

MTR Sheet Metal, Inc. and Sheet Metal Workers Local 66, affiliated with Sheet Metal Workers International Association, AFL-CIO. Case 19-CA-27617

June 28, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On March 28, 2002, Administrative Law Judge James L. Rose 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 and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, MTR Sheet Metal, Inc., Kent, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Cease and desist from

(a) Threatening employees with business closure, discharge, or transfer to lower paying jobs because they engage in activity on behalf of Sheet Metal Workers Local 66, affiliated with Sheet Metal Workers International Association, AFL-CIO, or other concerted activity protected by Section 7 of the National Labor Relations Act.

(b) Soliciting employees to engage in surveillance of other employees' union activity and creating the impression that employees' union activity is under surveillance.

(c) Telling employees not to wear union T-shirts.

(d) Discharging, transferring to lower paying jobs, giving written warnings for excused absences, or otherwise discriminating against employees because they engage in union or other concerted activity protected by the Act.

¹ In the absence of exceptions by the Respondent, we adopt the judge's decision. The General Counsel filed exceptions concerning the judge's inadvertent omission of expunction language from the recommended Order and notice. We hereby grant the General Counsel's exceptions and shall correct the judge's recommended Order and notice. We shall also correct the judge's omission of reinstatement language from the affirmative portion of his recommended Order and notice with respect to the unlawful transfers of Saul Heikkila and Kevin Moltz. Finally, we shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), as modified by *Excel Container*, 325 NLRB 17 (1997), and in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

(e) 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 Larry Ramey 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 Larry Ramey whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and to the four written warnings for absences, and within 3 days thereafter notify Larry Ramey in writing that this has been done and that the discharge, and the four written warnings for absences will not be used against him in any way.

(d) Within 14 days from the date of this Order, offer Saul Heikkila and Kevin Moltz prevailing wage jobs, or if those jobs no longer exist, substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make Saul Heikkila and Kevin Moltz whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful transfers, and within 3 days thereafter notify Saul Heikkila and Kevin Moltz that this has been done and that the transfers will not be used against them in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the

² 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."

Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 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 May 1, 2001.

(i) 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 attesting to the steps that the Respondent has taken to comply.

The allegations of unfair labor practices not found are dismissed.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT threaten you with business closure, discharge, or transfer to lower paying jobs because you engage in activity on behalf of Sheet Metal Workers Local 66, affiliated with Sheet Metal Workers International Association, AFL-CIO, or other concerted activity protected by Federal Law.

WE WILL NOT ask you to report the union activity of other employees or otherwise create the impression that your union activity is under surveillance.

WE WILL NOT tell you not to wear union T-shirts.

WE WILL NOT discharge, transfer to lower paying jobs, give written warnings for excused absences, or otherwise

discriminate against you because you engage in union or other concerted activity protected by the National Labor Relations Act.

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

WE WILL, within 14 days from the date of the Board's Order, offer Larry Ramey 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 Larry Ramey whole for any loss of earnings and other benefits resulting from his discharge, less any net 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 Larry Ramey, and to the four written warnings for absences, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge, and the four written warnings for absences, will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, offer Saul Heikkila and Kevin Moltz prevailing wage jobs, or if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Saul Heikkila and Kevin Moltz whole for any loss of earnings and other benefits resulting from their transfers, 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 transfers of Saul Heikkila and Kevin Moltz, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the transfers will not be used against them in any way.

MTR SHEET METAL, INC.

Irene Botero, Esq., for the General Counsel.

Richard Llewelyn Jones, Esq., of Bellevue, Washington, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Seattle, Washington, on February 12, 2002, upon the General Counsel's complaint which alleged that the Respondent terminated one employee and transferred to lower paying jobs two others in violation of Section 8(a)(3) of the National Labor Relations Act (the Act). Violations of Section 8(a)(1) are also alleged.

The Respondent generally denied that it committed any violations of the Act and affirmatively contends that Larry Ramey

was discharged for cause and that Kevin Moltz and Saul Heikkila were transferred for legitimate business reasons.

Upon the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the business of fabricating and installing exterior architectural sheet metal with its principal place of business in Kent, Washington. The Respondent annually purchases and receives directly from outside the State of Washington goods and materials valued in excess of \$50,000 or from suppliers who in turn directly receive such goods directly from outside the State of Washington. I therefore conclude that the Respondent is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Sheet Metal Workers Local 66, affiliated with Sheet Metal Workers International Union, AFL-CIO (the Union) represents members who are employees of employers engaged in interstate commerce concerning wages, hours, and other terms and conditions of employment. I conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The Respondent is a sheet metal contractor. It uses three crews and has a fabrication shop. Much of its work is for governmental projects on which the prevailing wage must be paid. The Respondent also has some "private" contracts, and on these employees receive whatever wage they negotiated with the Respondent. The prevailing wage jobs pay from \$28.87 to \$31.47 per hour, depending on the employee's job classification. The private jobs pay from \$11 to \$15 per hour.

In the spring of 2001,¹ the Union sent members Steven Sykes, Kevin Moltz, and Larry Ramey to apply for jobs with the Respondent. After being hired, they were to attempt to organize the Respondent's employees. Moltz was hired in April, Ramey on May 1, and Sykes in mid-May.

In June these "salts" began attempting to organize fellow employees. Then on July 11, the Union's business representative wrote the Respondent advising that an organizational campaign was under way. Also on July 11, the Union wrote the Respondent that Larry Ramey, Kevin Moltz, and Steve Sykes were members of the organizing committee, with Ramey being designated chairman. By letter of July 13, Dann Decker and Saul Heikkila were designated as additions to the organizing committee. The first two letters were received at the Respondent's office on July 12. The third was received on July 16.

On July 16, Ramey was discharged and on July 17, Moltz and Heikkila were transferred from a prevailing wage job to a

private job. They both quit their employment shortly after being transferred.

B. *Analysis and Concluding Findings*

In addition to certain alleged violations of Section 8(a)(1), the General Counsel contends that the discharge of Ramey and the transfer of Moltz and Heikkila were violative of Section 8(a)(3). The Respondent argues that Ramey was discharged principally because he had been absent too many times and that Moltz and Heikkila were transferred pursuant to its policy of equalizing the prevailing wage hours among employees.

As will be discussed in more detail below, I reject these arguments of the Respondent. While Ramey had been absent on perhaps three occasions, the absences were excused and he was not given any kind of warning for missing work. The warnings offered in evidence by the Respondent were written, I conclude, on the day he was discharged and were meant to give a plausible reason for the Respondent's unlawful act.

The Respondent's argument about equalizing hours is reasonable and was in fact discussed with these employees when hired. Nevertheless, other than self-serving testimony of the owners, there is no evidence that in fact the transfers of Moltz and Heikkila were pursuant to this policy, or otherwise were for valid business reasons.

The alleged violations of the Act will be treated seriatim as they appear in the complaint.

1. The alleged violations of Section 8(a)(1)

a. *By Mike MacDonald*

Mike MacDonald is a crew foreman for the Respondent. He is alleged to have violated Section 8(a)(1) by creating the impression of surveillance of employees' union activity and various threats.

It is alleged that in May, MacDonald created the impression that employees' union activity was under surveillance by telling an employee that he thought a recently hired employee was a union organizer. This allegation is based on the testimony of Saul Heikkila: "Mike told me that they [he and Anthony Fulfer], Mike had beliefs that Larry [Ramey] was a union organizer."

Heikkila testified that on two occasions (probably in May or June, though when exactly is unclear) MacDonald told him he suspected Ramey of being involved with the Union and for Heikkila "to keep his eye" on Ramey. Soliciting employees to report on the union activity of others necessarily creates the impression of unlawful surveillance and is violative of Section 8(a)(1). *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

Again, according to Heikkila, on July 13 two union representatives came to a job on which he, MacDonald, Ramey, and others were working. MacDonald "stated to Larry Ramey looks like your buddies have shown up," to which Ramey responded that he did not know what MacDonald was talking about. The union representatives placed flyers on cars, including MacDonald's truck. MacDonald told them to get away from his truck. MacDonald's comment to Ramey is alleged to have created the impression that employees' union activity was under surveillance.

¹ All dates are in 2001, unless otherwise indicated.

Ramey testified that somewhere around the July 4 holiday, he told MacDonald that he had reviewed materials from the Union and asked what the Respondent had to offer. They then discussed the Union and union benefits. It is therefore clear that in the first part of July, Ramey had made himself known as being interested in the Union, and later that he was in fact a union organizer.

In order to sustain a violation of Section 8(a)(1) based on an alleged creation of the impression of surveillance the General Counsel must prove that the Respondent's knowledge of one's union activity could only have resulted from unlawful surveillance. Since MacDonald had solicited Heikkila to "keep an eye" on Ramey, it is reasonable to conclude that MacDonald's statement about Ramey's union activity was based on unlawful surveillance. Therefore, I conclude that the allegation in paragraph 5(a)(i) has been established. Apparently this conversation is also the basis of the allegation in paragraph (5)(b)(i), which I conclude has been sustained. Finally, I conclude that MacDonald's statement to Ramey suggested unlawful surveillance as alleged in paragraph 5(a)(iii).

During the discussion Ramey and MacDonald had in early July, MacDonald said that "I do not like them [unions]. They want to swell their ranks, their [sic] a bunch of politicians and that, that MTR would never go union. If they did or tried that they would close the doors, they'd shut down." Ramey affirmed this testimony on cross-examination testifying that MacDonald told him "if the company went union, the employees wanted to go union, that the owners would close the doors, start a new company." MacDonald did not deny telling Ramey something along these lines and I found Ramey generally credible. Therefore, I conclude that the Respondent, through MacDonald, did in fact threaten employees with plant closure should they select the Union as their bargaining representative. The Respondent thereby violated Section 8(a)(1) of the Act as alleged in paragraph 5(a)(ii).

Heikkila testified that the Sunday of his last week of work (probably July 9), he called MacDonald at MacDonald's home and told him he had decided to join the Union and "I told him that his suspicions about Larry Ramey were true, that he was a union organizer but as well Kevin Moltz was a union organizer and that also Dan Decker and I had decided to join the union as well."

Later that week all employees on the crew wore, for the first time, union T-shirts. On that day Ramey was discharged. After Ramey left the job, according to Heikkila's credible testimony, MacDonald said to him "have you informed Rich [Fulfer] of your decision to go union yet. I said, 'no.' He said, 'you might want to think about calling Rich about your decision to go union.' And then he said you might want to think about going union because you'll probably be next."

I conclude that MacDonald's statements to Heikkila were direct threats of job loss for engaging in union activity and were violative of Section 8(a)(1) as alleged in paragraphs 5(a)(iv) and (v).

On July 16, after Ramey was discharged, MacDonald told Heikkila that he and Moltz were being assigned to a private job on Bainbridge Island. According to Heikkila, whom I credit, MacDonald said "I can't have you guys, you union guys sacri-

ficing my way of life so I have to break you guys up." I conclude that this statement by MacDonald, in addition to being evidence that the transfer was violative of Section 8(a)(3), was itself violative of Section 8(a)(1) as alleged in paragraph 5(a)(vi).

It is also alleged in paragraph 5(b)(ii) that MacDonald told an employee that he "could" send a suspected union organizer to a private job with its lesser pay. This allegation is based on Heikkila's testimony: "He [MacDonald] said that he'd called, he told me that he'd called Tony and that they'd discussed, Mike, Mike told me that they, Mike had beliefs that Larry [Ramey] was a union organizer. He continued to tell me that they couldn't, couldn't fire him for being affiliated with the union but they could move him to a lower paying job."

I credit Heikkila and conclude that MacDonald made the statement, in substance, attributed to him and that such was a threat to treat those engaged in union activity disparately and was therefore violative of Section 8(a)(1).

b. By Richard Fulfer

As noted above, Richard Fulfer is one of the co-owners of the Respondent. It is alleged that on July 5, he "interrogated employees about whether the Union organizers had asked them how much they made." Steven Sykes testified that two union organizers had visited the Respondent's shop. Following this Fulfer "just asked us if they had asked us our wages or any other questions and we told him that no, the conversation didn't get that far, it was pretty short, brief." Fulfer went on to tell Sykes that he had been in the Union for about 30 years, but when he started a nonunion company, "they had taken away his pension."

Interrogation which does not contain a threat or promise of benefit is protected by Section 8(c). I conclude that the interrogation here was not violative of Section 8(a)(1). See *Rossmore House Hotel*, 269 NLRB 1176 (1984). Therefore I shall recommend that paragraph 6(c) be dismissed.

Sykes also testified that about a week later, after the above event, he was wearing a union T-shirt. Fulfer "asked me if I had gotten a new shirt and I said yes. He asked me if they had convinced me to go union, I said yeah, I was thinking about taking the apprenticeship test." Nothing further was said. This interrogation did not contain a promise or threat and thus was not violative of Section 8(a)(1). I shall recommend that paragraph 5(d) be dismissed.

c. By Dave Metcalfe

It is alleged that on July 9, Shop Foreman Dave Metcalfe ordered an employee (Sykes) not to wear a union T-shirt. This occurred after Sykes' conversation with Fulfer that day. Metcalfe "told me that I shouldn't wear the shirt because he was taking heat from the bosses and he" appreciate it if I didn't "stir stuff up."

Employees' Section 7 rights include the right to wear union-related apparel while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). Thus prohibiting an employee from wearing a union T-shirt permissibly be prohibited only in circumstances where the employer can demonstrate that the message on the T-shirt will likely disrupt good order and disci-

pline. E.g., *Reynolds Electrical & Engineering Co.*, 292 NLRB 947 (1989) (company lawfully prohibited wearing buttons with a red line drawn diagonally through the word "scab" following an acrimonious strike).

There is no suggestion here that wearing a union T-shirt would in any way disrupt the Respondent's production, cause it to lose customers or otherwise impair good order and discipline. Therefore, I conclude that MacDolfe's statement to Sykes was violative of Section 8(a)(1) of the Act as alleged in paragraph 5(e).

2. The alleged violations of Section 8(a)(3)

a. The written warnings to Ramey

Though MacDonald professed not to remember when he issued warnings to Ramey, I conclude the four were written by MacDonald on July 16 and I infer for the purpose of creating a plausible lawful reason for discharging Ramey. The "no show" violation of May 10 was purportedly signed by MacDonald on that day; however, there is no corroboration that this was the case. On the Respondent's discipline form is a space for the employee's response. Nothing is filled in here. Further, the testimony of MacDonald and Richard Fulfer is to the effect that an absence is unexcused only if the employee fails to call in. MacDonald testified that on the occasions Ramey was absent, he in fact did call in. On May 10, for instance, Ramey admitted to not coming to work. But he so notified MacDonald, telling MacDonald that his car had been broken into.

Similarly, on June 1, Ramey notified MacDonald that he had a dental emergency and would not be to work. Nevertheless, Ramey's absence that day was stated to be a "no-show" and purportedly signed by MacDonald on June 1. Again, there is no employee response on the form.

Ramey's absences on June 9 and 21 were noted on discipline forms dated by MacDonald on July 16. Again, the credited testimony of Ramey, denied by MacDonald, is that these absences were excused.

Although there is no question that Ramey was absent 4 days, the credited testimony is they were excused, or at least not unexcused. Ramey was not shown the four written warnings, nor was he ever advised that any of his absences were not excused. Further, there is no evidence that any other employee, at any time ever received a warning for being absent. Indeed, Moltz testified that he was absent 1 day, called in, and was not given any kind of a warning. Richard Fulfer testified that employees take off work from time without any apparent jeopardy to their employment status.

Since the Respondent learned on July 12 that Ramey was the chairman of the employee organizing committee, I conclude that the written warnings signed by MacDonald were violative of Section 8(a)(3), even though there is no evidence that any was in fact given to Ramey. In fact, the sum of the evidence suggests that they were written after Ramey was discharged.

b. The discharge of Ramey

The Respondent argues that it has no animosity toward the Union and does not care whether its employees are members. Richard Fulfer testified that he had been a union member for many years, until he started a nonunion company. Such pro-

fessed ambivalence does not imply that the Respondent was unconcerned that the Union began an active organizational campaign. The Respondent's actions, particularly the statements of MacDonald, suggest otherwise. I conclude that in fact the Respondent was opposed to the Union representing its employees.

Two days after receiving a letter from the Union naming Ramey as the chairman of the employees' organizing committee, he was discharged. And the alleged basis for the discharge were warnings for absences which were in fact not written until the day of the discharge and were never given to Ramey.

Apparently to prove a company policy of discharging employees for absenteeism, Anthony Fulfer testified that he had recently discharged an employee who was absent without explanation four times in a 2-week period. He could think of no other employee ever discharged for being absent. Nor did he offer facts to support the conclusion that this situation was at all similar to Ramey's. I do not believe that in fact the Respondent had a policy of discharging employees who missed work, especially where, as in Ramey's case, the employee called in.

In short, I conclude that the cause relied on by the Respondent was made up and was not the true reason for the discharge. Where a reason for discharge is so patently bogus, I can and do infer that the true motive lie elsewhere—namely, Ramey's activity on behalf of the Union. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

c. The transfer of Moltz and Heikkila

The Respondent admits that on July 16, Moltz and Heikkila were told that they were being transferred from their current prevailing wage job to a private job and therefore would be paid a great deal less per hour. As with Ramey, Moltz and Heikkila were named by the Union as members of the employee organizing committee. On July 15, in a phone conversation, Heikkila told MacDonald that he had decided to join the Union and that Moltz was an organizer. Accordingly, their union activity was known, 1 or 2 days before the transfer. Adding the Respondent's animus and MacDonald's statement to Heikkila that they were being transferred in order to break up the union employees to this timing, I conclude that the General Counsel established prima facie that the transfer of Moltz and Heikkila was unlawful. *Wright Line*, 251 NLRB 1083 (1980), enfd. denied on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Therefore, the burden shifted to the Respondent to show that it would have transferred these employees when it did irrespective of their union activity. I conclude the Respondent failed to meet this burden.

The Respondent maintains that it shifts employees from prevailing wage jobs to private jobs in order to equalize the wages of all employees. Indeed, Moltz was so advised when he was hired. Nevertheless, other than the self-serving testimony of the Respondent's owners, there is no evidence that a shift of employees on July 16 was required or that Moltz and Heikkila were the two employees in line to go from prevailing wage to private jobs.

I therefore conclude that the Respondent's alleged reason for transferring these two employees was an after-the-fact justification to disguise its true motive. I conclude they were trans-

ferred in order to discourage union activity and the Respondent thereby violated Section 8(a)(3).

IV. REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I conclude that it should be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including offering

reinstatement to Larry Ramey and make him, Saul Heikkila and Kevin Moltz whole for any loss of earnings and other benefits in accordance with the provisions *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]