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The Second Shift Inc., d/b/a Jobsite Staffing and Jobsite Personnel, Inc., a single employer and International Brotherhood of Electrical Workers, Local Union 756, AFL-CIO. Case 12-CA-17521

September 29, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND WALSH

On October 10, 2002, Administrative Law Judge Keltner W. Locke issued the attached bench decision. The General Counsel and the Union each filed exceptions and the Union filed 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, and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified and set forth in full below.¹

The complaint alleges, inter alia, that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire and refusing to consider for hire 17 job applicants. The judge found that the Respondent violated Section 8(a)(3) and (1) by refusing to hire five applicants, Barry Bostwick, Jonathan Carnes, Robert Murphy, Phillip Pelc, and Stephen Williams.² The judge dismissed complaint allegations that the Respondent violated Section 8(a)(3) and (1) by refusing to hire 13 other job applicants.³ The judge further found that the Respondent violated Section 8(a)(3) and (1) by refusing to consider for hire all 18 job applicants.⁴

¹ We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), and to include our customary expunction remedy, which the judge omitted.

² One of the applicants who the judge found that the Respondent unlawfully refused to hire, Bostwick, was not alleged as a discriminatee in the complaint.

³ The 13 applicants were John Barrington, Richard Buffington, Christopher Downs, Bruce Evans, Jamie Eyler, Richard Forrester, John Gambone Sr. John Gambone Jr., Jason Harrison, Robert Higley, Eric Law, Ken Mortensen, and James Warren.

⁴ The judge included Bostwick in the refusal-to-consider violation as well as the refusal-to-hire violation, although he was not alleged as a discriminatee in the complaint. Thus, the total number of applicants who the Respondent unlawfully refused to consider, as found by the judge, was 18.

The Union filed exceptions regarding the refusal-to-hire allegations that the judge dismissed, the judge's specific findings in dismissing the refusal-to-hire allegation regarding applicant Christopher Downs, the judge's finding that the Respondent unlawfully refused to hire Barry Bostwick, and the judge's remedy for the refusal-to-consider violations. The General Counsel filed exceptions contending that the judge's notice to employees failed to contain remedial language consistent with his conclusions of law and Order.

In his decision, after setting forth the framework established in *FES*, 331 NLRB 9 (2000), for analyzing alleged refusal-to-hire violations, the judge found that the General Counsel had established the first *FES* element regarding all the alleged discriminatees: the Respondent was hiring at the time that they submitted applications. Regarding the second *FES* element, the judge found that Bostwick, Carnes, Murphy, Pelc, and Williams had experience or training relevant to the announced or generally known requirements of the positions for which they applied but that the record fell short of establishing this element for the 12 alleged discriminatees who did not testify at the hearing.⁵ The judge did not address whether this element was established regarding alleged discriminatee Christopher Downs, who testified at the hearing.

Regarding the third *FES* element, the judge found that animus contributed to the Respondent's decisions not to hire applicants known to be associated with the Union. The judge further found, however, that the record did not establish that the Respondent knew about the union affiliation of some of the applicants. In particular, the judge found that the Respondent did not know of the union affiliation of Christopher Downs at the time that he submitted his application and the Respondent decided not to hire him.

Although the judge dismissed the refusal-to-hire allegations regarding 13 of the applicants on the basis that the record did not show that they had relevant training and experience and/or that the Respondent knew about

The judge also found that the Respondent violated Sec. 8(a)(1) by informing employees that it was futile for union applicants to apply for work, maintaining a work rule prohibiting employees from discussing their wage rates with each other, and interrogating employees concerning their union membership, activities, and sympathies. The judge dismissed the remaining 8(a)(1) allegations.

No exceptions were filed regarding the judge's disposition of the 8(a)(1) allegations or his findings that the Respondent violated Sec. 8(a)(3) and (1) by refusing to hire applicants Carnes, Murphy, Pelc, and Williams and by refusing to consider for hire all 18 applicants. Thus, these violations are not in issue.

⁵ The 12 alleged discriminatees who did not testify were John Barrington, Richard Buffington, Bruce Evans, Jamie Eyler, Richard Forrester, John Gambone Sr. John Gambone Jr., Jason Harrison, Robert Higley, Eric Law, Ken Mortensen, and James Warren.

their union affiliation, the judge failed to make particularized findings or to discuss or analyze the evidence in reaching these conclusions, other than evidence regarding the Respondent's knowledge of Downs' union affiliation. Thus, as the Union points out, in finding that relevant training and experience was not shown regarding the applicants who did not testify, the judge failed to address evidence that the Respondent ran newspaper ads seeking "electricians" and that Union Business Manager Williams testified that all 14 alleged discriminatees who applied for jobs on July 31, 1995, were licensed electricians and had served in apprenticeship programs.⁶

Further, the judge found that the record did not establish that the Respondent knew about the union affiliation of "some" of the applicants and cited Downs as an "example" of one such applicant.⁷ The judge, however, failed to identify any other applicant whose union affiliation was not shown to be known by the Respondent. Thus, we cannot determine which, if any, of the judge's other dismissals was predicated, in whole or part, on the basis that the applicant's union affiliation was not shown to be known by the Respondent or what evidence the judge relied on in reaching such a conclusion.

Accordingly, as the judge's decision fails to set forth sufficient findings and rationale, we shall remand this proceeding to the judge for a written analysis of the evidence and the legal issues regarding the elements of relevant training and experience and employer knowledge with respect to the refusal to hire allegations that the judge dismissed in his bench decision. See *Dynatron/Bondo Corp.*, 326 NLRB 1170 (1998).

If, on review of the record on remand, the judge determines that the Respondent violated Section 8(a)(3) and (1) by its refusal to hire any of the applicants with regard to whom the judge previously dismissed refusal-to-hire allegations, the judge shall further determine whether the record shows that the Respondent had job openings for which such applicants had relevant training and experience and the number of such openings, and the judge shall provide an appropriate remedy based on such findings. *FES* requires such an analysis to determine

⁶ All but one of the refusal to hire allegations that the judge dismissed concerned applicants who applied for jobs on July 31, 1995. The 14 individuals who applied for jobs on July 31, 1995, were John Barrington, Richard Buffington, Bruce Evans, Jamie Eyler, Richard Forrester, John Gambon Sr., John Gambone Jr., Jason Harrison, Robert Higley, Eric Law, Ken Mortensen, Robert Murphy, James Warren, and Stephen Williams. The judge dismissed the refusal to hire allegations regarding all of these individuals except Murphy and Williams. The other refusal to hire allegation that the judge dismissed concerned Christopher Downs, who applied for a job on October 27, 1995.

⁷ Judge's decision, slip op. at 3.

whether an affirmative backpay and reinstatement remedy may be ordered. *FES*, supra, 331 NLRB at 14.

Additionally, in his bench decision, the judge found that the Respondent violated Section 8(a)(3) and (1) by refusing to consider for hire all 18 job applicants, but, as the Union notes, the judge failed to provide the remedy called for in *FES* for refusal-to-consider violations. *FES*, supra, 331 NLRB at 15; see, e.g., *Mainline Contracting Corp.*, 334 NLRB 922, 924-925 (2001). In his supplemental decision on remand, the judge, therefore, shall provide the appropriate remedy for this violation.⁸ However, when both a refusal-to-hire and a refusal-to-consider for hire violation are found regarding the same applicant and an reinstatement and backpay remedy is ordered for the refusal-to-hire violation, the remedy for the refusal-to-consider violation is subsumed by the broader refusal-to-hire remedy. *Gothic Stone Masonry*, 339 NLRB No. 116, slip op. at 1 fn. 3 (2003). Thus, no additional refusal-to-consider remedy is required regarding applicants Carnes, Murphy, Pelc, and Williams, as there are no exceptions to the judge's findings that the Respondent unlawfully refused to hire them and that they should be reinstated and made whole. Accordingly, we shall not remand the refusal to consider violations regarding applicants Carnes, Murphy, Pelc, and Williams.

In view of the Union's exception, we shall also remand the judge's finding that the Respondent violated Section 8(a)(3) and (1) by refusing to hire applicant Barry Bostwick, as the judge failed to explain his basis for finding this violation even though it was not alleged in the complaint. On remand, the judge shall reconsider this finding and, regardless of the outcome, shall explain the basis for his disposition of it.

As noted above, no exceptions were filed to the judge's findings that the Respondent violated Section 8(a)(3) and (1) by refusing to hire applicants Carnes, Murphy, Pelc, and Williams or to the judge's findings that the Respondent violated Section 8(a)(1) by informing employees that it was futile for union applicants to apply for work, maintaining a work rule prohibiting employees from discussing their wage rates with each other, and interrogating employees concerning their union membership, activities, and sympathies. There is no reason to delay the disposition and remedying of these uncontested violations pending the outcome of the remand that we are ordering. Accordingly, we shall issue a final order with respect to these violations.

We shall sever the complaint allegations that we are remanding, i.e., the refusal-to-hire allegations that the

⁸ The merits of the refusal to consider violations are not to be revisited on remand. As noted above, no exceptions were filed regarding them.

judge dismissed and the refusal-to-consider allegations, other than those concerning applicants Carnes, Murphy, Pelc, and Williams, plus the refusal-to-hire violation that the judge found concerning Bostwick.⁹ Although no exceptions were filed regarding the merits of the refusal-to-consider violations, we shall sever them, except those concerning Carnes, Murphy, Pelc, and Williams, because the remedy for them may be subsumed by the remedy for refusal-to-hire violations if, and to the extent that, the judge, on remand, finds any additional refusal-to-hire violations. *Kaminski Electric & Service Co.*, 332 NLRB 452, 454 (2000).

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, The Second Shift, Inc. d/b/a Jobsite Staffing and Jobsite Personnel, Inc., a single employer, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees, including job applicants, that it was futile for union applicants to apply for work.

(b) Interrogating employees, including job applicants, concerning their union membership, activities, and sympathies.

(c) Maintaining a work rule prohibiting employees from discussing their wage rates with each other.

(d) Refusing to hire job applicants or consider them for hire because of their union membership or sympathies.

(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 Jonathan Carnes, Robert Murphy, Phillip Pelc, and Stephen Williams instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

(b) Make Jonathan Carnes, Robert Murphy, Phillip Pelc, and Stephen Williams whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to

hire Jonathan Carnes, Robert Murphy, Phillip Pelc, and Stephen Williams and, within 3 days thereafter, notify them in writing that this has been done and that the refusals to hire them will not be used against them in any way.

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

(e) Rescind its work rule prohibiting employees from discussing wages with each other, and rescind and expunge any warnings or other discipline imposed for violation of this rule.

(f) Within 14 days after service by the Region, duplicate and mail to all current employees and former employees employed by the Respondent at any time since July 31, 1995, and post at its facility in Altamonte, Florida, and at all other places where notices to employees customarily are posted, copies of the attached notice marked "Appendix A."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 12, 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.

(g) 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 issues of whether the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire and/or refusing to consider for hire John Barrington, Barry Bostwick, Richard Buffington, Christopher Downs, Bruce Evans, Jamie Eyler, Richard Forrester, John Gambone Sr. John Gambone Jr., Jason Harrison, Robert Higley, Eric Law, Ken Mortensen, and James Warren are severed from the rest of this proceeding and remanded to Administrative Law Judge Keltner

⁹ In remanding, we are not passing on the Union's exceptions to the judge's specific findings in support of his dismissal of the refusal to hire allegation regarding Christopher Downs. As we are setting forth a new notice to employees, we need not pass on the General Counsel's exceptions to the judge's notice.

¹⁰ 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."

W. Locke for the purposes described above. The judge shall prepare and serve on the parties a Supplemental Decision containing findings of fact, conclusions of law, and a recommended Order in accordance with this order of remand. Following service of the Supplemental Decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. September 29, 2003

Robert J. Battista,	Chairman
Peter C. Schaumber,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT inform employees, including job applicants, that it is futile for union applicants to apply for work.

WE WILL NOT interrogate employees, including job applicants, concerning their union membership, activities and sympathies.

WE WILL NOT maintain a work rule prohibiting employees from discussing their wage rates with each other.

WE WILL NOT refuse to hire job applicants or consider them for hire because of their union membership or sympathies.

WE WILL NOT in any like or related manner interfere with, coerce, or restrain our employees in the exercise of their rights under Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Jonathan Carnes, Robert Murphy, Phillip Pelc, and Stephen Williams instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions.

WE WILL make Jonathan Carnes, Robert Murphy, Phillip Pelc, and Stephen Williams whole for any loss of earnings and other benefits suffered as a result of our unlawful discrimination against them, 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 refusals to hire Jonathan Carnes, Robert Murphy, Phillip Pelc, and Stephen Williams, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusals to hire them will not be used against them in any way.

WE WILL rescind our work rule prohibiting employees from discussing wages with each other, and rescind and expunge any warnings or other discipline imposed for violation of this rule.

THE SECOND SHIFT, INC. D/B/A JOBSITE
STAFFING AND JOBSITE PERSONNEL, INC., AS
SINGLE EMPLOYER

Thomas Brudney, Esq., for the General Counsel.

Stephen Williams, for the Charging Party.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on August 26–27 and September 11, 2002, in New Smyrna Beach, Florida. After the parties rested, I heard oral argument, and on September 12, 2002, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.¹¹

The complaint in this case, as amended, alleges that Respondent unlawfully discriminated against certain job applicants because of their union activities. In the bench decision, I concluded that evidence supported findings that Respondent discriminated against some, but not all, of these named individuals. The bench decision further stated that after further review of the evidence, I would make specific findings in this certification regarding the individuals affected by the unlawful discrimination.

¹¹ The bench decision appears in uncorrected form at pages 215 through 238 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification. [Omitted from publication.] These corrections include the insertion of three paragraphs inadvertently omitted from the discussion of complaint par. 5(c).

In making such findings, I follow the analytical framework established by the Board in *FES*, 331 NLRB 9 (2000). This decision requires the General Counsel to prove during the hearing on the merits (rather than later during a compliance hearing) that a respondent discriminated against an identified applicant because of that person's union or protected activities. The *FES* decision also lists the elements which the General Counsel must prove to carry the government's initial burden. Specifically, the General Counsel must show

1. That the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct;
2. That the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and
3. That antiunion animus contributed to the decision not to hire the applicants.

Once the General Counsel has established these elements by a preponderance of the evidence, the burden shifts to the respondent to establish that it would not have hired the applicant in question even in the absence of union or other protected activity. In the present case, although Respondent filed answers to the complaint, it did not appear at hearing. Thus, Respondent did not present any evidence to support an argument that it would have rejected the alleged discriminatees even in the absence of union activity.

For the reasons discussed below, I conclude that the General Counsel has satisfied the *FES* standards with respect to job applicants Barry Bostwick, Jonathan Carnes, Robert Murphy, Phillip Pelc, and Stephen Williams. Noting the absence of evidence which might rebut the General Counsel's case, I find that Respondent unlawfully refused to hire these individuals beginning on the dates of their applications, which are listed to the right of their names:

Barry Bostwick	November 2, 1995
Jonathan Carnes	September 22, 1995
Robert Murphy	July 31, 1995
Phillip Pelc	October 1995
Stephen Williams	July 31, 1995

Further, I conclude that the evidence does not establish that Respondent unlawfully refused to hire the other individuals alleged to be discriminatees in the complaint. These conclusions are based on the following analysis under the *FES* framework.

For all of the alleged discriminatees, the General Counsel has established the first *FES* element. The evidence clearly establishes that Respondent was hiring at the time these persons submitted applications.

With respect to the second *FES* element, the record establishes that Bostwick, Carnes, Murphy, Pelc, and Williams had experience or training relevant to the announced or generally known requirements of the positions for which they applied. The record falls short of establishing this element for individuals who did not testify at the hearing.

With respect to the third *FES* element, the record clearly shows that antiunion animus contributed to the decision not to hire applicants known to be associated with the Union. Evidence of this animus includes the statements violating Section 8(a)(1) of the Act made by Respondent's supervisor and agent, Henry Gee. The bench decision discusses these statements at length.

The General Counsel must do more, however, than prove the existence of animus. The Government also must connect that animus with Respondent's decision to reject a particular job applicant. When evidence shows that Respondent knew about the job applicant's union membership or activities, the connection appears obvious. In the present case, however, the record does not establish that Respondent knew about the union affiliation of some of the job applicants.

For example, Christopher Downs did not disclose his union affiliation when he applied for work with Respondent on about October 27, 1995. No credible extrinsic evidence establishes that Respondent had learned about Downs' union ties from some other source, or even suspected as much. Therefore, I conclude that the Government has not proven the third *FES* element.

Of course, it is possible that work opportunities arose after Respondent learned about Downs' connection with the Union, and that Respondent passed over Downs in favor of other applicants for this reason. Downs disclosed his union affiliation about a week after his initial job interview, when he returned to Respondent's office to inquire again about employment.

However, during this second conversation, Manager Gee made a statement to Downs which indicates that Respondent rejected Downs' application for a lawful reason, Downs' earlier failure to tell the truth when Gee asked him, during the initial job interview, if he knew a "Jim Downs." In response, Downs had told Gee that he did not know a "Jim Downs," but he had failed to disclose that a "James Downs" was his brother.

According to Downs, when he visited the Respondent's office the second time, Gee explained that Respondent had not hired him because of this earlier lack of candor. Crediting Downs, I find that Gee made this statement.

Rejecting a job applicant for perceived untruthfulness does not violate the Act. Therefore, even were I to conclude that the General Counsel had established all three *FES* elements, I would still find that Respondent would not have hired Downs in any event for this lawful reason.

Another witness, Barry Bostwick, was nearby during this conversation between Gee and Downs. Bostwick's testimony suggests Gee told Downs that he knew Downs was associated with the Union. However, Bostwick's testimony was vague and, based on my observations of the witnesses, I do not credit it.

In sum, the evidence does not establish that Respondent unlawfully refused to hire the job applicants identified in the complaint except for Barry Bostwick, Jonathan Carnes, Robert Murphy, Phillip Pelc, and Stephen Williams.

The complaint also alleges that Respondent unlawfully refused to consider job applicants for hire because of their union membership, activities, or sympathies. To establish such a violation, the General Counsel must show (1) that the respon-

dent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment.

The evidence establishes that Respondent excluded Barry Bostwick, Jonathan Carnes, Robert Murphy, Phillip Pelc, and Stephen Williams from the hiring process and that antiunion animus contributed to the decision not to consider them. Additionally, the evidence establishes that Respondent unlawfully refused to consider for hire the other job applicants named as discriminatees in the complaint. Therefore, I conclude that the government has established that Respondent violated Section 8(a)(3) and (1) by refusing to consider job applicants for hire, as alleged.

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, including posting the notice to employees attached hereto as "Appendix B."

Additionally, it appears that Respondent may have ceased business in whole or in part. In accordance with the Board's policy in *Excel Container, Inc.*, 325 NLRB 17 (1997), I recommend that Respondent be ordered to mail a copy of the notice to each person employed by Respondent on July 31, 1995, the date of the first unfair labor practice.

Respondent must also rescind its unlawful rule that prohibited employees from discussing their wages.

The remedy must also undo the harm caused by Respondent's unlawful discrimination against five job applicants whom it denied employment. The appropriate remedy for a refusal-to-hire violation is a cease-and-desist order, and an order to offer the discriminatees immediate reinstatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, and to make them whole for losses sustained by reason of the discrimination against them. Therefore, the recommended order below provides both that Respondent should institute Barry Bostwick, Jonathan Carnes, Robert Murphy, Phillip Pelc, and Stephen Williams, and that Respondent should make them whole for losses they suffered because of the unlawful discrimination.¹²

As discussed above, the evidence also established that Respondent unlawfully refused to consider job applicants for hire. In *FES 331 NLRB 9* (2000), above, the Board instructed that if job openings arise after the beginning of a hearing on the merits, the General Counsel must initiate a compliance proceeding to determine whether the discriminatees would have been selected for the openings in the absence of the proven discriminatory failure to consider them for employment.

In the present case, Respondent's failure to appear at the hearing makes it impossible to determine from the present record whether job openings have arisen. Such issues must be deferred to the compliance stage of this proceeding.

CONCLUSIONS OF LAW

1. The Second Shift, Inc., doing business as Jobsite Staffing, was, at times material to the complaint, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. On or about February 29, 1996, The Second Shift, Inc., doing business as Jobsite Staffing, established Jobsite Personnel, Inc. as a subordinate instrument to and a disguised continuation of The Second Shift, Inc. doing business as Jobsite Staffing.

3. At all material times since about February 29, 1996, The Second Shift, Inc., doing business as Jobsite Staffing, and Jobsite Personnel, Inc. have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have administered a common labor policy; have shared common premises and facilities; have interchanged personnel with each other; and have held themselves out to the public as a single integrated business enterprise.

4. At all material times since about February 29, 1996, The Second Shift, Inc., doing business as Jobsite Staffing, and Jobsite Personnel, Inc., collectively referred to herein as "Respondent," are and have been alter egos and a single employer within the meaning of the Act.

5. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

6. The Charging Party, International Brotherhood of Electrical Workers, Local Union 756, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

7. The Respondent violated Section 8(a)(1) of the Act by the following conduct: Informing employees that it was futile for union applicants to apply for work; interrogating employees concerning their union membership, activities and sympathies; maintaining a work rule prohibiting employees from discussing their wage rates with each other; refusing to hire or consider for hire Barry Bostwick, Jonathan Carnes, Robert Murphy, Phillip Pelc, and Stephen Williams.

8. The Respondent violated Section 8(a)(3) of the Act by refusing to hire Barry Bostwick, Jonathan Carnes, Robert Murphy, Phillip Pelc, and Stephen Williams.

9. The Respondent violated Section 8(a)(3) of the Act by refusing to consider job applicants, including Barry Bostwick, Jonathan Carnes, Robert Murphy, Phillip Pelc, and Stephen Williams, for hire, because of their union membership, sympathies, or activities.

10. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

11. The Respondent did not engage in the unfair labor practices alleged in the consolidated complaint not specifically found herein.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended¹³

¹² Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

¹³ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be

ORDER

The Respondent, The Second Shift, Inc. d/b/a Jobsite Staffing and Jobsite Personnel, Inc., a single employer, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees, including job applicants, that it was futile for union applicants to apply for work.

(b) Interrogating employees, including job applicants, concerning their union membership, activities and sympathies.

(c) Maintaining a work rule prohibiting employees from discussing their wage rates with each other

(d) Refusing to hire job applicants or consider them for hire because of their union membership, or sympathies.

(e) In any like or related manner 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) Offer immediate reinstatement to Barry Bostwick, Jonathan Carnes, Robert Murphy, Phillip Pelc, and Stephen Williams and make them whole, with interest, for all losses they suffered because of the unlawful discrimination against them.

(b) Preserve and, on 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) Rescind its work rule prohibiting employees from discussing wages with each other, and rescind and expunge any warnings or other discipline imposed for violation of this rule.

(d) Mail to every person it employed on July 31, 1995, and post at its facility in Altamonte, Florida, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix B."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated Washington, D.C. October 10, 2002

APPENDIX A

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. The evidence establishes that Respondent violated Section 8(a)(1)

adopted by the Board, and all objections to them shall be deemed waived for all purposes.

¹⁴ 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."

and (3) of the Act, although not in every instance alleged in the Complaint.

Procedural History

This case began on November 7, 1995, when International Brotherhood of Electrical Workers, Local Union 756 filed its initial charge in this proceeding. For convenience, I will refer to this labor organization as the "Union" or the "Charging Party."

The Union's unfair labor practice charge identified the employer as "The Second Shift, Inc. doing business as Jobsite Staffing," a temporary employment agency with an office in Altamonte Springs, Florida. For convenience, I will refer to this corporation as "Jobsite Staffing." The original charge alleged that this employer unlawfully refused to consider certain job applicants for hire because of "their support, affiliation, or presumed membership and activities on the Union's behalf." On April 29, 1996, the Union amended this charge.

On June 27, 1996, after investigation of the charge, the Regional Director of Region 12 of the National Labor Relations Board issued a Complaint and Notice of Hearing, which I will call the "Complaint." In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

On March 20, 1998, the Union again amended the unfair labor practice charge. This amendment named as the employer "The Second Shift, Inc. d/b/a Jobsite Staffing/Jobsite/Jobsite Personnel."

On August 6, 2001, the General Counsel issued an Amended Complaint, which named as Respondent both The Second Shift, Inc. d/b/a Jobsite Staffing and Jobsite Personnel, Inc., as a single employer. For simplicity, I will refer to this latter corporation as "Jobsite Personnel." Additionally, for convenience, I will refer to this Amended Complaint simply as the "Complaint."

On August 17, 2001, Jobsite Personnel, Inc. filed an Answer to this Amended Complaint. On August 21, 2001, Jobsite Staffing filed an Answer to the Amended Complaint.

On December 27, 2001, the Regional Director issued an Order postponing the hearing in this matter indefinitely. On March 19, 2002, the Regional Director issued an Order scheduling the hearing to begin on August 26, 2002.

On August 26, 2002, hearing opened before me in New Smyrna Beach, Florida. Respondent did not appear. Counsel for the General Counsel stated on the record that more than a year previously, the lawyer for Jobsite Staffing had informed him that this company had gone out of business in July 1996. Further, Counsel for the General Counsel quoted this attorney, Gary S. Betensky, as saying that he no longer represented this client and that "neither he nor his client would show up at the hearing, whenever it would be."

Additionally, the General Counsel stated on the record that in about March 2001, the attorney for Jobsite Personnel, Inc. had stated that he no longer represented this client, which was defunct, and that he would not appear at the hearing on this client's behalf.

Affidavits of service establish that the General Counsel sent copies of the Order Setting Date and Time of Hearing and the Order Setting Location of Hearing by regular mail to both Jobsite Staffing and to Jobsite Personnel, Inc. The General Counsel stated on the record that the Regional Office had mailed these orders to the last known addresses of the two corporations, but that the Postal Service returned both orders undelivered.

Records of the Florida Division of Corporations indicate that Jobsite Personnel, Inc. filed annual reports for 2001 and the preceding four years, but that Jobsite Staffing did not, which is consistent with the representation by its former attorney that the corporation was defunct.

The addresses to which the General Counsel had mailed the pleadings were the addresses listed for the registered agents of the Respondent corporations in the records of the Florida Division of Corporations. However, as already noted, the Postal Service returned these documents undelivered.

Counsel for the General Counsel also stated that in August 2002, two agents from the Board's Miami office visited three other addresses where they believed Jobsite Personnel or Jobsite Staffing might be doing business. However, they found no one at these locations.

Concluding that the General Counsel had tried all reasonable means to locate and serve the Respondent, I allowed the General Counsel to proceed with the government's case. See *Beta Steel Corp.*, 326 NLRB 1267, 1267 fn. 3, 1268 (1998); *Quality Hotel*, 326 NLRB 83, 83 fn. 4 (1998).

The General Counsel presented witnesses on August 26, 2002. The next day, the General Counsel requested an adjournment so that it could serve a subpoena on a company which had been a customer of Respondent, to obtain additional evidence regarding Respondent's impact on interstate commerce, necessary to establish that Respondent had met the Board's standards for assertion of jurisdiction, as alleged in the Complaint. I granted an adjournment to September 9, 2002.

The General Counsel thereafter moved for an additional extension of time and I extended the recess until September 11, 2002, when the hearing resumed. Respondent did not appear when the hearing resumed.

The General Counsel completed the presentation of the government's evidence on September 11, 2002 and also presented oral argument on that date. Today, September 12, 2002, I am issuing this bench decision.

Issues Relating to Jurisdiction and Status of the Parties

In the Answers to Amended Complaint filed by Jobsite Staffing and Jobsite Personnel, both corporations denied the allegations in Complaint paragraph 1, related to the filing and service of the charge and amended charges. However, as already discussed, neither of these corporations appeared at the hearing, and the affidavits of service of the charges remain un rebutted. Based upon this evidence, and noting the presumption that government agencies conduct business in a regular manner, I find that the General Counsel has established the allegations in Complaint paragraphs 1(a), 1(b) and 1(c).

Complaint paragraph 2(a) alleges that at all material times, Respondent Jobsite Staffing, a Florida corporation with offices

and places of business located in Altamonte Springs, Florida and at various other locations in Florida, had been engaged in the business of supplying temporary labor to employers in the construction industry throughout the State of Florida. Jobsite Staffing denied this allegation on the basis that the Complaint did not specify what time period constituted "at all material times." However, Jobsite Staffing's Answer did contain the following admission:

Respondent admits that at one time it did have an office in Altamonte Springs, Florida and at other locations within the State of Florida and had been engaged in the business of supplying temporary labor. . .

Additionally, Jobsite Staffing attached as an appendix to its Answer, and specifically incorporated by reference, a March 18, 1996 letter to a Board attorney from Jobsite Staffing's attorney at that time. This letter and its attachments establish that Jobsite Staffing was in the business of supplying temporary labor to other employers, and that on September 25, 1995, it opened an office at Port Orange, Florida.

Based on these documents and the uncontradicted testimony of Barbara Scott, whom I find to have been a supervisor and agent of Jobsite Staffing in 1995, I find that the General Counsel has proven the allegations in Complaint paragraph 2(a).

Complaint paragraph 2(b) alleges that at all material times since on or about February 29, 1996, Jobsite Personnel, a Florida corporation with offices and places of business located in Port Orange, Florida and in Altamonte Springs, Florida, and at various other locations in the State of Florida, has been engaged in the business of supplying temporary labor to employers in the construction industry throughout the State of Florida.

Jobsite Personnel's Answer generally denied the allegations in Complaint paragraph 2, but did include this admission: "With regard to Paragraph 2(b) of the Complaint, Respondent admits that in 1996 Respondent was incorporated and started its business in the State of Florida supplying temporary labor to construction contractors, however, Respondent denies the remaining allegations of said Paragraph 2(b)."

In addition to this admission and the records of the Florida Division of Corporations, certain other evidence also supports the allegations in Complaint paragraph 2(b). The General Counsel introduced into evidence certain Dun and Bradstreet "Business Information Reports" concerning Jobsite Personnel. Such reports, of course, constitute hearsay which might not be competent evidence under the Federal Rules of Evidence. However, Section 10(b) of the National Labor Relations Act requires adherence to the Rules of Evidence only so far as "practicable."

The record does not establish that Jobsite Personnel is defunct, and it filed a report with the Florida Division of Corporations in 2001. Its failure to appear at the hearing, notwithstanding that it filed an Answer to the Complaint, creates a situation in which it is not practicable to follow the Rules of Evidence strictly. Therefore, I will rely on the Dun and Bradstreet reports, but only to the extent that they confirm or corroborate other evidence in the record.

Additionally, the General Counsel relies on admissions in a response to an inquiry which a Board agent sent both to Robert Renner, at Jobsite Staffing, and to Robert Renner Jr. at Jobsite

Personnel. Other evidence in the record establishes that Robert Renner Jr. is the son of Robert Renner.

The Board agent's inquiry is dated May 7, 1999. On the second page, below the Board agent's signature, Robert Renner answered in handwriting and dated the response May 27, 1999. Along with the letter, which Renner sent back to the Board agent, he enclosed documents.

In his response, Renner cautioned that "the information provided is from me and me alone. I cannot speak for Jobsite Personnel, Inc." In view of this caveat, I first must determine whether statements by Robert Renner, the father, constitute admissions attributable to Jobsite Personnel. A report which Jobsite Personnel filed with the Florida Secretary of State on April 23, 1999 lists Robert B. Renner as president of the corporation and Robert B. Renner Jr. as its registered agent.

Although the report gives the same address for both Renners, that address is the principal place of business of Jobsite Personnel. From the fact that the report identifies the registered agent as "junior" but does not use this designation for the corporation's president, I conclude that the report is referring to two separate individuals and that the Robert B. Renner shown as corporate president is the same person who sent the May 27, 1999 response to the Board agent. Further, I conclude that on May 27, 1999, Robert B. Renner was a corporate officer and therefore, that his statements concerning Jobsite Personnel constitute admissions binding on that corporation, notwithstanding his disclaimer.

The documents enclosed with Renner's response state that on February 29, 1996, "with his father's approval, Robert B. Renner, Jr. started JobSite Personnel, Inc." They also indicated that unlike Jobsite Staffing, the new corporation did not provide fringe benefits to its employees, so that it could compete with a rival which also did not pay fringe benefits. However, the documents do establish that Jobsite Personnel engaged in the same business as Jobsite Staffing, providing temporary workers to other employers.

Based upon all of this evidence, I find that the government has proven the allegations raised in Complaint paragraph 2(b).

Complaint paragraph 2(c) alleges that "On or about February 29, 1996, Respondent Personnel was established by Respondent Staffing as a subordinate instrument to and a disguised continuation of Respondent Staffing."

Complaint paragraph 2(d) alleges that "At all material times since on or about February 29, 1996, Respondent Staffing and Respondent Personnel have been affiliated business enterprises with common officers, ownership, directors, management and supervision; have administered a common labor policy; have shared common premises and facilities; have interchanged personnel with each other; and have held themselves out to the public as single-integrated business enterprises."

Complaint paragraph 2(e) alleges that Jobsite Staffing and Jobsite Personnel "are, and have been at all material times, alter egos and a single employer within the meaning of the Act."

The Answers of both Jobsite Staffing and Jobsite Personnel deny the allegations in Complaint paragraphs 2(c), 2(d) and 2(e).

As described above, the documents included with Robert Renner's May 27, 1999 response to the Board agent states that

"with his father's approval, Robert B. Renner, Jr. started JobSite Personnel, Inc." Additionally, these documents include organization charts for Jobsite Staffing and Jobsite Personnel. The chart for Jobsite Staffing indicates that Robert B. Renner (the father) was president of that corporation, that James Stevens was vice president of operations, that Pam Anderson was operations assistant, and that Lois M. Renner was accounting manager.

The chart for Jobsite Personnel lists Robert B. Renner Jr. as president and Robert B. Renner Sr. as "consultant." It shows Lois M. Renner as accounting manager. Pam Anderson, who held the position of operations assistant at Jobsite Staffing, appeared on the Jobsite Personnel chart as operations manager.

The fact that Lois M. Renner served as accounting manager in both corporations indicates common oversight of the financial affairs of both entities. Additionally, documents which Jobsite Personnel filed with the Florida Secretary of State list Lois Renner as a corporate officer, specifically, treasurer-secretary. She was, in effect, chief financial officer of that corporation.

The fact that Pam Anderson, who reported to the Jobsite Staffing operations manager, served as operations manager at Jobsite Personnel, shows a connection in the operations of the two companies. Although Anderson was in charge of operations at Jobsite Personnel, her subordinate role at Jobsite Staffing is consistent with a finding that Jobsite Personnel was in a subordinate role.

Although the organization chart submitted by the senior Robert Renner on May 27, 1999 indicates that he was a "consultant" at Jobsite Personnel, documents that corporation filed with the Florida Secretary of State show that during certain periods, Renner served as Jobsite Personnel's president.

Newspaper advertisements, as well as the testimony of Union Business Manager Steven Williams, establish that Jobsite Personnel invited applicants to inquire about employment by calling the same telephone number used by Jobsite Staffing. Moreover, when Williams called this number, the person answering the telephone indicated that Jobsite Personnel was the same business as Jobsite Staffing.

Even without the testimony of Barbara Scott, who was a supervisor of Jobsite Staffing within the meaning of Section 2(11) of the Act, the record establishes that Jobsite Staffing and Jobsite Personnel constitute a single employer. Her testimony bolsters that conclusion.

When asked about the relationship between Jobsite Staffing and Jobsite Personnel, Scott referred to Robert Renner Jr. as "a professional name changer. He's bad about paying taxes, therefore he just, taxes and bills, so he just changes his name. . . which is why I left the company. . ."

It is not necessary to determine whether Renner is a "professional name changer" or bad about paying taxes and bills. It suffices to conclude, based on all the evidence, that the General Counsel has proven the allegations raised in Complaint paragraphs 2(c), 2(d) and 2(e). I so find. Because Jobsite Staffing and Jobsite Personnel are alter egos and constitute a single employer, I will refer to them together simply as "Respondent."

Complaint paragraph 2(f) alleges commerce facts to support the conclusion alleged in Complaint paragraph 2(g), that Re-

spondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. Respondent denies these allegations.

To establish that Respondent constitutes an employer engaged in commerce, and therefore within the Board's jurisdiction, the General Counsel relies on records provided by one of Respondent's customers, Owen Electric Company, Inc. These records and the testimony of their custodian establish that during a representative 12-month period, Respondent provided services in excess of \$50,000 to Owen Electric, an enterprise doing business within the State of Florida which is directly engaged in interstate commerce. I find that the government has proven the allegations in Complaint paragraphs 2(f) and 2(g).

Complaint paragraph 3 alleges that at all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act. Respondent denies this allegation. Based on the testimony of Union Business Manager Williams, I find that the General Counsel has proven this allegation.

Complaint paragraph 4 alleges that four individuals were, at all material times, supervisors of Respondent and its agents within the meaning of Sections 2(11) and 2(13) of the Act, respectively. These individuals are Robert B. Renner, president of Jobsite Staffing, Robert B. Renner Jr., president of Jobsite Personnel, Hank Gee, account executive, and Barbara Scott, office manager. Respondent denies that these individuals were its supervisors and agents.

Based primarily on the testimony of Barbara Scott, I find that she and Hank Gee both possessed the authority to hire employees, and that in so doing they exercised independent judgment in the interest of Respondent. I conclude that they were Respondent's supervisors and agents within the meaning of Sections 2(11) and 2(13).

Based upon Scott's testimony and other evidence, including reports filed with the Florida Secretary of State and admissions made in documents submitted to the Board, I find that Robert B. Renner and Robert B. Renner, Jr. were Respondent's supervisors and agents within the meaning of Sections 2(11) and 2(13) of the Act.

The Unfair Labor Practice Allegations

On July 31, 1995, a rented van pulled up at Respondent's office in Altamonte Springs, Florida and discharged 14 men. Inside the office, they told Manager Barbara Scott that they were there to apply for work.

Assistant Business Manager Stephen Williams had planned this visit earlier the same day, almost on the spur of the moment. Calling a telephone number which appeared in a help wanted ad, Williams had reached Scott. From her, Williams had learned that Respondent needed 11 electricians to refer to employers in the Daytona Beach area.

During the telephone call, Scott had indicated that Respondent planned to open an office in the Daytona Beach area to serve these employers, and suggested that Williams wait a couple of weeks until that office opened. When Williams replied that he did not want to wait, Scott had suggested that if he came to Respondent's Altamonte Springs office, he could apply there.

Williams brought 13 Union members with him as part of an organizing strategy known by its acronym, "COMET." The strategy entailed sending union members to apply for work with a targeted employer. Sometimes, the applicants would appear at the employer's office wearing clothing which clearly identified their affiliation with the union. Other times, a union member would apply for work without revealing this link. If an employer hired applicants not known to be associated with the Union but passed over applicants wearing union insignia, the disparate treatment would indicate to the Union that this employer had discriminated in violation of the Act.

On July 31, 1995, the 14 men who entered Respondent's offices wore caps and t-shirts clearly proclaiming their Union identity. Complaint paragraph 5(a) alleges that on this occasion, Respondent, by Barbara Scott, told employees that they could not talk about the Union on the job. Respondent denied this unfair labor practice allegation and all other unfair labor practice allegations in the complaint.

According to Assistant Business Manager Williams, another person employed by Respondent had come out of an interior office and had begun talking with the job applicants. This person suggested that the applicants wait until Respondent's Daytona Beach office opened in two weeks, when Scott interjected that they could go on strike if they wanted to but if they did, they'd be replaced.

Williams testified that Scott told the men they were not allowed to talk union except at lunch time. Williams asked, "Are we not allowed to talk about other issues, such as hunting and fishing?" According to Williams, Scott replied, "You're not there to talk. You're there to work."

For several reasons, to the extent that Scott's testimony conflicts with that of other witnesses, I credit Scott. She appeared at the hearing under subpoena, and did not have an interest in the outcome of the case.

Additionally, as discussed above, Scott did not testify favorably about one of Respondent's principals, Robert Renner Jr., but called him a "name changer" who tried to avoid paying bills and taxes. She had left Respondent's employment after becoming dissatisfied with Renner's practices. Clearly, Scott demonstrated no motivation to shade her testimony to protect her former employer.

Moreover, based upon my observations while she testified, I formed the impression that Scott tended to speak her mind without regard to how it might affect the listener. On the one hand, she said that she liked applicants who belonged to the Union because they had superior work experience. On the other hand, she expressed distaste for what she perceived to be an attempt by the Union's business manager to enlist her help in getting her former employer in trouble. She testified that even though she did not like her former employer, she remained surprised by what she interpreted to be a Union effort to embroil that company in unfair labor practice charges.

In sum, Scott's testimony and, indeed, her demeanor as a witness lead to the conclusion that when she testified, she took the attitude "let the chips fall where they may." Her opinion regarding the Union's motivation is merely that - opinion - and has little relevance to the issues I must decide. However, I conclude that when she testified regarding what she did, saw

and heard, such testimony was as faithful to the facts as her memory allowed.

For all these reasons, I conclude that Scott's testimony is reliable and credit it. Therefore, I find that she did not make the comment attributed to her by Williams, and I recommend that the Board dismiss the allegation raised in Complaint paragraph 5(b).

Complaint paragraph 5(c) alleges on or about October 24, 1995, at its Port Orange office, Respondent, by Barbara Scott, threatened employees that union applicants would not be hired.

To establish this allegation, the General Counsel relies on the testimony of Daniel Fischer, who applied for a job as an electrician. Fischer testified that sometime in October 1995 he telephoned the Respondent and identified himself as applicant with union connections. The person with whom he talked told him to call back later to speak with someone named Barbara, whom I presume to be Barbara Scott.

The next day, Fischer used the state employment service as an entree to a job interview. According to Fischer, he spoke with Scott, who did not realize he was the same person who had called the previous day and identified himself with the union.

Fischer quoted Scott as saying that the Respondent's owner was antiunion and so they would stall union applicants rather than hire them. Fischer said he concealed his union membership and was hired. However, for the reasons I have already discussed, I have concluded that Scott is a very reliable witness. Based on my observations of the witnesses, I credit Scott rather than Fischer. Additionally, Fischer's version is somewhat implausible absent corroboration, which is not present. Therefore, I find that Scott did not make the statements which Fischer attributed to her.

Scott's testimony is not limited to a denial of such an allegation. Scott credibly testified that the Respondent's president had given her instructions not to discriminate against anyone on the basis of union activity or other factors such as race or sex. Crediting that testimony, I find that Scott neither engaged in unlawful discrimination nor made statements to suggest that she did.

As I will discuss later, the record does establish that Respondent engaged in certain unfair labor practices. However, another of its managers, Hank Gee, committed these violations and at a different location from where Scott worked.

I recommend that the Board dismiss the allegations raised by Complaint paragraphs 5(a), 5(b), and 5(c).

Complaint paragraphs 6(a) through 6(e), together with Complaint paragraph 10, allege that Respondent, by its supervisor, Hank Gee, made a number of statements in violation of Section 8(a)(1) of the Act.

Complaint paragraph 6(a) alleges that on about October 20, 1995, in a telephone conversation, Respondent, by Hank Gee, stated to employees that it was futile for union applicants to apply for work. Robert Murphy testified that on that date, he was present when Assistant Business Manager Williams telephoned Respondent's office and spoke with Gee. Murphy testified without contradiction that Williams told Gee that he had two men present in the office who were ready to come down for job interviews. Gee declined, saying that he wanted men who would stay working for him and not be subject to recall.

Gee did not testify and Murphy's account of this conversation is uncontradicted.

As testimony of other witnesses establishes, Gee stated, on numerous occasions, that persons who belonged to the union were "subject to recall." Although this phrase is cryptic, Gee considered it a disqualification.

Electrician Phillip Pelc also provided testimony which supports the allegations in Complaint paragraph 6(a). Pelc testified that late in October 1995, he telephoned Respondent's office and spoke with Hank Gee concerning employment for himself and some friends. At this point, Pelc did not identify himself as a Union member. Gee replied that he had plenty of work in Volusia County and that Pelc could bring others with him to apply for work.

A half hour later, Pelc, Assistant Business Manager Williams, and some others made a call to the same number from the Union hall. Williams actually placed the call, and when he reached Gee, Williams said that he was union and that they had plenty of people ready to work. Pelc testified that Gee replied that the unions were subject to recall and that Gee didn't want any guys subject to recall to be working for Second Shift or Jobsite Staffing.

Considering that Gee used the phrase "subject to recall" as synonymous with union membership, and conveyed that meaning to the people with whom he spoke, I find that Gee violated the Act by explaining a refusal to hire Union adherents in these terms. I conclude that the government has established the violation alleged in Complaint paragraph 6(a) and recommend that the Board find that Respondent thereby violated Section 8(a)(1) of the Act.

Complaint paragraph 6(b) alleges that on October 20, 1995, at its Port Orange office, Respondent, by Hank Gee, interrogated employees concerning their union membership, activities and sympathies.

Later on the same day Pelc had telephoned the Union hall, in late October 1995, he went to the Respondent's office. Pelc was not wearing any clothing which identified him with the Union. Pelc testified that Gee had him fill out an application form with a question on the back related to Union membership.

Additionally, during the job interview, Gee asked Pelc if he were subject to recall. Gee explained that if Pelc were a Union member, he would be subject to recall and said, "we don't want a union member working here because of that." (tr 103)

After filing the application, Pelc waited for a call from Respondent to inform him of a work assignment. On several occasions he telephoned Respondent but did not get a work assignment, except on one occasion Gee called to tell Pelc about a work opportunity in Melbourne, Florida. Pelc declined this work because it was too far away.

Finally, sometime in November or December 1995, Pelc returned to Respondent's office and told Gee that he was a Union member, a fact also obvious on this occasion from the emblems on Pelc's shirt and cap. Pelc testified that Gee said, "we figured there was a problem with your application. That's why we couldn't hire you."

Based on Pelc's uncontradicted testimony, which I credit, I find that the government has established the violation alleged in

Complaint paragraph 6(b), and recommend that the Board find that Respondent thereby violated Section 8(a)(1) of the Act.

Complaint paragraph 8 alleges that Respondent discriminated against a number of job applicants, including Pelc, because of their Union membership. I further conclude that Respondent refused to hire Pelc because of his affiliation with the Union.

Complaint paragraph 6(c) alleges that on about October 27, 1995, Respondent, by Gee, interrogated employees concerning their union membership, sympathies and activities. Electrician Christopher Downs testified that on that date, he drove to Respondent's Port Orange office and filled out a job application. In handwriting on the back of the application appeared a question about the application's union membership. Downs answered this question in the negative.

Downs testified that Gee also asked him about his Union membership and Downs again denied it. Downs' testimony is uncontradicted and I credit it.

Relying on Downs' testimony, I conclude that the government has proven the allegation raised in Complaint paragraph 6(c) and recommend that the Board find that Respondent thereby violated Section 8(a)(1) of the Act.

Complaint paragraph 6(d) alleges that on or about November 30, 1995, at its Port Orange office, Respondent, by Gee, impliedly informed employees that they would not be hired due to their union affiliation. My initial review of the evidence does not indicate Gee made such a statement on that date, but I will examine the record further before issuing the certification of this bench decision.

The record does establish that on about November 2, 1995, Gee spoke with electrician Christopher Downs, who had submitted a job application on October 27, 1995. A handwritten question on the back of that form had asked Downs about his union affiliation, which Downs had denied. When Downs did not hear from Respondent, he returned to Respondent's office on November 2, 1995 and spoke with Gee.

Downs told Gee that he was a Union member. Gee said that he "didn't have a problem" with hiring union electricians, that he had received plenty of applicants from the Union hall, but he just didn't have a place for them. This testimony is uncontradicted and I credit it.

Based on this testimony, I conclude that Respondent thereby violated Section 8(a)(1) of the Act and recommend that the Board so find.

Complaint paragraph 6(e) alleges that on about January 29, 1996, at its Port Orange office, Respondent, by Gee, impliedly threatened employees that Union applicants would not be hired. My initial examination of the evidence does not disclose a violation at that time, but I will review the record again before issuance of the Certification of this bench decision.

Complaint Paragraph 7 alleges that Respondent maintained in effect a rule prohibiting employees from discussing their wage rates among themselves, under penalty of termination. Former employee Fischer's testimony establishes the existence of this rule. Although I did not credit Fischer's testimony concerning statements attributed to Barbara Scott, I do credit Fischer's testimony regarding the work rule, because it is cor-

roborated by a copy of the rule itself, which is in evidence as General Counsel's Exhibit 19.

This prohibition clearly interferes with employees' rights to engage in the protected, concerted activity of discussing working conditions. See, e.g., *Phoenix Transit System*, 337 NLRB No. 78 (May 10, 2002). I recommend that the Board find that Respondent thereby violated Section 8(a)(1) of the Act.

Complaint paragraph 8 alleges that since on or about October 27, 1995, Respondent, by use of its job application, interrogated applicants about their Union membership. As already noted, credible evidence establishes that applicants were asked to answer a handwritten question on the back of the application concerning their union affiliation. I conclude that the government has established this allegation, and recommend that the Board find that Respondent thereby violated Section 8(a)(1) of the Act.

Complaint paragraph 9 alleges that on various specified dates, Respondent refused to consider for hire and/or to hire 17 job applicants identified by name. Respondent has denied this allegation.

The evidence establishes that Respondent unlawfully refused to consider for hire, or to hire, at least some of these applicants, most notably Christopher Downs and Robert Murphy. After further review of the record, I will make specific findings with respect to each of the 17 applicants in the Certification of Bench Decision.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, Remedy, Order and Notice. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

The hearing is closed.

PROCEEDINGS

(Time Noted: 10:35 a.m.)

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JUDGE LOCKE: Hearing will be in order. This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. The evidence established is that Respondent violated Section 8(a)(1) and (3) of the Act, although not in every instance alleged in the complaint.

Procedural History

This case began on November 7, 1995, when International Brotherhood of Electrical Workers Local Union 756 filed its initial charge in this proceeding. For convenience, I will refer to this labor organization as the Union or the Charging Party. The Union's unfair labor practice charge identified the Employer as the Second Shift, Inc., doing business as Jobsite Staffing, a temporary employment agency with an office in Altamonte Springs, Florida. For convenience, I will refer to this corporation as Jobsite Staffing. The original charge alleged that this Employer unlawfully refused to consider certain job applicants for hire because of "their support, affiliation, or presumed membership in activities on the Union's behalf."

On April 29, 1996, the Union amended this charge.

On June 17, 1996, after investigation of the charge, the Regional Director of Region 12 of the National Labor Relations Board issued a complaint and notice of hearing, which I will

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call the Complaint. In issuing this Complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the General Counsel or as the Government.

On March 20, 1998, the Union again amended the unfair labor practice charge. This amendment named as the Employer the Second Shift, Inc., d/b/a Jobsite Staffing/Jobsite/Jobsite Personnel.

On August 6, 2001, the General Counsel issued an amended complaint which named as Respondent both the Second Shift, Inc., d/b/a Jobsite Staffing and Jobsite Personnel, Inc., as a single Employer. For simplicity I will refer to this latter corporation as Jobsite Personnel. Additionally, for convenience, I will refer to this amended complaint simply as the Complaint.

On August 17, 2001, Jobsite Personnel, Inc., filed an answer to this amended Complaint.

On August 21, 2001, Jobsite Staffing filed an answer to the amended Complaint.

On December 27, 2001, the Regional Director issued an order postponing the hearing in this matter indefinitely.

On March 19, 2002, the Regional Director issued an order scheduling the hearing to begin on August 26, 2002.

On August 26, 2002, hearing opened before me in New Smyrna Beach, Florida. Respondent did not appear. Counsel for the

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General Counsel stated on the record that more than a year previously the lawyer for Jobsite Staffing had informed him that this company had gone out of business in July 1996. Further, Counsel for the General Counsel quoted this attorney, Gary S. Betensky as saying that he no longer represented this client and that "neither he nor his client would show up at the hearing whenever it would be."

Additionally, the General Counsel stated on the record that in about March 2001, the attorney for Jobsite Personnel, Inc., had stated that he no longer represented this client, which was defunct, and that he would not appear at the hearing on this client's behalf.

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addresses listed for the registered agents of the Respondent corporations in the records of the Florida Division of Corporations. However, as already noted, the Postal Service returned these documents undelivered. Counsel for the General Counsel also stated that in August 2002, two agents from the Board's Miami Office visited three other addresses where they believed Jobsite Personnel or Jobsite Staffing might be doing business. However, they found no one at these locations.

Concluding that the General Counsel had tried all reasonable means to locate and serve the Respondent, I allowed the General Counsel to proceed with the Government's case. See *Beta Steel Corporation*, 326 NLRB 1267, 1267 Footnote 3, 1268 (1988); *Quality Hotel*, 326 NLRB 83, 83 Footnote 4 (1998).

The General Counsel presented witnesses on August 26, 2002. The next day the General Counsel requested an adjournment so that it could serve a subpoena on a company which had been a customer of Respondent to obtain additional evidence regarding Respondent's impact on interstate commerce necessary to establish that Respondent had met the Board standards for assertion of jurisdiction as alleged in the complaint. I granted an adjournment to September 9, 2002.

The General Counsel thereafter moved for an additional extension of time and I extended the recess until September 11, 2002, when the hearing resumed. Respondent did not appear when the hearing resumed.

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The General Counsel completed the presentation of the Government's evidence on September 2001 and also presented oral argument on that date.

Today, September 12, 2002, I am issuing this bench decision.

Issues Relating to Jurisdiction and Status of the Parties

In the answers to amended Complaint filed by Jobsite Staffing and Jobsite Personnel, both corporations denied the allegations in Complaint paragraph 1 related to the filing and service of the charge and amended charges. However, as already discussed, neither of these corporations appeared at the hearing and the affidavits of service of the charges remain un rebutted.

Based upon this evidence and noting the presumption that Government agencies conducted business in a regular manner, I find that the General Counsel has established the allegations in Complaint paragraphs 1(a), 1(b) and 1(c).

Complaint paragraph 2(a) alleges that at all material times, Respondent, Jobsite Staffing, a Florida corporation with offices in places of business located in Altamonte Springs, Florida, and at various other locations in Florida had been engaged in the business of supplying temporary labor to employers in the construction industry throughout the State of Florida. Jobsite Staffing denied this allegation on the basis that the Complaint did not specify what time period constituted a "at all material times." However, Jobsite Staffing's answer

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did contain the following admission:

"Respondent admits that at one time it did have an office in Altamonte Springs, Florida, and at other locations within the

State of Florida and had been engaged in the business of supplying temporary labor.”

Additionally, Jobsite Staffing attached as an appendix to its answer and specifically incorporated by reference, a March 18, 1996, letter to a Board Agent from Jobsite Staffing’s attorney at the time. This letter and its attachments established that Jobsite Staffing was in the business of supplying temporary labor to other employers and that on September 25, 1995, had opened an office at Port Orange, Florida.

Based on these documents and the uncontradicted testimony of Barbara Scott, whom I found to have been a supervisor and agent of Jobsite Staffing in 1995, I find that the General Counsel has proven the allegations in Complaint paragraph 2(a).

Complaint paragraph 2(b) alleges that at all material times since on or about February 29, 1996, Jobsite Personnel, a Florida corporation with offices and places of business located in Port Orange, Florida, and in Altamonte Springs, Florida, and at various other locations in the State of Florida, has been engaged in the business of supplying temporary labor to employers in the construction industry throughout the State of Florida. Jobsite Personnel’s answer generally denied the

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allegations in Complaint paragraph 2 but did include this admission:

“With regard to Complaint paragraph 2(b) of the Complaint, Respondent admits that in 1996 Respondent was incorporated and started this business in the State of Florida supplying temporary labor to construction contractors. However, Respondent denies the remaining allegations of said paragraph 2(b).”

In addition to this admission and the records of the Florida Division of Corporations, certain other evidence supports the allegations in Complaint paragraph 2(b). The General Counsel introduced into evidence certain Dun & Bradstreet “Business Information Reports” concerning Jobsite Personnel. Such reports, of course, constitute hearsay which might not be competent evidence under the Federal Rules of Evidence. However, Section 10(b) of the National Labor Relations Act requires adherence to the Rules of Evidence only so far as practicable. The record does not establish that Jobsite Personnel is defunct and it filed a report with the Florida Division of Corporations in 2001. Its failure to appear at the hearing, notwithstanding that it filed an answer to the Complaint, creates a situation in which it is not practicable to follow the Rules of Evidence strictly. Therefore, I will rely on the Dun & Bradstreet reports but only to the extent that they confirm or corroborate other evidence in the record.

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Additionally, the General Counsel relies on admissions in response to an inquiry which a Board Agent sent to both to Robert Renner at Jobsite Staffing and to Robert Renner, Jr., at Jobsite Personnel. Other evidence in the record establishes that Robert Renner, Jr., is the son of Robert Renner.

The Board Agent’s inquiry is dated May 7, 1999. On the second page below the Board Agent’s signature, Robert Renner answered in handwriting and dated the response May 27, 1999. Along with a letter which Renner sent back to the Board Agent, he enclosed documents. In his response, Renner cautioned that

“the information provided is from me and me alone. I cannot speak for Jobsite Personnel, Inc.”

In view of this caveat, I first must determine whether statements by Robert Renner, the father, constitute admissions attributable to Jobsite Personnel. A report which Jobsite Personnel filed with the Florida Secretary of State on April 23, 1999, lists Robert B. Renner as president of the corporation and Robert B. Renner, Jr., as its registered agent. Although the report gives the same address for both Renners, that address is the principal place of business of Jobsite Personnel. From the fact that the report identifies the registered agent as Jr., but does not use this designation for the corporation’s president, I conclude that the report is referring to two separate individuals and that the Robert B. Renner shown as corporate president is the same person who sent the May 27, 1999, response

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to the Board Agent.

Further, I conclude that on May 27, 1999, Robert B. Renner was a corporate officer and, therefore, that his statements concerning Jobsite Personnel constitute admissions binding on that corporation notwithstanding his disclaimer. The documents enclosed with Renner’s response state that on February 29, 1996, “with his father’s approval, Robert B. Renner, Jr., started Jobsite Personnel, Inc.” They also indicated that unlike Jobsite Staffing, the new corporation did not provide fringe benefits to its employees so that it could compete with a rival which also did not pay fringe benefits. However, the documents do establish that Jobsite Personnel engaged in the same business as Jobsite Staffing, providing temporary workers to other employers.

Based upon all of this evidence, I find that the Government has proven the allegations raised in Complaint paragraph 2(b).

Complaint paragraph 2(c) alleges that “on or about February 29, 1996, Respondent, Personnel, was established by Respondent, Staffing, as a subordinate instrument to and a disguised continuation of Respondent, Staffing.”

Complaint paragraph 2(d) alleges that “at all material times since on or about February 29, 1996, Respondent, Staffing, and Respondent, Personnel, have been affiliated business enterprises with common officers, ownership, directors, management and supervision, have administered a common labor

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policy, have shared common premises and facilities, have interchanged personnel with each other and have held themselves out to the public as single integrated business enterprises.”

Complaint paragraph 2(e) alleges that Jobsite Staffing and Jobsite Personnel “are and have been at all material times, alter egos in the single employer within the meaning of the Act.”

The answers of both Jobsite Staffing and Jobsite Personnel deny the allegations in Complaint paragraphs 2(c), 2(d) and 2(e). As described above, the documents included with Robert Renner’s May 27, 1999, response to the Board Agent states that “with his father’s approval, Robert B. Renner, Jr., started Jobsite Personnel, Inc.” Additionally, these documents include organization charts for Jobsite Staffing and Jobsite Personnel.

The chart for Jobsite Staffing indicates that Robert B. Renner, the father, was president of that corporation and that

James Stevens was vice president of operations, that Pam Anderson was operations assistant and that Lois M. Renner was accounting manager.

A chart for Jobsite Personnel lists Robert B. Renner, Jr., as president and Robert B. Renner, Sr., as consultant. It shows Lois M. Renner as accounting manager, Pam Anderson who held the position of operations assistant at Jobsite Staffing, appeared on the Jobsite Personnel chart as operations manager. The fact that Lois M. Renner served as accounting manager

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in both corporations indicates common oversight of the financial affairs of both entities. Additionally, documents which Jobsite Personnel filed with the Florida Secretary of State lists Lois Renner as a corporate officer, specifically, treasurer/secretary. She was, in effect, chief financial officer of that corporation.

The fact that Pam Anderson who reported the Jobsite Staffing operations manager served as operations manager at Jobsite Personnel shows the connection in the operations of the two companies. Although Anderson was in charge of operations at Jobsite Personnel, her subordinate role at Jobsite Staffing is consistent with the finding that Jobsite Personnel was in a subordinate role.

Although the organization chart submitted by the Senior Robert Renner on May 27, 1999, indicates that he was a consultant at Jobsite Personnel, documents that corporation filed with the Florida Secretary of State show that during certain periods, Renner served as Jobsite Personnel's president.

Newspaper advertisements, as well as the testimony of Union business manager, Stephen Williams, established that Jobsite Personnel invited applicants to inquire about employment by calling the same telephone number used by Jobsite Staffing. Moreover, when Williams called this number, the person answering the telephone indicated that Jobsite Personnel was the same business as Jobsite Staffing.

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Even without the testimony of Barbara Scott, who was a supervisor at Jobsite Staffing within the meaning of Section 2(11) of the Act, the record establishes that Jobsite Staffing and Jobsite Personnel constitute a single employer. Her testimony bolsters that conclusion. When asked about the relationship between Jobsite Staffing and Jobsite Personnel, Scott referred to Robert Renner, Jr., as "a professional name changer. He's bad about paying taxes, therefore, he just -- taxes and bills, so he just changes his name, which is why I left the company."

It is not necessary to determine whether Renner is a "professional name changer" or bad about paying taxes and bills. It suffices to conclude based on all the evidence that the General Counsel has proven the allegations raised in Complaint paragraphs 2(c), 2(d), and 2(e).

I so find because Jobsite Staffing and Jobsite Personnel are alter-egos and constitute a single employee, I will refer to them together simply as Respondent.

Complaint paragraph 2(f) alleges commerce facts to support the conclusion alleged in Complaint paragraph 2(g) that Respondent has been an employer engaged in commerce within

the meaning of Section 2(6) and (7) of the Act. Respondent denies these allegations.

To establish that Respondent constitutes an employer engaged in commerce and, therefore, within the Board's

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jurisdiction, the General Counsel relies on records provided by one of Respondent's customers, Owen Electric Company, Inc. These records and the testimony of their custodian establish that during a representative 12-month period, Respondent provided services in excess of \$50,000.00 to Owen Electric, an enterprise doing business within the State of Florida, which is directly engaged in interstate commerce. I find that the Government has proven the allegations in complaint paragraphs 2(f) and 2(g).

Complaint paragraph 3 alleges that at all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act. Respondent denies this allegation.

Based on the testimony of Union business manager Williams, I find that the General Counsel has proven this allegation.

Complaint paragraph 4 alleges that four individuals were at all material times, supervisors of Respondent and its agents within the meaning of Sections 2(11) and 2(13) of the Act, respectively. These individuals are Robert B. Renner, president of Jobsite Staffing, Robert B. Renner, Jr., president of Jobsite Personnel, Hank Gee, accounting executive, and Barbara Scott, office manager. Respondent denies that these individuals were supervisors and agents.

Based primarily on the testimony of Barbara Scott, I find that she and Hank Gee both possessed the authority to hire

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employees and that in so doing, exercised independent judgment in the interest of Respondent. I conclude that they were Respondents supervisors and agents within the meaning of Sections 2(11) and 2(13).

Based upon Scott's testimony and other evidence, including reports filed with the Florida Secretary of State, and admissions made in documents submitted to the Board, I find that Robert B. Renner and Robert B. Renner, Jr., were Respondents' supervisors and agents within the meaning of Section 2(11) and 2(13) of the Act.

The Unfair Labor Practice Allegations

On July 31, 1995, a rented van pulled up at Respondent's office in Altamonte Springs, Florida, and discharged 14 men. Inside the office they told manager Barbara Scott that they were there to apply for work. Assistant business manager Stephen Williams had planned this visit earlier the same day, almost on the spur of the moment. Calling a telephone number which appeared in the help wanted ad, Williams had reached Scott. From her Williams had learned that Respondent needed 11 electricians to refer to employers in the Daytona Beach area.

During the telephone call, Scott had indicated that Respondent planned to open an office in the Daytona Beach area to serve these employers and suggested that Williams wait a cou-

ple of weeks until that office opened. When Williams replied that he did not want to wait, Scott had suggested that if he

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came to Respondent's Altamonte Springs office, he could apply there. Williams brought 13 union members with him as part of an organizing strategy known by its acronym, COMET. The strategy entails sending union members to apply for work with a targeted employer. Sometimes the applicants would appear at the employer's office wearing clothing which clearly identified their affiliation with the union. Other times, a union member would apply for work without revealing this link. If an employer hired applicants not knowing to be associated with the union but passed over applicants wearing union insignia, the disparate treatment would indicate to the union that this employer had discriminated in violation of the Act.

On July 31, 1995, the 14 men who entered Respondent's offices wore caps and T-shirts clearly proclaiming their union identity. Complaint paragraph 5 alleges that on this occasion Respondent, by Barbara Scott, told employees that they could not talk about the union on the job. Respondent denied this unfair labor practice allegation and all other unfair labor practice allegations in the complaint.

According to assistant business manager Williams, another person employed by Respondent had come out of an interior office and had begun talking with the job applicants. This person suggested that the applicants wait until Respondent's Daytona Beach office opened in two weeks, when Scott interjected that they could go on strike if they wanted to but if they did,

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they'd be replaced.

Williams testified that Scott told the men that they were not allowed to talk union except at lunchtime. Williams asked, are we not allowed to talk about other issues, such as hunting and fishing. According to Williams, Scott replied, "You're not there to talk, you're there to work." For several reasons to the extent that Scott's testimony conflicts with that of other witnesses, I credit Scott. She appeared at the hearing under subpoena and did not have an interest in the outcome of the case. Additionally, as discussed above, Scott did not testify favorably about one of Respondent's principals, Robert Renner, Jr., but called him a name changer who tried to avoid paying bills and taxes. She had left Respondent's employment after becoming dissatisfied with Renner's practices. Clearly Scott demonstrated no motivation to shade her testimony to protect her former employer.

Moreover, based upon my observations while she testified, I formed the impression that Scott tended to speak her mind without regard to how it might affect the listener. On the one hand, she said that she liked applicants who belonged to the union because they had superior work experience. On the other hand she expressed distaste for what she perceived to be an attempt by the Union's business manager to enlist her help in getting her former employer in trouble. She testified that even though she did not like her former employer, she remained

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surprised by what she interpreted to be a union effort to embroil that company in unfair labor practice charges.

In sum, Scott's testimony and indeed her demeanor as a witness lead to the conclusion that when she testified, she took the attitude "let the chips fall where they may." Her opinion regarding the union's motivation is merely that, opinion. It has little relevance to the issues I must decide. However, I conclude that when she testified regarding what she did, saw, and heard, such testimony was as faithful to the facts as her memory allowed.

For all these reasons, I conclude that Scott's testimony is reliable and credited. Therefore, I find that she did not make the comment attributed to her by Williams and I recommend that the Board dismiss the allegation raised in Complaint paragraph 5(b).

Complaint paragraph 5(c) alleges that on or about October 24, 1995, at its Port Orange office, Respondent, by Barbara Scott, threatened employees that union applicants would not be hired. However, for the reasons I have already discussed, I have concluded that Scott is a very reliable witness. Scott's testimony is not limited to a denial of such an allegation. Scott credibly testified that Respondent's president had given her instructions not to discriminate against anyone on the basis of union activity or other factors such as race or sex.

Crediting that testimony, I find that Scott neither engaged

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in unlawful discrimination or made statements to suggest that she did. As I will discuss later, the record does establish that Respondent engaged in certain unfair labor practices. However, another of its managers, Hank Gee, committed these violations at a different location from where Scott worked.

I recommend that the Board dismiss the allegations raised by Complaint paragraphs 5(a), 5(b), and 5(c).

Complaint paragraphs 6(a) through 6(c), together with Complaint paragraph 10, allege that Respondent, by its supervisor, Hank Gee, made a number of statements in violation of Section 8(a)(1) of the Act.

Complaint paragraph 6(a) alleges that on about October 20, 1995, in a telephone conversation, Respondent, by Hank Gee, stated to employees that it was futile for union applicant's to apply for work. Robert Murphy testified that on that date, he was present when assistant business manager Williams telephoned Respondent's office and spoke with Gee. Murphy testified without contradiction that Williams told Gee that he had two men present in the office who were ready to come down for job interviews. He declined, saying that he wanted men who would stay working for him and not be subject to recall. He did not testify and Murphy's account of this conversation is uncontradicted.

As testimony of other witnesses establishes, Gee stated on numerous occasions that persons who belong to the union were

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"subject to recall." Although this phrase is cryptic, Gee considered it a disqualification.

Electrician, Philip Pelc, also provided testimony which supports the allegations in Complaint paragraph 6(a). Pelc testified that late in late October 1995, he telephoned Respondent's office and spoke with Hank Gee concerning employment for himself and some friends. At this point, Pelc did not identify himself as a union member. He replied that he had plenty of work in Volusia County and that Pelc could bring other with him to apply for work. A half hour later Pelc, assistant business manager Williams, and some others, made a call to the same number from the union hall. Williams actually placed the call and when he reached Gee, Williams said he was union and that they had plenty of people ready to work. Pelc testified that Gee replied that the unions were subject to recall and that Gee didn't want any guys subject to recall to be working for Second Shift or Jobsite Staffing.

Considering that Gee used the phrase, subject to recall, as synonymous with union membership and conveyed that meaning to the people with whom he spoke, I find that Gee violated the Act by explaining refusal to hire union adherents in these terms.

I conclude that the Government has established the violations alleged in Complaint paragraph 6(a) and recommend that the Board find that Respondent thereby violated Section 8(a)(1) of the Act.

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Complaint in paragraph 6(b) alleges that on October 20, 1995, at its Port Orange office, Respondent, by Hank Gee, interrogated employees concerning their union membership activities and sympathies. Later on the same day, Pelc had telephoned the union hall. In late October 1995, he went to Respondent's office. Pelc was not wearing any clothing which identified him with the union. Pelc testified that Gee had him fill out an application form with a question on the back related to union membership.

Additionally during the job interview, he asked Pelc if he were subject to recall. He explained that if Pelc were a union member, he would be subject to recall and said, "we don't want a union member working here because of that." After filing the application, Pelc waited for a call from Respondent to inform him of a work assignment. On several occasions he telephoned Respondent but did not get a work assignment, except on one occasion he called to tell Pelc about a work opportunity in Melbourne, Florida. Pelc declined this work because it was too far away. Finally, sometime in November or December 1995, Pelc returned to Respondent's office and told Gee that he was a union member, a fact also obvious on this occasion from the emblems on Pelc's shirt and cap. Pelc testified that Gee said, "we figured there was a problem with your application, that's why we couldn't hire you."

Based on Pelc's uncontradicted testimony, which I credit, I

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find that the Government has established the violation alleged in Complaint paragraph 6(b) and recommend that the Board find that respondent thereby violated Section 8(a)(1) of the Act.

Complaint paragraph 8 alleges that Respondent discriminated against a number of job applicants, including Pelc because of their union membership. I further conclude that Re-

spondent refused to hire Pelc because of his affiliation with the union.

Complaint paragraph 6(c) alleges that on or about October 27, 1995, Respondent, by Gee, interrogated employees concerning their union membership, sympathies, and activities. Electrician Christopher Downs testified that on that date, he drove to Respondent's Port Orange office and filled a job application. In handwriting on the back of the application appeared a question about the applicant's union membership. Downs answered this question in the negative. Downs testified that Gee also asked him about his union membership and Downs again denied it. Downs' testimony is uncontradicted and I credit it.

Relying on Downs' testimony, I conclude that the Government has proven the allegations raised in Complaint paragraph 6(c) and recommend that the Board find that Respondent, thereby, violated 8(a)(1) of the Act.

Complaint paragraph 6(d) alleges that on or about November 30, 1995, at its Port Orange office, Respondent, by Gee, impliedly informed employees that they would not be hired due to their union affiliation. My initial review of the evidence does

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not indicate Gee made such a statement on that date, but I will examine the record further before issuing a certification in this bench decision.

The record does establish that on or about November 2, 1995, Gee spoke with electrician Christopher Downs who had submitted a job application on October 27, 1995. A handwritten question on the back of that form had asked Downs about his union affiliation, which Downs had denied. When Downs did not hear from Respondent, he returned to Respondent's office on November 2, 1995, and spoke with Gee. Downs told Gee that he was a union member. Gee said that he didn't have a problem with hiring union electricians, that he had received plenty of applicants from the union hall but he just didn't have a place for them. This testimony is uncontradicted and I credit it.

Based on this testimony, I conclude that Respondent thereby violated Section 8(a)(1) of the Act and recommend that the Board so find.

Complaint paragraph 6(e) alleges that on about January 29, 1996, at its Port Orange office, Respondent, by Gee, impliedly threatened employees that union applicants ordered not be hired. My initial examination of the evidence does not disclose a violation at that time, but I will review the record again before issuance of the certification of this bench decision.

Complaint paragraph 7 alleges that Respondent maintained in effect, a rule prohibiting employees from discussing their wage

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rates among themselves under penalty of termination. Former employee Fisher's testimony establishes the existence of this rule. Although I did not credit Fisher's testimony concerning statements attributed to Barbara Scott, I do credit Fisher's testimony regarding the work rule because it is corroborated by a copy of the rule itself, which is in evidence as General Counsel's Exhibit 19. This prohibition clearly interferes with em-

ployee's rights to engage in the protected concerted activity of discussing working conditions. See e.g. *Phoenix Transit System*, 337 NLRB 78 (May 10, 2002).

I recommend that the Board find that Respondent thereby violated Section 8(a)(1) of the Act.

Complaint paragraph 8 alleges that since on or about October 27, 1995, Respondent, by use of his job application, interrogated applicants about their union membership. As already noted, credible evidence establishes that applicants were asked to answer a handwritten question on the back of the application concerning their union affiliation.

I conclude that the Government has established this allegation and recommend that the Board find that Respondent thereby violated Section 8(a)(1) of the Act.

Complaint paragraph 9 alleges that on various specified dates, Respondent refused to consider for hire and/or to hire 17 job applicants identified by name. Respondent has denied this allegation. The evidence establishes that Respondent unlawfully

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refused to consider for hire or to hire at least some of these applicants, most notably Christopher Downs and Robert Murphy. After further review of the record, I will make specific findings with respect to each of the 17 applicants in the certification of bench decision.

When the transcript of this proceeding has been prepared, I will issue a certification which attaches as an exhibit the portion of the transcript reporting this bench decision. The certification also will include provisions relating to the findings of fact, conclusions of law, remedy, order, and notice. When that certification is served upon the parties, the time period for filing an appeal will begin to run.

The hearing is closed.

(Whereupon, at 11:15 a.m., the hearing in the above-entitled matter was closed.)

APPENDIX B

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT inform employees, including job applicants, either expressly or by implication, that we will not hire or consider for hire any person because of his or her union membership, activities, or sympathies.

WE WILL NOT interrogate employees, including job applicants, concerning their union membership, activities or sympathies.

WE WILL NOT maintain or enforce a rule prohibiting employees from discussing their wage rates.

WE WILL rescind our previous unlawful rule prohibiting employees from discussing their wage rates, and rescind and expunge any discipline resulting from the application of that rule.

WE WILL offer immediate reinstatement to Barry Bostwick, Jonathan Carnes, Robert Murphy, Phillip Pelc, and Stephen Williams and make them whole, with interest, for all losses they suffered because of the unlawful discrimination against them.

THE SECOND SHIFT, INC. D/B/A JOBSITE
STAFFING AND JOBSITE PERSONNEL, INC., AS
SINGLE EMPLOYER