

**Merit Electric Company, Inc. and International Brotherhood of Electrical Workers, Local Union 728, AFL-CIO and International Brotherhood of Electrical Workers, Local Union 915, AFL-CIO.** Cases 12-CA-16363, 12-CA-16532, 12-CA-16638, 12-CA-16707, 12-CA-16720, 12-CA-16739, and 12-CA-16796

November 7, 1997

ORDER REMANDING PROCEEDING TO  
ADMINISTRATIVE LAW JUDGE

BY CHAIRMAN GOULD AND MEMBERS FOX AND  
HIGGINS

On February 19, 1997, Administrative Law Judge Robert C. Batson delivered a bench decision in this proceeding, and on April 16, 1997, he issued his supplement to bench decision. The General Counsel and the Respondent each filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the bench decision, the supplement, and the record in light of the exceptions and briefs and has decided to remand this proceeding to the judge for further consideration as set forth below.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to hire Frank Roper because of his union activities.<sup>1</sup> In its exceptions, the Respondent contends, inter alia, that at the hearing its vice president, Tim Wooten, presented legitimate business reasons for failing to hire Roper, but the judge made no finding regarding the credibility of Wooten's testimony. Specifically, the Respondent contends, and the record shows, that Wooten testified to three reasons why he did not hire Roper:

- Wooten worked with Roper approximately 18 years ago and believed that he had poor work habits.
- Wooten believed that, if hired, Roper would not be a satisfied employee because he would be taking a 50-percent reduction in pay from his previous job.
- Wooten believed that it would be necessary to retrain Roper due to his lack of "on the job" experience over the past 18 years.

Thus, the Respondent argues that on the basis of Wooten's testimony it satisfied its burden under *Wright Line*<sup>2</sup> of demonstrating that it would not have hired Roper even in the absence of his union activities.

<sup>1</sup> At the time Roper applied for work with the Respondent in August 1994, he was the business manager for International Brotherhood of Electrical Workers, Local 308, AFL-CIO. He had been employed in that capacity since July 1977.

<sup>2</sup> 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

In his brief in support of his exceptions, the General Counsel appears to acknowledge that the judge failed to make a credibility finding concerning Wooten's testimony because the General Counsel argues to the Board that Wooten's testimony "should be discredited." Similarly, the General Counsel recognizes that the judge failed "to [make] a finding . . . regarding the Respondent's affirmative defense," and the General Counsel "urges the Board to find, based on the record before it, that Respondent failed to establish that it would not have hired Roper in the absence of his union activity."

We agree with both the Respondent and the General Counsel that the judge failed to make a clear credibility resolution concerning Wooten's testimony and that such a resolution is necessary for a proper evaluation of the Respondent's *Wright Line* defense. We do not agree with the parties, however, that it would be appropriate for the Board itself to make such a credibility finding. See *Standard Dry Wall Products*, 91 NLRB 544, 545 (1950) (The Board attaches "great weight" to a judge's credibility findings because the judge, not the Board, "has had the advantage of observing the witnesses while they testified."), enfd. 188 F.2d 362 (3d Cir. 1951). Accordingly, we shall remand the case to the judge for the purpose of making an explicit finding concerning the credibility of Wooten's testimony about the reasons why he refused to hire Roper. In light of that credibility resolution, the judge shall also determine, consistent with the entire record, whether the Respondent satisfied its *Wright Line* burden of demonstrating that it would not have hired Roper even in the absence of his union activities.<sup>3</sup>

<sup>3</sup> If the judge had evaluated the Respondent's explanations for its action and concluded that the reasons advanced were pretextual, then we would agree with our dissenting colleague that there would be no need for a remand. The problem here, however, is that the judge did not find that the reasons asserted by the Respondent were mere pretexts. In the absence of a finding of pretext and in the absence of a finding concerning the credibility of Wooten's testimony, we can only speculate what the judge's *Wright Line* analysis would be. Accordingly, a remand to the judge is clearly warranted.

Our dissenting colleague does not dispute that the judge failed to make a clear credibility resolution concerning Wooten's testimony. Further, the dissent concedes, as it must, that the judge's decision contains no discussion whatsoever of one of the three reasons proffered by the Respondent (Roper's poor work habits). Nevertheless, the dissent claims that the judge "has made all the necessary findings," citing the judge's repeated statement that "the motivating factor" in the failure to hire Roper was his union activity. We disagree. Whether union activity was or was not "the motivating factor" in an employment decision is a conclusion one reaches after analyzing a respondent's *Wright Line* defense; use of "the motivating factor" phrase is not an appropriate substitute for reasoned analysis. Careful examination of the judge's decision fails to reveal how he arrived at the conclusion that union activity was "the motivating factor" in the failure to hire Roper. Therefore, contrary to the dissent's assertion, this case is not "ripe for review."

## ORDER

It is ordered that this proceeding is remanded to Administrative Law Judge Robert C. Batson for the purposes described above.<sup>4</sup>

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

CHAIRMAN GOULD, dissenting.

Contrary to my colleagues, I find it unnecessary to remand the issue of whether the Respondent violated Section 8(a)(3) and (1) by failing and refusing to hire Frank Roper because of his union activities. The majority finds that the administrative law judge "failed to make a clear credibility resolution" with respect to the testimony of the Respondent's vice president, Tim Wooten, and that such a resolution is necessary to a proper evaluation of the Respondent's *Wright Line* defense. I disagree.

Where an employer has failed to assert any legitimate reason for its action other than one found to be pretextual by the judge, then the employer has failed to establish that it would not have taken the same action in the absence of the protected activity. Further, as the Ninth Circuit observed,

[A]ctual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances. . . . If [the trier of fact] finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference. *Shattuck Denn Mining Corp. (Iron King Branch) v. NLRB*, 362 F.2d 466, 470 (1966).

In the instant case, the judge rejected the Respondent's proffered reasons for Roper's discharge and inferred an unlawful motive.

In his bench decision, the judge noted Wooten's testimony as to his reasons for not hiring Roper: (1) that he had worked with Roper 18 years ago and that Roper had poor work habits then; (2) that it would be necessary to retrain Roper because he had not worked

in the field for 18 years; and (3) that Roper would have to take a 50-percent reduction in pay to take the job. However, the judge rejected Wooten's stated reasons and, relying on the Respondent's knowledge that Roper was the Union's business agent and that Roper's application stated that his reason for leaving his position as union business agent was "to organize contractors in the area," the judge found that the General Counsel had established that *the* motivating factor in the Respondent's refusal to hire Roper was his union activity. The judge specifically rejected Wooten's contentions with regard to the need to retrain Roper and the disparity of pay. As to the former, the judge cites Wooten's admission that an individual who was a journeyman electrician 18 years ago could "pick up" the techniques again quickly. As to the latter, the judge found that it was not "the motivating factor in the Respondent's refusal to hire Mr. Roper." Although the judge did not specifically reject Wooten's reference to Roper's poor work habits, he implicitly did so when he found that "*the*" motivating factor in the failure to hire was Roper's union activity.

Although the judge did not explicitly analyze the failure to hire with reference to *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), his findings are consistent with that decision and, unlike my colleagues, I find it unnecessary to insist that the judge recast his findings and conclusions to achieve formalistic consistency with *Wright Line*. It is well settled that, where an administrative law judge has evaluated an employer's explanation for its action and concluded that the reasons advanced by the employer were pretextual, that determination constitutes a finding that the reasons advanced by the employer for its action either did not exist or were not in fact relied on thereby leaving intact the inference of wrongful motive established by the General Counsel. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982). In the instant case, as discussed above, the judge considered and rejected as pretextual all of the Respondent's proffered reasons for its refusal to hire Roper and further found that Roper's union activity was the motivating factor in its action. Under the judge's analysis, no legitimate explanation remains to establish that the Respondent would have taken the same action even in the absence of that union activity and the inquiry is logically at its end since the Respondent has not met its burden.

The judge has made all the necessary findings and the case is ripe for review. Therefore, I dissent from the remand and would proceed to a determination of whether the judge's decision should be adopted.

<sup>4</sup>In remanding this case, we are not passing on any of the other issues raised by the parties' exceptions at this time.

*Evelyn Korschgen, Esq.*, for the General Counsel.  
*William E. Sizemore, Esq.*, of Tampa, Florida, for the Respondent.  
*William Dever, Esq.*, of Tampa, Florida, for the Charging Parties.

#### SUPPLEMENT TO BENCH DECISION

ROBERT C. BATSON, Administrative Law Judge. This matter was heard by me at Tampa, Florida, on February 18, 1997. At the close of evidence and argument, I delivered a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations and found that Respondent had engaged in certain unfair labor practices.

I certify the accuracy of the portion of the transcript, as corrected, pages 255 to 263 containing my decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A." The decision is further supplemented to include the following recommended Order and proposed Notice to Employees. A copy of the Notice to Employees is attached hereto as "Appendix B."

On the finding of facts and conclusions of law set forth in the bench decision delivered at the close of evidence and argument and on the entire record, I issue the following recommended<sup>1</sup>

#### ORDER

The Respondent, Merit Electric Company, Inc., Largo, Florida, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Refusing to employ or offer employment to any qualified applicant, when a position is available, because of that applicant's union activities or because he is or has been employed by the Union.

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

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

(a) Make Frank Roper whole for any loss of pay or benefits he may have suffered by reasons of the discrimination against him in the manner described in this bench decision.

(b) Within 14 days of this Order offer Frank Roper employment to the position for which he applied or to a substantially equivalent one without prejudice to his seniority or other rights and privileges he may have enjoyed.

(c) Remove from his personnel file any references to his unlawful refusal to hire and notify him that it has done so, and that it will not be used against him in any way.

(d) Preserve and on request make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days, post at the Respondent's Largo, Florida site copies of the attached notice marked "Appendix

<sup>1</sup> 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

B."<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 12, 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.

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

<sup>2</sup> 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 A

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frankly, the contrast between Mr. Roper and these other cases are simply day and night.

They were day and night before the settlement. They're day and night now, and I do not believe that you can infer animus as to Mr. Roper from those. You can't because the facts are too different.

I ask you to please consider each case on its own merits. Let's say, your Honor, I know as well as you do that all of those eleven people and had turned down Mr. Roper, we'd still be here.

Those firings don't add anything to this case. We would still be here. But we would be here because his facts are different than anyone else's.

They made a logical decision. They followed good business practices. They were credible in their testimony in front of you. And for that reason, they deserve to be exonerated.

Thank you, your Honor.

JUDGE BATSON: Thank you.

Counselors, now any Bench Decision, I don't know whether or not any of you have had one, but you will have from now—when I get the transcript in approximately ten to fifteen days, my decision will be at the back of the transcript.

It will be extracted and attached to the certification of the record.

From the time my decision—that decision issues

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incorporating the Bench Decision, your time for filing exceptions begins to run.

MR. SIZEMORE: That's a separate transmittal?

JUDGE BATSON: That will be a separate transmittal, yes, very similar to this.

MR. SIZEMORE: All right. But it wouldn't be from the Court Reporter, it's going to be from your office?

JUDGE BATSON: No, it won't be from the Court Reporter. Well, you will get a copy of the transcript.

MR. SIZEMORE: Right.

JUDGE BATSON: And I'll get a copy of the transcript. That portion of the transcript containing my Bench Decision will appear in the record, but I will have to certify that record.

And in the event there are some minor errors, I will issue a correction of the transcript as to those errors, but your time for filing—similar to this.

But as for your time for filing exception, it begins to run from the date my decision issues. Not today, it does not begin to run today.

Counselors, I'm going to issue a Bench Decision pursuant to Section 102.35(a)(10) of the Board's rules and regulations in this case, because there is a single issue and not a great deal of factual conflict or dispute.

The Regional Director for Region 12, on April 28, 1995, issued an order consolidating cases, consolidating complaint and notice of hearing, alleging inter alia that Respondent refused to hire eleven applicants for employment because of their union activities.

As a result of a stipulation of facts, the General Counsel, the Charging Party and the Respondent, entered into an agreement dated February 18, 1997, which disposes of ten of the eleven alleged discriminatees in the Complaint.

It also stipulates that Respondent hired during a relevant period of time, between June 27 and November 14, at least twenty two electricians.

Now, Mr. Frank Roper is the only one involved in this case that has not been disposed of, and I believe he was the subject of the charge in 12-CA-16638.

Now, Respondent by its amended answer admits that the charges were filed and served, as alleged in the Complaint.

Also, his answer, as amended at the hearing, admits that the Board has jurisdiction over this matter, and that the Respondent is an Employer within the meaning of 2(2), (6) and (7) of the Act. Accordingly, the case is properly before the Board.

Now, the General Counsel has established that during the period of time, the relevant period being, say, August, 1994, the Respondent ran quite a number of advertisements in local, daily newspapers for electricians.

On August 26, 1994, Mr. Frank Roper, who was business agent for Local 308, filed an application with Respondent. Mr.

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Roper is a journeyman electrician and had been business agent for some seventeen years, and admittedly had not had any hands on electrical work.

However, he testified that he did get trade magazines. I believe the Electrical Engineering Magazine, which covers all new products and all new techniques in the electrical industry.

The Respondent says that there are three reasons why he did not hire Mr. Frank Roper. One of them is that Mr. Tim Wooten had worked with Mr. Roper for about three months some eighteen years earlier, and felt that he had poor work habits or bad work habits.

I believe Mr. Tim Wooten testified to that on the stand. That was one of the factors.

And another being that he had been out of the trade for approximately seventeen years, and thus, initially, Mr. Wooten tended to make it appear that it would take an extensive period of time for Mr. Roper to learn the new materials and new techniques in the electrical business.

However, under examination from Mr. Dever, Mr. Tim Wooten readily admitted as to the several items Mr. Dever

asked him about, that a man who was a journeyman seventeen years ago, could be taught or retrained in some of them, in just a matter of couple of minutes of a journeyman showing him what to do.

And I believe Mr. Dever, in his examination of Mr. Tim Wooten, questioned him concerning just about every one of the

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items, and there were six or eight of them that you brought in yesterday, demonstrating that had changed from what it was seventeen years ago.

However, Mr. Wooten conceded that as to most of them, it would not be a problem. A matter of two or three minute's instruction or an hour, perhaps.

And a man who had not been in the field, but was a journeyman eighteen years ago, could pick up the techniques again.

And it was also pointed out, although there are new types of equipment, such as flexible conduit as opposed to the metal conduits. I mean that's one thing that I recall. Installing fire alarms, different material in them is another.

Accordingly, the General Counsel has established by a preponderance of the evidence that the motivating factor in Respondent's not hiring Mr. Roper, was that, first of all, the Respondent, through its owners, knew that Mr. Roper was business agent for Local 308.

And secondly, Mr. Roper put on his application that his reason for leaving as business agent of 308 was to organize contractors in the area. And as counsel for the Respondent pointed out, he did use the plural there.

So I find that the General Counsel has sustained her burden of proof that the motivating factor in Respondent's refusing to hire Mr. Roper was his Union activity.

Accordingly, the Respondent shall be ordered to reimburse Mr. Roper for all earnings or loss or earnings and other benefits he may have sustained, by reason of the Respondent's discrimination against him, from the date of his application until the job, for which he applied, was concluded.

Now, in the settlement agreement or the joint stipulation of facts, the Respondent and the Charging Party and the General Counsel agreed that the introduction of any evidence regarding the likelihood of Frank Roper's transfer or reassignment at the direction of Respondent to other projects subsequent to the completion of the Brandon Town Center project, as well as the likelihood of Frank Roper being rehired by Respondent to work at other projects subsequent to the completion of the Brandon Town Center project, will not be litigated or introduced in the instant unfair labor practice hearing.

But rather, will be reserved for introduction at compliance.

And that concludes my Bench Decision, counselors, and thank you very much.

That concludes the decision, Ms. Reporter.

Are there any questions now, counselors?

MR. SIZEMORE: Yes, sir, your Honor.

You didn't make any comment on the third proffered reason and that was that he was leaving a \$40,000 a year job and seeking a \$24,000 a year job.

JUDGE BATSON: Very well.

Continue with the decision, Madam Reporter.

Another factor that Respondent just pointed out, is that Mr. Roper was making \$40,000 a year as a business agent for Local 308.

Respondent contends, in effect, that it doesn't make sense for him to leave a \$40,000 a year job to take a job paying \$12 an hour, which would almost reduce his salary in half.

I do not think that is the factor that Respondent considered. Well, they may have considered it, but I do not think that it was the motivating factor in the Respondent's refusal to hire Mr. Roper.

MR. SIZEMORE: In addition to that, your Honor, you made no findings at all about whether there were any similarly situated candidates—

JUDGE BATSON: I don't think it—now, that concludes the decision, Madam Reporter.

I don't think it necessary that I consider it. You can take that up on appeal.

MR. SIZEMORE: Well, of course I will.

JUDGE BATSON: Yeah.

MR. SIZEMORE: And I was hopeful that you would make some findings so that I would at least know what you were thinking about.

JUDGE BATSON: Very well. I will insert as a footnote to

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the decision that there were—I'm sorry, what was your statement?

MR. SIZEMORE: I'm sorry?

JUDGE BATSON: What was your statement, that I made no finding on? Similarly situated individuals?

MR. SIZEMORE: That's correct, your Honor.

JUDGE BATSON: I find that there are no similarly situated individuals, that is, had been out of the trade for as long as seventeen or eighteen years, other than Mr. Roper.

MR. SIZEMORE: Are you going to credit or not credit Mr. Tim Wooten on the refusals to hire the two former businessmen, Mr. Frazier and Mr. Summercamp?

JUDGE BATSON: I don't believe that's necessary in this decision, Mr. Sizemore. You may take that up with your exceptions.

MR. SIZEMORE: Thank you, your Honor.

JUDGE BATSON: Thank you, counselors.

Is there anything further now from the General Counsel?

MS. KORSCHGEN: Nothing.

JUDGE BATSON: From the Respondent?

MR. SIZEMORE: The only other point, your Honor, and I apologize for belaboring it, but I only get one shot at it.

JUDGE BATSON: No, it's—that's right.

MR. SIZEMORE: One of the arguments that I advanced to you at the opening was the equivalent of Mr. Roper being a tester,

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not being sincere in his effort to secure employment.

Do you mean for your finding to disallow me from litigating that at the back pay stage?

JUDGE BATSON: Well, that can go to compliance, as well as whether or not he would have been transferred.

MR. SIZEMORE: All right. So I'm not forbidden from litigating that at the back pay?

JUDGE BATSON: I would think not.

MR. SIZEMORE: Okay. Thank you, your Honor.

JUDGE BATSON: And you can take that up on exceptions also, you know.

MR. SIZEMORE: No, I don't—I just need to make sure that—

JUDGE BATSON: All right.

MR. SIZEMORE: —Ms. Korschgen won't say that you resolved that.

JUDGE BATSON: All right, counselors. If there is nothing further, I want to thank all counsel and representatives for their courtesies and the professional manner in which they litigated and tried the case.

MS. KORSCHGEN: Thank you, your Honor.

JUDGE BATSON: The hearing is now closed, subject to issuance of my decision after receipt of the transcript.

(Whereupon, at 11:15 o'clock a.m., the hearing in the above-entitled matter, was concluded.)

## APPENDIX B

### 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 threaten our employees that other employees will be fired for engaging in protected concerted activities for mutual aid and protection.

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

WE WILL offer Frank Roper immediate and full employment to position applied for or, if that position is no longer available, to a substantially equivalent one without prejudice to his seniority or any other rights and privileges he may have enjoyed. WE WILL make him whole for any loss of earnings or other benefits resulting from our refusal to hire, less any net interim earnings, plus interest.

MERIT ELECTRIC COMPANY, INC.