

K. T. Metal Finishing d/b/a Electro-Plating Specialties, Inc. and Steven Montano. Case 32-CA-254 (formerly 20-CA-13085)

May 30, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO
AND TRUESDALE

On December 23, 1977, Administrative Law Judge David G. Heilbrun issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The facts, as more fully set forth in the Administrative Law Judge's Decision, show basically the following:

On June 1, 1977, Steven Montano, an employee of Respondent, was scheduled to make a delivery of parts to one of Respondent's customers, Ran-Rob, Inc. The employees of Ran-Rob were engaged in a lawful strike authorized by Local 1518, International Association of Machinists and Aerospace Workers, AFL-CIO, against their employer. When Montano approached the entrance to Ran Rob in his truck, approximately 12 striking employees, patrolling the entrance, urged him not to cross the picket line. Montano testified that he then drove to the rear of the business premises, turned around, and drove away without making the scheduled delivery.

Officials of Ran-Rob immediately called Respondent to inform it that the scheduled delivery of parts had not been made. These calls were received by Respondent's secretary, Maria Romani, who informed Montano of the calls when he returned to the office, and also stated that Respondent's president, Tom Davis, would not be pleased by Montano's failure to make the delivery to Ran-Rob. The credited testimony of Romani shows that Montano then uttered a profanity aimed at Davis and Respondent's vice president, Robert Hall, and then left the office.¹

Later on the same day, Romani informed Davis

¹ According to Romani, Montano said, "F— Tom (Davis) and Bob (Hall), because I don't give a God damn." Montano himself specifically denied making the statement attributed to him by Romani.

that Montano had not made the delivery to Ran-Rob, and also related Montano's profane remarks. When Davis arrived at Respondent's premises, he approached Montano and asked what had happened at Ran-Rob. Montano, attempting to explain, replied that he was sorry, but Davis responded by saying that sorries were not enough this time, and discharged Montano immediately.

Based on the foregoing, the Administrative Law Judge found that the discharge was not discriminatorily motivated, but instead was in response to Montano's vulgar remarks made upon his return from the scheduled Ran-Rob delivery. We disagree.

As found by the Administrative Law Judge, the profanities uttered by Montano were not mentioned by Davis at the time he discharged Montano. It is undisputed that Davis inquired about the nondelivery to Ran-Rob, and then stated, "If it bothered you so much you should have said something before you left. This time its going to cost you your job." The Administrative Law Judge construed Davis' use of the phrase "this time" as being a reference to Montano's profane remarks. However, as noted by the General Counsel in his brief, such a construction would be logically and textually inconsistent. Davis made no reference to the alleged profanities when he approached Montano, but instead, prefaced the "this time" statement with a question about the Ran-Rob delivery. Clearly, if the real reason for Montano's discharge was the utterance of vulgar remarks to Romani, this reason was not communicated to Montano at the time of his discharge, and we have consistently held that an employer's failure to state a reason for discharge at the time of an employee's termination gives rise to at least an inference that the reasons advanced are in fact pretextual.²

Above and beyond the foregoing, a written statement by Respondent's president, Davis, to the California Employment Development Department, stating that one of the reasons for Montano's termination was because Montano had "jeopardized our largest account by not delivering a badly needed shipment of parts," is instructive regarding the *real* reason for the discharge. This same statement, submitted some 6 weeks after Montano's discharge, made no mention of Montano's remarks to Romani as a factor in causing the discharge. Indeed, in an affidavit given to the Board Agent during initial investigation of the charge in this case, Davis again advanced the nondelivery of parts to Ran-Rob as the sole reason for Montano's discharge.

It is well established that employees engage in protected concerted activity when they respect a lawful picket line established at the premises of another em-

² See *Inland Motors*, 175 NLRB 851 (1969).

ployer.³ We have held that an employer may replace (although not discharge) an employee for refusing to cross a picket line, but only in circumstances where the sole reason for the replacement is the continued efficient operation of its business.⁴ Initially, we note that there is no claim made by Respondent that its efficiency was impaired by Montano's failure to make the scheduled delivery. Indeed, the record reveals that the disputed delivery was made later the same day by another employee, and Respondent's business was not disrupted in any significant aspect. More importantly, however, it is clear that Montano was not merely replaced, but flatly discharged for his refusal to cross the picket line. This was a violation of employee Section 7 rights, even under the principles enunciated in *Redwing Carriers*.⁵

On the basis of the foregoing, we find that the reasons advanced at the hearing on this matter for the discharge of Montano were pretextual in nature, and that Respondent discharged Steven Montano for his failure to cross a lawful picket line. Accordingly, we conclude that by discharging Montano Respondent violated Section 8(a)(3) and (1) of the Act.

THE REMEDY

We have found, contrary to the Administrative Law Judge, that Respondent engaged in certain unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by discharging Steven Montano on June 1, 1977, for engaging in protected activities. In our opinion, it is necessary in order to effectuate the purposes of the Act that Respondent be ordered to cease and desist from engaging in such unfair labor practices and to reinstate Steven Montano to his former job, or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges. We shall also order Respondent to make him whole for any loss of earnings he may have suffered because of the discrimination practiced against him by payment to him of a sum equal to that which he normally would have earned from the date of the discrimination to the date Respondent offers him reinstatement, less his net earnings during that period. Backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).⁶

³ *Overnite Transportation Company*, 154 NLRB 1271 (1965).

⁴ *Montana-Dakota Utilities Co.*, 189 NLRB 879, 882 (1971).

⁵ *Redwing Carriers, Inc. and Rockana Carriers, Inc.*, 137 NLRB 1545 (1962); *Torrington Construction Company, Inc.*, 235 NLRB No. 211 (1978).

⁶ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

CONCLUSIONS OF LAW

1. K. T. Metal Finishing d/b/a Electro-Plating Specialties, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discharging Steven Montano for engaging in protected concerted activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, K. T. Metal Finishing d/b/a Electro-Plating Specialties, Inc., Hayward, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, and discriminating in regard to hire, tenure, and other terms and conditions of employment by discharging employees because they engaged in protected concerted activities.

(b) In any other manner interfering with, restraining, and coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action:

(a) Offer Steven Montano immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay which he may have incurred by reason of Respondent's discrimination against him in the manner described in "The Remedy" section of this Decision.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its place of business in Hayward, California, copies of the attached notice marked "Appendix."⁷ Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly

⁷ In the event that 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 Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

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

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the National Labor Relations Act or discriminate against them for engaging in protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by the Act.

WE WILL offer Steven Montano immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, and we will make him whole for any loss of earnings suffered by reason of his unlawful discharge, with interest.

K. T. METAL FINISHING d/b/a ELECTRO-
PLATING SPECIALTIES, INC.

DECISION

STATEMENT OF THE CASE ¹

DAVID G. HEILBRUN, Administrative Law Judge: This case was heard at Oakland, California, on November 15, based on a complaint alleging that K. T. Metal Finishing d/b/a Electro-Plating Specialties, Inc., herein called Respondent, violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, by discharging Steven A. Montano because he chose to honor a lawful picket line at the premises of another employer, or because he engaged in other concerted protected activities for the purposes of collective bargaining or other mutual aid or protection.

¹ All dates are in 1977

Upon the entire record, my observation of the witnesses, and consideration of General Counsel's brief, I make the following:

FINDINGS OF FACT AND RESULTANT CONCLUSION OF LAW

On June 1, Steven Montano, employed primarily as a truckdriver, appeared with a delivery at Respondent's customer Ran-Rob.² Production employees of that firm, including Montano's mother, were lawfully on strike as members of Machinists Union 1518, International Association of Machinists and Aerospace Workers, AFL-CIO, and about a dozen pickets patrolled the vehicular entrance.³ Montano was importuned not to deliver but, at behest of a Ran-Rob representative, drove through toward the rear of these business premises. Loud jeering followed and Montano, flustered and uncertain, turned around and left unloaded. Ran-Rob officials immediately telephoned their dismay to Respondent's office, the calls being received by secretary Maria Romani. Shortly Montano arrived back, entered the office, and was told of the calls by Romani who alluded to Respondent's president, Thomas Davis, by adding Tom wouldn't like it. Montano testified that at this point he said, "sorry [but] someone else [would have to make the delivery because he was] honoring the picket line." Romani's contrary testimony credibly recounts how her opening remark heightened an already upset mood in Montano and he said, "Fuck Tom and Bob (Respondent's Vice President Robert Hall) because I don't give a God damn. I can get a better job any place else." She added that he then ranged angrily around the office for a few moments, and exited to the production area, cursing as he did.⁴

Shortly thereafter, Romani was summoned to a nearby restaurant where Davis needed transportation back to his office. In the several minutes of a drive back, she referred to Ran-Rob calling (and why) as a lead-in to describing the freshly-experienced conversational exchange with Montano. Davis listened without significant comment and, upon reaching the shop, hurried in to speak briefly with a fore-

² Respondent is engaged in electro-plating at Hayward, California, annually purchasing and receiving goods valued in excess of \$50,000 from suppliers located in California which had obtained such goods directly from sources outside California, while providing services valued in excess of \$50,000 to customers located within California, each of which in turn met a jurisdictional standard of the Board other than nonretail indirect inflow or indirect outflow. I find that Respondent is an employer within the meaning of Sec. 2(6) and (7) of the Act.

³ Respondent has not denied that Local 1518 is, as alleged, a labor organization within the meaning of Sec. 2(5) of the Act, and I so find. I disregard that portion of Respondent's answer to the complaint which "concur[s]" with par. VIII, as based on obvious inadvertence or misunderstanding.

⁴ I fully credit Romani over Montano as to this conversation occurring solely between the two. Demeanor factors strongly favor her version, as she displayed a persuasively composed appearance of carefully recalling utterances heard during the unwelcome episode. She framed the exchange in a highly realistic sense of having intended only to forewarn Montano that he *might* expect censure about the undelivered Ran-Rob order. She restrained, consistently, and believably described Montano's exact utterances, delineating carefully between his stormy mood and her own hope that he quickly pass from her presence. Montano's differing testimony that he innocuously replied to her comment is thoroughly discounted. He was vague, hesitant, and appeared hopelessly forgetful of details, all rather understandable in context of his having been abruptly cast into a situation of distasteful ramifications.

man. He then approached Montano, asked what happened at Ran-Rob, and upon Montano's reply that he was sorry, said sorries were not enough because this time he was through.⁵ This effected a discharge, although Montano answered back that Respondent would be taken to court. Shortly afterward Montano relinquished credit cards and keys. Davis took these, saying there were many things Montano did not understand about the action. Montano, himself still disturbed and inclined not to talk, mustered a "see you in court" and left. The next day Montano reappeared to pick up his check. Davis asked if they would be seeing each other in court, and Montano indicated not as he left.

Superficially, this case invokes classic doctrine plainly settled under *Overnite Transportation Company*, 154 NLRB 1271 (1965). However, actuality of the situation shows otherwise. Business justification and burden of proof principles of that case do not address the threshold question here. Davis, as Respondent's chief actor, has asserted vigorously that the discharge of Montano was unrelated to the failure of delivery, but based solely on the jarringly profane name-calling Romani heard applied to him and his co-officer Hall. Ordinarily, one might find this reason gaggingly hard to accept in hard-driving milieu of the metals processing industry. But judgmental factors, ethical precepts, or peculiarly personal reaction syndromes must not subordinate to the mere substitutional view of another. The test is in proof; evidence of purpose, result, or motivation. General Counsel has amply established indicators neatly harmonious with *Overnite*. Other persons were conveniently present to supply Ran-Rob, relations with this prominent customer were prudently important and, most significantly, Davis prefaced his discharge of Montano with vernacularly explicit reference to the nondelivery. I find a fatal flaw in the allegations, however, because no affirmative evidence elevating the case beyond mere suspicion has emerged. General Counsel relied on the syllogistic notion that service employers in the manufacturing chain sorely dislike employees honoring a picket line at a struck customer's premises. This happened here; ergo, *Overnite*. Naturally, the case is radically different were Montano to have been credited over Romani but, even without that, an argument may still be made that Davis' hypersensitivity is mere pretext. In this sense, his statement of position as Respondent's formal representative and his own testimony tend to intertwine for decisional purposes. Harking again to the error of substituting values, I believe that what remains of General Counsel's case carries a faulty premise.

The vice is in any automatic assumption, that an employer would be so perturbed over nondelivery when its truck was physically beyond a picketing ambit that human-

ly this factor could not but be an influence in the discharge following shortly. This issue of the case, therefore, devolves to whether Davis truly and *fully* separated honoring of the picket line from his personal affrontation (and surrogately so for Hall).⁶ This must be evaluated from the standpoint of his overt behavior and subsequent secondary indicators. Davis testified that his predischarge approach to Montano was cunningly intended to ferret out whether the latter "was going to have the nerve" to exactly repeat the hated words. When not, the discharge followed with Davis intending his reference to sorrieness to mean verbal disparagement of the day, and chronically so before. Disingenuous as this may have been, it is not outside the range of what a person might do. More pointedly, I believe it is exactly what Davis did do as an individual figuratively wounded by knowledge he was publicly labled one of "two fuckers." General Counsel parries this with contents of Davis' investigatory affidavit, in which the point is not really explained in those terms. Davis' response to this, then and still unrepresented by counsel, is that he felt "enough reasons" had been set forth and chose not to refine the affidavit's theme.

The essential dynamics of the case were compressed into a 1/4-hour span between Romani telling Davis what Montano said (assertedly triggering a conscious intention to discharge Montano) and the brief conversational exchange at the shop that followed. Concerning all this, a broad credibility issue (whether Davis is telling the truth when he now finally explains his subjective motivation) is intertwined with typical evaluation of whether some pretext has been advanced. After careful reflection on Davis' demeanor and the elements of his explanation, I am firmly satisfied that at the hearing he for the first time voiced precisely how the eventful quarter hour was spent *from his standpoint*. I believe he hastily equated the utterance "fuck" with personal treachery and, regardless of any long-range potential for flexibility, resolved to punish Montano with termination on whatever spot he first found him. The supposedly marginal nature of Montano's employment status at the time, and mounting dissatisfaction toward him from Davis and Hall, was all inconsequential as Davis seethed with sudden anger. Granted, he did so with subsidiary awareness that Montano had jeopardized relations of a key customer, but evidence is lacking to show his emotional reaction was not the sole influencing factor.⁷ General Counsel's brief marshals all countervailing points but, even in the aggregate, these are insufficient to establish unlawful conduct. First, it is argued that saying "this time" (a phrase taken from Davis' mere assumption of what he may have said) *must* refer to the nondelivery. I decline this inference, concluding instead, as Davis has credibly elucidated, that it referred instead to the outburst in Romani's presence with particular note of Davis' sentiment that she had done nothing to de-

⁵ The described version, from among several on the point, is the adequately complete recollection of Montano as to what words were uttered by Davis during those moments. Davis, admittedly not remembering the conversation, reconstructed it in his testimony as having told Montano he "really blew it this time" and "don't have a job here anymore." Respondent's answer to the complaint, signed by Davis, recites that he had approached Montano on the occasion with the quoted utterance. "If *it* [emphasis supplied to note ambiguity in this context] bothered you so much, you should have said something before you left. This time it's going to cost you your job."

⁶ Another tempting thought is to draw this matter into the doctrinal area of misconduct while engaged in a protected activity. I decline to do so on grounds that an ample hiatus separated the commotion at Ran-Rob from Montano's arrival back. His utterance to Romani, made as part of an understandably distraught carryover from what he experienced with picketers, did not sufficiently connect to the experience nor excuse the crude and unprovoked epithets he uttered to her. Cf. *Firch Baking Company*, 232 NLRB 772 (1977).

⁷ The Ran-Rob delivery was actually made later in the afternoon of June 1 by another individual.

serve the unpleasantness.⁸ Next it is argued that Davis did not even mention the vulgarism to Montano, a suspicious omission of frequent significance in 8(a)(3) cases. Here again, the more compelling answer lies in Davis' credibly stated ploy. If General Counsel is asserting that people are never devious, this is a woeful misconception of human foible. Montano himself, on June 2 when appearing for a final paycheck, blandly concealed his intention to follow through in protest of his discharge, for the simple purpose of avoiding a "hassle" and because he preferred not "to talk to [Davis] no more." Other points raised by General Counsel such as not advancing insubordination "as a reason until 2-1/2 months after the discharge," that Davis' supposed infuriation over being told Montano had coarsely consigned him to be "fuck[ed]" was inconsistent with earlier resolve reached around May 20 that this employee be fired, and that written "Request for Ruling to Relieve

⁸This point relates also to argument that Davis had inconsistently claimed to have verified "what Maria had told me" with other employees. Such a view gives overliteral weight to a layman's attempted formal writing. By that passage Davis was expressing what he credibly testified was random conversations late on June 1 with "people in the shop" who claimed that Montano had, in fact, "bad mouthed" others. I also observe, at this point, that regardless of how "improbable" it might seem to General Counsel, the credited utterance of Montano is hardly inconsistent with bland harmony expressed directly to Davis the next day.

Benefit (Unemployment) Charges" made July 20 listed the nondelivery but not the profane comments, are all sterile observations that fail to comprehend employment realities of a small business and the character of personal relationships that can arise. Davis (his view endorsed by Hall) harbored a vague, free-floating notion that Montano should generally be doing better and could at some future time be fired, a consequence as to which "*we never set a date.*" Such vagary is typical of a classic employment relationship based, as here, on oral contract terminable at will. It was in that context Davis experienced the trauma of Romani's tale. His confrontation with Montano scant minutes later effectively clammed up this already shaken individual. Communication on a personal level ceased, and the fact situation then extent plus such clues as subsequent behavior might create served to frame an ultimate issue of whether the picket line observation had any bearing on Montano's severance from employment.

I am satisfied, abstruse, capricious and quirky as the episode might seem, that all Davis reacted to was the described verbalism. To hold otherwise would sorely misjudge emotional potential of human nature.

Accordingly, I render a conclusion of law that Respondent has not violated the Act as alleged.

[Recommended Order for dismissal omitted from publication.]