

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
ATLANTA BRANCH OFFICE

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THE SECOND SHIFT, INC. d/b/a  
JOBSITE PERSONNEL, INC.,  
a Single Employer

10

and

CASE 12–CA–17521

INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS,  
LOCAL UNION 756, AFL–CIO

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*Thomas Brudney, Esq.*,  
for the General Counsel.  
*Mr. Steven Williams*,  
for the Charging Party.

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SUPPLEMENTAL DECISION

**Keltner W. Locke, Administrative Law Judge:** On October 10, 2002, I issued a bench decision and certification in this case. Both the General Counsel and the Charging Party filed timely exceptions to portions of that decision. On September 29, 2003, the Board severed certain issues and remanded them with instructions to consider them further and to write a supplemental decision addressing them.

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**Background**

In 1995, when most of the material events in this case took place, The Second Shift, Inc. was a temporary employment agency with various offices, including one in Altamonte Springs, Florida. It did business under the name Jobsite Staffing.

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By the time of the hearing in 2002, the entity known as The Second Shift, Inc., doing business as Jobsite Staffing, ostensibly had gone out of business. However, in 1996, while it was still in business, it established Jobsite Personnel, Inc. as a subordinate instrument and disguised continuance.

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In my October 10, 2002 decision, I concluded that The Second Shift, Inc., doing business as Jobsite Staffing, and Jobsite Personnel, Inc., have been and are alter egos and a single

within the meaning of the Act. In its September 29, 2003 Decision and Order, the Board adopted this conclusion. Therefore, in this supplemental decision, I will refer to that single employer as “Respondent.”

5           Although Respondent itself was not an electrical contractor, it supplied temporary employees to various electrical contractors. Such contractors turn to a “temp” service, such as Respondent’s, because their labor needs fluctuate greatly depending on how many jobs are underway.

10           Respondent therefore provided contractors with a ready source of trained workers, including electricians. It thereby performed much the same function as a union hiring hall, except it served contractors which did not have collective–bargaining relationships with labor organizations.

15           In July 1995, the International Brotherhood of Electrical Workers, Local Union 756, AFL–CIO (the “Union”) decided to send its members to Respondent to apply for work. It followed a strategy which has come to be known as “salting.” Some of its members applied for work without revealing their union affiliation. Other members appeared at Respondent’s office wearing apparel or insignia which clearly identified them with the Union, and announced their  
20           desire to be employed.

          Before proceeding further, it may be noted that for simplicity, this decision may occasionally use the term “applicant” instead of the longer but more exact phrase, “alleged job applicant.” Credible evidence indicates that some of the persons alleged to be discriminatees did  
25           not submit application forms or attend scheduled job interviews. Whether these individuals merit the status of “applicant” will be discussed below.

          At a minimum, the Respondent in this case required job seekers to complete and submit written applications before they would be considered for employment. Whether particular  
30           individuals took such steps will be discussed below.

          In my October 10, 2002 decision, I concluded that Respondent unlawfully had refused to hire five job applicants: Barry Bostwick, Jonathan Carnes, Robert Murphy, Phillip Pelc and Stephen Williams. I also concluded that the government had not proven unlawful discrimination  
35           with respect to 13 other job applicants and dismissed the allegations that Respondent had violated the Act by refusing to hire them.

### Scope of Remand

40           The Board’s September 29, 2003 Decision and Order stated, in pertinent part, as follows:

          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  
45           John Barrington, Barry Bostwick, Richard Buffington, Christopher Downs, Bruce Evans, Jamie Eyler, Richard Forrester, John Gambone Sr., John Gambone Jr., Jason Harrison, Robert Highley, Eric Law, Ken[t] Mortensen, and James Warren are severed from the rest of this proceeding and remanded to Administrative Law Judge Keltner 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.

5 340 NLRB No. 43, slip op. at 3–4. However, the Board’s decision also states “The merits of the refusal to consider violations are not to be considered on remand. As noted above, no exceptions were filed regarding them.” 340 NLRB No. 43, slip op. at 2, fn. 8.

10 Thus, the Board appears to have remanded the case with instructions to determine whether Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider certain named individuals for employment, but also directed me *not* to consider the merits of the refusal–to–consider violations. It is not entirely clear how to comply with both of these instructions. Determining “whether the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to . . . consider for hire” certain individuals entails visiting the merits of such  
15 allegations, which the Board quite clearly told me not to do.

Perhaps the key to resolving this seeming conflict may be found in the words “purposes described above.” The Board did not direct me to determine, for *all* purposes, whether Respondent refused to hire and/or consider for hire the named individuals, but only instructed me  
20 to make these determinations for certain purposes, namely, the “purposes described above.”

The “purposes described above” include (1) reconsidering the finding that Respondent unlawfully had failed to hire applicant Barry Bostwick; (2) further analyzing whether certain named individuals, who sought employment at Respondent’s office on July 31, 2003, possessed  
25 training and experience relevant to the positions for which they applied; (3) further analyzing what knowledge, if any, Respondent possessed concerning the Union activities or affiliations of these same individuals; and (4) providing the appropriate remedy for refusal–to–hire violations found in the initial decision.

30 The first three of these purposes do not shed light on how the refusal–to–consider allegations should be treated on remand, but the fourth does appear relevant. With respect to this purpose, the Board stated:

35 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. . . In his supplemental decision on remand, the judge, therefore, shall provide the appropriate remedy for this violation.

40 340 NLRB No. 43, slip op. at 2. This paragraph suggests that the Board is taking for granted that Respondent unlawfully refused to consider all 18 job applicants, and simply wants the judge to fix his mistake by specifying the appropriate remedy. I will assume that this interpretation correctly reflects the Board’s intent.

45 In the case of Barry Bostwick, however, I believe the Board would want me to address both the refusal–to–hire and the refusal–to–consider issues. As the Board pointed out, the General Counsel did not allege that Respondent discriminated against Bostwick.

**Barry Bostwick**

In its September 29, 2003 Decision, the Board noted that I had found that Respondent unlawfully had refused to hire applicant Barry Bostwick, even though the Complaint had not  
 5 alleged such a violation. It is clear that I made a mistake.

Bostwick testified that when he applied for work with Respondent on November 2, 1995, he did not reveal his union affiliation either by his words or his wearing apparel. To the contrary, when the interviewer asked Bostwick if he “was union,” Bostwick said no. The record  
 10 does not indicate that Respondent otherwise had a reason to believe Bostwick had ties with the Union.

As the October 10, 2002 decision stated, the government not only must establish antiunion animus but also “must connect that animus with Respondent’s decision to reject a particular job applicant.” The evidence does not establish this element in Bostwick’s case.  
 15 Therefore, I conclude that Respondent did not violate the Act either by refusing to hire Bostwick or by refusing to consider him for hire.

**Refusal to Hire 13 “Applicants”**

Union Business Manager Stephen Williams testified that on July 31, 2003, he rented a  
 20 van and took 13 men to Respondent’s office to apply for work as electricians. Williams identified the men as Robert Murphy, Bruce Evans, Richard Forester, Richard Buffington, James Warren, Robert Higley, John Barrington, John Gambone, Jr., John Gambone, Sr., Jamie Eyler, Jason Harrison, Kent Mortensen, and Eric Law. In the initial decision, I found that Respondent  
 25 had violated the Act by refusing to hire Robert Murphy and Stephen Williams, had not unlawfully refused to hire the other 12 men.

In determining the lawfulness of Respondent’s failure to hire these “applicants,” I followed the framework which the Board established in *FES (A Division of Thermo Power)*, 331  
 30 NLRB No. 20 (May 11, 2000). To carry the government’s initial burden, the General Counsel must prove the following:

1. That the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct;
- 35 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
- 40 3. That antiunion animus contributed to the decision not to hire the applicants.

With respect to the 14 men who arrived together at Respondent’s office on July 31, 1995, the record clearly establishes the first and third elements. However, in my initial decision, I  
 45 concluded that, except for applicants Murphy and Stephens, a preponderance of the evidence did not establish the second element.

5 Murphy testified at the hearing that he was a licensed electrician. Crediting that testimony, I found that he had experience or training relevant to the announced or generally known requirements of the positions for hire. Williams also testified concerning his experience as an electrician. Therefore, I concluded that the General Counsel had established all three elements with respect to Murphy and Williams.

10 Respondent did not appear at the hearing and presented no evidence. It did not establish that it would have rejected the applications of Murphy and Williams in any event, regardless of their Union affiliation and protected activities. Accordingly, I found that Respondent unlawfully had refused to hire Murphy and Williams.

15 On the other hand, I concluded that a preponderance of the evidence did not establish that the other individuals who applied for work on July 31, 1995 also possessed the necessary experience or training relevant to the announced or generally known requirements of the positions for hire. Therefore, I did not find that Respondent violated the Act by failing to hire them.

20 In its remand order, the Board directed me to provide 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 I dismissed. *Jobsite Staffing*, 340 NLRB No. 43, slip op. at 2. The Board further stated:

25 [A]s 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.

30 Id. (Footnote omitted.)

35 Strictly speaking, Business Manager Williams did not make the statements attributed to him in the excerpt above. Literally, Williams did not state that all 14 men who showed up at Respondent’s office on July 31, 1995 were licensed electricians. Indeed, as I read Williams’ testimony, it suggests quite the opposite, namely, that some of these “applicants” were not licensed.

40 Additionally, Williams did not testify “that all 14 alleged discriminatees who applied for jobs on July 31, 1995. . .had served in apprenticeship programs.” For reasons discussed below, I believe that inferring such a finding from Williams’ testimony would be inconsistent with the hearsay rule.

45 Before addressing these matters, however, it should be noted that the record does support a conclusion that Respondent was seeking to hire licensed electricians. Both the Respondent’s newspaper advertisements and Williams’ testimony lead to this conclusion.

Thus, Williams recounted how he had telephoned Respondent’s office in late July 1995, after learning Respondent was hiring. According to Williams, he spoke with Respondent’s regional sales manager, Barbara Scott, whom I have found to be Respondent’s officer and agent. Williams further testified as follows:

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Q. And did she say anything to you about the qualifications needed for these positions?

A. I believe they were looking for 11 licensed electricians, at that time, yes.

10

Another witness, Phillip Pelc, described his job interview with one of Respondent’s managers, Henry Gee. Pelc testified:

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. . . I talked about having a Volusia County license, and he told me that I didn’t need that until I actually went to work, that that would be a benefit, would mean more money, basically, if I had those things.

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Gee’s comment to Pelc that he wouldn’t need a license until he actually went to work implies that Pelc *would* need the license when he did go to work. The remainder of Gee’s statement to Williams does not contradict such a conclusion. It may be that at times, Respondent hired other employees, such as apprentices and helpers, for lower–wage positions, but the record doesn’t establish that Respondent was filling such lower–wage positions at the time Pelc applied. To the contrary, Scott’s statement to Williams indicates that in late July 1995, Respondent was seeking licensed electricians.

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In sum, I find that on July 31, 1995, Respondent was seeking to hire licensed electricians.

### Were The “Applicants” Licensed Electricians?

30

To prove that the July 31, 1995 “applicants” had relevant training and experience – the second *FES* criterion – the General Counsel must rely on the testimony of Stephen Williams simply because the record is devoid of other evidence on this subject. However, a careful examination of Williams’ testimony does not support a conclusion that all of these “applicants” held electrician’s licenses.

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During his testimony on August 26, 2002, Williams described how he rented a van on July 31, 1995 and took the “applicants” to Respondent’s office. That testimony included the following question and answer:

40

Q. And they were all licensed electricians?

A. Yes, I believe they were.

45

This testimony falls short of satisfying the government’s burden of proof. When a witness simply agrees with a leading question, as here, such assent doesn’t carry the same force as a declarative sentence uttered in response to a question which does not suggest the answer. Moreover, Williams did not state with certainty that the “applicants” were licensed electricians but only that he believed them to be. Williams admitted that he recalled little of the events, which took place 7 years before his testimony. Considering this problem with his memory, I would be reluctant to interpret “I believe” to mean “I know.”

After a recess of more than two weeks, the hearing resumed on September 11, 2002. The General Counsel again called Williams to the stand and elicited testimony about how Respondent's employees treated the job "applicants" after they arrived as a group on July 31, 1995:

We all had licenses or competency cards, and there was no mention of any trade schools test to be taken.

Q. So Ms. Scott did not mention it, and Ms. Thomas did not mention any skills test at that point in time?

A. No, they did not.

This testimony suggests that not all of the job "applicants" were licensed electricians. Instead of licenses, some of them held "competency cards." However, Williams did not describe the criteria which someone must satisfy to receive a "competency card" or even what kind of organization issued such a card. It might be a document which a licensing authority issued to someone who demonstrated satisfactory training and experience, or, on the other hand, it might be merely a certificate bestowed generously by a private body for reasons of its own.

The record does not support a finding that someone holding a competency card was a licensed electrician but rather suggests the opposite. Williams testified that "we all had licenses *or* competency cards," and not that "we all had licenses *and* competency cards." I must conclude that some of the "applicants" who showed up at Respondent's office on July 31, 1995 did not have licenses.

But which ones? The General Counsel bears the burden of establishing that *each* of the alleged discriminatees possessed the relevant training and experience. That burden cannot be satisfied by showing that *many* of them did or even that *most* of them did. Each alleged discriminatee must be considered individually.

Except for the two applicants who testified, the government has not shown that any particular job "applicant" held a license rather than merely a competency card. Therefore, the General Counsel has not established the second *FES* element for any of these 12 discriminatees.

To carry its burden of proof, the government did not have to call each of these dozen "applicants" to the witness stand. Indeed, the most obvious way to prove that someone is a licensed electrician is simply to introduce into evidence a copy of the license. Presumably, a license issued by a governmental body is a public record and therefore self-authenticating within the meaning of Rule 902 of the Federal Rules of Evidence. However, no such licenses are in evidence here.

It should be stressed that I am not suggesting that the government had to introduce a copy of the license or any other particular evidence to prove the second *FES* requirement. Indeed, clear and unequivocal testimony by a credible witness might well suffice. However, Williams' testimony alone did not carry the government's burden.

This conclusion arises from the plain meaning of Williams’ words. Even were I to credit fully his testimony that “we all had licenses or competency cards,” that statement certainly does not establish that all the “applicants” were licensed as electricians.

5           Additionally, Williams’ credibility as a witness should be taken into account. Williams himself admitted problems with recollection, which is hardly surprising, considering the 7 years which elapsed between the events and his testimony about them.

10           When the General Counsel began examining Williams about the events of July 31, 1995, Williams asked if he could refer to his notes. He then explained why he needed them.

THE WITNESS:           These are my personal notes, and I just — it’s been seven years, it’s awful hard for me to recall —

JUDGE LOCKE:           I understand.

15           THE WITNESS:           — in specific detail.

20           Additionally, in the initial decision I discredited parts of Williams’ testimony and specifically found that one of Respondent’s employees had not made the statement which Williams attributed to her. See *Jobsite Staffing*, 340 NLRB No. 43, slip op. at 11. I have similar concerns about the portion of Williams’ testimony under discussion here.

25           It is well settled that the Board may decline to credit the testimony of interested witnesses even though such testimony is uncontradicted. *Sioux City Foundry Co.*, 323 NLRB 1071 (1997). Williams represented the Charging Party in this matter, so he falls within the category of “interested witnesses.”

30           Based upon Williams’ interest in the outcome of this proceeding, his admittedly sketchy memory, and my observations of the witnesses as they testified, I do not credit Williams’ testimony about the training and experience of the July 31, 1995 job “applicants.” Noting that no other evidence establishes that the “applicants” were all licensed electricians, I conclude that the government has not established the second *FES* element.

### Evidence Concerning Apprenticeships

35           To establish that all of the “applicants” had finished apprenticeships, the government necessarily relies on the testimony of Union Business Manager Williams. However, Williams did not specifically testify that all of the job “applicants” had completed an apprenticeship program. He did make one passing reference to an apprenticeship program but in doing so, he was quoting one of Respondent’s employees. Specifically, he described a conversation he had with Wendy Thomas, in which she told him that no electrician positions were available:

40           And she said, well, all I have available right now is jobs for mechanics. And as all of us being, you know, electricians that have served in an apprenticeship program, a mechanic would be of a lesser skill level. And I just said, well, we’d be willing to work in that classification as well.

45           Logically, the words “And I just said” separate the statements Williams attributed to Thomas from his reply. The reference to electricians who had served in an apprenticeship

program comes before this dividing line. Thus, it was Thomas who made the statement that assumed all the “applicants” had completed apprenticeships.

5 Confusion arises because, in describing what Thomas said, Williams used the term “us” rather than “you.” Thomas would be unlikely to use the word “us” to refer to electricians because, presumably, she was not an electrician. However, Williams was quoting Thomas indirectly, summarizing what she said rather than trying to recite her words verbatim. Such an indirect quote would be likely because, as Williams acknowledged, he did not recall many specific details.

10 Thomas did not take the witness stand and there is no assurance that she was competent to testify about which applicants had gone through apprenticeships. The record provides no foundation concerning what knowledge, if any, Thomas possessed about the Union apprenticeship program or who participated in it. Even assuming that Thomas had some  
15 knowledge about the Union’s apprenticeship program, the record does not reveal whether she acquired such knowledge through firsthand experience, or from hearsay, or even from double hearsay. Under these circumstances, it would not be appropriate to accept Thomas’ out-of-court statement for the truth of the matter asserted.

20 When Williams quoted Thomas, he offered no comment as to whether she had been correct or incorrect in assuming that all the “applicants” had gone through the apprenticeship program. However, nothing should be inferred from Williams’ failure, as a witness, to state whether Thomas was right or wrong because Williams was not asked that question.

25 Williams made no reference to an apprenticeship program except in quoting what Thomas had told him. As a Union official, Williams may have had direct knowledge making him competent to testify about how many of the “applicants” had completed apprenticeships. If Williams had such knowledge, he certainly could have given testimony drawing upon it. No such testimony appears in the record.

30 In sum, neither Williams’ testimony nor other evidence supports a finding that all of the job “applicants” had completed apprenticeships. To make such a finding, I would have to rely on an out-of-court statement attributed to another person by a witness who admitted having memory difficulties.

35 Section 10(b) of the Act requires me to follow the rules of evidence so far as practicable. Section 802 of the Federal Rules of Evidence makes hearsay inadmissible and the statement attributed to Thomas must be considered hearsay. It constitutes an out-of-court declaration by someone who did not testify in this proceeding, and would be relied on for the truth of the matter  
40 asserted.

If the statement attributed to Thomas constituted the admission of a party opponent, it would not fall within Rule 801’s definition of hearsay. However, although Thomas was working for Respondent at the time, the record does not establish that she was acting as Respondent’s  
45 agent. Specifically, the record does not show that Respondent gave Thomas actual authority to make the statements attributed to her.

Similarly, the evidence falls short of establishing that Respondent ever manifested to a third party that Thomas had such authority. To establish that someone possesses such apparent authority, there must be evidence that the principal manifested to a third party that the person had authority to speak or act on the principal’s behalf. *Hausner Hard–Chrome of Kentucky, Inc.*, 326 NLRB 426, 428 (1998) Apparent authority cannot be established by statements of the putative agent herself. *Ready Mix, Inc.*, 337 NLRB No. 181 (August 1, 2002).

Because the record fails to establish that Thomas had either actual or apparent authority to speak on Respondent’s behalf, she cannot be considered Respondent’s agent, and her statements cannot be imputed to Respondent. Therefore, the remarks which Williams attributed to Thomas do not constitute an admission by a party–opponent but instead are hearsay. Therefore, I do not consider them.

No other evidence establishes that all 14 of the “applicants” had completed apprenticeship programs. Accordingly, I make no such finding.

**Summary of Findings Concerning Relevant Training and Experience**

For the reasons stated above, I conclude that the government has not established that the following individuals had the relevant training and experience necessary to satisfy the second *FES* criterion: Bruce Evans, Richard Forester, Richard Buffington, James Warren, Robert Higley, John Barrington, John Gambone, Jr., John Gambone, Sr., Jamie Eyler, Jason Harrison, Kent Mortensen, and Eric Law. Accordingly, I further conclude that the record fails to establish that Respondent unlawfully refused to hire them, and recommend that these allegations be dismissed.

**Respondent’s Knowledge of “Applicants” Union Affiliation**

In its remand order, the Board also instructed me to provide an analysis of the evidence and legal issues pertaining to whether Respondent knew that each of the July 31, 1995 “applicants” was affiliated with the Union.

Business Manager Williams testified that when he and the other 13 “applicants” arrived at Respondent’s office on July 31, 1995, they were all wearing either t–shirts or hats bearing the union insignia. On the other hand, Regional Sales Manager Scott gave the following testimony:

Q. Okay. Do you remember they were wearing the Union hats and the Union clothes?

A. They did everything in their power to be extremely intimidating.

Q. All right. Well, why don’t you describe for the Judge what you remember?

A. I don’t remember the number of men, but it was quite a few. They came in in their black hats, their black shirts, and their dark pants, and they encircled my desk. They told me that they were all there to apply for a job. . .

For the same reasons discussed in my initial decision, to the extent that Williams’ testimony contradicts Scott’s, I credit Scott. Therefore, I do not conclude that all 14 of these

men wore clothing or insignia identifying themselves with the Union. Nonetheless, the fact that all 14 arrived at the same time reasonably would lead to the conclusion that all of them came for the same purpose. Accordingly, it appears likely that Scott would believe all 14 had some affiliation with the Union.

5

The individuals who came to the Respondent's on July 31, 1995 included John Barrington, Richard Buffington, Bruce Evans, Jamie Eyler, Richard Forrester, John Gambone Sr., John Gambone Jr., Jason Harrison, Robert Highley, Eric Law, Kent Mortensen and James Warren. I find that Respondent had knowledge of their affiliations with the Union.

10

This finding does not mandate a conclusion that Respondent either refused to consider or refused to hire these individuals. These issues will be addressed further below.

15

Christopher Downs was not in the group which arrived at Respondent's office on July 31, 1995. Rather, Downs applied for work on about October 27, 1995, and did not disclose his Union affiliation at that time. I find that Respondent was unaware of Downs' affiliation with the Union at this time, and did not discover this affiliation until about a week later, when Downs disclosed this relationship during a second visit to Respondent's offices.

20

At that time, Respondent's representative, Hank Gee, informed Downs that he had not been hired because he had not been truthful at the earlier interview when asked about his relationship to a "Jim Downs." No evidence contradicts Gee's explanation.

25

Accordingly, I find that Respondent did not know about Downs' Union affiliation at the time management decided not to hire him. Therefore, I conclude that the General Counsel has not established the third *FES* element with respect to Downs and recommend that the Board dismiss the allegation that Respondent unlawfully refused to hire him.

30

Similarly, because the evidence does not establish that Respondent knew about Downs' Union affiliation at the time management decided not to hire him, I recommend that the Board dismiss the allegation that Respondent unlawfully refused to consider Downs for employment.

### **Failure to Complete Application Process**

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As discussed above, I have concluded that the record does not establish the second *FES* element with respect to the following men who went to Respondent's office on July 31, 1995 and announced that they were looking for work: Bruce Evans, Richard Forester, Richard Buffington, James Warren, Robert Higley, John Barrington, John Gambone, Jr., John Gambone, Sr., Jamie Eyler, Jason Harrison, Kent Mortensen, and Eric Law.

40

An additional reason supports the conclusion that Respondent did not unlawfully refuse to hire them. These 12 men did not complete the application process because many of them did not file employment applications and none of them attended the scheduled job interview.

45

This conclusion rests on Barbara Scott's testimony, which I credit, that only a fraction of the men actually submitted job applications and none attended scheduled job interviews. Such failure to complete the application process indicates that the men were not seriously interested in

jobs, but had only accompanied Union Representative Williams in a show of support for the Union.

5 The 14 “applicants” arrived at Respondent’s office late in the afternoon, not long before closing time, on July 31, 1995. Because of the late hour, Scott did not conduct job interviews. The testimony conflicts concerning what Scott actually did.

10 According to witness Robert Murphy, when the 14 men arrived at Respondent’s office on July 31, 1995, a woman “decided that rather than fill out, she’d just take our names and addresses, and have somebody call us that’s going to set up shop in either the Palm Coast or Port Orange.” Although Murphy did not identify this woman, presumably it was Barbara Scott.

15 However, Scott testified that she did take applications from some of the men and scheduled all of them for job interviews during the next two days. Based on my observations of the witnesses, I believe that Scott’s testimony is more reliable, and credit it.

20 Additionally, it may be noted that Murphy did not specifically recall the woman taking down the telephone numbers of the men. Instead, he testified that she took down their addresses. The General Counsel then sought to clarify that testimony:

Q. BY MR. BRUDNEY: And addresses? I’m sorry, names and telephone numbers?

A. Well, probably so.

Q. Okay.

A. I don’t recall that exactly.

25  
30 Considering that Murphy demonstrated no uncertainty when he testified that the woman took down the names and addresses of the men, and in light of his testimony that the woman said she would call the men later when jobs were available, it isn’t clear why he would be somewhat uncertain about the men giving her their telephone numbers. For this reason, as well as my observations of the witnesses, I conclude that Murphy’s recollection is not as reliable as Scott’s.

35 For the reasons stated above and in the initial decision, I also credit Scott’s testimony rather than Williams to the extent that the two versions conflict. Scott testified that “only a small portion” of the men who appeared at the Respondent’s office on this date, no more than half of them, filed job applications. Scott credibly testified that she did not recall which of these men submitted applications and which did not.

40 Scott further testified that when the men appeared at the Respondent’s office on July 31, 1995, she scheduled appointments for the men to be interviewed. Some of the men were to return the next day, and the rest were to be interviewed on the following day: “I remember scheduling everybody an hour apart, and nobody showed up.” Crediting this testimony, I find that Scott scheduled job interviews for the men on August 1 and 2, 1995, and that none of them showed up for the scheduled interview.

45 Assuming that an employer’s hiring process is not inherently discriminatory, the employer has no duty to hire someone who fails to complete it. There is no allegation in this

case that requiring an applicant to fill out Respondent’s application form or attend a job interview would, in and of itself, violate that person’s Section 7 rights.

Accordingly, I conclude that Respondent had no duty to hire the following 12 applicants:  
 5 Bruce Evans, Richard Forester, Richard Buffington, James Warren, Robert Higley, John Barrington, John Gambone, Jr., John Gambone, Sr., Jamie Eyer, Jason Harrison, Kent Mortensen, and Eric Law.

**Summary of Refusal–to–Hire Allegations**

10 The government has established that Respondent knew about the Union affiliations of all the individuals who applied for work on July 31, 1995. However, the General Counsel has not established that all of these individuals had experience or training relevant to the announced or generally known requirements of the positions for hire. Specifically, credible evidence fails to  
 15 establish that the following individuals had completed apprenticeships and held licenses as electricians: John Barrington, Richard Buffington, Christopher Downs, Bruce Evans, Jamie Eyer, Richard Forrester, John Gambone Sr., John Gambone Jr., Jason Harrison, Robert Highley, Eric Law, Ken[t] Mortensen, and James Warren. Additionally, none of these individuals attended a scheduled job interview.

20 Therefore, I recommend that the Board dismiss the allegations that Respondent unlawfully refused to hire John Barrington, Richard Buffington, Christopher Downs, Bruce Evans, Jamie Eyer, Richard Forrester, John Gambone Sr., John Gambone Jr., Jason Harrison, Robert Highley, Eric Law, Ken[t] Mortensen, and James Warren.

**Remedy for Refusal to Consider for Hire**

25 My initial decision found that Respondent unlawfully had failed and refused to consider 18 job applicants because of their Union activities. In its September 29, 2003 remand order, the Board directed me to provide the appropriate remedy called for in *FES (A Division of Thermo Power)*, 331 NLRB 9 (2000) for a refusal–to–consider violation. The Board also stated that the “merits of the refusal to consider violations are not to be revisited on remand” because no exceptions had been filed to those findings. 340 NLRB No. 43, slip op. at 2, fn. 8. As the Board stated in *FES*,

35 The appropriate remedy for such a [refusal to consider] violation is a cease–and–desist order; an order to place the discriminatees in the position they would have been in, absent discrimination, for consideration for future openings and to consider them for the openings in accord with nondiscriminatory criteria; and an order to notify the  
 40 discriminatees, the charging party, and the Regional Director of future openings in positions for which the discriminatees applied or substantially equivalent positions.

45 As discussed above, the record does not establish that certain of the job applicants had the relevant training and experience. However, the absence of evidence regarding the qualifications of some of the applicants does not affect the remedy for Respondent’s unlawful refusal to consider them.

5 It may be noted that the government's initial burden of proof for a discriminatory refusal-to-consider allegation is different from the corresponding burden for a refusal-to-hire allegation. To carry the government's initial burden with respect to a refusal-to-consider violation, the General Counsel does not have to establish that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire.

10 The Board's remand order stated that the merits of the refusal-to-consider allegations should not be revisited and I have not done so. To avoid the possibility of confusion it may be noted that Barry Bostwick's name is not included among the employees, listed below, whom Respondent must consider for employment. Bostwick was not among those employees who went to Respondent's office on July 31, 1995. Additionally, when Bostwick later applied for employment, Respondent hired him.

15 If it is shown at a compliance stage of this proceeding that the Respondent, but for the failure to consider the discriminatees on July 31, 1995, would have selected any of them for any job openings arising after the beginning of the hearing on August 26, 2002, or for any job openings arising before the hearing that the General Counsel neither knew nor should have known had arisen, the Respondent shall hire them for any loss of earnings and other benefits suffered as a result of the discrimination against them. *Mainline Contracting Corp.*, 334 NLRB 922, 924 (2001). Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

25 **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

30 1. Cease and desist from

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

35 (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

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

45 (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.

5 (a) Offer immediate instatement to 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.

10 (b) Consider for hire John Barrington, Richard Buffington, Christopher Downs, Bruce Evans, Jamie Eyer, Richard Forrester, John Gambone Sr., John Gambone Jr., Jason Harrison, Robert Highley, Eric Law, Ken[t] Mortensen, and James Warren for future job openings for a period of 6 months from the date of this Order in accord with nondiscriminatory criteria, and notify them, the Charging Party, International Brotherhood of Electrical Workers, Local Union 756, AFL–CIO, and the Regional Director for Region 12 of future openings in  
15 positions for which the discriminatees applied or substantially equivalent positions for a period of 6 months from the date of this Order. If it is shown at a compliance stage of this proceeding that the Respondent, but for the failure to consider the discriminatees on July 31, 1995, would have selected any of them for any job openings arising after the beginning of the hearing on August 26, 2002, or for any job openings arising before the hearing that the General Counsel  
20 neither knew nor should have known had arisen, the Respondent shall hire them for any such position and make them whole for any losses, in the manner set forth in the Remedy section of this Supplemental Decision and Order.

25 (c) 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.

30 (d) 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.

35 (e) Within 14 days from the date of this Order, notify the discriminatees in writing that any future job applications will be considered in a nondiscriminatory way.

40 (f) Within 14 days from the date of this Order, 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 A.”<sup>1</sup> 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

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<sup>1</sup> If this Order is enforced by a Judgment of the 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.**”

be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

5 (g) 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.

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**Keltner W. Locke**  
**Administrative Law Judge**

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APPENDIX A

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
5 NATIONAL LABOR RELATIONS BOARD

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

10 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
- 15 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.

20 **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.

25 **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.

30 **WE WILL NOT** refuse to consider any job applicant for employment because of that person's Union membership, affiliation, or sympathies.

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

35 **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.

40 **WE WILL** offer immediate reinstatement to 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.

45 **WE WILL** consider for hire John Barrington, Richard Buffington, Christopher Downs, Bruce Evans, Jamie Eyler, Richard Forrester, John Gambone Sr., John Gambone Jr., Jason Harrison, Robert Highley, Eric Law, Ken[t] Mortensen, and James Warren for future job openings for a period of 6 months from the date of the Board's Order in accord with nondiscriminatory criteria and notify them, the Charging Party, International Brotherhood of Electrical Workers, Local

Union 756, AFL–CIO, and the Regional Director for Region 12 of future openings in positions for which the discriminatees applied or substantially equivalent positions for a period of 6 months from the date of the Board’s Order. If it is shown at a compliance stage of the Board’s proceedings that, but for our failure to consider the discriminatees on July 31, 1995, we would have selected any of them for any job openings arising after the beginning of the hearing on August 26, 2002, or for any job openings arising before the hearing that the General Counsel neither knew nor should have known had arisen, **WE WILL** hire them for any such position and **WE WILL** make them whole for any loss of earnings and other benefits sustained as a result of the discrimination against them, plus interest.

**WE WILL**, within 14 days from the date of the Board’s Order, notify the discriminatees in writing that any future job applications will be considered in a nondiscriminatory way.

**WE WILL**, within 14 days from the date of the Board’s Order, remove from our files any reference to the unlawful refusal to consider the discriminatees for employment, and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and that the refusal to consider them for employment will not be used against them in any way.

**THE SECOND SHIFT, INC. d/b/a  
JOBSITE PERSONNEL, INC., a Single Employer  
(Employer)**

**Dated:** \_\_\_\_\_ **By:** \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret–ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board’s Regional Office set forth below. You may also obtain information from the Board’s website: [www.nlr.gov](http://www.nlr.gov).

201 E. Kennedy Boulevard, South Trust Plaza, Suite 530, Tampa, FL 33602–5824  
(813) 228–2641, Hours: 8 a.m. to 4:30 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE’S COMPLIANCE OFFICER, (813) 228–2662.