

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

D & F ELECTRIC, INC.

and

Case No. 9-CA-34614

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, LOCAL
UNION 369, AFL-CIO

Patricia R. Fry, Esq., for the General Counsel.¹
Michael L. Boylan, Esq., for the Respondent.

DECISION

Statement of the Case

GEORGE ALEMÁN, Administrative Law Judge. This case was tried in Louisville, Kentucky on September 18, 1997. The charge in the matter was filed on February 6, 1997, by International Brotherhood of Electrical Workers, Local Union 369, AFL-CIO (the Union), after which the Regional Director for Region 9 of the National Labor Relations Board (the Board) issued a complaint on April 28, 1997, alleging that the Respondent, D&F Electric, Inc., violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by “failing and refusing to consider for hire” David Adams and William Bogard because of their membership in the Union, and by denying access to its facility to Union members who sought to submit applications for employment.² By answer dated May 6, 1997, the Respondent denied the above allegations.

All parties were afforded full opportunity to call and examine witnesses, to submit oral as well as written evidence, and to argue orally on the record. On the basis of the entire record in this proceeding, including my observations of the demeanor of the witnesses, and having duly considered posthearing briefs filed by the General Counsel and the Respondent, I make the following³

¹ Herein referred to as the General Counsel.

² The General Counsel, on brief (p. 2), erroneously asserts that the allegation in the complaint avers that the Respondent “refused to consider or hire union members.” The complaint does not allege a refusal to hire, but rather only a refusal to consider for hire.

³ Transcript pages herein are identified as (Tr.) followed by the page number. Exhibits are identified as either (GCX) for a General Counsel exhibit or (RX) for a Respondent exhibit. The General Counsel’s brief is identified as (GCB) and the Respondent’s brief as (RB).

Findings of Fact

I. Jurisdiction

5 The Respondent, a corporate entity with a facility in Louisville, Kentucky, is engaged as
an electrical contractor in the construction industry. During the twelve months preceding
issuance of the complaint, a representative period, the Respondent performed services valued
in excess of \$50,000 outside the Commonwealth of Kentucky. The complaint alleges, the
Respondent admits, and I find that Respondent has been at all relevant times herein an
10 employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The
Respondent further admits, and I find, that the Union is a labor organization within the meaning
of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Factual Background

15 The facts in this case are relatively simple. D&F Electric is owned by Richard Duncan.
Historically, the Respondent has operated as a non-union contractor, and is a member of
Independent Electrical Contractors Association, an organization composed primarily of non-
20 union contractors. During the relevant time period herein, e.g., Fall, 1996,⁴ Lyndel Lee
Whitmer served as a supervisor for Respondent, responsible for the hiring of electricians,
helpers, truck drivers, and other personnel that would be needed on any particular job. Leslie
Robin Wade serves as its secretary/payroll clerk.

25 The Respondent obtains electrical contracting jobs through competitive bidding.
According to Whitmer, if the Respondent believes one or more of its bids may be successful, it
proceeds to place a help wanted ad in the local newspaper. Whitmer added, however, that
Respondent solicits résumés only to ensure that it has a pool of candidates from which to select
30 in the event its own workforce, which in the Fall of 1996 included some 25-30 electricians and
helpers, proves to be insufficient to handle a particular job it has bid on (Tr. 20). Both he and
Duncan testified that the mere placement of an ad does not mean that jobs are available or that
Respondent intends to hire anyone who responds inasmuch as Respondent may not be
awarded any of the jobs it has bid on, and may simply not need any additional help (Tr. 118;
35 146). They further testified that the résumés received in response to an ad are maintained in a
45-day file, after which they are discarded. Whitmer claims he normally shreds the old résumés
every 2-3 weeks, but may have at times delayed doing so for more than three weeks depending
on his work schedule or whether he was out of the office (Tr. 13). Duncan agreed with Whitmer
40 that the purging of the 45-day file does not always occur (Tr. 149). As to Respondent's hiring
practices, Whitmer and Duncan testified, without contradiction, that Respondent gives first
preference to former employees, followed by employee referrals. Only when the Respondent is
unable to meet its hiring needs from the latter two categories does it hire from résumés
received in response to its want ads (Tr. 110; 147). The Respondent does not accept walk-in
applications and will only allow an application to be submitted when it anticipates hiring the
individual in question (Tr. 115).

45 During the latter part of 1996, more particularly on September 29, and November 17, the
Respondent ran two such ads in a local newspaper (GCX-13, 14). The September 29, ad was
placed in the Louisville Courier Journal, a local newspaper, and solicited résumés from

⁴ All dates are in 1996, unless otherwise indicated.

electricians, apprentices, and helpers. The ad did not identify the Respondent by name and simply instructed applicants to send their résumés to PO Box 91436. Union organizer William Finn testified that during this time period the Union was trying to place its members in non-Union companies as part of a “salting” strategy (Tr. 97).⁵ He did this by reviewing the “help wanted” ads in newspapers and determining which employers were looking for workers and then urging his members to apply for work. On September 29, Finn came across Respondent’s ad and on checking with the Post Office learned the PO Box listed in the ad belonged to Duncan. On October 9, Finn sent unemployed Union members David Adams, Brian Vandenburg, Eugene Ramey, and Dennis Sells to apply for work with various employers who had run ads, including the Respondent. Adams and Vandenburg both gave accounts of their activities that day.

Adams testified that he and the other three individuals, all of whom were wearing some form of Union logo or insignia, drove in his truck to four different employers, including Star Electric, Thurman & O’Connell, Payne Electric, and the Respondent, to submit job applications. At Star Electric, they were told the employer was not accepting applications, but Thurman & O’Connell and Payne Electric did accept their applications. The employees arrived at the Respondent’s facility at around 3:00 PM and parked the truck in Respondent’s parking lot. Adams could not recall seeing other cars parked in the lot. He testified that after parking his truck, he got out and walked towards the door leading to Respondent’s office. The top half of the door was glass-paned and covered inside with a venetian blind that was closed. Adams claims that as he approached the door, he observed that a corner of the blinds “moved a little bit,” and that the door was locked when he tried to enter.⁶ He then returned to his truck, got one of Finn’s business cards from the back of the truck, and stuck it in Respondent’s door. Adams did not recall if he or any of the other three knocked on Respondent’s door that day. The entire incident took about five minutes or so, according to Adams, after which he and the others drove back to the Union hall.

Adams claims that he called Respondent the following day to ask if it was hiring, and informed the woman who answered that he had been there the day before but that the door was locked. The woman responded that Respondent was not hiring and hung up. He purportedly made a similar inquiry on November 7, and received the same answer. Adams did not recall having mentioned his Union status to the woman during either of these phone conversations (Tr. 70).

Vandenburg’s version of the October 9, visit accords with Adams’ account only with respect to how they arrived at Respondent’s facility that day and in their description of the front door. Vandenburg, however, claims he tried to open the door but found it locked, that he observed a light on inside the office, and that he knocked loud enough to be heard but received no response. He testified that while he was at the door trying to enter, Adams and the other two individuals waited in the parking lot. Vandenburg denied seeing any intercom on the door that day. On receiving no response to his knock, Vandenburg claims he asked the others if

⁵ The “salting” strategy, in place for four years, was simply a plan by the Union to organize the non-Union contractors in the Louisville area by having its members apply for work with and be hired by such firms. The “salting” plan was a departure from the Union’s practice of discouraging its members from working for non-Union contractors (Tr. 191).

⁶ Duncan testified that since 1961, the front door has always been kept locked (Tr. 151). Wade likewise recalled the door being locked since the start of her employment in 1989, and ascribed it to security concerns noting that Respondent’s facility, located in a problem neighborhood, has been broken into in the past (Tr. 135).

they had one of Finn's business cards, that Adams said he did and went to the truck to retrieve it, and that he (Vandenburg), not Adams, stuck Finn's card in the door.

5 Finn claims that when Adams and the others returned to the Union hall, he asked them what had happened and that they told him that someone inside Respondent's office saw them coming and locked the door (Tr. 102-104). Neither Adams nor Vandenburg was asked to corroborate Finn's above account.

10 The Respondent, as noted, ran a similar ad on November 17 (GCX-14). Adams testified that on November 19, he mailed a copy of his résumé to the PO Box listed in the ad. The résumé reflected, inter alia, that from 1977 to 1981, Adams was enrolled in an apprenticeship program with the Union, and listed three individuals, including Finn and Terry Lockett, another Union official, as references (GCX-11).⁷ Adams' testified that he received the PO Box from Finn,⁸ but could not recall seeing Respondent's want ad or being told the PO Box belonged to D&F Electric (Tr. 76). There is no indication that Adams' undated résumé was forwarded with a cover letter or that Adams called any time shortly thereafter to inquire if the résumé had been received or if jobs were available. Rather, according to Adams, his only call to Respondent occurred some three months later, in February 1997, during which he asked whether Respondent was hiring or accepting applications, and was told no. He could not, however, recall ever mentioning that he was from the Union.

20 Union member William Bogard similarly testified that he sought Finn's advice on November 25, about obtaining work with non-union contractors. The following day, he prepared a résumé to be sent in response to help wanted ads. Bogard identified himself as a Union member in the résumé, listed his involvement in the Union's apprenticeship program, and, like Adams, named Finn and Lockett as references (GCX-8). However, unlike Adams, Bogard identified Finn and Lockett as Union officials. The next day, November 27, Bogard went to the Union's office to get his résumé typed. Unable to do so right away, Bogard decided to mail out his handwritten version to the various employers that were running ads, including one to PO Box 91436 which Finn had given him. After addressing an envelope to PO Box 91436, he gave it to Finn. Finn then ran the envelope through the Union's postage meter and deposited the envelope in the Union's outgoing mail bin. Finn confirmed Bogard's account as to the mailing of the résumé, but admits he did not see Bogard address the envelope to Respondent's PO box. As a follow-up to his mailing, Bogard on December 2, called Respondent's office and spoke to a woman. In response to his inquiry, the woman told Bogard the Respondent was neither hiring nor accepting applications or résumés. Bogard purportedly asked the woman if she knew anyone who was hiring and was again told no. He did not, however, identify himself as being with the Union (Tr. 43-44).

40 Bogard claims he went to Respondent's facility two days later and observed construction taking place and an intercom by the door. He purportedly knocked on the door at which point a woman responded through the intercom. Using the intercom, Bogard identified himself, stated that the Union sent him because it believed Respondent was hiring, and asked if this was so

45 ⁷ Adams did not identify Finn or Lockett as Union officials, and there is no evidence that Respondent knew who Finn and Lockett were or that they were somehow affiliated with the Union.

⁸ While Finn testified that he encouraged Union members to respond to the ads, he makes no mention of having specifically provided Adams with Respondent's PO box address. Rather, the General Counsel only had him confirm Bogard's account of the circumstances surrounding the latter's mailing of his résumé (Tr. 100).

because he needed a job really bad. The woman told him Respondent was not hiring, and when Bogard asked if it planned to hire in the near future, the woman stated she did not think so (Tr. 42-43). Bogard purportedly contacted Respondent on numerous occasions thereafter and identified himself as a union electrician.⁹ On each such occasion, he was again told that Respondent was not hiring, or accepting applications or résumés.¹⁰

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According to Vandenburg, he too visited Respondent's facility on December 4, but left without seeking entry after seeing a sign on the door prohibiting solicitation and stating that Respondent was not accepting applications. He also noticed that there was an intercom on the door. He testified that neither the sign nor the intercom were in place on October 9, when he and others tried to apply for work, and further observed that the blinds on the door were closed, as they had been on October 9 (Tr. 85; 91).

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Although neither Bogard nor Adams was hired, the Respondent did do some hiring in the Fall 1996. Thus, the record reflects that Greg Weyhing, a former employee, submitted a résumé on or about November 21, and was hired soon thereafter by Whitmer, possibly on or about December 4 (GCX-4; Tr. 21-22). Whitmer also hired former employee Ron Poston, although the record does not make clear when (Tr. 18-20;109), as well as James Franklin, who had been referred to him by another employee, Tommy Williams (Tr. 126-127). Franklin was hired on or about December 5 (GCX-16). Another employee, O'Neil, was hired by Duncan because the latter was a personal friend of his as well as a former employee (Tr. 147). Except for these four, no other individuals were hired during this period. The record is silent on just how many résumés Respondent received in response to its ads, or as to the number of union and nonunion applicants who submitted résumés. Whitmer, who admitted he reviews all résumés (Tr. 111), could not recall ever seeing either Adams' or Bogard's résumé in the 45-day file, and testified that their résumés may or may not have been received by Respondent, but he simply had no knowledge of this one way or the other (Tr. 112, 114).

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Regarding the 45-day file, the record reflects that during the government's investigation of the charge, Whitmer provided the General Counsel with an affidavit dated April 1, 1997, that contained attachments labeled "A-1, A-2, A-3," The attachments included résumés that were still in the 45-day file as of March 1997, and photocopies of envelopes containing the postmarked dates on which the résumés were presumably sent. The record, however, does not make clear precisely how many résumés were found in the file, although the General Counsel's reference to an attachment "A-19" reasonably suggests that at least 19 items were retained. Of these nineteen résumés, seven apparently were received around the time that Bogard and Adams allegedly sent theirs, although the résumé of neither two was found in the file.¹¹ Nor was it established on the record whether any of the nineteen applicants had, like

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⁹ Bogard's testimony reflects that he identified himself only as a union electrician, not as a Local 369 member.

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¹⁰ Bogard testified to having called on January 6, 1997, visited on January 13, 1997, and called again on January 15, 24, 27, February 7, 14, 21, and 28, 1997 (Tr. 42-48). During the January 24, 1997, phone conversation, he learned that the woman who answered his calls was named "Leslie," presumably Respondent's secretary, Leslie Wade. During the February 28, phone conversation, Bogard purportedly spoke with another woman who identified herself only as "Mary." Wade identified a Mary White as an employee of Respondent (Tr. 137-138).

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¹¹ The General Counsel questioned Whitmer only with respect to attachments A-3 to A-6, A-8, A-10, and A-19, but made no inquiry into the remaining 12, leading me to believe that the seven résumés alluded to by the General Counsel were in all likelihood the only ones more than 45 days old as of March 1997 (Tr. 14-17).

Bogard, identified themselves on their résumés as being affiliated with Local 369, or with some other union. While the General Counsel had the résumés with her at the hearing and questioned Whitmer as to when some of them might have been received by the Respondent, she made no inquiry into whether any of the applicants' résumés revealed a union affiliation and, except for two résumés, that of applicants Ronald Panther and Brian Cave,¹² offered none of the résumés into evidence.

As to the "no applications/no solicitation" sign Vandenburg purportedly saw on Respondent's door on December 4, and which the latter claims was not in place on October 9, Wade testified, credibly and without contradiction, that the sign in question was ordered from Recognition Unlimited, a sign-making firm, on April 18, received by Respondent soon thereafter, and placed by her on the door on April 22. Wade's testimony as to when the sign was ordered is corroborated by the purchase order received into evidence as RX-1. While the purchase order does not reflect the date the sign was actually posted, Wade's testimony that the sign took only 3-4 days to make after which she personally installed the sign on April 22, is simply more believable than the alternative suggestions that the Respondent delayed posting the sign for six to eight months, e.g., between October 9, and December 4, after receiving it, or that the sign was not posted sooner because it took some six to eight months to make. Accordingly, I credit Wade's testimony and find that she placed the sign on the door on April 22, that it was in place on October 9, when Vandenburg and others arrived at Respondent's premises, and that Vandenburg either failed to notice the sign on October 9, or is simply not being truthful.

With respect to the intercom system, Duncan admits that a new system was ordered on October 11, two days after the October 9, visit (Tr. 185-186). He testified, however, that this new system simply replaced an older ineffective intercom that had been in place long before October 9. He noted in this regard that some two years earlier, Respondent reconfigured its facility resulting in a slight relocation of its main office. Although the front door retained use of the intercom, Duncan testified that it lacked a buzzer by which someone inside the office could buzz open the door and let someone in. It was this particular change which was apparently added after October 11. Thus, while I am convinced Vandenburg was correct in testifying that he saw a new intercom in place on December 4, I also find credible Duncan's assertion that the old intercom system was in place on October 9, during Vandenburg's initial visit. Vandenburg's assertion that he did not see an intercom on October 9,¹³ like his claim about not having seen the sign before December 4, is found not to be credible.

B. Analysis and Findings

As indicated, the General Counsel contends that Respondent was motivated by anti-Union reasons when it refused to allow Adams, Vandenburg, Ramey, and Sells to enter its office to file job applications, and by failing and refusing to consider Bogard and Adams for hire.

An employer's failure or refusal to allow an individual to file an application for employment because of his or her membership in, or association with, a union violates Section 8(a)(3) and (1) of the Act, as does its refusal to consider applicants for hire because of their union membership. *Smith and Johnson Construction Co.*, 324 NLRB No. 153, slip. op. 16 (1997); *Lancet Arch, Inc.*, 324 NLRB No. 28 (1997); *Walz Masonry, Inc.*, 323 NLRB No. 216, slip op. at page 3 (1997); *Manno Electric*, 321 NLRB 278, 294 (1996); also, *Fluor Daniel, Inc.*,

¹² Neither Panther's nor Cave's résumé show an affiliation with a union (GCX-15, 18).

¹³ Adams was not asked whether he noticed an intercom system in place on October 9.

311 NLRB 498 (1993). This holds true even when, as here, the intent of the union applicant seeking employment is to organize the employer's employees. *Starcon, Inc.*, 323 NLRB No. 168, slip op. at 6 (1997), citing *NLRB v. Town & Country Electric*, 516 U.S. 5 (1995). Where the alleged violations hinge on the employer's motivation for its actions, the Board applies the causation test enunciated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), and approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's actions. If the General Counsel is able to do so, the burden then shifts to the employer to show that the same action would have occurred notwithstanding the protected conduct.

Where, as here, it is alleged that the Respondent refused to consider Union members for hire, the General Counsel's *Wright Line* burden is one of showing that Adams and Bogard applied for work, that Respondent knew or had reason to know they were associated with the Union, that it harbored anti-union animus, and that it was this animus which motivated the employer's actions. See, *Norman King Electric*, 324 NLRB No. 166 (1997), citing to *Fluor Daniel, Inc.*, 304 NLRB 970 (1991) and *KRI Constructors*, 290 NLRB 802, 811 (1988). As to the allegation that Union members Adams, Vandenburg, Ramey, and Sells were unlawfully denied the opportunity to file applications in the first place, it stands to reason that the General Counsel's burden is one of showing that these four attempted, but were rebuffed in their efforts, to file job applications with Respondent, and that the latter knew or should have known of their Union status and refused to allow them to do so because of its anti-union animus. If the General Counsel is able to make such a prima facie showing, the burden then shifts to the employer to demonstrate that it would have made the same decision even if the applicants had not been affiliated with the Union.

1. The alleged October 9, refusal to allow Adams, Vandenburg, Ramey and Sells to file job applications

The General Counsel has not sustained her *Wright Line* burden of proof with respect to this allegation, for two essential elements of her prima facie case, employer knowledge of their visit and status as union members, and anti-union animus, have not been proven. On the knowledge question, the General Counsel argues that knowledge should be inferred from the fact that Adams saw the blinds move, from Vandenburg's claim that cars were in Respondent's parking lot and that he saw a light on in the office, suggesting implicitly that someone from management must have been inside, and from Finn's claim that he was told by the four members on their return to the Union hall that someone inside Respondent's office saw them approaching and locked the door. The General Counsel claims that the above facts establish that Respondent saw the applicants coming, recognized them as Union members from the insignia on their clothing, and purposely locked the door to prevent them from filing job applications. However, there are sufficient contradictions in the versions of the October 9, visit provided by Adams and Vandenburg as to render their accounts unworthy of belief.

Adams and Vandenburg, for example, contradict each other as to the placement of Finn's card on the door, with each claiming credit for it. Further, Vandenburg was not asked about and consequently did not corroborate Adams' story about seeing the blinds move. Indeed, Vandenburg's claim that Adams, Ramey, and Sells remained in the parking lot while he tried to enter suggests implicitly that Adams may never have gotten as far as the door, thereby contradicting Adams' claim that he tried the door and found it locked. Adams, on the other hand, made no mention in his testimony of seeing a light on inside the office or seeing Vandenburg knock on the door, as claimed by the latter. Adams was also unable to recall if any cars were parked in Respondent's parking lot, thereby failing to corroborate Vandenburg's claim

to having seen cars parked in the lot.

Finn's testimony that Adams, Vandenburg, Ramey and Sells told him they saw someone looking through the blinds as they approached and that the door was locked at that point, as noted, was not corroborated by either Adams or Vandenburg. Ramey and Sells did not testify. Neither Adams nor Vandenburg testified to having observed someone peeking through the blinds or hearing the door being locked. Rather, Adams' testimony is only that he saw the blinds move, and Vandenburg claimed only that he saw a light on inside the office. Vandenburg admits he did not see anyone peeking at them through the blinds and simply assumed someone was doing so (Tr. 94). While each claims to have tried the door and found it to be locked, neither testified that he actually heard someone locking the door.

While I am inclined to believe that Adams and Vandenburg visited several nonunion contractors, including the Respondent, on October 9, the inconsistencies in their stories as to what they saw or did at Respondent's premises, and their generally poor demeanor, lead me to believe that either Adams and/or Vandenburg fabricated, or at the very least, embellished his testimony as to what occurred on October 9, in an effort to bolster the government's case against Respondent. Finn, I am further convinced, testified with a like-minded purpose when he gave his uncorroborated, and in my view untruthful, account of what the four employees may have told him on their return to the Union hall on October 9. The testimony of all three as to the events of October 9, is therefore found not to be credible. Consequently, no credible evidence exists from which one might reasonably infer, as the General Counsel would have me do here, that the Respondent knew that Adams, Vandenburg, Ramey and Sells had arrived at its facility to apply for work on October 9, or that they were members of the Union.

Even if I were to credit Vandenburg's or Adams' account of their October 9, visit, nothing in the facts as reported by them would justify drawing an inference that Respondent was aware that Union members had sought entry to its premises that day. For example, Vandenburg's claim that there were cars in Respondent's parking lot proves very little, for the vehicles could have belonged to clients of Respondent, to friends or family members of either Whitmer, Duncan, or Wade, or simply may have been parked there by persons having nothing to do with Respondent's business. Nor does the fact that the blinds moved necessarily establish that someone was observing the Union members approaching, for I can perceive of any number of reasons as to how such a movement might occur, e.g., an accidental brush against it, etc. In any event, Adams, as noted, never claimed that he saw someone looking through the blinds. But even if someone did peek through the blinds, as Finn, who was not present, claims he was told, there is no indication in the record as to who that someone might have been. That someone, for example, could arguably have been one of Respondent's clients, a son or daughter of someone inside, a janitor or other cleaning person, or simply a visitor. Finally, Duncan's credible and uncontradicted testimony, corroborated by Wade, that Respondent's front door is always kept locked for security reasons, and that this practice has existed for many years, reasonably explains why Adams and/or Vandenburg would have found the door locked on October 9, and lays bare the General Counsel's claim that the door was locked that particular day to prevent the four Union members from entering and filing applications. Finally, assuming arguendo that Vandenburg knocked on Respondent's door, it is quite possible no one inside heard the knock.¹⁴

¹⁴ Respondent's offices consist of three rooms. The first room and the one closest to the front door is the secretary's office. The next room is the manager's office which is accessed by going through the secretary's office. Finally, there is the "safe" room located at the rear part of the offices where files are stored. To reach the "safe" room, one has to go through the first two

Continued

Thus, the above testimonial evidence relied on by the General Counsel to establish employer knowledge, even if accepted as true, falls far short of what is needed to sustain a prima facie case under *Wright Line*, for at best it raises nothing more than a suspicion that Respondent knew of the visit by these four individuals or of their Union membership. Mere suspicion, however, cannot serve as a basis for finding discriminatory conduct on Respondent's part. *International Association of Firefighters*, 297 NLRB 865, 872 (1990). Moreover, as discussed in greater detail below, there is no evidence that the Respondent harbored animosity or was hostile towards the Union or its members. Accordingly, I find that the General Counsel has not made a prima facie showing that Adams, Vandenburg, Ramey, and Sells were, on October 9, denied access to its office or an opportunity to submit job applications because of their Union membership or affiliation. This complaint allegation shall therefore be dismissed.

2. The alleged refusal to consider
Union applicants for hire

a. *Bogard's application*

Bogard, as noted, testified with some corroboration from Finn, that he prepared a handwritten résumé on or about November 26, that the following day he placed his résumé and cover letter in an envelope addressed to Respondent's PO box provided to him by Finn, that he then gave it to Finn who ran it through the Union's postage meter, and that he personally observed the latter place it in the Union's outgoing mail bin. Union secretary Darlene Shepard testified that she, and another individual, Ronda Goodin, had responsibility for taking the mail from the bin at the end of the workday and depositing it in the U.S. Postal Service mailbox located on the sidewalk outside the Union's office, and that she followed this same procedure on November 27. While Shepard did not claim that she saw Bogard's letter in the bin that day, I credit her testimony that on November 27, she deposited all mail contained in the Union's outgoing mail bin in the U.S. Postal Service mailbox located just outside the Union's office, and am convinced that Bogard's letter was included in that mailing. A letter correctly addressed and properly mailed gives rise to a rebuttable presumption that it was received in the ordinary course of mail. *Communication Workers of America, Local 11500, AFL-CIO (American Telephone & Telegraph Company)*, 272 NLRB 850, 851 (1984); *E.B. Manning & Son*, 281 NLRB 1124, 1126 (1986). The presumption may be overcome with evidence showing it has not been received. *Camay Drilling Company*, 239 NLRB 997 (1978). The Respondent here does not claim Bogard's résumé was not received, and states only that it does not know one way or the other if Bogard's résumé ever arrived. In these circumstances, I find that the Respondent has not rebutted the presumption that it in fact received Bogard's résumé.

On the question of whether the Respondent knew of Bogard's association with the Union, the evidence, more particularly Bogard's résumé identifying him as a Union member and his two references, Finn and Luckett, as Union officials, irrefutably establishes that it had reason to know of his Union affiliation. Whitmer, as noted, never denied receiving Bogard's résumé, and stated only that he had no recollection of having seen it. However, his further testimony that he reviews all résumés and applications leads me to believe that Whitmer must have reviewed Bogard's résumé at some point in time after receiving it, establishing knowledge on the part of Respondent of Bogard's link to the Union.

offices, suggesting that it is situated furthest from the front door (Tr. 113). It is quite likely, therefore, that someone in the "safe" room might not have been able to hear a knock on the door.

5 Having found that Respondent had reason to know of Bogard's Union affiliation, I turn next to the question of whether anti-union animus played any role in Respondent's alleged failure to consider Bogard for employment. I find no direct evidence of animus on the part of the Respondent towards the Union herein or its members, or towards unions in general. The inquiry, however, does not end there, for a finding of animus may be inferred from a totality of the circumstances and may be found even when direct evidence of animus is lacking. *Fluor Daniel, supra*.

10 The General Counsel contends that an inference of animus should be drawn from the fact that Respondent refused to allow Union members Adams, Vandenburg, Ramey, and Sells to enter its offices and apply for work on October 9, and from the fact that the résumés of Adams and Bogard were not in the 45-day file while that of other applicants who submitted résumés around the same time had been retained.¹⁵ She further argues that prior to Fall 1996, when the Union began sending its members to apply for work, the Respondent was not strictly
15 adhering to its stated practice of giving preference in hiring to former employees and referrals, citing as support therefore the fact that the Respondent hired three individuals - Brian Higdon, Margaret Gilbert, and someone named Denzek - who presumably had never worked for Respondent before or been referred by employees. The General Counsel argues that the Respondent began to strictly enforce the policy only when it began seeing the résumés of
20 Union applicants. These factors, the General Counsel claims, support a finding that the Respondent was trying to avoid hiring Union members and is evidence of Respondent's anti-union animus. I disagree.

25 As to the October 9, visit by Adams, Vandenburg, Ramey, and Sells to Respondent's facility, while I do not doubt that these four individuals appeared outside Respondent's offices on that date, as noted, no credible evidence was produced to show that the Respondent was aware of their visit, much less of their purported interest in filing job applications. In these circumstances, no inference of animus can be drawn from the simple fact that the four
30 individuals showed up at Respondent's premises.

Nor is such an inference warranted merely because Bogard's résumé was not found in the 45-day file while that of seven applicants (see fn. 14, supra) who submitted résumés during the same period were. The General Counsel's argument is premised on a belief that Respondent discarded Bogard's résumé because it showed him to be a Union member. Thus,
35 she argues on brief that "many résumés, but not union members' résumés, were kept past Respondent's 45-day limit" (GCB: 8). This, of course, presupposes that none of the applicants whose résumés were found in the 45-day file had any such association with the Union or any other labor organization or, if they did, it was not revealed on their résumés. Had this been established on the record, I might be inclined to agree with the General Counsel, absent some
40 other reasonable explanation, that Bogard's résumé was disparately treated, e.g., discarded, because it referenced his association with the Union, and would have no difficulty attributing such conduct to anti-union animus. *TIC-The Industrial Co. Southeast*, 322 NLRB 605, fn. 3 (1996).

45 The General Counsel's argument would, on the other hand, be seriously undermined if any or some of the résumés found in the 45-day file, particularly those of the seven applicants

¹⁵ Although the General Counsel claims that Adams' résumé also "inexplicably disappeared" from the 45-day file, as found and more fully discussed below, Adams never sent his résumé to Respondent.

who applied between October and December, revealed the applicant to have an affiliation with Local 369, or possibly some other IBEW local. However, except for the résumés of applicants Panther and Cave, the General Counsel, as noted, chose not to introduce the remaining résumés into evidence. Nor did she attempt to elicit from either Whitmer or Duncan an admission that none of the applicants whose résumés were found in the 45-day file had identified himself or herself as being affiliated with a union. Thus, there is no way of ascertaining on this record the accuracy of the General Counsel's claim that Respondent only purged from its 45-day file the résumés of Union members, and retained only those showing no union affiliation. While the Panther and Cave résumés admittedly are devoid of reference to an association with Local 369, or any other union, that fact alone does not warrant a sweeping assumption that the remaining seventeen résumés not introduced were equally devoid of any such reference.¹⁶ Thus, other than the fact that Bogard's résumé was not in the 45-day file as of March 1997, there is simply no documentary or testimonial evidence linking the "disappearance" of Bogard's résumé to his association with the Union. At most, the "disappearance" of Bogard's résumé from the 45-day file, while that of other applicants who submitted résumés during roughly the same time were found therein, can only be termed as suspicious. However, as noted, the General Counsel's prima facie case cannot rest on suspicion, speculation, or conjecture, but must be based on competent direct evidence. *International Association of Firefighters*, supra. See, also, *Natico, Inc.*, 302 NLRB 668, 689 (1991); *Ramada Inn of South Bend*, 268 NLRB 287, 298 (1981); *Mason & Hanger*, 270 NLRB 383, 385 and cases cited at fn. 7 (1984).

The General Counsel further claims that the hiring of Higdon, Gilbert, and Denzek, who purportedly had not previously worked for Respondent or been referred by other employees,¹⁷ demonstrates that Respondent did not strictly adhere to its policy of giving hiring preference to former employees and referrals, and purportedly started doing so only after Union members began applying for work in response to its Fall ads. The Respondent's conduct in this regard, argues the General Counsel, makes clear that it was simply trying to avoid hiring any of the Union applicants, and gives rise to an inference of animus.

As to Higdon, the record reflects he applied for work on December 1, 1995, and was apparently hired by Respondent soon thereafter (GCX-19, p. 7). The General Counsel points to Higdon's failure to list the Respondent as a prior employer as proof that he had not previously worked for Respondent. Unlike the General Counsel, I am not convinced that this is the only inference possible from such an omission. An applicant, for example, may simply forget to list all of his previous employers when filling out a job application, or may believe given his status as a prior employee that he need not do so. I do not suggest by this that I believe Higdon was in fact a former employee of Respondent; rather, I only make the observation that there could be reasons, other than the one proffered here by the General Counsel, to rationally explain the failure of an applicant, such as Higdon, to list a past employer on a job application.¹⁸

¹⁶ Had the résumés been supportive of her position, the General Counsel, I am convinced, would have proffered them into evidence. Her failure to do so, or so much as to question Whitmer or Duncan on this matter, leads me to believe that some, if not all, of the remaining résumés showed some union affiliation on the part of the applicants.

¹⁷ Denzek and Gilbert were hired before the Respondent ran its ads for electricians in the Fall, although precisely when they were hired is not made clear in the record. The only evidence as to the timing of Gilbert's hiring was an affirmative response to the following vague question directed at Duncan by the General Counsel: "And just immediately prior to the time of this situation, did you hire an individual named Gilbert?" (Tr. 147).

¹⁸ The General Counsel questioned Duncan regarding Poston's employment application

Continued

However, the General Counsel's case would not be enhanced much even if I were to accept that Higdon was not a former employee when hired by Respondent, for it is quite possible that Higdon may have been referred for employment by one of Respondent's own employees. While the General Counsel asserts on brief (p. 8) that Higdon was not a referral, there is simply no evidence to support her assertion. Thus, in questioning Duncan about Higdon's application, the General Counsel directed her inquiry only to whether Duncan knew if Higdon had a union background, and never asked how Higdon came to be hired or, for that matter, if he previously worked for Respondent (Tr. 159-160). A finding that the Respondent did not hire Higdon in accordance with its stated hiring practice solely because the latter's résumé does not identify Respondent as a past employer is therefore tenuous at best, and one which I decline to make.

Denzek was hired as a driver in response to a help wanted ad for a delivery driver placed by Respondent in a local newspaper (Tr. 26). It does appear that, as argued by the General Counsel, Denzek was neither a former employee nor a referral hire. However, it does not necessarily follow from this that the Respondent did not apply its hiring policy when it selected Denzek for hire. Thus, except for the fact that Denzek came to be hired from a want ad, no information whatsoever was adduced as to how the Respondent came to select Denzek for the position. Assuming, arguendo, that Respondent applies the same hiring criteria to drivers as it does to electricians, e.g., former employees receive preference, followed by referrals, and lastly résumés from interested applicants, it is quite possible that Respondent opted to hire Denzek because it had no prior employees interested in the driving job or because it received no referrals for the position. In these circumstances, the hiring of Denzek would have been fully consistent with its established hiring practice. The simple fact is that the circumstances surrounding the hiring of Denzek are not readily discernible on this record, and while the scenario I have just described as to how Denzek may have come to be hired seems speculative, it is no more so than the General Counsel's own unsupported claim that the Respondent did not adhere to its policy when hiring Denzek. As noted, the General Counsel's prima facie must be based on more than mere suspicion or conjecture. *Natico, Inc.*, supra; *Ramada Inn of South Bend*, supra.

As with Higdon and Denzek, the General Counsel has not demonstrated that in hiring Gilbert the Respondent deviated from its policy of hiring only former employees and referrals. There is no disputing that Gilbert was neither a former employee nor a referral when she was hired by Respondent as an electrician. Gilbert, as testified to by Duncan, sent Respondent a "blind" résumé, apparently at a time when Respondent was not advertising for workers. There is in this regard nothing in the record to suggest that when Gilbert applied for work, the Respondent needed, or was looking for, workers. Duncan's assertion that he hired Gilbert solely because she was a woman, that he had never employed a woman before, and that he wanted to give a woman an opportunity to work for him (Tr. 147), suggests to me that the hiring of Gilbert was an extraordinary event for Respondent, and that it may have gone out its way to make room for Gilbert in order to provide her with an equal employment opportunity and to diversify its workforce, without regard to whether it needed an additional worker. Had evidence

which, while marked and identified as GCX-3, was not offered into evidence. In filling out his application, Poston apparently did not list the Respondent as a former employer although as credibly testified to by Duncan, he had worked for Respondent several years earlier (Tr. 166-167). Poston's application is a clear example of a situation in which a former employee, for whatever reason, failed to list the Respondent as a former employer. Thus, while the General Counsel claims that Higdon was not a former employee of Respondent because the Respondent was not identified as a past employer on his application (GCB: 8), I make no such inference from that omission.

5 been produced to show that Respondent was seeking workers when Gilbert sent in her résumé, and that Gilbert was selected over former employees and referrals who applied for work, I might have agreed with the General Counsel that Respondent “fail[ed] to use its restrictive policy” when it hired Gilbert (GCB: 5). As no such showing has been made here, there is no basis for concluding, from the fact that Gilbert was not a former employee or a referral, that the Respondent deviated from its hiring policy.

10 In sum, I find nothing in the above-described events that would lead me to reasonably conclude that the Respondent harbored animosity, or was hostile, towards Local 369, or to unions in general. Indeed, record evidence showing that Respondent has hired individuals who either identified themselves as union members or whose prior work history was suggestive of some union affiliation, would tend to favor a contrary conclusion.¹⁹ The General Counsel nevertheless argues that while certain of Respondent’s employees may have had some union affiliation, “no employee with clear ties to Local 369 has ever been hired,” and “none had worked for a local contractor in the electrical industry whom the Respondent knew to be a signatory to the IBEW Local 369 contract” (GCB: 7). Such bold assertions, however, require evidentiary support if they are to be believed. No such evidence was produced here.

20 Thus, while Duncan was questioned on whether he knew if certain of his employees, whose applications were received in evidence as GCX-19, had previously worked for union contractors, the General Counsel did not inquire of Duncan whether he knew if any of his employees had been or were members of Local 369.²⁰ Further, despite recalling Finn as a rebuttal witness to refute Duncan’s testimony, the General Counsel made no effort to confirm through him whether or not any of Respondent’s employees were Local 369 members. Given his position with the Union, it would have been a relatively simple task for Finn to access the Union’s membership rolls and determine if any of Respondent’s current or former employees were members of the Union. Thus, there is simply no evidence in this record to support the General Counsel’s claim that no member of Local 369 has ever been hired by Respondent. In fact, Finn’s acknowledgment that Higdon, a former employee of Respondent, was a member of Local 369, lays bare the General Counsel’s assertion that “no employee with clear ties to Local 369 has ever been hired” by Respondent. Accordingly, the General Counsel’s claim that the Respondent has never hired a Local 369 member simply lacks evidentiary support and is without merit.

35 Equally devoid of merit is the General Counsel’s further assertion that none of Respondent’s employees had previously worked for employers who were or had been signatory to a Local 369 contract, for she produced no evidence to support such claim. While Finn did

40 ¹⁹ Duncan testified, credibly and without contradiction, to having hired employee James Evans despite being told by the latter that he was a member of IBEW (Tr. 160). Higdon, a Local 369 member, was, as noted, also employed by Respondent. It is not clear, however, if the Respondent knew of his affiliation with the Union, although it was aware that he had worked for union contractors before (Tr. 195). Other individuals with prior union contractor experience hired by Respondent include Arthur Ware (Tr. 158, 193), David O’Leary, Arthur Harbolt (Tr. 160, 163), John Hartlage (Tr. 161-162), Daniel Eden (Tr. 159, 193), Steven Jesse (Tr. 158, 196), and Reynolds Peyton (Tr. 161, 192).

45 ²⁰ Whitmer, on the other hand, was asked if any of Respondent’s current employees were members of the IBEW. He responded, “none that I’m aware of” (Tr. 121). The fact that Whitmer was unaware whether any of Respondent’s current employees was an IBEW member does not necessarily lead to the conclusion that Respondent had no IBEW-affiliated employees on his payroll, or that such Union-affiliated employees had not been hired in the past.

testify on rebuttal that certain of the employers listed in the employee applications (GCX-19) fell within the jurisdiction of a different IBEW local, or had a bargaining relationship with some other non-IBEW union, such testimony falls far short of establishing that none of Respondent's employees was ever employed by an employer that was party to a local 369 agreement.

5 Finally, there is nothing particularly unusual in the fact that the Respondent did not identify itself in its want ads and listed only a PO box number to which résumés were to be sent. The General Counsel in this regard has not shown, nor for that matter argued, that the ads placed by Respondent on September 29, and November 17, were any different from ones it had run in the past. Further, the use of a PO Box for such purposes is a common business
10 practice, as made clear by the fact that want ads run by different employers on the days Respondent ran its own ads likewise contain only a PO box number and do not reveal the employer's identity (see GCX-13, 14). Thus, there is simply no evidentiary support for the General Counsel's suggestion that the Respondent was trying to conceal its identity from the Union by not listing its name or phone number in its help wanted ads.

15 In summary, I find no evidence to support the General Counsel's claim that the Respondent harbored animus towards the Union or its members. Consequently, the General Counsel has not made a prima facie showing under *Wright Line* that Bogard was denied
20 consideration for employment because of his Union membership. As the General Counsel has not satisfied her *Wright Line* burden of proof, the Respondent is under no obligation to defend its alleged failure to give Bogard any such consideration.

 However, even if the General Counsel had been able to make a prima facie case with respect to Bogard's application, the record evidence convinces me that Bogard would not have
25 been considered for hire even if he had not been a Union member. Thus, as credibly testified to by both Whitmer and Duncan, the Respondent's policy is to give priority in hiring first to former employees, and then to individuals referred to it by employees. The hiring of former employees Poston, Weyhing and O'Neil, and of referral applicant Franklin, in Fall 1996, was therefore fully consistent with that policy. The General Counsel seems to suggest that the
30 Respondent would have had no reason to run its ads if it only intended to hire former employees and referrals (GCB: 7). The General Counsel misses the point. As Whitmer and Duncan further credibly explained, the Respondent runs its ads based on projections of the number of additional employees it may need over and above its regular complement of 25-30 electricians to satisfy the demands of the jobs it anticipates receiving. If, however, the work
35 does not materialize, or if its own labor force proves sufficient to perform the work, the Respondent simply does not hire even though it may have advertised for workers. But when it needs the additional help, it will begin hiring former employees first, referrals second, and lastly, individuals who have submitted résumés. Thus, there is no inconsistency between the running of the ads and the Respondent's policy of looking first to former employees and referrals, for
40 assuming arguendo that the Respondent is unable to find candidates for hire from the latter groups, it will presumably hire from the résumés received.

 While the complaint does not allege that the Respondent's hiring policy is on its face
45 unlawful, the General Counsel appears to make the argument on brief by asserting that the policy has the "fortuitous effect of eliminating candidates who are affiliated with the Union" and was "instituted and maintained simply to keep the Union out" (GCB: 8). I find the argument to be without merit.

 Initially, I find nothing inherently wrong in an employer policy that gives hiring preference to former employees, and to referrals by employees, over unknown applicants for employment, see, e.g., *B E & K Construction Co.*, 321 NLRB 561, 569 at fn. 29 (1996), unless, of course,

there is evidence to show that the policy was specifically created to exclude from employment individuals having a union affiliation, in which case the policy would, in my view, clearly run afoul of the Act. The General Counsel here, however, has produced no evidence to show that the policy was instituted by Respondent for the particular purpose of excluding union applicants from employment. Nor has she shown that the policy was not being adhered to prior to the Fall of 1996, when Union members purportedly began applying, or that Respondent applied its hiring policy in a disparate and inconsistent manner so as to deny employment opportunities to union members or supporters only.²¹ In the absence of such evidence, the Respondent's institution and use of such a hiring policy to fill vacancies can hardly be deemed unlawful.

The policy admittedly discriminates between job applicants in that those who previously worked for Respondent or been referred to it by one of its own employees undoubtedly receive preference in hiring over all other applicants. The likelihood, therefore, that a union applicant having no prior work experience with Respondent may not receive the same consideration as a nonunion applicant having such experience does indeed exist. That fact alone, however, does not render Respondent's policy discriminatory under the Act, for only employer conduct that discriminates on the basis of union activity is proscribed by Section 8(a)(3). Here, the Respondent's policy distinguishes between applicants not on the basis of their union or nonunion status, but rather on whether they are former employees or referrals, with the latter two categories receiving priority in hiring over all other applicants. Thus, Respondent's policy would allow any former employee of Respondent who happened to be a Union member, Higdon for example, to receive priority hiring consideration over nonunion applicants lacking a prior work history with Respondent. Accordingly, and contrary to Respondent's intimation on brief, I find that Respondent's policy, either on its face or as applied, does not unlawfully discriminate against Union members.²²

The General Counsel seeks to bolster her case by claiming that if, as testified to by Whitmer, the Respondent was interested in hiring reliable employees, it would not have hired Poston because, during his previous employment stint with Respondent, Poston quit after only one week, nor Weyhing because the latter's personnel file revealed he had made some errors during his prior employment. She further cites the fact that in February 1997, Respondent hired another individual even though his prior employment record with Respondent showed that he had committed some traffic infractions. The General Counsel argues that Respondent's willingness to rehire these individuals despite their alleged poor work record, at a time when it claims it was seeking reliable employees, demonstrates the pretextual nature of Respondent's defense. I disagree.

²¹ As found above, the General Counsel's insistence that the Respondent deviated from its policy when it hired Higdon, Gilbert, and Denzek lacks evidentiary support and is based on pure speculation.

²² *D.S.E. Concrete Forms*, 303 NLRB 890 (1991), cited by the General Counsel (GCB: 8), is factually distinguishable and not controlling here. In that case, the Board agreed with the judge that an employer's refusal to hire union applicants because none were former employees or referrals had the practical effect of precluding the employment of union members, was unlawful. However, the Board made clear that it was doing so only because the employer there defended its refusal to hire on grounds that the union workers would not want to work in a nonunion job, despite evidence showing the union had waived that particular restriction for the job in question. Nothing in that decision, however, can be construed as suggesting that an employer's policy which affords hiring preference to former employees and to referrals is inherently discriminatory.

As found above, the decision to hire former employees Poston, Weyhing, and Hutchins over other applicants for employment was fully consistent with the Respondent's established past practice and policy of giving preference in hiring to former employees first. The General Counsel has presented no credible evidence to the contrary. Thus, whether or not the Respondent should have hired these individuals based on their prior work record is a purely subjective decision which the Respondent has the exclusive right to make on the basis of its own judgment and experience. That other applicants with a union persuasion may have been better able to serve the Respondent's needs is of no consequence, for the Act imposes no requirement on an employer to use good business judgment in choosing whom it will hire, and exacts no penalty for exercising bad business judgment. *Cotter & Company*, 276 NLRB 714 (1985). Rather, the Act requires only that any such decision be based on legitimate, nondiscriminatory reasons. The hiring of Poston, Weyhing, and Hutchins, in my view, satisfies this criteria. Consequently, I will not, nor am I at liberty to, substitute my judgment for that of the Respondent regarding its decision to rehire these individuals. *Textron, Inc.*, 302 NLRB 660, 662 (1991); *Hallmark & Son Coal Co.*, 299 NLRB 259, 260 at fn. 7 (1990). See, also, *California Cooperative Creamery*, 290 NLRB 355, 360 (1998) (General Counsel cannot use subjective hiring decision to substitute for failure to make out a prima facie case).

b. Adams' application

In deciding whether Adams was unlawfully denied consideration for hire, the first issue to be addressed, and which constitutes part of the General Counsel's prima facie case, is whether Adams indeed applied for work with Respondent. The General Counsel argues that he did, based on Adams' testimony that he mailed his résumé on November 19, to the P.O. Box found in Respondent's November 17, want ad. I do not believe Adams did so.

Given his overall poor demeanor and inconsistencies between his testimony and that of other General Counsel witnesses, Adams, as previously found, was not a particularly credible witness. Further, although he claims that Finn provided him with the P.O. Box number, Finn never corroborated him on this point. Instead, the General Counsel, inexplicably, only got Finn to confirm that he furnished Bogard with Respondent's PO address. Fueling my skepticism is Adams' apparent failure to include some form of cover letter with his undated résumé, for it seems unlikely, in my view, that a job applicant would forward a résumé to a prospective employer without providing an introductory letter. While Adams' claim of having mailed the résumé to Respondent is uncontradicted, it does not necessarily follow that his claim must be blindly accepted as true, particularly when his credibility has been called into question. *Medin Realty Corp.*, 307 NLRB 497, 505 (1992); *Irwin Industries*, 304 NLRB 78, 92-93 (1991). As the judge, quoting from *Plasters Local 394*, 207 NLRB 14 (1973), aptly pointed out in *Medin Realty*, supra:

A trier of fact need not accept uncontradicted testimony as true if contains improbabilities or if there are reasonable grounds for concluding it is false. It is well-settled that a witnesses' testimony may be contradicted by circumstances as well as by statements and that demeanor may be considered in such circumstances.

Here, Adams' poor demeanor, his discredited testimony as to the circumstances surrounding his visit to Respondent's facility on October 9, and the lack of corroboration by Finn on whether he provided Adams with Respondent's P.O. Box number, lead me to conclude that Adams was not being truthful about having sent his résumé to Respondent. As such, I find that the General Counsel has not sustained her burden of showing that Adams applied for work with Respondent.

5 However, even if I were to believe that Adams sent his résumé to Respondent, the Respondent would not have known or had reason to suspect from reviewing it that Adams was a member or supporter of the Union. Nothing in his résumé, for example, reveals anything about Adams' pro-Union sympathies. Unlike Bogard, Adams did not identify himself on his
10 résumé as a Union member or as being associated with it in any way. Nor can such knowledge be inferred from Adams' prior work history for no testimony was elicited from Adams on whether the past employers listed in his résumé were union or non-union contractors, and no evidence produced to show that Respondent was familiar with any of the contractors listed. Adams' résumé does show that between 1977 and 1981, he participated in the Union's apprenticeship program. However, his involvement in the program some fifteen years earlier is simply too remote in time to justify an inference that in 1996 he was somehow involved with the Union. *B E & K Construction Co.*, supra.

15 Further, while Adams, as noted, did list Finn and Luckett as references, there is no indication in the record that Respondent, when it received Adams' résumé, knew who they were or of their association with the Union, or that it knew that the address listed next to their names was in actuality that of the Union hall. See, e.g., *B E & K Construction Co.*, supra at 571. Thus, assuming that Adams did forward a résumé to Respondent on November 19, I am not
20 convinced that Respondent would have known from seeing Finn's and Luckett's names listed as references that Adams was somehow affiliated with the Union. Nor can such an assumption be made from the fact that Adams may have called Respondent in February 1997, to inquire about work, for Adams did not recall identifying himself as being with the Union. Finally, as found above with respect to Bogard's application, there is no evidence from which an inference of anti-union animus on the part of the Respondent can reasonably be drawn. In these
25 circumstances, I find that the General Counsel has not made out a prima facie case that Adams was denied consideration for employment because of his membership in the Union.

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Finally, the weight of the evidence convinces me that even if the General Counsel had presented sufficient evidence to sustain a prima facie case, the Respondent would nevertheless prevail. Adams was neither a former employee of Respondent nor a referral when he purportedly sent in his résumé. Consequently, he would have been considered for hire only if the Respondent was unable to meet its hiring needs from the ranks of former employees or referrals. The Respondent, in fact, did so when it hired former employees Poston, Weyhing, and O'Neil, and referral employee Franklin. The hiring of these four individuals was fully consistent with Respondent's past practice and policy of giving preference in hiring to former employees first, referrals second, and all other applicants last. As found above, the General Counsel has not shown that the policy was inconsistently or discriminatorily applied so as to exclude union applicants from employment. Accordingly, I shall recommend dismissal of this allegation.²³

Conclusions of Law

1. The Respondent, D & F Electric, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers Local Union 369, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not engaged in any of the unfair labor practices alleged in the complaint.

²³ I also find no merit to the allegation that the Respondent violated Section 8(a)(3) by refusing to accept job applications from Union members who called to inquire about jobs. Initially, this was not specifically alleged as a separate violation in the complaint, and the General Counsel neither moved to amend the complaint at the start of the hearing nor moved to conform the pleadings to the proof at its conclusion. Dismissal of the allegation on this basis alone would suffice. However, even on its merits the allegation is properly dismissed, for the General Counsel, as found herein, has not shown any animus on the part of the Respondent, an element essential to the General Counsel's prima facie showing that Respondent was motivated by anti-union considerations when it purportedly refused to accept job applications over the phone from Adams and Bogard. As to Adams, the latter admits not knowing if he ever identified himself as a Union member when he called. Bogard also admitted that he did not identify himself as being from the Union during every call he made to Respondent, and that he received the same negative answer from Respondent even when he did not reveal his union affiliation. These facts make clear that Respondent treated all callers the same, regardless of their union or nonunion affiliation, and negate the General Counsel's claim that Adams and Bogard were denied an opportunity to file applications over the phone because of their Union affiliation. The General Counsel has therefore not established a prima facie case with respect to this particular allegation, warranting its dismissal.

