit on December 7, House accepted Salo’s offer to “get ahold of” some licensed men, telling Salo, “just as long as they’re not union.”

House had earlier given a conflicting version of the purported Donnelly telephone call, omitting any reference to the November 20 newspaper ad being placed by mistake. This time House claimed that Donnelly told him on Friday (December 2) that his crew was filled and that Donnelly just wanted a six-man crew of three welders and three fitters. “I told him I hired” (Harrison on Wednesday, November 30) and he said, “Well, we will see what happens,” but “they really wanted to go with six-man crew, three welders and three fitters.” (Tr. 444–445.)

In still another version of the purported Donnelly telephone call, which he claimed this time he received on Friday, December 2, House again omitted any reference to the newspaper ad being placed by mistake and omitted any reference to Donnelly’s stating, “Well, we will see what happens.” House claimed instead that Donnelly told him that Donnelly had talked to President Appleton and they “said they had enough men; that I should not hire any more,” and Donnelly “thought I had already *went over my quota* [emphasis added].” House claimed that he responded, “Well, the guy didn’t show up,” referring to Harrison’s not reporting to work on Monday, December 5. (Tr. 445.)

According to this version, Appleton announced the hiring freeze, not on Friday, December 2, but on Friday, *December 9*, the Friday after Harrison declined the job on Monday, December 5. Furthermore, Donnelly would not have told House on December 9 that he thought House “had already” gone over his quota of six employees. That was 2 days after welder Remy quit without prior notice on December 7, leaving only two welders on the job.

Thus, in contending that the hiring freeze occurred weeks earlier than the first of January 1995, House claimed three different dates that Donnelly advised him of the freeze, on

November 25 and December 2 and 9, and gave conflicting versions of what Donnelly said.

By his demeanor on the stand, House appeared willing to fabricate any testimony that might help the Company's cause. I discredit his claim that the Company adopted a hiring freeze on November 25, December 2, or December 9. I find that if there had been such a hiring freeze, House would not have accepted Salo's offer on December 15 to "get ahold of" some nonunion licensed men, telling Salo, "just as long as they're not union." Nor would House have given Von Deck a welding test on December 17 and told Von Deck "he would let him know what the results were."

Moreover, even if the Company had imposed a hiring freeze shortly after House turned away the five union members on November 22, without offering to interview or test them, and after the Union renewed the applications that same day, the Company has not offered any nondiscriminatory reason for imposing such a freeze, undoubtedly delaying its completion of the project.

I note that House's lack of credibility is illustrated by his explanation for interviewing union welder Contos (after Foor disassociated himself and Contos from Business Agent Musheno). House claimed (Tr. 437-438):

Q. BY MR. MASON: Now, can you tell me whether or not you interviewed a Mr. Contos for employment?

A. Yes, sir.

Q. What position was he being interviewed for?

A. Welder.

Q. Why were you seeking another welder when you had Mr. Contos in?

A. Because Remy had taken and notified me that he was having to leave.

To the contrary, House interviewed Contos on November 22, and it is undisputed that House did not hire Remy until after November 23. The Company admits that Remy quit on December 7 (2 weeks later) and House admitted that when Remy advised him that his Canadian local was forbidding him to work on the nonunion job, Remy "just finished out the day and left." (Tr. 438-439.) It is obvious that House would not have known at the time he interviewed Contos on November 22 that Remy was leaving.

6. Concluding findings

I find that the General Counsel has made a strong prima facie showing that a motivating factor in the Company's failure on and after November 22 to even consider hiring the five union members who accompanied Business Manager Musheno to the jobsite was their union membership. *Wright Line*, 251 NLRB 1083 (1980).

I make this finding particularly in view of (a) Superintendent House's coercive interrogation of employees about their union membership; (b) his statement that he had to get "rid of the two union men" on the job "and be diplomatic about it"; (c) his stating that the Company promulgated its disciplinary policy at the jobsite "to get rid of the union problems"; (d) his failure to follow his "normal practice" of giving applicants an interview and offering a welding test to welder applicants, but instead turning the five union members away without even looking at their application; and (e) his hiring

after November 22 only employees who were, or were believed to be, nonunion.

Finding the Company's defenses to be fabricated and lacking in merit, I find that the Company has failed to carry its burden to show that it would have failed to hire the union applicants in the absence of their union membership.

The Company contends in its brief (at 40, 48) that "the Union is on trial here" for engaging in "a salting campaign against the Company." The Company admits (at 25-26), however, that House had never heard of "salts" until "shortly before this trial" and that he did not even know "what such a program was or what its implication would be to the Company."

The counsel for the General Counsel argued at the trial (Tr. 466) that the reference to a salting campaign is "an after-the-fact rationalization or an attempt to muddy the waters to get the court off track, and I submit there is no relevance to it in any possible way."

In view of the Company's admission that House had no knowledge of a salting campaign, I agree that the reference to such a campaign is irrelevant. I find it clear that House's failure to hire the five union members was not motivated by a belief that they were engaged in a salting campaign. Cf. *NLRB v. Town & Country Electric*, above, 116 S.Ct. at 457 (refusing to interview "employees" on the union's payroll).

CONCLUSIONS OF LAW

1. By failing to give five union members nondiscriminatory consideration for the temporary employment at the Rocky Hill, Connecticut jobsite, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. By (a) coercively interrogating employees about their union membership, by (b) threatening to terminate employees because of their union activities, and by (c) stating that the Company was promulgating its disciplinary policy at the jobsite because of the employees' union activities, the Company violated Section 8(a)(1) of the Act.

3. By demoting an employee because of his union organizing, the Company violated Section 8(a)(3) and (1).

REMEDY

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

The Respondent having failed to give five union members nondiscriminatory consideration for temporary employment at the Rocky Hill, Connecticut jobsite, it must make whole those it otherwise would have hired for any loss of earnings, computed on a quarterly basis from date of failure to hire to date of nondiscriminatory layoff before completion of the project, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]