

Webb-Centric Construction and Edward J. White.
Cast: 27-CA-6541

March 9, 1981

DECISION AND ORDER

On **November 4, 1980**, Administrative Law Judge **William L. Schmidt** issued the attached Decision in this proceeding. Thereafter, the General Counsel filed **exceptions** and a supporting brief, and Respondent filed an answering brief in support of the Administrative Law Judge's Decision.

The **Board** has considered the record and the attached **Decision** in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section **10(c)** of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, **dismissed** in its entirety.

¹ The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 *NLRB* 544 (1950), *enfd.* 188 *F.2d* 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge: This matter was heard by me on August 19, 1980, at Denver, Colorado. The complaint was issued on behalf of the General Counsel by the Regional Director for Region 27 on March 18, 1980, pursuant to a charge filed by **Edward J. White**, an individual, on January 31, 1980. The issues were joined by the answer of Respondent **Webb-Centric Construction**, which is dated March 27, 1980.

The essence of the complaint is that Respondent violated Section **8(a)(1)** of the Act by its discharge of **White** on **December 3, 1979**,¹ and its subsequent refusal to reinstate **White** because of his attempts to enforce the collective-bargaining agreement applicable to the unit of employees to which **White** belonged while he was employed by the Respondent. The answer admits most of the preliminary allegations of the complaint but denies that the Respondent engaged in the unfair labor practice alleged.

The General Counsel and the Respondent were represented at the hearing by able counsel. All parties were

¹ Unless specified otherwise, all dates refer to the 1979 calendar year.

afforded the opportunity to offer **relevant** evidence, to argue orally, and to file post-hearing briefs. On the basis of the record made at the hearing, my observation of the demeanor of the witnesses, and my careful consideration of the briefs filed on behalf of the General Counsel and the Respondent, I make the following:

FINDING OF **FACTS**

I. JURISDICTION

The Respondent admits that it is a joint venture, comprised of the Del E. Webb Corporation, an Arizona corporation, and the Centric Corporation, a Colorado corporation, engaged in the construction of a high rise office building in downtown Denver, Colorado, known as the Arco Center or Energy Center **II**. In addition, the Respondent admits that in the course of its business operations within the State of Colorado it annually purchases and receives goods and materials valued in excess of **\$50,000** directly from suppliers located outside of the State of Colorado. On the basis of the foregoing, the Respondent further admits, and I find, that it is an employer engaged in commerce within the meaning of Section **2(2)**, **(6)**, and **(7)**.

II. THE LABOR ORGANIZATIONS INVOLVED

The complaint alleges and the answer admits that the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, is a labor organization within the meaning of the Act. However, the gravamen of the complaint is that **White**, a member of Carpenters Local 2249, engaged in activities designed to obtain the benefits allegedly provided for by a collective-bargaining agreement wherein the labor organization party is the Carpenters District Council of Denver and Vicinity, acting on behalf of its affiliated local unions. At the Arco Center **jobsites**, representatives of Carpenters Local 55 serviced the aforesaid agreement and engaged in adjustment of grievances. Other evidence in this matter shows that the hiring hall arrangement established under the applicable agreement at this **jobsite** was regularly utilized by the members of Locals 55 and 2249 in seeking work and by the Respondent in seeking employees. On the basis of the record before me, I find that Carpenters Locals 55 and 2249, as well as the Carpenters District Council of Denver and Vicinity (hereinafter referred to individually and collectively as the Carpenters Union or the Union), are each labor organizations within the meaning of Section **2(5)** of the Act.

III. THE EVIDENCE

A. *Preliminary Matters and Contentions*

As noted above, the Respondent is engaged in the construction of a high rise office building in downtown Denver. This construction project is under the overall supervision of Ed Heybon. However, the personages pertinent to this dispute who served in managerial or supervisory positions at the **jobsite** include William J. Spies, classified as a general superintendent; Don Dowdy, classified as an assistant or an area **superintendent**.

ent; John Goodrich, classified as a carpenter foreman; and Leo Chea, classified as a laborer foreman. The evidence shows that Spies, who had served for a number of years in a supervisory or managerial capacity for the Centric Corporation, had been a member of the Carpenters Union for a period of approximately 10 years. At the time pertinent herein, both Dowdy and Goodrich were members of the Carpenters Union.² Likewise, it appears that the Centric Corporation regularly recognized the Carpenters Union as the exclusive representative of its carpenter employees on its various construction sites. The foregoing suggests that, at least insofar as this project is concerned, the direct project supervision was not hostile toward the principles of collective bargaining and the rights of employees to be represented by labor organizations. Other evidence not directly bearing on the incident giving rise to this dispute also indicates that the project management and representatives of the Union worked in a civilized fashion to resolve problems and to come to agreements about disputes on the project in a spirit reflecting a mutual respect for the respective interests of labor and management. In sum, the general atmosphere which was shown to prevail on this job is not characterized by a hard-boiled antiunion or antiemployee attitude on the part of the jobsite management and immediate supervision.

White was employed by the Respondent as a journeyman carpenter on October 8. At that time he was assigned to a crew comprised of four or five other journeyman carpenters working under the supervision of a temporary foreman, Ed Plato. Subsequently, in late October, Plato's crew was integrated with the other crew of carpenters who worked under Goodrich's direct supervision, so that all carpenters thereafter were directly supervised by Goodrich. During the period that White was employed on the Arco Center project by the Respondent, John Berry served as the carpenters' steward for the project. After White's termination, one of White's friends, Dave Faustin, was appointed as the carpenters' steward. There is no evidence of any hostility toward either Berry or Faustin as a result of their status as steward on the project.

Throughout the period that White was employed on the project approximately 22 other individuals were employed on the job as carpenters. Generally, the carpenter crew ranged from 8 to 12 carpenters, but for a period of 2 or 3 days, during Respondent's payroll period ending November 17, the crew of carpenters grew to 16, which was the largest complement of carpenters at any one time while White was employed on the project.

On November 29, White was laid off along with five other carpenters because of a temporary lack of work for those employees. The General Counsel does not question that this layoff was for other than economic reasons. The only carpenter employees retained on the job in the period from November 29 to December 3 were Goodrich and Berry. Commencing on December 3, the Respondent recalled or attempted to recall all of the carpenters laid off on November 29, except for White.

² Curiously, the collective-bargaining agreement involved here requires that all carpenter foremen must be union members.

White was informed on December 3 by Dowdy that he would not be recalled.

The General Counsel asserts that White was not recalled because of his efforts to enforce the collective-bargaining agreement applicable to the Respondent's carpenter employees on the jobsite. The Respondent asserts, generally, that the General Counsel has failed to meet his burden of proving that the Respondent refused to recall White by a preponderance of the evidence. According to the Respondent, White was not recalled because he did not work very hard and he enjoyed talking to the other carpenters.

B. *The General Counsel's Case*

The evidence presented by the General Counsel concerning White's attempts to enforce the collective-bargaining agreement involves three incidents which occurred in the course of White's employment at the Arco Center jobsite. Two incidents are related to work jurisdiction matters, and the third incident relates to the Respondent's method of payment at the time of the layoff on November 29.

During the period of White's employment on the Arco jobsite, one of the principal types of the work being performed by the carpenters was the erection of forms which served to retain and shape concrete foundation walls until the concrete set to a sufficient degree to retain the formed shape and support weight. Approximately 2 weeks after White was first employed, he observed certain laborer employees stripping the concrete forms from a poured concrete wall. As White considered this work to fall within the jurisdiction of the carpenters, he complained to Plato, his foreman at the time, about the utilization of laborers to strip forms, and Plato told White only that he did not "want to hear about it." Obviously unsatisfied, White also talked to one of the laborer employees engaged in the disputed work to make sure he knew what he was doing and the laborer told White that he was just doing what his foremen had told him to do. Subsequently, White protested to the laborer foreman, Chea, and Chea dismissed White's complaint by telling him to mind his own business. There is no evidence White pursued the matter further nor is there any evidence that the Respondent harbored any particular animosity toward White for voicing this complaint.

When White reported to work on October 29, Goodrich handed White two paychecks and told him that he was being laid off. When White asked for an explanation, Goodrich alluded to three specific reasons: White had been lounging behind a wall 2 days before smoking a cigarette; White's work was lax; and White had not shown up for work the previous day.³ When White protested further, the two men went to Dowdy about the layoff. Following a discussion with Dowdy (in which Dowdy took the position that the layoff was Goodrich's

³ White testified that he had not reported for work the previous day because he did not think anybody was going to show up that day due to the inclement weather. The inference warranted by the record is that White failed to notify the Respondent that he was not going to report for work on that occasion.

responsibility) **Goodrich** relented, tore up the checks, and permitted White to continue to work.

Approximately 2 weeks after the attempted layoff White **observed** laborers rigging concrete forms so they could be hoisted from an excavated area with a crane. White **believed** this work also belonged to the carpenters and on this occasion he expressed his view **initially** to Chea in Dowdy's presence. Once again, Chea told White to mind his own business. White responded by telling Chea that in that event he would have to call the carpenters' **business** representative. There is no evidence that Dowdy said anything during the course of this exchange. **Subsequently**, White went to the carpenters' steward, Berry, and told Berry about the laborers rigging the forms. In addition, White told Berry that this activity was "against the contract" and that he would like to see the matter cleared up. Berry told White he did not know whether **White** was right or wrong, but that he would look into the matter. Subsequently, at lunchtime that same day, White encountered **Goodrich** who told White that Berry had come to him about the rigging problem and that it would be **resolved**.⁴ There is no evidence that White pursued his rigging complaint further.

On the morning of November 29, **Goodrich** approached White and **Faustin** and advised them that it would be **necessary** to lay off the carpenter crew for a few days. At that time, **Goodrich** handed each of the employees a single check for their accumulated time to that day which included not only pay for the work performed during the current week, but also pay for the prior week's **work**.⁵ White complained to **Goodrich** that he should be given two checks—one limited to the pay for the previous week and another separate check for the current week's pay. At the hearing, White claimed that such a **procedure** is required by article 11(B) of the applicable **labor** agreement and the practice he has observed in his 20 years' experience as a **carpenter**.⁶

⁴ Insofar as this record shows, **Goodrich** initiated the discussion of the rigging **problem** at this time. There is evidence that the Respondent and a representative of Local 55 reached an accord about the division of rigging work between the laborers and the carpenters after White's termination.

⁵ Normally, employees at the **jobsite** are paid on Friday for work performed in the preceding week. The payroll for the previous week's work which was **prepared** in Phoenix, Arizona, had not arrived at the time of the layoff.

⁶ Art. 11(B) relied on by White provides:

(B) Payment of Employees. The Employer shall pay employees and in **full** for the payroll period. Each Employer shall designate a regular **workday** of the week as payday. All Carpenters employed by him **shall** be paid on **that** same day each week and will be paid on the job **before** quitting time. Payment shall be made by cash or negotiable **check** and within one (1) week following the end of the payroll period.

Violations of the above Paragraph shall be cause to give the Union a **right** to strike after twenty-four (24) hours of advance notice to the Employer unless good faith legal **justification** for nonpayment is **presented** in writing to the Union.

An employee who is discharged or laid off shall be paid in full at the time of **termination**. If, however, an employee is required to wait for his **pay** beyond the time limit set forth herein, he shall be paid eight (8) **hours** straight time pay for each twenty-four (24) hour period or fraction thereof. Thereafter, he must wait for his pay at the rate for the classification he holds on the payday.

When **any** man is to be laid off due to shortage of work or job completion, he shall be given one-half (1/2) hour's notice. Men **quit-**

White's reason for desiring two paychecks results from the fact that by lumping the pay for the two different weeks in a single paycheck, the amount of tax withholding is increased and the amount of take home pay is reduced. According to White, **Goodrich** told him to take the matter up with the office, meaning the payroll clerk. White proceeded to do as **Goodrich** suggested and when White arrived at the timekeeper's office he informed the timekeeper that a single check was "not acceptable." The timekeeper made a computation which showed that the single check made a \$36 difference in White's take home pay and remarked to White, "I really didn't realize that it made that big of a difference in the pay." Thereafter, the timekeeper complied with White's desire to have his accumulated pay broken into two separate checks. **Faustin**, who was present when White initially voiced his complaint to **Goodrich**, tended to some other business first and then went to the timekeeper's office about the same matter. The timekeeper complied with **Faustin's** request that he be given two checks also. According to **Faustin**, no one seemed particularly upset by this activity. Indeed, **Faustin** testified that the timekeeper even apologized to him.

The following Monday, December 3, **Faustin** was called by Dowdy and told to report back to work that day. Thereafter, **Faustin** telephoned White with the information that he had been called back to work and soon thereafter White telephoned Dowdy to inquire as to when he would be **recalled**.⁷ According to White, Dowdy told him at this time that because of the commotion that he had caused about the checks, he was not going to be recalled to the job. White testified that he explained to Dowdy his reasons for asking for the two checks citing the contract and the difference the tax withholding made in his take home pay. Upon hearing White's explanation, Dowdy apologized for the **single-check** incident, said that it was his fault, stated that he did not know that it made that much difference and then told White to come back to work the next day. However, approximately 20 minutes after the initial telephone conversation, Dowdy called White back and said, "Ed we're not going to use you on this job anymore." White testified that he simply said, "Thank you, Don" and the conversation ended. White did not ask for an explanation because he "realized what had happened."

The termination slip prepared for the December 3 separation of White recites that he was terminated as a

ting a job of their own volition will receive their pay in full on the next regular payday.

When the designated payday falls on a holiday, the succeeding workday shall be determined as the **official** payday.

The Employer agrees that with each **negotiable** paycheck it shall also provide the employees with a payroll stub containing the following:

1. Employer's name,
2. employee's name and social security number,
3. hours worked, regular and overtime,
4. payroll period.
5. gross amount of pay, and
6. deductions.

⁷ White testified that at the time of the November 29 layoff **Goodrich** took his home telephone number and, in response to White's question, told him that the layoff would last about a week.

result of a reduction in force. A summary of the Respondent's payroll records shows that all of the carpenters laid off on November 29 were recalled by the payroll period ending December 15 except Plato and White. Other evidence establishes that an attempt was made to recall Plato but that he had already obtained other employment. The same summary shows that two additional carpenters were laid off on November 28 and another carpenter was laid off on November 27. Other evidence shows that, at the time these latter three carpenters were laid off, the Respondent had no intention of recalling them although one of these individuals was reemployed by the Respondent in February 1980, but only after several other carpenters had been employed. In addition, the summary shows that two new carpenters—M. Slaughter and G. Saylor—were employed on December 6 and a third carpenter—R. Lindow—was employed on December 19. Nevertheless, the Respondent did not reach or exceed the complement of carpenters employed in its payroll period ending December 1 until mid-January 1980.

White testified that in the 20 years he has worked as a carpenter, he has never been terminated for any reason other than the lack of work. Faustin testified that from what he observed on the Arco Center jobsite White was a good worker.

C. The Respondent's Case

Respondent asserts that White's work was unsatisfactory and that is the reason White was not recalled from the November 29 layoff. In support of its contention, the Respondent called Spies and Goodrich as its sole witnesses. Assistant Superintendent Dowdy, who informed White of his final termination, was not called as a witness in this proceeding. Dowdy had been terminated by the Respondent approximately 2 months prior to the hearing. According to the representation made by Respondent's counsel, the whereabouts of Dowdy (whom the Respondent attempted to locate) at the time of the hearing was unknown.

Both Spies and Goodrich acknowledged that White had complained about the laborers stripping concrete forms and rigging forms. In addition, both of the supervisors acknowledged an awareness that White had complained about receiving only one check at the time of the November 29 layoff. More specifically, Goodrich testified that White asserted that the two-check requirement was a contractual right. Although Goodrich disputed this fact when he spoke with White on November 29, he readily acknowledged calling White a fool when he first raised the matter and that he subsequently checked the collective-bargaining agreement concerning this point.⁸

According to Spies, he was present in the jobsite office and overheard the December 3 telephone conversation wherein Dowdy told White to report back to work. Following the conclusion of this telephone conversation, Spies told Dowdy that it was his recommendation that White not be recalled as they had better employees coming to work. According to Spies, he was specifically referring to Slaughter and Saylor, whom

Spies described as key carpenter employees for the Centric Corporation. Spies testified that he had been informed during the previous week that Slaughter and Saylor were completing their work at another project and would be available to work at the Arco Center jobsite, if positions were available for them. Accordingly, Spies told Dowdy to take White's recall up with Goodrich and see what he thought. Spies said that Dowdy left the office for a short while and when he returned to the office, he told Spies that there was a mutual agreement not to recall White. Subsequently, Dowdy telephoned White in Spies' presence and advised White that he would not be recalled. Spies testified that he was convinced that White did not work up to his full potential every day and that he thought that it would be better to take a chance on new employees for improved performance.

Spies and Goodrich characterized White as a slow, deliberately paced worker who stood around too much and who engaged in excessive and unnecessary talking with the other carpenter employees. Although Spies and Goodrich were incapable on cross-examination of buttressing their opinion concerning White's work habits with examples complete with the "wheres and whens" of White's derelictions, I find on the basis of my observation of them as witnesses that there is no substantial reason to doubt their sincerity in this regard or their candor in general. The inability of Goodrich and Spies to recall with precision the first, second, or third time they observed White standing around or talking too much is as likely to be the product of the passage of time and the shortcoming of a normal human memory as opposed to a deliberate attempt to fabricate a story to cover up the discharge of White. Similarly, I am not satisfied that Spies and Goodrich are proven liars simply because of the lack of oral or written warnings prior to White's termination, where, as here, there is no evidence that the Respondent's supervisors at this jobsite made it a practice to forewarn experienced journeymen employees of their work deficiencies in any fashion and to thereafter accord them an opportunity to improve. To the contrary, Goodrich's attempted termination of White on October 29 is significant evidence of his misgivings about White's work.

The Respondent argues that a "many were called but few were chosen" policy existed at this jobsite. In this regard the Respondent contends that the practice at the Arco Center site was to hire a large number of carpenters, but to terminate carpenters on a regular basis who did not measure up to the standards which it required on this job. The summary of the Respondent's payroll records, both before and after the period of White's employment on this project, tends to support the Respondent's argument in this regard. Moreover, the evidence shows that Slaughter and Saylor were hired on December 6 and continued their employment with the exception of brief layoff periods up to the time of the hearing.

D. Concluding Findings

In *Wright Line, a Division of Wright Line Inc.*, 251 NLRB 1083 (1980), the Board articulated the test that it

⁸ White did not mention the "fool" remark in his testimony.

would employ in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. Under the test articulated in the *Wright Line* decision, the General Counsel is required to make a *prima facie* showing sufficient to support the inference that protected conduct was a motivating factor in the employer's action being examined. Once such *prima facie* case is established, the burden is shifted to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Id.* This shifting of burdens does not shift ultimate burden to the General Counsel to establish an unfair labor practice by a preponderance of the evidence. *Id.*, fn. 11. The allegation here is that the Respondent violated Section 8(a)(1) by its refusal to recall White on or about December 3, because of his protected concerted activity. As the result here turns on the Respondent's motive for refusing to recall White, the analytical approach of *Wright Line, supra*, applies.

The initial inquiry must be whether or not the General Counsel has established a *prima facie* case. The most compelling evidence in this regard involves White's request for two checks pursuant to his interpretation of the labor agreement applied on this job and White's version of the first December 3 telephone conversation with Dowdy. Although it is true that the evidence shows that Goodrich reacted initially by calling White a fool, he soon thereafter referred White to the payroll check, who—upon making a calculation—came to understand and accept White's point of view on this subject. The evidence most favorable to the General Counsel also indicates that Dowdy, who was ready to terminate White over the so-called paycheck commotion, acquiesced in White's view once he was aware of White's rationale for requesting two paychecks and appears to have dismissed this as a reason for not recalling White. Hence, the demonstrated animosity over the paycheck incident was significantly diminished, if not completely extinguished, by the credible evidence presented in this case. Moreover, there is no evidence that the Respondent harbored any ill will toward White over the work jurisdiction matters. When the foregoing is considered against the background of a generally amicable labor relations climate on this jobsite, it becomes clear that the General Counsel's *prima facie* case is tenuous, at best.

The essence of the Respondent's case is that it was not wholly satisfied with White's performance. The mixture of circumstances, including the need for a layoff on November 29 and the availability of other Centric carpenters at that particular time, suffices to forcibly explain the timing of White's separation. Moreover, the inference

the General Counsel would have me draw that the first attempt to discharge White resulted from his single complaint about a work jurisdictional matter is not warranted and, consequently, the first attempt to terminate White in October lends support to the position advanced by the Respondent that it was not entirely satisfied with White's work performance.

Succinctly summarized, I find, in agreement with the Respondent, that the General Counsel has failed in his ultimate burden of proving this case by a preponderance of the evidence because the nexus between White's discharge and his protected activity—a case substantially weakened at the outset by only minimal, if any, evidence of hostility—is not sufficient to overcome the more plausible explanation that the Respondent was merely making room for the employment of other individuals it had reason to believe would be more qualified. Accordingly, I shall recommend that the Board dismiss the complaint in its entirety.

CONCLUSIONS OF LAW

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

2. Carpenters District Council of Denver and Vicinity and Carpenters Locals 55 and 2249 are labor organizations within the meaning of Section 2(5) of the Act.

3. On or about December 3, 1979, the Respondent terminated Edward J. White, and since that date the Respondent has failed and refused to reinstate Edward J. White to his former position.

4. The General Counsel has failed to establish by a preponderance of the evidence that the Respondent's conduct specified in paragraph 3, above, violated the Act.

Pursuant to Section 10(c) of the Act, and upon the foregoing findings of fact, conclusions of law, and the entire record herein, I hereby issue the following recommended:

ORDER⁹

It is hereby ordered that the complaint herein be, and the same hereby is, dismissed in its entirety.

⁹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.