

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

April 30, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On January 9, 1998, Administrative Law Judge Robert C. Batson issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.¹

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 conclusions as discussed below and to adopt the recommended Order as modified and set forth in full below.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act by failing and refusing to hire Frank Roper because of his union activities. We agree with the judge for the reasons discussed below.

The Board in *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), set forth the framework for analyzing discrimination cases that turn on employer motivation. Under *Wright Line*, the General Counsel must show that antiunion animus was a motivating factor in the employer's decision not to hire an employee. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even absent the protected activity. See, e.g., *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). An employer cannot simply present a legitimate reason for its actions, but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. Furthermore, if an employer does not assert any business reason, other than one found to be pretextual by the judge, then the employer has not shown that it would have failed to hire the employee for a lawful nondiscriminatory reason. See *T&J Trucking Co.*, 316 NLRB 771 (1995).

¹ On November 7, 1997, the Board issued an Order Remanding Proceeding to Administrative Law Judge. *Merit Electric Co.*, 325 NLRB 32. In that Order, at fn. 4, the Board specifically stated that it was not passing on any issues raised by the parties' exceptions other than the issue of Tim Wooten's credibility. Accordingly, the parties' exceptions to the judge's February 19, 1997 bench decision and April 16, 1997 supplement remain pending before us.

Although the judge did not fully analyze the Respondent's refusal to hire Frank Roper strictly within the framework of *Wright Line*, his findings are nonetheless consistent with that decision. The General Counsel has established that the Respondent knew about Roper's protected activities. On his application for employment with the Respondent, Roper plainly stated that he was employed as IBEW Local 308's business manager for 17 years and that he was leaving his position in order "to organize electric contractors." The General Counsel additionally has established that, immediately upon reviewing Roper's application containing the direct references to his union activities, the Respondent's vice president and chief operating officer, Tim Wooten, decided not to interview Roper and directed his secretary to tell Roper "if we need[] any help in the future, we'[ll] be in touch."² Approximately 30 minutes later, after conferring with his brothers James and Gregory,³ Tim Wooten decided not to hire Roper. Finally, the Respondent's admission that it refused to hire 10 other applicants between June 27 and November 14, 1994, because they were union activists is persuasive evidence of the Respondent's strong antiunion animus.⁴ Accordingly, we find that the General Counsel has made a very substantial showing that the Respondent's animus against Roper's support for the Union was a motivating factor in the Respondent's decision not to hire him.

Therefore, under *Wright Line*, the burden shifted to the Respondent to demonstrate that it would not have hired Roper even in the absence of his union activities. The Respondent maintains that it refused to hire Roper for valid business reasons and without regard to his union activities. Specifically, Tim Wooten testified that he did not hire Roper because Wooten believed that Roper (1) had poor work habits, based on his having worked with Roper approximately 18 years' earlier, (2) would be dissatisfied with a 50-percent pay cut, and (3) would need extensive retraining due to his 18-year absence from hands-on work in the trade.

² Roper and fellow union member Bill Caron submitted applications in person at the Respondent's office on August 26, 1994, and neither of them was interviewed or hired. Earlier that same day, another union member, Tim Lynch, submitted an application for employment with the Respondent, was interviewed by Vice President James Wooten, but was denied employment. As discussed in fn. 5, *infra*, the Respondent admits that it failed to hire Caron and Lynch (along with eight other applicants) because they were union activists.

³ Gregory Wooten is the Respondent's president.

⁴ The Respondent admits that between June 27 and November 14, 1994, it hired at least 22 electricians/helpers and denied employment to 10 applicants during that same time period because they were union activists. More specifically, the Respondent admits that on or before August 26, 1994, the date of Roper's application, it hired 14 electricians/helpers while refusing to hire 9 applicants because of their union activities. The Respondent also admits that after August 26, 1994, it refused to hire two applicants because of their union activities, but hired eight more electricians/helpers.

Like the judge, we reject the Respondent's contention that Tim Wooten relied on Roper's poor work habits that he observed 18 years earlier. Those observations were too remote in time. Also, like the judge, we reject the Respondent's argument that Wooten decided against hiring Roper because he lacked recent hands-on experience. Wooten admitted on cross-examination that basic electrical systems were essentially the same as 20 years ago and that a journeyman electrician could be retrained in 2–3 minutes on most of the new materials.

The only reason remaining is Wooten's claim that, if hired, Roper would not be a satisfied employee. The judge's analysis of Wooten's testimony on this point is as follows:

As to Wooten's opinion that Roper would not be a satisfied employee because he was taking an almost 50-percent wage cut, I credit him in light of the following facts. Roper had stated on his application that his purpose for leaving as business agent for Local 308 was to organize contractors in the area. Wooten apparently did not ask Roper why he was willing to reduce his salary from \$40,000 to about \$23,000 annually. I believe it was apparent to Wooten because Roper stated on his application that he was going to organize contractors in the area. Any conjecture concerning other reasons would be mere speculation. However, under the *Town and Country* doctrine, the union would be permitted to supplement Roper's salary. I find Roper's averred purpose for going into the field to organize contractors in the area was the motivating factor in Wooten's decision not to hire him.

. . . .
 . . . All reasons advanced by Respondent were concocted and "Post hoc" contrived to not hire Roper.

Admittedly, the judge's reasoning is difficult to follow. On the one hand, the judge stated that he "credit[ed]" Wooten's testimony, that in his opinion Roper would not be a satisfied employee because of the reduction in his pay. On the other hand, the judge concluded that the pay cut contention, like the other two reasons asserted by the Respondent, were "concocted," "post hoc," and "contrived."

Considering the judge's findings in their entirety, we conclude that, although he credited Wooten's testimony that in his "opinion . . . Roper would not be a satisfied employee because he was taking an almost 50-percent wage cut," the judge did not find that Wooten's opinion was a motivating factor in the Respondent's decision not to hire Roper. In other words, Wooten honestly believed that Roper would not be satisfied with a reduction in his pay, but that belief played no part at all in the decision not to hire Roper. Rather, as the judge found, Roper's intent to organize electrical contractors "was the motivating factor in Wooten's decision not to hire him."

The record as a whole supports this construction of the judge's decision. Thus, as the judge properly recognized, the record clearly shows that Roper stated on his application that his purpose in leaving his present position was "to organize electric contractors." The record also shows that Wooten reviewed Roper's application. He therefore knew that Roper was seeking a lower-paying position with the Respondent in order to engage in union activities. Immediately after reading Roper's application, Wooten decided not to interview him and not to hire him. Both before and after the date of Roper's application (and even on the very same day), the Respondent admittedly refused to hire a total of 10 other employees because of their union activities. Given these circumstances, the judge reasonably drew the inference that it was "Roper's averred purpose [of] going into the field to organize contractors," not any concern over his taking a pay cut, that "was the motivating factor in Wooten's decision not to hire" Roper. Accordingly, for all these reasons, we find that the Respondent has not established that it would have refused to hire Roper even absent his protected activities and, therefore, violated Section 8(a)(3) and (1) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(3) and (1) of the Act, we shall order the Respondent to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.⁵

Having found that the Respondent has discriminatorily failed and refused to hire Frank Roper, we shall order it to offer him employment in the position for which he applied, without prejudice to his seniority or any other rights or privileges to which he would have been entitled in the absence of the Respondent's hiring discrimination. Additionally, we shall order the Respondent to make him whole for any loss of earnings or other benefits he may have suffered as a result of the Respondent's discrimination from the date that he applied for employment until the date that the Respondent makes a valid offer of employment. Such amounts shall be computed in accordance with *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). This Order is subject to resolution at the compliance proceeding of the issues outlined in *Dean General Contractors*, 285 NLRB 573 (1987).⁶ Consistent with that decision, the Respondent

⁵ We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 325 NLRB 17 (1997).

⁶ We do not rely on that portion of the judge's bench decision (p. 260) which limits Roper's remedy to a make-whole provision encompassing the time period "from the date of his application until the job, for which he applied, was concluded." Rather, the appropriate remedy for the hiring discrimination found in this case is for Roper to be of-

may show that, under its customary procedures, Frank Roper would not have been transferred to another jobsite after the project on which the discrimination occurred was completed, and that, therefore, no backpay obligation exists beyond the time when the Respondent finished that particular project.⁷

ORDER

The National Labor Relations Board orders that 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 or she is or has been employed by a union.

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

ferred employment and made whole subject to the considerations described in *Dean General Contractors*, supra.

In addition, we do not rely on that portion of the judge's bench decision (pp. 262-263) suggesting that the Respondent may pursue at compliance its contention that Roper was not genuinely seeking employment because he was a "tester." An element of a case of hiring discrimination is a showing that "the applicant was a bona fide applicant." *Ultrasystems Western Constructors*, 316 NLRB 1243, 1244 (1995). Here, the General Counsel established that Roper was qualified for the position of electrician for which he applied. Therefore, the burden was on the Respondent to show that Roper was not seeking employment in a bona fide fashion. *Id.* Although counsel for the Respondent stated on the record that he intended to present evidence on this issue, he ultimately failed to do so. Accordingly, we conclude that the "bona fide applicant" issue must be resolved against the Respondent in the instant unfair labor practice proceeding and that the Respondent may not relitigate the issue at the compliance stage. See *Transport Service Co.*, 314 NLRB 458-459 (1994).

⁷ The General Counsel has excepted to the judge's failure to order the Respondent to send to the Board's Regional Office a copy of the records necessary to determine the backpay owed (the "backpay records") and to include electronic copies of the backpay records, where the records are already maintained in such form, within the scope of the records preservation and production order. We find that electronic copies of the relevant records, where such already exist, are encompassed within the Board's traditional remedial language. See generally Fed.R.Civ.P. 34 (definition of "document" includes data compilations). See also *Bills v. Kennecott Corp.*, 108 F.R.D. 459 (D. Utah 1985) (requesting party need not accept only data that exists in traditional forms, but may discover the same information when stored in electronic form in a computer); *National Union Electric Corp. v. Matsushita Electric Industrial Co.*, 494 F.Supp. 1257 (E.D. Pa. 1980) (same). Moreover, the Respondent has not established that it would be prejudiced in any way by a requirement that it produce electronic copies of these documents. Accordingly, and to clarify any ambiguity with respect to this matter, we have modified the recommended Order to provide for the production of electronic copies of the specified backpay records if they are stored in electronic form.

With respect to the General Counsel's proposed requirement that the Respondent submit copies of the necessary backpay records at the Board's Regional Office, however, we find that this litigation does not satisfactorily present the question of whether a respondent should be ordered to provide copies of its records in this manner. We accordingly decline to order the Respondent to do so in connection with this case.

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

(a) Within 14 days from the date of this Order, offer Frank Roper employment in the job for which he applied or, if that job no longer exists, in a substantially equivalent position, without prejudice to his seniority or any other rights or privileges to which he would have been entitled if there had been no discrimination against him.

(b) Make Frank Roper whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to its unlawful refusal to hire Frank Roper, and within 3 days thereafter notify him in writing that this has been done and that the discrimination will not be used against him in any way.

(d) Preserve and, within 14 days of a 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, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Largo, Florida facility, copies of the attached notice marked "Appendix."⁸ 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. 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 at any time since August 26, 1994.

(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 the Respondent has taken to comply with this Order.

MEMBER HURTGEN, dissenting.

I do not agree that the Respondent's decision not to hire Frank Roper was unlawful.

⁸ 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."

I agree that the General Counsel has established a prima facie case that Roper's union activity was a reason for the Respondent's decision not to hire him. However, I conclude that the Respondent rebutted that prima facie case. Alternatively, at the very least, the matter should be remanded to the judge for clarification.

The Respondent's agent, Tim Wooten, testified that he did not hire Roper because, inter alia, he believed that Roper would be a dissatisfied employee. Wooten explained that his belief was based on the fact that Roper would be taking a 50-percent pay cut from his prior job (as a union business agent). *The judge specifically credited Wooten's explanation.* In light of this, the Respondent met its *Wright Line* burden. That is, the Respondent would have reached the same "nonhire" decision with respect to any applicant (union or nonunion) who would be taking a 50-percent pay cut.¹

Concededly, the judge later said, *ipse dixit*, that "all reasons advanced by Respondent were concocted and 'post-hoc' contrived to not hire Roper." And, the judge also said that the Respondent's real motive was Roper's organizational intentions. In light of this seeming contradiction (between these conclusions and the earlier credibility resolution), my colleagues concede that "the judge's reasoning is difficult to follow." However, my colleagues are quick to supply the reasoning that the judge, himself, failed to supply. In their view, the judge simply found that Wooten held an honest belief that Roper would be a dissatisfied employee. But, my colleagues reason, Wooten *did not rely upon* that belief when he decided not to hire Roper.

This reasoning is counterintuitive. In essence, my colleagues find that: (1) Wooten believed that Roper would be a dissatisfied employee because of the 50-percent wage cut; (2) Wooten would have hired Roper irrespective of that belief. It is not clear to me why an employer would hire an applicant, knowing in advance that the employee will be dissatisfied from the start. Concededly, there could be circumstances where an employer might do this (e.g., if the employer were desperate). But, if this was the judge's view, he should have explained it. Most assuredly, my colleagues should not ascribe to the judge a view that he has not articulated.

Based on the above, I disagree with the proposition that the Respondent's view (that Roper would be a dissatisfied employee) played no role in the Respondent's decision not to hire him. Alternatively, at the very least, I would remand this case to the judge for his findings on this point. To repeat, as my colleagues concede, the judge's opinion is "difficult to follow."

¹ The judge noted that the Union "would be permitted to supplement Roper's salary." However, there is no finding that it did so, or (more importantly) that the Respondent was aware of any such supplement.

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 refuse to employ or offer employment to any qualified applicant, when a position is available, because of that applicant's union activities or because he or she is or has been employed by a union.

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, within 14 days from the date of the Board's Order, offer Frank Roper employment in the job for which he applied or, if that job no longer exists, in a substantially equivalent position, without prejudice to his seniority or any other rights or privileges to which he would have been entitled if he had been hired.

WE WILL make Frank Roper whole for any loss of earnings and other benefits resulting from the discrimination against him, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our refusal to hire Frank Roper, and WE WILL within 3 days thereafter notify him in writing that this has been done and that the discrimination will not be used against him in any way.

MERIT ELECTRIC COMPANY, INC.

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.

SUPPLEMENTAL DECISION

ROBERT C. BATSON, Administrative Law Judge. This case was heard by me at Tampa, Florida, on February 18, 1997. At the conclusion of testimony and evidence I rendered a Bench decision and on April 16, 1997, issued a Supplement to the Bench decision. The only issue was whether Respondent had refused to hire Frank Roper, because he was a business agent for a Local IBEW for 17 years. During his interview with Respondent's vice president, Tom Wooten, Roper told him he was going to organize electrical contractors. I found that Respon-

dent refused to hire Roper because of his union activity and stated intent to organize contractors was the sole motivating factor in Respondent's refusal to hire Roper.

On November 7, 1997, a majority of a Board panel remanded the case to me to make specific findings regarding the credibility of Tom Wooten's testimony, specifically as to the three reasons why he did not hire Roper. They are:

- 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.

Addressing Wooten's testimony that after working with Roper for 13 months, 17 years ago he believed that Roper had poor work habits. Assuming, and even finding that Wooten had an opinion of Roper's work habits after observing him for 3 months, 18 years before and he felt the habits were poor, I find such to be far to remote in time to be a determining factor in Wooten's refusal to hire Roper at this time. Furthermore, Wooten made no reference to Roper about having worked with him 18 years' earlier and his opinion of his work habits. Accordingly, I find that Wooten's opinion of Roper's work habits 18 years' earlier had no bearing on Respondent's refusal to hire him.

As to Wooten's opinion that Roper would not be a satisfied employee because he was taking an almost 50-percent wage cut, I credit him in light of the following facts. Roper had stated on his application that his purpose for leaving as business agent for Local 308 was to organize contractors in the area. Wooten apparently did not ask Roper why he was willing to reduce his salary from \$40,000 to about \$23,000 annually. I believe it was apparent to Wooten because Roper stated on his application that he was going to organize contractors in the area. Any conjecture concerning other reasons would be mere speculation. However, under the *Town & Country* doctrine the Union would be permitted to supplement Roper's salary. I find Roper's averred purpose for going into the field to organize contractors in the area was the motivating factor in Wooten's decision not to hire him.

The Board directed that I make creditability findings as to Wooten's belief that it would necessary to retrain Roper due to

his lack of "on the job" experience over the past 18 years. Wooten testified initially that this was one of the reasons he did not hire Roper. In support of this contention Respondent attempted to demonstrate that the materials and techniques in the trade had changed dramatically and brought in six or eight examples in support of this contention.

Roper testified that during his tenure as business agent of the Local 308 he subscribed to the trade magazines, including Electrical Engineering Magazine, which described and demonstrated all new products and techniques in the electrical industry. More importantly, on cross-examination Wooten admitted that a journeyman electrician could be retained in 2 or 3 minutes on most of the new materials, i.e., flexible as opposed to metal conducts and the installation of the new fire alarm systems. Basically, he admitted that the basic electrical systems were essentially the same as 20 years ago. The result of his testimony was that it would take relatively little time to retrain a journeyman electrician of 20 years although he had little if any "on hand" experience for 17 years.

Accordingly, I find the General Counsel has established an extremely strong prima facie case that the Respondent failed and refused to hire Frank Roper because of his union affiliations and stated purpose to organize contractor in the area.

The three reasons given by Respondent to meet the *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1988), test demonstrating that it would not have hired Roper in the absence of his union activities. All reasons advanced by Respondent were concocted and "Post hoc" contrived to not hire Roper.

CONCLUSIONS OF LAW

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

(2) The International Brotherhood of Electrical Workers, Local Union 728, and the International Brotherhood of Electrical Workers, AFL-CIO, Local Union 915, AFL-CIO are labor organization within the meaning of Section 2(5) of the Act.

(3) By refusing to employ or offer employment to Frank Roper or any qualified applicant, when a position is available, because of that applicants union activities or because he has been employed by the Union, Respondent has violated Section 8(a)(3) and (1) of the Act.

[Recommended Order omitted from publication.]