

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

ANDERSON C & E, INC.  
d/b/a ANDERSON CONSTRUCTION

and

Case 17-CA-21891

OPERATIVE PLASTERS AND CEMENT  
MASONS LOCAL UNION NO. 518

*Michael Werner, Esq.*, Overland Park, KS,  
for the General Counsel.

*Anthony Mihalevich, Business Rep.*  
Kirksville, MO, for the Union.

*Mark D. Anderson and Kathy Darling,*  
Kirksville, MO, for Respondent.

DECISION

Statement of the Case

JAY R. POLLACK, Administrative Law Judge: I heard this case in trial at Kirksville, Missouri, on February 25, 2003. On September 25 2002, Operative Plasterers and Cement Masons Union No. 518 (the Union) filed the original charge alleging that Anderson C & E, Inc., d/b/a Anderson Construction (herein called Respondent) 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 November 25, 2002, the Union filed an amended charge against Respondent. On November 26, 2002, the Acting Regional Director for Region 17 of the National Labor Relations Board issued a Complaint and Notice of Hearing against Respondent, alleging that Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Josh Carman because of his support for the Union or because of his other 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:

## Findings of Fact and Conclusions

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### I. Jurisdiction

Respondent is a corporation, with an office and place of business in Kirksville, Missouri, where it is engaged in the construction industry as an excavation and concrete subcontractor. During the 12 months prior to issuance of the complaint, Respondent purchased and received at its Kirksville, Missouri facility, goods and services valued in excess of \$50,000 directly from points outside the State of Missouri. 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.

Respondent admits and I find that at all times material herein the Union has been a labor organization within the meaning of Section 2(5) of the Act.

## II The Alleged Unfair Labor Practices

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### A. The Facts

Respondent is an excavation and concrete contractor. Respondent maintains two crews; an excavation crew and a concrete crew. Mark Anderson, Respondent's president and owner supervises the excavation crew. Josh Carman began working on the concrete crew for Respondent in April 2002. Beginning in May 2002, Herb Williams, foreman, supervised the concrete crew consisting of Williams, Carman and two other employees. Anderson testified that Carman was a good worker but had a poor attendance record.

In early September 2002, the concrete crew was working on a construction site at Truman State University in Kirksville, Missouri. This was a "prevailing wage job." Anthony Mihalevich, business representative for the Union, visited the jobsite and spoke with the Respondent's employees. Upon learning that the employees did not belong to a union, Mihalevich passed out business cards and asked the employees to call him. Several days later, Williams called Mihalevich and they scheduled a meeting in a restaurant in Kirksville. Williams invited the three other concrete crew employees to the meeting but only Carman was interested.

On September 16, Carman and Williams met with Mihalevich and discussed the possibility of organizing the employees of Respondent. The following day, Carman spoke with the two other employees and attempted to convince them to join the Union.

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On Monday, September 23, Carman and Williams arrived at Respondent's shop for instructions to begin work. Carman testified that on September 23, while he and Williams were drinking coffee, Anderson approached them and said that he had heard something that disturbed him. Anderson said that he had heard that Carman and Williams were talking to Tony

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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.

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Mihalevich. Anderson declared that nobody was going to make him go union. He stated that it was his company, and that he was firing Carman. He then said that he was demoting Williams. Carman asked if Anderson was firing him for talking to the Union and Anderson answered "yes." Williams testified that Anderson approached Carman and Williams and said, "I need to speak  
5 with you about rumors I have heard, that you were wanting to join the Union." Anderson stated that he would not have the Union in his shop. He added that it was his business, and that he would run the business the way he wanted. Anderson then told Carman that he was fired and told Williams that he was being replaced as concrete foreman. Williams asked where Anderson had heard the rumors and Anderson answered that it didn't matter. Anderson told Williams that  
10 if Williams did not like it, he could quit. While Anderson denied these statements, I credit the testimony of Carman and Williams over Anderson's denials.

On September 25, Anderson prepared a letter to Carman dated September 23, 2002 entitled notice of termination. In the letter, never given to Carman, Anderson states that  
15 Carman was terminated for the following reasons:

1. June 17-23 was given one week off without pay due to third time of not showing up for work. There was no phone call or excuse given as to why.
- 20 2. Girlfriend constantly showing up at the jobsites in an unprofessional manner and acting inappropriately, i.e., screaming at employees and the owner of the company, squealing tires in [sic] her car, coming into a restricted hard hat area and laying on the car horn while the owner of the company was on his cell phone making a business call, and constantly questioning other employees of the whereabouts of Josh when he is on the job or is not at work. It is not the policy of  
25 this company to be an answering service. We need to have our phone lines available for our customers first.
3. Recently, Josh walked off the jobsite at the Truman Paric job before the work was complete without the Foreman's permission.

Also on September 25, Anderson gave Williams a letter dated September 23, 2002, listing the reasons for Williams' demotion from foreman. The letter stated that Williams was demoted because the work he supervised was not done in a timely fashion and was performed inefficiently. The letter also alleged that Williams had been previously warned.  
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Anderson does not maintain records of employee discipline or attendance. In spite of the fact that Anderson has hired and fired many employees, these letters are the only written documents regarding personnel changes. The informal system used by Respondent consists of "post-its" given by Anderson or Williams to Kathy Darling, office manager. Using post-its and her memory, Darling could not confirm that Carman had been suspended the week of June 17-  
40 23, 2002. Rather Darling's records showed that Carman did not work that week but was paid for ten hours. According to Darling, Carman was fired and paid severance pay but Anderson relented and allowed Carman to return to work. Darling had no records to support the allegations concerning Carman's girlfriend but testified that the woman was constantly calling her. According to Darling, Anderson would always give Carman a "second chance." Darling's records showed that on the Truman jobsite, Respondent's customer had claimed that the hours for certain employees were overcharged. The responsibility for the alleged overcharging would have properly been placed on Williams, the foreman. Further, the record shows that the customer refused to pay for one hour charged to Carman. However, the customer also refused  
45 to pay for one hour each for two other employees and three hours each for Williams and another employee. There was a charge back for every employee who worked on that job during the week in question.  
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5 Mark Anderson testified that Carman and Williams were drinking beer on the morning of September 20 and that he waited until September 23 to discharge Carman. Carman and Williams did drink beer on the morning of September 20, however, the weather that day caused work to be postponed. Further, neither the letter to Williams nor the letter to Carman mentioned the drinking. Moreover, Anderson testified falsely that he had given the letters to the employees on September 23, when in fact, he gave the letter to Williams on September 25 and never gave a letter to Carman.

10 Anderson admitted that Carman was a good worker but claimed that Carman was discharged for poor attendance. According to Anderson, Carman was suspended for one week in June 2002, due to his poor attendance. However, Anderson did not explain the payment made to Carman for that week. Even assuming Carman was suspended for poor attendance, Carman had no attendance problems between his suspension in June and his discharge in September.

15 Anderson further testified that Carman walked off the Truman State jobsite on September 17. There is no credible evidence to support this allegation. As noted above, the general contractor for the job reduced the number of hours on that job for all Respondent's employees. Carman's hours were reduced by only one hour. This amount was not more than 20 any other employee and less than two other employees.

25 Anderson further testified that Carman's girlfriend showed up at work and acted in an unprofessional manner. The credible evidence establishes only that Carman's girlfriend frequently called Darling asking about Carman. However, that was not a recent occurrence but a situation that had occurred throughout Carman's employment. Anderson never spoke to Carman or Williams about this conduct. Had this truly been a reason for discharge, Anderson would have communicated with Carman, directly or through the foreman, about the problem.

### 30 B. Conclusions

35 The credible evidence establishes that Anderson told Carman that he was discharged because the company was non-union and Carman had spoken with a union agent. I find this statement tantamount to a confession that Respondent took punitive action against Carman for engaging in union activities. Not only is such a statement evidence of hostility toward Carman because of his protected activity, but it constituted an outright confession of Respondent's intention to retaliate against Carman because he had supported the Union. *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 Langenbacher 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). Such conduct restrains and coerces employees in the exercise of the right to select a bargaining representative of their own choice. See *Winges Company, Inc.*, 263 NLRB 152 (1982); *A & A Ornamental Iron, Inc.*, 259 1019 (1982). See also *San Souci Restaurant*, 235 NLRB 604 (1978); *Bell Burglar Alarms, Inc.*, 245 990 (1979).

50 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).

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For the following reasons, I find that General Counsel has made a strong prima facie showing that Respondent was motivated by unlawful considerations in discharging Carman. Respondent condoned Carman's attendance problems and poor work habits for at least five months. However, shortly after Carman engaged in union activities with foreman Herb Williams, Carman was discharged. At the time of the discharge, Carman was told that Anderson did not want anything to do with the Union. In that context, Anderson told Carman and Williams that Anderson no longer desired Carman's services because Respondent was a non-union company. Anderson admitted that he was firing Carman for speaking with a union agent.

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The burden shifts to Respondent to establish that the same action would have taken place in the absence of Carman's union activities. Respondent has not met its burden under *Wright Line*. Its assertion that Carman was not a good employee is 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 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 conceal." *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 Carman had a poor attendance record, there has been no credible evidence that his attendance record was the actual reason for the discharge. Moreover, analysis of Anderson's testimony shows that it cannot be relied upon to show any legitimate reason for the termination of Carman. Where, as here, General Counsel makes out a strong prima facie case under *Wright Line*, the burden on Respondent is substantial to overcome a finding of discrimination. *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991).

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In the instant case, the evidence leads to a conclusion that, prior to discovering that Williams and Carman had spoken with an agent of the Union, Anderson had condoned Carman's attendance and girlfriend problems and had continued the employment relationship as though no misconduct had occurred. *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 discharge of Carman on September 23, 2002, had been unlawfully motivated. Respondent has failed to credibly show that the discharge had been for a legitimate reason. Therefore, I find that Respondent's discharge of Carman violated Section 8(a)(3) and (1) of the Act. See *Bronco Wine Co.*, 253 NLRB 53 (1981); *Hunter Douglas, Inc.*, 277 NLRB 1179 (1985).

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#### Conclusions of Law

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

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2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees that they would be discharged for engaging in union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5           4. By discharging Josh Carman because of his activities on behalf of the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

10           5. 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

15           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.

20           I shall recommend that Respondent offer Josh Carman full and immediate reinstatement to the position he would have held, but for his unlawful discharge. Further, Respondent shall be directed to make Carman 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).

25           Respondent shall also be required to expunge any and all references to its unlawful discharge of Josh Carman from its files and notify Carman in writing that this has been done and that the unlawful discharge will not be the basis for any adverse action against him in the future. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

30           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

35           Respondent, Anderson C & E, Inc., d/b/a Anderson Construction, its officers agents, successors, and assigns, shall:

- 40           1. Cease and desist from:
- (a) Discharging employees in order to discourage union activities.
  - (b) Threatening employees with discharge, or other retaliation for engaging in union activities.

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50           <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.

(c) 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:

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(a) Within 14 days from the date of this Order, offer reinstatement to Josh Carman to the position he would have held, but for his unlawful discharge.

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(b) Make whole Josh Carman for any and all losses incurred as a result of Respondent's unlawful discharge of him, with interest, as provided in the Section of this Decision entitled "The Remedy".

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(c) Within 14 days from the date of this Order, expunge from its files any and all references to the discharge of Josh Carman and notify him in writing that this has been done and that Respondent's discharge of him will not be used against him in any future personnel actions.

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(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.

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(e) Within 14 days after service by the Region, post at its Kirksville, Missouri, facilities copies of the attached Notice marked "Appendix".<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 17, 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 September 23, 2002.

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(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, April 9, 2003.

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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 discharge employees in order to discourage union activities.

WE WILL NOT threaten employees with discharge or other adverse action in order to discourage union 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 Josh Carman to the position he would have held, but for his unlawful discharge.

WE WILL make whole Josh Carman for any and all losses incurred as a result of our unlawful discharge of him, with interest.

WE WILL expunge from our files any and all references to the discharge of Josh Carman and notify him in writing that this has been done and that the fact of his discharge will not be used against him in any future personnel actions.

Anderson C & E, Inc., d/b/a Anderson Construction

\_\_\_\_\_  
(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).

8600 Farley Street, Suite 100, Overland Park, KS 66212-4677

(913) 967-3000, Hours: 8:15 a.m. to 4:45 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, (913) 967-3005.