

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SAN FRANCISCO BRANCH OFFICE  
DIVISION OF JUDGES

HARCO TRUCKING, LLC

and

Case 32-CA-20621-1

SCOTT WOOD, an Individual

*Karen Reichmann, Esq.*, Oakland, California,  
for the General Counsel.

*Mark Thierman and Micheline Fairbank, Esqs.*  
(*Thierman Law Firm*) Reno, Nevada, for Scott Wood.

*Timothy E. Rowe, Esq.*, (*McDonald Carano Wilson*)  
Reno, NV, for Respondent.

DECISION

Statement of the Case

JAY R. POLLACK, Administrative Law Judge: I heard this case in trial at Reno, Nevada, on December 11, 2003. On June 2, 2003, Scott Wood (Wood) filed the original charge alleging that “Harco Company and its successor in interest, Capurro Trucking” committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (29 U.S.C. Section 151 et seq., herein called the Act). On August 26, 2003, Wood filed an amended charge against Harco Trucking, LLC, (Respondent), using the correct name of the charged party. On August 29, 2003, the Regional Director for Region 32 of the National Labor Relations Board issued a Complaint and Notice of Hearing against Respondent, alleging that Respondent violated Section 8(a)(1) of the Act by failing and refusing to hire employee Wood because of his protected concerted activities. Respondent filed a timely answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses,<sup>1</sup> and having considered the briefs submitted by the parties, I make the following:

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<sup>1</sup> The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings, herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

## Findings of Fact and Conclusions

## I. Jurisdiction

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Respondent is a Nevada corporation, with an office and place of business in Sparks, Nevada, where it is engaged in the business of hauling materials for construction companies and other companies throughout the Western United States. Respondent purchased the assets of this business at the end of May 2003. Based upon a projection of its operation since May 2003, Respondent will annually provide services valued in excess of \$50,000 to customers who themselves meet one of the Board's jurisdictional standards, other than the indirect inflow or outflow standards. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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## II The Alleged Unfair Labor Practices

## A. The Facts

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Respondent purchased the assets of Harco Company, including the Harco trademark, in a bankruptcy proceeding in May 2003. Harco Company was engaged in the business of hauling materials for construction companies and other companies throughout the Western United States. After Respondent purchased the assets of Harco Company it operated the same business, out of the same location, using the same equipment. The employees of Harco Company went to work for Respondent without any hiatus in employment.

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Wood was employed by Harco Company as a low bed truck driver. Wood was hired in June 2002 and was laid off on December 24, 2002. This layoff was due to a seasonal slowdown and Wood continued to receive health benefits while on layoff status. In March 2003, Wood filed a lawsuit against Harco Company in Superior Court in California, alleging, inter alia that Harco Company had failed to pay the legally required prevailing wages on certain of its jobsites. In April 2003, the complaint was amended as a class action lawsuit on behalf of Wood and the other similarly situated drivers employed by Harco Company.

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Subsequently, Harco Company entered into bankruptcy proceedings. The assets of Harco Company were sold at a bankruptcy auction to a partnership, which created a new entity, Harco Trucking, L.L.C., the Respondent herein. Respondent was aware of the class action lawsuit at the time of the asset purchase.

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In mid-May 2003, prior to the official takeover of Harco Company, Respondent took over management of the trucking business with the approval of the Bankruptcy Court. Respondent operated the business with former Harco Company employees and equipment and serviced the former customers of Harco Company. Beginning on or about May 23, 2003, Larry Chance, Respondent's dispatcher/manager, placed an advertisement for low bed, flat bed, front end and rear end dump truck drivers. Wood learned that the new management of the Harco Company was seeking to hire drivers and he sought employment with Respondent.

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Wood testified that during the last week of May 2003, he called Chance to express his interest in driving for Respondent. According to Wood, he told Chance that he had worked for Harco Company and had been laid off for the Winter. Wood testified that he told Chance that he was the driver that had filed the class action lawsuit against Harco Company. Chance and Wood agreed that Wood would come in the next day for an interview. The next day, Wood called Chance from outside the facility to confirm that Wood was authorized to enter the property.

According to Wood, when he entered Chance's office, Chance was on the telephone. When Chance got off the telephone, he told Wood, "Your plans of working here have been kyboshed." Chance did not interview Wood and Wood did not file a job application. Shortly thereafter, Wood reported these events to his attorney and the original charge was filed.

5 Chance testified that he told Wood that the driver would not be employed by Respondent "because of the pending lawsuit" and that he should not expect to come back to work "until the lawsuit was resolved." Respondent hired other drivers and placed another advertisement for drivers in July.

10 Chance testified that he did not hire Wood because other drivers and employees had indicated that Wood was not a careful driver. Chance admitted that he was originally interested in hiring Wood. Chance also admitted that an office worker of Harco Company told him that she would not hire Wood because of the lawsuit. According to Chance, this conversation raised a "red flag." He testified to having conversations with other employees about Wood's driving only after speaking with the office worker. Wood was the only former Harco Company truck driver not hired by Respondent. Further, Wood received no disciplinary action while employed by Harco Company.

20 I find Wood's version of these events more credible than that of Chance. Wood knew that it would aid his case to testify that Chance told him that he would not be hired because of the lawsuit. Nonetheless, Wood testified that Chance made no such statement to him. Chance on the other hand, was self-contradictory in his testimony and at one point attempted to testify that he did not make the decision not to hire Wood. He later changed his testimony and stated that he did make that decision. The circumstantial evidence leads me to conclude that Chance questioned employees about Wood's performance after rejecting Wood as an applicant and as a defense to the instant charge. Chance's testimony was very vague as to when he had conversations about Wood's work performance. Further, Chance exaggerated the number of meetings he had with Wood. Chance testified that he "sugarcoated" the refusal to hire Wood by referring to the lawsuit rather than Wood's work performance. Chance did not explain how telling Wood that he should not expect to come back to work "until the lawsuit was resolved", qualifies as "sugarcoating." I find that Chance's testimony was merely an attempt to explain away a very damaging admission. I credit Wood's testimony that Chance simply stated, "Your plans of working here have been kyboshed." It appears that any discussions with other employees about Wood's work performance occurred after this brief conversation.

### B. Conclusions

40 Pursuant to Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid and protection. Accordingly, an employer may not, without violating Section 8(a)(1) of the Act, discipline or otherwise threaten, restrain, or coerce employees because they engage in protected concerted activities.

45 In regard to the Section 7 rights of employees filing civil actions against their employer, the Board has held that the filing of a civil action by a group of employees is protected activity unless done with malice or in bad faith. See *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975); *Host International*, 290 NLRB 442, 443 (1988). Respondent does not deny that Wood was engaged in protected concerted activities in filing and maintaining the class action lawsuit against Harco Company. Rather, Respondent contends that General Counsel has not shown that Respondent was motivated by that activity in not hiring Wood.

In *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899

(1st Cir. 1981), cert. denied 455 U.S. 989, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp.*, 462 U.S. 393, 399-403 (1983).

In *FES (A Division of Thermo Power*, 331 NLRB 9, 12 (2000) the Board set forth the following test for a refusal to hire case:

To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity. In sum, the issue of whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits. If the General Counsel meets his burden and the respondent fails to show that it would have made the same hiring decisions even in the absence of union activity or affiliation, then a violation of Section 8(a)(3) has been established. The appropriate remedy for such a violation is a cease-and-desist order, and an order to offer the discriminatees immediate reinstatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions, and to make them whole for losses sustained by reason of the discrimination against them.

In the instant case, Larry Chance, Respondent's chief witness, testified that he told Wood that the driver would not be employed by Respondent "because of the pending lawsuit" and that he should not expect to come back to work "until the lawsuit was resolved." However, the credible evidence establishes that Chance told Wood "Your plans of working here have been kyboshed". Nevertheless, I find Chance's testimony tantamount to a confession that Respondent ceased consideration of Wood for employment because of the class action lawsuit against his former employer. Not only is such a statement evidence of hostility toward Wood because of his protected activity, but it constituted an outright confession of Respondent's intention to retaliate against Wood because he engaged in protected concerted activities. *American Petrofina Company of Texas*, 247 NLRB 183 (1980); See, e.g., *NLRB, v. L.C. Ferguson and E.F. Von Seggern d/b/a Shovel Supply Company*, 257 F.2d 88, 92 (5th Cir. 1958), and *NLRB v. John Langerbacher Co., Inc.*, 398 F.2d 459, 463 (2d Cir. 1968), cert. denied 393 U.S. 1049 (1969). "The Courts pay special attention to such statements against interest when in the unusual case it occurs that a party admits that his conduct, otherwise ambiguous, is for improper purpose or

objective." *Brown Transport Corp. v. NLRB*, 334 F.2d 30, 38 (5th Cir. 1964).

5 For the following reasons, I find that General Counsel has made a strong prima facie showing that Respondent was motivated by unlawful considerations in refusing to hire Wood. Chance was interested in hiring former drivers of Harco Company and was interested in hiring Wood. However, an office clerical employee told Chance that she would not hire Wood because of the class action lawsuit. Then Chance told Wood that his plans were "kyboshed." Next, Chance spoke to employees in an attempt to defend the failure to hire Wood. It is clear that  
10 Respondent excluded Wood from the hiring process and that animus against the protected activity (the class action lawsuit) contributed to the decision not to consider Wood for employment.

15 Thereafter, Respondent hired drivers for positions for which Wood was qualified. Subsequently, Respondent again advertised for truck drivers for which Wood was qualified. Chance knew that Wood had driven for Harco Company and was qualified for these driving positions.

20 The burden shifts to Respondent to establish that the same action would have taken place in the absence of Wood's protected concerted activities. Respondent has not met its burden under *Wright Line*. Its assertion that Wood may not have been a good driver for Harco Company was not sufficient to overcome the prima facie case. An employer cannot carry its *Wright Line* burden simply by showing that it had a legitimate reason for the action, but must "persuade" that the action would have taken place even absent the protected conduct "by a preponderance of the  
25 evidence." *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984). In other words, the mere presence of legitimate business reasons for disciplining or discharging an employee does not automatically preclude the finding of discrimination. *J.P. Stevens & Co. v. NLRB*, 638 F.2d 676, 681 (4th Cir. 1981). Beyond that, "when a respondent's stated motive for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to  
30 conceal." (Footnote omitted.) *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991). See also *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Here, while it has been shown that certain co-workers had the opinion that Wood was not careful, there has been no credible evidence that the opinions of these co-workers was the actual reason for the discharge. It  
35 appears that Chance did not obtain this information until after he decided that Wood "should not expect to come back to work until the lawsuit was resolved." As stated above, analysis of Chance's testimony shows that it cannot be relied upon to show any reason for the termination of Wood's interview, rather than the class action lawsuit. Where, as here, General Counsel makes out a strong prima facie case under *Wright Line*, the burden on Respondent is substantial  
40 to overcome a finding of discrimination. *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991).

45 Rather, the evidence leads to a conclusion that, prior to the discussion of Wood and the lawsuit with the office clerical worker, it appears that Chance was interested in hiring Wood as a driver for Respondent. *White Oak Coal Co.*, 295 NLRB 567, 570 (1989). See also *Jones & McKnight, Inc. v. NLRB*, 445 F.2d 97 (7th Cir. 1971). In sum, the General Counsel has shown that the failure to consider Wood for employment in May 2003 had been unlawfully motivated. Thereafter, Respondent hired other drivers for positions for which Wood was qualified. Respondent has failed to credibly show that its refusal to consider Wood for employment and its  
50 refusal to hire Wood had been for a legitimate reason. Therefore, I find that Respondent's refusal to hire Wood violated Section 8(a)(1) of the Act.

It is no defense that Respondent acted without union animus or a willful intent to violate the Act. The law is well established that when it is once made to appear from the primary facts that an employer has engaged in conduct which operates to interfere with an employee's statutorily protected right, it is immaterial that the employer was not motivated by antiunion bias or ill intentions." *Fabric Services, Inc.*, 190 NLRB 540,543 (1971). See also *NLRB v. Burnup and Sims, Inc.*, 379 U.S. 21 (1964) and *Time-O-Matic, Inc. v. NLRB*, 264 F.2d 96 (7<sup>th</sup> Cir. 1959). The test is whether the employer engaged in conduct, which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. *Continental Chemical Company*, 232 NLRB 705 (1977), and *American Lumber Sales, Inc.*, 229 NLRB 414 (1977).

Further, it is no defense that Respondent did employ certain former drivers of Harco Company who were named in Wood's class action lawsuit. In regard to employer motivation, the Board has held that an employer's failure to take action detrimental to all known union adherents does not show that its action against some was not for antiunion reasons. See, e.g., *Alliance Rubber Co.*, 286 NLRB 645, 647 (1987); *Master Security Services*, 270 NLRB 543, 552 (1984).

Finally, Respondent seeks to avoid liability because the aborted interview between Wood and Chance occurred prior to Respondent's formal takeover of Harco Company's business operations. It is undisputed that joint venture which was later incorporated as Respondent was operating the business with the approval of the Bankruptcy Court at the time Chance unlawfully eliminated Wood from consideration for employment. Respondent's subsequent hiring of other employees, which forms the basis of the refusal to hire violation, occurred after Respondent was incorporated and officially operating the business.

#### Conclusions of Law

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

2. Scott Wood was engaged in protected concerted activities within the meaning of Section 7 of the Act in filing and maintaining a class action lawsuit, on behalf of himself and his co-workers against his former employer.

3. By failing and refusing to hire Scott Wood because of his protected concerted activities activities, Respondent violated Section 8(a)(1) of the Act.

4. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### The Remedy

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Respondent must offer Scott Wood full and immediate reinstatement to the position he would have held, but for the unlawful discrimination against him. Further, Respondent must make Wood whole for any and all loss of earnings and other rights, benefits and privileges of

employment he may have suffered by reason of Respondent's discrimination against him, with interest. Backpay shall be computed in the manner set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); See also *Florida Steel Corp.*, 231 NLRB 651 (1977) and *Isis Plumbing Co.*, 139 NLRB 716 (1962).

Respondent must also expunge any and all references to its unlawful refusal to hire Wood from its files and notify Wood in writing that this has been done and that the unlawful refusal to hire will not be the basis for any adverse action against him in the future. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended<sup>2</sup>.

### ORDER

Respondent, Harco Trucking, LLC, its officers agents, successors, and assigns, shall:

1. Cease and desist from:

- a. Failing and refusing to hire employees because they engaged in protected concerted activities within the meaning of Section 7 of the Act.
- 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.

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 reinstatement to Scott Wood to the position he would have held, but for the discrimination against him.
- b. Make whole Scott Wood for any and all losses incurred as a result of Respondent's unlawful refusal to hire him, with interest, as provided in the Section of this Decision entitled "The Remedy".
- c. Within 14 days from the date of this Order, expunge from its files any and all references to the failure to hire Scott Wood and notify him in writing that this has been done and that Respondent's discrimination against him will not be used against him in any future personnel actions.
- d. Preserve, and within 14 days of a request make available to the Board or its agents for examination and copying, all payroll records, timecards, social security payment records, personnel records and reports, and all other records necessary to determine the amount of backpay due under the terms of this Order.
- e. Within 14 days after service by the Region, post at its Sparks, Nevada, facilities

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<sup>2</sup> All motions inconsistent with this recommended order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

copies of the attached Notice marked "Appendix".<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced or covered by 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 attached notice to all current employees and former employees employed by the Respondent at any time since May 29, 2003.

- 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 Respondent has taken to comply.

Dated, San Francisco, California, January 26, 2004.

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Jay R. Pollack  
Administrative Law Judge

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<sup>3</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated 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 refuse to consider for employment or refuse to hire employees in order to discourage any of these protected 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 offer reinstatement to Scott Wood to the position he would have held, but for the discrimination against him.

WE WILL make whole Scott Wood for any and all losses incurred as a result of our unlawful refusal to hire him, with interest.

WE WILL expunge from our files any and all references to the refusal to hire Scott Wood and notify him in writing that this has been done and that the fact of this discrimination will not be used against him in any future personnel actions.

HARCO TRUCKING, LLC

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

1301 Clay Street, Federal Building, Room 300N, Oakland, CA 94612-5211

(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (510) 637-3270.