

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

YELLOW FREIGHT SYSTEMS, INC.

and

Case 9-CA-33908

WILLIAM STEPHENSON, An Individual

*Patricia Rossner Fry, Esq.*, for the General Counsel.  
*Ronald E. Sandhaus, Esq.*, of Overland Park, KS,  
for the Respondent.

DECISION

Statement of the Case

RICHARD A. SCULLY, Administrative Law Judge. Upon a charge filed on May 21, 1996, by William Stephenson, an individual, the Regional Director, Region 9, National Labor Relations Board (the Board), issued a complaint on August 12, 1996, alleging that Yellow Freight System, Inc. (the Respondent), had violated Section 8(a)(1) of the National Labor Relations Act, as amended (the Act), by discharging Stephenson because he engaged in protected concerted activity. The Respondent filed a timely answer denying that it had committed any violation of the Act.

A hearing was held in Columbus, Ohio, on January 14, 1997, at which all parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument. Briefs submitted on behalf of the General Counsel and the Respondent have been given due consideration. Upon the entire record, and from my observation of the demeanor of the witnesses, I make the following

Findings of Fact

I. The Business of the Respondent

At all times material, the Respondent was a corporation engaged in the transportation of freight from its facility in Columbus, Ohio. During the 12-month period preceding August 1997, the Respondent in the conduct of its business has derived gross revenues in excess of \$50,000 from the transportation of freight in interstate commerce. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

The Respondent's employees in Columbus, Ohio, are represented for the purposes of collective-bargaining by Teamsters Local No. 413, an affiliate of the International Brotherhood of Teamsters, AFL-CIO (the Union). The Respondent admits, and I find, that at all times material the Union was a labor organization within the meaning of Section 2(5) of the Act.

### III. The Alleged Unfair Labor Practices

William Stephenson has been employed by the Respondent since August 1986, starting as a road driver. He suffered a work-related back injury in August 1991 and was off on worker's compensation until February 1993. After three months back on the job, he was injured again and was off on compensation for about six months. He returned to work in December 1993 but, as he was medically disqualified from road driving, he was placed in a lower paying yard driver position. Stephenson testified that he learned about a State of Ohio rehabilitation wage loss program under which he would be paid two-thirds of the difference between his former wage and the lower rate he was receiving as a yard driver for a period of 200 weeks. He applied for this benefit and eventually began to receive it. The benefit is paid to Stephenson by the Respondent which is reimbursed by the State. He testified that he has discussed the program with a number of other road drivers who were similarly situated, i.e., working in the yard at a lower wage due to medical problems. When they came to him and asked about it, he told them about the wage loss program and showed them copies of papers he had concerning it. During the summer of 1995, he did not work during July and August due to problems with his back. At about that time, he and another individual started an excavating business. He testified that he owned a dump truck and a backhoe for which he hired an operator since he did not know how to operate it. In September 1995, he took himself out of service due to a depressive disorder. He continued to receive the wage loss benefit but not worker's compensation. By letter dated December 14, 1995, the Respondent informed Stephenson that he was being terminated, effective December 15, "for proven dishonesty." He filed a protest through the Union and at a meeting on the protest he was told by the Respondent's labor manager Noble Jackson that the "dishonesty" referenced in the letter involved his having been observed performing work while he was off his job with the Respondent and receiving worker's compensation. Stephenson explained that he was not receiving worker's compensation but only the wage loss benefit. Jackson said that they wanted to continue to investigate the matter because they did not have all this information. Thereafter, he received another letter, dated December 29, 1995, informing him that he was discharged, effective that date, for falsifying his employment application.<sup>1</sup>

The complaint alleges that Stephenson was discharged in violation of Section 8(a)(1) of the Act because he had engaged in the protected concerted activity of informing other employees about the rehabilitation wage loss benefit program and how to obtain those benefits. The General Counsel contends that the alleged reasons given for Stephenson's discharge are pretextual in that (1) he was not guilty of any dishonesty and (2) the Respondent has been aware of the falsification of his employment application since 1992 but took no action against him at that time.

### Analysis and Conclusions

<sup>1</sup> The evidence indicates that the Union filed a grievance over Stephenson's discharge and that it was determined that he could not be discharged while he is off work due to medical problems so there has been no determination on the merits of the grievance. The Respondent's position is that the discharge letters have been issued and that the grievance process will resume once Stephenson is medically able to return to work.

5 In cases where an employer's motivation for a personnel action is in issue, it must be analyzed in accordance with the test outlined by the Board in *Wright Line*, 251 NLRB 1083 (1980) enfd 662 F. 2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must persuade the Board that animus toward protected activity on the part of the employee was a substantial or motivating factor in the employer's decision. Once that has been done, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected activity on the employee's part. *Manno Electric*, 321 NLRB 278, 280 at fn. 12 (1996).

10 The General Counsel's prima facie case is established by proof of protected activity on the part of the employee, employer knowledge of that activity and employer animus toward it. *W.R. Case & Sons Cutlery Co.*, 307 NLRB 1457, 1463 (1992); *Associated Milk Producers*, 259 NLRB 1033, 1035 (1982). The evidence shows that Stephenson had taken advantage of the rehabilitation wage loss program and had discussed it with and advised other employees about it, specifically, James Barker and Michael Hindman. The Respondent does not dispute that these actions related to the assertion of a right grounded in the collective-bargaining agreement between it and the Union or that it constituted protected activity under *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966) and *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). It is also clear that those actions were related to the employees' efforts to obtain benefits arising out of their employment situation and were protected under the Act. E.g., *S & R Sundries, Inc.*, 272 NLRB 1352, 1357 (1984); *Supreme Optical Co.*, 235 NLRB 1432, 1433 (1978).

15 There is evidence that the Respondent's injury counselor, Frank Pagnatta, had knowledge that Stephenson had been discussing the wage loss rehabilitation program and how to go about obtaining its benefits with other employees. James Barker credibly testified that he told Pagnatta that Stephenson had informed him of the possibility that he qualified for the benefit before he applied for it. Eugene Dollins credibly testified that, during a conversation about his application for the benefit, Pagnatta said that Stephenson had been telling people about it and asked if he had told Dollins about it. When Michael Hindman met with Pagnatta to discuss his eligibility for this benefit, Stephenson accompanied him to the meeting. The Respondent denies that Pagnatta was its agent and that it can be charged with the knowledge that he had about Stephenson's protected activities.

20 The evidence shows that Pagnatta was a former shift operations manager who served in the position of injury counselor from May 1992 until May 1996. In that position he was involved in the administration of the Respondent's workers' compensation control program and served as the liaison between it and injured workers. His responsibilities included investigation of employees' injuries, contacting the employees' treating physicians and monitoring the treatment of employees during the recovery process, and assisting injured employees to participate in the Respondent's transitional return-to-work program. The latter responsibility included approving employees' requests to enter the program, informing them of their return dates and the jobs to which they had been assigned, and monitoring their progress in the program. The Board applies common law principles in deciding whether an employee is an agent of the employer. *Southern Bag Corp.*, 315 NLRB 725 (1994). The test is whether, under all the circumstances, an employee would believe that Pagnatta was reflecting company policy and was speaking and acting for management. I find that in the position of injury counselor Pagnatta was an authoritative communicator of information concerning worker's compensation and the transitional return-to-work program and that the Respondent's employees would reasonably view him as its agent in such employment-related matters. Since Pagnatta was an agent of the Respondent, his knowledge is imputed to it. *Pellegrini Bros. Wines, Inc.*, 239 NLRB

1220 (1979); *Grand Rapids Die Casting Corp.*, 831 F. 2d 112, 117 (6th Cir. 1987). It can also be inferred that Pagnatta made his superiors aware of what he had learned concerning Stephenson's telling other employees about and assisting them in applying for the rehabilitation wage benefit. His duties required him to communicate necessary information concerning workers' compensation issues to management and the evidence shows that it was Pagnatta who provided management with the information on which Stephenson's discharge was assertedly based, i.e., his allegedly performing physical work while collecting worker's compensation and his falsification of his employment application. In addition, Jim McDonald, manager of the Columbus distribution center, had knowledge of Stephenson's protected activity. McDonald testified that, in 1994, while he was investigating an allegation of a threat by Stephenson to another employee, he asked why Stephenson was on the dock at the time of the alleged incident when he was supposed to be working in the yard. Stephenson told him that he had been on the dock talking to some people about the rehabilitation wage benefit.

The remaining question is whether there is evidence of animus on the part of the Respondent which is sufficient to support the inference that it was a motivating factor in the decision to discharge Stephenson. There must be a nexus between that decision and the employer's animus, which must be strong enough to support the conclusion that it was willing to violate the law in order to put a stop to such activity. See *Rayse/IDE, Inc.*, 284 NLRB 879, 880 (1987). Here, the only direct evidence of such animus is the alleged statements by Pagnatta and McDonald to the effect that the Respondent was unhappy about Stephenson's telling employees about the rehabilitation wage benefit. There is also some indirect evidence, i.e., the weakness of the reasons given by the Respondent for discharging Stephenson. Considering all this evidence, I find that it fails to establish that the decision to discharge Stephenson was motivated by animus toward his engaging in protected activity.

Robert Taylor has been employed by the Respondent for 10 years and has served as a union steward. Taylor testified that sometime around 1995 he had a conversation in which Pagnatta told him that Stephenson was "making waves" by telling too many people about their rights to draw the rehabilitation wage benefit and that the company "was going to get him" because it "could not continue to pay these wages." He also testified that in 1996, after Stephenson had been investigated for worker's compensation fraud, McDonald told him that the Respondent was going to fire Stephenson and said that he did not have a problem with him, but that "Kansas City<sup>2</sup> wanted Bill Stephenson" because he was "causing waves" about the wage benefit and was "muddying the water."

Stephenson testified that in the late summer or fall of 1994 Pagnatta told him that he "opened a whole can of worms" by telling other employees about the rehabilitation wage loss benefit, that it was "costing the company a lot of money," and that a lot of people were "upset" with him. He also testified that in a conversation they had on March 22, 1996, McDonald told him that he had "opened a big can of worms" in connection with the rehabilitation wage benefit, "that it cost the company a lot of money," that Kansas City was out to get him, and that he was not coming back to work at Yellow Freight.

Notwithstanding the fact that the above-mentioned testimony of Taylor and Stephenson was not directly contradicted, I do not credit it. Although Taylor is a current employee of the Respondent and would not directly benefit from a finding against it in this proceeding, after observing his demeanor while testifying and considering the content of his testimony, I did not

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<sup>2</sup> A reference to the Respondent's headquarters in a suburb of Kansas City, Kansas.

believe him. His animosity towards the Respondent was evident throughout his testimony in which, inter alia, he twice interjected that company officials had “conspired” to fire him from transitional work, claimed that he was on a company “hit-list,” and asserted that Pagnatta must be intelligent because “he quit Yellow.” I find that this offsets the enhanced credibility to which his current employment status might otherwise entitle him. See e.g., *Stanford Realty Associates*, 306 NLRB 1061, 1064 (1992); *K-Mart Corp.*, 268 NLRB 246, 250 (1983). I also find it unlikely that both Pagnatta and McDonald, on different occasions a year apart, would confide in him why Stephenson was being fired and that in doing so they would both use almost identical language. Moreover, in an affidavit Taylor gave to the Board in August 1996, he failed to mention McDonald’s statement about Stephenson’s causing waves although it allegedly happened earlier that same year. Likewise, I found the self-serving testimony of Stephenson that both Pagnatta and McDonald, on different occasions years apart, made almost identical statements concerning the Respondent’s alleged animus towards Stephenson’s protected activity, to be incredible. Such testimony, even where uncontradicted, need not be treated as conclusive. *David’s*, 271 NLRB 536, 538 at fn. 17 (1984). I find more probative and persuasive the fact that, although both Taylor and Stephenson claimed that the only asserted reason that the Respondent was upset with Stephenson for telling employees about the rehabilitation wage benefit was that it was costing it too much money, there is no evidence that was the case. On the contrary, the credible testimony of Brett Miller, an attorney licensed to practice in Ohio who has specialized in worker’s compensation matters for 15 years, was that all payments the Respondent made under the rehabilitation wage program were fully reimbursed by the State of Ohio. In fact, the Respondent saves money by having an injured employee come back to work under the rehabilitation wage program, since if he remains off work on temporary total disability, it has to pay him worker’s compensation and pay another worker to perform the job he would have performed. As explained by Miller, “the rehabilitation program is available . . . to create an incentive to the employer to bring their employees back. It lets the employer save money and its good for the employees to get back into the work environment as quick as possible.” Miller also testified that in his experience it is common practice for counselors at the Ohio Division of Worker’s Compensation to inform workers about the benefits they are eligible for, including, the rehabilitation wage loss benefit.<sup>3</sup>

Considering all of the foregoing evidence, I find no reason to believe that Pagnatta or McDonald made the statements concerning the Respondent’s alleged animus towards Stephenson attributed to them by them by Stephenson and Taylor. I also find no basis to draw an adverse inference from the Respondent’s failure to call Pagnatta as a witness to deny the statements attributed to him. He left its employ in May 1996 and there is nothing in the charge or complaint to indicate that statements attributed to him would be an issue at the hearing. As for McDonald, although he was not specifically asked about his alleged statement to Taylor that Stephenson was “causing waves,” his testimony that he told Taylor that the matter of Stephenson’s discharge was “out of his hands” is essentially the same as what Taylor attributed to him in his affidavit, discussed above. In the case of the remarks attributed to him by Stephenson, McDonald admitted telling him that there were people who were mad at him, but said he did not “recall” saying they were mad because he was telling people about compensation benefits. Having observed him as a witness, I do not believe he was attempting to evade the question or that his choice of words can somehow rehabilitate Stephenson’s discredited testimony about the conversation.<sup>4</sup>

<sup>3</sup> Eugene Dollins testified that he learned about the program from that source.

<sup>4</sup> His statement about people being “mad” at Stephenson is consistent with the fact that the Respondent was attempting to discharge him but does not imply what they were mad about.

Finally, the weakness of an employer's reasons for discharging an employee is a factor to be weighed in determining whether the action was unlawful. *Briarwood Hilton*, 222 NLRB 986, 991 (1976). Here, both reasons given for Stephenson's discharge are weak. The first, that he was guilty of "proven dishonesty" because he was observed performing physical work at a time when he was off on worker's compensation, appears to have been incorrect. Its conclusion was apparently based on an inadequate investigation, as well as a misunderstanding of what benefits Stephenson was receiving. The second, his admittedly false work application, in which he failed to disclose a criminal conviction, had been brought to the attention of supervisor Bob Gifford in a 1992 meeting attended by Stephenson and several Union representatives without any adverse action being taken against him. At that meeting, Gifford said that it had happened a long time ago and there was no need to worry about it.<sup>5</sup> However, the fact that the Respondent's stated reasons for discharging Stephenson are weak or discredited, without more, does not affirmatively establish that he was discharged in violation of the Act. *Garrett Flexible Products*, 270 NLRB 1147, 1148 (1984). It is well recognized that an employer is free to run its business as it pleases and can discharge an employee for a good reason, a bad reason, or no reason at all so long as it does not do so for an unlawful reason. See *Wright Line*, supra, at 1084. I find that Stephenson's discharge has not been shown to be unlawful under the Act because the General Counsel has not established by a preponderance of the evidence that the Respondent was motivated by animus towards him for engaging in protected activity. Accordingly, I shall recommend that the complaint be dismissed.

#### Conclusions of Law

1. The Respondent, Yellow Freight System, Inc., is an employer engaged in commerce 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. The Respondent did not commit the unfair labor practices alleged in the complaint.

Upon the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended

#### ORDER<sup>6</sup>

The complaint is dismissed in its entirety.

Dated, Washington, D.C. November 7, 1997

<sup>5</sup> This finding is based on the credible testimony of union steward and long-time employee Wilson Raver which I credit over Gifford's lack of recollection as to whether such a meeting occurred.

<sup>6</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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Richard A. Scully  
Administrative Law Judge

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