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**Jacobs Heating and Air Conditioning and Sheet Metal Workers International Association, Local Union No. 19.** Cases 4-CA-28122 and 4-CA-28143

May 20, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND SCHAUMBER

On September 18, 2001, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Charging Party filed exceptions and supporting argument, and the Respondent filed an answering 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 briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.<sup>2</sup> For the reasons that follow, we affirm the judge's finding that the Respondent did not violate Section 8(a)(3) and (1) of the Act in refusing to hire union applicants John Barzeski, Joseph Barzeski, and Patrick Keenan.

In *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002), the Board held that, in order to carry his initial burden in a case alleging discriminatory refusal to hire, 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.

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

<sup>2</sup> In the absence of exceptions, we affirm the judge's dismissal of the allegations that the Respondent unlawfully refused to hire James White and threatened John Barzeski. We also adopt the judge's dismissal of the allegation that the Respondent unlawfully refused to consider the union applicants, for the reasons set forth in his decision.

Id. at 12 [footnotes omitted]. Should the General Counsel make that showing, the burden shifts to the respondent to show that it "would not have hired the applicants even in the absence of their union activity or affiliation." Id.

If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show . . . that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity." [Id.]

Here, the judge found that the Respondent was hiring and that antiunion animus contributed to the decision not to hire the three applicants. (No exceptions have been filed to these findings.) The judge concluded, however, that the General Counsel had not met his *FES* burden of proving that the applicants had the "experience or training relevant to the announced or generally known requirements" of the positions for hire. Even assuming that this burden had been met, the judge observed, the Respondent had established a defense, by showing that the applicants "did not possess the specific qualifications the position required."

Here, the "announced or generally known requirements of the position" were those reflected in the Respondent's newspaper advertisement, which read in relevant part:

Air Conditioning/Heating. Aggressive co. established in all aspects of HVAC [Heating, Ventilation, Air Conditioning] offers F/T permanent positions in installation & service. Exp'd [Experienced] individuals that possess a positive attitude with a strong desire to succeed should call.

The judge accordingly found that the Respondent "was looking for employees experienced in all aspects of HVAC for positions in installation and service."

We agree with the judge that, in these circumstances, the General Counsel failed to carry his initial burden with respect to the applicants' relevant training and experience. The Respondent is a contractor that specializes in residential installation and service of heating, ventilation, and air-conditioning (HVAC) systems. It performs the full range of HVAC work, involving a variety of tasks including electrical, piping, and wiring work. The Respondent's advertisement indicated that the Company performed work in "all aspects" of the HVAC field, and asked for "experienced individuals" to fill positions in installation and service. It is clear from the Respondent's advertisement that the relevant experience for the posi-

tion was broad: i.e., experience in “all aspects” of HVAC work, not merely some. The union applicants had narrow, not broad experience. Their experience was primarily in the sheet metal aspect of HVAC work, which was only a small portion of the Respondent’s business.

Thus, the General Counsel has shown only that the union applicants had *some* HVAC experience. The Respondent was seeking more. Our colleague accuses us of reading the Respondent’s advertisement too narrowly. However, in our view, it is her interpretation that seems too broad. The advertisement stated that the Respondent performed “all aspects of HVAC” work. The advertisement sought experienced employees for “permanent positions in installation and service.” Our colleague says that an employee who was experienced in only one aspect of the Respondent’s operation would qualify. In doing so, our colleague places her own interpretation above that of the advertiser. In addition, that interpretation is unreasonable. Given the statement that the Respondent performed *all* aspects of HVAC work, and given the fact that it sought permanent persons who could perform installation and servicing, it is unreasonable to suppose that the Respondent would be satisfied with a narrowly experienced person.

Further, even assuming that our colleague is correct, and that the union applicants did have generally relevant experience, we find that the Respondent carried its *FES* burden by proving that, in the words of *FES*, the union applicants (1) “did not possess the specific qualifications the position required” or (2) that “others (who were hired) had superior qualifications” and were hired for that reason.

With respect to the first part of the defense, the record is clear that, in addition to seeking broadly experienced HVAC technicians, the Respondent preferred to hire workers who were certified to handle chlorofluorocarbon (CFC) refrigerants, as required by Federal regulations. A CFC certification is a highly desirable qualification for HVAC work, and a large majority of the Respondent’s HVAC technicians were CFC-certified. The union applicants lacked this important certification, but other applicants did not.

With respect to the second part of the defense, the Respondent has shown that the persons who were hired had qualifications that were superior to those of the alleged discriminatees. During the 30-day period when the union applications were viable,<sup>3</sup> the Respondent hired Frank Wilson and David Seibel. Wilson and Seibel had CFC certifications, and both were trained in all aspects of

<sup>3</sup> The judge found that Respondent only held applications for 30 days, after which they were considered stale. There are no exceptions to this finding.

HVAC work.<sup>4</sup> By contrast, the alleged discriminatees lacked CFC certification. Further, Joseph Barzeski did not even want to do HVAC work. He wanted to do sheet metal work, and sheet metal work was only a minimal portion of the Respondent’s work. Finally, neither the Barzeskis nor Keenan had worked in their trade for years, and that trade was sheet metal work.

For all the foregoing reasons, we conclude that the Respondent did not unlawfully refuse to hire the union applicants and that the complaint was properly dismissed.

#### ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Dated, Washington, D.C. May 20, 2004

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Robert J. Battista, Chairman

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Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

Because I believe that the majority takes too narrow a view of what constituted the relevant experience for job applicants in this case, and because I believe that union affiliation (not CFC certification) was the critical factor in the hiring decision at issue, I dissent from the dismissal of the complaint allegation that the Respondent unlawfully refused to hire union applicants John Barzeski, Patrick Keenan, and Joseph Barzeski.<sup>1</sup>

It is conceded here that antiunion animus played a part in the Respondent’s decision not to hire the union applicants. Contrary to my colleagues and the judge, I would find (1) that the General Counsel demonstrated that the union applicants had both experience and training relevant to the announced requirements for the positions that the Respondent sought to fill; and (2) that, in turn, the Respondent failed to prove that it refused to hire the union applicants because they lacked CFC certification and

<sup>4</sup> Our colleague faults Seibel as being only a recent graduate of an HVAC school. However, Seibel was hired as a helper. None of the discriminatees was applying for the position. Further, in contrast to our dissenting colleague, we agree with the judge that the Respondent’s failure to hire the union applicants as helpers—as opposed to the installation or “mechanic” positions they actually applied for—is immaterial. That they might have been qualified for helper positions, and that the Respondent could have chosen to employ them as helpers, does not establish a discriminatory refusal to hire them for the positions they sought.

<sup>1</sup> In all other respects, I agree with the majority decision.

were experienced only in “sheet metal work,” not all aspects of HVAC work.

Given the newspaper advertisement placed by the Respondent for “experienced individuals,” the union applicants here unquestionably “met the employer’s publicly announced or generally known requirements of the position.” *FES*, 331 NLRB 9, 13 (2000). Under *FES*, then, we should conclude that the General Counsel has met his initial burden of proof. It is puzzling that the majority disagrees.

The majority, like the judge, read the Respondent’s advertisement as announcing that only applicants with experience in all aspects of HVAC work were sought. This interpretation is unreasonably narrow. The Respondent certainly described its work as involving “all aspects of HVAC,” and it clearly sought “experienced” persons. But, on its face, the advertisement does not demand that applicants themselves have experience in all—as opposed to some—aspects of the work done by the Respondent. Presumably not every employee of the Respondent must be capable of doing every job or task involved in the work. The General Counsel proved that the union applicants were experienced in at least some, and perhaps most, aspects of HVAC work. Given the finding of animus, that was sufficient to place the burden on the Respondent to prove that, despite the antiunion animus that influenced its decision, it still would have refused to hire the union applicants for lawful reasons.

In turn, I reject the Respondent’s argument that it would not have hired the union applicants because they lacked the CFC certification to handle refrigerants and were only experienced in “sheet metal work” as opposed to all aspects of HVAC work. The Respondent admits that it hired numerous applicants without CFC certifications, and the record shows that Respondent had hired applicants who were not experienced in all aspects of HVAC work. The Board has rejected employer defenses based on putative hiring standards that were frequently observed in the breach. See *North Bay Plumbing*, 327 NLRB 899, 900 (1999); *Americlean*, 335 NLRB 1052, 1053 (2001).<sup>2</sup>

<sup>2</sup> In my dissent in *Kelly Construction*, 333 NLRB 1272, 1273 (2001), I argued that, where an employer bases its defense on neutral hiring policies, those policies must be shown not to be an ad hoc response to a union campaign. Instead, they should be:

- (1) in existence before the organizational effort; (2) openly promulgated; and (3) widely disseminated among the personnel involved in the hiring process.

Id. at 1273. The Respondent made no such showing concerning the CFC “requirement.” The Respondent made numerous exceptions to this supposed CFC requirement before the Union arrived on the scene. In addition, Respondent’s service manager, John Schell, admitted that the CFC certification was not in fact an “absolute requirement” for the jobs. And there is no evidence that the CFC certification was openly

Nor, in my view, has the Respondent shown that the individuals it hired were better qualified than the union applicants. Union applicant John Barzeski had 7 years of experience in HVAC work at the time he applied; union applicant Keenan had 6 years of the same. Their experience included most, if not all, aspects of HVAC work, as supported by their testimony. In contrast, Frank Wilson, who was hired as an installation technician, had only 3 years of experience and attended an HVAC school. The only qualification he possessed that John Barzeski and Patrick Keenan did not was the CFC certification, which the Respondent did not consistently require.

Union applicant Joseph Barzeski was close to the completion of his training at the Union’s school, where he learned the basics of the HVAC trade, including piping, electrical work, and heating systems. He also had 6 months of experience working with sheet metal fabrication and installation. In contrast, David Seibel, hired as a helper, was a recent graduate of an HVAC school and had a CFC license but no experience whatsoever. Aside from the CFC requirement, which was not consistently applied, it is doubtful whether Seibel was more qualified than even Joseph Barzeski for the helper position that Respondent gave him. He was certainly less qualified than either John Barzeski or Keenan for that position.

In any event, the judge found that Respondent was looking for two helpers during the relevant period, and Seibel was the only one hired. Any of the union applicants could also have been hired as helpers.<sup>3</sup>

For these reasons, I find that the Respondent failed to carry its burden of showing, by a preponderance of the evidence, that it would not have hired the union applicants even absent antiunion animus. I therefore respectfully dissent.

Dated, Washington, D.C. May 20, 2004

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Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

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promulgated or widely disseminated to the relevant parties by the Respondent.

<sup>3</sup> Contrary to the judge, I find it irrelevant that the union applicants applied for installation or “mechanic” positions, and not as helpers. The Respondent had hired applicants for positions other than the one for which they applied. Employee Jenkins applied as a technician but was hired as a helper. Wilson applied as a service technician but was hired to do installation work. In addition, Service Manager Schell testified that he was not bound by the position applied for, as written on the application, when determining where to place a new hire at the company.

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## DECISION

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. This is a salting case. Respondent Jacobs Heating and Air Conditioning is accused of failing to hire or consider for hiring three representatives and one member of Charging Party Metal Workers International Association, Local Union No. 19 (the Union). Respondent denies that it violated the Act in any manner.<sup>1</sup>

Respondent is a Pennsylvania corporation located in Glenside, Pennsylvania, which provides service and installation of heating, ventilation, and air-conditioning (HVAC) systems primarily to residential customers and also to commercial customers in the greater Philadelphia metropolitan area. During the year preceding January 31, 2001, Respondent received gross revenues in excess of \$500,000 and purchased goods valued in excess of \$50,000 directly from points outside Pennsylvania. I conclude that Respondent has been an employer within the meaning of Section 2(2), (6), and (7) of the Act and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

In early February 1999,<sup>2</sup> the Union was trying to organize employees of Respondent and received the support of at least five employees, three installation technicians and two helpers. But by early March, the Union needed additional people to work on union jobs; and so it accepted into membership those five employees, all of whom reported immediately to unionized jobs, and none of whom gave notice to Respondent that they were leaving. They simply did not show up for work. Why that event would have prompted Union Organizers John Barzeski and Patrick Keenan to visit Respondent in mid-March, as they testified, to ask to speak to Don Wagner then Respondent's co-owner, or Brett Hayes, then the assistant to then Installation Manager Paul Della Monica was unexplained. I am unclear even how Barzeski knew of Hayes' name. In any event, Respondent's office manager, Jennifer Hartman Reeves, who among all the witnesses I found generally reliable,<sup>3</sup> testified

that Barzeski asked only for Wagner. Although she could not remember whether Barzeski left his card, which identified him as a union organizer, as Barzeski testified, John Schell, Respondent's service manager, was sure that he had seen Barzeski's card; and other evidence makes clear that Respondent knew later exactly who Barzeski was. I thus find that Barzeski left his business card and otherwise credit Reeves' recollections.

With five unexpected vacancies, from a work force of 23–25 employees, Respondent needed additional help. It placed an advertisement in the Philadelphia Inquirer on Sunday, March 28, captioned "Air Conditioning/Heating, seeking applicants for a company established in all aspects of HVAC for full-time permanent positions in installation & service, wanting experience individuals that possess a positive attitude with a strong desire to succeed." Barzeski called the phone number in the advertisement that day and determined from the answering machine that the unnamed advertiser was Respondent. He testified that he left a message with his first name and generally describing his experience; and that Monday, the following day, a message was left on his answering machine from a man identifying himself as "Brett [Hayes] from Jacobs Mechanical." According to Barzeski, Hayes was happy with Barzeski's qualifications and wanted him to come in for an interview. Hayes asked that he call him; but, instead, Barzeski decided to apply for a job directly at Respondent's place of business and did so on Tuesday, March 30. However, Barzeski testified that before doing so he called Respondent first to ask for directions. Why, if he had been there several weeks before? Because, Barzeski answered: "I don't want to tip myself off like I know where the place is." That is incredible; there would have been no harm. He had previously visited the office and left his business card, and he would soon be filling out an application in which he would state his full involvement with the Union.

Hayes denied that he called Barzeski, that he had anything to do with hiring, and that Barzeski called him. I credit him, finding that Barzeski would have called back for an appointment, if there had really been such a message, but did not. I was also impressed that Respondent's name was not "Jacobs Mechanical," as Barzeski described. What is most devastating to Barzeski's narration is that his application is dated March 29. That was no mistake. Keenan's was dated the same day; and both Barzeski and Keenan testified that they went together to apply. Accordingly, Barzeski's testimony was false, and deliberately so, concocted to support his contention that, among other things, Respondent's representatives stated that applications would be maintained without expiration. I have little regard for Barzeski's credibility and credit little of his testimony, none of it when denied by Respondent's witnesses.

Thus, on March 29, Barzeski went to Respondent's offices with Keenan, spoke with Reeves, and advised her that they were there to apply. She provided them with application forms, which they completed there. She asked to make copies of their

<sup>1</sup> The Union filed its charge in Cases 4–CA–28122 and 4–CA–28143 on April 23 and 28, 1999, respectively. The consolidated complaint was issued on January 31, 2001. The hearing was held in Philadelphia, Pennsylvania, on June 26–27, 2001.

<sup>2</sup> All dates are in 1999, unless otherwise indicated.

<sup>3</sup> I found her positive identification and memory of Barzeski particularly appealing. In making this and other factual determinations, I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. I have also taken into consideration the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or the lack of it; and the consistencies or inconsistencies within the testimony of each witness and between the testimony

of each and that of other witnesses with similar apparent interests. Testimony in contradiction to that upon which my factual findings are based has been carefully considered but discredited. See, generally, *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

driver's licenses, which they provided. Barzewski asked to see Wagner, but Reeves replied that he was not in. Barzeski also testified that he asked her whether his application would be kept on file and that she answered that it would, in the filing cabinet. Reeves denied that testimony, and I credit her. She had nothing to do with hiring and she kept no records. I find that the union witnesses attempted to establish that applications would be kept indefinitely and was particularly unimpressed with the testimony of Barzeski's nephew, Joseph Barzeski, who also testified to the same effect. I found nothing in his testimony that supplied a rationale for him to ask such a question.

Barzeski followed up his application with more efforts to "salt" Respondent. Joseph was unemployed in late March; and Barzeski showed him Respondent's advertisement, at least so Barzeski testified, and suggested that he call. In testimony reminiscent of Barzeski's, Joseph testified that he called Respondent and spoke with a male, possibly Hayes, and told him that he could read blueprints, fabricate duct work, hang duct work, do service work, pipe and install heaters, and run wire. Joseph was told to come in to fill out an application and was given a date and time. Hayes credibly denied this testimony. I note that Joseph never represented to Reeves, when he went to Respondent's office on Tuesday, March 30, that he was there for an appointment with Hayes. In any event, Joseph applied, wearing a shirt with the Union's name on it. Reeves gave him an application, which he completed at the site and returned to her. Another union organizer, James White, went to Respondent's office on Thursday, April 1, requested an application, completed it there, and provided his driver's license. None of the four union applicants were hired. None were even interviewed.

In *FES*, 331 NLRB 9, 12 (2000), the Board required the General Counsel to prove in a refusal-to-hire case, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982):

(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. [Footnotes omitted.]

In this case, in which so much credibility was at issue, there can be no doubt that Respondent was indeed hiring. Whether it was hiring as many as five new employees to replace the five that it lost, three of whom were installation mechanics and two were helpers, was more problematic. That results from Wagner's vacillation, from his statement that the departing employees left "five voids" on his staff, a decrease of 20 percent or more of his total employee complement, to his contention that he was uncertain about the number of employees he would hire. Although claiming that he was so upset at the sudden loss of the five employees recruited by the Union because "it was a busy time for the trade," he later claimed that March and April

were not busy and that "cooling [had not] taken off and heating ha[d] ended." However, the General Counsel correctly contends that, within the next 90 days, from April 15 to July 26, Respondent hired five new employees, persuasive evidence that Respondent needed replacements and may have intended earlier to replace all those who had left. On the other hand, Respondent's needs were obviously not that immediate, as shown by its delay until the end of March in advertising for replacements. Wagner explained that, although the quitting of the five employees caused immediate problems, they lasted only "a couple of weeks." I find sufficient evidence that Respondent intended to replace two technicians and one, possibly two, helpers to assist them, at the time that it rejected the applications of the four union applicants.

The final part of the three-point test of *FES* relates to proof that antiunion animus contributed to Respondent's decision not to hire the four applicants. Barzeski had been trying to organize Respondent's employees, and Respondent knew it, even before he applied for a job with Respondent. All four were linked by the fact that they personally applied at Respondent's office, which Respondent conceded was most unusual. All other applicants telephoned first and obtained appointments. The applications of all but White showed that they were trained at the Union's school. Barzewski and Keenan listed their employment by the Union. Joseph advertised his membership by wearing a shirt with the Union's name on it. Showing his dislike of the Union, Wagner was furious that the four "barged" into the office and "insist[ed] on filling out" applications. Wagner's dislike for the Union resulted from another fact, that the Union had caused him trouble by taking away five of his employees, without notice.

Della Monica saw on their application forms that they "came from Local 19 members"; he knew that they were attempting to be hired in order to organize Respondent's employees; and he conceded that it was management's preference that Respondent remain nonunion. He even admitted that one of his reasons for not hiring Barzeski was that he knew Barzeski "was an Organizer in the Union." Della Monica favored rejecting the four for employment but did not make the final decision, referring the decision to Wagner instead, because the applications were "questionable. . . [w]ith all the background of the Union and the fear that . . . efforts were being made to organize." Furthermore, Respondent did its best to find reasons not to hire Barzeski, Keenan, and Joseph by obtaining criminal background checks on April 19. That was contrary to Respondent's practice, which was to order criminal background checks only when an employee was hired.

I conclude that antiunion animus contributed to Respondent's decision not to hire Barzeski, Keenan, and Joseph. White presents a different situation. His application contained nothing to link him with the Union. Della Monica thought, however, that he was involved with the others, because he was one of the four who had come to Respondent's office, uninvited, and asked for an application. On the other hand, Respondent did not request a criminal background check of White; and I assume that was Wagner's decision, who denied that he had any inkling about White's union involvement. I credit him and find that the

decision not to hire White did not result from his union activities.

The thorniest issue relates to the General Counsel's proof of the four's qualifications. Respondent was looking for employees experienced in all aspects of HVAC for positions in installation and service. What Respondent was not hiring was a "sheet metal mechanic," the position that Joseph applied for (not even the position that Joseph inaccurately testified—"HVAC helper, sheet metal worker"—was the one that he had read was being advertised by Respondent). He listed his trade school experience as the "Sheet Metal Training Center." His special studies were: "Sheet metal layout, fabrication, installation, serviceing [sic]." His three prior jobs were with firms not known to Respondent as, or firms whose names did not imply that they were. HVAC installation and servicing companies. Rather, they were companies that specialized in sheet metal work.

Respondent had one job that was dedicated to sheet metal work, in its custom sheet metal shop where it employed one employee, who fabricated custom duct work and whatever was needed on the job, such as adapter fittings. That position was not open at the time that Joseph's application was filed on March 30. Respondent reasonably rejected Joseph's application. I reject the General Counsel's contention that Respondent could have offered Joseph a job as a helper. That was not the position that Joseph applied for or indicated that he wanted. He wanted to work with sheet metal and not with HVAC, with which he exhibited little familiarity and as to which he had not completed his studies. Instead, Respondent hired as a helper an applicant who had graduated from a trade school known to train persons to work in all aspects of HVAC, work that Joseph was not qualified to perform.

Whether the other three applicants met the second of *FES*' tests, whether they had the requisite experience or training relevant to the jobs that Respondent was trying to fill, was the subject of much testimony and dispute. The issue, at least from Respondent's perspective in desiring employees experienced in all aspects of HVAC, narrowed somewhat to its requirement that any applicant needed a CFC refrigerant-handling license, which only White had or, at least, testified that he had at the time he submitted his application. A number of facts question the truth of Respondent's position. First, Schell, who was responsible for hiring service technicians, hired one who did not have a CFC license, although he was in the process of obtaining one, and testified that the license was "not an absolute prerequisite" to consideration for employment. In fact, Respondent had hired others, admittedly a small minority of successful applicants, who did not possess such licenses. Second, Respondent established a series of questions that had to be asked of potential applicants, before giving them interviews. Although Reeves was to ask them first whether they had a valid driver's license, even before she asked for their names, addresses, and experience, a question about whether they had a CFC license was not on the list.

On the other hand, with a relatively few exceptions, Respondent has consistently and uniformly hired service and installation technicians who are able to handle, service, and install every aspect of an HVAC system. Technicians needed CFC

licenses, which permitted them to handle refrigerants. Those persons who were unlicensed could not, by the regulations of the Environmental Protection Agency, handle refrigerants, an integral part of a heating and cooling installation. The fact that the license may have been easy to obtain, requiring 16 hours of study and passing a test, did not require Respondent to waive its requirement and permit the two union representatives additional time to become eligible. Respondent's insistence on a license, which showed that applicants were experienced in all phases of an HVAC system, was not pretextual.

With certain exceptions, the 10 or 15 to 20 applicants who answered Respondent's newspaper advertisement listed on their applications or resumes the fact that they were CFC-certified. Some who did not specifically state that fact provided information of their trade schools, all of which, except the one run by the Union, provided that their students had to have certifications in order to graduate. The listing of attendance and graduation from those schools gave Respondent reasonable assurance that the applicants had the required certification. Della Monica and Wagner were looking to employ persons who had full knowledge of and were able to handle all aspects of HVAC systems. Barzeski's and Keenan's applications gave no such indication. Typically on union jobs, sheet metal workers tend to perform the work of their craft, while electricians do wiring and pipefitters install piping. The fact that the trade labor unions perform different work is probably the reason that the Union's school, of all the technical schools, did not require the obtaining of the CFC certificate for graduation. Indeed, the work experience of Barzeski and Keenan, hardly any of which was current, because they were full-time union employees, was principally in sheet metal work, which constituted only a minimal portion of Respondent's work, and not in full servicing and installation of HVAC systems. In a telephone conversation several weeks after Barzeski filed his application, Wagner asked him two specific questions about HVAC installation. Barzeski's response was: "I have people that do that for me Don"; to which Wagner replied, "Well, here at Jacobs, we do it all." On the basis of this record, and my impressions that neither Barzeski nor Keenan was particularly candid about his previous employment, I find that neither had the qualifications nor the experience for the jobs Respondent advertised.<sup>4</sup>

Although I found, above, that Wagner's decision not to hire White was not related to his union activities, I note that White's 7 or 8 years' experience in installing, reconditioning, and servicing HVAC systems listed on his application appeared impeccable, but for his failure to list his CFC license, which he had, and his technical schooling on his application. He also did not list some of his other qualifications, such as "[h]eating ventilation installation certification, . . . OSHA-500 certification, welding certification, hepafilter installation certification, clean room instructor certification, foreman's training certification." White's explanation for not advertising these obvious skills was that some of these certifications were ones that "a non-union person wouldn't have." In light of the fact that the Union was obviously attempting to "salt" Respondent, as shown by the

<sup>4</sup> Keenan, who did not perform "servicing work," obtained a CFC license after he applied for a job with Respondent.

three applications within 3 days of White's application, his explanation is hardly appealing. Even if it were, an employer is not required to guess about whether its applicants are qualified. An application is intended to provide pertinent information to permit an employer to make an informed judgment about the applicant's desirability. Respondent was entitled to rely on White's failure to inform it of his CFC certification and any technical schooling as an indication that he did not have that required license and that he dealt with less than all aspects of HVAC systems.

Of greater importance, White's testimony at the hearing revealed that his application was a fabrication. The 7 or 8 years' HVAC experience that he said that he had, he did not. Those years he actually spent as a union organizer. Respondent's suspicions and doubts about White's experience and training were fully vindicated, even more so. He had no qualifications for the position, at least none that he listed on his application. The General Counsel contended that, had Respondent asked White, as well as Barzeski and Keenan, if they had licenses, it would have found out that White did. In support, the General Counsel relied on one of Respondent's three precomplaint position statements to the Regional Office, in which it answered the Region's question, "How did Jacobs know that any of the union applicants did not have licenses?" with: "If the applicant failed to note on his or her application that he or she possessed the license, Jacobs asked the applicant if he or she possessed the license." Wagner denied that he had a policy of telephoning all applicants for more information, thus contending that the answer, which was not even responsive to the question, was inaccurate. Although by no means free from doubt, I credit his denial.

I thus find that the General Counsel has not met his burden of proving that, in the words of *FES*, quoted above at 12, "the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire." Accordingly, the General Counsel has not proved a prime facie case that Respondent violated Section 8(a)(3) and (1) of the Act by not hiring the four applicants. Even assuming that he has, Respondent has met its burden of proving under *Wright Line*, as explained in *FES*, above at 12, that the applicants "did not possess the specific qualifications the position required . . . and that it would not have hired them for that reason even in the absence of their union support or activity." It follows that because these union applicants did not have any of the experience, training, and specific qualifications that the positions required, Respondent's hiring of applicants who had even minimal training and experience (in fact, they had more) did not prove that Respondent violated the Act.

The complaint also alleged that Respondent refused to consider these union representatives for employment. In *FES*, su-

pra at 15, the Board set forth a somewhat different test for analyzing refusal-to-consider allegations:

[T]he General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that anti-union animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

I also conclude for reasons similar to those set forth in the refusal-to-hire discussion, above, that the General Counsel did not prove that Respondent failed to consider the four for hire. It did, and it rejected them. In addition, Respondent had an unwritten rule, not precisely followed, which provided that applications became stale after 30 days or so. Wagner cogently explained that the industry is "quick moving." An employer had to hire an applicant with some haste; otherwise, within a matter of days, and certainly within a month, another employer would hire that individual, who would no longer be available. The General Counsel did not prove that Respondent violated its rule or that the rule was a sham. Thus, when Respondent decided to hire two new helpers, as it did, about 75 days after the four union applicants filed their applications, Respondent no longer had to consider their applications.

Finally, in light of my finding that the testimony of the Union witnesses was intentionally false, I refuse to believe the last two allegations of the complaint, that in mid-April Wagner threatened unspecified reprisals to the effect that Barzeski should "ask them guys [another union] what happened to them when they f-cked with me before" and threatened to kill Barzeski or his children. Even had I credited the narration of that threat, Wagner was threatening Barzeski not as an employee but in his capacity as a union organizer in an organizing campaign, gathering information, watching where Respondent's employees were going, following them, and attempting to talk with them. This threat would not have interfered with Barzeski's Section 7 rights. I dismiss this allegation.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>5</sup>

#### ORDER

The complaint is dismissed.  
Dated, Washington, D.C. September 18, 2001.

<sup>5</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.