

A B & E Foreign Car Parts and Automotive Warehousemen Local 241, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 20-CA-10692 and 20-RC-13107

March 11, 1977

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS
FANNING AND JENKINS

On August 31, 1976, Administrative Law Judge James T. Rasbury issued the attached Decision in this proceeding. Thereafter, Respondent Employer filed exceptions and a supporting brief, and the General Counsel filed a letter containing remarks with respect to Respondent's arguments in its brief in support of its exceptions and attached the brief he filed with the Administrative Law Judge.

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 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 as modified herein.²

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, as modified below, and hereby orders that the Respondent, A B & E Foreign Car Parts, San Francisco, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(d):

"(d) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act."

2. Delete from paragraph 1(c) the language preceding "threatening."

3. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that Case 20-RC-13107 be, and it hereby is, remanded to the Regional Director for Region 20 to open and count the ballot of Robert Deasy, to issue a revised tally of ballots, and to take such further action as then becomes appropriate.

228 NLRB No. 75

¹ Respondent 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 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

² The discriminatory discharge of an employee because of his protected concerted activities goes to the very heart of the Act. The Administrative Law Judge omitted a broad cease-and-desist order covering the illegal discharge which he found Respondent had committed. Consequently, as it is found that Respondent unlawfully discharged an employee, we shall issue a broad cease-and-desist order herein. *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (C.A. 4, 1941).

Contrary to the Administrative Law Judge, we find that Respondent did not violate Sec. 8(a)(1) by making "disparaging" remarks about the Union. We shall amend the Order and notice accordingly.

APPENDIX

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

After affording all sides an opportunity to present evidence and state their positions, the National Labor Relations Board has found that we have violated the National Labor Relations Act and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist unions
- To bargain collectively through representatives of their own choosing
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any such activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL NOT offer employees increased wages or improved medical insurance benefits in an effort to induce the employees to defeat the Union.

WE WILL NOT threaten to close the business in the event the employees select the Union as their collective-bargaining agent.

WE WILL NOT discharge or otherwise discriminate against employees for engaging in union or concerted activities protected by the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed under Section 7 of the Act.

WE WILL offer Robert Deasy full and immediate reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, and WE WILL make him whole for any loss in wages or other benefits incurred by him because of our discriminatory and unlawful conduct in discharging him on October 3, 1976.

A B & E FOREIGN CAR
PARTS

DECISION

STATEMENT OF THE CASE

JAMES T. RASBURY, Administrative Law Judge: These consolidated cases were heard before me in San Francisco, California, on May 5 and 6, 1976. An unfair labor practice charge was filed by Kenneth Silbert, an attorney for the Charging Party, on October 6, 1975, alleging the unlawful discharge of Robert Deasy by A B & E Foreign Car Parts (herein Respondent), because of Deasy's activities on behalf of Teamsters Local 241 (herein Union). The charge was served on Respondent on October 8, 1975. A complaint issued on January 26, 1976, based on the aforementioned charge and alleged four specific acts of interference, restraint, or coercion by Respondent during October in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, and the unlawful discharge of Robert Deasy because of his membership in or activities on behalf of the Charging Union in violation of Section 8(a)(3) and (1) of the Act.¹

A Stipulation for Certification Upon Consent Election was executed by counsel representing Respondent and by the counsel for the Charging Union in the following appropriate collective-bargaining unit:

All drivers, warehousemen and counter men employed by the Employer at its San Francisco, California location; excluding all other employees, guards and supervisors, as defined in the Act. [See G.C. Exh. 2(b)].

Pursuant to that consent agreement, an election was held in the agreed-upon unit of Respondent's employees on November 24, 1975. The election resulted in two ballots cast for the Petitioner, two ballots cast against the participating labor organization, and two challenged ballots.

The two challenged ballots were those of Jerome (Jerry) Sadhu and Robert Deasy. The Regional Director's Report on Challenged Ballots dated January 27, 1976, resolved the status of Jerry Sadhu by recommending that the challenge to his ballot be sustained because the evidence clearly revealed that he is the son of Mrs. Shanti Sadhu, the sole owner of the Employer. Section 2(3) of the Act specifically excludes as employees individuals who are employed by their parents. At the time of the election, Robert Deasy was not on the Employer's payroll, and his ballot was

challenged by the Board agent conducting the election. The validity of this challenge will be determined by resolving the unfair labor practice allegedly occurring as set forth in the complaint issued in Case 20-CA-10692. The Regional Director then consolidated this unresolved issue in Case 20-RC-13107 and the unfair labor practice complaint.

Briefs were filed by the General Counsel and Respondent and have been carefully considered.

Upon the entire record and my observation of the demeanor of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. JURISDICTION

During the calendar year 1975, Respondent received within the State of California goods of value exceeding \$50,000, which goods were shipped to Respondent directly from outside the State of California, or purchased from suppliers of Respondent within the State of California, which suppliers in turn had purchased said goods from outside the State of California. At all times material herein, Respondent has been a sole proprietorship with its principal place of business in San Francisco, California, where it is engaged and has been engaged in the wholesale and retail sale of foreign car parts. On the basis of this undenied information, I find Respondent to be an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated and I hereby find that the Automotive Warehousemen, Local 241, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

The pleadings and the evidence presented in this case raise the following issues:

1. Is Jerome (Jerry) Sadhu, son of the sole owner, an agent and supervisor of Respondent within the meaning of Section 2(13) and (11) of the Act?
2. What was the real motivating factor which precipitated the discharge of Robert Deasy?
3. Did Jerome Sadhu and/or Mrs. Shanti Sadhu threaten, promise, or interrogate employees as alleged in the complaint in violation of Section 8(a)(1) of the Act?

¹ At the hearing, the General Counsel was permitted to amend the complaint by including two additional allegations of 8(a)(1) violations

IV. THE UNFAIR LABOR PRACTICES ALLEGED

A. *Background*

Robert Deasy was hired by Respondent on April 21, 1975,² as a counterman at the rate of \$5 per hour. Except for a brief vacation during the month of August, he remained employed full time until October 3, on which date he was terminated by Respondent. The duties of a counterman included taking orders from customers, filling the orders, preparing invoices, stocking shelves, storing parts, and occasionally ordering parts. At all times during the period of Deasy's employment there were two other countermen, Kelvin Tom and Francis Anthony. Additionally, for at least a portion of the time, Paul Francis was also employed as a counterman and at all times Jerry Sadhu was a member of the work force performing some of the duties of a counterman and allegedly performing additional duties which made him a supervisor. There also were two deliverymen, Dan Perez and David Genochio.

B. *Jerry Sadhu's Supervisory Status*

Robert Deasy testified that he first learned of possible employment with Respondent through the California Human Resources Development Department. An employment clerk at the Human Resources Department called Respondent and then gave the phone to Deasy, who talked to Mrs. Sadhu concerning his experience for a job as counterman with Respondent. The next day, Deasy testified that he called Jerry Sadhu on the telephone and talked to him, at which time he again discussed his experience as a foreign car parts counterman and gave Jerry Sadhu the names of his former employers. Jerry Sadhu advised Deasy that the job which had been listed with the California Employment Department had been filled but, in the event help was needed in the future, they might call him. The following Monday, April 21, Deasy received a call from Jerry Sadhu and was asked if he could report for work immediately. Deasy reported to Respondent about 11 a.m. After a brief discussion with Jerry Sadhu regarding wages and benefits, he promptly started to work.

Kelvin Tom testified that he first went to work for Respondent in 1973 and remained through November 1975. During the last 6 months of his employment, he testified, he reported to Jerry Sadhu, and it was Jerry who gave him his work assignments. Tom also testified that, when a problem of discounts arose that he would discuss the problem with Jerry Sadhu, who was always able to tell him how much of a discount was to be given to the particular account. Tom also testified that, in January 1975, he requested permission to take his vacation from Jerry Sadhu, which permission was granted, without further consultation with anyone else in authority.

Daniel Perez, currently employed as a deliveryman, testified that, at the time he was hired by Respondent, he was interviewed by Jerry Sadhu and questioned concerning his knowledge in the area of foreign cars and, without

consulting anyone else, Jerry Sadhu advised Perez that he would be hired on a 2-week trial basis.

David Genochio, currently employed as a deliveryman, testified that he heard of a possible opening from his friend, Daniel Perez, and that he spoke directly to Jerry Sadhu in the presence of Francis Anthony and was hired immediately by Jerry Sadhu and promptly started to work.

Kelvin Tom also testified to an occasion where Jerry Sadhu discharged an employee who refused to perform the work requested by Sadhu because it was shortly before 9 a.m., which was the employees' regular starting time, whereupon he was immediately discharged by Jerry Sadhu.

C. *The Union Activity of Deasy*

Both Kelvin Tom and Robert Deasy testified that, following a private discussion regarding insurance, a question came up concerning the possibility of group insurance for the employees at Respondent's place of business. This in turn led to a suggestion that the employees might consider the advantages of joining a union. Following conversation with employees Daniel Perez and David Genochio, Kelvin Tom contacted Jim Kincaid, business representative for the Union, from Respondent's premises by use of the telephone on either September 15 or 16. A meeting was arranged for September 17 so that the four employees could talk to Kincaid regarding the Union. At this meeting in the union offices employees Deasy, Tom, Perez, and Genochio signed union authorization cards.³

On Monday, September 29, Kelvin Tom overheard Jerry Sadhu mention Jim Kincaid's name on the telephone then, following a pause, heard Jerry say, "My guys?" At the conclusion of this telephone conversation, Tom saw Jerry Sadhu speak to Francis Anthony in private. Later on the same day, Deasy heard Jerry Sadhu talking on the telephone and overheard the following conversation: "Did you get any names? [Pause.] So that's the punk. [Pause.] So that's the son-of-a-bitch."

The following day, Tuesday, September 30, Jerry Sadhu told Deasy that due to the financial situation at the store they were going to have to make some cutbacks in the number of employees and that Deasy would have to go. During this conversation, there was no indication that Deasy's work had been unsatisfactory; he had not received any written warnings during the period of his employment. There had been no indications of an economic curtailment or conversation indicating that Respondent was considering laying off any of its employees. Later on the same afternoon, Deasy learned that Mrs. Sadhu had been hospitalized, and he asked Jerry Sadhu if he might be retained. On Friday, October 3, Deasy was "laid off."

Kelvin Tom testified that on Monday, following the layoff of Deasy, when he was eating lunch with Jerry Sadhu, Jerry Sadhu "asked me how well I knew Bob. I just told him we were just friends. He said not to tell anybody this, but the reason he had fired Bob was because he had gone to the Union [not] because of financial reasons." In this conversation, Jerry Sadhu further related that he had

² The relevant and significant events relating to this case occurred in the year 1975 and, unless otherwise indicated, all dates hereinafter will be in the year 1975.

³ Apparently neither Francis Anthony nor Paul Francis was invited to attend this initial effort by the employees. Both Anthony and Paul Francis are related to the Sadhus.

learned about the union activities from Keith and Norman, employees of the Lucas warehouse, which is involved in the business of auto parts imported from England.

D. Threats and Promises

Kelvin Tom also testified that, just before he resigned his position with Respondent on or about November 10 or 11, he visited Mrs. Sadhu in her home, at which time Jerry Sadhu was present. According to Tom, Jerry Sadhu and Mrs. Sadhu were attempting to persuade him to stay on his job with Respondent. Tom testified: "They offered me a wage increase, plus a promise of medical benefits if I stayed and voted the Union down."

Dan Perez testified to a statement he heard Jerry Sadhu make at a time when both Perez and David Genochio were present. According to the testimony, Jerry Sadhu was posting the National Labor Relations Board poster informing the employees of the election, at which time he said, "If you guys want to go union, you guys would have to find—no, he would wash his hands of it and we would have to find a new boss and I would sell the shop." Neither Perez nor Genochio responded in any manner.

E. The Respondent's Defenses

Ronald Brittain, a public accountant who services the Respondent's account, testified, in essence, that a friend of his son had made a comment that Deasy was not the "salesman that he was cracked up to be." As a consequence, he discussed this comment with Mrs. Sadhu and Jerry Sadhu, and it was suggested that an audit be made of the volume of work produced by Deasy as compared to the other countermen. Brittain's testimony indicated that 2 days were selected at random, and the number of sales tickets for each of the countermen counted. Deasy's number of sales tickets was only average, but he was receiving the highest pay of any of the countermen.

Mrs. Shanti Sadhu's testimony tended to indicate that Deasy was only hired as a temporary employee in order to replace Paul Francis, her nephew, who had broken his leg in an automobile accident, and also because Jerry Sadhu was going to be married on April 26 and would be taking a vacation. However, there was no testimony that Deasy was so advised at the time he was hired. Her testimony also blamed Deasy for drinking beer on the job and entertaining friends in the shop when there were customers waiting to be assisted. Her testimony further indicated that he spent too much time assisting purchasers of parts in how to repair their automobiles; that Respondent had received complaints from customers, including two undated letters which were received on or about the date of Deasy's termination. However, there was a paucity of testimony and a complete absence of any written evidence to indicate that Deasy had ever been specifically warned of *any or all*

⁴ See Wigmore, *Evidence* 285-290 (3d ed.); also *Michael Benevento and John Benevento d/b/a M. Benvento Sands & Gravel Co.*, 131 NLRB 358, 364 (1961); *Mariello Fabrics, Inc. and Michael Mariello*, 149 NLRB 333, 341 (1964).

⁵ Sec. 2(11) of the Act reads as follows: "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances,

of these shortcomings and told that, if they were not corrected, he would be "laid off" or "discharged."

Don Ray Sharp testified that he had been a regular customer of Respondent for a number of years but that he became disenchanted with Deasy, who insisted on trying to assist him rather than permitting him (Sharp) to talk to Jerry Sadhu, who Sharp felt was better qualified to aid him on the particular problems of his foreign automobile. The letter which he claims to have written and mailed on October 1 voicing his complaints to Respondent appears in the record as Respondent's Exhibit 2. The letter is undated, and there is no proof that it was received prior to the discharge of Deasy.

Theresa Reena Devi Sadhu, the owner's daughter, identified Respondent's Exhibit 1 as a customer's complaint letter which she received in the mail on October 1 (again this letter was not dated). Her other relevant testimony related to a denial that her mother had offered Kelvin Tom an increase in wages if he would stay with them and help to vote the Union down. Theresa Sadhu also identified Robert Deasy's claim for unemployment insurance on which he had indicated that he was "laid off."

Analysis

The alleged and apparent wrongdoer in most of this series of events is Jerry Sadhu. He was not called as a witness, and there was no explanation as to why he was not called. In the absence of some reasonable explanation, the failure of one party to call a witness within its control justifies the reasonable inference that his testimony, if called, would be unfavorable.⁴ The testimony of Deasy, Tom, Perez, and Genochio regarding Jerry Sadhu's authority (or apparent authority and actual conduct) to hire, fire, and direct the efforts of the other employees; his disparaging remarks regarding the Union; his threat to sell the shop in the event the Union got in; and the acknowledgment that Deasy was discharged because of his interest and activity on behalf of the Union, stand in the record undenied.

On the basis of the above-related incidents and the generally credited testimony of the witnesses referred to, I herewith find Jerome (Jerry) Sadhu to be, and at all times material herein to have been, an agent and supervisor of Respondent acting within the meaning of Section 2(13) and 2(11) of the Act.⁵ At the hearing, counsel for Respondent acknowledged that Mrs. Shanti Sadhu was the sole owner of Respondent. As such certainly she was a supervisor and agent within the meaning of the Act.

The testimony of Respondent's witnesses at the hearing was that of a "scattergun" with the hope that some portion of it might provide an acceptable excuse or reason for laying off Deasy. The reasonable, candid, and straightforward testimony of General Counsel's witnesses, whom I have credited, when weighed in light of the adverse

or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a mere routine or clerical nature, but requires the use of independent judgment."

Sec. 2(13) reads: "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

inference to be drawn by the failure of Respondent to produce Jerry Sadhu or explain his absence, lead to the inescapable conclusion that Respondent's reason for discharging Deasy was pretextual and that much of the evidence and testimony by Respondent's witnesses at the hearing was contrived.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent as set forth in section IV, above, occurring in connection with the business operations of the Employer, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VI. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily discharged Robert Deasy, I find it necessary that Respondent be ordered to reinstate him to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges, dismissing, if necessary, anyone who may have been hired to perform the work which he was performing at the time of his severance on October 3, 1975. Additionally, Respondent will be ordered to make Robert Deasy whole for any loss of earnings he may have suffered by reason of his unlawful termination. Backpay is to be computed on a quarterly basis, making appropriate deductions for interim earnings, and with interest to be paid at the rate of 6 percent per annum as set forth by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

CONCLUSIONS OF LAW

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

2. The Automotive Warehousemen, Local 241, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. Jerome (Jerry) Sadhu and Mrs. Shanti Sadhu are, and each is, a supervisor and agent of Respondent within the meaning of Section 2(11) and (13) of the Act.

4. By discharging Robert Deasy on October 3, 1975, because of Deasy's support and activity on behalf of the Union, Respondent has violated Section 8(a)(3) and (1) of the Act.

5. By the disparaging remarks towards the Union and by threatening to sell the shop, Respondent by the actions and conduct of its supervisor, Jerry Sadhu, has coerced and

threatened its employees in violation of Section 8(a)(1) of the Act.

6. By offering Kelvin Tom an increase in wages and improved medical insurance benefits if he would remain an employee and help to defeat the Union, Respondent has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

7. Allegations of the complaint not specifically set forth hereinabove as violations of the Act are to be dismissed.

VIII. DISPOSITION OF CHALLENGED BALLOT

Having found that Robert Deasy was unlawfully discharged by Respondent because of his support and activity on behalf of the Union, it is recommended that the challenge to his ballot be overruled and that his ballot be opened and counted. Thereafter, the results of the election to be certified by the Board.

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

ORDER⁶

The Respondent, A B & E Foreign Car Parts, San Francisco, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, laying off, or otherwise discriminating against employees in regard to hire or tenure of employment or any other term or condition of employment because of their activities on behalf of a labor organization or for engaging in any activity protected by Section 7 of the Act.

(b) Promising or offering employees improved wages and/or medical insurance benefits if they will assist in defeating the Union.

(c) Making disparaging remarks about Automotive Warehousemen and Local 241, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, or threatening to close Respondent's place of business in the event the employees affiliate with a labor organization.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Make Robert Deasy whole for any loss of earnings he may have suffered as a result of his discriminatory discharge and offer him reinstatement in the manner set forth hereinabove in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents all payroll and other records necessary to compute the backpay rights of Robert Deasy as set forth in "The Remedy" section of this Decision.

⁶ 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.

(c) Post at its San Francisco, California, facility, copies of the attached notice marked "Appendix."⁷ Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places,

⁷ In the event that the Board's 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

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 20, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."