

**AAA Equipment Service Company and District No. 9,
International Association of Machinists and Aero-
space Workers, AFL-CIO. Case 14-CA-10099**

September 26, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS
AND MURPHY

On September 22, 1977, Administrative Law Judge Anne F. Schlezinger issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief. Respondent filed a brief in response to the General Counsel's exceptions.

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 briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

At the outset, we note that the Administrative Law Judge has credited the testimony of Donald Fairfield, Respondent's former shop foreman, where it is in conflict with the testimony of Richard Goslin, Respondent's service manager, and Frank Katzenberger, on whose behalf the instant charge was filed. No exceptions have been filed to the Administrative Law Judge's credibility findings. Instead, the General Counsel contends that, even crediting Fairfield, the record evidence establishes that employee Katzenberger was discharged for refusing to participate in an investigatory interview without his shop steward.

As more fully described by the Administrative Law Judge, the credited testimony shows that Katzenberger was absent from work on Monday, February 21, 1977.¹ Katzenberger called to report his absence that day. Upon Katzenberger's return to work the next day, Fairfield questioned him about filing work orders instead of making minor repairs on his truck and about the reason for his absence the previous day. Katzenberger answered that he "forgot" that he was not to file work orders for minor items and that "he had personal reasons for being absent."² Fairfield told Katzenberger that he was not satisfied with Katzenberger's answers and that he was going to tell Goslin what Katzenberger had said. The record shows that Fairfield reported the conversation to Goslin.

The next day, when Katzenberger returned from

¹ All dates are 1977.

² As more fully described by the Administrative Law Judge, Fairfield also testified that Katzenberger said, "It's none of anybody's fucking business what I do when I take off."

his route, Goslin, in Fairfield's presence, confronted Katzenberger in the parking lot. The credited testimony of Fairfield is that Goslin went to the back of the truck and said he wanted to talk with Katzenberger. Katzenberger took a few minutes to get his papers and, on getting out of the truck, immediately said, "I want my shop steward." Goslin said repeatedly he wanted to talk to Katzenberger, but Katzenberger kept "hollering" he wanted the shop steward. Katzenberger finally turned around and began to walk away. Goslin said to Katzenberger, "If you walk off and leave me here and refuse a direct order, you are terminated." Katzenberger repeated he was getting the shop steward. Goslin then told Katzenberger he was terminated.

It is now settled that an employee has a right to request representation as a condition of participation in an interview where the employee reasonably believes the interview will result in disciplinary action.³ Similarly, it is settled that reasonable grounds for so believing shall be measured by objective standards under all the circumstances of the case. The Board has indicated that it will not apply the rule requiring representation at interviews to "run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques."⁴ The Board has qualified this limitation, however, by noting:

In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative. [195 NLRB at 199.]

We do not agree with the Administrative Law Judge that Goslin was attempting to have a "run-of-the-mill shop-floor conversation" with Katzenberger on the parking lot that involved "the giving of instructions or training or needed corrections of work techniques." Instead, we find that Goslin was attempting to interview Katzenberger for the purpose of eliciting facts or permitting Katzenberger to explain or defend his conduct. In addition, we find that prior incidents provided a reasonable basis for Katzenberger to reasonably expect disciplinary action or other adverse consequences as a result of the parking lot interview.

We have examined and evaluated Goslin's attempt to interview Katzenberger on the parking lot against the background of Fairfield's interview of Katzenber-

³ *International Ladies' Garment Workers' Union, Upper South Department, AFL-CIO v. Quality Manufacturing Co.*, 420 U.S. 276 (1975); *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

⁴ *Quality Manufacturing Company*, 195 NLRB 197, 199 (1972); *N.L.R.B. v. J. Weingarten, Inc.*, *supra*.

ger 1 day earlier. In this connection, we note that Fairfield had talked previously with Katzenberger about doing certain minor repairs that take little time and putting only big items on a work order. Furthermore, Fairfield's immediate supervisor, Roesler, criticized Fairfield constantly because Katzenberger continued to write up tickets for "the small stuff." Thus, the Fairfield interview began as "the giving of instructions . . . or needed corrections of work techniques." It changed in character, however, when Fairfield expressed dissatisfaction with Katzenberger's answers to questions regarding (1) minor repairs and, even more particularly, (2) the reason for his absence. Indeed, Fairfield put Katzenberger on notice not only that were his answers unsatisfactory but also that they were going to be brought to Goslin's attention.

In addition, we find Service Manager Goslin's involvement in the investigation to be significant. Thus, Goslin admitted that he needed to talk to Katzenberger because Fairfield did not get an acceptable answer. However, there is no assertion by Respondent, nor record evidence to show, that Goslin was previously involved in such discussions with Katzenberger. Hence, it is reasonable to infer from Goslin's involvement that he was attempting to determine whether discipline was merited by Katzenberger's failure to perform minor repairs, his failure to adequately explain his absence, and his attitude during the Fairfield interview the previous day. In short, these circumstances establish reasonable grounds for Katzenberger to have believed that Goslin's attempt to interview him was for the purpose of eliciting facts or having Katzenberger explain or defend his conduct.

In its brief in support of the Administrative Law Judge's Decision, Respondent contends that there could not have been any possible basis for Katzenberger to fear disciplinary action because "he was entitled to the one day absence and had complied with the Union's agreement by reporting it." Respondent's contention is, however, at odds with the statements and actions of its officials, *supra*.⁵ Moreover, we note that, although the contract specifies events that shall be considered a break in seniority and termination of employment, it is silent on lesser forms of discipline. Thus, we find that Katzenberger had reasonable grounds to fear adverse consequences from Respondent's continued investigation of his conduct.

In sum, we find that Katzenberger had a reason-

⁵ The contract provides, *inter alia*, that failure to report the "reason for such absence within the first three (3) days of such absence" is one of the events that "shall be considered a break in seniority and termination of employment." Although it would appear from certain record evidence, and from Respondent's brief, that "personal reasons" is an acceptable reason within the contract, the statements and actions of Respondent's officials clearly suggest otherwise. Assuming that Respondent decided, based on the investigatory interview, that Katzenberger failed to state an acceptable "reason for such absence," Katzenberger may have been terminated.

able basis for fearing an adverse impact and hence for requesting union representation and that Respondent discharged Katzenberger because he was insisting on that right.⁶ Accordingly, we conclude that Katzenberger's discharge violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

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

2. District No. 9, International Association of Machinists and Aerospace Workers, AFL-CIO, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to allow Frank Katzenberger to have his union steward present during an investigatory interview and by discharging Katzenberger for refusing to participate in an investigatory interview without his union representative, Respondent has interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 7 of the Act and thereby has 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 certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action in order to effectuate the policies of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, AAA Equipment Service Company, St. Louis, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Disciplining any employee for requesting to be represented by a labor organization at any interview or meeting held with the employee where the em-

⁶ We disagree with the Administrative Law Judge's finding that Respondent discharged Katzenberger for repeatedly refusing to permit Goslin even to state the subject about which Goslin wished to talk with him without a shop steward present and for walking away while Goslin was trying to do so. In so finding we note that it is well established that where, as here, an employee is entitled to union representation and the employer denies the employee's request to be represented, the employee's refusal to participate in the interview is protected. *Quality Manufacturing Company, supra*.

ployee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action.

(b) Requiring any employee to take part in an interview or meeting where the employee has reasonable grounds to believe that the subject matter to be discussed may result in his being the subject of disciplinary action and where Respondent has refused that employee's request to be represented at such meeting by a labor organization.

(c) In any other manner interfering with, restraining, or coercing any employee in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Frank Katzenberger 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, and make him whole for his loss of earnings in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and pay him interest thereon, to be computed in the manner prescribed in *Florida Steel Company*, 231 NLRB 651 (1977).⁷

(b) 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.

(c) Post at its St. Louis, Missouri, facility copies of the attached notice marked "Appendix."⁸ Copies of said notice, on forms provided by the Regional Director for Region 14, 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.

(d) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

⁷ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

⁸ 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 discipline any employee for requesting to be represented by a labor organization at any interview or meeting held with the employee where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action.

WE WILL NOT require any employee to take part in an interview or meeting where the employee has reasonable grounds to believe that the subject matter to be discussed may result in his being the subject of disciplinary action and where we have refused that employee's request to be represented at such meeting by a labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce any employee in the exercise of rights guaranteed by Section 7 of the National Labor Relations Act.

WE WILL offer Frank Katzenberger immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent one, without prejudice to his seniority and other rights and privileges enjoyed by him, and WE WILL make him whole for any loss of pay he may have suffered by reason of his termination, plus interest.

All our employees are free to become, remain, or refuse to become or remain members of District No. 9, or any other labor organization.

AAA EQUIPMENT SERVICE COMPANY

DECISION

STATEMENT OF THE CASE

ANNE F. SCHLEZINGER, Administrative Law Judge: Upon a charge filed on March 9, 1977,¹ by District No. 9, International Association of Machinists and Aerospace Workers, AFL-CIO, referred to herein as the Charging Party or the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 14 (St. Louis, Missouri), issued a complaint on March 30 against AAA Equipment Service Company, herein called the Respondent. The complaint alleges that the Respondent, on or about February 23, refused to allow Frank Katzenberger, an employee, to have his Union steward present during an investigatory interview, discharged him for refusing to participate in an investigatory interview without

¹ All dates hereinafter refer to 1977 unless otherwise indicated.

his Union representative, and since then has failed and refused to reinstate him and by this conduct interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, as amended, and thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act. In its answer and amended answer, duly filed, the Respondent admits some of the factual allegations of the complaint but denies that it engaged in any conduct violative of the Act.

Pursuant to notice, a hearing was held before me at St. Louis, Missouri, on May 9. All parties appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce relevant evidence. Subsequent to the hearing, the General Counsel and the Respondent filed briefs on or about June 3, which have been duly considered.

Upon the entire record in this case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is, and at all times material herein has been, a corporation duly authorized to do business under the laws of the State of Missouri. It maintains its principal office and place of business at 9305 Natural Bridge, in the county of St. Louis and State of Missouri, referred to herein as the St. Louis County place of business. The Respondent also maintains other places of business in the State of Missouri. The Respondent is, and at all times material herein has been, engaged at the St. Louis County place of business, the only facility involved in this proceeding, in the repair, sale, rental, and distribution of material-handling equipment and related products. During the year 1976, which period is representative of its operations during all times material hereto, the Respondent, in the course and conduct of its business operations, purchased and caused to be transported and delivered at its St. Louis County place of business machinery and other goods and materials valued in excess of \$50,000, of which goods and materials valued in excess of \$50,000 were transported and delivered to its place of business in St. Louis County directly from points located outside the State of Missouri. The complaint alleges, the Respondent in its amended answer admits, and I find, that the Respondent is, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find, as the complaint alleges and the Respondent in its answer admits, that the Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Relevant Events*

The Respondent is party to a contract with the Union effective until December 15. The contract, placed in evi-

dence by the Respondent, provides that "Failure to report absence and reason for such absence within the first three (3) days of such absence" is one of the events listed that "shall be considered as a break in seniority and termination of employment and subsequent employment shall be deemed to be new employment." Other such events include voluntary quitting and dismissal for cause.

Katzenberger, the alleged discriminatee, was the only witness called by the General Counsel. He testified that he had been employed by the Respondent for about 4 years as a mechanic on a preventive maintenance (PM) truck when he was "temporarily terminated" on February 23. Katzenberger, who was a member of the Union, worked on the day shift, where Mick Richter was the shop steward.

Katzenberger testified that on Monday, February 21, he called in at about 8 a.m., asked for Fairfield, the shop foreman, and said, "I will not be in today. I have personal problems to take care of"; that Fairfield said "O.K."; and that he then said he would see Fairfield the next day.

Katzenberger came to work on Tuesday, February 22, went out on his route, and came back about 4:20 p.m. He testified that he was sitting in his vehicle "making out my paper work, requisitions that is, for parts that you put on vehicles, on forklifts," when Fairfield joined him and said he wanted to talk about "these repairs"; that Fairfield also said, "I know that you think that I'm after you but I'm not. . . . I work side by side with you If you asked me to go work on your car tonight, I would help you." Katzenberger testified that with reference to "these repairs" Fairfield "said 'I understand what you mean but they don't'"; that he did not know who Fairfield was referring to unless it was management; that Fairfield pointed out that Katzenberger should have taken care of certain minor repairs he had put on his report and should report only major matters, giving examples of what were viewed as minor and major matters; and that he "said, 'Sure, Don, I will.'"

Katzenberger testified that Fairfield then repeated that whether he believed it or not Fairfield was not "after" him, but "they" wanted to know what his personal reasons were for the absence the day before; that he again did not know who "they" were, but "Evidently it was management"; that Fairfield added, "if I had personal business to take care of, if I didn't want them to know, I wouldn't tell"; that he then said Fairfield had answered his question, and that "when somebody wants to know more specific what my personal business is, I will not tell them. If I want to go to the corner tavern somewhere and get inebriated and tell the whole world my business, that's fine. When somebody wants to pry into my personal business, I will not tell them"; that Fairfield responded that, if questioned, what Katzenberger had said would be reported, but there would be no report otherwise; and that he said Fairfield could report whatever Fairfield wanted, and Fairfield again said he would not say a word about it unless asked.

Katzenberger also testified that he then said "from here on out, I will want my steward present"; that Fairfield asked if he had been denied those rights by Fairfield; and that he "said, 'No, you didn't but it was just a normal routine talk but I just want to let you be aware of it, from here on out, I will have my steward present.'" He testified that he also told Fairfield that about a year ago "this same inci-

dent happened"; that Rich Goslin asked to speak to him and "I said, 'oh, that sounds like I better get my steward'"; that Goslin advised him not to do so; that after their talk he again "said, 'I think I should have my steward'"; and that Goslin then "said, 'You can get your steward if you want to but I will deny every word I said to you.'"

Katzenberger testified that when he returned from his route on Wednesday about 4:20 he saw Goslin and Fairfield walking up and down on the parking lot side by side so that they had to separate in order for Katzenberger to park his vehicle; that he was getting his paperwork together to turn in before quitting time when he happened to look in the rearview mirror and saw Goslin approaching; that he continued with his paperwork until suddenly Goslin "hollered out, 'Katzenberger, get out, I want to talk to you'"; that he grabbed his paperwork and jacket, got out and locked the truck, and started toward the rear of the truck; and that Goslin at this point "said, 'What is it that you said to Don Fairfield yesterday?'"

Katzenberger testified further that "At this point, thinking to myself evidently there's going to be something done here, I said, 'Rich, I will answer any question you want to know if my shop steward is present'"; that Goslin "said, 'You're not getting no one here'"; that "I said 'I will answer any questions you want to know when my steward is present'"; that when Goslin again said "You're not getting no one here," Katzenberger turned to Fairfield and "said, 'Don, you're still a union member, go get our steward'"; that Goslin told Fairfield not to go, and Fairfield did not leave; and that, after he repeatedly demanded the presence of his steward and Goslin repeatedly refused, he "said, 'Well, Rich, I will have to get the steward myself.'"

Katzenberger testified that at this point Goslin "said, 'If you go get your steward, you will be terminated'"; that he "said, 'Rich, I'm going to get my steward and I'm going to ask you one more time, I want my steward and I will answer any question you want to know'"; that Goslin "said, 'You're not getting anyone'"; and that he "started toward the shop and Rich Goslin shouted out, 'You bastard, you're terminated'"; that he made no answer; and that he used no profanity during the entire conversation. Katzenberger went into the shop and asked a mechanic there where the steward was. The mechanic said Richter was at the parts window. Katzenberger then saw Richter there and called out that he wanted to see him, and Richter said he would be there in a minute. There is no evidence, however, that Richter became involved in this situation.

Katzenberger testified that he knew Goslin wanted to talk to him about the work orders and his absence, both of which he had discussed with Fairfield the day before, because "First of all, pulling in the parking lot, I didn't know for sure if he was waiting for me . . . so that's why I continued to pull my truck in and do my paperwork. Then when I seen him approaching the back of my truck, the tone of his voice shouting out, 'Katzenberger, get out, I want to talk to you.' Then when I got out of the truck and locked it, walked to the rear of the truck, then Goslin said, 'What is it you said to Don Fairfield yesterday?' Then I knew there was some disciplinary action going to be taken."

Katzenberger testified, on cross-examination, that the collective-bargaining contract requires that an absence and

the reason be reported within the first 3 days but that this is not required for a 1-day absence, so he felt he had done more than was required to comply with the contract by calling in a 1-day absence and giving a reason on Monday and felt the same way when he had the conversation with Fairfield on Tuesday and when he had the encounter with Fairfield and Goslin on Wednesday.

Katzenberger also testified that, while he did more than was required by the contract with regard to reporting his absence and the reason, he believed the only thing Goslin wanted to talk to him about on Wednesday was his conversation with Fairfield on Tuesday as to the reason for his absence, and that was why "I asked for my steward the next time I was going to have a lecture." Katzenberger admitted that he had just a "routine talk" with Fairfield on Tuesday and then stated that he took it "as a routine talk and also a lecture. Half of it the repairs needed on units and the other part of absenteeism was a lecture."

Katzenberger also testified that the reason he demanded, prior to any conversation with Goslin, that the shop steward be present was Goslin's tone of voice in telling him to get out of the truck so they could talk. He then testified that he expected to be disciplined because of Goslin's tone of voice plus the incident a year earlier when Goslin warned him that if he got his steward Goslin "will deny anything that was said to me and he will write a letter to the hall on absenteeism" and that Goslin thereby threatened him. Finally, after being asked repeatedly if Goslin disciplined him on that occasion, Katzenberger admitted Goslin did not.

Asked to give the "complete reason" why he felt he could be disciplined, Katzenberger answered:

Because of the facts of coming into the parking lot and seeing the shop foreman and the service manager walking up and down the parking lot as if they were waiting for someone which it turned out to be me, and as I parked the van, they had to step out of the way to make clearance for me to pull up to the building and park. Then due to the fact that I sat in the van not knowing that it was for me until I seen Mr. Goslin in the rear view mirror and screamed out, "Katzenberger, get out of there, I want to talk to you."

In turn, I got out and when I approached him, he shouted out again, he said, "What is it you told Don Fairfield yesterday?" That is reason enough to know then and there I would be disciplined.

Katzenberger then testified that he did not know he was going to be disciplined when he saw Fairfield and Goslin on the lot or when they had to separate so he could park but that he felt he was going to be disciplined because of Goslin's tone of voice and because of his conversation the day before with Fairfield. Katzenberger also testified, on cross-examination, that he felt he had the right to have his shop steward present whenever he talked to Goslin.

The Respondent called Fairfield and Goslin as its witnesses. Fairfield, who was employed by the Respondent as the used equipment foreman and was a member of the same union as Katzenberger, at the time of the hearing had left the Respondent and was employed by a different employer. Goslin, who began working for the Respondent 9 years ago as a mechanic, has been the service manager for 3 years and

is admitted to be a supervisor within the meaning of the Act.

Fairfield testified that Katzenberger did not talk with him in the telephone call on Monday but that he received a message that Katzenberger called the office to report his absence that day and that the message did not include any reason for the absence.

Fairfield testified that he had talked previously to Katzenberger about doing certain minor PM repairs that take very little time and putting only big items on a work order; that his immediate superior, Roesler, criticized him constantly because Katzenberger continued to write up tickets for "the small stuff"; that that was the matter he took up with Katzenberger on Tuesday afternoon; and that, when he raised the question again of work orders for minor items Katzenberger said, "I forgot." Fairfield also testified that after some further conversation he said he had to ask something else, why Katzenberger was absent on Monday; that in the ensuing conversation Katzenberger said, "It's none of anybody's fucking business what I do when I take off"; that he said that, if asked, he was going to have to repeat exactly what Katzenberger had said; that Katzenberger then "said, 'I don't give a fuck what you does.' He said, 'It's none of their fucking business or yours either one.' That's exactly what he said." Fairfield testified that Katzenberger added, "The next time you talk to me, I want my shop steward" but never gave a reason for this and that he again told Katzenberger he would have to tell Goslin what was said.

Fairfield testified that he reported this conversation to Goslin the next morning; that they were out on the parking lot the next afternoon because Fairfield had been ordered to make certain changes in the area where service trucks were parked and they wanted to make sure the trucks were being parked properly; that when he saw Katzenberger's truck coming in, he and Goslin separated so Katzenberger could park; that Goslin went to the back of the truck and said he wanted to talk to Katzenberger; and that Katzenberger took a few minutes to gather his papers and, on getting out of the truck, immediately said "I want my shop steward." Fairfield testified that Goslin said repeatedly he wanted to talk to Katzenberger; that Katzenberger "kept hollering" he wanted the shop steward, and at one point "hollered" at him to get the shop steward; that Goslin never had an opportunity to state what he wanted to talk to Katzenberger about; that Katzenberger finally turned around and began to walk away; that Goslin said to Katzenberger, "if you walk off and leave me here and refuse a direct order, you are terminated"; and that Katzenberger, with repeated vulgar language, said he was getting the shop steward.²

Goslin testified that he was told on February 22, but could not recall by whom, that Katzenberger called in to report he would be absent that day, which was "a normal procedure." He also testified that it was company policy to require the foremen to learn the cause of an absence in order to be able, in scheduling jobs, to estimate how long the absence was likely to be. Goslin testified that Fairfield

told him that Monday of some problems on the PM job orders; that he directed Fairfield to "confront the mechanic"; and that, when Fairfield said the mechanic was not in that day, he directed Fairfield to "Confront him tomorrow when he shows up and find out where he was, the reason for his absence," and Fairfield agreed to do so. Goslin testified that Fairfield reported on Tuesday afternoon that he talked to Katzenberger "about the job orders and his absence and that he didn't get any good answers. He said he told him he didn't know why he was not doing the minor repairs and it wasn't anybody's business where he was absent and I said, well, that's not acceptable."

Goslin testified that he and Fairfield were on the parking lot Wednesday afternoon to check on the new parking arrangement; that he saw Katzenberger drive in; and that "immediately it reminded me on the way out there that I needed to talk to him because Don [Fairfield] had said he didn't get an acceptable answer and I wanted to talk to the man about it and find out what's the problem or why didn't he or what's the reason or what I could find out" with regard to "The two job orders and the absence."

Goslin testified further as follows:

A. And as he pulled in, I said, "Frank, I want to talk to you," and it was a little while before he got out of the truck and as he came back he said, "I want my shop steward." I said, "I just want to ask you," he said, "I want my shop steward." I never got out—

Q. [By Mr. Dempsey— Interrupting]: Were you ever able to state to him what the purpose of your questions were going to be, what the conversation was going to be about?

A. No, sir, I was talking and saying, "Look, I want to ask you a question." He would say, "I want my shop steward", and it was, I wasn't given the courtesy of stopping while I was talking, it was a duel.

Q. Then what happened?

A. He turned away and said, "I'm getting my shop steward." I said, "Look." And he said, "I'm getting my shop steward." And I said, "I'm giving you direct orders to stand here." And he said, "I'm getting my shop steward." I said, "Hey, I'm telling you to stand still." He said, "I'm getting my shop steward, fuck you." And away he went. I said, "Hold it." And he kept walking and I said, "You're terminated, Frank. Hit the time clock, you're done."

Q. Let me ask you this. Prior to the time that you had this conversation with Mr. Katzenberger, had you anticipated any disciplinary action against him?

A. No, I wanted to find—no, sir.

Q. Do you know of any reason under the union contract why you could have discharged him?

A. No, sir.³

JUDGE SCHLEZINGER: You mentioned that you ask for reasons for an absence so that you will know how long the absence is likely to be. In this instance, you knew that Mr. Katzenberger was back on Tuesday?

THE WITNESS: Yes.

JUDGE SCHLEZINGER: You were at that point not inquiring to find out whether he would be absent one

² The only question directed to Fairfield on cross-examination was whether he or Goslin had advised Katzenberger that the parking arrangement was changed or that they would be on the parking lot when Katzenberger returned that afternoon, to which Fairfield answered, "No, didn't have to."

³ The General Counsel asked Goslin questions on cross-examination.

or more days. Why was it necessary to obtain a reason for the absence at that point?

THE WITNESS: Well, I had two purposes. One is job orders and then for what Don had told me, when a man says I don't know, he had been told before to do minor things and at that point I said, well, I want to clarify that he did know or he didn't know because I was getting conflicting information from my people.

JUDGE SCHLEZINGER: This, then, was about the job order?

THE WITNESS: Right.

JUDGE SCHLEZINGER: You said you were also going to talk to him about the reason for the absence?

THE WITNESS: Right. If he would have said personal or sick or whatever, there's nothing we can do.

JUDGE SCHLEZINGER: You had not been informed at that point that he was absent to take care of personal business?

THE WITNESS: Yes, Mr. Fairfield had told me what he said in his testimony.

Katzenberger, recalled by the General Counsel in rebuttal, maintained that when he got out of the truck on Wednesday the first thing said was by Goslin asking what he had said to Fairfield the day before; that he replied, "I will answer any question you want to know when my steward is present"; and that he did not ask for his steward at any time before that. Katzenberger then admitted, on cross-examination, that in his conversation with Fairfield the day before, as he had earlier related it, he had simply indicated that he would do whatever was necessary as far as the work orders were concerned, and that the statement he made that his absence was due to personal reasons had been accepted as satisfactory.

B. Contentions of the Parties

The General Counsel contends that the evidence shows Katzenberger was absent on February 21; that his discussion with Fairfield on February 22 "left unresolved the issue of absenteeism and left Katzenberger with the understanding that he had breached company policy in regard to work orders"; that on February 23 he was approached by both Fairfield and Goslin, an unprecedented confrontation, and was told by Goslin in a loud voice to get out of the truck as Goslin wanted to talk to him; that Katzenberger had a reasonable belief, based on all the surrounding circumstances, that the ensuing interview could result in discipline for his absenteeism or for the failure to follow directions as to work orders; that his insistence on having his steward present was therefore protected concerted activity; and that he was discharged therefor in violation of Section 8(a)(1) of the Act.

The Respondent contends that there was no reasonable basis for Katzenberger to anticipate that the Goslin interview could possibly lead to disciplinary action, that Katzenberger therefore had no right to insist on his steward's presence, and that he was discharged because he refused to listen to what Goslin had to say and walked away while Goslin was trying to speak to him.

Concluding Findings

I found Katzenberger an evasive, self-contradictory, and unimpressive witness. I also found Goslin an unconvincing witness whose testimony was inherently inconsistent and confused. On the other hand, Fairfield impressed me as a candid and believable witness. Moreover, he was a member of the same Union as Katzenberger, and he had left the Respondent's employ prior to the hearing herein. Where the testimony is in conflict, therefore, I credit that of Fairfield.

There is no evidence that Katzenberger, who was employed by the Respondent for 4 years, or any other employee, had been disciplined following an interview with Goslin. Moreover, I do not credit Katzenberger's testimony that there was a reasonable basis for him to anticipate possible disciplinary action in the circumstances which he referred to, at one point or another, in his testimony—the 1-day absence on Monday, which he had called in and explained was to take care of personal problems; his failure to follow certain work-order procedures, which he told Fairfield on Tuesday he had forgotten and would follow; seeing Fairfield and Goslin on the parking lot on Wednesday side by side so they had to separate to let him pull in his truck to park it, although at another point he admitted that he did not know from these factors that he was going to be disciplined; and Goslin's loud voice in telling Katzenberger to get out of the truck as Goslin wanted to talk to him, when Katzenberger, although he thought Goslin might want to talk to him, continued to do his paperwork in the truck. I find, therefore, that the reasons given by Katzenberger in various shifting combinations do not establish that he had a reasonable basis for his immediate and continuing demand for the presence of the shop steward on the parking lot before he would permit Goslin to speak to him there, but show rather that he was acting pursuant to his statement to Fairfield that "from here on out, I will want my steward present" and to his testimony that he felt he had the right to have his shop steward present whenever he talked to Goslin.

I do not credit Goslin's testimony that on Wednesday he had to ask the reason for Katzenberger's absence on Monday for work-scheduling purposes, but Goslin would have been warranted in asking Katzenberger to give a reason for a future absence for that purpose. He would have been warranted also in confirming Fairfield's directions as to the work-order procedures. Katzenberger referred several times to Goslin's "tone of voice" in summoning him to get out of the truck. Katzenberger, however, although suspecting Goslin was waiting to talk to him, sat in the truck finishing some paperwork, and Goslin's "tone of voice" may have seemed necessary to get Katzenberger to leave the truck. Moreover, this was an encounter with a truckdriver on the company parking lot, not a summons for Katzenberger to appear in a management office for an investigative interview.

The General Counsel points out that the Board, in *Quality Manufacturing Co.*, 195 NLRB 197 (1972), found the discharge of King, an employee, for insisting on having a union representative present at an interview in the company president's office was violative of the Act because

"There can be no doubt that under the facts and circumstances of this case King had reasonable grounds to believe that disciplinary action might result from the Employer's investigation of her conduct," reasonably requested union representation, and was clearly discharged therefor. The Board pointed out, however, that this was "the proper rule where . . . the interview, whether or not purely investigative, concerns a subject matter related to disciplinary offenses"; that it would not be applied "to such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques"; and that "In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative." The United States Supreme Court affirmed these holdings of the Board⁴ and quoted approvingly the Board's description of the circumstances where the rule would not be applicable.

I find, in conclusion, that Goslin was attempting to have a run-of-the-mill conversation with Katzenberger on the parking lot that involved "the giving of instructions or training or needed corrections of work techniques"; that there was no reasonable basis for Katzenberger "to fear that any adverse impact may result from the interview," even if the chance encounter on the parking lot can be termed an investigatory interview; that in all the relevant circumstances there was "no reasonable basis for him to seek the assistance of his representative," and he was in fact demanding the presence of his Union steward not because he reasonably anticipated disciplinary action but because, as he announced to Fairfield and admitted in his testimony, he had resolved not to talk to Fairfield or Goslin without having the shop steward present; and that the Respondent

discharged Katzenberger for repeatedly refusing to permit Goslin even to state the subject about which Goslin wished to talk to him without a shop steward present, and for walking away while Goslin was trying to do so.⁵ Accordingly, I find, on the basis of the foregoing and the record as a whole, that the General Counsel has failed to establish, by a preponderance of the credible and probative evidence, that the Respondent, as alleged in the complaint, terminated Katzenberger because he refused to participate in an investigatory interview without his shop steward, in violation of Section 8(a)(1) of the Act. I shall therefore recommend that the complaint be dismissed in its entirety.

Upon the basis of the foregoing findings of fact, and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. AAA Equipment Service Company is, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. District No. 9, International Association of Machinists and Aerospace Workers, AFL-CIO, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to establish by a preponderance of the evidence that the Respondent has, as alleged in the complaint, discharged Frank Katzenberger in violation of Section 8(a)(1) of the Act.

[Recommended Order for dismissal omitted from publication.]

⁵ Cf. *Alfred M. Lewis, Inc.*, 229 NLRB 757 (1977), where the Board found a violation of the Act in an employer's refusal to permit a union representative to be present at counseling sessions, as the employees had "reasonable grounds to fear adverse consequences" from the counseling sessions, which "explored the reasons for an employee's failure to meet production quotas and took place as an integral part of" the employer's "production quota and disciplinary system. The counseling was a preliminary step to the imposition of discipline under the system."

⁴ *International Ladies Garment Workers Union v. Quality Manufacturing Company*, 420 U.S. 276 (1975); see also *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).