

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

McCLENDON ELECTRICAL SERVICES,
INC.

and

CASE 16-CA-22434

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 520

Jamal Allen, Esq., for the Government.
*Frank L Carrabba, Esq. and Jennifer J.
Cooper, Esq.*, for the Company.
David Van Hass, Esq., for the Union.

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 at sl. op. p. 1 (May 10, 2002) and *Felix Industries*, 331 NLRB 144, 146 (2000).¹

¹ In light of my finding that Elgin's discharge violated Section 8(a)(1), I found it unnecessary to decide whether it also violated Section 8(a)(3). See: *Phoenix Transit System*, 337 NLRB No. 78 ft n. 3, (May 10, 2002).

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.”

Conclusions 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 following:³

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.

² I have corrected the transcript pages containing my Bench Decision and the corrections are as reflected in attached Appendix C.

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 Board’s Rules and Regulations, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(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, time cards, 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 back pay due under the terms of this Order.

(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

⁴ If this order is enforced by a Judgment of the 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 JUDGEMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.**"

responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

Dated, Washington, D.C.

William N. Cates
Associate Chief Judge

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

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

7 This is an unfair labor practice case prosecuted by the
8 National Labor Relations Board, herein, Board; General
Counsel,
9 herein, Government Counsel, acting through the Regional
Director

10 for Region 16 of the Board following an investigation by
Region

11 16's staff. The Regional Director for Region 16 of the Board
12 issued a complaint and notice of hearing, herein, complaint,
on

13 February 28, 2003 based upon an unfair labor practice charged
14 filed by International Brotherhood of Electrical Workers,
Local
15 520, herein, Union or Charging Party, on December 18, 2002 and
16 amended on February 7, 2003.

17 Certain facts herein are admitted, stipulated or
18 undisputed. It is essential that I state certain of those
facts

19 at this point in my bench decision, which I now do.

20 It is admitted the Company is a Texas corporation with an
21 office and place of business in Round Rock, Texas, where it
has
22 been engaged as an electrical contractor in the construction
23 industry performing commercial and residential construction.

24 During the 12 months preceding issuance of the complaint herein,

25 a representative period, the Company in conducting its business

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1 operations purchased and received goods valued in excess of
2 \$50,000 directly from firms inside the state of Texas, which
3 firms had in turn purchased and received such goods directly
4 from suppliers located outside the state of Texas.

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

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

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

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

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

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

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

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

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

25 The Company requires all employees to proceed through a

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1 90-day probationary period. During the 90-day probationary
2 period, the employees do not receive benefits such as health
3 insurance. Employees are evaluated closely during their 90-day
4 probationary period, where the employee sees if the employee
5 wishes to work for this Company and the Company has an
6 opportunity to evaluate the potential of the probationary
7 employee to becoming a permanent employee.

8 According to Company President McClendon, Elgin telephoned
9 the Company two or three times before he came for an interview,
10 stating each time he had heard this was a good company to work
11 for and that he, Elgin, was interested in working for the
12 Company. Thereafter, Elgin came for an interview and was hired
13 as an apprentice electrician on September 25, 2002. Elgin
14 worked at various projects for the Company.

15 The Company's normal work day starts at 7:00 a.m. Elgin
16 was given a disciplinary warning on December 13, 2002 for
17 arriving at work 45 minutes late on December 9, 2002. Elgin
18 signed the warning but indicated on it that he,
19 "Protested this write-up."

20 Elgin wore a Union organizer's shirt to this December 13,
21 2002 meeting with Company President McClendon. In fact, Elgin
22 stated he wore a Union shirt or cap on numerous occasions while
23 working at the Company.

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

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"APPENDIX A"

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1 Austin, Texas, on Monday, December 16, 2002, where he would
2 report for and work under the supervision of project manager
3 Sanford. Elgin, however, did not report for work on December
4 16, 2002 as directed but, rather, left a voice mail message with
5 the Company that he would not be at work on that day. Elgin
6 testified he was sick on that particular Monday.

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

13 Elgin and Garcia loaded a Company truck with materials
14 cleaned up from the wet, muddy work site. The materials the two
15 of them cleaned up from the area included PBC pipe pieces,
16 pipe fittings, debris from around concrete pourings and the
17 like. The two of them unloaded the Company truck and loaded it
18 a second time. The employees took a break from approximately
19 9:00 a.m. until approximately 9:15 a.m.

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

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1 Practices." Elgin stated several unfair labor practice charges
2 had been filed by the Union against the Company and they
3 involved him.

4 Elgin told Garcia he was going to join the pickets and
5 invited Garcia to join him in doing so. One of those picketing
6 that morning was Union organizer Robert Beeler.

7 Elgin obtained a picket sign from the Union and joined
8 those picketing. Elgin testified the picketing took place on a
9 road easement at the corner of Texas State Highway 620 and a
10 side street in front of the Company's construction project at
11 the Maxwell Dodge work project in Austin, Texas. Elgin
12 testified he picketed with the others from 10:30 a.m. until
13 11:15 a.m. on December 17, 2002.

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

22 Elgin testified they stopped picketing at approximately
23 11:15 a.m. and he placed the picket sign he had been carrying in
24 his truck and returned for work. Elgin testified he told
25 project manager Sanford, "I am ready to work; What can I

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

5 Elgin worked from approximately 11:15 a.m. until 11:30
6 a.m., at which time he and the other employees left the job site
7 for their 45-minute lunch break, which ran from 11:30 a.m. until
8 12:15 p.m. Elgin testified that after returning from lunch
9 break, he helped fill in some PBC pipe.

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

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

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

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

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

11 Company President McClendon testified Elgin worked at a
12 number of the projects of the Company but was a disappointment
13 as to his work potential. McClendon testified the first project
14 Elgin worked at was the Lack's Furniture project under the
15 supervision of project manager Dale Davis, where he worked for
16 approximately five to six weeks. Company President McClendon
17 testified project manager Davis reported to him that Elgin was a
18 slow worker with not much mechanical aptitude.

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

25 Company President McClendon testified that when he met

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

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

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

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

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

12 Company President McClendon acknowledged that when project
13 manager Sanford told him about Elgin's leaving the job on
14 December 17, 2002, Sanford told him Elgin had left to join the
15 pickets at the Company's entrance. Company President McClendon
16 explained employees were sent to the Company shop for him to
17 deal with when the project manager had, "Something he
18 didn't feel comfortable with."

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

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

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

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

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

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1 office.

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

6 Next, did the Company violate the Act when Company
7 President McClendon discharged employee Elgin on December 18,
8 2002, and what standard of analysis should be applied? The
9 Government contends, as does the Union, that Elgin was
10 participating in picketing that was taking place at the Company.

11 The Government and Union would contend that the picketing
12 was valid both as to its purpose and in the carrying out of the
13 picketing and that when Elgin joined the picketing, he was
14 participating in concerted protected activity. They would also
15 contend that the analysis that need be followed would not be the
16 Wright Line analysis but, rather, would simply be that if the
17 employee's participation in the picketing constituted protected
18 concerted activity, the only issue left to be decided was
19 whether the individual engaged in any conduct that would remove
20 the protection of the Act from him.

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

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

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

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

19 Does a Wright Line, 251 NLRB 1083 (1980), enforced 662 F.
20 2nd 899 (1st Cir. 1981), cert. denied 455 U. S. 989, (1982)
21 analysis apply herein? A Wright Line analysis is appropriately
22 used in cases that turn on an Employer's motivation. The Wright
23 Line analysis is not the appropriate vehicle for an analysis
24 where the employee is discharged for protected concerted
25 activity. See Phoenix Transportation System, 337 NLRB No. 78

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

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

10

11 Accordingly, when an individual assists a union or engages
 12 in union-related activity, by definition, he is engaged in
 13 concerted activity. See Tradesman International, Inc., 332 NLRB
 14 No. 107 at Sl. op. Page 2 (October 31, 2000.).

15 Picketing is a concerted activity within the, "Mutual aid
 16 or protection," language of Section 7 of the Act.

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

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

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

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

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

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

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

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

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

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

JD(ATL)-32-03

Austin, Texas 78731
(512) 450-0342

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

7 After being provided a copy of the transcript of this
8 proceeding by the court reporting service, I will certify those
9 pages of the transcript that constitute my decision, and
10 attached to that will be the notice language that is to be
11 posted. And, also, I will spell out in some more detail the
12 remedy that is applicable herein. The appeal period for
13 appealing from this decision is set forth in the Board's rules
14 and regulations, and I invite your attention to those.

15 Let me state in closing that it has been a pleasure to be
16 in Austin, Texas. And this hearing is closed.

17 Off the record.

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

ON THE RECORD REPORTING, INC.
3307 Northland, Suite 315
Austin, Texas 78731

(512) 450-0342

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.

(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

819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6178
(817) 978-2921, 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 REGION'S

COMPLIANCE OFFICER, (817) 978-2925.

			Page(s)	Line(s)	DELETE	INSERT
166	11	16			16's	
166	22	in the			as an	
167	13	Stanford [sic]			Sanford	
167	25	alleged			participated	
169	18	quote,				
169	19	, close quote			“.”	
170	15	[sic]				
170	20	of				
170	22	quote,				
170	23	close quote,				
170	25				“before” “McClendon”	
171	25	quote,				
170	25	quote				
172	1	close quote			“.”	
172	2	not			now	
172	13	close quote,				
172	14	quote, close quote			“.”	
172	17	appraisal			approximately	
172	22	quote close quote			“.”	
173	2	quote, close quote				
173	3	quote, close quote			“.”	
173	4	quote,				
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175	17	quote,				
175	18	close quote			“.”	
176	20	the				
178	7	quote, close				
178	8	quote,				
178	11	quote- -				
178	13	were listed				
178	19	Fed			F.	
178	20	Circuit			Cir.	
178	25	Number			No.	
179	1	Slip [plonetic] Opinion			sl. op.	
179	3	established by the Company - -				
179	7	quote,				
179	9	, close				
179	10	quote.			“.”	
179	14	Number Slip Opinion			No. sl. op.	

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179	15	quote,	
179	16	close quote,	
180	4	: The	; the
180	13		“activities” before “lost”
181	18		demonstrated --
181	23	Employer’s	Company’s