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McClendon Electrical Services, Inc. and International Brotherhood of Electrical Workers, Local 520
Case 16-CA-22434

September 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

On May 13, 2003, Administrative Law Judge William N. Cates issued the attached bench decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs.

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 briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

In its exceptions, the Respondent contends that had the judge properly analyzed the case under *Wright Line*,³ he would not have found that the Respondent violated Section 8(a)(1) of the Act by discharging employee Dan Elgin for participating in a picket line established by the Union to protest alleged unfair labor practices of the Respondent. For the following reasons, there is no merit to the Respondent's contentions.

Initially, we find that the General Counsel has satisfied his burden under *Wright Line*, supra, of showing that Elgin's protected conduct was a substantial or motivating factor in the Respondent's decision to discharge him. Thus, the General Counsel has established that Elgin was engaged in protected activity when he participated in the Union's picketing of the Respondent and that the Re-

spondent knew of Elgin's protected activity.⁴ The General Counsel has also shown that the Respondent harbored animus against Elgin's protected activity, as evidenced by its unlawful threat to him and other employees.⁵ In addition, the timing of Elgin's discharge, the day after he participated in the picketing, supports a finding of unlawful motive.⁶ Finally, the termination notice itself, stating under "Description of the Incident" that Elgin "left the job without reason," further demonstrates the nexus between the protected activity and the discharge.

Accordingly, under *Wright Line*, the burden shifted to the Respondent to demonstrate that it would have discharged Elgin even in the absence of his protected conduct. The Respondent argues essentially that Elgin would have been terminated in any event for two reasons: (1) he failed to give notice to his supervisor before leaving the worksite; and (2) poor work performance.

As to (1), the Board has held that the Act generally does not require employees to give notice to their employer before ceasing work in connection with a labor dispute. *International Protective Services*, 339 NLRB No. 75, slip op. at 2 (2003). Therefore, Elgin's failure to give such notice here does not afford the Respondent a lawful basis for discharging him.

⁴ The record shows that Project Manager Bobby Sanford told Company President Mike McClendon that Elgin had left the worksite to join the picketing at the Company's entrance.

⁵ In its exceptions, the Respondent argues that it did not violate Sec. 8(a)(1) of the Act by threatening employees with unspecified reprisals. The Respondent asserts, inter alia, that the judge mischaracterized employee Dan Elgin's testimony when the judge found that Project Manager Sanford "called the employees together" and said, "If anyone left the job, he would send them to the shop and let them deal with it." The Respondent argues that there is no evidence that Sanford called the employees together, and that, in fact, the testimony shows that Sanford was operating the backhoe equipment when he made the remark to the employees.

We find, in agreement with the judge, that Sanford made the statement attributed to him by Elgin, and that even if, as contended by the Respondent, Sanford did not actually call the employees together to make the statement, the comment was heard by the employees and was nonetheless coercive. Sanford made the remark to the employees a few hours after Elgin participated in the Union's picketing, and the remark was clearly a reference to employee participation in the picketing. Because the employees were aware that Sanford previously had sent employees to the shop for disciplinary reasons, we find that the comment implied that some form of disciplinary action would result from participation in picketing activity. Accordingly, we find that this comment had a reasonable tendency to coerce and intimidate employees in the exercise of their Sec. 7 rights, and thereby violated Sec. 8(a)(1) of the Act.

⁶ The Board has held that where adverse action occurs shortly after an employee has engaged in protected activity, an inference of unlawful motive is raised. *La Gloria Oil*, 337 NLRB No. 177 (2002), enf. 71 Fed. Appx. 441 (5th Cir. 2003) (Table).

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also contends that some of the judge's findings call into question the judge's impartiality. Upon careful examination of the decision and the record we are satisfied that this contention is without merit.

² We shall modify the judge's recommended Order and substitute a new notice to correct inadvertent errors and omissions.

³ 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

As to (2), we note that Elgin's disciplinary notice stated that he was being discharged for "failure to complete shift" and "insubordination." McClendon explained that the "failure to complete shift" was Elgin's absence from the job while on the picket line and that the "insubordination" was Elgin's thinking he could come and go from the jobsite as he pleased without notifying his supervisor. As discussed above, Elgin's absence from the job while on the picket line was protected by the Act, and he had the right to take this action without giving advance notice to the Respondent. Therefore, neither reason the Respondent asserted at the time of discharge constituted a lawful ground for taking adverse action against Elgin.

At the hearing, McClendon added several additional reasons for discharging Elgin: (1) he was in a 90-day probationary period; (2) his work was slow/lethargic and generally not good; and (3) he had some absences and was late a couple of times. These deficiencies, however, were not contained in the disciplinary notice, which set forth the other grounds discussed above. "The Company's vacillation and the multiplicity of its alleged reasons for firing [the employee] render its claims of non-discrimination the less convincing." *NLRB v. Schill Steel Products, Inc.*, 340 F.2d 568, 573 (5th Cir. 1965). Indeed, "[s]uch shifting assertions strengthen the inference that the true reason was for [protected] activity." *Abbey's Transportation Services, v. NLRB*, 837 F.2d 575, 581 (2d Cir. 1988).

Based on the above, we find that the Respondent has not met its *Wright Line* burden of showing that it would have discharged Elgin even in the absence of his protected conduct. Accordingly, we agree with the judge that the Respondent violated Section 8(a)(1) of the Act by discharging Elgin.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, McClendon Electrical Services, Inc., Round Rock, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(a) and reletter the subsequent paragraphs.

"(a) Threatening employees with unspecified reprisals if they participate in concerted activities protected by the Act."

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Make Dan Elgin whole for any loss of earnings and other benefits suffered as a result of the discrimina-

tion against him, in the manner set forth in the remedy section of this decision."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C., September 30, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) 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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten our employees with unspecified reprisals if our employees participate in concerted activities protected by the Act.

WE WILL NOT discharge our employees because they engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or in order to discourage employees from engaging in such activities.

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

WE WILL, within 14 days from the date of the Board's Order, offer Dan Elgin full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges he previously enjoyed.

WE WILL make Dan Elgin whole for the loss of earnings and other benefits he suffered as a result of the discrimination against him, with interest.

WE WILL, within 14 days of the date of the Board's Order, remove from our files any reference to Dan Elgin's unlawful discharge and WE WILL, within 3 days thereafter, notify Elgin in writing that this has been done and that evidence of this unlawful discharge will not be used against him in any way.

MCCLENDON ELECTRICAL SERVICES, INC.

Jamal Allen, Esq., for the General Counsel.

Frank L Carrabba, Esq. and *Jennifer J. Cooper, Esq.*, for the Respondent.

David Van Hass, Esq., for the Charging Party.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is an interfering with employee rights and wrongful discharge case. At the conclusion of trial in the above-styled case in Austin, Texas, on April 25, 2003, and after hearing closing argument by counsel, I issued a bench decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's (Board) Rules and Regulations setting forth findings of fact and conclusions of law.

For the reasons stated by me on the record at the close of the trial, I found McClendon Electrical Services, Inc. (Company) violated Section 8(a)(1) of the National Labor Relations Act, as amended (Act) on or about December 17, 2002, by threatening its employees with unspecified reprisals if the employees participated in a picket organized by the International Brotherhood of Electrical Workers, Local 520, (Union) and by on or about December 18, 2002, discharging its employee Dan Elgin (Elgin) because he engaged in concerted activities protected by Section 7 of the Act, namely he participated in a picket line established at the Company by the Union. I further concluded Elgin did not lose the protection of the Act by any conduct on his part. See: *Phoenix Transit System*, 337 NLRB No. 78 sl. op.at. 1 (2002) and *Felix Industries*, 331 NLRB 144, 146 (2000).¹

I certify the accuracy of the portion of the transcript, as corrected,² pages 166 to 182 containing my Bench Decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

CONCLUSION OF LAW

Based on the record, I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, that it violated the Act in the particulars and

for the reasons stated at trial and summarized above and that its violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(2) and (6) of the Act.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Company having discriminatorily discharged its employee Dan Elgin, I recommend he, within 14 days from the date of the Board's Order, be offered full reinstatement to his former job, or if his former job no longer exists to a substantially equivalent position, without prejudice to his seniority, or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings or other benefits suffered as a result of the discrimination against him with interest. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following³

ORDER

The Company, McClendon Electrical Services, Inc, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Discharging employees because they engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such concerted activities.

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

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

(a) Within 14 days of the date of the Board's Order offer Dan Elgin reinstatement to his former position or if his former position no longer exists to a substantially equivalent position without prejudice to his seniority or other rights or privileges.

(b) Within 14 days of the Board's Order remove from its files any reference to Elgin's unlawful discharge and within 3 days thereafter notify him in writing this has been done and that his discharge will not be used against him in any manner.

(c) Preserve, and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of any backpay due under the terms of this Order.

¹ In light of my finding that Elgin's discharge violated Sec. 8(a)(1), I found it unnecessary to decide whether it also violated Sec. 8(a)(3). See: *Phoenix Transit System*, 337 NLRB No. 78 fn. 3, (2002).

² I have corrected the transcript pages containing my bench decision and the corrections are as reflected in Appendix C (omitted from publication).

³ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Within 14 days after service by the Regional Director of Region 16 of the National Labor Relations Board, post at its Round Rock, Texas facility copies of the attached notice marked "Appendix B."⁴ Copies of the notice, on forms provided by the Regional Director for Region 16 after being signed by the Company's authorized representative shall be posted by the Company and maintained for 60 consecutive days in conspicuous places, including all places where notices are customarily posted. Reasonable steps shall be taken 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 Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the Notice to Employees, to all employees employed by the Company on or at any time since December 17, 2002.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 16 of the National Labor Relations Board sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

Dated, Washington, D.C. May 13, 2003

APPENDIX A

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This is my decision in the matter of McClendon Electrical Services, Inc., herein, Company, Case 16-CA-22434.

First, I wish to take this opportunity to thank counsel for the presentation of the evidence. You are a credit to the party you represent. It has been a pleasure being in Austin, Texas.

This is an unfair labor practice case prosecuted by the National Labor Relations Board, herein, Board; General Counsel, herein, Government Counsel, acting through the Regional Director for Region 16 of the Board following an investigation by Region 16's staff. The Regional Director for Region 16 of the Board issued a complaint and notice of hearing, herein, complaint, on February 28, 2003 based upon an unfair labor practice charged filed by International Brotherhood of Electrical Workers, Local 520, herein, Union or Charging Party, on December 18, 2002 and amended on February 7, 2003.

Certain facts herein are admitted, stipulated or undisputed. It is essential that I state certain of those facts at this point in my bench decision, which I now do.

It is admitted the Company is a Texas corporation with an office and place of business in Round Rock, Texas, where it has been engaged as an electrical contractor in the construction industry performing commercial and residential construction. During the 12 months preceding issuance of the complaint herein, a representative period, the Company in conducting its business

⁴ 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."

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operations purchased and received goods valued in excess of \$50,000 directly from firms inside the state of Texas, which firms had in turn purchased and received such goods directly from suppliers located outside the state of Texas.

The parties admit the evidence establishes and I find the Company is an Employer engaged in commerce within the meaning of Section 2(2),(6) and (7) of the National Labor Relations Act as amended, herein, Act. The parties admit and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

The parties admit and I find that Company owner Michael McClendon, herein, Owner McClendon, and project managers Bobby Sanford, Melvin Rowan and Dan Wyrick are supervisors and agents of the Company within the meaning of Section 2(11) and (13) of the Act.

The specific complaint allegations are that: On or about December 18, 2002, the Company discharged its employee, Dan Elgin, herein, Elgin, because he assisted the Union and engaged in union and protected concerted activities and to discourage employees from engaging in those activities. It is alleged the Company's actions violate Section 8(a)(1) and (3) of the Act.

It is also alleged that the Company, by supervisor and agent Project Manager Sanford on or about December 17, 2002, threatened employees with unspecified reprisals if the employees participated in a picket organized by the Union. The Company admits

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it discharged Elgin on December 18, 2002 but denies it violated the Act in any manner alleged in the complaint.

This case, unlike most cases, essentially requires no credibility resolutions. In arriving at the facts, I carefully observed the two witnesses as they testified, and I utilized such in arriving at the facts herein that I rely on. I have considered both witness' testimony in relation to each other's testimony and in light of the exhibits presented herein.

If there is any evidence that might seem to contradict the credited facts that I rely on, I have not ignored such evidence but, rather, have discredited it or rejected it as not reliable or trustworthy. I considered the entire record in arriving at the facts herein.

The Company, which is an electrical contractor in the residential and commercial construction industry, employs approximately 40 to 50 employees, with eight to ten office employees plus management and supervision. The construction projects that are pertinent to this particular case are located in and around the Austin and Round Rock, Texas, areas.

The Company employs all types of licensed and unlicensed employees, those with experience and those without prior experience. However, anyone doing electrical work in the geographic area concerned herein must have an apprentice license.

The Company requires all employees to proceed through a

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90-day probationary period. During the 90-day probationary period, the employees do not receive benefits such as health insurance. Employees are evaluated closely during their 90-day

probationary period, where the employee sees if the employee wishes to work for this Company and the Company has an opportunity to evaluate the potential of the probationary employee to becoming a permanent employee.

According to Company President McClendon, Elgin telephoned the Company two or three times before he came for an interview, stating each time he had heard this was a good company to work for and that he, Elgin, was interested in working for the Company. Thereafter, Elgin came for an interview and was hired as an apprentice electrician on September 25, 2002. Elgin worked at various projects for the Company. The Company's normal work day starts at 7:00 a.m. Elgin was given a disciplinary warning on December 13, 2002 for arriving at work 45 minutes late on December 9, 2002. Elgin signed the warning but indicated on it that he, "Protested this write-up."

Elgin wore a Union organizer's shirt to this December 13, 2002 meeting with Company President McClendon. In fact, Elgin stated he wore a Union shirt or cap on numerous occasions while working at the Company.

Elgin testified that on Friday, December 13, 2002, he was told by management to report to a project at Maxwell Dodge in

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Austin, Texas, on Monday, December 16, 2002, where he would report for and work under the supervision of project manager Sanford. Elgin, however, did not report for work on December 16, 2002 as directed but, rather, left a voice mail message with the Company that he would not be at work on that day. Elgin testified he was sick on that particular Monday.

Elgin testified he reported at 7:00 a.m. to the Company shop on December 17, 2002 to see where he was to work that day. Elgin was sent to the Maxwell Dodge project, where he reported at approximately 8:00 a.m. According to Elgin, approximately five employees were present at the job site and he assisted helper Dominic Garcia commencing at approximately 8:00 a.m.

Elgin and Garcia loaded a Company truck with materials cleaned up from the wet, muddy work site. The materials the two of them cleaned up from the area included PBC pipe pieces, pipe fittings, debris from around concrete pourings and the like. The two of them unloaded the Company truck and loaded it a second time. The employees took a break from approximately 9:00 a.m. until approximately 9:15 a.m.

Elgin testified a number, perhaps ten to 20, individuals were picketing at the entrance to the work site. According to Elgin, Garcia told him, "Hey, it's your brothers over there," picketing. Elgin noticed those picketing and, upon closer examination, noticed they were picketing with signs that said, "McClendon Unfair Labor

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Practices." Elgin stated several unfair labor practice charges had been filed by the Union against the Company and they involved him. Elgin told Garcia he was going to join the pickets and invited Garcia to join him in doing so. One of those picketing that morning was Union organizer Robert Beeler.

Elgin obtained a picket sign from the Union and joined those picketing. Elgin testified the picketing took place on a road

easement at the corner of Texas State Highway 620 and a side street in front of the Company's construction project at the Maxwell Dodge work project in Austin, Texas. Elgin testified he picketed with the others from 10:30 a.m. until 11:15 a.m. on December 17, 2002.

Elgin said he did not notify project manager Sanford of his whereabouts because Sanford was not at the job site when he, Elgin, joined the picket line. Elgin testified that about 30 minutes after he joined the others on the picket line, project manager Sanford drove up and parked his truck approximately 40 feet from the picket site. According to Elgin, project manager Sanford walked over to the picket line and, within 15 feet of where Elgin was, spoke with some of those on the picket line.

Elgin testified they stopped picketing at approximately 11:15 a.m. and he placed the picket sign he had been carrying in his truck and returned for work. Elgin testified he told project manager Sanford, "I am ready to work; What can I

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do" Elgin explained to Sanford that he had been honoring the picket line but was now ready to return to work and specifically asked what he could do; according to Elgin, Sanford pointed for him to go to where two other employees were working.

Elgin worked from approximately 11:15 a.m. until 11:30 a.m., at which time he and the other employees left the job site for their 45-minute lunch break, which ran from 11:30 a.m. until 12:15 p.m. Elgin testified that after returning from lunch break, he helped fill in some PBC pipe.

Project manager Sanford called the employees together after lunch and, according to Elgin, told them, "If anyone left the job, he would send them to the shop and let them deal with it," and then told the employees to, "Get back to work." Elgin worked until quitting time, at 4:30 p.m., that day and left.

Elgin reported for work at approximately 6:50 a.m. on December 18, 2002 and picketed at the Company for approximately five minutes or until he reported for work at the 7:00 a.m. starting time. Elgin testified he worked until approximately 8:15 a.m., at which time project manager Sanford told him he was to report to the shop. Elgin asked why he had to report to the shop, and Sanford told him, "Because I told you to."

Elgin testified he reported to the shop about 45 minutes later, where he met with Company President McClendon along with project managers Rowan and Wyrick. Elgin testified he was given

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a disciplinary notice which indicated he was being discharged for, "Failure to complete shift, and, "Insubordination."

The portion of the dismissal notice labeled, "Description of Incident," read that the employee had left the job without reason. Elgin testified he asked Company President McClendon if he could explain insubordination and McClendon responded it was because Elgin left work and was arrogant. Elgin was told his final check would be mailed to him, and he left the Company shop at that time.

Company President McClendon testified Elgin worked at a number of the projects of the Company but was a disappoint-

ment as to his work potential. McClendon testified the first project Elgin worked at was the Lack's Furniture project under the supervision of project manager Dale Davis, where he worked for approximately five to six weeks. Company President McClendon testified project manager Davis reported to him that Elgin was a slow worker with not much mechanical aptitude.

Company President McClendon stated Elgin worked next on the Southwest University project under the supervision of project manager Luke Benedetti and Kris Kowalik, K-O-W-A-L-I-K. Project manager Benedetti reported to Company President McClendon that Elgin was a lethargic, slow worker to whom he had to continually repeat instructions.

Company President McClendon testified that when he met

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with Elgin on December 13, 2002 to give him a warning for being late to work on December 9, 2002, Elgin told him he felt threatened by project manager Benedetti. Elgin had been on the ground when some mention was made by Benedetti of putting his knife up so he did not drop it on Elgin. Company President McClendon stated he knew an unfair labor practice charge had been filed on that incident and he reassigned Elgin to a different job site so Elgin would not come in contact with Benedetti.

According to Company President McClendon, Elgin did not show for work on Monday, December 16, 2002 but called and left a message on the Company's voice mail that he would not be at work on that day but did not say why. Company President McClendon testified that when project manager Sanford was away from the Maxwell Dodge work site on Tuesday morning, December 17, 2002, he left journeyman Chris Tanner in charge. Company President McClendon explained that the City of Austin, Texas, by regulation requires that a journeyman be present on all work sites at all times.

Company President McClendon testified he made the decision to terminate Elgin and did so for the following reasons: One, Elgin was in his 90-day probationary period; Two, Elgin's work performance was not good generally, and he was slow; Three, Elgin had absences other than those discussed, and he was late a couple of times; Four, Elgin was arrogant, thinking he could

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come and go from work as he pleased, and; Five, the last straw was when he left the job on December 17, 2002 without telling his supervisor.

Company President McClendon denied Union or picketing activities by Elgin had anything to do with his discharge. McClendon recalled a number, perhaps as many as eight, employees who worked or had worked for his Company that were Union sympathizers. Specifically, McClendon knew Philip Lawhon was a Union sympathizer. And even after he learned of that fact and, based upon Lawhon's job performance, he gave Lawhon a \$3-per-hour pay raise.

Company President McClendon acknowledged that when project manager Sanford told him about Elgin's leaving the job on December 17, 2002, Sanford told him Elgin had left to join

the pickets at the Company's entrance. Company President McClendon explained employees were sent to the Company shop for him to deal with when the project manager had, "Something he didn't feel comfortable with."

Did the Company violate the Act in any manner, as alleged in the complaint, by its actions on December 17 and 18, 2002? First, did project manager Sanford threaten the employees with unspecified reprisals if the employees participated in a picket organized by the Union? The Government would contend that Sanford's comments about sending anyone to the shop taken in its context would constitute an unlawful threat of reprisals of an

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unspecified nature. The Union would join in the Government's position.

The Company takes the position that the comment was vague and was really in keeping with the practice that the Company had followed in the past in that when a project manager felt uncomfortable with whatever discipline or other action that might be need taken, the individual was simply referred to the Company shop. I'm fully persuaded that in the context herein, Sanford's comments, which I find were made, had a reasonable tendency to coerce and intimidate employees in the exercise of their Section 7 rights.

There had been picket line activity at the Company's entrance that morning. At least one employee, namely Elgin, had participated in the picketing from 10:30 a.m. until 11:15 a.m. Thereafter, the employees went to lunch, from 11:30 to 12:15. And shortly thereafter or at the first available opportunity, project manager Sanford told the employees that if anyone left the project, they would be sent to the Company shop and let them be dealt with there.

The shop was where project managers sent employees for matters they, the project managers, did not feel comfortable with. It was the seat of power for this Company, where Company President McClendon could and had on numerous occasions disciplined employees. For example, McClendon had disciplined employee James Ruben Hernandez on numerous occasions at the job

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office. By the fact that project manager Sanford made his comments almost immediately after picketing activity, it is clear the two were tied together and his comments constituted a threat of unspecified reprisals, and I so find.

Next, did the Company violate the Act when Company President McClendon discharged employee Elgin on December 18, 2002, and what standard of analysis should be applied? The Government contends, as does the Union, that Elgin was participating in picketing that was taking place at the Company.

The Government and Union would contend that the picketing was valid both as to its purpose and in the carrying out of the picketing and that when Elgin joined the picketing, he was participating in concerted protected activity. They would also contend that the analysis that need be followed would not be the *Wright Line* analysis but, rather, would simply be that if the employee's participation in the picketing constituted protected concerted activity, the only issue left to be decided was whether

the individual engaged in any conduct that would remove the protection of the Act from him.

The Company, on the other hand, would contend that this case would be analyzed under the *Wright Line* cases and that although the Company appears to concede that a prima facie case had been established, it very strongly contends that it has met its burden of demonstrating that Elgin's discharge would have

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taken place notwithstanding any protected concerted activity on Elgin's part.

It is clear from the evidence that the basis for Elgin's discharge was in part and in substantial part, if not in whole, from his picketing activities at the Company on the morning of December 17, 2002. The written notice of dismissal states it was because Elgin, "Left the job without reason," and it is acknowledged he left the job to join the picketing taking place that morning.

Company President McClendon testified to a number of reasons for Elgin's discharge but only listed, "Failure to complete his shift on December 17, 2002," and his, "Insubordination," on his dismissal notice. McClendon explained that the insubordination was Elgin's thinking he could come and go from the job site as he pleased without notifying his supervisor and that his failure to complete his shift on that day was that he was away from his job on the picket line.

Does a *Wright Line*, 251 NLRB 1083 (1980), enforced 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U. S. 989, (1982) analysis apply herein? A *Wright Line* analysis is appropriately used in cases that turn on an Employer's motivation. The *Wright Line* analysis is not the appropriate vehicle for an analysis where the employee is discharged for protected concerted activity. See *Phoenix Transportation System*, 337 NLRB No. 78

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at Sl. op. Page 1 (May 10, 2002).

Here it is clear the Company discharged Elgin because he participated in a picket established by the Union at the Company. It is just as clear that Elgin's conduct was activity protected by the Act. The Supreme Court noted in *NLRB v. City Disposal Systems*, 465 U. S. 822, 831 (1984) that Section 7 of the Act, "Defines both joining and assisting labor organizations' activities in which a single employee can engage as concerted activities."

Accordingly, when an individual assists a union or engages in union-related activity, by definition, he is engaged in concerted activity. See *Tradesman International, Inc.*, 332 NLRB No. 107 at Sl. op. Page 2 (October 31, 2000.). Picketing is a concerted activity within the, "Mutual aid or protection," language of Section 7 of the Act.

When Elgin left his work at the Company to join the Union's picketing near the entrance to the Company's work area, he was demonstrating his support for and assistance to the Union. The objective of the Union's picketing was to protest alleged unfair labor practices of the Company. Picketing to protest unfair labor practices is protected activity under Section 7 of the Act.

The fact the unfair labor practice charges alleging unfair labor practices of the Company herein were withdrawn or even

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without merit does not detract from Elgin's right to protest what he perceived were unfair labor practices of the Company. There is a clear nexus between Elgin's picketing activity and legitimate employment-related concerns, that is; the perceived unfair labor practices of the Company.

In the circumstances of this case, there is no requirement that Elgin give the Company notice that he was going to join the pickets in order to preserve his Section 7 protections. Elgin in this particular situation would have been unable to give his project manager notice even if he as a courtesy had wished to, because project manager Sanford was not present when Elgin joined the picketing activity.

Thus the only issue is whether Elgin's activities lost the protection of the Act, as asserted by the Company, because he left work or was arrogant. Stated differently, did Elgin's conduct cross the line from protected to unprotected? It did not. I am fully persuaded his conduct did not lose the protection of the Act. Accordingly, his discharge violated Section 8(a)(1) of the Act, and I so find. In light of my finding that his discharge violated Section 8(a)(1) of the Act, I find it unnecessary to decide whether it also violated Section 8(a)(3) of the Act.

In finding that Elgin's discharge violated the Act, I am not finding he is an exemplary employee; the evidence establishes he is a slow, lethargic worker who on occasion has trouble timely reporting for work or, at least, was disciplined

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for such without challenge. What I am finding is that the reason the Company discharged him was an unlawful one.

The evidence establishes to the Company's credit that it has certain family-friendly labor policies in that it has given great consideration to the personal problems of its employees. For example, one employee, a single parent who has four young daughters and has been late for work on numerous occasions is still retained by the Company. However, the concerns for special circumstances given to certain employees or having family-friendly labor policies will not insulate the Company from discharging an employee for unlawful reasons.

Even if I found that the *Wright Line* analysis was applicable herein, which I do not, I would even under that analysis find the Company violated the Act when it discharged Elgin. Under the *Wright Line* analysis, I would find that the Government established by preponderant evidence that Elgin was engaged in protected activity, that the Company was aware of that activity and that the Company discriminated against Elgin in the terms of his employment and that Elgin's activity was a substantial or motivating reason for the Company's action.

I would also conclude that there was a causal connection between the Company's animus, which was established by the statement made by project manager Sanford, and Elgin's discharge the next day. I would conclude that the Company failed to meet

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its burden of establishing it would have discharged Elgin even in the absence of any protected activity on his part. Having concluded that the Company violated the Act when it discharged Elgin, I shall order that the Company offer him reinstatement, make him whole and post an appropriate notice for the specified period of time.

After being provided a copy of the transcript of this proceeding by the court reporting service, I will certify those pages of the transcript that constitute my decision, and attached to that will be the notice language that is to be posted. And, also, I will spell out in some more detail the remedy that is applicable herein. The appeal period for appealing from this decision is set forth in the Board's rules and regulations, and I invite your attention to those. Let me state in closing that it has been a pleasure to be in Austin, Texas. And this hearing is closed.

Off the record.

(Whereupon, at 9:28 a.m., the bench opinion was concluded.)

APPENDIX B

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten our employees with unspecified reprisals if our employees participate in concerted activities protected by the Act.

WE WILL NOT discharge our employees because they engage in concerted activities protected by the Act and/or to discourage employees from engaging in such activities.

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 from the date of the Board's Order, offer Dan Elgin full reinstatement to his former job or if his former job no longer exists to a substantially equivalent position without prejudice to his seniority or other rights or privileges previously enjoyed; and, WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the discharge of Dan Elgin, and WE WILL within 3 days thereafter, notify him in writing that his discharge will not be used against him in any manner.

McCLENDON ELECTRICAL SERVICES, INC.

(Appendix C omitted from publication.)