

**Cedar Coal Company and Roger L. Hammack. Case
9-CA-14015**

24 October 1983

**SUPPLEMENTAL DECISION AND
ORDER**

**BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS**

On 8 February 1983 Administrative Law Judge Hutton S. Brandon issued the attached supplemental decision. The Respondent and the General Counsel each filed exceptions and a supporting brief, and the Respondent filed a brief in response to the General Counsel's exceptions.

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

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order.²

ORDER

The recommended Order of the judge is adopted and the complaint dismissed.

¹ We agree with the judge's assessment of the effect of the remand order of the United States Court of Appeals for the Fourth Circuit in this proceeding; i.e., that the General Counsel had not made out a prima facie case and, because the General Counsel declined to produce further evidence at a "new trial," and the record therefore remains the same, dismissal of the complaint is mandated under the terms of the court's remand order. In such circumstances, however, we find it unnecessary to pass on the judge's alternative findings on the merits.

² Chairman Dotson notes that not only did the Fourth Circuit remand this case for a "new trial," 678 F.2d 1197, 1199 (4th Cir. 1982), but also the Board, on 24 September 1982, issued an Order remanding the proceeding to the judge "for the purpose of reopening the hearing." Nevertheless, as stated above, counsel for the General Counsel took the position that no further evidence would be presented. In the Chairman's view, counsel for the General Counsel is bound by the decisions of the Fourth Circuit and the Board, even if she may personally disagree with them. Further, counsel for the General Counsel should have moved for dismissal or withdrawal of the complaint since she did not intend to comply with the court decree or the Board Order instead of wasting the time of the judge and this Board.

SUPPLEMENTAL DECISION

HUTTON S. BRANDON, Administrative Law Judge: My initial decision in this case issued on March 26, 1980, finding that Cedar Coal Company, herein called Respondent, violated Section 8(a)(3) and (1) of the Act in refusing to employ Roger L. Hammack, herein referred to as Hammack, on and after February 7, 1979, because of his publicized activities in support of United Mine Workers of America, herein called the Union. Exceptions to the decision were taken by Respondent, and the Board on August 26, 1980, affirmed the decision with a

modification of the Order.¹ Respondent thereafter filed a petition with the United States Court of Appeals for the Fourth Circuit for review of the Board's decision, and the Board cross-petitioned the court for enforcement of its Order in the case.

On May 19, 1982, the court issued a decision² in which it denied enforcement of the Board's Order and remanded the case to the Board:

... for further remand to the Administrative Law Judge for a new trial to ascertain (1) whether the General Counsel has demonstrated a prima facie violation of the Act, and, if so (2) whether measured under the appropriate standard, the refusal to hire was a violation of the Act.

With respect to the first issue, the court had concluded that in my initial decision I had only "assumed" that the union activity which was found to be the basis for Respondent's refusal to hire Hammack was protected under the Act. The second specified issue was related to the court's direction to the Board to consider Respondent's motivation in the case in light of the standard established by the Board in *Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).³

Consistent with the court's remand, the Board on September 24, 1982, issued its "Order Remanding Proceeding to the Administrative Law Judge for Further Hearing," in which it remanded the case to me "for the purpose of reopening the hearing to ascertain under the guidelines laid down by the court" the issues specified by the court. Accordingly, pursuant to the Board's Order, on October 21, 1982, I issued an "Order Reopening and Scheduling Hearing on Remand," setting the hearing for November 23, 1982, in Charleston, West Virginia. Thereafter, the General Counsel, on November 12, 1982, filed a motion to cancel the hearing, close the record, and set a time for filing posthearing briefs, along with a memorandum in support of the motion. In her memorandum in support of the motion, the General Counsel contended that the record in the case as it stood was "complete," that based on that record a prima facie case had been established, and that further hearing was neither required nor mandated by the court or Board Order. Respondent, by document dated November 15, 1982, filed objections to the General Counsel's motion contending, inter alia, that the court's remand contemplated a trial de novo in the case.⁴ In view of Respondent's opposition to the

¹ 251 NLRB 554 (1980).

² *Cedar Coal Co. v. NLRB*, 678 F.2d 1197 (1982).

³ The court recognized that the Board's decision in *Wright Line* issued on the day following its decision in the case sub judice, but concluded that remand for consideration of the application of *Wright Line* was mandated by *NLRB v. Food Store Employees Union*, 417 U.S. 1, 10 fn. 10 (1974), wherein the Supreme Court stated that:

A court reviewing an agency decision following an intervening change of policy by the agency should remand to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act.

⁴ Respondent's "objections" contained a certificate of service showing service on the General Counsel and other parties by "regular" mail.

General Counsel's motion and because the Board's Order directed "further hearing," I issued an order on November 19, 1982, denying the General Counsel's motion.

On November 22, 1982, the General Counsel arranged a telephonic conference with Respondent's counsel and me⁵ in which she complained that she had not been served with a copy of Respondent's objections to her prior motion, and in which she again urged cancellation of the hearing and the setting of a time for the filing of briefs containing arguments in the case. The General Counsel stated that she had no intention of presenting any additional evidence at the scheduled hearing. Respondent's counsel then asserted that, if the General Counsel did not intend to produce evidence at the hearing, he would not produce evidence. Accordingly, it appearing that the parties were in agreement that no further evidence would be produced and that nothing would be gained through the holding of the hearing as scheduled, I issued an order dated November 22, 1982, canceling the scheduled hearing and setting a date for the filing of briefs containing arguments based on the existing record to be considered in light of the court's remand.⁶

I. SUMMARY OF CREDITED FACTS

A brief summary of the facts found in the initial decision is here necessary. Hammack had been involved in work in the coal mining industry for many years prior to 1978. He had also been an active member of the United Mine Workers, herein called the Union, and various of its locals for an equivalent period of time. In 1975, he had pled guilty to bombing a school building during a school book controversy and had been sentenced to prison. In 1976, in connection with a work release program, Hammack was employed by Respondent, an employer in the coal mining industry, and worked for a period of about 6 weeks after which he quit to take a better paying job in the same industry.

Hammack has always been an outspoken supporter of the Union and its goals. Beginning in December 1977, and continuing through March 1978, Hammack participated in a strike by coal miners represented by the Union in furtherance of the Union's contractual demands in a new collective-bargaining agreement sought with the Bituminous Coal Operators Association (BCOA) of which Respondent was a member. At that particular time, Hammack was employed by an employer engaged in coal mine construction work (as opposed to mining itself) and party to a collective-bargaining agreement negotiated with the Union by the Association of Bituminous Contractors (ABC). Hammack testified without contradiction that he perceived support of the Union-BCOA strike to be in his own self-interest since benefits achieved through that strike would, in effect, enhance the Union's bargaining demands on the ABC contract which was

being negotiated at the same time. There was no contention that Hammack's general support of the Union-BCOA strike breached a no-strike agreement between the Union and ABC or was otherwise unprotected in itself.

Hammack received substantial publicity for his involvement in the 1977-1978 strike, and newspaper accounts of his activities and observations during the period were received in evidence. Two such accounts reported in a Charleston, West Virginia, paper are dated December 21 and 28, 1982, and referred to picketing of striking union miners at nonunion coal companies in Kentucky. The first account quotes Hammack as saying he intended to participate in such picketing, the second account contains remarks of Hammack on his return from Kentucky to the effect that he was disappointed in that the trip had been ineffective, and that the striking miners had been followed by state police. Hammack admitted in his testimony herein that he had picketed at the nonunion mines for approximately 2 or 3 days.

There were at least four other local newspaper accounts⁷ of the Union-BCOA strike referring to Hammack in either his observation on the likelihood of the Union and its membership achieving an agreement, or his involvement in the Union's relief committee which sought to obtain and distribute food for the strikers. Two of the articles contained pictures of Hammack.

In July 1978, after the strike had terminated in March, Hammack applied for employment with Respondent. Shortly after his application, Hammack was told by Respondent's transportation superintendent, Allen Tackett, that it would be difficult for Hammack to work for Respondent because of all the "strikes, all the news media," that Hammack had talked to. Hammack was not, in fact, employed by Respondent, and he reapplied in February 1979. Thereafter, he received assurances from representatives of Respondent, specifically Personnel Supervisor Terry Whitt and Mine Superintendent Larry Hughes, that they would try to help him. However, Hughes, in talking to Hammack, referred to Hammack's involvement in the 1977-1978 strike and remarked that Hammack had been very vocal and people did not like that. Hughes added that Hammack would have a better chance of working for Respondent if he completely stayed out of the paper or any type of news.

Personnel Supervisor Terry Whitt had also told another job applicant, William Carter, in September 1978, that Hammack would not be employed, "because he was a troublemaker for the Union." Subsequently, in mid-February 1979, Whitt also told Respondent's former employee Robert Bess that Hammack had been on television, had been mixed up in the strikes, had had trouble, was in that "bombing," and was jailed, and Respondent would not give him a job. Finally, there was also credited testimony of employee Hayes Holstein to the effect that Respondent's personnel manager, John Goodard, told him that Hammack was a "previous troublemaker," and Goodard was "afraid" of Hammack making trouble.

⁵ The General Counsel claimed that the Charging Party's counsel was unavailable for the conference call, but counsel related that the Charging Party's position was nevertheless consistent with hers.

⁶ Since this disposition of the hearing is consistent with the General Counsel's motive of November 12, 1982, no prejudice to the General Counsel can attach to any failure of service on her of Respondent's objections to her November 12 motion.

⁷ These accounts are dated December 7, 1977, February 23, 1978, February 26, 1978, and March 21, 1978. G.C. Exhs. 4(e), 5(a), 5(b), and 5(c), respectively.

Hammack was never hired, and the charge alleging he was denied employment because of his union activities was filed. Respondent's defense to the charge and the complaint thereon was based primarily on the testimony of Goodard who assertedly made the decision not to hire Hammack. Goodard testified, in effect, that Hammack was not hired because he had quit after a short period of employment in 1976. Moreover, Goodard testified that he was aware that Hammack had been involved in the school bombing and was concerned that, if employed, Hammack would present a risk because of being put into a position where explosives might be available to him.

The General Counsel argued that the reasons asserted by Respondent were pretextual and designed to cloak the real reason—Hammack's staunch union advocacy and activity.

In my initial decision, I observed that the burden of establishing the statutorily prohibited reason was on the General Counsel, but I nevertheless concluded that the General Counsel had sustained that burden. I noted that Hammack's publicity following his period of employment with Respondent was related to his involvement in this 1977-1978 contract dispute and concluded that such "publicity was inseparable from his strike involvement and was a part of his activity protected under the Act." While footnoting Respondent's argument that Hammack's picketing of the nonunion mines in the 1977-1978 strike was not protected, I concluded that the unprotected nature of such picketing was not affirmatively established and pointed out that in any event, Respondent had not claimed that it had relied upon any such protected activity in refusing to hire Hammack. I proceeded to conclude that Respondent's asserted reasons for failing to hire Hammack were pretextual, because (1) Respondent admittedly had no policy against hiring prior felons and in fact, based on record evidence, Respondent had employed others who had committed offenses identical to Hammack; (2) Respondent had hired Hammack once before subsequent to his offense and after he had been released from prison; (3) Respondent admittedly had no policy against not rehiring people who had previously quit; (4) Respondent had no evidence of any deficiency with respect to Hammack's work during his period of employment; (5) Respondent's asserted reasons for not hiring Hammack were never communicated to him; and (6) the statements of Respondent's representatives to Hammack and others regarding Hammack's penchant for publicity, including that growing out of the 1977-1978 strike, demonstrated the actual basis for Respondent's refusal to hire Hammack. Accordingly, the reasons asserted by Respondent were rejected as pretextual, and a conclusion was made that Hammack was not hired, at least in part, because of his publicized involvement in the 1977-1978 strike.

II. COURT'S DECISION

The court in its decision remanding the case stated that, "it is apparent from the Administrative Law Judge's opinion that the General Counsel did not actually demonstrate a *prima facie* violation of the Act." It went on to state that, "while the General Counsel provided satisfactory proof that Hammack was involved in union activity

during the 1977-78 strike, there was no proof that this conduct was protected under §7 of the Act, 29 U.S.C. Sec. 157." The court construed the footnoted reference in the initial decision regarding Respondent's failure to clearly establish that the picketing of nonunion mines by Hammack was an unprotected activity as improperly shifting "the burden of demonstrating the unprotected nature of activities to the employer when, in fact, the burden is on the General Counsel to establish the protected nature of the activities." Accordingly, and also in order to allow the Board to apply the analysis announced by the Board in *Wright Line*, supra, the court deemed the remand was necessary.

III. THE ARGUMENTS OF THE PARTIES ON REMAND

The General Counsel in her brief recited the union activity of Hammack contained in the record which was claimed to be protected under the Act. Such activity included service on the grievance and safety committees for the Union in times past, and serving as union local vice president as well as a brief, but aborted, campaign for vice president of the Union's District 17. More specifically, in relation to the 1977-1978 strike, Hammack had participated in the work of the Union's strike relief fund committee and had worked to obtain and dispense funds and supplies for needy strikers. With respect to Respondent's contention that Hammack had engaged in unprotected activity by virtue of his picketing of nonunion mines during the strike, the General Counsel contends that such picketing lasted only 2 or 3 days and, even if unprotected, was insufficient to justify refusal of employment to him. Moreover, Respondent did not contend that it was aware of such unprotected activity at the time it refused to hire Hammack, or that it refused to hire Hammack because of it.

Proceeding from the claim that the record does establish protected activities on Hammack's part, the General Counsel argues that, based on the credibility resolutions reached in the initial decision, Respondent was charged with knowledge of that activity. That knowledge coupled with Hammack's qualifications and experience in the industry, the statements of Respondent's representatives tying his strike publicity to the failure to hire him, constitute all the elements of a *prima facie* violation as the first step in the application of *Wright Line*. The General Counsel completed the application of *Wright Line* in her argument by asserting that in view of the previously found falsity of Respondent's claimed reasons for not hiring Hammack, i.e., his prior quitting of Respondent and his prior felony conviction, Respondent failed to rebut the General Counsel's *prima facie* case.

Respondent's argument in its brief can be related more succinctly. Respondent first asserts that the court in its decision remanding the case found as a matter of fact and law that the General Counsel had failed to establish a *prima facie* violation of the Act because he had not shown that Hammack's union activity was, in fact, protected under the Act. Respondent argues that that decision establishes the law of the case as it stood at the point of remand citing *EEOC v. International Longshoremen's Assn.*, 623 F.2d 1054 (5th Cir. 1980), and *Walston v.*

The School Board of the City of Suffolk, 566 F.2d 1201 (4th Cir. 1980). Accordingly, since the General Counsel sought to produce no additional evidence on remand, no prima facie case has been established and the court's decision requires that the case be dismissed.

Respondent extends this argument to the second issue specified in the remand regarding the application of *Wright Line*. Thus, under *Wright Line* the General Counsel was first required to demonstrate a prima facie case, and after such demonstration, the burden is shifted to Respondent to rebut the prima facie case by coming forward with evidence to establish that Respondent would have taken the same actions it took with respect to the alleged discriminatee without regard to his involvement in union or other protected activity. Because the General Counsel here, under the court's decision, did not establish a prima facie case, the first requirement of *Wright Line* was not satisfied, and the complaint should be dismissed. Respondent points out that even under Board law existing prior to *Wright Line* such as in *Neptune International Corp. v. NLRB*, 551 F.2d 658 (4th Cir. 1977), the General Counsel was still required to establish a prima facie case of a violation. No prima facie case having been established on remand, the application of either *Wright Line* or *Neptune*, the Respondent argues, requires that the complaint be dismissed.

IV. CONCLUSION

The initial and critical issue presented is whether the court in its brief opinion remanding the case concluded that, based on the record under review, the General Counsel had failed to establish a prima facie violation of the Act. Support for the conclusion that it made no determination on the points is found in the remand itself rather than simply denial of enforcement of the Board's Order. Moreover, the court did not specifically state that the General Counsel had not establish a prima facie case. Rather, the court stated only that the administrative law judge had "assumed" that the union activity which was concluded to be the real basis for Respondent's refusal to hire Hammack was protected under the Act and added that it was "apparent from the ALJ's opinion that the General Counsel did not actually demonstrate a *prima facie* violation of the Act." Thus, in this observation the court appears to be commenting on a perceived critical omission below rather than making a specific independent conclusion of its own as to the existence of the prima facie violation.

On the other hand, the court directed the Board to "further remand [the case] to the Administrative Law Judge for a new trial," on the specified issues. That language suggests a conclusion by the court that the General Counsel had not established a prima facie case on the existing record. Furthermore, the court prefaced its second basis for remand, i.e., to consider the application of *Wright Line*, only on the assumption or condition that the General Counsel "demonstrates" a prima facie case. That assumption clearly implies the inadequacy of the General Counsel's existing evidence and contemplates the production of further evidence.

Considering the court's language and its decision as a whole, I am of the opinion that it determined that a

prima facie case had not been established by the General Counsel because of the absence of specific evidence that Hammack's union activity was protected. Moreover, and in any event, whatever ambiguity exists in the court's decision, it appears that the Board has interpreted the court's decision as finding that the General Counsel had not established a prima facie case. Thus, the Board in its remand order of September 24, 1982, stated:

The court indicated that, in finding the violation, the Administrative Law Judge had assumed that this activity was protected under the Act. *But the court found* that the General Counsel had not proven a *prima facie* violation of the Act because he had not shown that Hammack's union activity was, in fact, protected under Section 7 of the Act. [Emphasis added.]

The Board's interpretation of the court's decision is binding on me. The court's decision is the law of the case, as argued by Respondent. Since the General Counsel declined to produce further evidence and the record remains unchanged with respect to the facts considered by the court, I am compelled to recommend dismissal of the complaint.

Should my construction of the court's decision and the Board's remand order be in error, and in order to avoid the possibility of further remand for such error and any failure on my part to make specific findings on the evidence already received, I deem it not inappropriate to briefly treat the two issues specified by the court.

First, with respect to Hammack's protected activity, it is abundantly clear that he participated in the 1977-1978 strike activity. That was an economic strike in support of bargaining demands. Participation by employees in an economic strike has traditionally been held to fall within the protection of the Act. Accordingly, Hammack's activities generally in support of that strike, including his publicized comments on the progress of negotiations and the likelihood of an agreement, as well as his efforts in support of the Union's relief committee, must be considered as protected. To the extent my initial decision was unclear on the point or poorly articulated, I would specifically conclude that Hammack's activity in support of the strike in the foregoing respects was clearly protected. A concern of the court was Hammack's involvement in picketing of nonunion mines which also received publicity. Assuming that such picketing was unprotected because of secondary boycott implications, the uncontroverted fact remains that such picketing was of short duration lasting only 2 or 3 days. Thus, considered in context with Hammack's other involvement in the strike, it constituted a small portion of his overall strike activity which lasted for almost 4 months. Still assuming the unprotected nature of the picketing of the nonunion mines, I would conclude that such picketing would be insufficient to so taint all of Hammack's strike involvement as to warrant his complete removal from the protection of the Act. This is not to say that Respondent, claiming awareness of Hammack's alleged unlawful picketing on nonunion mines, could not have relied on such picketing as a legitimate basis for refusing to hire him. But the fact

remains that Respondent did not claim such awareness⁸ and, hence, did not claim reliance on such picketing in refusing to hire Hammack.⁹

Accordingly, and because Hammack's involvement in picketing the nonunion mines was only a small portion of his publicized strike involvement, I would adhere to my original conclusion that Hammack had engaged in protected activity under the Act. Further, I would specifically find that to the extent Hammack's involvement in protected activity was a necessary element to the General Counsel's prima facie case, that element was established.

Turning to the application of *Wright Line*, the Board has stated that an analysis under *Wright Line* is "essentially the same" as that employed in the pre-*Wright Line* cases involving issues of employer motivation in alleged discrimination cases. See, e.g., *Thurston Motor Lines*, 258 NLRB 385 (1981); *Guerdon Industries*, 255 NLRB 610 (1981). Moreover, the Board has specifically refused to find that the *Wright Line* analysis is inapplicable to pretext cases. See *C-E Cast Equipment*, 260 NLRB 520 (1982). It has held, on the other hand, that "a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

In the initial decision in the instant case, a conclusion was reached that Respondent's asserted basis for refusal to hire Hammack was pretextual and designed to cloak its unlawful reason. Application of *Wright Line* analysis to the facts of the case, I conclude, produces the same result. First, using the *Wright Line* terminology and analysis, I would find the General Counsel established a prima facie case of an unlawful refusal to hire Hammack based on his involvement and publicized protected union activity during the 1977-1978 strike, knowledge of which was charged to Respondent, and statements to supervisors which indicated Respondent's refusal to hire Hammack was related to publicity regarding his union activity. The finding of the existence of a prima facie violation

shifts to Respondent the burden of demonstrating that it would have refused to hire Hammack without regard to his protected activity. I would conclude that Respondent failed in this regard since the reasons asserted by it are not founded in fact and could not in fact be relied upon. As already indicated herein, the first ground asserted by Respondent in refusing to hire Hammack, i.e., his prior quitting of Respondent, was not based on either an established practice or policy of not hiring former employees. Similarly, the second ground relied on, Hammack's prior conviction for the school bombing, cannot be considered valid because Respondent has once before hired Hammack after the conviction and Hammack's imprisonment. Furthermore, Respondent had hired other employees notwithstanding their conviction for identical or similar offenses. Accordingly, I would find no change from my original decision in this case is warranted by the application of *Wright Line*.

CONCLUSIONS OF LAW

1. The General Counsel has not proven a prima facie violation of the Act inasmuch as she has not shown by additional evidence that Hammack's union activity was, in fact, protected under Section 7 of the Act.

2. Respondent, by refusing to employ Roger L. Hammack, did not engage in, and is not engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

Upon the basis of the foregoing, the decision of the United States Court of Appeals for the Fourth Circuit remanding the case to the Board, and the Board's Order remanding the case to the administrative law judge, the conclusions of law reached in light of the court's decision and the Board's Order, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended

ORDER¹⁰

The complaint is dismissed in its entirety.

⁸ The failure to assert such a claim can be understood in view of its discredited assertion that it was not aware of any of the newspaper publicity surrounding Hammack's involvement in the 1977-1978 strike.

⁹ The Board has held that an administrative law judge may not rely on defenses never asserted to justify dismissal of a complaint allegation. *Inland Steel Co.*, 257 NLRB 65 (1981).

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.