Hahner, Foreman & Harness, Inc. *and* United Brotherhood of Carpenters & Joiners of America, Carpenters District Council of Kansas City & Vicinity and Local 201. Cases 17–CA–22382 and 17–RC–12206

December 16, 2004

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On March 17, 2004, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

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, and conclusions and to adopt the recommended Order as modified and set forth in full below.[1]

The judge found that the Respondent violated Section 8(a)(1) of the Act by discharging employees Daniel Caudell and Todd Stewart because they engaged in protected concerted activity. In reaching his decision, the judge determined, inter alia, that the employees engaged in protected concerted activity when they joined together to protest the loss of their health insurance and pension benefits. In its exceptions, the Respondent contends that the employees did not engage in concerted activity, and that, even if their conduct was concerted, the employees lost the Act's protection by threatening a work slowdown. For the following reasons, we reject the Respondent's contentions.

Facts

The Respondent is a general contractor in the building and construction industry. For more than 35 years, the Respondent and the United Brotherhood of Carpenters & Joiners of America, Carpenters District Council of Kansas City & Vicinity and Local 201 (the Union) were parties to successive 8(f) collective-bargaining agreements, the last of which expired March 31, 2003.[2] Under that agreement, the Respondent paid the unit employees' pension and health and welfare benefits. When the agreement expired, the Respondent ceased making these payments, and the pension obligation and health insurance coverage lapsed.

Daniel Caudell has worked for the Respondent for over 20 years. About April 3, Caudell met with the Respondent's president, Dave Foreman, to find out how the expiration of the collective-bargaining agreement would affect his benefits. Foreman assured Caudell that he would not lose anything when the contract expired. Similarly, Respondent's general superintendent, Bradley Oxford, assured employees, including Caudell, that they would not suffer any economic harm and that the Respondent would pay the employees the money it had been paying into the union benefit funds. Despite these assurances, when he tried to fill a prescription in early April, Caudell learned that his health insurance had lapsed. Caudell spoke to his coworkers, including Todd Stewart, about the health insurance problem. Stewart was also particularly concerned about the loss of health insurance because he needed to maintain medical coverage for his son.

On April 10, Caudell and Stewart received their paychecks and discovered that, contrary to Oxford's assurances, the checks did not contain an increase in pay to compensate for the loss of pension and health benefits. In the presence of his coworkers, including Stewart, Caudell asked Job Superintendent Bob Dick why his paycheck did not include the pension and health insurance money. Dick did not have an answer and left to find out. As he started working, Caudell complained to Stewart about his check being short and the loss of insurance.

Later that morning, Oxford arrived at the jobsite. Stewart approached Oxford and expressed his dissatisfaction with the cancellation of the health insurance. The conversation became heated and Caudell intervened. Caudell asked Oxford why his paycheck did not reflect an increase in pay to cover the cost of the lost benefits, as Oxford had assured Caudell and other employees it would. Oxford replied that if the employees did not like the situation, they could quit, as this was the way things were going to be. Stewart and Caudell both stated that they were not quitting, and Caudell threatened to file a lawsuit if he were discharged. Caudell further told Ox-

[1] We shall modify the judge's recommended Order to conform to the violations found, in keeping with the Board's standard remedial language, and in accordance with our decisions in *Ferguson Electric Co*., 335 NLRB 142 (2001), and *Excel Container, Inc.*, 325 NLRB 17 (1997).

The judge found, and we agree, that employees Daniel Caudell and Todd Stewart were unlawfully discharged, and that the challenges to their ballots in Case 17–RC–12206 should be overruled. Having so found, the judge directed the Regional Director to prepare a revised tally of ballots and issue a "certification of the results of the election." Until the ballots are opened and counted, however, it cannot be determined whether the Regional Director should issue a certification of results or of representative. Thus, we shall amend the direction to provide that the Regional Director shall issue the "appropriate" certification.

[2] All dates are in 2003, unless stated otherwise.

ford that if this was the way things were going to be—i.e., fewer benefits with no commensurate increase in pay—he might not be able to work as fast as he normally did. Stewart then jokingly stated that he was already going so slow that he did not see how he could slow down. Oxford commented that a slowdown would be unacceptable. The conversation ended, and Caudell and Stewart immediately returned to work. There is no record evidence that either of them worked more slowly than usual.

After the employees returned to work, Oxford called Foreman. According to Foreman, whose account of the ensuing phone conversation the judge implicitly credited, Oxford told him that Caudell and Stewart were protesting the loss of benefits, and that Caudell had threatened a slowdown. Foreman told Oxford to fire both employees. Oxford informed Foreman that Caudell had threatened to sue if terminated, and Foreman then told Oxford to lay them off instead. Oxford did just that, and the employees left the worksite. The Respondent never recalled Caudell or Stewart despite the fact that work was available at the worksite. The judge found, and we agree, that Caudell and Stewart were effectively discharged.

Analysis

1. The Respondent initially contends that Caudell's and Stewart's conduct was not concerted. Section 7 of the Act protects the right of employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." For activity to be "concerted," it must be "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[3] The determination of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence.[4] Under the totality of the circumstances present in this case, we agree with the judge's finding that Caudell and Stewart engaged in concerted activity to protest the loss of health insurance benefits or recompense for their value.

As stated above, when Caudell discovered that his health insurance had lapsed, he spoke with Stewart and other coworkers about the issue.[5] When Caudell received his paycheck on April 10, he complained to Job Superintendent Dick in the presence of his coworkers that his paycheck did not reflect an increase to compensate for the lost benefits.[6] He continued to talk about the situation to Stewart as he began working. Oxford then arrived, and Stewart joined Caudell's earlier protest by expressing his displeasure over the cancellation of his health insurance. Caudell then joined the conversation, objecting once again to the fact that his paycheck had not increased to make up for the lost benefits. We agree with the judge that, although Caudell and Stewart advanced somewhat different complaints, they were united in protesting the loss of benefits. Thus, based on all of the foregoing circumstances, we find their joint protest concerted.

The Respondent also contends that even assuming the employees' conduct was concerted it became unprotected when, according to the Respondent, Caudell and Stewart threatened a work slowdown. Contrary to the Respondent's contention, we find, for the reasons set forth below, that the employees did not lose the protection of the Act.

First, as to Stewart, we agree with the judge that Stewart did not threaten to slow down but merely made a joke at his own expense. Stewart commented to Oxford that he was already going so slowly that he did not see how he could slow down anymore. Moreover, Oxford evidently understood that Stewart was joking because when Oxford contacted Foreman about Caudell's and Stewart's protest, he identified Caudell alone as having made an alleged slowdown threat.

Turning to Caudell, we find that Caudell's remark, when viewed in context, was nothing more than an impulsive reaction expressive of his frustration with the Respondent's conduct, not a genuine threat. As noted above, Caudell had been assured by management that he would lose nothing when the collective-bargaining agreement expired, and that any loss of benefits would be compensated by a commensurate increase in pay. Then, in quick succession, his health insurance lapsed, and his paycheck was not increased as promised. When Caudell complained about his paycheck, the very same person who had promised the compensatory increase (Oxford) now told him that this was the way things were going to be, and if he did not like it, he could quit. In the stress of the moment, Caudell made an ill-advised remark about not being able to work as fast as he used to. However, he promptly returned to work, and there is no evidence that

[3] *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985).

[4] *Meyers Industries*, 281 NLRB 882, 886 (1986), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

[5] See *Cibao Meat Products*, 338 NLRB 934, 934 (2003) ("[T]he 'activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much "concerted activity" as is ordinary group activity.'") (quoting *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969)), enfd. 84 Fed. Appx. 155 (2d Cir. 2004), cert. denied 73 USLW 3077, 3293, 3296 (2004); see also *Phillips Petroleum Co.*, 339 NLRB 916 (2003).

[6] See *Avery Leasing*, 315 NLRB 576, 580 fn. 5 (1994) (finding concerted activity where an employee, in the presence of other employees, complains to management concerning wages, hours, or other terms and conditions of employment).

he worked any more slowly than usual. The Board has long held that an "employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect."[7] Striking this balance here, we find that Caudell did not lose the protection of the Act.[8]

2. Additionally, we find that, in taking action against Caudell and Stewart, the Respondent did not in fact rely on their purported slowdown threats. First, as the judge points out, Foreman decided to lay off both employees, even though, according to Foreman's testimony, Oxford reported to him only that Caudell had threatened to slow down. Second, the Respondent's entire account of the cessation of Caudell's and Stewart's employment has shifted. At the hearing on challenged ballots in Case 17–RC–12206, the Respondent based its challenge to the ballots of Caudell and Stewart on their having allegedly voluntarily quit their employment. At that hearing, the Respondent never asserted, as it does now, that Caudell and Stewart were laid off for threatening a work slowdown. The Board has long expressed the view that "when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted."[9] Thus, we reject the Respondent's assertion that it laid off Caudell and Stewart for threatening a work slowdown during their concerted protest on April 10.[10]

For all of the above reasons, we affirm the judge's finding that the Respondent violated Section 8(a)(1) of the Act as alleged.

Having found that Caudell and Stewart were unlawfully discharged, we also overrule the challenges to their ballots in Case 17–RC–12206, and we shall sever that case from Case 17–CA–22382 and remand it to the Regional Director for further appropriate action.

ORDER

The National Labor Relations Board orders that the Respondent, Hahner, Foreman & Harness, Inc., Wichita, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully laying off or discharging employees because they engage in protected concerted activities.

(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 Daniel Caudell and Todd Stewart full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Daniel Caudell and Todd Stewart whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any references to the layoffs or discharges of Daniel Caudell and Todd Stewart, and within 3 days thereafter, notify those employees in writing that this has been done and that the layoffs or discharges will not be used against them in any way.

(d) 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 such records if stored in electronic form, necessary to analyze the amounts of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Wichita, Kansas, copies of the attached notice marked "Appendix."[11] Copies of the notice, on

[7] *Enterprise Products,* 264 NLRB 946, 950 (1982) (citing *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965)).

[8] Before analyzing whether Caudell's and Stewart's remarks about slowing down lost them the Act's protection, the judge set forth as the applicable framework *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). As we have explained, however, *Wright Line* does not apply where the motivation for an adverse employment action is not disputed. See, e.g., *Neff-Perkins Co.*, 315 NLRB 1229 fn. 2 (1994). Where motive is at issue, under *Wright Line*, supra, the General Counsel must show that protected activity was a motivating factor in the employer's adverse employment action; and then the burden shifts to the employer to show that it would have taken the same action even in the absence of that protected activity. Here, however, motive is not at issue: it is undisputed that Caudell and Stewart were discharged as a result of their April 10 encounter with Oxford. Having found that this encounter constituted protected concerted activity, it remains only to determine whether the employees' slowdown-related remarks in the course of that encounter were sufficiently egregious to lose them the Act's protection. For the reasons stated above, we find that they were not.

[9] *Sound One Corp.*, 317 NLRB 854, 858 (1995) (citing *Aluminum Technical Extrusions*, 274 NLRB 1414, 1418 (1985)), enfd. mem. 104 F.3d 356 (2d Cir. 1996).

[10] Assuming that *Wright Line*, supra, applies to this part of the rationale, we conclude that the Respondent was motivated by the Sec. 7 protest rather than by the alleged threat to slow down.

[11] 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 Judg-

forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 10, 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 that the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 17–RC–12206 is severed from Case 17–CA–22382 and remanded to the Regional Director for Region 17 to take the action directed below.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 17 shall, within 14 days from the date of this Decision, Order, and Direction, open and count the ballots of Daniel Caudell and Todd Stewart, prepare and cause to be served on the parties a revised tally of ballots, and issue the appropriate certification.

APPENDIX

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

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 lay off or discharge you because you engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer Daniel Caudell and Todd Stewart full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges that they previously enjoyed.

WE WILL make Daniel Caudell and Todd Stewart whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, 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 references to the layoffs or discharges of Daniel Caudell and Todd Stewart, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that their layoffs or discharges will not be used against them in any way.

HAHNER, FOREMAN & HARNESS, INC.

Stanley Williams, Esq., for the General Counsel.
J. Michael Kennalley, Esq. and *W. Stanley Churchill, Esq*., of Wichita, Kansas, for the Respondent.
Angela M. Ford, Esq. and *Michael J. Stapp, Esq.,* of Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on February 3, 2004, in Wichita, Kansas. Following the filing of the petition in Case 17–RC–12206 on May 29, 2003, and pursuant to a Stipulated Election Agreement approved by the Regional Director of Region 17 of the National Labor Relations Board (the Board) on June 12, 2003, an election by secret ballot was conducted on July 9, 2003, among the employees in the agreed-upon appropriate unit.[1] The tally of ballots shows there were approximately 10

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] The unit is:

> All journeymen and apprentice carpenters employed by the Employer within the Kansas Counties of Barber, Barton, Butler, Chautauqua, Cheyenne, Clark, Comanche, Cowley, Decatur, Edwards, Elk, Ellis, Ellsworth, Finney, Ford, Gove, Graham, Grant, Gary, Greeley, Greenwood, Hamilton, Harper, Harvey Haskell, Hodgeman, Kearner, Kingman, Kiowa, Lane, Logan, Marion, McPherson, Meade, Morton, Ness, Norton, Osborne, Pawnee, Phillips, Pratt, Rawlins, Reno, Rice, Rooks, Rush, Russell, Scott, Sedgewick, Seward, Sheridan, Sherman, Smith, Stafford, Stanton, Stevens, Sumner, Thomas, Trego, Wallace, and Wichita, but EXCLUDING all other em-

eligible voters 2 of who cast their ballots for the Petitioner, United Brotherhood of Carpenters & Joiners of America, Carpenters District Council of Kansas City & Vicinity and Local 201 (the Union) and 1 of who cast their ballot against the Petitioner. There were no void ballots and 5 ballots were challenged.

On November 24, 2003, the Board issued a Decision and Direction in Case 17–RC–12206, directing that the challenge to the ballot of Fabian Morales be overruled, and ordering that the procedure be remanded to the Acting Regional Director for a hearing to resolve the issues raised by the challenges to the ballots of Daniel Caudell and Todd Stewart.

Upon a charge filed by the Union on September 10, 2003, in Case 17–CA–22382, on October 29, 2003, a complaint and notice of hearing issued alleging that Respondent Hahner, Foreman & Harness, Inc. (the Respondent or the Employer) has engaged in various actions and conduct violative of Section 8(a)(1) of the National Labor Relations Act (the Act). The issues raised by the challenges to the ballots of Daniel Caudell and Todd Stewart were consolidated by the Acting Regional Director for hearing and decision with the issues in Case 17–CA–22382. The complaint alleges, Respondent admits and I find that at all times material, Respondent has been a corporation, with an office and place of business in Wichita, Kansas, engaged in the building and construction industry, that during the 12-month period ending October 31, 2003, Respondent, in conducting its business operations, purchased and received at its facility goods valued in excess of $50,000 directly from points outside the State of Kansas and Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint also alleges and Respondent admits and I find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act. It is further alleged and admitted and I find that David A. Foreman is president and Bradley L. Oxford is general superintendent and that at all material times they have each been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.

The complaint also alleges that on April 10, 2003, Respondent's employees Daniel Caudell and Todd Stewart concertedly complained to Respondent regarding the wages, hours, and working conditions of Respondent's employees, about changes to their health insurance, pension benefits, and wages and on that date Respondent discharged its employees Daniel Caudell and Todd Stewart because they engaged in the aforesaid conduct and to discourage employees from engaging in these or other concerted activities.

At the hearing the parties stipulated to the following facts: Respondent is engaged in the construction industry as a general contractor for commercial and industrial buildings. The Union and the Respondent had been parties to successive 8(f) collective-bargaining agreements for over 35 years. The last collective-bargaining agreement between the Union and the Respondent was effective from April 1, 2002, through March 31, 2003, and has been entered in the record as Joint Exhibit 1. Under article 10 of this collective-bargaining agreement Respondent paid pension and health and welfare benefits on behalf of unit employees into funds administered by the Kansas Building Trades also known as Kansas Construction Trade Funds. The amounts of these contributions are set forth in Article 12 of the collective-bargaining agreement. Thursday, April 10, 2003, was the last day that Todd Stewart and Daniel Caudell worked for Respondent. The last project that Stewart and Caudell worked on was the Southwestern Bell project in Derby, Kansas. It was further stipulated that Robert Dick was both a foreman on this project and a member of the Carpenters Union as is permitted. At the hearing the General Counsel, with no objections, amended the complaint to correct the dates appearing in paragraph 5A and 5B to April 10, 2003.

When the contract expired by its terms on March 31, 2003, the pension obligation and the health and welfare insurance (health insurance) coverage of the unit employees ceased. The employees learned of this curtailment of their benefits shortly thereafter. Employee Daniel Caudell learned of this when he tried to have a prescription for medicine filled and was told that his insurance was canceled. He confirmed this by a telephone call to the administrator of the Kansas Building Trades Funds. About a week prior to April 10, 2003, Caudell met with Respondent's president, Dave Foreman, to find out how his benefits would be affected by the expiration of the collective-bargaining agreement. Caudell had worked regularly for Respondent for 20 to 25 years. He had been subject to periodic layoffs for lack of work when construction was slow but had worked exclusively for Respondent, as he would be called back to work as work became available. He was a valued employee and had on occasion served as superintendent on Respondent's projects. Foreman assured Caudell that he would not lose anything when the contract expired. Respondent's general superintendent, Bradley Oxford, also assured employees including Caudell that they would not suffer any economic harm if the labor agreement expired and told them that the Respondent would pay the employees the money it had been paying to the benefit funds.

Following the expiration of the labor agreement most of the unit employees continued to work for Respondent with the Union's approval. It was not until early April that Caudell discovered he no longer had health insurance when he tried to have a prescription for medicine filled. Employee Todd Stewart also learned of the expiration of the labor agreement and his loss of health insurance, which was a matter of serious concern to him as he is a single father with partial custody of his son and he needed coverage to protect his son in the event of a need for medical care. On April 10, 2003, employees picked up their paychecks and Caudell found the fringe benefit contributions were not on his check and his check had not been increased by the amount of the benefit contributions as he had been assured by Foreman that it would be. Todd Stewart also found that his check no longer contained the fringe benefit contributions with no commensurate increase in his pay to compensate for the loss of the fringe benefits. Caudell asked Job Superintendent Bob Dick about this. Superintendent Dick told Caudell he did not know but would check with the office and left the Southwestern

ployees, guards and supervisors as defined by the National Labor Relations Act.

Bell jobsite where they were working to check with management. Later that morning General Superintendent Brad Oxford arrived at the jobsite and was initially approached by Todd Stewart who expressed his dissatisfaction with cancellation of his health insurance. The conversation between Oxford and Stewart became heated and Caudell joined the conversation and then began to ask Oxford why his check had not been increased to make up for the cost of the benefits, which he had previously received. Oxford told Stewart and Caudell that this was the way it was going to be and if they did not like it, they could quit. Steward told Oxford he was not going to quit and that Oxford would have to lay him off if they wanted to get rid of him. Caudell told Oxford that there were three choices, he could quit, Respondent could lay him off or they could fire him and that he was not going to quit and if Respondent fired him, he would file a lawsuit. During the course of this conversation, Caudell told Oxford that if this was the way it was going to be, alluding to the loss of benefits and no commensurate increase in his paycheck, that he might not be able to work as fast as he normally did. Steward made a joking comment that he was already going so slow that he did not see how he could slow down any. Oxford told them that a slowdown would be unacceptable. Oxford testified he then went to call Foreman on his cell phone and told him that Caudell and Stewart were threatening to slow down as a result of the loss of benefits. Foreman told Oxford to fire them. Oxford also told Foreman that Caudell had threatened to sue if he were fired. Foreman then told Oxford to lay them off and Oxford did so immediately and sarcastically said "Bye Bye" to them as they left the jobsite. Neither employee has since been recalled to work. There was a good deal of work available to be performed at the time as the work on the Southwestern Bell project had just begun.

Analysis

I find that employees Caudell and Stewart were engaged in protected concerted activities when Caudell joined Steward and commenced to voice his complaints about the loss of benefits and no commensurate increase in pay for the loss of benefits. Although I note that Stewart was more upset with the loss of his health insurance which covered his son, and Caudell appeared more upset about the lack of a commensurate increase in pay to enable him to purchase health insurance, they essentially joined together to protest the loss of benefits with the object of recovering the benefits or at least the amount of the contributions by Respondent to enable them to obtain benefits to replace the coverage they were losing. Thus, they were engaged in protected concerted activities for their mutual aid and protection. I find they were engaged in protected concerted activities under Section 7 of the Act. I find that the General Counsel has established a prima facie case of a violation of the Act by Respondent when it laid off its employees Stewart and Caudell with no intention of recalling them after they complained to Respondent with a goal of recovering their benefits. I find that Respondent has failed to rebut the prima facie case by the preponderance of the evidence. I find the discussion of a slow down by Caudell and the limited joking comments by Stewart concerning his inability to slow down were not so egregious as to lose the protection of the Act.

The Board in *Meyers Industries (Meyers I),* 268 NLRB 493 (1984), remanded sub. nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), noted that the concept of concerted action has its basis in Section 7 of the Act. Section 7 of the Act in pertinent part states:

> Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection.

The Board pointed out in *Meyers I* that although the legislative history of Section 7 of the Act does not specifically define concerted activity, it does reveal that Congress considered the concept in terms of individuals united in pursuit of a common goal. The statute requires that the activities under consideration be "concerted" before they can be "protected." As the Board observed in *Meyers I*, "Indeed, Section 7 does not use the term 'protected concerted activities' but only concerted activity." It goes without saying that the Act does not protect all concerted activity. With the above, as well as other considerations in mind, the Board in *Meyers I* set forth the following definition of concerted activity:

> In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.

In *Meyers Industries (Meyers II),* 281 NLRB 882 (1986), enfd. sub. nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), the Board made it clear that under the proper circumstance a single employee could engage in concerted activity within the meaning of Section 7 of the Act. The question of whether an employee has engaged in concerted activity is a factual one based on the totality of record evidence. See, e.g., *Ewing v. NLRB*, 861 F.2d 353 (2d Cir. 1988). The Board has found an individual employee's activities to be concerted when they grew out of prior group activity. *Every Women's Place*, 282 NLRB 413 (1986). An employee's activity will be concerted when he or she acts formally or informally on behalf of the group. *Oakes Machine Corp.*, 288 NLRB 456 (1988). Concerted activity has been found where an individual solicits other employees to engage in concerted or group action even where such solicitations are rejected. *El Gran Combo de Puerto Rico*, 284 NLRB 1115 (1987), enfd. 853 F.2d 966 (1st Cir. 1988). The Board has long held, however, that for conversations between employees to be found protected concerted activity, they must look toward group activity and that mere "griping" is not protected. See *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964).

In *Wright Line*, 251 NLRB 1083(1980), enfd. 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), the Board set forth its causation test for cases alleging violations of the Act that turn, as does the case herein, on employer motivation. First the General Counsel must persuade the Board that antiunion sentiment was a substantial or motivating factor in the challenged employer conduct or decision. Once this is established the burden then shifts to the employer to prove its affirmative defense that it would have taken the same action even if its employee had not engaged in protected concerted activity. See *Manno Electric, Inc.,* 321 NLRB 278, fn. 12 (1996).

Counsel for the General Counsel must demonstrate by preponderant evidence (1) that the employee was engaged in protected concerted activity; (2) that the employer was aware of the activity; (3) that the activity or the workers' union affiliation was a substantial or motivating reason for the employer's action; and (4) there was a causal connection between the employer's animus and its discharge decision.

Counsel for General Counsel may meet the *Wright Line* burden with evidence short of direct evidence of motivation, i.e., inferential evidence arising from a variety of circumstances such as union animus, timing or pretext may sustain the General Counsel's burden. Furthermore, it may be found that where an employer's proffered non-discriminatory motivational explanation is false, even in the absence of direct evidence of motivation, the trier of fact may infer unlawful motivation. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Fluor Daniel, Inc.,* 304 NLRB 970 (1991). Motivation of union animus may be inferred from the record as a whole, where an employer's proffered explanation is implausible or a combination of factors circumstantially support such inference. *Union-Tribune Publishing Co. v. NLRB*, 1 F.3d 486, 490–492 (7th Cir. 1993). Direct evidence of union animus is not required to support such inference. *NLRB v. S0-White Freight Lines, Inc.,* 969 F.2d 401 (7th Cir. 1992).

It is clear as discussed above that Caudell and Stewart were engaged in protected concerted activity when they voiced their protests to Oxford concerning the loss of their health insurance and the loss of their retirement and pension benefits and the lack of an increase in Caudell's paycheck in the amount the Respondent had been expending on the health insurance and pension benefits. As the General Counsel notes in his brief, these two employees were understandably upset by the loss of the benefits and had discussed the situation with themselves and with other employees. Under these circumstances, the statement by Caudell, an employee of more than 20 years, that if he was to be paid $5 less an hour he might not be able to work as hard as he had been was part of his protest and was not so egregious as to lose the protection of the Act. Stewart testified that he stated he did not believe he could work any slower in a joking reference to his normal rate of speed which was reputed to be slow. However there was no threat made by Stewart that he would slow down. Only after prolonged testimony on cross-examination did Oxford testify that Stewart had threatened to slow down. However this testimony is in conflict with the testimony of Foreman as well as that of Stewart as Foreman testified that Oxford reported to him that Stewart and Caudell were protesting their loss of health insurance and benefits and that Caudell had threatened to file a lawsuit if he were fired and had threatened to slow down. Foreman's testimony clearly did not support that of Oxford concerning Stewart's alleged threat of a slowdown and yet Foreman testified he had initially decided to fire Stewart and Caudell but decided to lay them off instead. Foreman did not testify that he had received any information whatsoever from Oxford that Stewart had threatened to slow down and yet Foreman made the decision to lay off Stewart as well as Caudell. This clearly demonstrates that Caudell and Stewart were laid off because of their protest of the loss of their health and pension benefits and at least in Caudell's case the lack of a corresponding increase in his paycheck to ensure that he not sustain any loss in pay as a result of the loss of health insurance and pension benefits as both Foreman and Oxford had assured him.

Applying the above-discussed relevant case law to the facts of this case, I find General Counsel has established prima facie cases of violations of Section 8(a)(1) by the layoffs of Stewart and Caudell with no prospects of recall by Respondent. Essentially Respondent discharged Stewart and Caudell as it had no intention of recalling them. Respondent admittedly termed the action as a layoff rather than a discharge as it perceived that this might fend off the possibility of a lawsuit which Caudell had threatened to file if he were discharged. The evidence is uncontroverted that Respondent discharged Caudell and Stewart because of their engagement in protected concerted activities when they complained about the loss of benefits. I find that the reference to a slowdown by Caudell and the limited comment by Steward concerning his inability to slow down were not so egregious as to lose the protection of the Act. I find that the Respondent had knowledge of Caudell's and Stewart's engagement in protected concerted activities, and that their discharge was motivated by Respondent's disdain for their engagement in the protected concerted activities. I further find that the Respondent has failed to rebut the prima facie cases by the preponderance of the evidence as it has not shown that it would have discharged them in the absence of their engagement in protected concerted activities. I find that the discussion of a possible slowdown by Caudell and Stewart was not so egregious as to cause them the loss of the protection of the Act. I also find that there was ample work available at the time of their discharge. *Wright Line,* supra.

CONCLUSIONS OF LAW

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

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

3. Respondent violated Section 8(a)(1) of the Act by discharging Daniel Caudell and Todd Stewart.

4. The above unfair labor practices in conjunction with Respondent's status as an employer affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

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

Respondent having discriminately discharged Daniel Caudell and Todd Stewart, shall be ordered to offer them reinstatement to their former positions, or if those positions no longer exist, to substantially equivalent positions and make them whole for any loss of earnings and benefits they sustained as a result of the unlawful discrimination against them less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]