

**ABF Freight Systems, Inc. and Daniel Callahan.**  
Case 4-CA-12672

29 June 1984

**DECISION AND ORDER**

**BY CHAIRMAN DOTSON AND MEMBERS  
HUNTER AND DENNIS**

On 28 April 1983 Administrative Law Judge Joel A. Harmatz issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Charging Party filed cross-exceptions, a supporting brief, and a reply brief to the Respondent's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> as modified herein and to adopt the recommended Order.

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by discharging Charging Party Callahan because he complained about the safety of, and refused to drive, a tractor-trailer. The judge found that the collective-bargaining agreement between the Respondent and the Union contained provisions to the effect that an employee may not be required to operate a vehicle that is either unsafe or in violation of Department of Transportation regulations.<sup>3</sup> The judge found that Callahan complained that the tractor-trailer assigned to him 30 July 1981 had faulty brakes and the tractor lacked rear reflectors;<sup>4</sup> that, after

making these complaints, Callahan refused to drive the unit; and that the Respondent discharged him for his refusal to drive. The judge found that in refusing to drive the truck Callahan acted alone. The judge concluded that in discharging Callahan the Respondent did not violate the Act because at the time of his refusal to drive Callahan "did not possess a good faith belief that the unit . . . presented a hazard to himself or others." We agree with the judge's conclusion that the Respondent's discharge of Callahan was not unlawful, but for the following reasons.

In our recent decision in *Meyers Industries*,<sup>5</sup> we overruled *Alleluia Cushion Co.*,<sup>6</sup> in which the Board had held that the Act protected an individual employee's complaint to a public health and safety agency even in the absence of an affirmative showing that any other employee supported him in making the complaint. In *Meyers*, we held that, in order to find an employee's activity to be "concerted" within the meaning of Section 7 of the Act, it must be "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."<sup>7</sup> As noted above, the judge found that Callahan acted alone in refusing to drive the truck. Although the Charging Party excepts to the judge's failure to find that he was engaged in actual concerted activity when he refused to drive the truck, we find no merit in this exception. Thus, although the record shows that Callahan recruited a number of other employees to observe a moving test of the brakes and to check the rear of the tractor for reflectors, the record is devoid of evidence that these or any other employees participated with Callahan in his refusal to take the truck or authorized that refusal. Indeed, the only evidence in the record bearing directly on whether other employees supported Callahan in his refusal indicates that they did not. Thus, one employee, Malick, counseled Callahan not to refuse to drive the truck. Callahan's union business agent also advised him not to refuse to drive the truck. Accordingly, applying *Meyers*, we find that Callahan's refusal to drive did not constitute actual concerted activity.

In *Meyers*, however, we noted that there was no applicable collective-bargaining agreement and dis-

<sup>1</sup> The General Counsel and Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the credibility findings of the judge, we find it unnecessary to pass on his reliance on evidence concerning whether the tractor lacked reflectors required by Department of Transportation regulations inasmuch as there remain sufficient grounds relied on by the judge for discrediting the testimony of Charging Party Callahan.

<sup>2</sup> No exceptions have been filed to the judge's conclusion that deferral under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), to the decision of the Joint Area Grievance Committee denying Callahan's grievance concerning his discharge is inappropriate.

In adopting the judge's findings and conclusions, we do not rely on *John Sexton & Co.*, 217 NLRB 80 (1975), cited in sec. II of the decision.

<sup>3</sup> United States Department of Transportation Regulations, 49 CFR § 393.40(a) requires that vehicles covered by the regulations, including tractor-trailers, have adequate brakes. The subsequent sections set forth specific requirements for braking systems and brake performance. Sec. 393.13 of the same regulations provides that "[e]very truck tractor shall be equipped . . . [o]n the rear [with] . . . two reflectors, one at each side . . ." The regulation permits the reflectors to be combined with taillight lenses.

<sup>4</sup> In sec. II of his decision the judge inadvertently stated at one point that Callahan complained about missing reflectors on the rear of the trail-

er and the failure of the brakes on the tractor to "grab." It is clear from the record, as well as from the remainder of the judge's decision, that Callahan's complaints concerned an absence of reflectors on the tractor and the brakes failing to operate properly on the trailer. Callahan's initial complaints about the vehicle also included a cracked taillight lens on the trailer. However, the lens was replaced by the Respondent prior to Callahan's discharge, and it is clear from the record that his ultimate refusal to drive was not based on a cracked trailer taillight lens.

<sup>5</sup> 268 NLRB 493 (1984).

<sup>6</sup> 221 NLRB 999 (1975).

<sup>7</sup> 268 NLRB 493, 497.

tinguished that situation from the *Interboro* situation<sup>8</sup> in which an individual employee attempts to enforce the terms of a collective-bargaining agreement.<sup>9</sup> The Board's *Interboro* doctrine holds that in general, when an individual employee seeks to enforce the terms of a collective-bargaining agreement, his activity is concerted within the meaning of the Act. The Supreme Court recently upheld the *Interboro* doctrine in *NLRB v. City Disposal Systems*.<sup>10</sup> In *City Disposal*, the Court stated, "As long as the employee's . . . action is based on a reasonable and honest belief that he is being . . . asked to perform a task that he is not required to perform under his collective-bargaining agreement, and the . . . action is reasonably directed toward the enforcement of a collectively bargained right, there is no justification for overturning the Board's judgment that the employee is engaged in concerted activity . . ."<sup>11</sup>

In *City Disposal*, a truckdriver, Brown, was discharged for refusing to drive a truck, claiming that it had faulty brakes. Brown was covered by a collective-bargaining agreement which, like the collective-bargaining agreement in the present case, prohibited the employer from assigning employees to work under unsafe conditions and protected a driver's refusal to drive an unsafe vehicle.<sup>12</sup> Brown's refusal to drive the truck assigned to him was based on an incident the previous workday in which that truck nearly collided with a vehicle that Brown was driving apparently because the truck had faulty brakes. When his supervisor assigned Brown to drive that truck, Brown refused, asserting that there was something wrong with its brakes. When a second supervisor asked Brown to drive the same truck, Brown again refused and asked whether the supervisor was not putting work ahead of the safety of the drivers. Brown was then discharged for refusing to drive the truck. The Supreme Court upheld the Board's finding that Brown had reasonably and honestly invoked a collectively bargained right and that, therefore, Brown's conduct was concerted.

Turning to the facts of the instant case, employee Callahan had a history of rejecting four times as many trucks for alleged safety or equipment violations as any of the Respondent's other drivers, and as a result the Respondent in early January 1981 implemented a procedure under which trucks to be assigned to Callahan were sent to the Respondent's shop for inspection prior to assigning them to Cal-

lahan. Even after this change in procedure, Callahan rejected 40 percent of the rigs assigned to him. The truck assigned to Callahan on the day of his discharge had been inspected and cleared both by the previous driver and by the Respondent's mechanics before it was assigned to Callahan. After Callahan complained about the truck, the Respondent's chief mechanic gave the brake system additional stationary and moving tests and found the brakes to be in good working order.<sup>13</sup> Following Callahan's refusal to drive the truck, the brakes were given another moving test at the request of Callahan's union business agent and were found to be good by both the business agent and the employee who drove the truck during the test. Finally, when the truck was assigned to another driver after Callahan's final refusal to drive it, that driver found no problem with the truck in his pretrip inspection and cleared the truck as safe in his post-trip report.

As noted above, in *City Disposal*, the Supreme Court affirmed the *Interboro* doctrine, including the qualification that an individual employee's invocation of a collectively bargained right must be *reasonable* and *honest* in order to bring it within the protection of the Act. Taken as a whole, the evidence clearly establishes that, when Callahan refused to drive the tractor-trailer unit assigned to him 30 July 1981 complaining that it had faulty brakes and lacked required reflectors, he was not reasonably and honestly invoking a collectively bargained right, but was obstructively raising petty and/or unfounded complaints.<sup>14</sup> Thus, as more

<sup>13</sup> In response to Callahan's complaint that the tractor of the unit lacked rear reflectors required by Department of Transportation regulations, the Respondent's chief mechanic told Callahan that he would not place reflectors on the rear of the cab. The record does not clearly establish whether the taillight lenses that were on the tractor were sufficiently reflective to meet the requirements of the DOT regulations. However, it is undisputed that the *trailer* which Callahan was to tow did have rear reflectors. Although the record establishes that it is theoretically possible for a driver who begins a trip towing a trailer to be required to drive the tractor alone at some point (for example, if the trailer but not the tractor experiences a breakdown), the record also establishes that the Respondent required its drivers to drive with their lights on. Thus, even assuming the unlikely event that Callahan would have been required to drive the tractor alone and even assuming that the tractor lacked rear reflectors required by DOT regulations, there is no evidence that this could make any difference with respect to safety or any other aspect of Callahan's operation of the vehicle. Further, there is no evidence that any of the other drivers or mechanics who inspected the vehicle assigned to Callahan found any problem with its reflectors.

<sup>14</sup> Our conclusion that Callahan was not reasonably and honestly invoking a collectively bargained right is bolstered by a number of additional factors. First, Callahan testified that the brakes on *all* the Respondent's trucks are faulty because the Respondent has disconnected an electronic system for distributing braking force among the different wheels on all its trucks. This testimony indicates that, despite the fact that the Respondent has a high national safety standing and an extensive internal safety program, Callahan would feel himself justified in rejecting any of its trucks for faulty brakes. Second, as noted by the judge, in the affidavit that Callahan originally gave to the Board agent during the investigation

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<sup>8</sup> See *Interboro Contractors*, 157 NLRB 1295, 1298 (1966).

<sup>9</sup> 268 NLRB 493, 497.

<sup>10</sup> 115 LRRM 3193, 100 LC ¶ 10,846 (1984).

<sup>11</sup> *Id.* at 3200.

<sup>12</sup> *Id.* at 3195.

fully set forth above, the basis of Callahan's complaint about the brakes on the truck assigned to him was his purported opinion, which was contrary to the opinions of several other drivers and mechanics as well as Callahan's business agent, that the brakes did not function properly in moving tests. The honesty and reasonableness of Callahan's purported opinions about the truck's defects are particularly suspect in light of his history of rejecting four times as many trucks as the Respondent's other drivers, and the context and nature of Callahan's complaints indicate that they were neither reasonable nor honest attempts to invoke a right secured in the collective-bargaining agreement. Accordingly, we conclude that under the *Interboro* doctrine, as affirmed by the Supreme Court in *City Disposal*, Callahan's refusal to drive based on those complaints was neither concerted nor protected activity within the meaning of Section 7 of the Act. We therefore further conclude that, by discharging Callahan for his refusal to drive, the Respondent did not violate Section 8(a)(1) of the Act.

#### ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER DENNIS, concurring.

I agree with my colleagues, for the reasons they state, that Charging Party Daniel Callahan did not engage in concerted activity within the meaning of *Meyers Industries*, 268 NLRB 493 (1984), when he refused to drive a truck. I also agree that Callahan's refusal to drive the truck in question did not constitute concerted activity under the Board's *Interboro* doctrine,<sup>1</sup> but I do not rely on my colleagues' entire rationale.

In *City Disposal*,<sup>2</sup> the Supreme Court upheld the *Interboro* doctrine, stating: "As long as the employee's . . . action is based on a reasonable and honest belief that he is being . . . asked to perform a task that he is not required to perform under his collective-bargaining agreement, and the . . . action is

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of this case, he made no mention of any tendency of the unit to jackknife in referring to the problems he allegedly encountered with the brakes, whereas in his testimony at the hearing Callahan referred to such a tendency but couched it in equivocal terms—that the vehicle "seemed like it had a tendency to want to jack-knife." Finally, the lack of a reasonable and honest attempt to invoke a collectively bargained right on the part of Callahan is indicated by the nature of one of the other complaints that Callahan initially made about the vehicle assigned to him on the day of his discharge. Specifically, he complained about a cracked taillight lens on the trailer. Although the Respondent did replace this lens when Callahan complained about it, as the judge found, the crack in the lens was a small, hairline crack.

<sup>1</sup> *Interboro Contractors*, 157 NLRB 1295 (1966), enf. 388 F.2d 495 (2d Cir. 1967).

<sup>2</sup> *NLRB v. City Disposal Systems*, 104 S.Ct. 1505 (1984).

reasonably directed toward the enforcement of a collectively bargained right, there is no justification for overturning the Board's judgment that the employee is engaged in concerted activity, just as he would have been had he filed a formal grievance."<sup>3</sup> The Court also stated that "[t]he rationale of the *Interboro* doctrine compels the conclusion that an honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated."<sup>4</sup>

Applying these principles, the Court found that employee James Brown was unlawfully discharged when he refused to drive a truck, claiming that it had deficient brakes. Brown was covered by a collective-bargaining agreement, similar to the one here, which granted employees the right to refuse to drive unsafe trucks. The Court upheld the Board's finding that Brown's refusal was concerted because it was based on an honest and reasonable belief that the truck's brakes were faulty.

The instant case is factually distinguishable from *City Disposal*, in which Brown's personal observation of the truck's brake problem on the working day before his refusal to drive it gave rise to his reasonable and honest belief that the truck was unsafe. Here, by contrast, Callahan knew that the Respondent's mechanics had inspected and cleared the truck assigned to him. After Callahan complained about the truck, the Respondent's chief mechanic performed additional stationary and moving tests and found that the brakes were in good working order. Following Callahan's refusal to drive the truck, the brakes were given another moving test at the request of Callahan's union business agent and were pronounced in good working order by both the business agent and the employee testing the brakes.

The Respondent thus presented Callahan with an evaluation of the truck—prior to his discharge—showing that it was safe to drive. Under these circumstances, Callahan's continued refusal to drive cannot be considered a reasonable and honest invocation of rights secured by the collective-bargaining agreement.<sup>5</sup> For these reasons, I find that Callahan's refusal to drive the truck was not concerted within the meaning of Section 7 of the Act and conclude that Callahan's discharge did not violate Section 8(a)(1).

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<sup>3</sup> Id. at 1512.

<sup>4</sup> Id. at 1513.

<sup>5</sup> Similarly, the recitation of facts in fn. 13 of the majority opinion reveals that Callahan's complaint about the lack of rear reflectors was neither honestly nor reasonably maintained.

## DECISION

## STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This proceeding was heard by me on November 18 and 19, 1982, in Harrisburg, Pennsylvania on an unfair labor practice charge filed on January 27, 1982, and a complaint issued on March 8, 1982, alleging that ABF Freight Systems Inc. (the Respondent) on July 30, 1981, violated Section 8(a)(1) of the Act by discharging Daniel Callahan because he engaged in concerted activity "by complaining about the safety of a tractor-trailer and refusing to drive said tractor-trailer." In its duly filed answer the Respondent denied that it committed any unfair labor practices. Following close of the hearing, briefs were filed on behalf of the General Counsel, the Charging Party, and the Respondent.

On the entire record in this proceeding, including consideration of the post-hearing briefs, and, particularly, my ability directly to observe the witnesses while testifying and their demeanor, it is hereby found as follows.

## FINDINGS OF FACT

## I. JURISDICTION

The Respondent is a Delaware corporation engaged in interstate trucking operations with a principal place of business in Fort Smith, Arkansas, as well as terminals throughout the United States, including that located in Carlisle, Pennsylvania, the sole facility involved in this proceeding. During the calendar year preceding issuance of the complaint, the Respondent in the course of said operations derived revenues in excess of \$50,000 for delivering goods and merchandise across state lines.

The complaint alleges, the answer admits, and I find that the Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

This is another in a long line of cases spawned by *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), *affd.* 388 F.2d 495 (2d Cir. 1967), in which the lawfulness of a truckdriver's discharge is contested by the General Counsel because his discharge was motivated by a refusal to operate a vehicle out of professed concern for safety. See also *City Disposal Systems*, 256 NLRB 451 reversed 683 F.2d 1005 (6th Cir. 1982).

The Respondent is engaged in the interstate transport of freight by motor carrier. At times material, its Carlisle, Pennsylvania terminal was 1 of some 100 located throughout the United States. Employees at the terminal are covered by the industrywide collective-bargaining agreement and a local supplement thereto negotiated with the Teamsters Union. The dischargee, Daniel Callahan, was first employed by the Respondent in January 1978. During his employment, he served as a yardman, dockman, city driver, and over-the-road driver. Apparently, due to an injury, he was relieved of his driving duties during a 9-month period ending May 1981, at which time he resumed as an over-the-road driver, con-

tinuing in that capacity until his employment terminated on July 30, 1981.<sup>1</sup>

The discharge occurred in the course of a confrontation between Callahan and company representatives concerning the road worthiness of a vehicle.<sup>2</sup> Prior to June 1981, Callahan admittedly, as an over-the-road driver, rejected 90 percent of the rigs assigned to him. Consistent with established practice, the complaints were processed through the Respondent's dispatchers, who either permitted Callahan to take the vehicle to the garage for repair or replaced it with another assignment. When the dispatcher elected to maintain the assignment, Callahan was eligible for compensation in the form of "breakdown pay" so long as the mechanics were able to find something wrong with the rig and the repairs took in excess of 8 minutes. Thus, while rejection of an assigned unit would not necessarily increase labor cost inputs, it would cause a delay in the delivery of freight.

Testimony established that breakdown claims made by Callahan averaged four times greater than any other of the Respondent's over-the-road drivers.<sup>3</sup> This was explained by Callahan as an outgrowth of his above-average knowledge of Federal and State Department of Transportation (DOT) regulations pertaining to truck safety. He also averred that he was able to detect more defects because his DOT required pretrip inspections were "more thorough" than that of other drivers. In June 1981, because of the excessiveness of Callahan's breakdown time, the Company elected to protect itself by preinspecting all vehicles assigned to Callahan. Thus, the dispatcher would run Callahan's rig through the garage, for pretrip inspection by mechanics before its release to Callahan. This approach, however, failed to eliminate the problem. Callahan, according to his own testimony, despite this practice, continued to reject 40 percent of his assignments until his discharge.<sup>4</sup>

The events of July 30 opened with Callahan's dispatch on a run to Wycheville, Virginia. A "Vehicle Condition Report" (VCR) required by DOT regulations was completed by the prior driver of the tractor involved, who signified that the vehicle was okay.<sup>5</sup> Nevertheless,

<sup>1</sup> Unless otherwise indicated, all dates refer to 1981.

<sup>2</sup> The Respondent contends that Callahan quit his employment and was not discharged. It is apparent, however, that Callahan was ordered from company property on July 30 for reasons unmistakably triggered by his refusal to drive a tractor-trailer which he claimed to be unroad-worthy. The ordering of Callahan from the premises, in the circumstances, was the substantive equivalent of a discharge.

<sup>3</sup> The General Counsel urges that the above testimony by the Respondent's terminal manager, Donald J. Seguin, be discredited inasmuch as the Respondent failed to enforce this by presentation of supporting documentation. Contrary to the General Counsel, I am unwilling to draw an adverse inference in this respect. Cf. *St. Regis Paper Company*, 247 NLRB 745 (1980). Seguin's credibility as to this item was not seriously challenged during the course of the hearing and seemed entirely probable when assessed in the light of Callahan's own testimony concerning the frequency of his complaints.

<sup>4</sup> Callahan was the only over-the-road driver whose rigs were preinspected by the mechanics in this fashion. Following this innovation, he rejected assignments on June 7, 11, 15, 17, 18, 20, and 24 and July 2, 6, 9, 12, 25, 27, and 30, the last being the day of his discharge.

<sup>5</sup> The VCR is completed by the driver prior to release of a unit. By this document, word is passed as to whether the vehicle is suitable for dispatch to the next driver. Where a driver signifies a defect on the

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Donald Seguin, Respondent's line haul manager, overheard the dispatch and directed that the vehicle involved be run through the garage. The dispatcher obliged, the vehicle was examined by mechanics, and after the brakes were adjusted, it was cleared as roadworthy and placed on the ready line for release to Callahan.<sup>6</sup>

Callahan claimed that his pretrip inspection on July 30 was no exception to his customary "thorough" approach.<sup>7</sup> During same, Callahan alleges that he detected four deficiencies, as follows:

1. A safety chain attached to the trailer door was broken.
2. Reflectors on the rear of the trailer were missing.
3. Brakes on the tractor axle did not grab and the rig failed to show sufficient braking power.
4. A light assembly lens on the rear of the trailer was cracked.

Callahan reported the above to the dispatcher on duty and requested permission to either take the unit to the garage or switch rigs. After conferring with Seguin, the dispatcher permitted Callahan to go the garage.<sup>8</sup> Hedges changed the cracked lens on the trailer tail assembly,<sup>9</sup> but informed Callahan that he would not put reflectors on the back of the cab.<sup>10</sup> Hedges did, however, return to the underside of the trailer and for a second time that day examined operation of the brakes with the aid of a dock supervisor who operated the controls from within the cab. Having detected no discrepancies, Hedges inquired of Callahan as to whether he could drive the truck. Callahan agreed and Hedges drove the truck, checking the brakes twice, once with the foot valve and then again activating them with the trolley valve. He again concluded that the brakes performed without dis-

VCR, the vehicle automatically will go to the garage for correction before release to the next driver. There also is evidence that the yard jockey who delivers vehicles to the ready line is required to report defects.

<sup>6</sup> After adjustments, the brakes were examined by Reuben Hedges, the Respondent's maintenance supervisor, who concluded that they were properly adjusted and in good working order.

<sup>7</sup> The pretrip inspection is also required by Federal DOT regulations. Callahan's description of this process which was presented almost entirely in narrative form consumed almost five pages of the transcript.

<sup>8</sup> Callahan testified that on his arrival at the garage, Hedges exclaimed, "What the hell are you doing here." Although I see nothing out-of-line in this remark, it is noted that Callahan was not regarded as a credible witness. In a statement he prepared within a week of his termination, Callahan imputes the more innocent "What are you doing here?" to Hedges. See G.C. Exh. 8. As shall be seen, Callahan revealed a proclivity to enforce his position in this proceeding by falsely embellished testimony. From an overview of his testimony herein, one might well imagine the tempest he was likely to have contrived while simply on the job and not under oath.

<sup>9</sup> The lens that was on the vehicle on the occasion in question is in evidence as R. Exh. 3. The defect was obviously of the hair line variety. It was my impression that Callahan, out of concern that others might evaluate his citation in this respect as trivial, deliberately exaggerated in testifying that the crack was sufficient to permit a white light to shine through in violation of Pennsylvania State Highway regulations. How this was discernible to Callahan in broad daylight defies explanation.

<sup>10</sup> A conflict exists as to whether Callahan's allegations pertained to "the cab only" or to "the entire tractor." The matter is treated below.

crepancy and that the tractor stopped sufficiently.<sup>11</sup> He informed Callahan that he would not adjust the brakes. He also called the front office to inform Seguin that Callahan was refusing to drive the unit. Callahan, in the meantime, drove the rig, and sought out two other employees to confirm this further test of the brake system.<sup>12</sup> During this test, Callahan again found the brakes unsatisfactory.<sup>13</sup>

When Seguin arrived and confronted Callahan, the chain, which apparently was not a required item on the unit, had been removed from the rear door of the trailer. Therefore, the only remaining problems related to the brakes and tractor reflectors. Notwithstanding Callahan's request that these matters be corrected, Seguin consistent with the position of his chief mechanic, declared that no work would be done on the unit. Callahan asked that he be given another unit. Seguin held firm, directing Callahan to drive the vehicle. Callahan then sought advice from another over-the-road driver, Ken Malick. Malick advised him to have either Hedges or Seguin sign Callahan's trip report to reflect that the unit was okay. Malick warned Callahan not to refuse the unit. Callahan twice requested that Seguin sign, but Seguin refused.<sup>14</sup> According to Callahan, he again asked Malick what he should do, and Malick suggested that he call the union hall. At this point Callahan claims to have attempted unsuccessfully to reach Union Business Agent Tom Klinger. He then returned to the garage area, again inquiring of Malick as to what he should do. Malick told him to try to get management to sign the trip report, but warned that he should not refuse the unit. Accordingly, Callahan again asked Seguin to sign the trip report or give him another unit.<sup>15</sup> At this point, Seguin stated that

<sup>11</sup> William Sawyer, a repairman employed by the Respondent, testified that on July 30 he observed Hedges testing the rig. He claimed to have heard something dragging in the gravel, turned and looked, and saw tires sliding, and that it was the rig driven by Hedges. He claimed to have observed the front axle wheels on the trailer turning while the wheels on the rear axle of the trailer were digging into the gravel. He further averred that Hedges stopped a couple of more times, and then returned to the shop. At the garage, according to Sawyer, he told Hedges that "the wheels were turning, that they all wasn't holding." To this, according to Sawyer, Hedges replied "The brakes was holding, as far as he was concerned, the damn thing was all right." Hedges could not recall any conversation with an employee other than Callahan after completing the test. I was not impressed with Sawyer, his testimony did not ring true and, though an incumbent employee, his testimony was regarded as unbelievable.

<sup>12</sup> The other employees were Sawyer and another yardman, Kenneth Sniffen.

<sup>13</sup> Apparently Callahan inquired of Roger Peterson, a city driver for the Respondent, to confirm whether reflectors were absent from the tractor. According to Peterson, he examined the rear of the cab and looked on the rear of the chassis but observed no reflectors.

<sup>14</sup> Seguin testified that he refused to sign because this request was not in accord with proper procedure. I need not resolve the apparent conflict as to whether Callahan demanded that the report be signed as indicating that the vehicle was "okay," as Callahan recites, or as Seguin states, that "it would not be fixed." In this connection, I can understand why a representative of management, notwithstanding his strong belief that a vehicle was in good operating condition, would be reluctant to certify in writing that this was the case.

<sup>15</sup> It is noted that Callahan himself testified that the Company rarely switched rigs. On 9 of 10 occasions, they simply made the repairs.

if Callahan did not take the unit, it would be considered a voluntary quit. Callahan then informed Seguin "I am not quitting, but I am not going to drive that truck in the condition that it is in."<sup>16</sup> Callahan then said, "that if Seguin would sign his trip report that the unit was okay, he would take the unit out *on the street* and test it."<sup>17</sup> At this point, Seguin asked Callahan for his bills. Callahan obliged, but on returning with the documents, again asked if the trip report would be signed or the unit fixed. Seguin again asked for the bills, directing that Callahan be off the property in 10 minutes or be thrown off.<sup>18</sup>

Callahan did as directed, but, while waiting for his ride, remained outside the gates of the terminal when approximately 1-1/2 hours later Union Business Agent Klinger appeared. Callahan informed the latter that he had been ordered from the premises because he refused to drive the assigned unit. Consistent with the credited testimony of Klinger, I find that the sole defect expressly mentioned by Callahan at the time was the defective

brakes. Klinger then asked Callahan to wait and Klinger repaired to Seguin's office. Seguin confirmed to Klinger that Callahan had refused the truck because the brakes were no good. He in turn opined that there was nothing wrong with them. Seguin requested that Klinger drive the truck and judge for himself. Klinger refused, preferring that a yard jockey perform the test. Casey Michaels was designated to do so. He tested the brakes and found them adequate, as did Klinger who witnessed the test.

Klinger then went outside the gate where he told Callahan that there was nothing wrong with the brakes and that it would be best that he get in the truck and go.<sup>19</sup> At this point, according to Klinger's credited testimony, Callahan for the first time mentioned to Klinger that there was no reflector on the back "of the cab," and that he still would refuse to take the unit.

Thereafter, the same unit was dispatched to another driver, Stanley Dluzeski, who conducted a pretrip inspection finding it in good operating condition. Dluzeski made the trip to Wytheville without incident, ultimately passing on the rig at destination via a VCR that reflected that there were no problems with either tractor or trailer.

On August 6, Callahan filed a grievance protesting his termination in accordance with contractual dispute settlement procedures. Later the grievance was denied by a "joint area committee." The instant unfair labor practice charge was filed on January 27, 1982.

The motive on which the Respondent acted herein is not subject to serious dispute, i.e., Callahan's refusal to accept his assigned dispatch on July 30. Also clear is the fact that in deferring to this form of "self help," Callahan acted alone, exercising individual judgment without support of, direction or advice from any other employee.<sup>20</sup> However, the fact that Callahan elected on his own to engage in a job action is not fatal to his cause. For under the *Interboro* doctrine, supra, an employee, who alone attempts to exercise a right established by collective bargaining, does so aided by the protective guarantees of Section 7 of the Act. In this respect it has been stated "when an employee makes complaints concerning safety matters which are embodied in a contract, he is acting not only in his own interest, but is attempting to enforce such contract provisions in the interest of all of the em-

<sup>16</sup> Despite the above testimony, which was elicited on Callahan's direct examination by the General Counsel, the latter through a leading question obtained testimony from Malick to the effect that during this incident the latter did not hear "Callahan say that he refused to drive the truck." Indeed, based on the latter examination, the General Counsel's brief at page 8 represents that: "at no time during these discussions did Callahan say . . . that he refused the truck." In the face of Callahan's own testimony it is difficult to comprehend the General Counsel's strategy in this regard. It certainly dispels the notion that incumbent employees are to be credited in any and all circumstances.

<sup>17</sup> It is noted in this connection, that drivers test the brakes on their vehicles in the yard and on a street that runs adjacent to the terminal. Callahan related that he only would use the street if he was satisfied on the basis of his yard test that the brakes were okay. As shall be seen, the street furnishes what appears a more appropriate location for such a test than the area of the yard selected by Callahan to conduct his tests.

<sup>18</sup> Following close of the hearing the Charging Party, by his attorney, moved that the record be reopened to receive what had been marked at the hearing as C.P. Exh. 1. Based on representation by Charging Party's counsel, that document purported to be a transcription of a tape recording made of a joint area grievance committee meeting held on a grievance filed by Callahan with respect to his discharge. In support of the motion, it is indicated that said exhibit is relevant for purposes of assessing the credibility of Seguin and that it was not offered at the hearing by reason of counsel's oversight. The Respondent opposes the request to reopen. In denying the Charging Party's motion, it is noted that the evidence involved does not fit the "newly discovered or previously unavailable" standard covering posthearing submissions. See, e.g., *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); *Polis Wall Covering Co.*, 262 NLRB 1336 fn. 1 (1982). Indeed, the document in question was never authenticated. Other than the unsworn declaration by counsel, the source of this document is a mystery. There simply is no testimony under oath that C.P. Exh. 1 is a factual and accurate representation of what counsel says it is, nor explication as to how the transcription was made, who made it and from what source, and that the unauthenticated document represents an honest, complete, and accurate reproduction of what appeared on the tape and what transpired at the proceeding. Apparently, counsel for the Charging Party sought to sidestep this defect by the following representation in its motion:

The accuracy of that transcript was admitted by Mr. Seguin at the hearing of November 18-19:

Q. [By Mr. Goldberg]: [I]s this an accurate transcription of what you said at the hearing as far as you can recollect?

A. [By Mr. Seguin]: As far as I—if you got that off the tape then that's what I had to say. (Tr. 415.)

Quite obviously, a fair reading of the above-quoted testimony by Seguin hardly constitutes an admission substantiating counsel's representation. Thus, even if the rules designed to bring litigation to an end were relaxed, to grant this motion entails more than mere receipt of a document. Also required is parol testimony as to the authenticity of the transcription, subject to cross-examination by the party against whom that document is offered.

<sup>19</sup> Callahan in effect denied such a conversation, for, as he related, his ride arrived immediately after Klinger first entered the terminal and he left, thus denying opportunity for a second conversation with Klinger. I credit Klinger. I would note in this respect that Callahan seemed to insist that Klinger some months later, during a grievance presentation, told him merely that, in consequence of the test, the "truck had stopped." Callahan denied that Klinger had stated that the brakes "worked." Callahan's own prehearing affidavit indicated that this was precisely what Klinger stated on the occasion in question.

<sup>20</sup> The fact that the refusal to work was borne of a safety complaint, a matter shared commonly by employees generally, is beside the point. The action under scrutiny here concerns, the "means" utilized, as distinguished from the objective of Callahan in the area of safety. Indeed, on this record no rational basis would exist for concluding that the Respondent harbored any resentment toward employee concerns for safety or acted against Callahan for any such reason. On the contrary, it plainly appears that Callahan would still be employed had he performed his assignment, while continuing to protest the matter under conditions compatible with continuous operations.

ployees covered under that contract."<sup>21</sup> Here, Callahan's refusal to work was not lacking in contractual support. Thus, article 16, section 1 of the National Master Freight Agreement provides in material part, as follows:

The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition, including but not limited to acknowledged overweight or not equipped with the safety appliances prescribed by the law [sic]. It shall not be a violation of this agreement where employees refuse to operate such equipment unless such refusal is unjustified. All equipment which is refused because not mechanically sound or properly equipped, shall be appropriately tagged so that it cannot be used by other drivers until the maintenance department has adjusted the complaint.

In addition, article 54 of the Central Pennsylvania Over-The-Road and Local Cartage Supplemental Agreement provides as follows:

Employees shall not work in violation of, nor shall the agreement be construed contrary to, any law or ordinance, or of the applicable rules of the Department of Transportation and the Interstate Commerce Commission, or of any Public Utility Commission or agency having jurisdiction.

Refusal to drive a vehicle believed to be unsafe or because it fails to qualify with governing laws,<sup>22</sup> has been deemed protected as has an attempt to enforce contractual provisions substantially identical to the above-cited terms of the governing collective-bargaining agreements.<sup>23</sup> Indeed, the breadth of the protection accorded employees under this policy leaves employers only the barest room for legitimate discipline. For example, one major aid to complaints against such action is the principle that assertion of a contract claim is protected by the Act even if the employee is unaware of the existence of the agreement or neglects to mention it in pressing his position with management. See, e.g., *Beatrice Food Co.*, 217 NLRB 80 (1975). Remedial intervention by the Board to preclude discipline in this area is also facilitated by its view that the fact that an employee's protestation

is nonmeritorious or ultimately is disproven, will not defeat statutory protection.<sup>24</sup>

Thus, discipline is not excused where an employee, acting alone, insists that a job assignment be retracted as unsafe and creates a bitter confrontation with management over his refusal to perform, even though clear proof establishes that no hazard in fact existed. Indeed, since employee repudiation of a work instruction is always involved in this type of case, a threat to plant discipline and efficiency will always be present which is far more acute than other individual actions deemed protected by the Act such as the filing of grievances or the filing of complaints before a governmental agency. Yet, over the years, the balancing process so familiar to the accommodation of competing interests under this Act, has relegated traditional management interests to a single narrow defense in truck refusal cases. For under established policy, the employer will prevail only where it develops factually that the employee did not act in good faith in rejecting his assignment. As reaffirmed by the Board in a 1982 decision: "Once it has been established that the reason is one which is of common concern to employees with respect to their terms and conditions of employment, our inquiry into the private motivations for asserting such a reason is limited to the question of whether it was asserted in good faith or maliciously . . ." *Transport Service Co.*, 263 NLRB 910, 912 (1982) (Members Fanning, Jenkins, and Zimmerman).<sup>25</sup> My own personal survey reveals that this defense is so extreme that it has been sustained in only two cases in 17 years.<sup>26</sup>

In view of the foregoing, although the Respondent would have it otherwise, with respect to the merits, the only available defense rests upon the state of mind issues as defined above.<sup>27</sup> The Respondent's further contention

<sup>24</sup> See, e.g., *McLean Trucking Co.*, 252 NLRB 728, 734 (1980), and cases cited at fn. 21 thereof.

<sup>25</sup> It is in this respect that contractual remedies may be far narrower than that available with the Board. Thus, the contractual standard as to whether the refusal to work is "justified" would appear to turn on the accuracy of the safety complaint. In other words, the individual who declines an assignment as unsafe acts at his peril under the contract. Before the Board, the far more liberal good-faith belief standard prevails.

<sup>26</sup> *Roadway Express*, supra and *Johnson-Stewart-Johnson Mining Co.*, 263 NLRB 123 (1982).

<sup>27</sup> The Respondent also contends that in accordance with the *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), binding effect should be given to the denial by a joint area grievance committee of Callahan's grievance concerning his discharge. By virtue of the *Spielberg* doctrine, conclusive effect is conferred upon arbitral awards if it be demonstrated that the arbitration proceeding was fair and regular on its face, that all parties agreed to be bound, that the ultimate award is not clearly repugnant to the policies of the Act, and that the unfair labor practice issue was considered. Here, there is no evidence as to whether the parties agreed to be bound by determinations of the joint area committee. G.C. Exh. 4 merely contains excerpts from the governing collective-bargaining agreements, and neither as part of that exhibit nor any where else in the record does evidence appear as to the structure, authority, and composition of the various panels or steps within the contractual adjustment procedure. Furthermore, contrary to the Respondent, the only evidence as to the issue submitted to the arbitrator is to be found in the vague, uncertain testimony of Business Agent Klinger. Klinger testified the committee gave no reason for its action, and there was no written decision, nor transcript of the hearing. Thus evidence is absent that the statutory issue was presented, considered or decided by the panel. Indeed, Klinger's description of

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<sup>21</sup> See *Roadway Express*, 217 NLRB 278, 279 (1975). The Respondent correctly observes that the Board will not presume that concerted activity exists if employee complaints are no more than "gripes." However, that view has never been invoked to support dismissal where the employee was engaged in conduct consistent with the terms of a collective-bargaining agreement or to enforce governmental regulations. Thus, *Washington Cartage, Inc.*, 258 NLRB 701 (1981), is distinguishable. There the individual's action in refusing to drive an assigned vehicle was not authorized by a collective-bargaining agreement and his complaint did not relate to any failure on the part of the employer to adhere to lawful requirements. See also *Comet Fast Freight*, 262 NLRB 430 (1982) (Members Fanning and Zimmerman, with Member Jenkins dissenting).

<sup>22</sup> The protected scope of the Act is broad enough to include a driver's rejection of a vehicle because it was not equipped in a fashion required by regulatory laws. See, e.g., *Private Carrier Personnel*, 240 NLRB 126 (1979); *Transport Service Co.*, 263 NLRB 910 (1982).

<sup>23</sup> See, e.g., *United Parcel Service*, 241 NLRB 1074 (1979); *City Disposal Systems*, 256 NLRB 451 (1981); *Roadway Express Inc.*, 257 NLRB 1197, 1203 (1981).

that Callahan was not engaged in concerted activity appears to rest upon a challenge to the efficacy of long-standing Board policy that has developed under *Interboro Contractors*. In this latter regard, it is true, as the Respondent observes, that court approval was lacking with respect to much of the precedent urged by the General Counsel and the Charging Party in support of the instant complaint.<sup>28</sup> Indeed, as matters now stand, the legal sufficiency of the Board's *Interboro* doctrine, is pending before the Supreme Court of the United States. Thus, in *City Disposal Systems v. NLRB*, 683 F.2d 1005 (6th Cir. 1982), the Sixth Circuit Court of Appeals reversed the Board, declining to view individual enforcement of rights under a labor contract by an employee acting solely in his own behalf as conduct protected by Section 7. The court rejected the theory that the contract itself is the product of concerted activity in the form of collective bargaining and enforcement thereof by an employee is an inseparable extension of that process. Certiorari was sought and on March 28, 1983, the Supreme Court granted same. However, until the Supreme Court decides otherwise, I am duty bound to follow existing Board precedent.<sup>29</sup>

Accordingly, the legitimacy of the discipline imposed herein will turn solely upon the state of mind of the Charging Party at the time of the events precipitating his termination. Obviously, any finding that Callahan acted in bad faith or without reasonable basis for belief that an unsafe condition or regulatory infraction existed must turn on the inferences available from all credible facts. The analysis begins with the observation that safety of operation on the highways is a matter of legitimate concern to any responsible motor carrier. Over the years,

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the issue presented, at one point, seemed in the nature of a challenge to the harshness of the discipline imposed rather than a claim that Respondent acted in violation of the contract or the Act, in effecting the discharge. Cf. *Bloom v. NLRB*, 603 F.2d 1015, 1019 (D.C. Cir. 1979). Accordingly, not only is it impossible, in view of the abbreviated evidence adduced by the Respondent, to hold that the statutory issue was in fact considered, but it appears as a matter of relative certainty that it was not. Cf. the 1982 dissenting opinions in *American Freight System*, 264 NLRB 126 (1982) (Members Fanning, Jenkins, and Zimmerman; with Chairman Van de Water and Member Hunter dissenting separately). See also *Surburban Motor Freight*, 247 NLRB 146, 147 (1980).

<sup>28</sup> See, e.g., *McClain Trucking Co. v. NLRB*, 689 F.2d 605 (6th Cir. 1982); *NLRB v. Northern Metal Co.*, 440 F.2d 881 (3d Cir. 1971); *NLRB v. Buddies Supermarkets*, 481 F.2d 714 (5th Cir. 1973); *Kohls v. NLRB*, 629 F.2d 173 (D.C. Cir. 1980), cert. denied 450 U.S. 931 (1981); *Aro, Inc. v. NLRB*, 596 F.2d 713, 718 (6th Cir. 1979); *Royal Development Co. v. NLRB*, 703 F.2d 363 (9th Cir. 1983); *Roadway Express v. NLRB*, 700 F.2d 687 (11th Cir. 1983).

<sup>29</sup> See, e.g., *United Parcel Service*, 241 NLRB 1074, 1077 fn. 6 (1979). Apparently, to influence me to accord primacy to court decisions at odds with Board policy, the Respondent points to *Allegany General Hospital v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979), where the Board was reprimanded for resolving a case under a view that had been rejected by the Third Circuit Court of Appeals. In due respect to the court, it is difficult to imagine how the Board could perform its Congressionally defined responsibility "to equalize legal responsibilities of labor organizations and employees" to avoid burdens to interstate commerce and to contribute to the development of a national labor policy were it impelled to maintain separate rules along geographic and sectional lines, while implementing its expertise independently only within the realm of appellate forums that have either confirmed its views or remained open with respect thereto. Moreover, in view of the jurisdiction conferred on the United States Court of Appeals for the District of Columbia by Sec. 10(f) of the Act, the Board is not in a position to forecast, with absolute certainty, the appellate tribunal in which a particular order will be reviewed.

the safe and efficient transport of cargo had been the only basis for competition among certificated interstate carriers and today, despite deregulation, those factors remain critical to a carrier's appeal to shippers. The more obvious benefits to be reaped by a positive safety experience is more directly evident to managers through downward influence on costs in the areas of insurance and employee disability. Consistent with the foregoing, the Respondent's own efforts to preserve safety within its overall nationwide operation presents objective evidence as to the environment in which Callahan worked as an over-the-road driver.

Undisputed evidence shows that the Respondent annually maintains a considerable investment in the area of safety. Though ranked ninth nationally in gross revenues, its annual expenditure of in excess of \$2 million places it either third or fourth in relation to what competitors spend on safety. Eleven field safety supervisors are employed on a regional basis to enforce policies and perform inspections to assure compliance with Federal and state law in the area of safety at the local level. The Respondent also sponsors internal safety programs whereby prizes are awarded to those domiciles that achieve predefined safety goals. As part of its own internal policy, all vehicles are to be driven with lights at all times. Its dedication in this area has produced results, for in safety ratings maintained by the American Trucking Association the Respondent placed second in 1981 as against 25 to 30 other trucking concerns.<sup>30</sup> In the light of the foregoing, it could not fairly be stated that the Respondent maintained a posture of indifference to safety and its impact upon the welfare of employees and the general public.

Apart from the events immediately given rise to this proceeding, it does not appear that the interaction between management and drivers at the terminal level departed from this positive attitude toward safety. At Carlisle, Callahan acknowledges that during one phase of his assignment as an over-the-road driver he rejected 9 out of every 10 assignments.<sup>31</sup> These complaints, whether or not justified, would naturally cause a delay in freight,<sup>32</sup> and increase unit trip costs should the driver be eligible under the contract for "breakdown" pay. Yet, there is no evidence that Callahan, or any other employee at the Carlisle terminal, had been threatened, disciplined, or otherwise discouraged from raising safety issues.

Yet, returning to the question of Callahan's state of mind, the sheer volume of his complaints causes one to pause as to whether they were always genuine in nature. Seguin's undenied testimony establishes that there were

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<sup>30</sup> The foregoing is based on the credited testimony of Melvin LaForce, the Respondent's manager of safety and security.

<sup>31</sup> The vehicle condition report which is now required by the United States Department of Transportation is a recent innovation. Prior thereto, the Respondent internally required its drivers to report the condition of their equipment in writing prior to releasing it. Thus, it is fair to assume that in each of these instances the vehicles assigned to Callahan had been cleared as having no problems by the former driver.

<sup>32</sup> According to the credited testimony of Donald Seguin, the Respondent's manager of the over-the-road drivers at the Carlisle terminal, delay time at each of the Respondent's terminals is monitored at company headquarters. Delay time is a competitive factor as between the terminals, and weekly reports are published to the various driver supervisors in the terminals throughout the United States.

instances in which Callahan complained, yet nothing could be found wrong with his vehicle.<sup>33</sup> I have no doubt that this was so. Adding to the suspicion, is the fact that Callahan was able to maintain a high frequency of complaints in June and July 1981. For, during this period, the Respondent made an innovation to, on the one hand, accommodate Callahan's professed concern for safety, while at the same time reducing, if not eliminating, the downtime created by his complaints. Thus, it elected to have its staff of mechanics inspect all units assigned to Callahan before the rigs were made available to him. The new approach was not a complete success. For notwithstanding that vehicles assigned were released by their prior driver, repaired and inspected again by technicians, Callahan, by his own admission continued to reject 40 percent of his assignments.

While the possibility exists that other drivers were careless in their evaluation of vehicles, were neglectful in their obligation to report defects, and that the Carlisle mechanics were shoddy in their own preassignment inspection of Callahan's vehicles, my own evaluation and impression of Callahan from his demeanor and testimony in this proceeding is consistent with the Respondent's contention that his job action of July 30 was unreasonable and lacking in good faith. He impressed as of the ilk that feeds on controversy, being highly argumentative, resistive of authority, prone to confrontation, and a need to win, so strong as to project a proclivity toward contrived argumentation and outright fabrication.<sup>34</sup>

<sup>33</sup> While I am reluctant to do so, evaluation of the reasonableness of Callahan's overall posture is a cogent area of examination if the interests of all employees are to be served. The chronic complainer does not always serve the interest of coworkers. Indeed, the burden placed on grievance procedures or other remedial are not without cost. To the extent that the system is burdened by one's trivial claims, access of fellow employees is impeded. While it is not possible to evaluate all of the complaints registered by Callahan, there is, at least, one which appears to reveal his interest in promoting personal convenience under the guise of safety. Thus, according to Callahan he filed a "safety" related grievance concerning Respondent's Dayton, Ohio terminal. According to Callahan, the nearest restaurant to that terminal was about three-eighths of a mile away. His grievance was based on the fact that the Company refused to furnish transportation to the restaurant. He asserted that the cab fare was about \$19. It is the drift of his testimony that because the drivers had to walk to the restaurant, a safety hazard was presented, since the street had no sidewalk and bordered on private property marked by no trespassing signs. Apparently, Callahan was also of the view that drivers visiting that terminal ought not have been expected to take care of their daily eating requirements, before or after their duties required presence at that terminal.

<sup>34</sup> That Callahan was apt to say anything so long as it would support his cause is evident throughout his testimony. One example relates to his alleged concern for the absence of the reflective lens on the rear of the tractor on the day of his discharge. Just how Callahan could have identified G.C. Exh. 7 as being the "same type of lens" that was on the tractor that day escapes me. Quite clearly he even was in a position to check the "SAE" number that was actually on the tractor lens at the time. But even more unbelievable was his testimony that he knew that said lens lacked the reflective qualities required by DOT because he had "read the book and studied it." Precisely what book he was referring to is nowhere defined in the record. Indeed, it is a stipulated fact that the regional director of the Department of Transportation headquartered in Harrisburg could not state with absolute certainty that G.C. Exh. 7 violated DOT regulations. Furthermore, counsel were instructed by me to obtain, after close of the hearing, a statement under seal from the Department of Transportation to the effect that a lens devoid of honeycomb or cross-hatching, such as G.C. Exh. 7, could not possibly possess the reflective characteristics required by DOT. They were unable to obtain such a statement. Instead, the parties provided a stipulation which also lacks

Consistent with the foregoing, Callahan's testimony concerning his actions on July 30 was replete with falsity of the type calculated to create an aura of reasonableness where in truth none existed.<sup>35</sup> I have heretofore expressed my misgivings with respect to the testimony of Callahan concerning the foundation for his belief that the taillight assembly lens on the tractor did not meet DOT regulations. His good faith in that respect is also compromised by the fact that it was unlikely that he would be "bobtailing" on the Wytheville trip.<sup>36</sup> In any event such a lens would have little independent utility since the Company requires that its vehicles be operated with lights on at all times. Finally, it is difficult to understand why Callahan, despite his claimed familiarity with DOT regulations, did not bother to check the SAE number on the lens before stirring controversy over it. According to my evaluation, the explanation lies in his unrelenting need to combat the more knowledgeable views of the mechanics and management on the basis of tenuous beliefs as to what was required and to confront management with those beliefs, haphazardly and without verification.

This evaluation derives added support from the credible evidence concerning the allegation by Callahan that the trailer brakes were faulty on the rig he was assigned on July 30. Prior to the assignment of that unit, the brakes were adjusted as part of the initial inspection performed by mechanics. In addition, Garage Superintendent Hedges himself, before release of the unit, tested each brake, with the aid of someone else in the cab, who operated the controls. Only then was the unit made available to Callahan. According to Callahan, after completing his pretrip inspection he tested the brakes in the yard on the gravel surface. He claims to have applied the brakes while turning, and to have observed that the front tires on the passenger's side of the trailer grabbed, while the rear tires continued to turn freely. He claims that when he pressed the foot brake, the vehicle "seemed like it had a tendency to want to jackknife."<sup>37</sup> According to

conclusiveness in that it merely recites that the several manufacturers that they contacted "believed that combination reflector lenses currently in use have cross checking or honeycombing somewhere in the lens cap . . ." (The stipulation is received in evidence as ALJ Exh. 2.) Thus, Callahan not only professed to know more than the experts, but, in alluding to his understanding of "the book," sought to convince me that his knowledge was authoritatively based.

<sup>35</sup> The parties stipulated that DOT regulations would be satisfied by the placement of reflective lens on either the rear of the cab or the rear of the chassis of the tractor. Although Chief Mechanic Hedges testified that Callahan's complaint concerning the lens was limited to the fact that none was on the back of the cab, in this instance, it was my impression that Hedges simply articulated his understanding of Callahan's gripe and that Hedges believed that the reflective lens on the taillight assembly at the rear of the chassis was adequate. For this reason, he declined to perform the 2-minute task of installing additional reflectors on the rear of the cab. I consider it unlikely that Hedges would have cleared the tractor, rather than perform the 2-minute job were he given to understand that this was required under DOT regulations.

<sup>36</sup> The lens in question would only have utility where a tractor is not in tow. "Bobtailing" is the term applicable to such a run.

<sup>37</sup> It is noted that in a grievance form affirmed by Callahan on August 6, he averred that the test revealed "overall braking deficiency" reflected by a "noticeable lack of braking force." There is no mention of any tendency to "jackknife." See G.C. Exh. 8.

Callahan, after completion of this test, he obtained permission to take the unit to the garage.

At the garage, Hedges again climbed under the vehicle and once more observed, separately, the operation of each of the brakes from beneath the trailer. Failing to detect discrepancies, Hedges elected to test drive the unit in the yard. He twice applied the brakes. The first time, at a speed of 10 to 15 miles an hour, he applied the foot valve, finding no irregularity, with the unit stopping sufficiently. He then applied the hand valve during a second test and again concluded that the vehicle stopped sufficiently. Hedges then returned the truck to the vicinity of the shop, and told Callahan that he "didn't see nothing wrong with the brakes."

At this juncture, Callahan testified that because some foreign matter might have obstructed the air line valve and thereby influenced the previous test he made, and that Hedges' effort might well have cleared any such obstruction, he elected to again test the braking force.<sup>38</sup> Callahan asked Yardmen Sawyer and Kenneth Sniffen to watch the wheels as he performed the second test. Callahan described his experience as follows:

I . . . backed the unit up, started across the yard, probably got up to 8 or 10 miles an hour, stepped on the brake. The unit felt to me as if it was going to jackknife. I wasn't getting sufficient braking.

<sup>38</sup> This explanation by Callahan as to why he elected once more to test the brakes provides the threshold for another internal inconsistency. For it plainly implies that he did so out of personal concern that Hedges' conclusion as to the soundness of the brakes might well have been accurate. Yet, elsewhere, Callahan testified that he personally observed a segment of Hedges' test in which the brakes malfunctioned, as follows:

. . . I noticed that the unit seemed to be tracking thoroughly well and it drove good, and he applied the brakes. When he applied the brakes, the tractor tires that I observed slid, the tractor was obscured in a cloud of dust and none of the trailer tires that I could see were sliding at all.

Though the plain import of the above is that the wheels on the rear axle continued to roll, the statement prepared by Callahan on August 6, and in evidence as G.C. Exh. 8, strongly implies that he could not see the wheels of the vehicle during Hedges' test. Thus in that document, Callahan recites as follows:

The maintenance supervisor then got into the unit and drove north through the terminal yard between the terminal and the ready line, approximately 500 feet and then applied [sic] the brakes at which time the unit was obscured by a cloud of dust. He then drove around the end of the ready line headed the wrong way (notice posted on bulletin board by the terminal manager) back towards the garage, at this time I was not able to observe what happened then.

In my opinion these three elements reflect a contradiction as to a highly material issue. The August 6 statement, while going out of its way to point out that Hedges violated terminal rules in heading his vehicle in the wrong direction, failed to mention that Callahan observed the functioning of the brakes. But when testifying under oath, Callahan claimed to have observed the wheels. Finally, Callahan's own explanation as to the reason for his testing the brakes a second time implied that he feared that the test performed by Hedges might well have established that there was nothing wrong with the brakes. In this regard, I have not overlooked the testimony of William Sawyer, a yard employee, who at the time of the hearing remained on the Respondent's payroll. Sawyer claims to have observed Hedges driving the tractor when the brakes were applied. He claims that he "heard something dragging in the gravel and . . . looked around and saw the shop supervisor there sliding the tires in the gravel." Contrary to Callahan, Sawyer claimed to have observed that the front wheels of the axle were still turning, while the rear was digging into the gravel. Obviously, even were one to believe Sawyer, it would not influence my conclusion that Callahan did not actually observe any adverse performance of the brakes during Hedges' testing of the vehicle.

I, in turn, pulled the trolley valve about half-way down. Didn't seem to make any difference, and I pulled it all the way down and it didn't make any difference as far as stopping or anything.<sup>39</sup>

Sniffen and Sawyer also offered their perspectives on what transpired during the second test, testimony which compounded the confusion as to what actually transpired. According to Callahan, immediately upon completion of the test, Sawyer told him that the tractor tires grabbed while those on the trailer did not, and Sniffen reported that the tires on the right front axle of the trailer slid while those on the right rear axle were "turning freely." Significantly, these reports failed to jibe. This despite the fact that both related that they observed the test from the passenger side of the unit.<sup>40</sup> It is apparent therefor that on the evidence presented at the hearing, the information provided to Callahan by his own witnesses was not entirely consistent.<sup>41</sup>

Callahan's apparent reaffirmation that he would not drive the unit in the face of these conflicting reports, achieves heightened significance when considered with his admitted knowledge that DOT regulations specify the circumstances under which brakes are to be tested. It would seem obvious that the performance of brakes on an ungraded surface of loose gravel would be subject to distortion and would offer less precise results than where the evaluation is made on a hard, smooth, level surface and in a straight line as directed by DOT regulations. Callahan acknowledged that the requisite conditions were available on a street immediately outside the terminal's gates.<sup>42</sup> Yet Callahan, a stickler for compliance

<sup>39</sup> Callahan, in his sworn testimony, stressed the unit's tendency to "jackknife." It will be recalled that in connection with the first test, though performed at only 5 miles per hour, Callahan also used this term to describe the effect of the brakes' failure to grab. There can be no question that the possibility of jackknife is a matter of vital concern to the safe operation of a tractor-trailer. I do not believe, however, that a "jackknife" tendency was sensed by Callahan in consequence of either test. If he did, it is difficult to imagine just why he neglected to mention so important a matter in his description on the facts prepared within a week of his discharge. See G.C. Exh. 8. Here again, it was my impression that Callahan, in his own testimony, resorted falsely to dramatics in his effort to generate sympathy for his cause.

<sup>40</sup> Although the brief of the General Counsel, perhaps, inadvertently states otherwise, Callahan testified that he observed that on the front axle of the trailer, the right front tire (passenger side) was sliding but that the left front tire was not.

<sup>41</sup> However, once more the August 6 grievance statement is in conflict with the evidence developed at the instant hearing. There, Callahan relates that "Mr. Sawyer and Mr. Sniffen, both told me that one wheel was sliding and the others were turning freely, on the trailer." [Emphasis added.] See G.C. Exh. 8.

<sup>42</sup> Callahan testified that he only tested his vehicle on that street if he was satisfied as to the means by which the brakes performed on the loose gravel surface of the terminal. From all appearances on the record, the street was a suitable location for such testing, being lightly traveled, since of limited access to a single farm, a Carolina Freight terminal, and the ABF terminal. I was not impressed by the observation by counsel for the Charging Party that this was not a feasible alternative to a "yard test" because employees are precluded from taking defective equipment on streets and highways. This argument is hypertechnical, was not an excuse afforded by Callahan, and does not dispell the clear implication from DOT regulations that conclusive results could not be gleaned under the test ministered by Callahan. It will be noted that while Hedges also used the yard to test the brakes, his examination was not limited to road testing.

with DOT regulations, in this instance spurned them by testing in the yard despite knowledge that his unit had been preinspected and cleared by Carlisle mechanics, and that Hedges had himself driven the vehicle to check the brakes.

Callahan must have known that DOT detailed the conditions for testing the brakes for a reason, and that, at least in part, those regulations were developed because they provided the optimum basis for evaluating brake performance.<sup>43</sup> Having forced the issue by challenging the garage superintendent's analysis—without testing in the manner authorized by law—Callahan elected to refuse Seguin's order to run the rig, adopting this stance on his own without advice from anyone. On the contrary, Malick, a codriver, told him not to refuse the unit. His own business agent, Klinger after observing a test run, agreed with management's conclusions that the brakes were in good working order, and immediately told Callahan, who remained outside the gate, to take the truck as the brakes were in good working order.<sup>44</sup> That the brakes were in fact in good working order is also confirmed by the testimony of "Casey" Michaels, the yardman who tested the brakes in the presence of Klinger, and Stanley Dluzeski, the road driver who replaced Callahan on the rig and completed the Wytheville run.

Based on the total circumstances, while it would be difficult to conclude that Callahan acted out of malice, I am convinced that he did not possess a good-faith belief that the unit ultimately rejected, presented a hazard to himself or others. Under the holding by the Board in *Johnson-Stewart-Johnson Mining Co.*, 263 NLRB 123 (1982) (Chairman Van de Water, Members Fanning and Hunter) no more need be shown to support dismissal of the instant complaint. In that case, a truckdriver had been assigned a vehicle which he characterized as a "disaster." He reported this to the plant manager and filed a written report which outlined deficiencies such as faulty steering, noise vibrations, and a broken door. That evening mechanics repaired the truck. When the driver reported to work the next day and was again assigned by the dispatcher to drive the same truck, he refused the assignment and left the plant without determination or inquiry as to whether the requested repairs had been completed. Based on this failure to inquire, the Board con-

<sup>43</sup> Notwithstanding the claimed experience in the industry of Callahan, Sniffen, and Sawyer, I am convinced that the circumstances under which Callahan tested the brakes were not likely to produce accurate results. In this regard, consistent with the requirements of the DOT regulations, I was inclined to believe the testimony of Melvin LaForce, the Respondent's manager of safety and security, that a loose gravel, ungraded surface would not allow fair evaluation of braking capacity and that on such a surface simultaneous braking, with all wheels locking at once, would not produce the degree of control that would result from sequential locking of the wheels. The fact that wheels might grab or continue to roll briefly after application of the brakes on such terrain could be explained by the interrelationship of grade, load weight, load distribution, and centrifugal force, rather than malfunction.

<sup>44</sup> Implicit in Callahan's testimony is a denial that such a conversation occurred. Thus, according to Callahan, he left the area immediately after his first conversation with Klinger. For reasons that have already been made apparent, I prefer the testimony of Klinger. In any event, I find it difficult to accept that Klinger would have manufactured this aspect of his account.

cluded that the refusal to operate the assigned truck was "not based on a reasonable belief that the truck was unsafe . . ."<sup>45</sup>

Here too, the Charging Party maintained his position without attempt to verify the reasonableness of his ground for rejecting the assigned unit. Callahan knew that his boss, Seguin, insisted that he perform the run only after preinspection *and* after the latter received a report from Hedges, the chief technician, that the brakes were in good working order. Thus, from matters within Callahan's own knowledge, he should have known that Seguin rightfully assumed that there were no further repairs to be made and that the unit was roadworthy. Moreover, the notion that Callahan acted on any sincerely held thought that Hedges, after taking the trouble personally to examine the brakes twice and then to road test the vehicle (thereby assuming personal responsibility for its roadworthiness), would have released the unit if unsafe is rejected. At the same time, it is clear that Callahan resisted the instruction of his superior and impugned the judgment of the Respondent's chief mechanic without making any effort to check the brakes as prescribed by DOT regulations. By pitting his own faulty assumptions against the Respondent's resident expert, the advice of coworker Malick, and the evaluation of Business Agent Klinger, Callahan labored under a "pique" not dissimilar to that of the driver in *Johnson-Stewart-Johnson*, supra, and appeared more intent on imposing his will on management as a matter of personal pride than acting on any genuine concern that would be of interest to any other employee.<sup>46</sup>

Based on the total facts and circumstances, it is concluded that the incident precipitating the discharge involved conduct on the part of Callahan which was not out of any personally held, honest and sincere concern for safety, but to further personal goals which foreseeably would contribute to excessive downtime, inefficiency and waste. His discharge on July 30 was predicated on considerations outside the protected ambit of Section 7 and the Respondent did not thereby violate Section 8(a)(1) of the Act. The complaint shall be dismissed in its entirety.<sup>47</sup>

<sup>45</sup> 263 NLRB 123.

<sup>46</sup> I am not entirely certain to what extent the problem concerning the reflective lens on the rear of the tractor contributed independently to Callahan's refusing the rig. If it was a material concern, it is further concluded that his action could not be condoned in that respect either. To date, it has not been established that the lens which he claimed to have been on the taillight assembly of the tractor on July 30 met or did not meet DOT regulations. His misrepresentation as to the type of light that was on that taillight assembly, as well as his insistence that the book he had studied made it clear to him that that lens did not conform to DOT regulations, serve to support his own lack of confidence in the accuracy of his complaint in that regard. But any good faith in this assertion cannot stand side by side with his knowledge that it was unlikely that the trip in question would entail "bobtailing" and the fact he was obligated in any event to drive his vehicle at all times with lights on, a requirement which would render reflectors superfluous even while "bobtailing."

<sup>47</sup> In the view I take of the case, it is unnecessary and I do not pass on the Respondent's prehearing motion to "Toll Backpay." Insofar as that same motion seeks reimbursement for costs incurred by the Respondent in connection with an earlier adjournment of the hearing, the relief sought is denied as beyond the statutorily defined, remedial competence of the Board. See R. Exhs. 1(a)-(c).

## CONCLUSIONS OF LAW

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

2. Respondent did not violate Section 8(a)(1) of the Act by on July 30, 1981, terminating Daniel Callahan.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>48</sup>

## ORDER

IT IS ORDERED that the complaint herein be dismissed in its entirety.

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<sup>48</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.