

Modern Electric Co. and International Brotherhood of Electrical Workers, Local 617, AFL-CIO.
Case 20-CA-27392

October 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On April 1, 1997, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel filed exceptions and a supporting 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 brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge dismissed allegations that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to hire or to consider the employment application of union organizer Bill Petros. He determined that the Respondent's actions were not motivated by antiunion considerations. For the reasons set forth below, we disagree with the judge's analysis and conclusion regarding the Respondent's handling of Petros' employment application and find that the Respondent violated the Act by *failing to consider* him for employment. In addition, while we agree that Respondent's *failure to hire* Petros was not unlawful, we do so for reasons different from those relied upon by the judge.

I. FACTS

The Respondent is an electrical contractor in the building and construction industry. In response to a July 7, 1996¹ newspaper ad for electricians, Petros telephoned and then faxed his resume to the Respondent. Petros' resume disclosed both his 27 years of electrical industry experience and his position as an organizer with International Brotherhood of Electrical Workers, Local 617, AFL-CIO (the Union). About a week later, Petros suggested to fellow union member Merle Rogers that he also apply for a job with the Respondent. Shortly thereafter, Rogers, who did not disclose to the Respondent his union affiliation, was hired as a foreman. On learning that the Respondent hired Rogers, Petros telephoned the Respondent to inquire as to the status of his application. The Respondent's project manager, Bruce Taber told him that he could not locate his resume, so Petros faxed a second one. Two days later, the Respondent advised Petros that the position had been filled.

On August 11 and again in September, the Respondent placed newspaper ads for electricians. Petros encouraged union members to apply. In telephone conversations with the Respondent's office manager, two such applicants, Robert Alano and C. D. Underwood, were asked

¹ Dates refer to 1996 unless otherwise stated.

directly about their union affiliations.² Neither was hired. Instead, the Respondent hired one individual referred by a state employment agency and another applicant whose resume indicated no current union membership.

Not long after being hired by the Respondent, Rogers openly began organizing efforts among his coworkers. While aware of these activities, the Respondent's owner, George White, took no steps to interfere with his union activities and developed a social friendship with Rogers. After about 2 months, however, Rogers voluntarily left his job, citing dissatisfaction with the Respondent's hiring practices. Rogers declined White's entreaties that he return to work for the Respondent.

II. THE JUDGE'S DECISION

Despite concluding that the Respondent's owner, White, had knowingly made certain self-serving and false statements in his pretrial sworn affidavit regarding the Respondent's hiring practices,³ the judge found that the Respondent, through project manager Taber, who made the hiring decision, articulated credible reasons relating to Rogers' superior experience and qualifications to warrant his being hired over Petros. Taber testified that he was looking for "foremen-type people that could run work," who would be staying with the Respondent for the duration of a project and possibly longer. Accordingly, he looked for applicants whose employment history demonstrated a record of extended employment with the same company, as indicative of their value to those employers as "key" employees. Because Rogers' resume showed an employment pattern indicating that he had worked as a foreman for several companies, and had worked for those companies for periods of at least 2 years, Taber concluded that he possessed the "key employee" quality that he was looking for. Taber testified that, by contrast, Petros' employment history, as disclosed in the resume that Petros sent when told that his first resume could not be found, did not show the same pattern, thereby making him less suited to the Respondent's needs. The judge credited Taber's testimony, and determined that Rogers was hired for nondiscriminatory reasons relating to his experience. Acknowledging that the Respondent had unlawfully inquired into other job applicants' union affiliation, the judge nevertheless rejected the General Counsel's contention that this was evidence of animus, and concluded that the Respondent

² The judge determined that the Respondent violated Sec. 8(a)(1) by interrogating job applicants about their union affiliation. The Respondent did not except to these findings, and we adopt the judge's conclusions.

³ In his affidavit, White stated that he did not receive Petros's resume until *after* Rogers was hired and, thus, the position Petros sought had already been filled. In his testimony at the hearing, however, White admitted that that statement was false. In addition, the judge determined that White's assertion, made both in his affidavit and repeated on the stand, that he had tried without success to reach applicant Alano by telephone, was untrue.

did not violate the Act by its disposition of Petros' application and dismissed the allegations of unlawful refusal to consider and unlawful refusal to hire Petros.

In his exceptions, the General Counsel asserts, *inter alia*, that the judge erred (1) by failing properly to consider evidence of Respondent's union animus and (2) by failing to analyze the failure-to-consider allegation separately from the failure to hire allegation. We find merit in these contentions.

III. ANALYSIS

The judge's fundamental error was in failing to distinguish between the two separate Section 8(a)(3) allegations involved in this case: first, that the Respondent unlawfully *failed to consider* Petros for employment and second, that the Respondent unlawfully *failed to hire* Petros. While the judge refers to each allegation separately and sets forth the facts relative to both aspects, he nevertheless fails to analyze them individually. Rather than examining the events of this case sequentially, as they actually occurred, the judge viewed the evidence in hindsight and assessed the situation retrospectively. By so doing, he melded the two allegations, and, on finding that sound business reasons justified the hiring of Rogers, instead of Petros, summarily dismissed the failure to consider allegation as well. We find, for the reasons set forth below, that the Respondent unlawfully failed to consider Petros for employment because of his union affiliation, but that the Respondent has nevertheless demonstrated at the hearing that, had it considered Petros' application, it would have hired Rogers based on objective, lawful considerations.

Petros sent his resume to the Respondent in early July. He got no response. About a week later, Rogers applied for a job with the Respondent, and was hired. Thereafter, Petros spoke by telephone to Taber, who told him he had not seen Petro's resume and that he could not locate it in the company files. Petros then faxed Taber another copy of his resume, but was subsequently informed that the position had been filled. Contrary to his pretrial affidavit, White admitted at the hearing that he had received Petros' resume, and he did not contradict Taber's testimony that Taber had not seen it at the time Petros called.

From this evidence it is clear that White made timely consideration of Petros' application for employment impossible by not giving Petros' resume to Taber, the hiring official. White admitted that he had concerns about hiring union workers.⁴ In addition, it is established and unchallenged that the Respondent's office manager unlawfully asked job applicants about their union status. Thus, it is reasonable to infer that when White received Petros' resume, he immediately rejected the application because of the information regarding Petros' union position. Inasmuch as Rogers had already been hired by the

time of Petros' telephone conversation with Taber, White's action denied Petros the opportunity to be considered for that job. Accordingly, we reverse the judge and find that the Respondent, through White's admitted actions, unlawfully failed to consider Petros' July application for employment because of his affiliation with the Union.

With regard to the Respondent's failure to hire Petros, there is credible record evidence, however, establishing that the Respondent was looking for an applicant whose experience would qualify him as a "key employee." As set forth above, Taber at the hearing compared the relative qualifications of Rogers and Petros, as well as the qualifications of certain other applicants. As the judge describes, Taber's testimony relating to Petros' qualifications *vis a vis* Rogers sets forth objective, lawful considerations which would have caused the Respondent to select Rogers rather than Petros, had a timely comparison between the two been made. For this reason, we conclude that the General Counsel has not established that the Respondent has unlawfully failed to hire Petros. We therefore dismiss the allegation of unlawful failure to hire.

AMENDED REMEDY

We have found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom, and take certain affirmative action deemed necessary to effectuate the policies of the Act.

We have found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider Bill Petros for hire. Accordingly, if it is shown at the compliance stage of this proceeding that the Respondent would have hired Petros to another job opening had his application been fairly considered, we shall order the Respondent to offer Petros employment in that position and make Petros whole for the discrimination found. If such position no longer exists, the Respondent shall be required to offer Petros a position substantially equivalent to that for which he would have been hired. See generally *B E & K Construction Co.*, 321 NLRB 561 (1996). Any backpay found owing shall be computed on a quarterly basis as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Modern Electric Company, San Mateo, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

⁴ White explained that he was concerned about union employees leaving the Respondent if a union job opened up elsewhere.

(a) Interrogating job applicants about their union affiliation.

(b) Discouraging union activity by refusing to consider employees for hire because of their union affiliation.

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

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

(a) If it is shown at the compliance stage of this proceeding that the Respondent, but for its discrimination, would have hired Bill Petros to a job that became available subsequent to his July 1996 application, the Respondent shall offer Petros employment in that position and make him whole for the discrimination found and, if that position no longer exists, offer him a position substantially equivalent to that for which he would have been hired, in the manner set forth in the amended remedy section of this decision.

(b) Within 14 days from the date of this Order, notify Bill Petros in writing that any future job applications will be considered in a nondiscriminatory manner.

(c) Within 14 days after service by the Region, post at its facility in San Mateo, California, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent since July 8, 1996.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage union activity by refusing to consider employees for hire because of their union affiliation.

WE WILL NOT interrogate employee-applicants about their union membership or union sentiments.

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

WE WILL within 14 days of the Board's Order, notify Bill Petros in writing that any future job applications will be considered in a nondiscriminatory manner.

If it is established that, but for our discrimination, we would have hired Bill Petros to a job that became available subsequent to his July 1996 application, WE WILL offer Petros employment in that position and make him whole for the losses he suffered as a result of our discrimination, and if that position no longer exists, WE WILL offer him a position substantially equivalent to that for which he would have been hired.

MODERN ELECTRIC CO.

Lucile R. Rosen, Esq., for the General Counsel.
Deborah Wilder, Esq. (Deborah Wilder & Associates), of Burlingame, California, for the Respondent.
Bill Petros, Organizer, of San Mateo, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at San Francisco, California, on February 20, 1997. On August 8, 1996, International Brotherhood of Electrical Workers, Local 617, AFL-CIO, (the Union) filed the charge alleging that Modern Electric Co. (Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act. The charge was amended on November 22. On November 27, 1996 the Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section

8(a)(3) and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally. The parties waived the filing of briefs.

On the entire record, from my observation of the demeanor of the witnesses, and having considered the arguments of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a sole proprietorship owned by George White, with an office and principal place of business in San Mateo, California. Respondent is engaged as an electrical contractor in the building and construction industry. During the calendar year ending December 31, 1995, Respondent purchased and received goods and materials valued in excess of \$50,000 from suppliers located within California, each of which suppliers received these goods and materials directly from points outside the State of California. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties stipulated and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

As stated above Respondent is an electrical contractor located in San Mateo, California. In anticipation of a commercial project for the Marriott Corporation, Respondent took out a classified advertisement in *The San Francisco Examiner* for Sunday, July 7. In this case, the General Counsel alleges that Respondent failed to consider the resume of, and refused to hire, Bill Petros a paid union organizer, because Petros was identified as a union member and organizer. Further, the complaint alleges that Respondent unlawfully interrogated employees regarding their union membership or affiliation. Respondent denies the commission of any unfair labor practices. Further, Respondent contends that it has no animus against union members and has hired union members in the past. It contends that it did not hire Petros because another applicant had a more impressive work history. Finally, Respondent contends that any questioning of employees was not coercive and was motivated by legitimate business reasons.

Petros telephoned the Respondent's San Mateo office the day after finding the July 7 advertisement. He faxed his resume shortly after telephoning the office. Petros applied for work under a practice known as "salting" whereby a union local authorizes its members to work for a nonunion employer in order to organize the employees of the nonunion employer. Petros testified that he intended to organize Respondent's employees and to demonstrate to Respondent the advantages of hiring skillful union employees.

Petros applied for work as journeymen electrician and foreman. He listed the Union as his present employer and as past employers certain union construction contractors. Approximately a week after Petros faxed his resume to Respondent, Petros suggested that Merle Rogers, another union member, apply for work in response to Respondent's advertisement. Rogers was hired by Respondent as a foreman.

After Petros learned that Rogers had been hired by Respondent, he called Respondent to check on his own employment opportunities. Petros spoke with Bruce Taber, Respondent's estimator-project manager. Taber told Petros that he would check to find

out what had happened with Petros' resume. Taber later called Petros and said that he could not find Petros' resume. Petros then faxed Taber a second copy of his resume. Petros called back a couple of days later and was told that the position had been filled. Petros was not again contacted by Respondent.

Respondent placed advertisements for electricians in August and September and Petros suggested that union members apply. Employee Robert Alano called Respondent in August after being advised by Petros that Respondent was advertising for electricians. Alano spoke to Janet McEntee, Respondent's office manager. McEntee asked Alano about his work experience and whether he was willing to travel. McEntee asked Alano, "Are you affiliated with the union?" Alano expressed surprise at that question and McEntee responded that she was just reading from the form and that she had to ask these questions. In fact, McEntee was reading from a form composed by White that asked, "Are you affiliated with any unions?" Alano answered "yes" and McEntee marked his response on the form. Alano was asked whether he had a resume he could fax to Respondent. Alano said he did and faxed a resume that same day. Alano was not called for an interview.

Employee C.D. Underwood also called Respondent seeking employment in August. Underwood was also asked whether he was affiliated with any unions. Underwood answered yes. Notwithstanding Underwood's affirmative response, White called Underwood for an interview. White spoke to Ramona Underwood, C.D. Underwood's wife. White asked Ms. Underwood whether her husband was looking for work. He also asked whether the Underwoods were new to the area. Ms. Underwood stated that they traveled to different areas following the work. White asked if Underwood was in the union and Ms. Underwood answered that he was. White told Ms. Underwood that he had problems with union employees quitting his jobs when work became available in the union hiring hall. According to Ms. Underwood, White said he would call again. According to White, he asked that Underwood call him back. White did not call again and Underwood did not call White back.

George White, Respondent's owner, testified that he has hired approximately six union members during the past 6 years. The position for which Petros applied was filled by a union member named Merle Rogers. Respondent did not know Rogers was a union member at the time it hired him. However, shortly after his hire, Rogers began actively organizing for the Union. He wore union shirts and insignia at work and attempted to recruit members for the Union. Notwithstanding Rogers' open union organizing efforts, he and White became friends. White took Rogers to several football games and allowed Rogers to store certain of his belongings in White's garage. In September, Rogers voluntarily left Respondent's employ claiming that he was striking in protest of Respondent's hiring practices. White attempted to convince Rogers to return to work and to finish the job for which he had been hired. Rogers did not respond.

Bruce Taber, Respondent's estimator and project manager, testified that he believed Rogers' resume was more impressive than that of Petros. Taber based his belief on the fact that Rogers had worked as a foreman for several companies and that he had worked for these companies for 2 years or longer. Taber testified that this pattern showed that Rogers' previous employers had considered him a key employee and had tried to move him from job to job so as to keep him with the companies. According to Taber, Petros' resume did not show the same pattern. He concluded that Petros' previous employers did not consider Petros to be a key employee. Since he was hiring someone to "run the job"

for 3 or 4 months, Taber felt that Rogers would be a better choice than Petros.

In July, Respondent also hired an employee, Tim Hassan, who had been referred by the State Employment Development Department. Hassan had been referred by the State prior to Petros' application for employment. Respondent hired only one of six employees referred by the State.

In August, when Respondent again advertised for electricians, it was in fact looking for apprentice electricians. In October, it hired employee Terry Weiss. Weiss had an impressive resume. With her application, Weiss submitted certain certificates and letters of recommendation. Included in Weiss' certificates were documents showing that she had taken courses given by joint union-employer programs. She also included a letter offering her the opportunity to join another local of the IBEW.

White gave a pretrial affidavit in which he stated that he did not receive Petros' resume until after the position had been filled. At the hearing, White had to admit that his pretrial statement was false. I draw the inference that this was not an inadvertent error but rather a misstatement in an attempt to avoid liability in this case. Further, in his pretrial statement White stated that he had attempted to call union applicant Alano but that no one answered the phone and that there was no message machine. After Alano testified that he had an answering service, White testified that he must have had the wrong number because he got a recording that the number was no longer in service. I do not credit White's affidavit or trial testimony on this point. Rather, I find that White did not call Alano for an interview.

An administrative law judge may conclude that a witness who intentionally testified falsely to a material fact may have also testified falsely as to other facts. However, I am not required, in all circumstances to consider such a witness unworthy of believe. I may accept so much of White's testimony as I believe to be true and reject only such part as I conclude is false.

B. *The Failure to Consider Petros for Hire*

The General Counsel alleges that Respondent failed to hire or even interview Petros because of his affiliation with the Union.

In *Wright Line, Inc.*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, 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 decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp.*, 462 U.S. 393, 399-403 (1983).

As the Board stated in *Big E's Foodland*, 242 NLRB 963, 968 (1979):

Essentially, the elements of a discriminatory refusal to hire case are the employment application, the refusal to hire each, a showing that each was expected to be a union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus.

The General Counsel argues that this is a case where the Respondent failed to even consider Petros for employment, i.e., dis-

criminating against the employee in the earliest stage of the hiring process. As will be discussed more fully herein, the General Counsel must establish that Petros' resume was not considered for reasons proscribed by the Act.

In this case, there is no dispute that Petros submitted a resume and was not hired. In fact, Respondent filled the position by hiring Rogers without even interviewing Petros. Petros' resume clearly indicated that he been employed as a union organizer for over 3 years. Thus, it is undenied that Respondent's agents knew that Petros was a union organizer. Petros' resume also revealed over 27-year experience as a foreman and journeyman electrician.

It is unquestioned that the General Counsel must establish unlawful motive or union animus as part of his prima facie case. If the unlawful purpose is not present or implied, the employer's conduct does not violate the Act. *Abbey Island Park Manor*, 267 NLRB 163 (1983); *Howard Johnson Co.*, 209 NLRB 1122 (1974). However, direct evidence of union animus is not necessary to support a finding of discrimination. The motive may be inferred from the totality of the circumstances proved. *Fluor Daniel, Inc.*, 311 NLRB 498 (1993); *Asociacion Hospital del Maestro*, 291 NLRB 198, 204 (1988). The General Counsel has produced no evidence that Respondent harbored any animus against the union or hiring union members. Rather the record reveals that Respondent hired union members in the past and hired Terry Weiss during the same timeframe at issue here. White befriended union organizer Merle Rogers and attempted to convince Rogers to return to the job after Rogers voluntarily left the job.

The General Counsel argues animus from the fact that employees were asked whether they were affiliated with any union. However, there is no evidence of animus against those applicants that answered affirmatively. Employee C. D. Underwood had indicated he was affiliated with the IBEW and still received a phone call from White. Weiss submitted a recommendation from another local of the IBEW with her resume. She was hired by Respondent. Merle Rogers was permitted to fill a 1-day vacancy with a union member friend of his. The record is further devoid of evidence of any antiunion statements by Respondent's supervisors or that the union was ever discussed with employees. There was no evidence of Employer action after it learned of Rogers' organizing. White invited Rogers to football games notwithstanding the fact that Rogers was attempting to organize his company. After Rogers "went on strike," Respondent attempted to convince him to come back to work.

The failure to hire Petros does not violate Section 8(a)(3) if it is motivated by legitimate and substantial business reasons. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). If the unlawful purpose is not present or implied the employer's conduct does not violate the Act, even if it is unjustified or unfair. *Howard Johnson Co.*, 209 NLRB 1122 (1974). The issue is the employer's motive and the burden is on the General Counsel, *Laidlaw Corp.*, 171 NLRB 1366 (1968), enf. 414 F.2d 99 (7th Cir. 1969). The General Counsel must establish an unfair labor practice by a preponderance of the evidence. See *Wright Line*, supra. The General Counsel must show discriminatory motive or unlawful intent existed. *NLRB v. Consolidated Diesel Electric Co.*, 469 F.2d 1016 (4th Cir. 1972); *Clothing Workers v. NLRB*, 564 F.2d 434, 440 (D.C. Cir. 1977). The Board requires proof of unlawful motivation or animus as part of the General Counsel's prima facie case. *Abbey Island Park Manor*, 267 NLRB 163 (1983); *Class Watch Strap Co.*, 267 NLRB 276 (1983). Here there is no evidence to rebut Taber's testimony that Rogers was chosen because his resume was more impressive than that of Petros. Taber chose

Rogers because he believed Rogers had been considered a key employee by his previous employers and would be better suited for running the job than Petros.

The General Counsel argues that the false reason for the failure to hire Petros, contained in White's pretrial statement supports an inference that the motive is an unlawful one which the Respondent wishes to conceal. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Abbey's Transportation Services*, 284 NLRB 698 (1987); *First National Bank of Pueblo*, 240 NLRB 184 (1979).

While White's false statements do raise a concern, I find that evidence offset by Taber's credible reasons for choosing Rogers over Petros for the position at issue. Taber's explanation for hiring Rogers instead of Petros was that he had been able to work as a foreman on a regular basis. Rogers' previous employers had employed him for substantial periods of time. Taber believed that such an employment record indicated that Rogers' previous employers had viewed him as a key employee and had attempted to find work for Rogers so that he would remain with their companies. Further, in view of the evidence of neutrality towards union activity, I find White's pretrial statement insufficient to support a case of an unlawful refusal to hire.

Based on all of the above, I find that the General Counsel has failed to establish a prima facie case that Respondent was motivated by union considerations and acted upon union considerations in failing to hire or interview Petros. An affirmative showing that an employer lacks animus against the union constitutes a good defense. *Sun Coast Foods*, 273 NLRB 1642, 1644 (1985); *Goodyear Tire & Rubber Co.*, 312 NLRB 674 (1993).

Assuming arguendo that a prima facie case had been established the burden shifts to Respondent to establish that the same action would have taken place in the absence of the employee's protected conduct. Thus, even assuming arguendo that the Gen-

eral Counsel had established a prima facie case, the totality of the evidence preponderates in a finding of a failure to prove that Respondent was motivated by unlawful union considerations in not interviewing or hiring Petros.

C. *The Unlawful Interrogations*

The undisputed evidence shows that Respondent's office manager, following a form composed by White, routinely asked job applicants whether they were affiliated with any unions. The answers were then recorded on the form. The employees were not given any explanation or reason for the question. Further, the employees were not given any assurances that no reprisals would be taken against employees with union affiliations. In these circumstances, employees could reasonably fear that an affirmative response would adversely affect their job prospects. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act. *GM Electrics*, 323 NLRB No. 14 (1997); *Adco Electric*, 307 NLRB 1113, 1116-1117 (1992).

CONCLUSIONS OF LAW

1. The Respondent, Modern Electric Co., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union, International Brotherhood of Electrical Workers, Local 617, AFL-CIO, is a labor organization within the meaning of the Act.
3. Respondent has violated Section 8(a)(1) of the Act by interrogating job applicants as to their union affiliations.
4. Respondent has not otherwise violated the Act as alleged in the complaint.

[Recommended Order omitted from publication.]