American, Inc. *and* International Brotherhood of Electrical Workers, Local 428, AFL–CIO. Case 31–CA–26247

July 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND MEISBURG

On January 14, 2004, Administrative Law Judge Lana H. Parke issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

We agree with the judge's dismissal of the allegations that the Respondent refused to consider for hire and refused to hire the nine union-affiliated applicants involved in this case. Specifically, we agree that the General Counsel failed to satisfy his burden of showing, as to each allegation, that antiunion animus was a motivating factor in the Respondent's conduct. See *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).

The General Counsel's attempt to establish unlawful motivation rested heavily on employee Michael Warholm's testimony that Electrical Shop Manager David Martin threatened that the Respondent would close its electrical department before allowing it to be unionized. However, Martin denied making such a statement, and the judge found "no basis for crediting the testimony of either Mr. Martin or Mr. Warholm over the other." In the absence of credited evidence that Martin made such a threat, the judge properly refused to rely on it as evidence of discriminatory motivation regarding the refusal to consider and refusal to hire allegations. The judge, thus, found no direct evidence of unlawful motivation, and further found that the circumstances did not warrant an inference that the Respondent was motivated by antiunion animus. Therefore, the judge properly dismissed the 8(a)(3) allegations of the complaint.

Our dissenting colleague says that the judge discredited Warholm and Martin. This is not the case. The judge said that she lacked a basis for crediting one over the other. Phrased differently, the judge weighed the testimony of both, and concluded that the credibility of the General Counsel's witness did not preponderate over that of the Respondent's witness. Accordingly, the allegations must be dismissed, because the General Counsel has not carried his burden of establishing the alleged violations by a preponderance of the evidence. See, e.g., *Iron Mountain Forge Corp.*, 278 NLRB 255, 263 (1986) (dismissing allegation that supervisor threatened to fire employee for union activity where judge found nothing to indicate one's testimony was more believable).

Unlike our dissenting colleague, we see no need to remand this case to the judge for her to reconsider her dismissal of the allegations. Our colleague asserts that the judge did not explain her credibility determination. However, as noted, the judge has explained that she had no basis for crediting one over the other. In these circumstances, no useful purpose would be served by a remand.

Nor do we find it appropriate to force the judge to credit Warholm or Martin over the other when she has candidly stated that she has no basis for doing so. The Board relies on the judge, as the finder of fact, to make determinations regarding the credibility of witnesses whose testimony is in conflict. In this case, we find that the judge has appropriately considered the credibility of the two witnesses and made a determination, which we accept, that she had no basis for choosing the testimony of one witness over the other.

Also contrary to our dissenting colleague, we agree with the judge that the circumstances surrounding the Respondent's failure to hire the nine applicants, even if suspicious, are insufficient to warrant an inference that the Respondent was motivated by antiunion animus. See *Dorey Electric Co.*, 312 NLRB 150, 151 (1993) ("Proof of suspicious circumstances is not enough."). Although our colleague posits an answer to the question of the Respondent's motivation, such speculation cannot substitute for proof by a preponderance of the evidence that the Respondent was unlawfully motivated. In this case, the General Counsel has failed to provide such proof, and therefore we must dismiss the complaint allegations.

ORDER

The complaint is dismissed.

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

[2] We find it unnecessary to pass on the agency status of the Respondent's receptionist who denied employment applications to organizers Larry Adams and Ronny Jungk.

MEMBER LIEBMAN, dissenting.

I would remand this case to the judge to make a critical credibility determination and to address record evidence at odds with her dismissal of the complaint.

In March, April, and May 2003, the Respondent was doing electrical work on an Albertson's grocery store in Bakersfield, California.[1] The complaint alleges that the Respondent unlawfully failed to consider for hire and/or hire nine union-affiliated electrician applicants during this time period. The key issue was one of unlawful motivation: whether the Respondent failed to consider or hire the applicants because of their union affiliation. See *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).

The judge found that the General Counsel failed to prove unlawful motive;[2] that the Respondent harbored no antiunion animus, lawfully sought less experienced applicants because they would be likely to accept an hourly wage of $12–16 per hour (the Respondent's targeted wage range), and lawfully preferred applicants who had a referral. The judge concluded that these were "neutral hiring policies, uniformly applied," and dismissed the complaint. As the judge herself acknowledged, however, "some facts have not been fully explained and might even be considered suspicious" (ALJD 7: 44–47). I agree.

The General Counsel elicited testimony from employee Michael Warholm that Electrical Shop Manager David Martin admitted to Warholm that the Respondent's owner, Corwyn Oldfield, did not like the Union and would probably shut down the electrical department before allowing it to go union. Martin denied making these statements. The judge, however, failed to resolve this critical credibility conflict. Instead, she summarily discredited *both* Warholm's testimony and Martin's denial, and concluded that the General Counsel failed to meet his burden of proof.

While a judge may dismiss an allegation because the relevant, conflicting evidence is in equipoise,[3] the judge must provide some explanation, especially when making key credibility determinations. Here, the judge simply stated: "I find no basis for crediting the testimony of either Mr. Martin or Mr. Warholm over the other."

The judge's failure to resolve this conflict over critical testimony is particularly problematic because of other credited record evidence, which points to unlawful motivation. To illustrate:

> 1) The Respondent hired nonunion applicant Ronald McCamey over union-affiliated applicants Larry Adams, Ronny Jungk, and John Benedict, even though Adams, Jungk, and Benedict had less experience;
>
> 2) The Respondent hired certain nonunion applicants at wage rates substantially higher than its targeted wage range, including Benny Jones and Ronald Hicks at $19 per hour, but admittedly disregarded the application of union-affiliated individuals using assumptions as to their wage-rate expectancies;
>
> 3) Several of the union-affiliated applicants did not demand specific wage rates and/or affirmatively stated their willingness to negotiate wages; and
>
> 4) Nearly half of the nonunion applicants hired did not have a referral, despite the Respondent's claim that it normally relied on referrals.

All of this evidence strongly suggests that the Respondent's hiring criteria were anything but "neutral" and "uniform."

Perhaps most troubling, the Respondent was under enormous pressure from the general contractor to assign more workers to the jobsite as soon as possible. Despite its stated preference for referrals, the Respondent ran blind ads seeking electricians. Even so, it did not hire, or even seriously consider, a single known union-affiliated applicant, even though all were qualified and several actually applied immediately after the general contractor demanded more workers. If the Respondent was under such pressure to hire (including Jones whom it hired at $19 an hour), then why did it not offer jobs to Larry Adams and Ronny Jungk? And, of course, what legitimate explanation can there be for denying applications to Adams and Jungk, who were responding to the blind ads, and 15 minutes later giving one to Juan Jaimes? The only apparent explanation is that Adams and Jungk were wearing union insignia. Jaimes was not.

Given these questions and suspicious circumstances, the only appropriate course is to remand the case to the judge for further consideration of the record as a whole.

Rodolfo L. Fong Sandoval, Esq., for the General Counsel.
Steven R. Williams, Atty., of Visalia, California, for the Respondent.
Duane W. Moore, Assistant Business Manager, of Bakersfield, California, for the Charging Party.

[1] All dates are 2003 unless stated otherwise.

[2] The judge found that the General Counsel established all the other necessary elements of his case, as required by *FES*, supra: that the Respondent was hiring, that the union-affiliated applicants had the relevant experience, and that the Respondent did not seriously consider them or hire them.

[3] See, e.g., *Iron Mountain Forge Corp.*, 278 NLRB 255, 263 (1986) (dismissing allegation that supervisor threatened to fire employee for signing union card).

DECISION

STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This matter was tried in Bakersfield, California, on December 3, 2003,[1] upon an amended complaint and notice of hearing (the complaint) issued November 10 by the Regional Director for Region 31 of the National Labor Relations Board (the Board) based upon charges filed by the International Brotherhood of Electrical Workers, Local 428, AFL–CIO (the Union.) The complaint alleges American Incorporated (Respondent)[2] violated the National Labor Relations Act (the Act).[3] Respondent denied all allegations of unlawful conduct.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with an office and place of business in Visalia, California (Respondent's office), has been engaged in the performance of construction services at jobsites located in California. Respondent annually purchases and receives in California goods valued in excess of $50,000 directly from points outside the State of California. Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Refusal to Consider and Failure to Hire Employment Applicants

During March through May, Respondent provided construction services at two jobsites in Central California: Albertsons Market in Bakersfield and Albertson's Market in Clovis (the Albertsons Bakersfield and Albertsons Clovis jobsites, respectively). On February 28 through March 6, Respondent ran help wanted advertisements for electricians in two newspapers, the Bakersfield Californian and Visalia Times Delta. In the former newspaper, the advertisement in the March 5 edition read:

ELECTRICIANS
3 YRS MIN EXP. INDUS-
TRIAL/COMMERCIAL PROJECTS.
559–651–1776

In the following circumstances, the following individuals submitted employment applications to Respondent. As noted below, Respondent did not offer employment to nine of them (the Applicants):

Larry Adams (Mr. Adams) and Ronny Jungk (Mr. Jungk): Mr. Adams is a representative of the Union, and Mr. Jungk is a representative of IBEW Local 100 in Fresno, California (IBEW Local 100). After seeing Respondent's help-wanted advertisement for electricians in the Bakersfield Californian on March 3, Mr. Adams telephoned the listed number, mentioned the advertisement, and was told to come to Respondent's office and fill out an application. Mr. Adams arranged with Mr. Jungk and Juan Jaimes (Mr. Jaimes) to travel to Respondent's office the following day. On March 4, Mr. Adams and Mr. Jungk, wearing IBEW-inscribed shirts, drove to Respondent's offices. Leaving Mr. Jaimes in a parked vehicle about a block away, Mr. Adams and Mr. Jungk went into the office and asked a woman at the counter for applications, saying they were answering a newspaper ad. The woman said Respondent was not taking applications right then, but she would take their information and call them. Mr. Adams said he had called earlier and had been told to fill out an application. The woman said she was just taking down names.[4] Mr. Adams left his resume. The resume stated he was currently employed as an organizer for the Union and that his objective was, "To obtain a position . . . performing electrical construction as a Journeyman Electrician and to educate and organize employees into the I.B.E.W."

Mr. Jungk faxed Respondent his resume later that day with an IBEW Local 100 cover sheet. Mr. Jungk's resume noted he was employed by IBEW Local 100.[5] Both Mr. Adams and Mr. Jungk would have taken positions with Respondent if offered.

On April 16, Mr. Adams telephoned Mr. Martin, said he had not heard from Respondent and asked if they were still hiring. Mr. Martin said work was slow, but he would review Mr. Adams' application and call him. Mr. Adams said he was not able to leave an application but had left his resume. Mr. Martin asked him to fax his resume, which Mr. Adams did along with a transmittal sheet bearing the Union's name and logo. No one from Respondent thereafter contacted Mr. Adams.

On April 16 and 28, Mr. Jungk left voice mail messages for Mr. Martin regarding his resume but received no response.

Mr. Jaimes: On March 3, after Mr. Jungk and Mr. Adams were denied an opportunity to submit applications to Respondent, they asked Mr. Jaimes to see if he could do better. Mr. Jaimes, who wore no clothing identifying him as affiliated with IBEW, went to Respondent's office and returning about 15 minutes later, reported he had been able

[1] All dates herein are 2003 unless otherwise specified.

[2] Respondent was formerly named American Air. The parties agreed that testimonial references to "American Air" are references to Respondent.

[3] At the hearing counsel for the General Counsel amended the complaint to allege Respondent unlawfully refused to hire the seven individuals named in par. 7(a) of the complaint and to include 8(a)(1) allegations of prohibition against employees discussing the Union and threat of business closure.

[4] Martin credibly testified that Respondent's policy is always to accept an application. I find this instance to be an unexplained aberration.

[5] Jungk was then and through the time of the hearing employed as an organizer of IBEW Local 100. Based on later conversations Jungk testified to between him and Butch Oldfield (Oldfield), Respondent's owner, Oldfield was clearly aware of Jungk's union employment.

to submit an application. Later, Respondent hired Mr. Jaimes to work at the Bakersfield Albertsons jobsite.[6]

Robert McKee, Mark Lewis, John Lewis, and Frank Hoffman III: These four applicants, members of IBEW Local 570 in Tuscon, Arizona, were looking for electrical construction work in California. They signed an out-of-work list at IBEW Local100 in Fresno, California, and Mr. Jungk suggested they apply at Respondent. When, on April 3, the four reported to Respondent's office as a group, two of them were wearing IBEW-inscribed clothing. They filled out and submitted applications to Respondent, which indicated their union affiliations.[7] Robert McKee, Mark Lewis, and John Lewis recontacted Respondent and left voicemail messages but were unable to speak to any manager or supervisor. Respondent hired none of them.

Robert McKee, Mark Lewis, and John Lewis were unwilling to take any position less than journeyman.[8] Robert McKee did not expect to be paid the contract scale of approximately $27.00 an hour. The lowest previous salaries of Robert McKee, Mark Lewis, John Lewis, and Frank Hoffman III as noted on their applications were $18.15, $17.00, $18.20, and $18.25 respectively.

Troy Guynn (Mr. Guynn): Mr. Guynn requested a job referral from IBEW Local 100. The union representative told him Respondent was hiring. Mr. Guynn, who planned to be a union organizer on the job if hired, faxed a resume to Respondent, the cover page of which was on the letterhead of IBEW Local 100 and stated, in pertinent part:

> I was made aware that you are bidding a lot of prevailing wage projects in the Tulare County area. I have worked on a lot of this type of work. I have over 30 years experience in the electrical field in commercial and industrial applications. I know if given the chance I would be an asset to your company. Thank you for your consideration.[9]

Respondent never called Mr. Guynn although he left manager voice mail messages for Mr. Martin on April 3, 16, 28, and May 12.

John Benedict (Mr. Benedict): On April 7, wearing a Local 100 vest and tee shirt, Mr. Benedict filled out a journeyman electrician application at Respondent's office, which noted his approved apprenticeship through IBEW. The secretary said she would put the application on Mr. Martin's desk. The secretary left the office briefly and upon returning said Respondent was not hiring electricians at that time. On April 28 and May 8, Mr. Benedict left voice mail for Mr. Martin requesting callbacks but received no response. Mr. Benedict would not have taken any job other than the journeyman position he had applied for.

Doug Ackerman (Mr. Ackerman): Mr. Ackerman's application dated April 16 was received into evidence. It noted he was an 8-year member of IBEW with 18 years of electrician experience. His lowest previous rate of pay was $22.00. Mr. Martin could not recall having received the application. No further evidence was adduced regarding Mr. Ackerman.

Michael Warholm (Warholm) worked on the Albertsons Bakersfield site for a few days in March as a nonsupervisory leadman. He left Respondent's employ to enter an apprenticeship program. On his last day of work, March 27, he spoke to Martin in the Visalia office at about 2 to 2:30 p.m.[10] Martin asked him not to tell other workers about his plans, as he did not want "to start a wildfire throughout the workers." Warholm asked Martin why the Company could not go Union. According to Warholm, Martin said, "Oldfield did not like the union and did not want the electrical department to go union; he would probably shut down the electrical department of the company before that happened." Martin denied ever telling anyone Oldfield would rather shut down the electrical unit than go Union, although he knows Oldfield does not want Respondent to be union signatory because he believes it would inhibit flexibility. I find no basis for crediting the testimony of either Martin or Warholm over the other. The General Counsel bears the burden of proving unlawful statements and/or animus. Since I cannot resolve credibility in favor of the General Counsel's witness, I cannot find the alleged statements to have been made.

On March 31, Ronny Jungk called Oldfield and asked to set up a meeting to discuss the advantages of Respondent going Union, saying good electricians were hard to find, and the Union could provide him with manpower. Oldfield said he was not interested, that the Union had nothing to offer the Company, which was not set up to go Union. Jungk said he knew Respondent was bidding Sequoia Regional Cancer Center and asked how Respondent intended to power it. Oldfield said a lot of his projects would be finishing up at that time, and he would transfer employees. Oldfield said he had learned Jungk had put in an employment application and asked, "Are you not busy . . . are you not the [union] business manager?"

[6] Upon counsel for the General Counsel's representation that Jaimes had returned to Mexico and was unavailable, I received his Board affidavit into evidence for limited purposes. Jaimes's affidavit testimony is that several hours after submitting his application, Jeff Hansen, Respondent's project manager, telephoned him and told him to report to the Bakersfield Albertson's jobsite for testing the following day, which I accept.

[7] Respondent's clerical employees accommodated the four by making a room available to them where they could sit at a table while filling out the applications.

[8] John Lewis testified he was not applying as an apprentice, having already served his time in that position but if he could make $20 an hour he guessed he could accept an apprentice job.

[9] The prevailing wage projects to which Guynn referred are those funded by public monies, which require employees to be paid "prevailing wages." No clear evidence was adduced as to what prevailing wages were in the area, but the parties essentially agreed such wages were at least the equivalent of the union contract wage and benefit package, which for journeymen electricians was about $27 an hour. Respondent generally promoted current employees to prevailing wage jobs, as a way of rewarding them.

[10] Martin put the meeting a few days later. I do not find it necessary to resolve this testimonial conflict.

Jungk said he wanted the job to show Oldfield how good union electricians were, how he could benefit from a pool of qualified manpower, and that he wanted to organize Respondent's employees. Oldfield said he was not interested in the Union or what the Union had to offer.

On May 12, Jungk spoke to Oldfield by telephone. He congratulated him on getting the Sequoia Regional Cancer Center contract. He told Oldfield Respondent would probably need more manpower once the job started, that the Union could provide such manpower, and that he still wanted a job. Oldfield said, "That is never going to happen." Oldfield asked if the Union was not busy. Jungk said the Union could draw in electricians from all over the United States, and if Respondent went signatory, the Union could supply qualified manpower. Oldfield said, "Well, like I said, that will never happen."[11]

B. Respondent's Evidence

According to Martin, Respondent's hiring preference is to recruit employees from referrals by other employees including foremen. Respondent rarely places help-wanted advertisements in newspapers. In late February, the general contractor at the Albertsons Bakersfield site directed Respondent to provide more electricians by the following week. To meet the request, Respondent needed to add about eight employees to its site complement and to that end placed advertisements in Bakersfield and Visalia newspapers. In response to the advertisements, Respondent received several dozen applications. In accordance with his normal practice, Martin cursorily reviewed the applications but did not make return calls to all applicants because of time constraints. According to Martin, within 1 to 2 days after placing the advertisement, the openings were filled.

In reviewing the applications/resumes submitted for the advertised positions, Martin looked for entry level employees with 2 to 4 years' experience because Respondent wanted to pay a commensurate wage, i.e., $12–$16 an hour. He believed union-affiliated employees were generally looking for higher wages than the range Respondent was willing to pay. Martin denied refusing to consider union-affiliated applicants for employment, but he believed their desired wage scale would be unacceptable.

During relevant times, Respondent hired the following employees on the following dates at the hourly wage rates[12] and classifications listed:

Rodrick Martinez	March 4	$9.00	electrician/laborer
Mr. Jaimes	March 7[13]	14.00	electrician
Benny Jones	unknown	19.00	electrician
Chris Portillo	March 10	6.75	electrician/laborer
Brice Souza	March 10		electrician/apprentice
Ronald McCamey	March 10	15.00	Electrician
Michael Hicks	March 10	14.00	electrician
Ronald Hicks	March 10	19.00	electrician
Richard Rivera	March 13	15.00	electrician
Troy Bridges	March 31		electrician
Alfonso Ibarra	April 7	10.00	electrician/apprentice
Adam Wyatt	April 11	12.00	electrician/laborer
Jose Benavides	April 21		electrician
Michael Herring	April 30		electrician
Adam Palmer	May 27		electrician/laborer
Paul Gayler	June 3		electrician[14]
Rick Aleman	June 6		electrician/laborer
Steve Wroten	June 13		electrician/laborer
Patrick Mossey	June 16		electrician

Although Respondent preferred to hire pursuant to employee referrals, Respondent hired Jaimes, Chris Portillo, Rodrick Martinez, Troy Bridges, Benny Jones, Ronald McCamey, and Adam Wyatt other than through referrals.

According to Oldfield, Respondent has no problem with the Union and considers union-affiliated employees to be generally highly trained and, mostly, knowledgeable. Because Respondent provides services in multiple trades, Respondent may ask its employees to perform varied tasks, e.g., electrical work, pour concrete, hang duct, sheet metal work, and, therefore, becoming union signatory would not be a "good fit" for the Company.

III. DISCUSSION

A. Alleged Independent Violations of Section 8(a)(1)

By amendment at the hearing, counsel for the General Counsel alleged Respondent violated Section 8(a)(1) of the Act by prohibiting employees from discussing the Union and by threatening business closure if employees engaged in union activity. Both allegations arise from Warholm's testimony of a conversation he had with Martin, wherein Martin assertedly asked him not to tell other workers of his entering an apprenticeship program and allegedly said Oldfield would probably shut down the electrical department of the Company before he went Union. Even assuming such statements constituted violations of the Act, as I am unable to conclude Martin made them, I cannot find any independent violations of Section 8(a)(1) of the Act, and I shall dismiss these allegations.

[11] There is no evidence to justify a conclusion that Oldfield's response meant anything more than that he was unwilling to sign an 8(f) contract with the Union.

[12] Evidence regarding wage rates was not introduced for all employees.

[13] Company records show Jaimes as hired on March 7. He signed his I-9 on March 5.

[14] Paul Gaylor's application shows his prerespondent hourly wage was $8.50.

B. Respondent's Failure to Hire Employment Applicants

The General Counsel alleges that Respondent refused to consider for hire or hire the applicants. In such cases, the General Counsel bears the burden under *FES*[15] of showing that Respondent was hiring at the time the applicants applied for employment, that the applicants had experience and training relevant to the requirements of the positions for hire, and that antiunion animus contributed to Respondent's decision not to consider or to hire them. The General Counsel has met its burden as to the first two elements.

As to the third element, "the allegations of unlawful discrimination . . . must be supported by affirmative proof establishing by a preponderance of the evidence that the Respondent's conduct was unlawfully motivated." *Ken Maddox Heating & Air Conditioning*, 240 NLRB 43, 44 (2003). The sum of the credible evidence is that the applicants, openly union-affiliated, sought employment with Respondent, and Respondent neither seriously considered them for employment nor hired them. Those facts, without more, do not constitute affirmative proof of unlawful motivation. The applicants were not alone in not being seriously considered or hired. Respondent received a large response to its employment advertisements and did not have the time or need to peruse each application. Accordingly, most individuals applying with Respondent during the relevant time period received the same treatment as the applicants, e.g., had their applications either disregarded or briefly reviewed with no follow up by Respondent. No direct evidence shows Respondent's failure to hire the applicants was motivated by antiunion considerations. Counsel for the General Counsel does not argue and authority does not support any contention that Respondent's desire to hire employees at lower wages than the ranges established by area union contracts is unlawful. Respondent's presumption that applicants with extensive and highly paid prior work experience are likely to want higher wages than Respondent is willing to pay is likewise lawful. Further, Respondent's preference in employing individuals referred by existing employees is a legitimate policy. *Ken Maddox Heating & Air Conditioning*, supra at 44, and cases cited at footnote 4.

It is true that some facts have not been fully explained and might even be considered suspicious. Thus, Adams and Jungk, overtly union-affiliated, were not given applications when they went to Respondent's office on March 3, whereas some minutes later, Jaimes, covertly union affiliated, was given one. Further, Benny Jones with 17 years of experience and Ronald Hicks, with many years experience, were hired during the relevant time period at $19 per hour, both having rates and experience above the range Respondent desired. As to Benny Jones, Respondent explained he happened to be at the right place at the right time when he walked onto the jobsite seeking work after Respondent had received a 48-hour notice from the general contractor to additionally man the job. As to Ronald Hicks, Respondent hired him as the senior member of a father/son team who had worked for many years with several of Respondent's employees, thus following Respondent's lawful referral policy. Respondent knew of the Hicks, *pere* and *fils*, and of their capabilities and considered Ronald Hicks to be underpaid at $19 an hour.

Notwithstanding the anomalies in Adams and Jungk's attempted applications and in the hiring of Jaimes, Benny Jones, and Ronald Hicks, I cannot infer anti union animus or other unlawful motivation from the circumstances. No supervisor or agent of Respondent was involved in refusing to give applications to Adams and Jungk. A month later Robert McKee, Mark Lewis, John Lewis, and Frank Hoffman III, also overtly union affiliated, were not only given applications but accommodated by being provided a place to fill them out. Even assuming disparate treatment was accorded Adams and Jungk in the application process, it cannot redound to Respondent's discredit in the absence of supervisor or agent involvement. Regarding the hiring of Jaimes, even a cursory examination of his application shows him to fit within Respondent's hiring policy parameters. Jaimes had a little over 2 years experience; his highest pay rate was $15; he stated a readiness to do laborer as well as electrical work, and he attached a letter of recommendation from a former employer. As to the hiring of Benny Jones and Ronald Hicks, Respondent's willingness to go beyond its preferred experience and wage range in special instances cannot, by itself, establish unlawful motive. There is no direct evidence of antiunion animus and no evidence Respondent's failure to hire the applicants was not the fortuitous result of "neutral hiring policies, uniformly applied [citation omitted]" *Ken Maddox Heating & Air Conditioning*, supra at 44 (2003). Accordingly, I conclude the General Counsel has not met its burden under *FES*, supra, of showing antiunion animus contributed to Respondent's decision not to consider or to hire the applicants, and I shall dismiss this allegation.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The complaint is dismissed.

[15] 331 NLRB 9 (2000), affd. 301 F.3d 83 (3d Cir. 2002).

[16] 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.