

**Schreiber Materials and Cartage Company and
Local 150, International Union of Operating
Engineers, AFL-CIO. Case 13-CA-19857**

29 February 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS**

On 29 September 1981 Administrative Law Judge J. Lee Benice issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.²

The judge found that the Respondent violated Section 8(a)(1) of the Act by discharging employee Jose Oliva because he filed and would not relinquish a workmen's compensation claim.

The judge found, and we agree, that Oliva acted alone and for his own benefit in filing his workmen's compensation claim. Relying on the Board's decisions in *Alleluia Cushion Co.*, 221 NLRB 999 (1975), and *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979), enf. denied 635 F.2d 304 (4th Cir. 1980), the judge found that the Respondent's discharge of Oliva violated the Act.

In our recent decision in *Meyers Industries*, 268 NLRB 493 (1984), we held that the activities of a single employee will not be found to be "concerted" within the meaning of the Act, unless they are engaged in with or on the authority of other employees. In so doing, we overruled *Alleluia Cushion* and its progeny and cited the Fourth Circuit's opinion in *Krispy Kreme* in which the court held that the filing of an individual workmen's compensation claim was not concerted activity within the meaning of the Act. Accordingly, for reasons fully set forth in *Meyers*, we shall dismiss the complaint in its entirety.

¹ Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In view of our decision herein, the General Counsel's motion to strike portions of the Respondent's brief and the Respondent's motion to reopen the record are moot and are hereby denied.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

J. LEE BENICE, Administrative Law Judge: The charge in this case was filed on April 28, 1980, by Local 150, International Union of Operating Engineers, AFL-CIO. On June 20, 1980, the complaint issued alleging that Respondent violated Section 8(a)(1) of the Act by discharging an employee, Jose Oliva, because he engaged in protected concerted activities. Respondent, in its answer, denies that it has committed any unfair labor practices.

A hearing was held before me in Chicago, Illinois, on January 26-28, 1981. Posthearing briefs have been filed by the General Counsel and Respondent.

The case presents these issues: whether Oliva was discharged because he filed (and refused to withdraw) a workmen's compensation claim and, if so, whether his prosecution of the claim was protected concerted activity.

On the entire record in this case, including my observation of the witnesses and their demeanor, I make the following

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT

Respondent is engaged in the distribution and sale of construction materials at a facility at Chicago, Illinois. During a representative 1-year period it purchased and received at its Chicago facility goods and materials valued in excess of \$50,000 directly from points outside the State of Illinois. I find that Respondent is an employer engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. In general

Oliva was employed by Respondent as an operator of a front-end loader. On October 10, 1979, he filed a workmen's compensation claim alleging that his back, legs, and arms had been injured on September 13. A notice of this claim reached the Company on November 6 and was handled (as all such claims are) by E. Gauthaman, the personnel manager. Gauthaman was suspicious of the claim and investigated the matter because it appeared at the time that Oliva had never reported any injury to the Company or lost any time from work. In the course of the investigation, which he worked at, off and on, for a number of days, Gauthaman checked with Oliva's two supervisors, with the dispatcher, and with the company president, John Grafft.

On November 11, 5 days after Gauthaman received the notice of the suspicious-looking claim, Grafft ap-

proached Oliva in the yard, accused him of urinating on the front-end loader, and sent him home. Each of the principals has his own version of this incident, and there were no other witnesses.

Grafft testified that he observed Oliva from a distance of 500 feet,¹ as the employee stood up in the loader, placed one foot outside the cab onto the machine, and urinated toward the ground. According to Grafft, he could see from where he sat how the wind was deflecting the stream of urine onto the side of the loader and into the cab where Oliva would later have to sit, and Grafft was sickened by what he saw. He claims that Oliva continued to urinate in this manner for more than a minute, and was still at it when Grafft drove up to the spot and interrupted him. Grafft claims that he then scolded Oliva for not using the washroom, asked him to "Please clean the machine and get out of here," then changed his mind and said "Punch out and get out of here."

Oliva testified that he urinated directly onto the ground while standing with one foot on the ground and one on the very high bottom step of the loader (because he was in a hurry to get back to work),² then returned to the cab, looked into his rear view mirror before backing up, and saw Grafft approaching. According to Oliva's version, Grafft accused him of urinating on the machine, Oliva denied it, and Grafft told him to park the machine and go home.

Yard Superintendent Adell Haynes testified that he saw the machine shortly afterward, did not smell anything, but did see some spots of water on the side.

According to Oliva's further testimony, after the above incident in the yard, as he was walking out of the company garage on his way off the site after having delayed his departure for a time, Grafft again drove up, opened his vehicle door, said that he had heard that Oliva was suing him, demanded that Oliva sign a paper relinquishing his workmen's compensation claim, and then, without more, drove off. Grafft denies that the incident ever took place.

Oliva took no action which in any way suggested that he would be withdrawing his claim, and a certain ambiguity remained for a time concerning his employment status since, under any version of the initial incident in the yard, Grafft had not made it altogether clear whether the employee was suspended or discharged. So, shortly after the incident, Carl Davis, the business representative who services the contract between Oliva's union and Respondent, spoke to Grafft about it,³ over the telephone, and was told that Oliva had not been fired and would be called back. However, shortly after that,⁴ in a

¹ He also stated earlier in his testimony that the distance was "certainly not less than three hundred fifty, four hundred feet."

² Respondent contended that a person would have to be a contortionist to be able to do this because the step was more than 3 feet above the ground. However, the record is not that clear concerning the height of the step. It could have been somewhat lower, but not so low as to make such a position anything but awkward. Jt. Exh. 2.

³ Davis was uncertain about the date, but certain that it was shortly after the incident in the yard.

⁴ Again, the precise time is not of record.

conversation in Grafft's office, Grafft told David that Oliva was discharged. The company records show a discharge on November 11.⁵

From the fact that Grafft, at the time he sent Oliva home, did not make it clear that Oliva was fired, and from the fact that he later told the union representative that Oliva was not fired and would be called back, I find that Oliva was not fired on the spot, but was suspended, only to be discharged shortly afterward.

On November 23, his investigation complete, and having reported his conclusions about the claim to Grafft, Gauthaman sent a letter to the insurance carrier expressing his view that Oliva's workmen's compensation claim was "blatantly false" and "worth fighting." After that, and at least 3 weeks after the incident in the yard,⁶ Oliva and Grafft had a conversation in the parking lot next to the company office building, witnessed from a distance by Gauthaman, who could not hear what was said. Again, their versions vary.

Oliva had gone there to try to get his job back. According to his testimony, he went about it by asking Grafft about his status; Grafft then accused him of disloyalty in filing a false workmen's compensation claim; and, later in the conversation, Grafft said "you wanted the reasons and this is the reason that I am firing you." According to Oliva, Grafft became very loud and angry. In Grafft's version of the conversation, he portrayed himself as calm throughout, even cordial, at first, and sympathetic, but also firm. He stated that he patiently explained that he was firing Oliva because of the employee's lack of respect for machinery; that he mentioned earlier problems he had with Oliva; and that then, although sympathetic, he turned Oliva down, whereupon Oliva asked if he was being fired because of the workmen's compensation claim. Grafft maintains that this was his first knowledge of the claim. Gauthaman testified that the conversation was neither calm nor cordial, but that both parties were loud and used "heated" words and gestures.

After the conversation ended, Gauthaman approached Oliva and asked what had happened. Oliva then asked him whether the Company had opposed his unemployment insurance claim.⁷ Gauthaman answered affirmatively. Oliva then stated, in effect, that if they were going to give him a hard time on his unemployment insurance claim, he would give them a hard time before the National Labor Relations Board or any other agency that

⁵ At the Schreiber site, urinating in the yard was frowned upon and was never knowingly done in front of supervisors. Urinating within sight of the women in the office (which Oliva did not do) was regarded much more seriously. Urinating upon machinery had no precedent. Other types of abuse of equipment were handled by discussion with the operator. Except for Oliva, the only operators ever fired were probationary employees.

⁶ Gauthaman testified that it came at the end of November or beginning of December; Oliva remembered it as 1 to 1-1/2 months after November 11; and Grafft could only remember that it was before the end of the year. Respondent, on brief, takes the position that it was "a few weeks" after November 11. There can be little doubt that it was after November 23.

⁷ Apparently, when Oliva learned earlier he had been fired, he filed an unemployment insurance claim.

would entertain the matter. He said that he would make them spend a lot of money for lawyers.

The insurance carrier eventually settled Oliva's workmen's compensation claim. The terms of that settlement are not of record.

2. Credibility findings

Concerning the urination incident itself, both of the principals appear to have distorted the facts somewhat in support of their positions,⁸ but even in Oliva's own version of the incident, he conceded that he was in contact with the machine when he urinated. Since he was admittedly in contact with the machine, but almost certainly in some position less favorable to his case than the ridiculous one he professed to have assumed, it is likely that he was standing somewhere on the tractor when he urinated. And Haynes, who testified that he saw spots of water on the side of the loader, gave every impression that he was a truthful witness. So I am persuaded that Haynes did see spots of water on the side of the loader, and that those spots were Oliva's urine. I find that Oliva urinated on the machine, and that Grafft, seeking him, reacted by sending him home. I note that, under such a finding, Grafft's conduct during this incident appears far more natural, rational, and easy to comprehend than under a finding which gives more credit to this position of Oliva's testimony.

Turning next to the alleged second incident in the yard, which Grafft denies ever occurred, but in which Oliva claims that Grafft drove up, demanded that Oliva sign a paper relinquishing his claim, and then drove off without further explanation and without waiting for a response of any kind, I find that the event as recounted by Oliva is a bizarre one, but that his story is, upon reflection, not so implausible that it may be rejected on that basis alone. The actions which Oliva's testimony attributes to Grafft could well have been part of a preconceived strategy to pressure Oliva into seeing his lawyer about dropping the claim. Or they could easily have been triggered by Grafft's having consulted promptly with Gauthaman (in order to report Oliva's suspension) only to learn that Oliva had filed a fraudulent-appearing workmen's compensation claim. Likewise not altogether implausible, although very odd, was Oliva's testimony about Grafft's having referred to a "paper" to be signed without Grafft having expressly indicated where or when Oliva was to execute the document, and without having waited for a response. Grafft might well have said it approximately as Oliva related it; or Oliva's testimony might simply reflect his subsequent recollection or interpretation of a simple demand from Grafft to the effect that Oliva take the necessary steps to see that the claim was released. Oliva's spoken English was very poor—he cannot read English at all—and his ability to understand and, at a much later date, restate accurately,

⁸ Oliva's claim that he chose so awkward a position, with one foot on an extremely high step, because he was so anxious to return to work, goes beyond anything I can accept as credible. Likewise, it seems improbable that Grafft could have discerned as much detail, at a distance of 500 feet, as he claims, or that (as Grafft insisted) Oliva, a young man, would have urinated for so long a time before Grafft interrupted him.

certain expressions that had legal ramifications, was presumably limited.

Because I am persuaded that this portion of Oliva's testimony may not be rejected out of hand, and because there is no other testimony to shed light on what happened, a determination as to whether the alleged second incident was fabricated by Oliva or falsely denied by Grafft must depend heavily on the credibility of the two individuals. And an assessment of their credibility first requires an analysis of the evidence relating to their final encounter in December.

Grafft's testimony about the December meeting appears to be false in two important respects. Grafft testified that he had no knowledge of the claim prior to this meeting. However, the meeting took place after the Company's November 23 letter declaring the claim to be "blatantly false," and Gauthaman testified that he had consulted with Grafft about the claim as a part of the investigation which led to the letter and had told Grafft about his conclusions before he sent the letter. I credit this portion of Gauthaman's testimony. It makes sense and, because Gauthaman was employed in the management of Respondent when he testified, it is all the more likely that his adverse testimony was truthful. Thus, it is clear that Grafft was made aware of Oliva's claim before the December meeting. And the Company did not see so many workmen's compensation claims that Grafft could have so quickly forgotten about one that appeared to be fraudulent.⁹ So he was testifying falsely when he stated that he was unaware of the claim until Oliva brought it up at the December meeting.

I also credit Gauthaman's testimony where it conflicts with Grafft's over the character of the meeting and the nature of Grafft's conduct at the meeting.¹⁰ Here I find that, contrary to Grafft's testimony, his conversation was not calm, but loud and angry.

Thus, I find that while the December conversation between Oliva and Grafft was an angry one at which Grafft knew from the beginning that Oliva had filed a workmen's compensation claim, Grafft falsely testified that he remained calm throughout, never angry, and that he was ignorant of the claim until Oliva mentioned it there for the first time. Such behavior on Grafft's part strongly suggests that he also lied about the remainder of the conversation and was concealing his knowledge of the claim because the claim was the real reason Oliva was fired. It is certainly difficult to devise any other explanation for his false testimony concerning his knowledge of the claim. In addition, such false testimony convinces me that, between Oliva and Grafft, the latter is by far the less credible witness. Even though both witnesses have shown a willingness to slant and distort the facts concerning small but important details (Grafft, for example, with his claims to have seen details beyond the limits of normal vision, and Oliva, for example, by revising his true position on the loader in order to place himself closer to the ground where he would have been less

⁹ R. Exh. 4 shows a total of eight claims filed during 1979 and 1980.

¹⁰ Again, it is very unlikely that this management employee would testify untruthfully against his superior. Grafft, on the other hand, had reason to testify falsely and has shown himself willing to do so.

likely to get any urine on the machine) only Grafft is shown ever to have resorted to a complete falsification of such major proportions, when he totally misrepresented the entire character of his last conversation with Oliva as well as his all-important knowledge of Oliva's claim. Nowhere in the hearing was it demonstrated that Oliva had a proclivity for fabrication on so large a scale. Accordingly, with respect to the alleged second incident in the yard (where one of the two witnesses has necessarily provided totally false testimony about a major event) and with respect to the last conversation between Grafft and Oliva (in which Oliva claimed, and Grafft denied, that Grafft gave, as the reason for firing Oliva, Oliva's disloyalty in filing what Grafft considered to be a false workmen's compensation claim) I find Oliva to be the more credible of the two witnesses, and I credit his version of those events.

B. Concluding Findings

Based on the foregoing findings, the following picture emerges of the events at the Schreiber site.

Oliva, caught in the act of urinating on a front-end loader, was summarily suspended and sent home by Grafft, who did not tell Oliva clearly whether he had been suspended or discharged, but instead left the matter unclear. Oliva delayed his departure from the site and was met again by Grafft who shouted a warning that Oliva should withdraw his workmen's compensation claim. Oliva never indicated to Grafft what response, if any, he would make to that demand, and never did anything to relinquish the claim. Shortly afterward, he was discharged. Later, at their December meeting outside the office building, Grafft told Oliva that he had been fired for the disloyal act of filing a workmen's compensation claim judged by management to be false.

From the foregoing findings, I conclude that Respondent suspended Jose Oliva for the act of urinating on a front-end loader, then discharged him because he had filed, and would not relinquish, his workmen's compensation claim.

In filing his claim, Oliva was admittedly alone and acting for his own benefit. However, the Board has treated the activities of individuals as being concerted, even where undertaken alone and for the immediate benefit only of the individual himself, if undertaken pursuant to a statute which benefits all employees. *Alleluia Cushion Co.*, 221 NLRB 999 (1975) (involving a complaint under the California Occupational Safety and Health Act); *Santa's Bakery*, 249 NLRB 1058 (1980) (a claim with a state agency for back overtime wages); *Self Cycle & Marine Distributor Co.*, 237 NLRB 75 (1978) (claim for unemployment compensation); and *King Scoopers, Inc.*,

222 NLRB 1011 (1976) (claim with the Equal Employment Opportunity Commission and Colorado Civil Rights Commission). This Board policy was specifically applied to protect an individual filing a workmen's compensation claim in *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979), enf. denied 635 F.2d 304 (4th Cir. 1980). The Board in *Krispy Kreme* noted that, by refusing to withdraw a workmen's compensation claim, an employee refuses to be denied (and, by example, refuses to permit other employees to be denied) access to workmen's compensation which is provided for the benefit of all employees. Thus it is clear that Oliva's prosecution of his workmen's compensation claim was protected concerted activity and that, by discharging him because of it, Respondent violated Section 8(a)(1) of the Act.

III. THE REMEDY

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

As I have found that Respondent unlawfully discharged Jose Oliva, I shall recommend that Respondent be ordered to offer him immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges. I shall further recommend that Respondent be ordered to make him whole for any loss of earnings he may have suffered as a result of his discharge by payment to him of the amount he normally would have earned from the date of his discharge until the date of Respondent's offer of reinstatement, less net earnings, to which shall be added interest to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).¹¹

On the basis of the above findings of fact and the entire record in this case, I make the following

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. By discharging Jose Oliva because of his protected concerted activities, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

¹¹ See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).