Yellow Freight System, Inc. *and* **Stanley H. Novak.**
Cases 3–CA–8827 and 3–CA–9025

January 8, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE

On October 3, 1979, Administrative Law Judge Robert Giannasi issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] No exceptions have been taken to the Administrative Law Judge's finding that deferral to an arbitration award concerning employee Novak's discharge, here alleged to violate Sec. 8(a)(1) of the Act, is unwarranted. Accordingly, Members Penello and Truesdale adopt such finding *pro forma*.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge: This case was heard on May 9, 1979, in Albany, New York. The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, by terminating the employment of Stanley Novak because he engaged in protected concerted activity under Section 7 of the Act and by refusing his request to have a union representative present during a confrontation he had with Respondent's dispatcher over a job assignment. Respondent denies the essential allegations of the complaint. The parties submitted proposed findings and conclusions and supporting memoranda.

Based on the entire record in this case, including the testimony of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a Kansas corporation engaged in the business of interstate shipment of general commodities by motor vehicle. It maintains facilities throughout the United States, including a terminal in Newburgh, New York, which is the location of the alleged unfair labor practices. During the past year, Respondent had gross revenues in excess of $50,000 of which over $50,000 were received for the transportation of goods from New York to other states. Accordingly, I find, as Respondent admits, that Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

Local 707, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter, referred to as the Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

At the time of his discharge, Stanley H. Novak was employed by Respondent as a road driver at its Newburgh, New York, terminal.[1] Road drivers at the Newburgh terminal are represented exclusively by the Union. At the time of Novak's discharge, the Union and Respondent were parties to a collective-bargaining agreement comprised of the National Master Freight Agreement and the New York-New Jersey Supplemental Agreement for the period of April 1, 1976, to March 31, 1979 (hereinafter the referred to as contract), and the Newburgh Local Rules and Regulations.

As a common carrier engaged in interstate transportation by motor vehicle, Respondent is subject to the Federal Motor Carrier Safety Regulations issued by the United States Department of Transportation (hereinafter referred to as DOT regulations), which provide, in Section 395.3, that:

> . . . no motor carrier shall permit or require any driver nor shall any such driver drive more than 10 hours following 8 consecutive hours of duty.

This regulation is incorporated in the applicable labor contract. Article 16 of the contract provides:

> Under no circumstances will an employee be required or assigned to engage in any activity involving dangerous conditions or danger to person or property or in violation of any applicable statute or court order, or in violation of a government regulation relating to safety of person or equipment.

[1] Prior to his employment at the Newburgh terminal, Novak had been employed at Respondent's Lancaster, Pennsylvania, terminal.

The work rules which supplement the contract provide:

> In all cases, drivers will comply strictly with all DOT Regulations (Rule 6) All layovers will be notified at the time of call (Rule 11).

The General Counsel contends that Novak was discharged for questioning the appropriateness of a dispatch which he reasonably believed might cause him to violate this provision, and therefore had engaged in the protected concerted activity of attempting to enforce his contract.

Respondent contends that the dispatch assigned to Novak was not in any way violative of DOT Regulations or the contract and that Novak's challenge of the dispatch constituted insubordination and a work slowdown. Respondent points to article 8 of the National Master Freight Agreement which provides for a grievance procedure through which all grievances or questions of interpretation arising under the contract are to be processed. Work stoppages or slowdowns are expressly prohibited in a "no-strike" clause, except in circumstances not applicable herein.

B. *The Termination of Novak*

On the morning of November 14, 1978,[2] Novak called the Newburgh terminal dispatcher from his home in Albany to receive his assignment.[3] Novak was told an assignment would be available for him that afternoon. He arrived at the terminal at 2:30 p.m. and inquired at the dispatcher's window about an assignment. Paul Oliveri, the dispatcher on duty, asked Novak whether he thought it possible to make a trip from Newburgh to Bloomsburg, Pennsylvania, return to Newburgh, and go out again on a round trip to Scranton, Pennsylvania, within 10 hours.[4] This was a new run for Respondent and the only available estimate of driving time was a computer calculation which showed that the trip should take 9 hours and 44 minutes.[5] Novak and Oliveri consulted with the central dispatcher's office, and Novak told Oliveri he felt the trip could possibly be made within 10 hours. He returned to the office at 4:30 p.m. and received the dispatch for the double-turn. Novak was scheduled to leave the Newburgh terminal at 7 p.m.

At 7 a.m. Novak was given a trip report, log book, and the bills for the trip to Bloomsburg.[6] He completed the necessary paperwork and proceeded to check the tractor assigned to him. The tractor was defective and the tractor sent to replace it was also found defective. A third tractor was provided which was found fit and safe to drive. Novak reported back to the dispatcher and departed for Bloomsburg at 8 p.m. Novak "punched in" at the Bloomsburg terminal at 11:50 p.m.; the punch clock, which works on the principle of 100 clicks to the hour on a 24-hour basis, registered 23:86 (the equivalent of 11:50). Novak departed from the Bloomsburg terminal at approximately 12:00. The punch-out machine registered 0:16.

Novak arrived at the terminal at 4:35 a.m., or 4:60 on the punch clock. At that time he had exhausted approximately 8 hours of driving time and had 2 hours remaining.[7] Novak punched out on his audit card, indicating that he had completed his assignment, and gave his papers from the Bloomsburg run to the clerk behind the dispatcher's window.[8] When the clerk gave Novak the papers for the run to Scranton, Novak stated that he did not have enough hours remaining to complete the run. Novak testified that he had passed through Scranton on the way to Bloomsburg and had noted that it took him 2 hours and 30 minutes to drive from Newburgh to Scranton. The clerk called John Sexton, the dispatcher on duty, to the window. Sexton knew that Novak had been dispatched on a double-turn, and understood that he was to send Novak to Scranton, as scheduled.

Novak asked Sexton where he was to get the hours for a 4-hour round trip when he had only 2 hours remaining. Novak testified that much of his concern arose from a similar incident which had occurred on October 15. Novak had accepted a dispatch for a turn-around which he believed could not be completed within 10 hours. He had taken the run because company regulations forbid the refusal of an assignment. Before the 10 hours were to expire, Novak notified the terminal that he could not complete the trip, and Respondent, in accordance with DOT regulations, instructed him to "go to bed."[9] Novak was put to bed for a total of 12 hours of which Respondent agreed to pay for only 4 hours which exceeded the required 8 hour rest period. Novak filed a grievance on the matter. Novak was eventually awarded payment for the full 12 hours, but he had not yet been notified of the decision at the time of his discharge. However, Novak did not mention the October 15 incident or

[2] All dates stated herein refer to 1978 unless otherwise indicated.

[3] It is the dispatcher's responsibility to see that trips are properly prepared and planned for, that drivers are assigned 40 "runs" in an orderly and expeditious fashion, that drivers are not scheduled to be on the road longer than a 10-hour maximum established by DOT, and that drivers receive the necessary paperwork to prepare for trips.

[4] A trip which consists of two round trips between the home terminal and the given destinations is referred to as a "double-turn." A single round trip assignment is referred to as a "turn-around," and a trip which is scheduled to take more than 10 hours is known as a "layover." Except in adverse weather conditions during the winter, under no circumstances may a driver be behind the wheel for longer than 10 hours. Upon expiration of the 10 hours, DOT regulations require an 8-hour rest period. In the case of a layover, the driver rests 8 hours before returning to the terminal. It is Respondent's practice, as set forth in rule 11, to notify drivers 2 hours before they are scheduled to make a trip for which a layover is planned. This enables the driver to take clothing and toiletries and make other preparations to "go to bed."

[5] The computer is programmed to determine the driving time of a run by calculating the mileage from post office to post office and dividing it by 55 miles per hour.

[6] It is Respondent's practice to give the driver one set of papers for the outbound trip, and, upon arriving at the destination terminal, the driver is given another set of papers for the return trip.

[7] There is some confusion regarding the driving time Novak believed was still remaining. He testified that he had only 1 hour and 45 minutes left and had informed the dispatcher of this. However, in his affidavit of November 30, 1978, Novak stated that he had 2 hours of driving time remaining, and, in a subsequent letter to the branch manager, also indicated that 2 hours remained. Witnesses for both the General Counsel and Respondent testified that Novak informed the dispatcher's office that he had 2 hours left, rather than 1 hour and 45 minutes.

[8] Novak testified that he refrained from punching his trip report because this would have indicated that he had no intention of going to Scranton. However, he did punch his audit card, which, under Respondent's procedure, indicates the completion of an assignment.

[9] A trip scheduled to take less than 10 hours may, due to unforeseeable circumstances or an error in calculation, take longer than anticipated. In such a case, it is company practice for the driver to notify the terminal before his 10-hour period runs out and receive instructions whether to return to the terminal within the 2 hours or to go to bed for the mandatory 8 hours. This practice is not violative of rule 11, which requires prior notification of layovers, since it is not technically a layover because the excess hours were not foreseen.

the resulting grievance during his November 15 encounter with Sexton.

When Novak asked Sexton where he was to get the hours to complete the trip to Scranton, Sexton told him to take the run, and when he exhausted his hours to call the terminal and he would be put to bed.[10] Novak returned to the drivers' table to fill out the papers for Scranton. Five minutes later he returned to the dispatcher's window and once again asked Sexton where he was to find the additional hours to complete the run. Sexton told him he "didn't give a shit, just take the run," and when he ran out of hours to call and he would be put to bed.[11]

Robert Luebbers, another official of Respondent who was present and had overheard the argument, checked the computer and found that the trip to Scranton could be made in less than 2 hours. While Novak sat at the drivers' table completing the necessary paperwork and continuing to complain about the assignment, Luebbers told Sexton that a failure to follow instructions constituted a "voluntarily quit." Sexton returned to the window, saw Novak still seated at the table, and told him to leave or he would be considered to have voluntarily quit his job. Novak remained seated. Sexton then told him to turn in his bills, that he had voluntarily quit. Novak said nothing, and Sexton repeated the statement. Luebbers came to the window and told Novak to hand in his bills, that he had voluntarily quit his job. Novak then stood up and stated that he was leaving for Scranton. Luebbers told Novak not to take a unit from the yard or he would be arrested. Sexton and Luebbers testified that Novak came to the window, threw the bills through the opening, and said, "[I]f that's the way you feel, so do I." Sexton dispatched another driver to Scranton, who made the run in 1 hour and 45 minutes.

The confrontation between Novak and his superiors took about 20 minutes.

Novak testified that, at some point during his confrontation with Sexton, he asked Sexton to call his union representative and that Sexton refused. Novak then requested that he be allowed to call his representative himself, and Sexton told him to call on his own time. Sexton and Luebbers both testified that they did not recall Novak requesting to speak with his union representative. Two coworkers, Frances Hartman and Sid Gleason, who were seated in the drivers' room at the time of the argument, testified that they overheard Novak ask for his union representative.[12] However, in a meeting held later that morning between Ronald Jones, the branch manager at the Newburgh terminal, Novak, and Novak's union representative, no mention was made of the alleged request. Nor did Novak mention the request in the first of three affidavits he gave to Board agents investigating his charge of violation in this case.

C. *Events Subsequent to the Termination*

At 8 a.m. on the morning of November 15, Sexton and Luebbers reported to Ronald Jones the events which culminated in Novak's termination. At 8:30 a.m. Novak and his union representative appeared at Jones' office and told Jones that Novak had only insisted that Sexton give him instructions regarding what to do when he exhausted his hours. As the branch manager, Jones had the power to reverse the termination decision, but chose not to. Jones testified that he agreed with Sexton and Luebbers that Novak had engaged in a work slowdown, based partially on his belief that Novak knew from past experience that he was to rest after exhausting his hours. At the meeting, neither Novak nor his union representative brought up Novak's alleged request to speak with a union representative the night before.

On November 15, Novak submitted a grievance described as follows:

> Company states I voluntary quit my job because I questioned a dispatcher as to how I was suppose to return home from a turn dispatch to Scranton PA when I only had 2 hours driving time left. At no time did I say that I would not go or did I refuse dispatch to Scranton, PA.

On December 14 the grievance was submitted to the New York City joint committee, which consists of employer and Teamster Union representatives whose decisions under the contract are final. The committee considered the grievance and position statements from the Union, Novak, and Respondent as well as answers to its questions submitted to "both sides." No transcript was taken, but the minutes of the hearing state that the parties agreed that they had "received a full hearing." The committee's minutes do not provide a rationale for its decision which is simply that "based on the evidence and testimony presented in this instant case . . . [Novak] constructively quit his job."

At the December 14 grievance hearing, Novak was represented by the Union. According to Novak's testimony, the only argument asserted by the Union pertained to the propriety of insisting that Novak make a trip which required an unscheduled layover when there were other drivers available to make the run within their 10-hour limit. The Union at no time asserted Sexton's alleged denial of Novak's request to speak with his union representative or the contention that Novak had engaged in protected concerted activity by defending a contract right.

[10] According to Novak's testimony, Sexton did not immediately tell him he would be put to bed, but only after being asked several times. Even assuming that Novak's version is correct, his testimony and his knowledge of the October 15 incident establishe that he was aware that he would not have to take the run in violation of DOT regulations and that he would be put to bed when his hours expired.

[11] Novak testified that he asked Sexton how he would get paid and Sexton replied, "how do you usually get paid?" I do not credit Novak on this point. None of the other four witnesses to the confrontation testified that Novak mentioned payment for the layover. Nor did Novak mention this matter in his grievance, in his letter 3 days later to Branch Manager Ronald Jones, or in his three pretrial affidavits. Finally, even though he attributed his request for a union representative to a concern over a prior incident of inadequate payment for a layover, he never specifically mentioned the prior incident or the resulting grievance to Sexton in their confrontation.

[12] The dispatcher's office is partitioned off from the drivers' room by a wall and a large window. An opening in the window allows the driver to communicate with the dispatcher and receive his papers.

D. *Discussion and Analysis*

1. The *Spielberg* deferral issue

The threshold issue herein is whether the Board should decline to consider the merits of this case and defer to the judgment of the biparte committee which, under the applicable collective-bargaining agreement, denied the Union's claim on Novak's behalf and found that Novak had "constructively quit" his job. The Board has a policy under which, in its discretion, it may defer to an arbitration award, including the award of a biparte panel, where (1) the proceedings were fair and regular; (2) all parties have agreed to be bound by such an award; (3) the decision is not repugnant to the purposes and policies of the Act;[11] and (4) the arbitrator or finder of fact has considered the unfair labor practice issues.[14]

The General Counsel asserts that the biparte committee's decision fails to meet the *Spielberg* criteria in two respects: first, the decision did not address the statutory issue; and, secondly, it was repugnant to the policies of the Act. As to the first point, the Board has held that the burden of proving that the unfair labor practice issue has been considered rests on the party asserting that the Board should defer its decision, here, the Respondent. See *Gulf States Asphalt, supra,* and cases there cited. I do not believe that Respondent has sustained that burden.

The General Counsel's theory is that Novak was terminated for protesting a violation of the contract—the assignment of a job which would keep him on the road over 10 hours. The theory is based on Board and court cases holding that Section 7 of the Act protects an employee's efforts to enforce contract terms where there is a reasonable basis for believing those terms are being violated.

In the instant case, the grievance presented to the biparte panel was the propriety of Respondent's asserted reason for Novak's termination: ". . . involuntary quit . . . because I questioned a dispatch as to how I was suppose [sic] to return home from a turn dispatch to Scranton, Pennsylvania, when I only had 2 hrs. driving time left." The grievance continued, "[A]t no time did I say I would not go or did I refuse dispatch to Scranton, Pa." The decision itself was very sketchy, referring simply to position statements of the parties and concluding that "based on the evidence and testimony presented"—which was not detailed or analyzed in any way—"the grievant . . . constructively quit his job." It is impossible to determine from the evidence presented to me whether the panel considered whether Novak was terminated for asserting a contract right. Novak himself testified that the Union never presented that issue to the panel, and, although this testimony may be somewhat conclusory, it was not refuted. There was no analysis in the committee's decision of the evidence or positions presented to it, and I am intrigued, but unenlightened, as to what is meant by a "constructive quit." Significantly, Respondent's position before the panel was that Novak "voluntarily" quit. The Board has stated that where an arbitrator has not clearly set forth which issues have been decided and which have not, "we will look to the evidence and contentions which have been presented to him together with the language of his award in an effort to determine whether he in fact disposed of the unfair labor practice issue." *Gulf States, supra,* 200 NLRB at 938, fn. 9. However, the sketchy evidence of the decisional process in the instant case, along with Novak's testimony that the Union never presented the issue of whether he was terminated for asserting a contract right, leaves me in considerable doubt as to whether the biparte panel considered—or, at the very least, appreciated the complexity of—the unfair labor practice issue when it determined that Novak had "constructively quit" his job. Moreover, it is not disputed that the panel failed to consider the alleged denial of union representation to Novak during his dispute with the dispatcher. In these circumstances, I cannot conclude that Respondent has satisfied its burden of showing that the unfair labor practice issues were considered and determined by the committee and I shall proceed to decide the unfair labor practice issues herein. See *Banyard* v. *N.L.R.B.*, 505 F.2d 342, 347 (D.C. Cir. 1974).[15]

2. The termination

I find that the General Counsel has not established by a preponderance of the evidence that Respondent discharged Novak for engaging in protected concerted activity, that is, asserting the violation of a contract right to the effect that he could not be assigned to drive for over 10 hours. Indeed, I find that Novak refused a justifiable work assignment or so delayed accepting that work assignment that his termination—whether it be deemed a quit or a discharge—was based on Respondent's legitimate interest in moving freight rather than Novak's assertion of a contractual right.

The General Counsel asserts that when Novak was protesting the continuation of the last leg of his job assignment—the Scranton run and return—he was asserting a contractual right. He argues that Novak's repeated requests as to how he could complete the run within his approximately 2 remaining hours of driving time are sufficient evidence that Novak was asserting contractual rights. The 10-hour DOT driving restriction was incorporated in the collective-bargaining agreement.[16]

The General Counsel cites cases where an employee's failure to specifically refer to a contractual right, or to be correct in his assertion, does not circumscribe his Section 7 rights.[17] However, an employee's assertion of a contract right must be reasonably based.[18] And the ultimate question is whether the employer did in fact discharge the employee for asserting a contract right.

[11] *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

[14] *Gulf States Asphalt Co.*, 200 NLRB 938 (1972).

[15] Here, unlike in the recent case of *Bloom* v. *N.L.R.B.*, 603 F.2d 1015 (D.C. Cir. 1979), there is no evidence that the panel "specifically" considered Novak's claim that he was attempting to enforce the contract, and the issue of whether Novak was discharged for "just cause" was skirted by an ambiguous conclusion. *Id.* at 1021.

[16] The General Counsel also argues that Novak's concern over payment for a possible layover constituted protected concerted activity. In view of my credibility determination—that Novak did not articulate such a concern to Respondent on November 15—I do not consider this additional contention.

[17] See *Firch Baking Co.*, 232 NLRB 772 (1977); *G & M Underground Contracting Co.*, 239 NLRB 78 (1979).

[18] See *N.L.R.B.* v. *Interboro Contractors, Inc.*, 388 F.2d 495, 499–500 (2d Cir. 1967).

I am not persuaded that Novak in protesting the job assignment—and refusing for about 20 minutes to continue his run—was engaged in protected concerted activity. First, Novak's protest was not a reasonably based contract claim. His own testimony shows that he understood he would not be required to violate any contractual provision or DOT regulation and that he was primarily concerned with his pay for the probable layover. Secondly, even if, initially, his conduct were viewed as a reasonably based assertion of a contractual right, the manner in which he made such an assertion rendered his conduct unprotected. Novak's conduct amounted to insubordination and a delay of freight. Finally, this was the real reason for Respondent's termination of Novak; Respondent's termination of Novak had nothing to do with his alleged assertion of a contract right.

As stated above, the dispatch was assigned to Novak only after he and the dispatcher agreed that the trip could be made in 10 hours. Novak conceded at the trial that the additional hours required to complete the trip were unforeseen and that the assignment itself, scheduled to take 9 hours and 45 minutes, violated neither the collective-bargaining agreement nor DOT regulations. The only possible violation which subsequently could have arisen, and to which Novak rightfully could have protested, would have been a demand on the part of Respondent's officials that he run over the 10-hour limit. This, however, was not the case. When Novak protested that he did not have the hours to complete the turn-around to Scranton, he was told to notify the dispatcher when his hours ran out and he would be "put to notify the dispatcher when his hours ran out and he would be "put to bed." Unforeseen layovers are encountered by Respondent's drivers upon occasion due to a miscalculation in time or distance or a breakdown of equipment. However inconvenient they may be, such layovers are not a violation of the collective-bargaining agreement or DOT regulations.

Even assuming that several minutes had passed before Novak received instructions to go to bed, he knew, from both his years of working for Respondent and his personal experience with an unexpected layover on October 15, that it was Respondent's practice to instruct drivers who have exhausted their hours to rest and that Respondent had always carefully adhered to the 10-hour rule established by DOT regulations. It is important to note that the run to Scranton was not a new assignment, but the completion of the "double turn" which Novak had agreed to undertake. Significantly, Novak testified that his primary concern was not that he would be made to run in violation of the 10-hour rule, but that he be paid for the rest time he was unexpectedly being forced to incur, a concern which he did not articulate to his superiors.

In these circumstances, I am not convinced that, at the time of the argument which led to Novak's termination, Novak reasonably believed that he was asserting a contract right. No violation of the contract had taken place, and his testimony reveals that he did not believe that he would be expected to violate the 10-hour rule which he was allegedly protesting or that he intended to run over the 10 hours on his own initiative. Rather I believe that Novak simply protested an assignment which would have caused him an inconvenience.

Even assuming that it could be found that Novak asserted a reasonably based contractual right, I find that his conduct was not protected because it constituted insubordination. By protesting the job assignment and delaying the continuation of his run in the face of driving-time restrictions, Novak was in effect attempting to work only on his own terms. His conduct was therefore unprotected. See *John S. Swift Co., Inc.*, 124 NLRB 394, 397 (1959); *N.L.R.B.* v. *Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946). Moreover, there was no need for Novak's slowdown or delay for there was a grievance machinery available for him to protest job assignments. Indeed, an integral part of the grievance procedure was the contractual prohibition against slowdowns and work stoppages. In view of the necessity to continue the dispatch and utilize the two remaining hours of Novak's driving time, as well as the necessity to maintain discipline in Respondent's operation, Novak's work interruption cannot be deemed insignificant.[19]

Finally, even assuming that it could be found that Novak was—however inartfully—asserting a reasonably based contract right and that this assertion was properly and reasonably accomplished, I cannot conclude that he was discharged for that reason. First, Respondent had no idea that Novak was asserting a contract right. He had 2 hours driving time left and Respondent's dispatcher had clearly told him that he should call from Sranton if he "ran out of hours" and he would be put to bed, as he had been on a recent similar incident. Respondent had never before—so far as this record shows—violated the DOT required-hours provision of the contract. There was no suggestion that Respondent was going to violate the provision on November 15 and Novak knew this. Novak himself testified that he was primarily concerned with his pay for the layover in Scranton. Moreover, according to the credited testimony, he did not mention this alleged concern with pay for the layover to his superiors. The pay dispute over Novak's October 15 layover was the subject of a pending grievance and was likewise not mentioned by Novak as a basis for his protest. There was no evidence that Respondent harbored any animus toward Novak for his assertion of contractual rights. Rather, it was understandably concerned over his delay in continuing the run to Scranton and his apparent refusal to work. Even as Novak argued, he was using up time he could have utilized by driving the empty trailer to Scranton where it was needed for loading the next morning. By all accounts, Novak still had sufficient driving time to take the needed trailer to Scranton. Once there, he would have been permitted to "go to bed." In this respect, I credit and accept the following testimony by Respondent's official, Luebbers:

[19] *Empire Steel Mfg. Co., Inc.*, 234 NLRB 530 (1978), cited by the General Counsel, is distinguishable on its facts. In that case, a group of employees met for from 5 to 10 minutes beyond their lunch hour on what clearly amounted to protected concerted activity. The disruption was not found to have interfered with production. In that case, there was no underlying dispute—the employees were simply discussing the implications of a work-related accident at the plant; and the meeting was not viewed as coming within the meaning of the no-strike clause involved therein. Here, the underlying dispute involved a single employee's questioning a job assignment and refusing to work in circumstances where a grievance could have been filed if the employee had any basis at all for his protest.

> Q. What prompted you to tell Mr. Sexton that this, that he should communicate to Mr. Novak it would be treated as a voluntary quit?
>
> A. Well, we're talking about fifteen minutes time here approximately, and our road dispatchers do not have to put up with this kind of harassment, they have more to do than try to get a driver out of town. Also, it was a work slow down and it was delaying freight. There is a way that a contractural employee can handle this and that is through the grievance committee if he thinks he's being wronged.

Furthermore, in response to my question as to why, after Novak finally decided to go on the run, Luebbers did not change his decision and permit Novak to work, Luebbers candidly testified as follows:

> JUDGE GIANNASI: Why did you not at that point forgive and forget? And let him take the run?
>
> THE WITNESS: The action that was taken, he should have taken the run on his first dispatch.
>
> JUDGE GIANNASI: I understand that's your position, but—
>
> THE WITNESS: The position I took is, as I mentioned before, he had already delayed freight, he had the work stoppage and he tied up a road dispatcher for twenty minutes. And there is a way to handle this if he felt that he was being wronged, there is a grievance procedure which they can go through. We have a saying, work and grieve. This is how it should have been handled if that's the way he felt.

In these circumstances, I find that Respondent terminated Novak for cause and not for engaging in protected, concerted activity in violation of the Act.

3. The *Weingarten* issue

The General Counsel also alleges that Respondent violated Section 8(a)(1) of the Act by refusing Novak's request for union representation during the confrontation between Novak and the dispatcher which resulted in Novak's termination. An employee has a right to the presence, upon request, of a union repesentative at an investigatory interview with his employer which the employee reasonably believes may result in disciplinary action. *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975); *Certified Grocers of California, Ltd.*, 227 NLRB 1211 (1977). However, based on the facts presented on this issue, I shall dismiss the allegation of a violation of Section 8(a)(1).

The evidence on the issue of whether Novak requested union representation at all on the night in question is in sharp dispute. Novak testified that he did, although such a request was not mentioned in the first of three pre-trial affidavits given by Novak to Board investigators. Nor did Novak mention the matter either in a subsequent meeting with Branch Manager Ronald Jones or in the grievance committee hearing. However, two other employees, who were present, testified that he informed the dispatcher he wanted to talk to his shop steward and the dispatcher said he would call the steward on his own and not on Respondent's time. Respondent's two witnesses disputed this evidence.

Novak testified that he asked for union representation because on October 15 he was given a dispatch and forced to lay over for a period of 12 hours and was not paid for the layover. He filed a grievance and received a check in full settlement of his claim after the December 14 committee hearing upholding his termination. He testified that on November 14 he was concerned because he had not been paid for the October 15 trip and was "curious as to . . . how I was to be paid for this particular trip . . . ." He did not, however, articulate this concern to Respondent's officials.

Even assuming, *arguendo*, the truth of Novak's testimony that he asked for union representation, I find that he had no Section 7 right to insist on such representation in the circumstances of this case. It appears from his testimony that Novak asked for union representation prior to being terminated. It is clear, however, that there was no investigatory or disciplinary interview in progress. Novak was simply given a work assignment which he questioned, and he was terminated. Nor was Novak seeking union representation to guard against possible discipline: he conceded he wanted the union representative simply to give him a clarification on his job assignment and how he would be paid for the trip. In these circumstances, I find that the General Counsel has not established that Respondent violated the Act by failing to call a union representative at Novak's request. See *Amoco Oil Co.*, 238 NLRB 551 (1978); *K-Mart Corp.*, 242 NLRB 855 (1979).

CONCLUSION OF LAW

Respondent has not violated the Act.

Based upon the above findings and conclusion and the entire record herein, I issue the following recommended:

ORDER[20]

The complaint is dismissed in its entirety.

[20] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.