

**Yellow Transit Freight Lines, Inc. Special Hauling  
Division and William Kusley. Cases 13-CA-7686  
and 13-CA-8161**

**ORDER**

April 29, 1969

**DECISION AND ORDER**

BY CHAIRMAN McCULLOCH AND MEMBERS  
BROWN AND JENKINS

On August 26, 1968, Trial Examiner John G. Gregg issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent and the General Counsel filed exceptions, cross-exceptions, and supporting briefs, and answering briefs. The Respondent filed a request for further hearing and a request for oral argument.<sup>1</sup>

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

The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, cross-exceptions and briefs, and the entire record in this case, and hereby adopts the findings,<sup>2</sup> conclusions,<sup>3</sup> and recommendations of the Trial Examiner, as modified herein.

<sup>1</sup>Respondent requests a hearing to adduce evidence concerning the position taken by the United States Steel Company before the Interstate Commerce Commission in a proceeding regarding the applications of 20 motor carriers for operating authority to compete with Yellow Transit. These matters were known to Respondent at the time of the hearing in the instant case and failure to litigate them at that time precludes further development of this issue now. The request for a hearing is denied. However, the General Counsel and the Charging Party have raised no objection to our consideration of certain documents pertaining to this matter submitted to the Board by the Respondent. We conclude that these documents, and the arguments predicated thereon, raise no serious question as to either the merits of the present case or the possibility of conflict between the National Labor Relations Act and the Interstate Commerce Act. Respondent's request for oral argument on the propriety of setting aside the June 1967 settlement agreement is also denied, the positions of the parties having been adequately presented in their briefs.

<sup>2</sup>The Trial Examiner found that the discharge of employee Kusley violated Sections 8(a)(1), 8(a)(3), and 8(a)(4) of the Act. The latter section proscribes discrimination against an employee for filing charges with or giving testimony before the Board. Since we agree with the Trial Examiner's finding of a violation of Section 8(a)(1) and (3), it is unnecessary to decide whether the evidence specifically substantiates his conclusion that Section 8(a)(4) was also violated. We shall therefore dismiss that portion of the complaint which alleges a violation of Section 8(a)(4). The Trial Examiner further found that the Respondent had committed various violations of Section 8(a)(1). We agree with these conclusions, with two exceptions. While there is some evidence in the record to support the Trial Examiner's summary conclusion that the Respondent engaged in unlawful interrogation of its employees, the record also contains conflicting testimony. Since the Trial Examiner made no

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 Trial Examiner, and hereby orders that the Respondent, Yellow Transit Freight Lines, Inc., Special Hauling Division, Kansas City, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Delete from paragraph 1(b) the language "coercively interrogating and" and "withholding paychecks and threatening reprimands because of such activities;"

2. Delete from the first indented paragraph of the Appendix attached to the Trial Examiner's Decision the words "and from filing charges or giving testimony to the National Labor Relations Board".

3. Delete from the second indented paragraph of the Appendix attached to the Trial Examiner's Decision the words "interrogate nor" and "nor withhold paychecks or threaten reprimands because of such union membership or concerted activity."

4. Delete the final paragraph of the Appendix attached to the Trial Examiner's Decision, beginning "All our employees. . .".

express resolution of this conflict and did not evaluate the circumstances surrounding the alleged interrogation, we are constrained to overrule this finding. We also reverse the Trial Examiner's holding that the Respondent violated Section 8(a)(1) by withholding the paycheck of employee Joseph Starr in December 1966. Respondent gave as its reason for this action Starr's failure to turn in logs on a daily basis, as required by ICC regulations. While there is some indication that this attempted imposition of a penalty on Starr for these derelictions was contrary to the treatment accorded other employees for similar defaults, there is no showing in the record that Respondent had knowledge of any union activity by Starr or, indeed, that Starr had engaged in any union activity markedly different from that of his fellow employees. It also appears that Starr's complaint about the withholding was immediately adjusted by an official at the home office of Respondent. We cannot find, therefore, that the withholding of the paycheck may properly be ascribed to a desire on Respondent's part to retaliate against concerted activity by Starr.

<sup>3</sup>Our modifications of the Trial Examiner's findings require certain changes in the section of his Decision entitled "Conclusions of Law." The words "and because he filed charges with the Board" and "and 8(a)(4)" are hereby deleted from paragraph 2 of that section. The words "interrogating its employees concerning their protected concerted activities and desires; withholding the paycheck of, and threatening to reprimand an employee because of his protected concerted activities" are deleted from paragraph 3 of this section.

**TRIAL EXAMINER'S DECISION**

**STATEMENT OF THE CASE**

JOHN G. GREGG, Trial Examiner: This trial was held at Chicago, Illinois, on June 4, 5, 6, and 7, 1968. Upon an original charge filed by William Kusley, December 13, 1966, Case 13-CA-7686, and a subsequent charge filed on December 8, 1967, Case 13-CA-8161, the Regional Director for Region 13 issued an Order Consolidating Cases, Complaint and Notice of Hearing on March 27, 1968, consolidating for trial the foregoing cases against Yellow Transit Freight Lines, Inc., Special Hauling

Division, hereinafter referred to as the Respondent.

The General Counsel contends that the Respondent discharged William Kusley on December 6, 1967 because of his union and other protected concerted activity in violation of Sections 8(a)(1), 8(a)(3) and 8(a)(4) of the Act; that the Respondent thereby violated a settlement agreement entered into by the Respondent and the Regional Director; and further that the Respondent interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

On April 5, 1968, the Respondent filed a timely answer denying the unlawful discharge of Kusley, denying any violation of the settlement agreement and denying any interference, restraint or coercion as charged by the General Counsel. At the close of the hearing counsel for the parties filed briefs.

Upon the entire record in the case, careful consideration of the briefs, and from my observation of the witnesses as they testified I make the following:

#### FINDINGS OF FACT

##### I. THE BUSINESS OF THE RESPONDENT

Yellow Transit Freight Lines, Inc., Special Hauling Division, is and has been at all times herein a corporation duly organized under and existing by virtue of the laws of the State of Indiana, and has maintained its principal office and place of business in Kansas City, State of Missouri.

Yellow Transit Freight Lines, Inc., Special Hauling Division, at all times material herein has been engaged in business as an interstate carrier of freight by motor truck, and in the course and conduct of said business has maintained freight terminals in various cities of the United States of America, including Gary, Indiana, and has carried on its said trucking operations among the States of Missouri, Iowa, Illinois, Indiana, Michigan, and Pennsylvania.

During the past calendar year which is a representative period, Yellow Transit Freight Lines, Inc., Special Hauling Division, received a gross annual revenue from its said business operations in excess of \$3,000,000 of which \$1,000,000 was derived from its said interstate operations.

The Respondent is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

##### II. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that on or about December 6, 1967 the Respondent discharged William Kusley because he engaged in union and other protected concerted activities and because he filed charges or gave testimony under the Act; all the foregoing in violation of Sections 8(a)(1), (3), and (4) of the Act, and that thereby the Respondent violated the terms of a settlement agreement entered into between the Respondent and the Regional Director for the Thirteenth Region. In addition to the foregoing, the consolidated complaint alleges the following acts by the Respondent of interference, restraint and coercion of its employees in the exercise of rights guaranteed to them in Section 7 of the Act: (a) That the Respondent, by Frank Gurgon and Jess Ward, on or about November 28, 1966 and another date, at Gary, Indiana, interrogated its employees concerning union membership and/or protected concerted activities of

various employees of the Respondent; (b) that the Respondent since December 1, 1966, has on several occasions withheld paychecks of employees because they engaged in union or other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (c) that the Respondent, by its agent Frank Gurgon, on or about December 30, 1966 at Gary, Indiana, told employees that it was going to send them letters of reprimand because of their union and other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (d) that the Respondent, by its agent Frank Gurgon, about mid-January 1967, at Gary, Indiana, threatened an employee that the Respondent might shutdown its steel division if the employees continued to engage in union or other concerted activities; (e) that the Respondent on or about February 4, 1967, by its agent Frank Gurgon, at Gary, Indiana told an employee that the employees were not going to achieve results and that they might as well forget their union and other concerted activities for the purpose of collective bargaining or other mutual aid or protection; and (f) that the Respondent on or about February 6, 1967, by its agent Jess Ward at Gary, Indiana told an employee to warn employees engaged in union or protected concerted activities that they were getting the reputation of being agitators, all the foregoing in alleged violation of Section 8(a)(1) of the Act.

##### A. *The Alleged Unlawful Discharge of William Kusley*

The Special Hauling Division of the Respondent is in the business of hauling steel, soliciting orders to transport steel by motor truck, and transporting such steel through owner-operators who lease their equipment to the Respondent and receive a percentage of the gross weight hauled for rental and a separate and additional payment as driver for the Respondent. The Respondent obtains the freight, operates a dispatch service, collects the bills and makes required payments to the owner-operators. The Respondent transacts its business through approximately 175 such owner-operators.

William Kusley was in the employ of the Respondent since approximately 1959. He hauled out of the Respondent's Gary, Indiana terminal to Michigan, deadheading back to Gary, Indiana his home base, hauling steel, steel coils, sheets and steel bars. Kusley operated a four-axle tractor and seven-axle tractor called Michigan trains, hauling exclusively for Yellow Transit Freight Lines, the Respondent. The record is replete with credible testimony indicating that Kusley was a key figure in the concerted activities of the owner-operators, attending several meetings during the year 1966 with owner-operators of the Respondent in Toledo, Ohio, Detroit, Gary, Indiana, and Chicago. Kusley testified that the meeting in Chicago was attended by representatives from all the local unions, presidents, and business agents and that the purpose of these meetings was to better working conditions. Some of the matters taken up at the Chicago meeting were the desires of the men to be relieved of the steel addendum, their desire for better terminal facilities, better hotel accommodations and amelioration of tax reimbursements, and grievances with respect to dispatching procedures. Kusley testified that there were grievances concerning the fact that certain operators were not placed on the board and that this was true especially in the Gary terminal where, according to Kusley, some Michigan outfits running out of Gary did

not go on the board for a year or more, but were getting the best loads, hauling four and five loads a week, while Kusley claimed he was getting one or two loads a week. Kusley testified that on the 5th of January 1966, at a time when he was engaged in exposing the alleged practice of the Respondent in using operators who were not on the board, he received a telephone call while he was at a doctors office from Frank Gurgon, a dispatcher, advising him that Mr. Dale Merriman wanted to see him down at the terminal immediately. According to Kusley, Merriman took Kusley to a restaurant, immediately told him to shut up, and said that he did not want Kusley telling the men what was going on, to shut his mouth or Merriman would blackball him. According to Kusley, Merriman threatened, him, saying "I'll put you out of business." The record indicates that Kusley was discharged by the Respondent on December 9, 1966, and that he subsequently filed a charge with the Board in Case 13-CA-7686. His reinstatement with the Respondent was effected through the grievance procedure and a Settlement Agreement was executed by the parties and approved by the Board.

Kusley testified additionally to a meeting in 1967 with Respondent company officials, including Mr. Dale Merriman and Mr. Whitchurch, where Kusley was the spokesman for the drivers and the discussion centered on minimum loads, better terminal facilities, better hotels, relief from the steel addendum, and payment of the Company of the highway use tax. According to Kusley, during the summer of 1967, the owner-operator drivers picketed Local Union 142 over the matter of the alleged failure of Local 142 to cooperate with them. Kusley testified that he tried on many occasions to contact the Union but could get no cooperation, so in August 1967, he organized a strike. According to Kusley, he and Jim Levitt put out posters calling for a general strike, which started at Gary, Indiana and extended directly to an 8 state area, and indirectly perhaps a 20 state area involving possibly 20,000 men. There is no question on this record but that Kusley was a key figure and active in concerted activity for the purpose of collective bargaining or other mutual aid or protection. While Merriman, in his testimony, denied threatening Kusley he corroborated the fact that he did have Kusley summoned to his office, took him to a restaurant where matters were discussed, because, according to Merriman, "We had some friction between the dispatcher and another driver in the company and I questioned him about it." I credit Kusley's testimony relating to this incident and find that Merriman made the remarks attributed to him by Kusley.

Frank Gurgon dispatcher, testified that at approximately 9 o'clock in the morning of December 6, 1967, he called Kusley on the telephone and offered him 55,000 pounds of pipe. Kusley said he did not want it and asked what else Gurgon had to which Gurgon replied that he had nothing else at that time.

Gurgon testified to receiving a U.S. Steel order that morning to pick up a 33,000 pound load of steel for delivery to Flint, Michigan. Gurgon offered the load in turn to the four drivers then on the board, Petersimes, Mida, Tilston and Phyllis, all of whom turned it down. Petersimes and Tilston were then ordered to deadhead to Middletown, Ohio and Phyllis and Mida to Cleveland, Ohio. Phyllis and Mida succeeded in gaining permission from the Respondent to change destination to their home terminal, Detroit, Michigan. According to the testimony of Petersimes he complained to Gurgon over being ordered to deadhead to Middletown, Ohio and then asked

Gurgon to give him the 33,000 pound load which he had previously turned down, instead of the deadhead. According to Petersimes, Gurgon refused to do so stating that Petersimes was already dispatched, and Gurgon would not move to change his dispatch and to substitute the 33,000 pound load which was then available in lieu of the deadhead. In his testimony Gurgon confirmed the version given by Petersimes.

A. He was already dispatched.

Q. You mean he was already out on the road?

A. My orders come at 10:15 to send these four units in after they decline the material of approximately 9:30. Once a dispatch is issued under rare circumstances do we change.

Q. You mean you would rather send a man empty to Cleveland or Middletown rather than let him take a load of 33,000 pounds on his way?

A. No. This is company dispatch, this isn't anything I myself personally want to do.

Q. Didn't you say occasionally you make an exception?

A. In other words it all depends if a man's wife is sick naturally we'd send him home.

Q. Didn't Petersimes tell you "I'll take the load rather than go empty."

A. Definitely.

Q. Did you make any attempt to call Indianapolis?

A. No, I did not.

Q. You just said "you're on your way to Middletown?"

A. "My orders are to send you four out empty."

Gurgon testified that with respect to the change of dispatch from Cleveland to Detroit for Phyllis and Mida the change was made at the request of Mr. Whitchurch to the central dispatch office. Gurgon stated that Petersimes did ask him to call the central dispatch office to see if he could be given the 33,000 pound load but Gurgon refused to do so. Gurgon testified that at this time he was trying to get another unit to go in to the city of Chicago to pick up 23,000 pounds of machinery to haul in conjunction with the 33,000 pounds.

According to Gurgon, Whitchurch called Kusley at about 11:20. The record indicates that at 10:15 that morning both Gurgon and Whitchurch knew there were no available drivers for the 33,000 pound load and yet they did not call Kusley until almost 11:30.

Q. Any particular reason for that?

A. Yes, because the same mill might have 33,000 pounds going to the same time and then I would have given him

Q. You were waiting?

A. Hoping to get a fill for that load.

Q. When it came to the crucial moment you only gave him half an hour to get there?

A. He had 1 hour.

Gurgon testified that at 2:30 he received a call from Kusley asking if he had a fill for his truck. According to Gurgon he advised Kusley he could have a fill of either 65,000 or 80,000 pounds. According to Gurgon, he and Whitchurch were suspicious and checked by telephone at the mill only to find Kusley had not yet arrived there. Gurgon testified that Whitchurch cancelled out the order "because of inefficiency to perform on our service." Gurgon testified it was shortly after 3 o'clock that Whitchurch cancelled the load, that he "had enough problems with the mill from 11:30 in the morning until 3:30 in the afternoon." The record also indicates that the Respondent got in touch with a substitute driver for the

load between 2:30 and 3 o'clock or shortly before 3 o'clock. Gurgon testified that he did not know that the load had been cancelled until the substitute driver, Brown, called him about 3:25 and told him there was no steel, that it had been cancelled.

Q. Is there any reason, or did Mr. Whitchurch tell you of any reasons why he didn't want Brown to take that load?

A. No.

Q. No reason at all?

A. Except the aggravation we were having at U. S. Steel with our particular customer on it because I had checked Mr. Lawrence several times. The first time I talked to him was at 2:30.

Q. What kind of aggravation were you having at U. S. Steel?

A. In other words we tried to pride ourselves on our service and when you start giving a 4 1/2 hour late pickup or a 3 1/2 hour it isn't too good, so in other words I would say the aggravation would be on the mill's part for having to check on their particular material.

Gurgon testified that when Kusley finally came back from U. S. Steel Kusley put his head in through the window and asked to be put on the bottom of the board. Gurgon denied that he told Kusley he was going back on the bottom of the board, but stated that Kusley had asked to be put back on the bottom of the board. At this time Gurgon testified that he told Kusley he was out of service, saying "I have to put you out of service, . . . them per my orders." Gurgon testified he had received those orders at about 3:30 p.m., directly from the Indianapolis office.

Based on my observation of the witness Gurgon as he testified I do not credit his testimony, which I found strained and unconvincing, particularly his attempt to portray any so-called aggravation or problem which he claims to have had with U. S. Steel, and particularly in view of the testimony of record which would indicate that U. S. Steel did not pressure the Respondent concerning the pickup other than to make a normal follow-up call, and particularly since U. S. Steel was still ready and agreeable at 3:10 p.m. to permit the late pickup of the steel by Kusley or the substitute driver.

In this connection, Tom Lawrence an employee of the U. S. Steel testified that he was a truck dispatcher at the Merchant Mill at the Gary works, Gary, Indiana. His duties included ordering trucks from the carriers and scheduling them at certain pickup times. Lawrence testified that on December 6, 1967, he ordered a truck from the Respondent sometime in the vicinity of 8:30, 9:30 or 10 in the morning. Lawrence testified further that prior to this time at the mill there had been no scheduled pickup times, and drivers could arrive at the mill at any time between the opening and closing of the mill, but that the procedure for scheduling a pickup time was just getting underway. Under this procedure trucks could pickup during a 1-hour period starting a half hour before scheduled time to a half hour after scheduled time.

Concerning the 33,000 pound load in question, Lawrence stated that it was mutually agreed between the U. S. Steel and the Respondent to have a 12 o'clock pickup for the load. According to Lawrence, following normal procedure, sometime after 12 o'clock he called the Respondent and indicated that the truck had not arrived. Lawrence testified that under certain circumstances rescheduling was possible and arrangements could be made for a later pickup time. He did not recall any attempt by the Respondent to reschedule the 33,000 pound

load for a later pickup time on December 6, 1967. Lawrence testified that the Respondent's truck arrived to pickup the 33,000 pound load at 3:10 p.m., that in accordance with the normal procedure the truckdriver identified himself over the two-way intercom between the truck scale and the truck dispatch desk which prompts the pulling of the file and its dispatch through the pneumatic tube from desk to scale.

Lawrence testified that about 15, 20 or 30 minutes prior to 3:10 p.m. he had received a call from the Respondent's dispatcher advising him to have the driver call his terminal on arrival at the mill. When the driver arrived at 3:10, Lawrence gave him that information. Although the load was ready for pickup at that time, Lawrence stated that the truck did not make the pickup.

Q. Mr. Lawrence, at this time were there any penalties for coming in late?

A. Not to my knowledge.

Lawrence went on to testify that in his opinion "you could not get a whole lot of them (Michigan train drivers) to take a 33,000 pound load, as this is not considered a good payload but is a partial load." He did state that this would not be an uncommon load when taken in conjunction with a fill.

Henry Marszlekv, an employee of U. S. Steel, testified that on December 6, 1967, he followed Tom Lawrence as truck dispatcher at the Merchant Mill, that after he started at about 3:10 or 3:15 p.m. he received a call from the Respondent's office:

Q. And what was this call?

A. Well, they referred to me that they had problems and they — we'd like a mutual agreement to — that they had been having problems, get the load back to us to you or to the corporation.

Q. Did they turn the load back to U. S. Steel?

A. Yes.

Marszlekv testified further that subsequently at about 3:20 or 3:30 p.m. another of the Respondent's trucks arrived to make the pickup but that the Respondent in the meantime cancelled out and turned the load back to U. S. Steel. U. S. Steel then placed the load with Long Transportation which subsequently picked it up.

Whitchurch, district sales manager for the Respondent, testified concerning the loss of the load:

A. And I called Mr. Tommy Lawrence, a dispatcher at the merchant mill.

Q. What did you say to Mr. Lawrence?

A. And I told Mr. Lawrence that, as far as Kusley was concerned, we were wanting to lose the load. Whitchurch stated further "We were willing to lose the load as far as Kusley was concerned. I was tired of fooling around with it. We were not serving our customer."

In this connection, it is interesting to note that a perusal of the U. S. Steel inbound truck record for December 6, 1967, would indicate that the newly instituted scheduled pickup procedure was at that time being honored by the carriers in the breach as well as in the observance, and that the Respondent's 3:10 arrival for a noon pickup was not an uncommon occurrence for that day. The Respondent's expressed concern over Kusley's failure to make a prompt pickup appeared to me to be strained and unconvincing under the circumstances, particularly since the record is devoid of any testimony indicating that U. S. Steel was indeed upset over this or had notified the Respondent of its displeasure, and in view of the fact that the procedure for prompt pickup was in its infancy and not fully established.

The Respondent makes much of the argument that Kusley could have rejected the load at 11:30 a.m., but instead waited over 3 hours to report to the mill, even though he was aware of the nature of the load and its scheduled pickup time. I am not persuaded, in view of my crediting the testimony of Kusley, that Kusley could have rejected the load at 11:30 a.m., but regardless of whether or not the load was forced, and accepting the fact that Kusley did not reject the load, I am not convinced that Kusley was specified by the Respondent as a voluntary quit because he did not report to the mill for over 3 hours. For there is ample, credible testimony of record to convince me, and I find, that Kusley was a key figure in the concerted activities carried on by the employees of the Respondent, which concerted activities were protected by the Act; that the Respondent had clear knowledge of and was well aware of Kusley's activities; that Kusley was given very short notice of the pickup even though the Respondent could have given him much more timely notice but failed to do so for a stated reason which is not convincing on this record; that Kusley did not just fail to report to the mill on the day in question, but was engaged in an effort to contact Gurgon and to arrange for what would appear to be a reasonable and satisfactory transfer of the load; that the Respondent made it clear to its customers that it would actually prefer to "lose the load" insofar as Kusley was concerned, and I am convinced and I find that Respondent did in fact deliberately lose the load, in order to place Kusley in the position of technically qualifying as a voluntary quit, even though the record indicates that it would have been possible for the Respondent and agreeable to the customer to seek a rescheduling of the pickup to a later time that day, and even though, in fact, both Kusley and a substitute truck could have picked up the load at 3:10 with no loss had it not been for the precipitate cancellation by the Respondent.

The Respondent also argues that Kusley was not an elected steward or representative of his union. It is well settled that the protection of the Act covers employees engaged not only in union activities but concerted activities engaged in for the purpose of collective bargaining or other mutual aid or protection. While not a union steward or representative, Kusley has been established on this record as a key mover in the concerted and protected activities of the employees of the Respondent.

The manner in which the load was assigned to Kusley, the strained explanation of the Respondent for its refusal to effect a simple transfer of the load for the convenience of the drivers, in the face of its rescheduling other drivers for their convenience, and that actions of the Respondent indicating that it preferred to lose the load under the circumstances herein, all convince me and I find that the Respondent specified Kusley as a voluntary quit, and thereby constructively discharged him, because it desired to get rid of him due to his key role in the protected concerted activities of its employees and because he filed charges with and gave testimony to the Board in connection with such activities as charged in the complaint; all the foregoing in violation of Sections 8(a)(1), 8(a)(3) and 8(a)(4) of the Act. I find also that by this substantial unlawful conduct the Respondent clearly violated the Settlement Agreement hereinabove referred to.

There was evidence of record by the Respondent indicating that Kusley had been terminated at various times in the past by the Respondent as a voluntary quit

and for other infractions, had taken these matters to grievance and had been reinstated as a result of each grievance. I have given this testimony no weight in arriving at the decision in this case. If I were to accord it weight I would be inclined to find it favoring an inference that in the case of Kusley the Respondent had established a pattern of being "trigger happy" in its use of the discharge in circumstances which would not withstand subsequent objective scrutiny.

#### *B. The Alleged Interference, Restraint and Coercion*

Roscoe Gibson testified that in February 1967, when he was a driver-operator for the Respondent, he had a discussion with Jess Ward in the Dunes Center Truck Stop in Gary, Indiana. According to Gibson, after the others who had been present left, Ward stated to him "Mr. Kusley and Mr. Starr are getting quite reputations as agitators." He testified further that about a week before that he had a discussion with Gurgon in which, as Gibson put it, "he said you guys aren't going to get what you want."

Gibson testified further to a telephone conversation which he overheard at the terminal around October 23, when Whitchurch and Gurgon were in the dispatch room with the door opened.

Well, he was on the telephone. I don't know who he was talking to but he kept saying that this man don't want to come back to work. Mr. Kusley does not want to come back to work. He doesn't want to come back to work. "If this S. O. B. comes in here we will put him back to work, we don't want him but we'll put him back to work. We signed a contract."

Gibson testified that a few days after Kusley was discharged in December, Whitchurch was talking generally with the drivers "fishing for information as to what Mr. Kusley was trying to do and he made a departing remark over his shoulder 'we'll get the S. O. B. no matter what it cost us.'" I was impressed by Gibson's straightforward testimony and his responses on cross-examination, and credit his testimony which was also partially corroborated by witness Emil Herder another driver-operator employee of the Respondent whose testimony I also credit. While Whitchurch denied making these remarks, based on my observation of him as he testified, I was not convinced by his testimony. Accordingly, I find that the Respondent, through Gurgon, and Ward, let employees know that they were singling out employees who were active in the protected concerted activities of the employees and were identifying them as agitators, and that the Respondent through Gurgon coercively indicated to its employees that their concerted activities were going to fail, and that by the foregoing, under the circumstances, the Respondent interfered with, restrained and coerced the employees of the Respondent in the exercise of rights guaranteed to them in Section 7 of the Act in violation of Section 8(a)(1) of the Act as charged in the complaint.

Joseph Starr, an employee of the Respondent prior to being injured, testified that he had attended meetings for the purpose of bettering working conditions for employees of the Respondent, that in December 1966, he failed to meet the ICC requirements of turning in his logs on a daily basis. According to Starr he had accumulated 9 days of logs. Prior to this time according to Starr when he failed to turn in logs he was merely advised to turn them in. A notice came over the teletype that he was not to receive any money. As Starr was pressed for money he discussed this with Gurgon who pointed out the teletype

instructions. Starr then contacted Stultz and indicated that he had the logs available and wanted his money. When Stultz refused, Starr called the office in Kansas City. He was advised by Kansas City that his money should not have been withheld. Subsequently, Stultz notified him by telephone that he would be paid but would also receive a letter of reprimand. While Starr stated that he knew of the ICC requirement of daily turn in logs, he testified that the general practice was to hold them for several days and to turn them in at the end of the week, and that many times drivers would hold logs for 30 days before turning them in. This testimony as to the practice was not controverted and I credit Starr's version, and in fact Stultz testified that this was the only time the Respondent had withheld a paycheck because of failure to turn in logs. Accordingly I find that the Respondent, with knowledge of Starr's concerted activities deliberately withheld his paycheck and threatened him with a reprimand under circumstances which convince me that this was done because of his concerted activities protected by the Act, in violation of Section 8(a)(1) of the Act as charged in the complaint.

Starr testified further that Gurgon, in a discussion with two or three drivers, subsequent to a meeting over working conditions in about March 1967, told him "the Company don't really need this steel division, they can have just a couple of trucks and shut her down just to keep the rights, just keep a couple of trucks." I credit the testimony of Starr and note that Gurgon, in his testimony, partially corroborated it. I find that the statement made by Gurgon under these circumstances, amounts to a threat to shutdown in view of the concerted activities of the employees, and that by such action the Respondent under the circumstances herein, interfered with, restrained and coerced its employees in the exercise of rights guaranteed to them by Section 7 of the Act in violation of Section 8(a)(1) of the Act, as charged in the complaint.

From the foregoing, and additional ample, credible testimony of this record I am also convinced and I find that the Respondent interrogated employees of the Respondent concerning their protected concerted activities as charged in the complaint, thereby interfering with, restraining and coercing the employees of the Respondent in the exercise of rights guaranteed to them in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

### III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices of the Respondent set forth in section II, above, occurring in connection with the operations of the Respondent described in section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

### CONCLUSIONS OF LAW

1. Yellow Transit Freight Lines, Inc., Special Hauling Division, is, and has been at all times material to this proceeding, an employer within the meaning of Section 2(2) of the Act.

2. By constructively discharging William Kusley on December 6, 1967 because of his union and other protected concerted activities engaged in for the purpose of collective bargaining or other mutual aid or protection, and because he filed charges with the Board, the

Respondent discriminated against Kusley in his hire and tenure of employment and terms and conditions of employment and has discouraged the Union and other protected concerted activities of its employees and has engaged in and is engaging in unfair labor practices within the meaning of Sections 8(a)(1), 8(a)(3) and 8(a)(4) of the Act.

3. By interrogating its employees concerning their protected concerted activities and desires; withholding the paycheck of, and threatening to reprimand an employee because of his protected concerted activities; threatening to shutdown certain operations if the employees continued to engage in protected concerted activities; and by warning employees that some employees were getting the reputation of being agitators because of their protected concerted activities and that the employees would not achieve results with their concerted activities; the Respondent interfered with, restrained and coerced its employees in the exercise of rights guaranteed to them by Section 7 of the Act, and thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

### THE REMEDY

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

Having found that the Respondent unlawfully discharged William Kusley on December 6, 1967, I shall recommend that it be ordered to offer him immediate and full reinstatement to his former or to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he normally would have earned from the aforesaid date of discharge to the date of Respondent's offer of reinstatement, less his net earnings during such period. The backpay provided herein shall be computed on the basis of calendar quarters, in accordance with the method prescribed in *F. W. Woolworth Company*, 90 NLRB 289. Interest at the rate of 6 percent per annum shall be added to such net backpay and shall be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

The General Counsel requests that in addition to backpay, the Respondent be ordered to make Kusley whole for the value of his tractor and trailer which the General Counsel contends was lost to Kusley by reason of the Respondent's unlawful discharge of Kusley on December 6, 1967. If in fact Kusley lost his equipment as a clear consequence of the discriminatory action of the Respondent I would be disposed to recommend an order requiring the Respondent to make Kusley whole through the application of some appropriate measure of loss such as the value of the property at the time of loss or the current cost of replacement of substantially similar piece of equipment. However, I do not reach this question, for after careful consideration of the testimony of record I am unable to ascertain or determine whether or not Kusley actually was deprived of his equipment, the nature of his ownership, if any, of such equipment, and whether or not such deprivation, if any, clearly resulted as a consequence

of the unlawful action of the Respondent. Accordingly I will not recommend the issuance of an order making Kusley whole for the alleged loss of his equipment.

Because of the Respondent's unlawful acts, its violation of the settlement agreement, and its discriminatory discharge of employee Kusley, it is reasonable to conclude that the Respondent in the future, unless specifically enjoined may deny its employees their statutory rights not only in these, but in other ways as well. Therefore, I shall also recommend that the Respondent be ordered to cease and desist from in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

### RECOMMENDED ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Yellow Transit Freight Lines, Inc., Special Hauling Division, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging the Union and other protected concerted activities of any of their employees by discharging or in any other manner discriminating against any employee in regard to hire, tenure of employment, or any other term or condition of employment because of such union or other protected concerted activity.

(b) Interfering with, restraining, and coercing its employees in the conduct of activities protected by the Act by coercively interrogating and threatening employees concerning their union and other protected concerted activities; withholding paychecks and threatening reprimands because of such activities; threatening to shutdown certain operations if the employees continued to engage in protected concerted activities; warning employees that some are getting the reputation of being agitators because of their protected concerted activities and that the employees would not achieve results with such activity.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, to bargain collectively with representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer to William Kusley immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Notify the above-named employee if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon 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 amounts of backpay due to William Kusley.

(d) Post at its Gary, Indiana, terminal, copies of the attached notice marked "Appendix." Copies of said notice on forms to be provided by the Regional Director for Region 13, after being duly signed by the Company's representative, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 13, in writing, within 20 days from the receipt of this Decision, what steps the Respondent has taken to comply herewith.<sup>2</sup>

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<sup>1</sup>In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order"

<sup>2</sup>In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Thirteenth Region, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

### APPENDIX

#### NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT try to discourage you from your union and other protected concerted activities engaged in for the purpose of collective bargaining or other mutual aid or protection and from filing charges or giving testimony to the National Labor Relations Board by discharging any employee, or in any other manner discriminating against our employees in regard to hire or tenure of employment or any other term or condition of employment because of your union membership or protected concerted activities.

WE WILL NOT interrogate nor threaten any of our employees concerning their union membership or activities; nor withhold paychecks or threaten reprimands because of such union membership or concerted activity.

WE WILL NOT try to discourage you from union or concerted activities by threatening to shutdown certain operations and identifying active participants in union and concerted activity as agitators.

WE WILL offer William Kusley his former job with all of his rights, without prejudice to his seniority, and make him whole for any loss of pay he may have suffered as a result of our discrimination against him. All our employees are free to become or remain, or

refrain from becoming or remaining, members of any labor organization.

YELLOW TRANSIT  
FREIGHT LINES, INC.,  
SPECIAL HAULING  
DIVISION  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_ (Representative) \_\_\_\_\_ (Title)

Note: Notify William Kusley if presently serving in the Armed Forces of the United States of his right to full

reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 881 U. S. Courthouse and Federal Office Building, 219 South Dearborn Street, Chicago, Illinois 60604, Telephone 353-7597.