

Yourga Trucking, Inc. and Michael James Pompey.
Case 6-CA-5297

June 26, 1972

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS
KENNEDY AND PENELLO

On June 22, 1971, Trial Examiner Melvin J. Welles issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions to the Trial Examiner's Decision with 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 Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, only to the extent consistent herewith.

Michael J. Pompey was discharged from his employment as a truckdriver on October 17, 1970. The General Counsel contends in this proceeding that the Respondent discharged Pompey because several grievances had been filed in Pompey's behalf and, thus, violated Section 8(a)(1) of the Act. The Respondent contends that Pompey was discharged because he reported to his dispatcher for a truckdriving assignment under the influence of alcohol. Respondent contends further that the question whether Pompey was properly discharged was submitted to the Western Pennsylvania Teamsters & Employers Joint Area Committee, pursuant to the provisions of the collective-bargaining contract in effect, and the discharge was upheld. The Respondent contends that conclusive weight should be given to the determination of that committee.

1. The Trial Examiner concluded that, although the award of the committee is otherwise cognizable by the Board under standards established in *Spielberg*,¹ the instant record did not disclose whether the committee had been presented with, or considered, the question of the Employer's assertedly improper motivation in effecting the discharge. The Trial Examiner treated the silence of the record as a failure of the General Counsel to establish an essential element of his *prima facie* case and recommended that the complaint be dismissed, in reliance on *Spielberg* and *Terminal Transport Company, Inc.*, 185 NLRB No. 96. We are unable to affirm the

conclusions of the Trial Examiner in this latter respect.

In *Airco Industrial Gases*, 195 NLRB No. 120, the Board held that deference would not be accorded to the result of an arbitration proceeding where the issue of Respondent's asserted discriminatory motive had not been presented to the arbitral forum which considered whether the discipline of an employee was imposed for just cause. We face here the further question of which party to a proceeding under the Act must adduce proof regarding the scope of matters presented in the arbitration proceeding. We hold that the burden to adduce such proof rests on the party asserting that our statutory jurisdiction to resolve the issue of discrimination should not be exercised. That party may be presumed to have the strongest interest in establishing that the issue has been previously litigated, if that is the case. Moreover, in the usual case, that party will have ready access to documentary proof, or to the testimony of competent witnesses, to establish the scope of the issue submitted to the arbitrator. Thus, here, in light of Respondent's failure to establish that the issue of its motivation was previously litigated, we shall decide the question of motivation.

2. The undisputed, or credited, testimony establishes the following sequence of events. On Saturday, October 17, 1970, at or about 9:30 a.m. Pompey called the freight terminal dispatcher, Milkie, to inquire whether a trip was available for assignment to him. Milkie stated that nothing was then available and that Pompey's next dispatch would probably be a load destined to New Jersey or New York on Monday morning. Pompey indicated he was satisfied not to be dispatched until Monday. Milkie, however, asked Pompey to call again at 10:30 that morning against the event that a dispatch might be required.

At 10:30, Pompey called Milkie again and was told that a load to Cleveland was then available. Pompey declared that he would prefer not to take the Cleveland trip and indicated he wanted a longer haul. Milkie then stated that Yourga, Respondent's owner, had directed him to assign the Cleveland trip to Pompey and told Pompey to report right away. According to Pompey, he responded that he had three drinks (of liquor presumably) "in front of him," knowing that it was the policy of the Company not to send out drivers who had been drinking. It thus appears that, after being ordered to report, Pompey proceeded to consume some quantity of liquor, and then reported to the terminal.

At or about 9:35 that same morning, Union Steward McFeaters had filed a grievance in Pompey's behalf seeking additional detention time or

¹ *Spielberg Manufacturing Co.*, 112 NLRB 1080

“show-up” time pay for three separate instances. Yourga accepted the claims with something less than total diplomacy: McFeaters testified that Yourga appeared to be angered by the presentation of the claims. Notwithstanding Yourga’s reaction, the claims were processed pursuant to the grievance procedure, and it was ultimately determined that Pompey was entitled to additional pay on one of the three claims.

At or about 12:30 that afternoon, after the departure of the union steward, Pompey reported to Dispatcher Ellia. (Dispatcher Milkie was not then on duty.) Ellia observed Pompey had been drinking and reported to Yourga that he did not think Pompey was “fit for the road.” Yourga went to the dispatch office, confirmed that Pompey had been drinking, and discharged him, stating in effect, “What do you want to do, run this company?”

The Trial Examiner inferred from this sequence of events, and from Yourga’s statement to Pompey, that the motivation for the discharge was Yourga’s pique arising from the filing of grievances earlier that day. For the reasons stated by Member Kennedy in that part of his concurring opinion which deals with the factual issue, we decline to draw that inference and we conclude that the reasons advanced for Pompey’s discharge are not pretextual. Accordingly, we shall dismiss the complaint in its entirety.

ORDER

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

MEMBER KENNEDY, concurring as to result:

I would affirm the Trial Examiner’s recommendation that deference be accorded the unanimous award of the arbitration panel and that the complaint be dismissed.

Disposition of the instant case, in my judgment, is controlled by *Spielberg Manufacturing Company*, 112 NLRB 1080. That case involved allegations of discrimination. In *International Harvester Company*,² the Board announced that it would honor an arbitration award in such cases “unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act.”

The *Spielberg* criteria were satisfied in the instant

² 138 NLRB 923, 927, *affd sub nom Ramsey v. N L R B*, 327 F.2d 784 (C A 7), cert denied 377 U.S 1003.

³ Pompey first testified that he had three or four drinks on the morning in question

⁴ Respondent’s dispatcher testified that when Pompey told him that he had three drinks in front of him he thought that Pompey was giving an

case. The Trial Examiner correctly points out that the parties “told essentially the same story to the Joint Committee” which they told at the hearing in the instant case. Indeed, it appears that the grievance upon which the General Counsel’s pretext argument is premised was a part of the deliberations before the joint committee. As the Trial Examiner observed, the dischargee had his day in court with full opportunity to present his side of the case. I adhere to the view set forth in my dissent in *Airco Industrial Gases*, 195 NLRB No. 120, that, if the parties choose to have the basic issue of the justness of a discharge arbitrated, the arbitrator’s award should not be rejected by the Board, because it can be argued, with the benefit of hindsight, that a better argument on the issue of discrimination could have been made to the arbitrator. In my view, the Trial Examiner is clearly correct in stating that, where a fair arbitration has been held pursuant to the collective-bargaining agreement, it should be the burden of the party seeking a result contrary to the arbitrator’s award to establish that the arbitrator did not consider the issue before the Board. No such burden has been met in this case.

As to the merits of the discharge, I agree with Chairman Miller and Member Penello that the complaint should be dismissed. Respondent says it discharged Pompey because he reported to work under the influence of alcohol. Pompey admitted that he had eight drinks during the 3 hours immediately preceding his reporting for work on the day of his discharge.³ Pompey testified when he first called Respondent’s dispatcher from a bar at 9:30 a.m. he had not yet had a drink. A load was not then available, and it was agreed that Pompey should call back 1 hour later. When Pompey called again at 10:30 a.m., he was told that the Company had a load for him which had to be picked up not later than 1 p.m. Pompey then advised Respondent’s dispatcher that he “had three drinks in front of” him.⁴ Pompey did not testify that he advised Respondent that he had already consumed three drinks. Respondent’s dispatcher denies that Pompey advised him that he had been drinking prior to the telephone call.

I can find no evidence in this record to suggest that Respondent countenanced drivers reporting to work in an intoxicated condition. The collective-bargaining agreement grants the Employer the right to discharge for drunkenness, and the dischargee admits that the posted company rules prohibit drinking. Respondent claims that it had warned its drivers about drinking and driving for 10 or 15 years

excuse for not taking the Cleveland load. Pompey acknowledged that he did not want to take the Cleveland load but Respondent refused to give it to another driver

Having three drinks in front of one at 10:30 in the morning is not so common as to render implausible the dispatcher’s testimony that he believed Pompey was giving an excuse for not taking the Cleveland load

because "all you have to do is get connected with a little accident where the driver is under the influence [of alcohol] and there goes a million dollars right down. We don't have that kind of money; it's a loss."

An adverse inference cannot be drawn from Yourga's inquiry as to "what are you trying to do to this company, are you trying to run the show or what?" Plainly, this did not relate to the grievance. The reasonable interpretation of the inquiry, as I view the record, is that it related to the 10:30 a.m. telephone conversation. Pompey's own version of that conversation reflects his independence:

I said, "Do you have anything to load, yet?" He said, "Yes," he said, "we've got a load for you." I said, "Where are we going?" He said, "To Cleveland." I said, "Since when do we start hauling to Cleveland?" He said, "Well, we haul it under Frank Cross." I told him I'd rather not have it. I said, "Give it to somebody who likes a short haul." I said, "I like a long haul. I'm an over-the-road man, not a local hauler." He said, "never mind that. John Yourga says this is your load." I said, "Well, if John says that, well, there's no argument." Duane then told me, he said, "Well, come on down right away." He says, "We have some special instructions." I asked him what they were, and he said he couldn't give them to me over the phone, he had to tell me to my face. So—Well, I didn't want to leave right then. I said I had a couple of drinks there in front of me and when I finished those I would be down. He says, "Well, you have a 1:00 o'clock deadline." I says, "Well, there's plenty of time. I'll drink them." He says,—Well, he wanted me to come down right then. I said, "No," I said I had these three drinks in front of me and I wasn't about to leave them. He says, "Well, I'll drink the drinks and you go load the truck." I says, "No, you go load the truck and I'll drink the drinks."

Finally, the contention that Pompey was discharged in reprisal for a grievance being filed on behalf of Pompey earlier in the morning is far-fetched. It is abundantly clear that any resentment which may have been shown was directed at David McFeaters and not at Pompey. According to McFeaters, when he handed the grievance to John Yourga, he was told "Okay, Mr. Union Steward, if you want to play Union steward, I'm going to accept this as a grievance." If McFeaters had been selected to act as union steward at the time of this incident, Respondent was not aware of it.

It was not until 5 days after this incident that the Union sent a letter, dated October 22, to Respondent advising that "McFeaters *will be* appointed steward

of Yourga Trucking." Respondent denies that it had been told prior to receipt of this letter that McFeaters had been designated steward. The General Counsel offered no testimony that Respondent had been informed prior to October 22 that McFeaters was a steward.

It seems to me that in this context it is improbable that Pompey's discharge was in any way related to McFeaters' purporting to act as a union steward earlier in the day. The discussion clearly was directed at McFeaters and not Pompey.

Plainly the arbitrator correctly concluded that the discharge was proper.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

MELVIN J. WELLES, Trial Examiner: This case was heard at Sharon, Pennsylvania, on March 10, 1971, on a complaint issued January 26, 1971, based on charges filed December 2, 1970. The complaint alleges that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Michael James Pompey. Respondent filed an answer denying that it violated the Act. Counsel for the General Counsel and for the Respondent argued orally before me; neither has filed a brief.

Upon the entire record,¹ including my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Pennsylvania corporation, with its principal offices and terminal at Wheatland, Pennsylvania, is an interstate motor truck carrier, licensed as such by the Interstate Commerce Commission. During the 12-month period prior to the issuance of the complaint herein, Respondent received in excess of \$50,000 for services in transporting goods and materials across state lines to and from the Commonwealth of Pennsylvania. I find, as Respondent admits, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 261, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

Respondent discharged the Charging Party, Michael James Pompey, on October 17, 1970. General Counsel alleges that Pompey was discharged for filing grievances with the Company; Respondent claims that he was

record as TX Exh 1.

¹ The General Counsel's motion to correct the transcript, which was not opposed by Respondent is hereby granted. The motion is made part of the

discharged for reporting to work drunk. Affirmatively, Respondent contends that the Board should defer to a decision issued by the Western Pennsylvania Teamsters & Employers Joint Area Committee Steel Sub-Committee on November 13, 1970, denying the Union's claim that Pompey was unjustly discharged.

B. *The Facts*

Pompey worked for the Company for about 4 years. During that period, he received a great many warnings, reprimands, and disciplinary actions for a variety of offenses, such as accidents, speeding, overloading, not showing up for a trip, and not turning in his log sheets. Pompey returned from a trip to Long Island City the evening of October 16, 1970. He called the dispatcher and was told there was nothing to load at that time. It was agreed that Pompey would call in at 9:30 the next morning to see if there was anything to load. He called at that time and spoke with dispatcher Duane Milkie, who indicated there was nothing to load then. Milkie indicated there was a load to New Jersey or New York to be picked up Monday (this conversation was on Saturday); Pompey said that was fine, but Milkie responded that they would wait a while and see if anything else came in. It was arranged that Pompey would call in at 10:30 that same day. He did so, spoke with Milkie again, and was told there was a load to Cleveland that day. Pompey said he would rather not take it, that he preferred a longer haul. Milkie said that Yourga had told him to give Pompey the Cleveland trip and he told Pompey to come in right away. Respondent then told Milkie he had been drinking² but would get down by the 1 o'clock deadline Milkie had indicated.³

When Pompey arrived at the company office about 12:30, Milkie was not in the office. Steven Ellia, who was doing the dispatching then, told Pompey that the dispatch had been changed, that they now had a load to Clifton, New Jersey. He then looked at Pompey and called Yourga, who was in his upstairs office, saying, "It seems to me like Mr. Pompey has been drinking. I don't think he's fit for the road."⁴ Yourga came down, asked Pompey, "were you drinking?" and Pompey said, "Sure, I was drinking. Your man knew it whenever I called him." Yourga asked "Who?" and Pompey replied "Duane." Yourga then told Pompey he was fired, to give him the card key and the key to the truck, and added "you've been trying to run this place—you think you're running this place."⁵ Following this interchange, a few harsh words were uttered by Pompey and Yourga told him to get off the property.

At about 9:35 that morning, approximately the same time that Pompey called in and spoke with Milkie, Union Steward McFeaters⁶ gave Milkie a "grievance"⁷ received

from Pompey about 12 days earlier. Yourga was in the office then and Milkie handed the grievance to Yourga. Yourga said to McFeaters, "O.K., Mr. Union Steward, if you want to play Union steward, I'm going to accept this as a grievance." McFeaters said, "John, this is not a grievance as of yet," and Yourga replied "I'm accepting it as of right now." McFeaters testified that Yourga was angry during their conversation.

The testimony of Respondent's president, Yourga, as well as that of dispatcher Ellia and employee Tenant, demonstrates that company officials often saw employees at a bar, drinking or believed to be so, and then either canceled assignments previously given to them or notified other officials not to send them out. Tenant also testified that he was sent home by Yourga for reporting drunk when scheduled to take a truck out, but returned to work the next day. Yourga himself testified that on one occasion Tenant was all ready loaded to go out, when Yourga noticed him drinking at a bar. Tenant did not take the truck out, but nothing more occurred.

Following the discharge, Pompey, through the Union, grieved, and the matter was heard, pursuant to procedures in the contract to which Respondent and the Union were parties, by Western Pennsylvania Teamsters & Employers Joint Area Committee Steel Sub-Committee. On November 13, 1970, the committee denied the claim. There was no transcript made of the proceedings. The denial of the claim, signed by the four members of the committee, two employer and two union, recites the "Union Position" as being:

Michael J. Pompey alleged the Company unjustly discharged him on 10/17/70 claiming the Dispatcher for Yourga gave load to Grievant despite the fact that the Grievant told him he had been drinking. Mr. Yourga determined he had been drinking and discharged him.

The Employer's position is stated as:

Employee was aware of rules concerning drinking on the job. Company has obligation to protect the public; man was not fit to work.

The "Decision" of the Joint Committee was that "the claim is denied."

The testimony before me establishes that all parties were permitted to testify at the hearing before the committee. Pompey testified before me to the effect that he gave his story to the committee. McFeaters testified that Yourga had mentioned the filing of the grievances that morning, although not mentioning that they were Pompey's.

conversation with Milkie

⁵ This latter statement by Yourga is based on Pompey's testimony, which is essentially the same as that of Yourga, who testified that he said, "What are you trying to do to this company, are you trying to run the show or what?" and of Milkie, who had just returned to the office at that point and testified that Yourga said, "What do you want to do, run this Company?"

⁶ There was some dispute as to whether or not he was officially the union steward at that time. Whether or not he was makes absolutely no difference, and I do not resolve that question.

⁷ The grievance consisted of three separate "complaints," seeking more money for detention time in two instances, and "show-up" time in the third

² Milkie so testified, Pompey had testified that he told Milkie he "had a couple of drinks there in front of me"

³ Milkie testified that he did not believe Pompey had been drinking, despite Pompey's telling him that he had, at the time of the 10 30 telephone call. He added that he would not have told Pompey to report to work if he had believed that Pompey was drinking, that it was not company practice to require drivers to come to work if they have been drinking.

⁴ According to Pompey, Ellia looked at him and immediately called Yourga. Pompey did not actually deny any other conversation. I credit Ellia's testimony, which comports with the admitted fact of the Cleveland assignment already having been given to someone else after Pompey's 10 30

C. Discussion

1. Whether to defer to arbitration

The Board's general criteria for determining whether to honor an arbitrator's award in a discrimination case are succinctly set forth in *International Harvester Company*, 138 NLRB 923, 927, *affd. sub nom. Ramsey v. N.L.R.B.*, 327 F.2d 784 (C.A. 7), cert. denied 377 U.S. 923. The Board there indicated that it would "voluntarily withhold its undoubted authority to adjudicate unfair labor practice charges . . . unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act." See also *Spielberg Mfg. Co.*, 112 NLRB 1008.

The most recent case I have found on the Board's standards for deferring to an arbitration award⁸ is *Terminal Transport Co.*, 185 NLRB No. 96. There the Board (Chairman Miller and Member Brown; Member Jenkins dissenting) gave conclusive effect to an arbitration award that did not, on its face, indicate that the panel had considered whether there had been discrimination. The Board reasoned that the award itself "at the very least, was ambiguous as to the question of discrimination," but that it was "clear that the issue specifically raised before the arbitration panel was identical to that alleged in the unfair labor practice charge in the instant case; i.e., was Pfaff [the alleged discriminatee] discharged because he engaged in protected grievance activity?"

The General Counsel contends that the Board should not defer to the arbitration award because "there is no evidence that the question of whether Pompey was discharged for filing grievances had been considered by the arbitration committee nor was there any evidence that the matter was considered *sua sponte* by the arbitration panel," citing *DC International, Inc.*, 162 NLRB 1383, and *John Klann Moving & Trucking Company*, 170 NLRB 1207 as authority. In *DC International*, the Board, in refusing to defer to the arbitrator's decision, found that the issue of pretextual discharge "was never raised, directly or inferentially, much less litigated before the Committee. Nor was there any evidence from which the Committee might, *sua sponte*, have considered this issue." The Board concluded that "it is plain that the Committee had no occasion to, and did not explore the issue of concern to the Board. . . ." In *John Klann*, the Board also concluded that the arbitration award should not be given controlling weight because the "arbitration committee was neither presented with, nor did it *sua sponte* consider, the question whether the reason advanced by Respondent for the discharge was pretextual," citing *DC International*.

The instant case falls somewhat between the *Terminal Transport* case and the *DC International* and *John Klann* cases. The award itself here does not disclose whether the Joint Committee considered the question of pretext, but this was so in all three cases discussed. There is no affirmative showing, as there was in *Klann* and *DC*

International, that the issue of pretext was never raised, "directly or inferentially" or that the committee did not consider whether Respondent's reason advanced for the discharge was pretextual.

On the other hand, we do not have here any affirmative showing that the question of pretext was raised, as was the case in *Terminal Transport*. As noted above, the pertinent testimony shows only that Pompey, according to his testimony, told essentially the same story to the Joint Committee as he did at the instant hearing, and that Yourga, in his testimony before the Joint Committee, mentioned the fact that a grievance had been submitted by McFeaters the day of the discharge, but not that it was Pompey's grievance. Obviously, these bits of evidence fall short of establishing that the Joint Committee either considered, had occasion to consider, or was presented with facts concerning the pretext question raised by the General Counsel, and equally obviously, the record would not permit a conclusive finding that the committee was *not* presented with evidence on, and did *not* consider, whether the Company's reason was pretextual.

In short, there is no substantial evidence, in my opinion, from which to conclude either way with respect to the pretext question having been before, or considered by, the Joint Committee. The need for the Board to decide, or me to recommend, whether to defer in this case is not obviated by the paucity of evidence. In my view, the stated principles in *Spielberg* and *International Harvester*, the Supreme Court's language in *Steelworkers v. Enterprise Wheel*, 363 U.S. 593, 596, and the recent Board decision in *Terminal Transport* strongly suggest that deference be given an arbitration award unless it affirmatively appears that the question before the Board was not considered at the arbitration proceeding. It would appear that to encourage use of the arbitration processes agreed to in collective bargaining, when all the requirements of fairness are met, and the award is not repugnant to the policies of the Act, it should be the burden of the party seeking to achieve a different result from the arbitrator's affirmatively to demonstrate, or provide sufficient evidence from which an inference can be drawn, that the arbitrator did not have before him, or consider, the issue before the Board.

No such burden has been satisfied here. Rather, the testimony of McFeaters before me, although seeming to limit the Union's position at the Joint Committee hearing to an argument that the Company had no right to call a driver in after he had informed the Company he had been drinking, discloses that the filing of the grievances that morning was mentioned by McFeaters and Yourga, and the testimony of Pompey before me was to the effect that he gave his story to the Joint Committee. Pompey clearly, at the very least, had his "day in court," with full opportunity to present his side of the case. For these reasons, I conclude that it will effectuate the policies of the Act to give conclusive effect to the arbitration award and that the complaint herein should be dismissed.

reaffirming *Denver-Chicago Trucking Company*, 132 NLRB 1416, and *Roadway Express, Inc.*, 145 NLRB 513. As discussed below, Member Jenkins dissented on these, as well as on other, grounds.

⁸ Although the Joint Council here is composed of two employer and two union members, the Board held in *Terminal*, *infra*, that a similar Teamsters-Employer committee was an "arbitration panel, even though operating without neutral arbitrators, and met the *Spielberg* standards of fairness,"

2. The alleged discriminatory discharge

The question of whether or not to give conclusive effect to the arbitration not being, as the above discussion makes abundantly evident, squarely governed by Board precedent, I shall, despite my conclusion above, present my views on the merits of the alleged discriminatory discharge,⁹ so that if the Board decides not to defer to the award of the Joint Committee, there will be no necessity, on that score at least, for remanding the case.

The undisputed facts in this case lead me to the conclusion that Respondent discharged Pompey solely because of the grievance filed for him by McFeaters the morning of the discharge. Thus, Respondent claims that Pompey was discharged for reporting drunk to take a truckdriving assignment. Yet the evidence shows that at least one other employee had reported drunk for such an assignment and had been sent home by Yourga, with no disciplinary action whatsoever. The evidence also shows that when a company official noticed a driver at a bar and believed he had been drinking, the official would make sure the driver was not sent out. A particular incident involving employee Tenant, as testified to by Yourga, is revealing. After Tenant's truck was loaded, he went to a bar. Yourga, who had seen him going in to the bar, followed him, and said "Tom, are you going out tonight?" Tenant replied "Well, you'd better believe I'm going out." Yourga then said, "Well, you're drinking, Tom, what are you going to do?" and Tenant replied "Well, I guess I'd better not go out." According to Yourga, "that was the extent of it."

It is self-evident that being drunk, or coming to the terminal drunk, is a marvelous reason for not being sent out to drive a truck. It is also evident that the Company in this case followed such a policy, but did not discharge, or even suspend, drivers, whether already "assigned" to take a truck, or unassigned but subject to call, for being intoxicated. That Pompey's state of intoxication had nothing to do with his discharge is manifest just from the above-recited policy and history. Had he been seen drinking, he would not have been called in. Had Milkie

believed his story that he was drinking, he would not have been called in. When he did come in, despite having told Milkie he had been drinking, the truth of his earlier statement was apparent. Yourga's testimony indicates that Milkie reported the 10:30 a.m. conversation to him, so that Yourga knew of Pompey's claim that he was drinking. Yet Yourga departed from all past policy and discharged Pompey for an "offense" never before even considered a basis for discipline. And Pompey was discharged for this "offense" even though his 4-year tenure with the Company, without discharge, was checkered with a host of much more serious offenses, involving speeding, accidents, overloading, and not showing up for an assignment after being called and telling the Company he would be in.

The explanation for this otherwise inexplicable change in company policy necessarily lies in the almost contemporaneous—apparently within a few minutes of Pompey's first call to the company office at 9:30 a.m.—presentation to Yourga by McFeaters of Pompey's grievances. The evidence shows that Yourga was angry at the time of the presentation and that he told Pompey, when he told him he was fired, without even asking Pompey for an explanation, "What are you trying to do, run the Company?" Yourga's own testimony indicates that this last remark was related to the grievances filed that morning. I reject Yourga's testimony that he did not discharge Pompey for filing the grievances, as I did not find Yourga to be a credible witness and his asserted basis for the discharge, for the reasons I have stated, is itself incredible.

For all these reasons, I conclude that Respondent discharged Yourga for filing the grievances, and therefore would find a violation of Section 8(a)(1)¹⁰ were I not recommending deference to the arbitration decision. Based on my conclusion that deference be accorded to the arbitration award, however, I issue the following recommended:

ORDER

The complaint is dismissed in its entirety.

view of the merits were to be an obstacle to deferment To defer only when one agrees is not to defer at all

¹⁰ Not Sec 8(a)(3)—there was no "union" animus involved.

⁹ The fact that I would, alternatively, find the violation, as set forth below, is not at all inconsistent with my prior conclusion. The whole point of according deference to an arbitrator's award would be lost if a different