A & A Insulation Services, Inc. *and* Local 32, Heat and Frost Insulators and Asbestos Workers. Case 22–CA–24669

February 28, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On August 2, 2002, Administrative Law Judge Steven Davis issued his decision and recommended Order in this proceeding in which he recommended that the Respondent be ordered to make whole discriminatees James Cunningham, Ken Johnson, and Keith Wagner for any loss of earnings and other benefits suffered as a result of the Respondent's discrimination against them. No exceptions were filed to the judge's decision and on October 4, 2002, the National Labor Relations Board issued an Order adopting the findings and recommendations of the judge and directing the Respondent to take the action set forth in the judge's decision and recommended Order. On April 30, 2003, the United States Court of Appeals for the Third Circuit entered an unpublished judgment enforcing the Board's Order.[1]

A controversy having arisen over the amount of backpay due the discriminatees under the Board's Order, the Regional Director for Region 22 issued a compliance specification and notice of hearing on May 20, 2004, identifying the amounts of backpay due under the Board's Order, and notifying the Respondent that it was required to file a timely answer complying with the Board's Rules and Regulations. On June 10, 2004, the Respondent filed an answer.

By letter dated September 14, 2004, the General Counsel advised the Respondent that its answer was defective under Section 102.56 of the Board's Rules and Regulations in that it failed to specifically admit, deny, or explain each and every allegation of the compliance specification. The letter notified the Respondent that if it failed to correct the deficiencies in its answer by September 28, 2004, a motion for summary judgment would be filed. The Respondent failed to file an amended answer.

On November 5, 2004, the General Counsel filed with the Board a Motion for Summary Judgment. The General Counsel asserted in that motion that there are no genuine issues of material fact regarding the allegations and calculations set forth in the compliance specification. The General Counsel contends that the Respondent failed to address a number of allegations in the compliance specification. The General Counsel further maintains that the answer constituted a general denial that was deficient under Section 102.56(b) and (c) of the Board's Rules and Regulations because it did not specify the basis for the disagreement with the backpay computations, offer any alternative formula for computing backpay, furnish appropriate supporting figures for amounts owed, or adequately explain its failure to do so. The General Counsel moved that the Board deem all the allegations of the compliance specification to be true and grant the General Counsel's Motion for Summary Judgment.

On November 10, 2004, the Board issued an Order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. The Respondent failed to respond to either the General Counsel's Motion for Summary Judgment or the Board's Notice to Show Cause. The allegations in the motion are therefore undisputed.

Ruling on the Motion for Summary Judgment

Section 102.56(b) and (c) of the Board's Rules and Regulations states:

> (b) *Contents of answer to specification.*—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.
>
> (c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification*—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by

[1] Case No. 03-1605.

paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing evidence controverting the allegation.

The gross backpay calculations of the compliance specification are based on a replacement employee formula. The compliance specification alleges that appropriate replacement employees are employees hired on or after May 15, 2001, the date the Respondent unlawfully refused to hire the discriminatees. The hours claimed on behalf of the discriminatees are the actual hours worked by the replacement employees on a weekly basis.

In its answer to the compliance specification, the Respondent disputes the General Counsel's allegation in paragraph 2 that Camilo Guzman is an appropriate replacement employee for discriminatee Ken Johnson. The Respondent contends that because Guzman had previously worked for the Respondent, he had seniority over Johnson, and therefore, Johnson would not have received the work that Guzman was assigned. The Respondent maintains, therefore, that reimbursement for the period from January 5 to February 9, 2002, based on Guzman's earnings should not have been included in backpay calculations for Johnson. In support, the Respondent attached to its answer Guzman's payroll records from 1991, 1996, 1997, 1998, and 1999 showing that Guzman had previously worked for the Respondent. Thus, the Respondent avers that $840, plus interest (representing 70 hours of work) should be deleted from Johnson's proposed reimbursement. The Respondent does not dispute any of the other calculations or premises in the compliance specification.

We find that the Respondent's answer complies with the requirements of the Board's Rules and Regulations with respect to the portion of paragraph 2 of the compliance specification alleging that Guzman is an appropriate replacement employee for Johnson. It adequately states the basis for its disagreement with the compliance specification allegations, sets forth the Respondent's position as to the applicable formula, and furnishes the appropriate supporting data. Accordingly, we find that the answer is sufficiently specific under the Board's Rules and Regulations to warrant a hearing on the appropriateness of the use of Guzman as a replacement employee for discriminatee Johnson and the proposed inclusion of Guzman's earnings from January 5 to February 9, 2002. Cf. *Sneva's Rent-A-Car*, 270 NLRB 1316, 1317 (1984) (summary judgment granted where respondent failed to set forth alternative premises or supporting details). For these reasons, we shall deny the General Counsel's Motion for Summary Judgment with respect to those issues.

The Respondent's answer does not, however, address any other allegation in the compliance specification. Thus, the Respondent has failed to deny those allegations in the manner prescribed in Section 102.56(b), or to explain its failure to do so. Because those allegations are uncontroverted, we deem them to be admitted as true, and we grant summary judgment as to them.

Accordingly, we shall grant the General Counsel's Motion for Summary Judgment with respect to all issues except those relating to the use of Guzman as a replacement employee for discriminatee Johnson and the inclusion of Guzman's earnings from January 5 to February 9, 2002, in Johnson's proposed reimbursement. We conclude that the amounts due discriminatees Cunningham and Wagner are as stated in the compliance specification, and we shall order payment by the Respondent of those amounts, plus interest accrued to the date of payment. We shall also order a hearing limited to the issues relating to the use of Guzman as an appropriate replacement employee for Johnson.

ORDER

It is ordered that the General Counsel's Motion for Summary Judgment is granted in part and denied in part.

IT IS FURTHER ORDERED that the Respondent, A & A Insulation Services, Inc., Hazlet, New Jersey, its officers, agents, successors, and assigns, shall make whole the individuals named below, by paying them the amounts following their names, plus interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and minus tax withholdings required by Federal and State laws:

Keith Wagner	$14,322
James Cunningham	6,000
TOTAL	$20,322

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 22 for the purpose of issuing a notice of hearing and scheduling a hearing before an administrative law judge for the purpose of taking evidence concerning the issues relating to the use of Camilo Guzman as a replacement employee in the calculation of the backpay due to discriminatee Ken Johnson.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the administrative law judge's decision on the parties, the provisions of Section

102.46 of the Board's Rules and Regulations shall be applicable.

Bernard S. Mintz, Esq., for the General Counsel.
Paul A. Stamoulis, Esq., of Hazlet, New Jersey, for the Respondent.
Francis Pykon, Esq., of Newark, New Jersey, for the Union.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based upon a charge filed on July 2, 2001, by Local 32, Heat and Frost Insulators and Asbestos Workers (Local 32), a complaint was issued on January 31, 2002, against A & A Insulation Services, Inc. (Respondent).

The complaint alleges that James Cunningham, Ken Johnson, and Keith Wagner applied for employment with the Respondent and it refused to hire them because they were members of a union and intended to engage in lawful activities in support of Local 32.

The Respondent's answer denied the material allegations of the complaint, and on June 12, 2002, a hearing was held before me in Newark, New Jersey. Upon the evidence presented in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the brief filed by the General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, having its office and place of business in Hazlet, New Jersey, has been engaged as an insulation contractor in the construction industry. During the past year, the Respondent provided services valued in excess of $50,000 for Akzo Nobel, Cas Chem, Troy Chemical, and other enterprises within the State of New Jersey which are directly engaged in interstate commerce. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION STATUS OF THE UNIONS

The complaint alleges, and the Respondent denies that Locals 14, 24, 32, and 42, all affiliated with the Heat and Frost Insulators and Asbestos Workers, are labor organizations within the meaning of the Act.

Each of the above unions has collective-bargaining agreements with employers covering their employees who are represented by the union with respect to wages, hours, and terms and conditions of employment. The members of each of the unions participate in the union by attending meetings and voting for union officers.

Based upon the above, I find that Locals 14, 24, 32, and 42 are labor organizations within the meaning of Section 2(5) of the Act.

III. PROCEDURAL ISSUES

A. Standing to File the Charge

The Respondent argues that since none of the three applicants for employment was a member of Local 32, that Union had no standing to file the charge, and that therefore the charge and the complaint upon which it is based, must be dismissed.

As set forth below, the three job applicants were officials of three other labor organizations but were acting at the request of Michael Schneider, an organizer for Local 32 in attempting to organize the Respondent.

Section 102.9 of the Board's Rules and Regulations provides that a charge may be filed by any "person." The term "person" is broadly defined in Section 2(1) of the Act to include labor organizations. Accordingly, Local 32 was a proper charging party even though none of its members was an applicant for hire or the victim of an unfair labor practice.

B. The Respondent's Request for a Greek Language Interpreter

The Respondent's counsel stated that he had requested that the General Counsel provide a Greek language interpreter at the hearing. He further stated that the General Counsel denied his request. The Respondent renewed its request at the hearing. The reason for the request is that the Respondent intended to call its president, Anthony Argyrou, as a witness, and further that Argyrou needed the interpreter to translate the proceedings so that he could understand what was being said. I denied the Respondent's request for a Greek language interpreter to be provided by the General Counsel, and suggested that the Respondent could hire an interpreter at the Respondent's expense. The Respondent called no witnesses to testify and rested its case upon the conclusion of the General Counsel's case.

In *Domsey Trading Corp.*, 325 NLRB 429 (1998), the Board upheld the administrative law judge's ruling denying the respondent's request that the Board pay for interpreters for the respondent's witnesses. In *Domsey,* as in our case, the Board held that (a) the witnesses will be called by the respondent in its case; (b) there was no claim or evidence that the respondent is financially unable to pay for the cost of an interpreter; and (c) the matters that the respondent seeks to adduce through its witnesses relate to its burden of proving its case.

In *George Joseph Orchard Siding*, 325 NLRB 252 (1998), the Board upheld the administrative law judge's ruling requiring that the Board pay for an interpreter for the respondent's witnesses. *George Joseph* is easily distinguishable from the facts here.

First, the Board held that its ruling was limited to the facts therein. The facts in that case when applied here require a finding that Respondent must pay for its own interpreter. In *George Joseph*, the General Counsel called numerous witnesses who were not English speaking or whose English was sufficiently limited so that testimony in Spanish was necessary. Here, all the witnesses called by the General Counsel were English-speaking.

The basis for the holding in *George Joseph*, supra, is that large numbers of witnesses were foreign speaking, the "bulk" of the testimony was in Spanish, and the events relevant to the issues in that hearing were conducted in Spanish. Documents

were in Spanish only, or in Spanish and English, including affidavits, company letters, and other exhibits.

In contrast, here the sole conversation at issue was between Robert Orr, the foreman, and the three individuals who applied for jobs and were refused hire. That conversation took place in English. There is no evidence that any conversation relating to this matter took place in the Greek language.

Accordingly, this case, unlike *George Joseph*, supra, does not involve such a "degree, extent, or proportion of interpretation that the interpretive function transcends simply the advocacy of one party or another and rather becomes a necessary part of the judicial administration of the trial."

Here, an obligation to provide an interpreter remains the obligation of a party litigant, in this case, the Respondent.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

The Facts[1]

1. The advertisement for employees

On May 6, 2001,[2] the following advertisement appeared in a local newspaper, the Asbury Park Press: "Insulators. Industrial work. Must have car. Call 732–495–0091."

Michael Schneider, an organizer for Local 32, noticed the advertisement and on May 7 called Keith Wagner, a Local 24 organizer to ask for help in organizing this employer. The Respondent was located within the jurisdiction of Local 32, and Schneider sought to have a collective-bargaining relationship between Local 32 and the Respondent.

On May 7, Wagner placed a call to the number in the advertisement and was told that the employer was A & A Insulation, the Respondent. Wagner said that he was responding to the ad for insulators. The woman who spoke to him asked how many years of experience he had, and he responded that he had about 15 years of experience. She replied that that was good since the Respondent was looking for experienced workers. She said that she would have "Rob" [Robert Orr] call him. Wagner asked how much work was available and she answered that the Respondent has "a lot of work." He inquired when he could start work, and she said he had to speak to Orr. Wagner offered that he had a couple of other workers who were also interested. She again advised him to speak to Orr.

On May 9, Orr phoned Wagner and asked about his experience. Wagner mentioned that he had 15 to 20 years in the business and had performed all aspects of the insulating trade. Orr mentioned that the Respondent had a large foam glass project "coming up" and wanted to know if he had experience with that type of material. Orr said that new employees start at $13 per hour. Wagner asked if he was looking for additional workers, and Orr replied that he was seeking three employees. Wagner replied that he had others available if he needed more, and Orr responded that three "will do well at this period in time." Wagner asked when "we" could start and Rob said that he needed to interview him first before hiring him. "You sound good, but I need to see you."

They arranged to meet at a rest stop on the New Jersey Turnpike on May 11. Orr asked Wagner where he lived and where he would be traveling from. Wagner answered that he lived in Maryland and that traveling was not an issue. He told Orr that traveling a "great distance" was no problem, and that if necessary, he could relocate to the work area. Wagner asked Orr if he was the owner of the Company. Orr said that he was not the owner but he acted as a field superintendent and did the hiring.

2. The refusal to hire the three applicants

On Friday, May 11, Wagner met James Cunningham, the president of Local 14, a resident of Philadelphia, Pennsylvania, and Ken Johnson, an organizer for Local 42, a resident of Delaware. All three men were full-time paid union officials or organizers. Together, they traveled to the rest stop and met Orr. They wore shirts that said "union yes," but covered those shirts with other apparel. They introduced themselves and Orr gave them employment applications. During the ensuing conversation they filled out their applications.

Unknown to Orr, Wagner tape recorded the conversation. What follows are the material parts of the transcript of the tape recording prepared by Wagner.

The Respondent objected to the introduction of the tape recording as hearsay. Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted. Federal Rules of Evidence, Rule 801(c). Cunningham, Johnson, and Wagner listened to the tape recording of the interview and reviewed the transcript made of the recording by Wagner. All three men testified that the transcript accurately reflected the conversation set forth on the tape. In addition, the Respondent's counsel, after having listened to the tape, stated that it was an accurate depiction of what was said at the meeting.

> Evidence obtained either secretly or without notice is presented all the time in trials. Examples include secretly made tape recordings of telephone or face-to-face conversations, or recordings secretly made of a manager's statements at group meetings. There are many such NLRB cases. *Parts Depot, Inc*., 332 NLRB 670, 679 (2000).

I accordingly reaffirm my ruling overruling the Respondent's objection to the tape as hearsay.

After speaking to the three men about their qualifications, Orr asked them "how soon are you guys looking to start?" They replied that they wanted to begin immediately. They asked where the Respondent was working at that time, and Orr said that the Company had just put in a bid for a foamglass job, was starting a job in Bayonne and "there are a couple of jobs coming. It's going to be a lot of jobs. We'll hopefully do a lot of jobs." Orr noted that if the work maintains its current level "we keep you on, but if we slow down, we slow down . . . ." He added that he could keep the men on "definitely through the summer."

WAGNER: When do you think we can start?

[1] This narrative of the facts is based upon the credited, uncontradicted testimony of the five witnesses presented by the General Counsel which was supported by a tape recording of the main incident involved herein. The Respondent presented no witnesses.

[2] All dates hereafter are in 2001, unless otherwise stated.

ORR: We'll probably get you guys going sometime next week.

WAGNER: Do you know when?

ORR: I'll have to call you. I need to talk to Tony about that.[3]

WAGNER: Can you ask him now? I mean, can you give us a definite date?

ORR: Well, I can call you.

WAGNER: Well, we would just like to know before we get out of here, so we know what we are locked into. Do you think Monday?

ORR: Let me see if I can get him on the phone.

Tony, what's going on with Cas-Chem? When do you want to start that? If you want to keep Gordon over at Axel and I'll set these guys up over there. Yeah, that's where I will be, I'll be there. Tuesday? Okay, yeah, yeah, is Tuesday all right? That will give us time to get material there. Okay, okay. When are you starting over at Hatco? When are you going to finish that shit over there? You working there tonight? Yeah, all right. Okay I'll start everything there unless you want to start it.

[At this point, an unidentified woman approached them and began a conversation. Wagner told her that they were being hired by Orr. She asked Orr whether he was the "boss of these guys?"]

ORR: Well, if I hire them I will be.

Wagner: So when do we start?

ORR: Tuesday, I'll get you guys set up on Tuesday, is that all right?

WAGNER, Cool, yeah man.

ORR: We are going to be starting a new job on Tuesday.

WAGNER: Where at?

ORR: By Bayonne.

WAGNER: Do you know where it is Kenny [Johnson]?

JOHNSON: Yeah.

WAGNER: How much?

ORR: How much what?

WAGNER: We going to start for?

ORR: Twelve.

WAGNER: I thought it was $13.00.

ORR: I said $12.00.

WAGNER: No man, you said $13.00.

ORR: No, I said $12.00. I start everyone at $12.00.

WAGNER: All right.

ORR: I said if you guys know what you are doing, then I will give you $13.00.

WAGNER: How many other people will be on the job?

ORR: The way it looks now, it will be me and one other guy. Maybe.

WAGNER: Will we get a chance to talk to the other people?

ORR: Talk to who?

WAGNER: The other employees, I'd like to. What time do we start on Tuesday?

ORR: The hours are 7:00 a.m. to 3:30 p.m. If we need you to stay later, we will ask you.

WAGNER: 1½ ?

ORR: Yeah, anything over 8 hours is 1½ , Saturday is 1½, Sundays are double time.

Wagner: It's almost like working for the Union, huh?

ORR: Yeah, any federal holidays we give you off. I don't know how many. 11 or 14 in the year. You guys have your own tools?

WAGNER. Yeah.

ORR: Do you have a bander?

WAGNER: I can probably get one.

ORR: They are kind of expensive. Normally when we are doing a tank, we'll make sure you have one. Any type of harness we supply. You are going to need a hard hat, safety glasses, work boots, long sleeve shirt, and pants.

Orr asked the men to write on the top of their applications how much money they wanted deducted from their wages for taxes. Wagner then introduced the subject of union organizing.

WAGNER: Have you ever thought about signing with the Union?

ORR: No, we don't want to get involved in that.

WAGNER: No that's what we are here for, to try and do some organizing.

ORR: For who?

WAGNER: For the Union.

ORR: Uh, we're not going to be Union.

WAGNER: What?

ORR: We're not going to be Union.

WAGNER: Well, we are going to try, that is why we want to meet your other employees. Is that all right? What do you think?

ORR: What do you mean?

WAGNER: We are going to try to organize.

ORR: We are pretty well organized.

WAGNER: No, Union Organizers for the Union.

ORR: We don't want to get involved with the Union.

WAGNER: So the Union's cool, huh?

ORR: What's that?

WAGNER: Organizing, you don't have a problem with that, do you?

ORR: I don't think my uncle wants to get involved in that?[4]

WAGNER: No?

ORR: No.

WAGNER: We are still going to work?

ORR: What do you mean?

WAGNER: The job is still on?

ORR: What are you looking to do here?

WAGNER: We're looking to go to work and organize your company. That's all we want.

ORR: What do you mean organize?

[3] Anthony Argyrou is the president of the Respondent.

[4] In response to a question by the unidentified woman, Orr said that his boss was his uncle.

WAGNER: Make A & A become a Union contractor. That's our goal. We are going to work hard for you and talk to your employees. That's cool, huh?

ORR: I don't think he wants to get involved in the Union.

WAGNER: No?

ORR: No.

WAGNER: So, do we have a job?

ORR: Why didn't you tell me that on the phone?

Wagner: Would you have hired us?

ORR: If you trying to get us in the Union?

WAGNER: Yeah.

ORR: No, we don't want no problems with the Union.

WAGNER: So, we don't have a job then?

ORR: Well, if you are trying to get us in the Union, we don't want to do that.

CUNNINGHAM: So, you are not hiring anybody?

ORR: No.

WAGNER: No?

ORR: We don't want to get involved with the Union.

WAGNER: So, what do you want us to do with these?

ORR: Well, if you are going to be in the Union, we don't want to get involved in the Union. We're not Union, simple as that.

WAGNER: So, since we are in the Union, we go?

ORR: If you are trying to get us in the Union, no.

Wagner: We want to go to work but we want the opportunity to talk to your employees.

ORR: Talk to them about what?

WAGNER: Joining the Union. We want to talk to the employees about making A & A a Union contractor. So, do we still have our job or not?

ORR: What are you trying to do?

WAGNER: We want to go to work and talk to your employees. We are going to talk to them on our own time.

ORR: You want to take our employees?

WAGNER: No, we want them to stay working for you, with Union representation. Do they deserve a better opportunity?

ORR: I don't know what you are talking about. We are not Union. We're not involved with the Union.

WAGNER: All right not yet, but you are now because we are here.

ORR: We are private contractors, we already knew somebody Union, and we did not get involved.

CUNNINGHAM: Who contacted you?

ORR: Tony took care of that.

At this point in the conversation, Orr made a phone call. Wagner stated that he did not know who he called, but Johnson believes that he called Argyrou. A fair inference may be made that Orr called the person who he spoke to earlier which was the Respondent's president, Argyrou.

ORR: Hey what's up? Hey, uh, these guys want us to get involved with the Union somehow. They want to get involved with the Union. The guys that are filling out applications. They want to make us Union. Yeah, yeah. They say Union Organizer. He's a Union Organizer. I know. Yeah, these guys want to make us Union.

CUNNINGHAM: We are not going to make you Union. It's your employees. Give them a better life?

WAGNER: We are going to tell your employees about the opportunities that are available.

ORR: Oh, what?

CUNNINGHAM: We are one of your employees now.[5]

ORR: I did not hear you. Yeah, I did not hear you, what'd you say? It's uh, Union Organizer, International Association of Heat & Frost Insulators and Asbestos Workers. Are you guys Union workers?

CUNNINGHAM: Yeah.

ORR: Yeah, they are Union workers.

CUNNINGHAM: He already hired us.

ORR: Well, all right. He doesn't want anything to do with the Union.

WAGNER: So, we are not going to work?

ORR: No, he doesn't want anything to do with Unions.

WAGNER: No?

ORR: No.

WAGNER: So, we are not going to work?

ORR: He doesn't want any of you guys working.

WAGNER: All right, can I finish filling this out?

ORR: He doesn't want any Union workers. He says no Union workers. I don't know why you didn't tell me this from the beginning.

WAGNER: Would you have hired us, we were looking for a job?

ORR: Why didn't you just tell me from the beginning?

WAGNER: 'Cause you wouldn't have hired us, right?

I guess we shouldn't have told you now. Does this application look all right? Is it cool?

ORR: Good.

WAGNER: All right, thanks, man. Sorry we couldn't do business. We were looking forward to going to work.

CUNNINGHAM: Since we're Union, we're not being hired.

JOHNSON: We are very capable and willing to work for what you are paying.

WAGNER: How about those marginal guys. Can we talk to them, we might want to get them in the Union.

ORR: What marginal guys?

WAGNER: The guys you said you might get rid of.

ORR. Well, right now, it looks like I need them.

At the conclusion of the interview, Wagner gave the three completed applications to Orr who looked at them for a few minutes. The applications prominently set forth the union affiliations of the men, listing their completion of union apprenticeship programs, their positions in the unions, and their employment with union contractors.

[5] Wagner stated that Cunningham gave Orr a business card, and apparently Orr was reading it to Argyrou on the phone.

3. The qualifications of the applicants

Apparently, Orr was satisfied with the qualifications of the three applicants because he offered them employment and told them to report to work.

Cunningham has more than 20 years experience as an insulator, having entered the trade in 1979. He completed a 4-year apprenticeship program and became a journeyman. He has performed "every facet" of insulation work in the industry, including hot and cold systems.

Johnson began work as an insulator in 1965, and he has performed such work for 32 years. He completed apprenticeship training which included all aspects of insulating work, and became a journeyman. He last worked in the trade for 1 month in the summer of 2001. He quit that job because of an old back injury for which he had surgery in 1996. However, Johnson is not restricted in his ability to work.

Wagner began work as an insulator in 1975 or 1976. He completed a 4-year apprenticeship which included all aspects of the trade. Upon completion of such training, he became a journeyman, being employed in all three types of insulation projects—commercial, industrial, and residential. He worked on hot and cold insulation projects. He stated that he was experienced in all aspects of insulation work. Wagner last insulated pipes 5 or 6 months prior to the hearing. Such work was for a charitable organization. Before that, he was employed as an insulator 6 years ago, having worked for M & M Insulation Company.

During the interview on May 11, Orr asked the men if they had worked with a material called Trimer 2000. They said they did not. At the hearing, they explained that Trimer 2000 was a manufacturer's brand name with which they were not familiar, but they knew of the product itself, which is urethane, and had worked with it in the past. In any event, their lack of knowledge of Trimer 2000 did not cause Orr to reject them for hire.

4. The supervisory and agency status of Robert Orr

As set forth above, the evidence establishes that Orr offered employment to the three applicants. He interviewed them and offered them jobs. Aside from the evidence, set forth above, that Orr offered jobs to the three applicants, there was also evidence that he hired two other workers.

Jerry Davis responded to a newspaper advertisement in the summer of 2000. He was interviewed by Orr who asked him about his experience. Davis recited his experience and Orr gave him an employment application. Orr told Davis just to list his name, address, phone number, and the number of dependents on the application. Orr said that he did not have to list his job history. Orr then told him that he could start work the following Monday at $14 per hour.

Davis worked for the Respondent for only 2 months, during which time he was a paid organizer for Local 89, Insulators Union. However, the Respondent did not know of his union affiliation. He sought the job only to obtain information for use in an organizing campaign.

In about the summer of 2000, Davis told Michael Schneider, an organizer for Local 32, that the Respondent was looking for workers. Schneider called the Respondent seeking work, and was told that Orr would call him. Shortly thereafter, Orr and Schneider spoke by phone. Orr said that he understood that Schneider was looking for work, and asked if he knew Davis. Schneider said that he knew Davis. Orr said that there was an opening for an employee and Schneider asked if he could be hired. Orr replied, "yes," and told Orr to report to the job that Davis was then working on.

The following day, Schneider reported to work and introduced himself to Orr who gave him an application. Schneider asked him if he was the boss. Orr said that he was not, that his "Uncle Tony" was the boss, but he (Orr) does the hiring and firing. Schneider worked for about 2 weeks and quit. His purpose in working was to obtain information regarding the Company and when that was completed he left. Schneider did not indicate on his application that he was a union member, and during his tenure, Schneider did not tell his coworkers that he was attempting to organize the Respondent, and did not attempt to solicit their membership in the Union.

In March 2001, Argyrou called Davis several times and asked him to return to work. Argyrou told him that there was a lot of work and that he needed a "couple of men." Davis said that he was not available.

The Respondent's original answer to the complaint admitted the complaint allegation that Orr was its supervisor and agent. The Respondent's first amended answer denied that allegation. At hearing, the Respondent's counsel, in arguing that the employees' testimony on the tape recording was hearsay, stated that "I do believe that the comments of our foreman, Mr. Orr, may qualify for exception to the hearsay rule as being an admission by party opponent, Mr. Orr of course being an agent of A & A Insulation, Inc., the Respondent."

It is abundantly clear, therefore, that on May 11, Robert Orr was an agent of the Respondent and its supervisor having the authority to hire, within the meaning of Section 2(11) of the Act.

Analysis and Discussion

The complaint alleges that the Respondent unlawfully refused to hire Cunningham, Johnson, and Wagner because they were members of a union and intended to engage in lawful activities in support of Local 32.

> To establish a discriminatory refusal to hire violation, the General Counsel must show: (1) that the respondent employer 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; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once the General Counsel has made this showing, the burden shifts to the employer to show that it would not have hired the applicants even in the absence of their union activity or affiliation. [*Tim Foley Plumbing Service*, 337 NLRB 598 (2002); *FES*, 331 NLRB 9, 12 (2000).]

It is clear that the Respondent was hiring at the time of the May 11 interview. In March 2001, the Respondent's president Argyrou asked former employee Davis several times to return to work and told him that he needed a couple of men. Apparently unable to fill the jobs through appeals to former workers,

the Respondent placed an advertisement in a local newspaper for "insulators." Thus, it was seeking more than one insulator. On May 9, Orr told Wagner that he was seeking to hire three people, and on May 11 he offered employment to the three applicants.

It is equally clear that the three applicants had experience relevant to the requirements of the positions for hire. As set forth above, Cunningham, Johnson, and Wagner each had more than 20 years experience as insulators and had completed an extensive 4-year apprenticeship program and had then become journeymen. Their lack of knowledge of Trimer 2000 did not deter Orr from hiring them.

The evidence establishes that Robert Orr possessed the authority to hire employees. He hired Davis and Schneider on his own without seeking permission from Company President Argyrou. Here, too, Orr offered employment to the three applicants without obtaining approval from Argyrou or anyone else. Thus, Orr interviewed the three men and asked about their experience. Immediately following that discussion, and apparently satisfied that the men possessed the needed experience, Orr asked, "[H]ow soon are you guys looking to start?" When they told him that they wanted to begin immediately, Orr said, that they could definitely remain employed through the summer. When the men pressed Orr about starting soon, he called Argyrou in order to determine when the men could start. Orr told the men that he would probably put them to work the following week but that he had to check with Argyrou about a starting date. It was at that point that he called Argyrou. After speaking to Argyrou, Orr told them that they could start the following Tuesday at Bayonne. Orr finalized the hiring by telling them the starting rate of $12 per hour and instructing that they should bring their own tools and safety equipment.

The evidence therefore establishes that three job openings were available and the three applicants were offered employment to fill those openings. *FES,* supra at 14.

Immediately following their hire, Wagner told Orr that they were union organizers who sought to organize the Respondent. Orr's attitude immediately changed. He said that he did not believe that Argyrou wanted to get involved with the Union, adding that Wagner should have told him his intentions to organize when they spoke on the phone prior to the interview. When Orr was asked directly whether he would have hired the men if he had known that they were union organizers, Orr said "No, we don't want no problems with the Union." When asked whether they had a job, Orr replied, "[I]f you are trying to get us in the Union, we don't want to do that" and he was not hiring anyone, and "we don't want to get involved with the Union." Finally, Orr spoke to Argyrou and told him that the three applicants were union organizers. He then told them that Argyrou "doesn't want anything to do with the Union." In reply to a question as to whether they would be going to work, Orr said, "[N]o, he doesn't want anything to do with Unions. He doesn't want any of you guys working. He doesn't want any Union workers. He says no Union workers. I don't know why you didn't tell me this from the beginning."

The evidence is crystal clear that Cunningham, Johnson, and Wagner were offered employment by the Respondent and then were refused hire when the Respondent learned that they were union organizers who sought to organize its shop. I accordingly find and conclude that antiunion animus contributed to the decision not to hire those three applicants. Once the General Counsel has made this showing, the burden shifts to the employer to show that it would not have hired the applicants even in the absence of their union activity or affiliation. *Wright Line*, 251 NLRB 1083 (1980).

The Respondent attempted to prove that it did not possess union animus since it employed Davis and Schneider, both of whom were union members. However, neither told any official of the Respondent that he was a member of a union and they did not indicate on their job applications the fact that they were union members. Accordingly, the Respondent had no knowledge of the union affiliations of Davis or Schneider. Therefore, the absence of animus toward them is explainable since the Respondent was not aware of their union membership.

The Respondent called no witnesses and presented no defense to the complaint's allegations. However, Respondent's counsel raised certain defenses in opening and closing statements, none of which were proven, which will nevertheless be discussed here.

The Respondent's counsel called the tactics of the union "entrapment" or a "sting" done for the purpose of organizing its employees. He asserted that the applicants were not interested in obtaining work but were simply attempting to organize its shop, and were therefore not bona fide applicants. On cross-examination, Cunningham, Johnson, and Wagner conceded that they were full-time paid union officials and organizers, and they intended to retain their jobs with their respective unions while working for the Respondent. They further conceded that they intended to quit work with the Respondent after it was organized. Orr expressed no concern about how long the three men intended to work for the Respondent when he offered them jobs. It is possible that the organizing effort would have taken much time and, thus, the Respondent's concern that these men would work only a short time would not be an issue. The Supreme Court and the Board, in rejecting other respondents' arguments, have found that full-time paid union organizers and employment applicants are considered employees under Section 2(3) of the Act, and are entitled to the Act's protection. *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995); *Ferguson Electric Co*., 330 NLRB 514 (2000), enfd. 242 F.3d 426 (2d Cir. 2001).

The Respondent's counsel further stated that the Respondent sought to hire only one employee, but that three appeared, and that certain jobs it had bid on did not materialize. However, it is clear that the advertisement sought more than one person, Orr expressed a need to hire three people, and in fact offered jobs to the three applicants. In addition, the three men were told that there was enough work to keep them busy through the summer. Counsel also asserted that the Respondent had a practice of hiring residents of New Jersey to work for it because all of its jobs were located in the Northern New Jersey area. As set forth above, Wagner told Orr on the phone when the interview was arranged that he lived in Maryland and that traveling was not an issue. The applicants were not asked at the interview where they lived, and Orr expressed no reservation about hiring them, except when he learned about their union affiliation and in-

tended activities in behalf of the union. In any event, these alleged defenses were not proven at the hearing, Respondent not having called any witnesses or adduced any evidence concerning those matters.

I accordingly find that the Respondent has not met its burden of showing that it would not have hired Cunningham, Johnson, and Wagner in the absence of their union affiliations and intended activities. I therefore find and conclude that the Respondent violated Section 8(a)(1) and (3) of the Act by refusing to hire them because of their union membership and because they intended to engage in lawful activities in support of Local 32.

CONCLUSIONS OF LAW

1. The Respondent, A & A Insulation Services, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Locals 14, 24, 32, and 42, affiliated with the Heat and Frost Insulators and Asbestos Workers, are labor organizations within the meaning of Section 2(5) of the Act.

3. By refusing to hire James Cunningham, Ken Johnson, and Keith Wagner because of their union membership and because the Respondent believed that they intended to engage in lawful activities in support of Local 32, the Respondent violated Section 8(a)(1) and (3) of the Act.

REMEDY

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

The Respondent having discriminatorily refused to hire James Cunningham, Ken Johnson, and Keith Wagner, it must offer them instatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date they would have commenced working for the Respondent, May 15, 2001, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The complaint contained a request for an additional remedy requiring the Respondent to reimburse Cunningham, Johnson, and Wagner for any extra Federal and/or State income taxes that would or may result from the lump sum payment of the award. I reject such a request since such remedial relief would require a change in Board law. *Colden Hills, Inc.*, 337 NLRB 560 (2002).

The Respondent's counsel argued at the hearing that the new work the Respondent expected and for which it had submitted bids did not materialize. Accordingly, according to counsel, it should not have to instate the three men because of lack of work.

Generally, an employee who has been refused hire by an employer is entitled to instatement to the position he applied for. "However, in some situations, legitimate and substantial business reasons may justify an employer in his failure or refusal to reinstate an employee. One such reason may be elimination of the employee's job for substantial and bona fide cause not related to any labor dispute." *McDonnell Douglas Corp.*, 270 NLRB 1204, 1209 (1984). These matters may be raised in a compliance proceeding, in which the Respondent has the burden of demonstrating that instatement should not be made. See *Boland Marine & Mfg. Co.*, 280 NLRB 454, 461 (1986). The Respondent's payroll records were received in evidence upon the General Counsel's offer of them. The General Counsel argues that they show that the Respondent hired certain employees following its refusal to hire the three applicants involved herein. I have not considered such evidence in making this decision. However, such evidence would also be appropriately considered in a compliance proceeding.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, A & A Insulation Services, Inc., Hazlet, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire applicants for employment because of their union affiliation or based on the Respondent's belief that they may engage in union organizing activity once they are hired.

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

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

(a) Within 14 days from the date of this Order, offer James Cunningham, Ken Johnson, and Keith Wagner full instatement to a job for which they applied or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges.

(b) Make James Cunningham, Ken Johnson, and Keith Wagner 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 decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful refusal to hire James Cunningham, Ken Johnson, and Keith Wagner and, within 3 days thereafter, notify each of them in writing that this has been done and that the refusal to hire 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) Within 14 days after service by the Region, post at its facility in Hazlet, New Jersey, copies of the attached notice

[6] 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.

marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 22, 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 are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 11, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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 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 refuse to hire applicants for employment because of their union affiliation or because we believe that they may engage in union organizing activity once they are hired.

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

WE WILL within 14 days from the date of this Order, offer James Cunningham, Ken Johnson, and Keith Wagner full instatement to a job for which they applied or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges.

WE WILL make James Cunningham, Ken Johnson, and Keith Wagner whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire James Cunningham, Ken Johnson, and Keith Wagner and, WE WILL within 3 days thereafter, notify each of them in writing that this has been done and that the refusal to hire will not be used against them in any way.

A & A INSULATION SERVICES, INC.

[7] 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."