

Felix Industries, Inc. and Salvatore Yonta. Case 2–
CA–29785

May 17, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On July 15, 1998, Administrative Law Judge Eleanor MacDonald issued the attached decision. The General Counsel filed exceptions and a supporting brief.

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

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

The judge found, *inter alia*, that the Respondent did not violate Section 8(a)(1) of the Act by discharging employee Salvatore Yonta for claiming the right to night differential pay under the terms of a collective-bargaining agreement.¹ For the reasons set forth below, we disagree.

The Respondent is a general contractor engaged in heavy highway and utility construction. The Respondent hired Salvatore Yonta to work as a dockbuilder in 1989. In September 1996,² the Respondent reassigned Yonta to work the night shift.

In mid-September, Shop Steward Mike Geiger asked Supervisor Felix Petrillo whether, under the applicable collective-bargaining agreement, Yonta was entitled to 9 hours pay for working an 8-hour night shift. Petrillo responded that Geiger should consult with his union³ about the correct interpretation of the contract and then inform him what Yonta is supposed to get paid.

On October 7, Yonta telephoned Petrillo and asked him if he had made a decision on the wage rate. Petrillo explained that he had spoken with Geiger about it but was still not sure whether Yonta was entitled to the night differential. Petrillo assured Yonta that he would get every penny he was entitled to. Petrillo then told Yonta that he could not believe Yonta was making an issue of the night differential, that the Respondent had never beat anybody out of any money, and that he (Petrillo) was tired of carrying Yonta.⁴ Yonta responded by telling Petrillo, "You're just a fucking kid. I don't have to listen to a fucking kid. Things were a lot different, before you were here."⁵ Petrillo asked, "what did you call me," and

Yonta responded, "fucking kid." Petrillo then told Yonta he would get a check and all his hours.

The Respondent terminated Yonta later that day.

The judge found that the Respondent did not unlawfully terminate Yonta. She found that the subject matter of Yonta's discussion with Petrillo, *i.e.*, Yonta's rights under the collective-bargaining agreement, was protected, but concluded that Yonta lost the protection of the Act by calling Petrillo a "fucking kid" in this discussion. The judge reached this conclusion by applying the following factors, set forth in *Atlantic Steel Co.*, 245 NLRB 814, 816–817 (1979), for determining whether an employee engaged in protected activity loses the protection of the Act by opprobrious conduct: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

Applying these factors, the judge first noted that Yonta's discussion with Petrillo occurred on the phone, where, according to the judge, the use of profane insulting language would not be expected. The judge next found that after assuring Yonta that the Respondent would not cheat him, Yonta—without provocation—used extreme and insulting language in calling Petrillo a "fucking kid." Accordingly, the judge concluded that, by his use of this language, Yonta lost the protection of the Act, and thus the Respondent's discharge of him was not unlawful.

The judge found, moreover, that even if Yonta's conduct was not so egregious as to lose the protection of the Act, Yonta's discharge would still not be unlawful. Applying a *Wright Line*⁶ analysis, the judge found that even if Yonta had engaged in protected activity, he would have been discharged for using a profane term to his supervisor. In support, the judge relied on Petrillo's testimony that he had previously fired employee Kevin Gregor for saying "fuck you, I don't have to work at night," in response to Petrillo's order to work a night shift.

Contrary to the judge, we find that the Respondent's discharge of Yonta was unlawful. Although we agree with the judge that the *Atlantic Steel* factors are applicable here, we disagree with her application of those factors to the instant facts. In addition, we find the judge erred in her use of a *Wright Line* analysis.

In determining whether an employee's conduct causes him to lose the protection of the Act, *Atlantic Steel* requires the Board to "carefully balance" the above factors. 245 NLRB at 816. For the reasons set forth below, a careful balance of those factors leads us to conclude that Yonta did not lose the protection of the Act.

¹ No exceptions were filed to the judge's finding that the Respondent did not violate Sec. 8(a)(3) of the Act by this conduct.

² All dates are in 1996 unless stated otherwise.

³ Geiger was a steward for employees represented by a different local than that which represented Yonta. Their respective collective-bargaining agreements, however, had the same applicable provisions.

⁴ Petrillo testified that Yonta was a slow worker and that he (Petrillo) had received complaints from Yonta's superiors about his work.

⁵ Petrillo was about 25 years old at the time.

⁶ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

At the outset, we find that the judge erred in her analysis of the first factor, i.e., the place of the discussion. Noting that Yonta's conversation with Petrillo occurred on the telephone, the judge surmised that the use of profane language would not be expected in such a setting (thus suggesting that this factor weighed in favor of Yonta losing the protection of the Act). We reject this view of the telephone which is no more or less likely a situs for the type of labor-management dispute where intemperate language is often tolerated. Further, the judge neglected to consider that, since the conversation was by telephone, no other employees heard or observed Yonta's statement to Petrillo. Yonta's comments were not made at work and did not have any direct impact on workplace discipline. In addition, the judge erroneously relied on *Piper Realty Co.*, 313 NLRB 1289 (1994), for the notion that an employee's use of profanity in a private conversation with a supervisor weighs in favor of an employee losing the protection of the Act. In *Piper*, the Board specifically noted that—with respect to the place of the discussion—the door to the supervisor's office was open and at least two employees overheard the conversation. Further, the Board noted that the employee swore at the supervisor in the course of repeatedly resisting a work assignment. No such facts are present in the instant case. Accordingly, we find nothing about the place of the instant discussion that weighs in favor of a finding that Yonta's conduct was so opprobrious to cause him to lose the protection of the Act.

As to the second factor (the subject matter of the conversation), the judge correctly found that the discussion concerned Yonta's rights under the collective-bargaining agreement and thus constitutes protected, concerted activity. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984); and *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966).⁷ The judge did not, however, appropriately consider the third and fourth factors (the nature of Yonta's outburst and whether it was provoked by unfair labor practices) in concluding that Yonta used "extreme and insulting language" without any provocation on the part of Petrillo.

With regard to the third factor, we note that Yonta's conduct consisted of a brief, verbal outburst of profane language, unaccompanied by any threat or physical gestures or contact.⁸

Significantly, with regard to the fourth factor, the judge completely ignored the context. Yonta's remarks

were immediately preceded by Petrillo's comments that he (Petrillo) could not believe Yonta was making an issue of the night differential and that he was tired of "carrying" Yonta. It is clear from Petrillo's testimony that Yonta's outburst was triggered by Petrillo's expression of hostility, including the remark that he was tired of "carrying" Yonta, which in turn was directed at Yonta's assertion of a right to the extra pay under the contract.⁹ In these circumstances, Petrillo reasonably conveyed at least an implicit threat that Yonta could lose his job for having engaged in this protected activity. Although the General Counsel did not allege that Petrillo's remarks were unlawful, we do not read *Atlantic Steel* so restrictively as to preclude any consideration of provocative conduct that likely would have been found to be an unfair labor practice had it been alleged.¹⁰ Thus, although we do not find that Petrillo's comments were violative of the Act, since they were not so alleged, we cannot agree with the judge that Yonta's outburst was not provoked by Petrillo. Rather, we find that, in the course of asserting his rights under the collective-bargaining agreement, Yonta was provoked by Petrillo's hostile responses to his protected remarks, including the implicit threat that he could lose his job for engaging in protected activity. For these reasons, we do not find that either the third or fourth *Atlantic Steel* factors weighs in favor of Yonta losing the protection of the Act.

We find no merit to our dissenting colleague's contention that Petrillo's remark about "carrying" Yonta was not related to Yonta's protected activity, but rather was merely a reasonable and accurate response to "Yonta's claim of maltreatment." As noted above, Petrillo's remark was angrily made in response to Yonta's pressing his right to extra pay under the contract. Although Petrillo credibly testified that he had previously received supervisory complaints about Yonta's work, Petrillo did *not* testify that he mentioned these complaints in this phone discussion. Indeed, the judge erred in his discussion of Petrillo's testimony on this point insofar as he characterized his testimony as being that "Petrillo reminded Yonta of his belief that he was carrying Yonta by keeping him on the job in the face of complaints by the supervisors." As set forth above, Petrillo testified only that he told Yonta he was tired of carrying him. In these circumstances, it is clear that Petrillo was conveying a threat of job loss for having engaged in protected activity.

⁷ Inasmuch as this discussion involved an argument over an employee's claim for wages owed under the applicable collective-bargaining agreement, we find puzzling our dissenting colleague's insistence that this discussion was not a heated labor-management dispute.

⁸ Although our dissenting colleague emphasizes the fact that Yonta used the term "fucking kid" three times, this fact does not describe the entire context of Yonta's outburst, i.e., that it consisted of three short sentences with one of the references to "fucking kid" being a response to Petrillo's request that Yonta repeat himself.

⁹ See generally *Caterpillar, Inc.*, 322 NLRB 674, 677 (1996), vacated as moot (Mar. 19, 1998) (employee's spontaneous and impulsive outburst triggered by supervisor's inflammatory conduct did not cause employee to lose the protection of the Act).

¹⁰ Indeed, it is well settled that, in considering allegations of discrimination for engaging in protected activity, the Board may consider, and rely on, conduct that would have been found unlawful had it been so alleged. See *London Memorial Hospital*, 238 NLRB 704, 709 fn. 12 (1978); and *Medicine Bow Coal Co.*, 217 NLRB 931 fn. 2 (1975).

Accordingly, based on the foregoing analysis of the relevant factors set forth in *Atlantic Steel*, we conclude that, in context, Yonta's outburst was not of such a serious nature as to cause him to lose the protection of the Act, and we reverse the judge's finding in this regard.

In addition, we find no merit to the judge's alternative finding that even if Yonta did not lose the protection of the Act, the Respondent has shown, under a *Wright Line*¹¹ analysis, that Yonta would have been discharged even absent his protected activity. In these circumstances, where the conduct for which the Respondent claims to have discharged Yonta was protected activity, the *Wright Line* analysis is not appropriate. *Neff Perkins Co.*, 315 NLRB 1229 fn. 2 (1994); and *Mast Advertising & Publishing*, 304 NLRB 819 (1991). The *Wright Line* analysis is appropriately used in resolving cases alleging violations where the Respondent's motivation for taking the allegedly unlawful action is disputed. Specifically, the analysis is used in dual motive situations, first to determine whether the employee's union or other protected activity was a motivating factor in the respondent's discipline of the employee and then to determine whether the respondent would have taken the same action even in the absence of such activity. Here, however, it is undisputed that the Respondent discharged Yonta because of his telephone exchange with Petrillo. The only issue is whether that exchange lost its protection under the Act because of Yonta's use of insulting language. Once that is decided the inquiry ends. Thus, the judge erroneously found applicable Petrillo's testimony that he had previously discharged employee Kevin Gregor after Gregor disobeyed Petrillo's order to work a night shift by stating, "Fuck you, I don't have to work at night." That incident did not involve protected activity and therefore does not privilege the Respondent to discharge an employee for conduct that was intertwined with protected activity, was provoked by a hostile response to that activity, and was not so opprobrious as to warrant a finding that the conduct lost its protected status. See generally, "*The Loft*," 277 NLRB 1444, 1467 (1986).

In sum, we find that Yonta engaged in protected concerted activity in raising the issue of his right to night differential pay under the applicable collective-bargaining agreement, that Yonta did not lose the protection of the Act by his remarks to Petrillo in the course of that discussion, and that the Respondent discharged Yonta for his protected remarks. Accordingly, we find that the Respondent's termination of Yonta violated Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Felix Industries, Inc., Lincolndale, New York, its officers, agents, successors, and assigns, shall

¹¹ 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. (1982).

1. Cease and desist from

(a) Discharging employees because of their protected concerted activities.

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

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

(a) Within 14 days from the date of this Order, offer Salvatore Yonta full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Salvatore Yonta whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Salvatore Yonta that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a 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 back-pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Lincolndale, New York, copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed down the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 28, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the region at-

¹² If 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."

testing to the steps that the Respondent has taken to comply.

MEMBER HURTGEN, dissenting.

Contrary to my colleagues, I agree with the judge that Yonta's conduct caused him to lose the protection of the Act. Thus, Respondent was privileged to discharge him.

Yonta's conduct was to call his supervisor (Petrillo) a "fucking kid." Yonta did so three times, and said that he did not have to listen to his supervisor, viz., "the fucking kid." Thus, the comments were vulgar, and they were insubordinate.

My colleagues have correctly set forth the factors to be considered in determining whether the conduct was such that it caused Yonta to lose the protection of the Act. Those factors are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by an employer's unfair labor practice.

With respect to the place and subject matter of the discussion, I note that the discussion was a private conversation on the telephone. In situations such as a grievance proceeding, a contract negotiation, or a spontaneous or emergency situation at the workplace, heated exchanges might cause an employee to engage in intemperate behavior. In such cases, after weighing the factors, the Board might find that an exuberant outburst was excusable, and did not cause the otherwise-protected activity to lose the protection of the Act. By contrast, the discussion here was a private conversation in which an employee was claiming that he should be getting a pay differential under a collective bargaining agreement. Respondent assured him that he would receive his contract rights. Thus, the context was not a heated labor-management dispute in which intemperate language might be tolerated.¹

With respect to the nature of the outburst, I again note that Yonta used the phrase "fucking kid" three times, and said that he did not have to listen to his supervisor.

With respect to the fourth factor, it is clear that Yonta's outburst was not provoked by any unfair labor practice by Petrillo. Indeed, Petrillo engaged in no unfair labor practice at all.² My colleagues disagree. However, as they acknowledge, the General Counsel did not even allege that Petrillo's comments were unlawful. There is a very good reason for the General Counsel's failure to so allege. As the judge found, while the discussion began with Yonta's inquiry to Petrillo about the night differen-

tial, the discussion expanded as it continued. The judge found that Petrillo defended Respondent as never cheating anyone, and Petrillo reminded Yonta of his belief that he was carrying Yonta. The judge found that this was a reference to the fact that Petrillo had kept Yonta on the job in the face of complaints by supervisors. My colleagues assert that Petrillo's remark was made in retaliation for Yonta's pressing of his claim for extra pay. There is no evidence to support this allegation and, as noted, the General Counsel does not allege that the remark was unlawful. In short, Petrillo was reasonably and accurately responding to Yonta's claim of maltreatment. In sum, it is clear that, under the four-factor *Atlantic Steel* test, Yonta's behavior not protected, and the Respondent's discharge of him was privileged. Accordingly, I dissent.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge employees because of their protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Salvatore Yonta full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Salvatore Yonta whole for any loss of earnings and other interim benefits resulting from his discharge, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Salvatore Yonta and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

FELIX INDUSTRIES, INC.

Olga C. Torres, Esq. and *Leah Z. Jaffe, Esq.* for the General Counsel.

Elliot J. Mandel, Esq. (Epstein, Becker & Green, P.C.), of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was heard in New York, New York, on December 15, 1997. The complaint alleges that the Respondent, in violation

¹ I agree that labor-management disputes can become heated, even on the telephone. If so, intemperate language may be tolerated. This was not a heated dispute over working conditions. As noted, Petrillo had assured Yonta that he would get whatever pay the contract called for.

² Compare *Caterpillar, Inc.*, 322 NLRB 674, 677-678 (1996), cited by the majority. The employee's spontaneous outburst there was triggered by a supervisor's actions found to be "unlawful conduct," including a clear threat to discharge for the employee's engaging in protected conduct.

of Section 8 (a) (1) and (3) of the Act, discharged its employee Salvatore Yonta because he claimed the right to night differential pay under the terms of a collective-bargaining agreement. The Respondent denies that it has engaged in any violations of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent on February 17, 1998, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation with an office located in Lincolndale, New York, is a general contractor doing heavy highway and utility construction. Respondent annually receives at its facility goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Dockbuilders Union Local 1456, is a labor organization within the meaning of Section 2 (5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Facts

1. Background

Salvatore Yonta testified that he was discharged because he telephoned his supervisor, Felix J. Petrillo, twice in 1 day to inquire about his entitlement to night differential pay under a collective-bargaining agreement and because he consulted the Union about his rights under the agreement. Petrillo testified that he discharged Yonta because the latter used profanity to him and challenged his authority in the workplace. The basic factual dispute concerns what was said by Yonta and Petrillo when they spoke on October 7, 1996. There is no dispute that Petrillo discharged Yonta following a telephone conversation between them.

Salvatore Yonta's father had been the longtime general superintendent of Respondent when in 1989 he obtained a job for the younger Yonta as a dockbuilder. Yonta had not been a member of the Union before that. The dockbuilders are timbermen who are members of Local 1536. Both of these locals are part of the District Council of Carpenters of New York City and Vicinity, AFL-CIO. At the time of his discharge, Yonta was the only dockbuilder employed by Respondent; there were two timbermen on the job.

Felix J. Petrillo, who supervises the field operations of the Company, is the son of Respondent's president. He is a 1993 college graduate with a degree in business management. At the time of the events material to the instant case, Petrillo was about 25 years of age. He had begun working full time for Respondent in 1993 following many years of part-time and summer jobs at the Company. Petrillo works in the Bronx location of Respondent, whereas the main office is in Lincolndale in Westchester County.

Respondent is a member of the General Contractors Association, an employer association that bargains with a number of construction unions. The parties agree that the relevant Dockbuilders, Local 1456 collective-bargaining agreement provides in Article 9:

Section 2 (c):

When 3 shifts are employed, each shift will work 7-1/2 hours but will be paid for 8 hours, since only 1/2 hour is allowed for mealtime.

Section 2 (d):

When 2 or more shifts of Dockbuilders are employed, single time will be paid for each shift.

Section 7 (c):

An off shift may commence between the hours of 5:00pm and 10:pm, and shall work for 8-1/2 continuous hours allowing 1/2 hours for lunch. The rate of pay shall be 9 hours pay including benefits at the straight time rate of 8 hours work.

2. Yonta's testimony

Yonta joined Local 1456 in 1990. Yonta, who was 42 years old at the time of the instant hearing, testified that he has performed various types of work for Respondent including pile driving, concrete work, carpentry work, welding and steel, and wood sheeting work. Up until September 1996, his regular shift had been from 7 a.m. to 3:30 p.m. Yonta had dealt with Petrillo a number of times. Petrillo assigned him to various tasks and on several occasions Yonta had spoken to Petrillo about matters such as pay, benefits, and vacation.

In the second week of September 1996, Yonta was assigned to work the night shift from 8 p.m. to 4:30 a.m. Yonta, who had not yet worked the night shift, believed that there was a night differential but he did not know how much it was. Before Yonta had received any paychecks for his work on the night shift, he spoke to Mike Geiger, the shop steward for Timbermen's Local 1536, and asked him to speak to his business agent about the differential because it was a question for all of the men on the job. Yonta testified that Geiger eventually told him that they were entitled to 1 hour's differential pay for the night shift and that Petrillo had assured him that they would receive it. Yonta's first night-shift paycheck for the week ending September 15, 1996, did not include any night differential. Yonta asked Steam Superintendent Charles Agro about the differential, but Agro told Yonta to speak to Petrillo directly. Apparently, Yonta's next action relating to the night differential took place at 7 a.m. on October 7 when he telephoned his business agent, Pete Thomason, at Local 1456.¹ According to Yonta, Thomason informed him that he was entitled to the hour of night differential. Yonta then telephoned Petrillo and said that he was under the impression that Petrillo had spoken to Geiger about the hour differential. Petrillo said that he had spoken to Geiger but that the men were not entitled to the extra hour because Respondent was working a day shift. Yonta then said he had spoken to the Union and that the Union had confirmed that the differential should be paid. Petrillo repeated that because Respondent was working a day shift, no differential was due. Following this conversation, Yonta called Thomason again and the latter told him that unless Respondent was working three consecutive shifts the hour differential was payable. Yonta testified that he telephoned Petrillo a second time and informed him that he had just gotten off the phone with the union agent who had confirmed that Yonta was entitled to the hour differential. According to Yonta, Petrillo said, "you got the Union involved." Yonta replied that the Union was not involved. Petrillo said he "was tired of this," and Yonta said that he was tired too and that if Respondent was honoring the engineers' contract it should honor his contract too. Petrillo

¹ Yonta was home on the morning of October 7, 1996.

replied that it was none of his business what the engineers were getting. Then Petrillo said that he was tired of carrying Yonta. Yonta denied that he was being carried, and Petrillo said, "You don't want to butt heads with me." Yonta asked whether Petrillo was threatening him and said, "I built my house while you were in your diapers." He continued, saying, "Son, it's not the money, it's the principle." Petrillo objected to being called "son" and Yonta said, "I'm calling you son because you act like a kid." Petrillo asked whether Yonta would meet him and his father in the office, but Yonta said he would be on the job if Petrillo's father wanted to speak to him. Yonta said, "All I want is my money." Then Petrillo told Yonta that he would get him all his money. Yonta denied that he called Petrillo a "fucking kid."

One hour later, Agro telephoned Yonta and said, "I guess you spoke to Felix. I have your money." Agro asked whether Yonta wanted his check mailed but Yonta said he would pick it up at the job at night. Yonta testified that after speaking to Agro he knew that he was terminated because he was being given his check on a Monday whereas the regular payday was Thursday.² Yonta did not protest his termination to Agro nor to Petrillo. However, Yonta telephoned Thomason at the union hall about his discharge and Thomason said that he would call Petrillo and try to work it out. But when Thomason called Yonta back he said he could not work things out because Petrillo claimed that Yonta had called him a "fucking kid."

Yonta testified that everybody uses profanity on the job, but he had never heard anyone address the boss as a "fucking idiot."

Yonta's testimony differs somewhat from a letter he sent to the Regional Office on November 11, 1996. The letter states that Yonta asked about the differential pay once in late September and it does not mention Yonta's conversation with Geiger in early September. The letter describes only one conversation with Petrillo on October 7 and it does not quote Petrillo as remarking that Yonta has involved the Union.

3. Petrillo's testimony

Felix J. Petrillo testified that Yonta has been employed since 1989 under a dockbuilder's book. Although Respondent had ceased doing its own dockbuilding in 1992, it had kept Yonta busy by assigning him a variety of tasks. Petrillo stated that although other dockbuilders were laid off, Yonta was kept on the payroll out of respect for Yonta Sr., who had retired from the Company in December 1993. According to Petrillo, Yonta is a slow worker and his lack of celerity has elicited complaints from his superiors.

Petrillo recalled that in mid-September the Timbermen's shop steward, Mike Geiger, informed him that there was a question whether the collective-bargaining agreement obligated Respondent to pay a night differential to Yonta when he began working the night shift.³ Petrillo told Geiger to obtain the correct interpretation of the contract from his union and then inform Petrillo what Yonta was supposed to get paid. This was a normal way of proceeding for Petrillo who testified that because Respondent has numerous contracts and their provisions are fairly confusing, he often asks a union for the correct inter-

² Yonta received all the money owing to him including the night differential.

³ Although Geiger was the Timbermen's shop steward, Petrillo stated that Yonta nevertheless considered Geiger his steward. According to Petrillo, the night differential provisions of the Timbermen's and Dockbuilders' contracts are the same.

pretation of its contract. Petrillo told Geiger that Yonta would get whatever he was entitled to. Petrillo considered the provisions of the collective-bargaining agreement confusing because he found it difficult to harmonize the provisions of Section 7 (c) with the provisions of Section 2 (c) and (d). Further, some of the trades received the 1-hour night differential but others, including the laborers, did not get it. This was the first project on which dockbuilders had been utilized during a regular night shift.

Petrillo did not hear from Geiger before Yonta called him on the morning of October 7.

At 7:15 or 7:30 a.m. on October 7, Petrillo received a telephone call from Yonta who asked him whether he had made a decision on the rate. Petrillo believed that Yonta's tone was arrogant from the minute the conversation began. Petrillo told Yonta that he had spoken to the shop steward but that he did not have a definite answer and that he was not sure Yonta was entitled to the hour differential. Petrillo assured Yonta that he would get every penny he was entitled to. As the conversation continued, Petrillo said he could not believe that Yonta was making an issue of the night differential. He told Yonta that Respondent had never beat anybody out of any money. He said that he was tired of carrying Yonta. Then Yonta said to Petrillo, "You're just a fucking kid. I don't have to listen to a fucking kid. Things were a lot different before you were here." Petrillo asked Yonta, "what did you call me" and Yonta replied, "fucking kid." Petrillo then told Yonta that he would get a check and all his hours. Petrillo denied that Yonta called him twice on October 7. He maintained that he and Yonta spoke only once in a telephone conversation which lasted about 5 minutes.

Petrillo testified that he was surprised that Yonta behaved in this manner. Petrillo considered that he was doing Yonta a favor by keeping him on in spite of the fact that the superintendents and foremen did not want Yonta on the job. Petrillo stated that Yonta's money was not significant to him. Respondent has over \$50 million of revenue annually and the 1-hour night differential was not a big issue.

Petrillo testified that he decided to terminate Yonta because he called him a "fucking kid" and said he did not have to listen to him. Petrillo testified that he was in charge of the workers and that he could not manage the people if he let one of them get away with speaking to him in that way. Petrillo could not continue working with Yonta because he would lose the respect of his employees. Petrillo stated that because he supervised 250 employees he could not let them find out that someone could speak to the boss in that fashion. Petrillo denied that he used the term "butt heads" to Yonta. Petrillo testified that he discharged Yonta for challenging his authority by saying, "You're just a fucking kid. I don't have to listen to you." Although Petrillo acknowledged that he hears profanity on the job, in this instance the profanity was directed at him and his ability to be a boss and to be in control.

Petrillo has fired one person for similar conduct. A mechanic named Kevin Gregor had disobeyed Petrillo's order to work a night shift, and when Petrillo confronted Gregor the next day, Gregor said, "Fuck you, I don't have to work at night." Thereupon, Petrillo made the decision to terminate Gregor.

Petrillo's testimony differed somewhat from his affidavit given to the Regional Office. Petrillo's affidavit quotes Yonta as saying, "You're a fucking kid, I was here long before you."

Discussion and Conclusions

There is no way to harmonize the two different versions of the events of October 7, 1996. I must believe either Petrillo or

Yonta. Having carefully considered the testimony of the witnesses and having observed the manner in which the witnesses testified, and having observed that Petrillo was unwavering and convincing in the face of an intense and very excellent cross-examination by counsel for the General Counsel, I have decided to credit the testimony of Petrillo. I do not credit the testimony of Yonta.

I find that Yonta telephoned Petrillo to inquire about the 1-hour night differential. Petrillo told him that the issue had not been resolved and that Yonta might not be entitled to the differential. Petrillo assured Yonta that he would get every penny he was entitled to. As the conversation continued, Petrillo expressed disbelief that Yonta was making an issue of the night differential because Respondent had never cheated its employees out of their money. Petrillo reminded Yonta of his belief that he was carrying Yonta by keeping him on the job in the face of complaints by the supervisors. Then Yonta told Petrillo, "You're just a fucking kid. I don't have to listen to a fucking kid." I note that there is no contention that Petrillo himself used profanity to Yonta. I do not credit Yonta's testimony that Petrillo told him not to "butt heads." I do not credit Yonta's testimony that Petrillo exclaimed to Yonta, "You got the Union involved." Indeed, Petrillo himself had gotten a union involved by asking Union Shop Steward Geiger to consult his union about the correct interpretation of the contract provisions, and it is clear that Petrillo wanted union involvement in resolving the issue of differential pay. I find it significant that Yonta himself testified that when Thomason reported to him that he had not been able to work things out with Petrillo, Thomason said that Petrillo claimed that Yonta had called him a "fucking kid." Thus, the term of disrespect was recalled by Petrillo immediately after the events occurred.

The General Counsel urges that Yonta was engaged in protected activity by reasonably and honestly invoking his right under a collective-bargaining agreement. The General Counsel maintains that Yonta's behavior was not sufficiently egregious to justify his discharge. While conceding that Yonta's effort to obtain a correct pay rate under the collective-bargaining agreement is protected activity, Respondent argues that Yonta engaged in unprovoked abusive conduct.

It is well established that profanity and other forms of offensive language are part of the give and take of collective-bargaining negotiations and grievance discussions. Employees engaged in negotiations and grievance meetings may say and do things that would otherwise be considered outrageous. Employees may not be disciplined for taking part in such outbursts. *Thor Power Tool Co.*, 148 NLRB 1379 (1964), enf. 351 F.2d 584 (7th Cir. 1965); and *Firch Baking Co.*, 232 NLRB 772 (1977). Furthermore, employees involved in a labor struggle such as an organizing campaign are often excused when they use profanity to their bosses. *NLRB v. Cement Transport, Inc.*, 490 F.2d 1024, 1030 (6th Cir. 1974). Moreover, there is evidence that profanity is used on the Respondent's jobsites.

In *Atlantic Steel*, 245 NLRB 814, 816-817 (1979), the Board thoroughly discussed the factors that must be balanced in deciding whether an employee engaged in concerted protected activity has lost the protection of the Act by opprobrious conduct. These factors are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's out-

burst; and (4) whether the outburst was in any way provoked by an employer's unfair labor practice.⁴

In the instant case, Yonta was not attending a negotiating session and he was not in a grievance meeting. Yonta was at home telephoning Petrillo to inquire about five hours of differential per week. Petrillo assured Yonta that he would get whatever the agreement called for as soon as the shop steward obtained a definitive interpretation of the contract language. Petrillo reminded Yonta that Respondent did not try to cheat its employees out of their wages and he expressed disbelief at Yonta's ingratitude. Without provocation on the part of Petrillo, Yonta called him a "fucking kid" and said he did not have "to listen to a fucking kid." Yonta continued that things were different before Petrillo was there. By this language, Yonta was emphasizing Petrillo's relative youthfulness and inexperience, and he was using a deliberately insulting profane term to tell Petrillo that he did not have to listen to him. Applying these facts to the criteria of *Atlantic Steel*, I find that Yonta used the profanity in a private conversation with his boss, a setting where such language would not be expected.⁵ I find that the subject matter of the discussion was protected. I find that the employee used extreme and insulting language and I find that the outburst was not provoked by an unfair labor practice or by the use of profanity on the part of Petrillo.⁶ I conclude that Petrillo discharged Yonta for calling him a "fucking kid" and saying that he did not have to "listen to a fucking kid." I conclude that Yonta had lost the protection of the Act under the rule of *Atlantic Steel*. In these circumstances, Respondent did not violate the Act.

The General Counsel cites *Great Dane Trailers*, 293 NLRB 384 (1989). In that case, the Board found that an employee repeatedly requested that his supervisor provide another worker to assist him on a difficult job. After the supervisor refused the employee's third request, the employee called him a "fucked up foreman." The employee was then disciplined. The Board found that the supervisor was not motivated to impose discipline on the employee because he had used an obscenity; rather the discipline was imposed solely because the employee had repeatedly requested that another worker be assigned to help him with a difficult job. The requests for assistance were protected concerted activity and it was a violation of Section 8 (a) (1) to punish the employee for making the requests. The Board further found, without discussion, that the employee's use of strong language in the course of his protected concerted activity did not remove the protection of the Act. *Great Dane* was decided on the basis that the employer motivation was solely to punish an employee for protected concerted activity. The employee's use of an obscenity was found to be a pretext by the administrative law judge. In the instant case, I have found that

⁴ It is true, as pointed out by the General Counsel, that *Atlantic Steel* was decided in the context of deferring to an arbitrator's award, but the Board's decision made it clear that its rationale was based on Board law and not on any special feature of the deferral process.

⁵ In *Piper Realty Co.*, 313 NLRB 1289 (1994), the employee lost the protection of the Act while engaged in concerted activity when he was insubordinate and profane during a meeting with his supervisor. The Board remarked that, "[E]ven if swearing was common in the workplace, what distinguishes it here is that [the employee] directed it at a supervisor, in his office."

⁶ In *Indian Hills Care Center*, 321 NLRB 144, 154-155 (1996), the employee's profanity was excusable on the ground that it had been provoked by the employer's unlawful and profane remarks.

Yonta was discharged not because he had inquired about the payment of night differential but because he had called his supervisor a “fucking kid.” Thus, *Great Dane* is not controlling herein.

In *Burle Industries*, 300 NLRB 498, 503–505 (1990), the employee’s use of the term “fucking asshole” to a supervisor was held not to deprive him of the protection of the Act while he was protesting a hazardous chemical situation during which many employees were sickened and the employer was not providing the correct safety documents. The administrative law judge emphasized the exigent nature of the confrontation and commented, “the situation at hand did not involve a question about overtime.” In the instant case, there was no emergency and Yonta was being reassured that he would get every penny that was owing to him.

Even if I found that Yonta’s conduct was not so egregious as to lose the protection of the Act when he was inquiring about his differential pay, I would still find that his discharge was not unlawful. Petrillo testified that he had fired employee Kevin Gregor for saying, “fuck you, I don’t have to work at night,” a statement remarkably similar to Yonta’s statement that Petrillo was a “fucking kid” and that he did not have to “listen to a fucking kid.” Thus, I would find that Respondent would have discharged Petrillo, even if he had not been engaged in protected activity, for using a profane term in describing his supervisor. *Wright Line*, 251 NLRB 1083 (1980), enf.d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

CONCLUSION OF LAW

The General Counsel has not proved that Respondent engaged in the violations of the Act alleged in the complaint.

[Recommended Order omitted from publication.]