

**Afro-Urban Transportation, Inc. and Joseph Dusenberry. Case 29-CA-4081**

October 20, 1975

**DECISION AND ORDER**

BY MEMBERS FANNING, JENKINS, AND PENELLO

On June 16, 1975, Administrative Law Judge Sidney J. Barban 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, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

Although the Administrative Law Judge indicated that employee effort to seek the aid of governmental organizations and agencies, in order to protect working conditions generally, is protected activity within the intentment of Section 7 of the Act, provided it is undertaken without malice or bad faith,<sup>1</sup> he nevertheless did not find a violation in the discharge of Dusenberry, the Charging Party herein, presumably because, in his view, Dusenberry was pursuing a personal vendetta.<sup>2</sup>

The facts, fully set forth in the Administrative Law Judge's Decision, depict a context of events preceding Dusenberry's discharge which substantiates the General Counsel's contention that Dusenberry was engaged in protected activity when discharged for his threat to report Respondent's pay practices to "the Union . . . the government agencies that fund the

company, and other people, the Department of Labor." Thus, when Respondent discharged Dusenberry for, as the Administrative Law Judge found, "his threat to bring the matter of the dishonored check to the attention of the various agencies which he mentioned," Dusenberry had been witness to: (1) Respondent's apparent dissembling with regard not only to Dusenberry's efforts to join the Union but also with regard to Respondent's very relationship with that Union, (2) conversations with Little, the only other employee employed by Respondent in a similar capacity, in which Little, like Dusenberry, indicated his desire to join the Union, (3) Little's indication that he had been given a dishonored check, (4) his own payment with a bad check shortly thereafter, and, finally, (5) Respondent's statement that it would withhold 1 week's pay from Dusenberry until he returned the previously dishonored check.<sup>3</sup>

On such bases we cannot characterize Dusenberry's outburst as "malicious" or undertaken in "bad faith." We, of course, acknowledge that it was an "outburst" but it is imbedded in our statute that there is a line "between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in 'a moment of animal exuberance' (*Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293) or in a manner not activated by improper motives, and those flagrant cases in which the misconduct is so violent or of such serious character as to render the employee unfit for further service." *The Bettcher Manufacturing Corporation*, 76 NLRB 526, 527 (1948), citing, *N.L.R.B. v. Illinois Tool Works*, 153 F.2d 811, 815 (C.A. 7, 1946). In our judgment, Dusenberry's conduct falls in the former category in the context of events. Finding sufficient concerted activity in his previous attempts to join the Union, his conversations with Little, the only other employee similarly situated, in which both the Union and Respondent's pay practices were discussed, and the feeling on both their parts that a need existed "for a union to protect them in such situations," we conclude his discharge is proscribed by Section 8(a)(1) of the Act and we shall order his reinstatement.<sup>4</sup>

<sup>3</sup> Respondent had not previously asked Dusenberry to return the check, according to the Administrative Law Judge's findings and, in any event, the check, in evidence, was no longer negotiable. The Administrative Law Judge apparently overlooked the fact that Respondent was withholding 1 week's pay from Dusenberry in his finding that the matter of the checks was "not then a matter of immediate concern when Dusenberry engaged in confrontation" with Respondent.

<sup>4</sup> We note that the Administrative Law Judge found "no evidence that Respondent knew that Dusenberry had joined the Union," but further found that Dusenberry was discharged because he threatened to go to, among others, "the union." It is evident, then, that, at the moment of Dusenberry's discharge, Respondent knew Dusenberry was affiliated in some way with a union, a fact buttressed by the Administrative Law Judge's additional finding that subsequent to Dusenberry's discharge, an official of

*Continued*

<sup>1</sup> See *Leviton Manufacturing Company, Inc.*, 203 NLRB 309 (1973), *Socony Mobil Oil Company, Inc.*, 153 NLRB 1244 (1965)

<sup>2</sup> The Administrative Law Judge, in support of the proposition, relied on *Northeastern Dye Works, Inc.*, 203 NLRB 1222 (1973), and *Hunt Tool Company*, 192 NLRB 145 (1971), cases we believe inapposite to the question posed herein. *Northeastern Dye Works* involved frequent complaints of an individual employee to management about another employee. We found that the nature of the constant complaints was not sufficiently related to working conditions and amounted to a simple "personal feud" between the two employees, the discharge of one being, therefore, unproscribed. *Hunt Tool's* relationship to the instant case is tenuous at best, involving as it did an employee's intiation of a suit, under the Jones Act and the Longshoremen's and Harbour Workers' Compensation Act, which sought damages from the respondent therein for an alleged on-the-job injury. The General Counsel had argued that the employee was engaged in "concerted" activity because, in bringing the suit, the employee was asserting a claim under a quasi-collective-bargaining agreement since the statutes in question resulted from "the concerted efforts of employees acting through their labor organizations in lobbying for the enactment of the two laws." We rejected the theory finding the case involved a single employee filing a purely personal claim.

## CONCLUSIONS OF LAW

1 Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act

2 The Union is a labor organization within the meaning of Section 2(5) of the Act

3 By discharging Joseph Dusenberry, Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act and thereby engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act

## REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It has been found that the Respondent has discriminated against employee Joseph Dusenberry by discharging him on September 6, 1974, because he engaged in concerted activity for the mutual aid and protection of employees, in violation of Section 8(a)(1) of the Act. We shall, therefore, order the Respondent to offer him immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and to make him whole for any loss of pay he may have suffered as a result of this discrimination against him by payment to him of a sum of money equal to that which he would have earned as wages from the date of the discrimination to the date of reinstatement, less his net earnings during such period, in accordance with the formula prescribed in *F W Woolworth Company*, 90 NLRB 289 (1950), together with interest at the rate of 6 percent per annum to be added to such backpay, such interest to be computed in accordance with the formula prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1965).

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Afro-Urban Transportation, Inc., Brooklyn, New

York, its officers, agents, successors, and assigns, shall

1 Cease and desist from

(a) Discharging and refusing reemployment to employees or otherwise discriminating in regard to their hire, tenure of employment, or any terms or conditions of employment because they have engaged in concerted activities for the purpose of mutual aid or protection

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to engage in concerted activities for the purpose of mutual aid or protection as guaranteed in Section 7 of the Act

2 Take the following affirmative action which the Board finds will effectuate the policies of the Act

(a) Offer Joseph Dusenberry immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed

(b) Make Joseph Dusenberry whole for any loss of pay he may have suffered by reason of the discrimination against him in the manner and in accordance with the methods referred to in the section above entitled "Remedy"

(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 amount of backpay due under the terms of this Order

(d) Post at its establishment in Brooklyn, New York, copies of the attached notice marked "Appendix"<sup>5</sup> Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by Respondent 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 by Respondent to insure that said notices are not altered, defaced, or covered by any other material

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith

IT IS FURTHER ORDERED that the complaint insofar as it alleges a violation of the Act not herein found be, and the same hereby is, dismissed

Respondent accused the union business agent of planting Dusenberry in an effort to organize Respondent. Nonetheless because our remedy would be unaffected we do not pass on the question whether Respondent's conduct also violated Sec. 8(a)(3).

<sup>5</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board".

## APPENDIX

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

WE WILL NOT discharge or refuse reemployment to employees or otherwise discriminate in regard to their hire, tenure of employment, or any terms or conditions of employment because they have engaged in concerted activities for the purpose of mutual aid or protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights to engage in concerted activities for the purpose of mutual aid or protection as guaranteed in Section 7 of the National Labor Relations Act.

WE WILL offer Joseph Dusenberry immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges he may have previously enjoyed.

WE WILL make Joseph Dusenberry whole for any loss of pay he may have suffered by reason of our discrimination against him by paying him all wages lost, together with interest at 6 percent per year.

AFRO-URBAN TRANSPORTATION, INC.

## DECISION

## STATEMENT OF THE CASE

SIDNEY J. BARBAN, Administrative Law Judge: This matter was heard at Brooklyn, New York, on February 18, and March 17, 1975, upon a complaint issued on January 8, 1975, based on a charge filed by the above-named Charging Party (herein Dusenberry) on November 1, 1974 (all dates herein in 1974, unless otherwise noted). The complaint alleges that the above-named Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, by discharging Dusenberry because he "was a member in good standing" of Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein the Union), and because "he threatened to complain to the Union about his working conditions." Respondent's answer, as amended, denies the commission of the alleged unfair labor practices, but admits allegations of the complaint sufficient to justify the assertion of jurisdiction under current standards of the National Labor Relations Board (Respondent in the conduct of its trucking operations performed services in a recent annual period valued in excess of \$150,000, of which more than \$50,000 were performed for companies shipping

goods valued in excess of \$50,000 in interstate commerce), and to support a finding that the Union is a labor organization within the meaning of the Act.

Upon the entire record in this case, from observation of the witnesses, and their demeanor, and after due consideration of the brief filed by the General Counsel (no brief being received from any other party), I make the following:

## FINDINGS AND CONCLUSIONS

## I. BACKGROUND

A. *The Operations Involved*

Respondent is one of three closely related and interdependent enterprises all located at the same address in Brooklyn, New York. Each has the same directors, and is managed by the same officers though each of these may perform different functions for the several enterprises. As described in the record, the primary purpose of these organizations is to provide a mechanism whereby minority groups may be able to undertake entrepreneurial functions in the trucking industry.

Respondent is organized as a profitmaking enterprise. Its principal function is to secure motor carrier operating rights in interstate commerce from the Interstate Commerce Commission, and to secure contracts from various companies, such as Bethlehem Steel and International Business Machine Corp., to haul products for them. Respondent does not, however, itself perform long-distance interstate hauling operations.<sup>1</sup> These over-the-road operations are subcontracted by Respondent to owner-operators of trucks who are members of Independent Truckers League, the second part of the triumverate of enterprises involved here.

Independent Truckers League (herein ITL) is a nonprofit membership association composed of persons who own tractor-trailer rigs capable of long-distance hauling, or persons who are expected to purchase such equipment. These persons are members of ITL, and pay certain fees to that organization, but are not considered employees of ITL. Whether any of these persons perform any services other than pursuant to contracts secured by Respondent is not shown. Members of ITL are recruited by management officials principally identified with the third arm of the triumverate of organizations with which we are here concerned: Greater Horizons. Some attempt was made by Respondent to assert that it also sought to recruit members for ITL from among Respondent's truckdriver employees. I am satisfied, on this record, that this occurs more in theory than in practice.

Greater Horizons, as described by Calvin Walton (president of Respondent and ITL, and founder of the three organizations) "is a non-profit economic development corporation, whose sole purpose is to develop and carry out

<sup>1</sup> The record indicates that Respondent owns one tractor-trailer rig that presumably could be used for long-distance hauls, but there is no indication that Respondent has used this for such purposes. The record is quite clear that Respondent does local hauling, pickups and deliveries, in straight trucks.

programs of an economic development nature that will enable the minority communities to penetrate the main stream of business."

The record indicates that these enterprises, and their purposes, have been funded and supported by governmental agencies concerned with promoting minority enterprises

### B *Relations With the Union*

Because it was considered to the advantage of the members of ITL to be union members, in order to have easy access to plants and other sites which are unionized, the managers of ITL were anxious to have owner-operators who were members of ITL become union members. According to Joseph Danetra, business agent of the Union, the Union thought this was a good idea also. There was some bargaining between the Union and ITL which is not detailed in the record. Danetra testified that the agreement under discussion was the Teamsters Master Freight Agreement, which is a standard over-the-road contract. For reasons not clear these negotiations have broken down. Owner-operator members of ITL who originally had become members of the Union with ITL aid and assistance are delinquent in their dues and are no longer in good standing.

In an effort to demonstrate that Respondent is not anti-union, much was made in the record of the fact that there is literature on a bulletin board at the premises of the three enterprises encouraging ITL members to become union members. Although there was some testimony that this was also intended to encourage driver employees of Respondent to become union members, on the basis of the record as a whole, I find that this literature was directed to ITL members only, and not to Respondent's local drivers. Respondent, as such, had no contact with, nor did it have any bargaining relations with the Union. Respondent, in fact, unknown to the Union, was paying its local drivers substantially below the union rates for local operations. As discussed hereinafter, Respondent's position with respect to its own employees joining the Union has been inconsistent, seemingly at times encouraging and at others discouraging such action.

## II THE ALLEGED UNFAIR LABOR PRACTICES

### A *Preliminary*

Dusenberry was hired by Respondent in late February 1974, as a local driver, operating a straight truck, picking up and delivering within a 50-mile radius of Respondent's operations. He was informed of his salary and that he would be paid every 2 weeks. Charles Spraggs, Respondent's assistant safety director, told Dusenberry that Respondent was affiliated with the Teamsters and after 30 days would help Dusenberry get into the Union. After 30 days of employment, Dusenberry asked Spraggs about this, and he said he would see about it. However, nothing was done.

In August, when Dusenberry was not working because of an injury, he called Spraggs about his desire to become

a member of the Union, and was referred to Univester Smith, who apparently is principally concerned with Greater Horizons, but acts as a liaison among the three enterprises, and is also personnel director of Respondent. Smith told Dusenberry that joining the Union would cost Dusenberry about \$200, but that Smith would draw up the papers for him.<sup>2</sup> Dusenberry decided to contact the Union on his own. He was informed that he did not need to be sponsored by the Respondent to join the Union, and also discovered that he was being paid at a rate substantially below the Union scale.

Dusenberry thereafter talked with Little, Respondent's other driver, about this on several occasions, attempting to persuade Little to join the Union. Little told Dusenberry of Smith's admonition to him that this would cost \$200 initiation fee and \$11 a month in dues, as well as \$40 a week for fringe benefits. Little said he didn't have the money and sought to have Dusenberry refrain from joining the Union himself until Little could raise \$200. However, as a result of events set forth immediately hereunder, on September 3, Dusenberry went to the union hall and joined the Union, paying the required initiation fee and dues. Dusenberry also discussed the Union, in a general fashion, with another driver, Harry Harris, employed by Respondent.

On August 23, Dusenberry received his usual check for 2 weeks' pay, which was cashed at a neighborhood store. The store thereafter informed Respondent that the bank had refused to honor the check and had returned it. On September 3, Respondent gave Dusenberry another check, on another bank, in replacement for the first check, to be given to the store in exchange for the dishonored check.<sup>3</sup> Dusenberry was aware that Little had previously received a paycheck which had been dishonored, and he states that he had discussed with Little the need for a union to protect them in such situations. As has been noted, on this same day, September 3, Dusenberry joined the Union. On this occasion Dusenberry learned that Respondent had no bargaining relations with the Union, but that the Union did have dealings with ITL.

### B *The Discharge of Dusenberry*

Dusenberry was discharged on September 6. The testimony as to critical events of the day are in sharp dispute and depend upon credibility resolutions which are considered hereinafter. Dusenberry reported to the garage that morning, as usual, and called the dispatcher, who was at Respondent's main office and terminal, for his orders. According to Dusenberry, he then proceeded to make the deliveries and pickups assigned, and that afternoon, as usual on paydays, stopped by the main office to receive his pay. Respondent's witnesses, on the other hand, assert that Dusenberry came by the main office *in the morning*, double

<sup>2</sup> Benjamin Little, another local truckdriver employed by Respondent, also testified that Spraggs told him that he could join the Union after 30 days if he wanted, but that Smith said it would cost \$200 plus \$40 a week for fringe benefits which the driver would have to pay himself. At the time the drivers were being paid about \$150 a week.

<sup>3</sup> There is some dispute as to whether Dusenberry was directed by Respondent on this occasion to return the dishonored check. The resolution of this issue is not necessary to the decision in this matter.

parked his truck, with undelivered merchandise, and came in to get his pay, provoking the situation which led to his discharge. Upon careful consideration of all the facts, I am convinced that the events with which we are here concerned occurred in the afternoon, as Dusenberry testified, and not in the morning as Respondent insists. I see no reason why Dusenberry would have on this occasion varied from the normal practice of the drivers, who picked up their paychecks in the afternoon. When Respondent had the relief driver, Harris, drive Dusenberry's truck away, on this occasion, after the latter was fired, it is noted that Harris immediately took the truck back to the garage, without any effort being made to deliver merchandise allegedly on the truck. General Counsel's witness Robert Saxon clearly fixed the return of the truck to the garage as in the afternoon.<sup>4</sup> Lastly, as Dusenberry, and Respondent's witness Spraggs testified, Respondent has records turned in by the drivers showing the stops and pickups made each day. Dusenberry testified that he made out such a report for September 6. Though Respondent's counsel, in response to General Counsel's subpoena for the document, stated that no such document exists, no testimony denying Dusenberry's testimony was adduced.

According to Dusenberry, he arrived at Respondent's offices on September 6, about 4:30 in the afternoon to pick up his pay from Respondent's head bookkeeper, William Penn. While waiting for Penn to become free, he was approached by the dispatcher, Mel Campbell, concerning a pickup at IBM. After Dusenberry said that he had not been assigned to make that pickup, Campbell asserted that it should have been made and walked away. Dusenberry states that when Penn became available, he asked Penn that he be paid in cash on this occasion, that Penn agreed, but said that he would withhold 1 week's pay until Dusenberry returned the dishonored check which was needed for Respondent's records, and that he then told Penn that he would return the check, but only after he had gone to "the Union—the government agencies that fund the company, and other people, the Department of Labor, and I considered it a criminal action. I should go to the police about it." At this point, Dusenberry states, Walton, president of Respondent, came into Penn's office and was informed by Penn of Dusenberry's statement. Walton's response, as Dusenberry asserted in his testimony, was that "he didn't need this, go to the Union, he said, go to—It's a criminal—You know to go to the police. You're fired. And he told me to get out of the office."

On the way out of the building, Dusenberry asserts, Walton related the incident to Walter Player, vice president and general manager of Respondent. Player also told Dusenberry that he was fired. According to Dusenberry, both Walton and Player laughed at Dusenberry's intention and took it as a joke. Walton said, "Go to whomever you want to go, go to the Union," to which Dusenberry answered that he would do so. Thereafter, there was some discussion concerning the possibility that Dusenberry might be able

to cash the dishonored check he was holding, after which Dusenberry gave Player the keys to Respondent's truck at Player's request. As a result, Dusenberry had some difficulty getting back to the garage, some 2 miles away, where he had left his car that morning.

Respondent's version of this incident is quite different. Walton testified that Dusenberry "again" came into the office in the morning of September 6, seeking his pay.<sup>5</sup> Walton indicates that Dusenberry asked him to be paid in cash, and that it was he who agreed to this, but asserted that 1 week's pay would be held back until Dusenberry returned the dishonored check. Walton makes no reference to "the accountant" who made out the check and to "the accounting office" which was instructed to cash it. Walton continued, "From that point on we got into a hassle, and I became very annoyed about the thing. I thought Mr. Dusenberry was being very, very unreasonable about the whole matter, because it was not a matter of the Company having given him a check in the past that was no good. We had a truck sitting outside the building loaded, freight to be delivered. I told Mr. Dusenberry, 'I have paid you, the truck is double parked on Atlantic Avenue, go to work and move that truck.' Mr. Dusenberry [said] 'What is this, another nigger business,' and at that point I told him to get the hell out." Walton, however, asserts that the only reason he discharged Dusenberry was because the latter refused to move his truck as ordered.

In his narrative testimony, Walton made no mention that Dusenberry had threatened to go to any outside authority or agency in the course of this "hassel." However, in his pretrial affidavit, Walton stated that Dusenberry had asserted on this occasion that he "did not like the way [Respondent] did business," and that "he was going to the State Labor Board." Walton agreed that though he had no present recollection of this, that he knew the statement to be true when he made it in his affidavit.

Player, Respondent's vice president, essentially confirmed Walton's account of the incident, asserting that it took place in the morning, that Dusenberry was angry because of the dishonored check and wanted to be paid in cash, that Walton said that 1 week's pay would be withheld until the dishonored check was returned, and that Dusenberry refused to move his truck at Walton's direction, saying that he wouldn't move the truck until he received his second week's pay, asking if this was "another nigger business," at which point, Walton discharged Dusenberry. Player states that he had earlier been told by the dispatcher that Dusenberry's truck contained goods to be delivered, and that he had earlier asked Dusenberry to take the truck out, but that Dusenberry said he had business with Walton. Player also asserted that after Dusenberry was fired, Player took Dusenberry into his office and attempted to explain the reason that the first check had been dishonored.

Harry Harris, who states he was a driver supervisor and assistant safety director for Respondent and whose office is near Walton's, testified that he overheard the argument going on apparently between Dusenberry and Walton, in

<sup>4</sup> I have fully considered Saxon's apparent incapacities revealed by the record. However, among the witnesses in this case, I was impressed by Saxon's bearing and demeanor on the witness stand and have no hesitancy in crediting him on this point.

<sup>5</sup> Walton's reference to an earlier occasion was to the morning of September 3, a non-payday when Dusenberry was given the replacement check. It may be that Walton had some confusion between the 2 days.

which the only words he actually heard "was that Mr Dusenberry wanted to go over the Company books, and he was really aggravating and rambunctious in his words and mannerism and everything" Harris and Smith, Respondent's personnel director, further support Walton's testimony that Dusenberry's truck was double parked, in front of Respondent's building during this incident As previously noted, Harris drove the truck back to the garage, where he was picked up by Smith to return to the office

Dusenberry denied that the truck was double-parked in front of Respondent's building on this occasion, but states that it was parked in an alley in back of the building He further denied that he was asked to move the truck during the course of the incident

Upon consideration of all the evidence, I am convinced that on this occasion, Dusenberry did, as he testified, assert that he considered Respondent's action in giving him a dishonored paycheck was a criminal matter and that he was going to the police, the Union, the State Labor Board, and to the governmental agencies funding Respondent about this Though Walton did not recall this, his memory of the event is admittedly deficient Previously, at a time closer to the event, he did recall that Dusenberry had said during the event that he was going to the State Labor Board about this matter, but Walton could no longer remember this at the time of the hearing<sup>6</sup> However, I do believe, in accordance with Walton's testimony that Dusenberry during this incident made unfavorable comments on the operation of the Respondent (as was stated in Walton's prehearing affidavit which he adopted at the hearing) This was not denied by Dusenberry I find it unnecessary to pass on whether those comments included a racial slur, because the import of Walton's testimony is that even if such remarks were made, he did not consider that they were cause for discharge inasmuch as Walton asserts that the only reason for terminating Dusenberry was his alleged refusal to move his truck when ordered to do so

Upon consideration of all the evidence, I find, contrary to Respondent's testimony, that the actual reason for discharging Dusenberry was his threat to bring the matter of the dishonored check to the attention of the various agencies which he mentioned I do not credit Walton's statement that he fired Dusenberry for refusing to move the truck Thus, when the union business agent, Danetra, called Respondent on September 9, to see if he could get Dusenberry reinstated, Player, who was in a position to know, told Danetra that Dusenberry had been discharged and would not be reinstated because he was a "troublemaker," without any mention that he had been insubordinate, or had refused to carry out orders Later, Player accused Danetra of "planting" Dusenberry on Respondent in an effort to organize Respondent<sup>7</sup> Further I find it unlike-

ly that Dusenberry would have flatly refused to move the truck, if asked, since he needed the use of the vehicle to get to the garage where he had left his car I have previously found that Dusenberry had completed his assigned pickups and deliveries for the day

### III ANALYSIS AND CONCLUSIONS

1 The evidence does not support General Counsel's contention that Dusenberry was discharged because he was a member in good standing of the Union There is no evidence that Respondent knew that Dusenberry had joined the Union Though I am not convinced that Respondent was prouion, as claimed, there is little evidence to show that it had an animus against the Union<sup>8</sup>

2 Employee effort to seek the aid of governmental organizations or agencies to protect or improve working conditions of the employees generally, or as a group, is protected activity under Section 7 of the National Labor Relations Act, so long as it is engaged in without malice or bad faith See, e g, *Leviton Manufacturing Company, Inc*, 203 NLRB 309 (1973), *Detroit Forming, Inc*, 204 NLRB 205 (1973) Therefore termination of an employee for engaging in such activity would violate the Act However, where the employee's action in resorting to outside governmental agencies, or in complaints to his own employer, is shown to have been undertaken by a single employee only in his own interest, in furtherance of a personal vendetta, or for personal gratification or reward, the employee's activity will not be protected even though the employee's action may have a relation to working conditions See, e g, *North-eastern Dye Works, Inc*, 203 NLRB 1222 (1973), *Hunt Tool Company*, 192 NLRB 145 (1971)

In the present case, I am convinced that Dusenberry's outburst on September 6, threatening to go to the Union, the State Labor Board, the government agencies funding Respondent, and to the police to institute a criminal action because Respondent had previously given him a bad check, was designed to secure personal satisfaction for himself and not to secure the protection of working conditions for the employees as a group The matter is not free from doubt Dusenberry knew that another employee had previously been given a check which had been dishonored, and Dusenberry had expressed a concern that the employees needed union protection against a recurrence of this situation However, Respondent had made the checks good and this was not then a matter of immediate concern when Dusenberry engaged in his confrontation with Respondent's management On that occasion, Dusenberry's anger was stirred by a personal matter

Whether Dusenberry did or did not make this statment is immaterial However I have considered this matter in assessing the credibility of Danetra in respect to the findings made above in the text Those statements are credited

<sup>8</sup> While Respondent's managers apparently desired that the members of ITL be union members—which was to the advantage of ITL whose members would ultimately bear the costs of the union agreement—it does not follow that those managers had the same attitude toward unionization of Respondent where Respondent would bear the increased costs and the advantages of unionization may not have been so evident It is noted that the Union was not advised of Respondent's operations which in fact were undermining the Union's local wage scale And indeed Player accused the Union of planting Dusenberry in an effort to organize Respondent

<sup>6</sup> William Penn who was then Respondent's head bookkeeper and who was present during the incident was not called to testify While there is an indication that he is no longer Respondent's head bookkeeper there is no claim that he was unavailable to give testimony

<sup>7</sup> Danetra at the hearing became so concerned in rebutting this accusation that he began equivocating as to whether Dusenberry had asserted to Danetra that Dusenberry had been fired for activity on behalf of the Union

Respondent's insistence that he bring in the dishonored check, enforced by withholding part of his pay I do not see this as a matter of general concern in the circumstances. Further his outburst, considered in its totality, was related not so much to amelioration of grievances about working conditions as to a desire to retaliate against Respondent. General Counsel emphasizes the protected nature of Dusenberry's assertion that he would go to the Union and the State Labor Board with his grievance. But I cannot separate his threat to go to those institutions from the rest of his outburst that he was also going to take Respondent's dereliction, which he considered criminal, to the police and to governmental agencies providing funding for Respondent. Taken as a whole, I find that his action was motivated by malice toward Respondent and served Dusenberry's personal ends and not those of the employees as a group. "The fact that certain of [Dusenberry's assertions] may have pertained to working conditions does not serve to cloak [his total activity] with the mantle of protected activity in the attendant circumstances." See *Northeastern Dye Works, supra* at 1203. Nor do I believe, on this record, that Respondent was motivated to discharge Dusenberry because he indicated that he would go to the Union, among

others, with his complaint.

For the reasons stated, and on the record as a whole, I find that, by discharging Joseph Dusenberry in the circumstances of this case, Respondent did not violate Section 8(a)(1) or (3) of the Act, and shall recommend that the complaint be dismissed in its entirety.

#### CONCLUSIONS OF LAW

1 The Respondent is an employer engaged in commerce within the meaning of the Act.

2 The Union is a labor organization within the meaning of the Act.

3 Respondent, by the discharge of Joseph Dusenberry on September 6, 1974, did not violate Section 8(a)(1) or (3) of the Act.

#### RECOMMENDED ORDER

On the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, it is hereby recommended that the complaint in this matter be dismissed in its entirety.