

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-960

TITLE NATIONAL LABOR RELATIONS BOARD, Petitioner v.
CITY DISPOSAL SYSTEMS, INC.

PLACE Washington, D. C.

DATE November 7, 1983

PAGES 1 thru 47



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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NATIONAL LABOR RELATIONS BOARD, :
4 Petitioner :
5 v. :
6 CITY DISPOSAL SYSTEMS, INC. :
7 - - - - - x No. 82-960

8
9 Washington, D.C.

10 November 7, 1983

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United
13 States at 1:46 p.m.

14 APPEARANCES:

15 NORTON J. COME, ESQ., Deputy Associate General
16 Counsel, National Labor Relations Board,
17 Washington, D.C.; on behalf of the Petitioner.

18 ROBERT P. UFER, ESQ., Detroit, Michigan; on behalf
19 of Respondent.

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1 to take out on the streets or highways any vehicle
2 that is not in safe operating condition or equipped
3 with the safety compliances prescribed by law.

4 It further provides that it shall not be
5 a violation of this Agreement where employees refuse
6 to operate such equipment unless such refusal is un-
7 justified.

8 A further provision of the Agreement provides
9 that the employer shall not ask or require any employee
10 to take out equipment that has been reported by any
11 other employee as being in unsafe operating condition
12 unless the same has been approved as being safe by
13 the mechanical department.

14 James Brown was a driver for the Respondent.
15 He normally drove Truck No. 245. On Saturday, May
16 12, 1979, he had a near accident with Truck No. 244
17 driven by another employee, Frank Hamilton, when the
18 brakes on 244 would not stop the truck at a landfill.

19 Hamilton took Truck 244 back to the drop-off
20 point and with Brown present the mechanics told him
21 that the truck would be fixed over the weekend or the
22 first thing Monday morning.

23 Brown returned to work at 4:00 a.m. on Monday,
24 14th. He took out his Truck 245 to the landfill and
25 found that the fifth wheel had a problem. He returned

1 to the drop-off point, talked to the mechanics and
2 learned that the truck could not be fixed that day.

3 He then spoke to his supervisor, Jasmund,
4 who told him to punch out and go home after confirming
5 that Brown's truck could not be fixed.

6 Brown punched out, but remained in the driver's
7 room, at which point Jasmund returned and requested
8 Brown to drive Truck 244. Brown said he would not
9 do so since 244 had a brake problem. Jasmund instructed
10 Brown to go home and the two had a heated exchange.

11 Another supervisor, Madary, came on the scene,
12 and when Brown reported that 244 had problems, Madary
13 replied that half the trucks around here have problems
14 and if Respondent tried to deal with all of them it
15 would be unable to do business.

16 During the conversation, Brown asked, Bob,
17 what are you going to do, put the garbage ahead of
18 the safety of the men? Madary did not reply nor did
19 he or Jasmund make any attempt to show Brown that Truck
20 244 had, in fact, been repaired and was safe.

21 Brown went home and later that day he was
22 discharged.

23 The Union's Recording Secretary received
24 notice of the discharge that day and he and Brown returned
25 to the plant and sought to get Jasmund and Madary to put

1 Bob back to work, but they refused to do so.

2 The next day Brown filed a written grievance
3 under the collective bargaining agreement alleging
4 that he had been discharged in violation of the contract.

5 The Union declined to pursue Brown's grievance
6 beyond the first step of the grievance procedure.

7 QUESTION: Does the record show why?

8 MR. COME: The record indicates, in Respondent's
9 Exhibit 10, which is not printed in the Joint Appendix,
10 but which is in the record, that they found no merit
11 to the grievance. Apparently the truck was driven
12 later that afternoon by another employee.

13 QUESTION: Mr. Come, if then the employee
14 had filed a 301 suit against the employer for an illegal
15 discharge, in order to win that, he would have had
16 to prove a breach of the fiduciary duty that the Union
17 owed him, wouldn't he? If he didn't allege that, it
18 would be dismissed.

19 CHIEF JUSTICE BURGER: Under fact cites that
20 is right, Your Honor.

21 QUESTION: So that -- But, instead of doing
22 that, he nows files with the Board, is that it?

23 MR. COME: He filed an unfair labor practice
24 charge with the Board. The Board, upholding the decision
25 of its Administrative Law Judge, concluded that the

1 Respondent had violated 8(a)(1) of the National Labor
2 Relations Act by discharging Brown.

3 QUESTION: Mr. Come?

4 MR. COME: Yes, sir.

5 QUESTION: I read the Administrative Law
6 Judge's findings fairly carefully and I am interested
7 to know what is the Board's position as to the reason
8 that the Administrative Law Judge assigned that the
9 company used to discharge Brown? Why did the Administrative
10 Law Judge think that Brown had been discharged? I
11 don't want exact quotes, but --

12 MR. COME: The Administrative Law Judge found
13 that Brown had been discharged for asserting his contract
14 rights not to drive an unsafe truck; that he had a
15 good faith and a reasonable belief at least that the
16 truck was unsafe and that under the Board's Interboro
17 Doctrine the assertion of a reasonable and good faith
18 contract claim is concerted activity protected by Section
19 7 of the Act.

20 QUESTION: What if the company contend that
21 Brown was discharged for failing to obey an order,
22 an order to get back and drive 244? Now, would the
23 Board's response still be the same?

24 MR. COME: I think it would, Your Honor,
25 because the -- If, in fact, Brown was engaging in concerted

1 activity protected by Section 7, the mere fact that the
2 company classified as as insubordination would not
3 remove the protection of Section 7.

4 There is an issue in this case which was
5 not reached by the Sixth Circuit and would be open
6 on remand; namely, whether or not Brown, in fact, was
7 refusing to drive this truck because of good faith
8 beliefs that it was unsafe or whether there were other
9 reasons for his refusal.

10 QUESTION: You are saying Brown is purported
11 to exercise the rights given him by a promise in the
12 contract?

13 MR. COME: That is correct.

14 QUESTION: A promise that the employer made.

15 MR. COME: That is correct, Your Honor.

16 QUESTION: Now, suppose there weren't any
17 specific promises about equipment, but the employer
18 promised never to discharge anyone without proper cause.
19 I think that is a normal promise, isn't it? You don't
20 discharge people without proper cause. So, the same
21 facts happened and Brown -- and he was fired and he
22 claimed that that wasn't good enough cause. All I
23 did was -- I didn't want to drive a truck without brakes
24 and he took it to a grievance and the Union refused
25 to press it and then he filed an unfair labor practice

1 proceeding.

2 Don't you, in effect, say that any breach
3 of the employer of the collective bargaining contract
4 is an unfair labor practice if it results in a discharge
5 and regardless of whether or not the Union could or
6 would ever be held guilty of a refusal to fairly repre-
7 sent employees?

8 MR. COME: Well, I think that you may have
9 to separate out a couple of problems in your hypothetical
10 example.

11 QUESTION: It has them there, I know that.

12 MR. COME: The Board's basic position is
13 that the right of an individual to assert a contract
14 right in good faith and in reason --

15 QUESTION: Such as the right not to be fired
16 without good cause even.

17 MR. COME: -- is protected by Section 7 against
18 reprisal for asserting that right.

19 Now, it does not follow, however, that every
20 assertion of a right under a contract can be followed
21 by a refusal to work if you are not granted your claim,
22 because if there is a no-strike clause in the contract,
23 the activity, though it may be concerted might forfeit
24 the protection of Section 7.

25 Now, in this case, you do have a work refusal,

1 however, the question of whether that would render
2 the activity unprotected in our view is not presented
3 in this case because Respondent did not raise that
4 issue either before the Board or the Court of Appeals.
5 The only issue that he raised, apart from the factual
6 one as to whether or not, in fact, it was safety that
7 motivated him, was whether the activity was concerted
8 where it involved merely the action of an employee
9 acting alone.

10 QUESTION: And that is the Interboro Doctrine?

11 MR. COME: That is the Interboro Doctrine.

12 QUESTION: Okay. I would like to ask you
13 a hypothetical question about the Interboro Doctrine.
14 Supposing that a collective bargaining agreement provided
15 that in the event of a dispute over an obligation to
16 work overtime the employee had to work overtime as
17 requested and file a grievance later. And suppose
18 an employee operating under that contract refused to
19 do the overtime and simply walked off the job. Now,
20 would the Interboro Doctrine protect him even though
21 he had not complied with the contract?

22 MR. COME: I don't think it would in that
23 circumstance, Your Honor, because the contract there
24 specifically made it clear, as I understand the example,
25 that --

1 QUESTION: Well then don't you have a problem
2 with the Board's treatment of the contract here, because,
3 as I understand the contract provision that he was
4 working under, it didn't provide that his refusal to
5 work on the basis of safety would need only be honestly
6 and reasonably held. I think the contract requires
7 more objective justification, yet the Board has simply
8 substituted its own term, I think, for the safety provision.

9 MR. COME: No, Your Honor, that is not the
10 position that we are urging here on our reading of
11 the Administrative Law Judge's findings which the Board
12 adopted, although to be sure, in some Board decisions,
13 there is some confusion as to whether the Board is
14 applying a purely subjective standard or whether it
15 requires that the refusal not only be in good faith,
16 but reasonable. The facts of those cases will show
17 that the decision rests not only upon the subjective
18 standard, but there has to be some objective basis
19 that makes the employee's claim reasonable.

20 And, the ALJ here so found in both respects
21 and that is the question we are presenting here and
22 that is the submission that we are making.

23 QUESTION: Well, is it slightly reasonable
24 to protect the people in Detroit from hugh sludge trucks
25 running around without brakes?

1 MR. COME: I believe it is, Your Honor, and
2 for that reason I believe that is why the parties negotiated
3 the kind of contract clause that you have here which
4 guarantees the employee not only a safe truck, but
5 it provides that it shall not be a violation of this
6 agreement where employees refuse to operate such equipment
7 unless such refusal is unjustified.

8 But, a point that I want to make though is
9 that as we view the record in this case the unprotected
10 aspect on which the Respondent dwells at great length
11 in its brief here is not presented in this case. The
12 only issue that was presented here is whether or not
13 the fact that the employee acted alone in forcing a
14 collectively bargained right made it not concerted
15 activity.

16 That is the Interboro Doctrine. That is
17 the basis on which the Court of Appeals affirmed Respondent's
18 position and for that theory it makes no difference
19 whether the employee here had merely protested driving
20 an unsafe truck and was fired for making the protest
21 or whether he momentarily hesitated or whether, in
22 fact, he refused to drive as he did here.

23 QUESTION: Would he have had to have protested
24 at all to invoke the Interboro Doctrine?

25 MR. COME: Well, I think he has to give the

1 employer some indication that it is a contract right
2 that he is claiming.

3 QUESTION: Well, suppose he does exactly
4 what he is told up to a point, then just refuses, walks
5 off, gets fired, just the way it happened here, except
6 he doesn't make any statement at all at the time and
7 the next day he files a grievance, as I believe he
8 did here. Is the mere filing of that grievance a sufficient
9 protest to invoke the Interboro Doctrine?

10 MR. COME: I think that it would be because,
11 as a matter of fact, even the courts that have disapproved
12 or rejected the Interboro Doctrine and there is a conflict
13 in the circumstance, feel that to discharge an employee
14 for filing a grievance is a violation of 8(a)(1) because
15 filing a grievance is, though it is filed by an individual
16 employee, concerted activity.

17 QUESTION: Would the Board recognize any
18 distinction between firing this person -- firing him
19 because he filed a grievance as opposed to firing him
20 because he refused to carry out a lawful order?

21 MR. COME: Well, in some cases, it would,
22 but as I tried to explain, in many cases where it would
23 be a breach of a no-strike clause to refuse to work
24 the activity would forfeit the protection of Section
25 7.

1 That is not the case here because of the
2 special contract clause here which, in effect, is an
3 exception to the no-strike clause, undoubtedly for
4 the reason that Justice Marshall pointed out, that
5 in the safety situations it is often a small comfort
6 to have the right to file a grievance after you have
7 risked your life and lost.

8 QUESTION: But, the Interboro Doctrine isn't
9 limited to safety at all, is it?

10 MR. COME: No, it is not limited to safety,
11 but the point I am trying to make is that the Interboro
12 Doctrine deals essentially with the issue that is here;
13 namely, whether or not an individual's assertion of
14 a contract right in good faith and reasonably based
15 is concerted activity for purposes of Section 7.

16 QUESTION: Of course, if the answer is yes,
17 as you say it is, and the Board thinks it is, then
18 the Board immediately proceeds to determine whether
19 this contract right, which is a protected right, has
20 been violated. And, here, it would be whether or not
21 the employee actually had some reasonable grounds for
22 his actions and if he did, why, there is an unfair
23 labor practice. Isn't that -- It is as simple as that.
24 And they would also do that even if this case had gone
25 right straight to arbitration and the arbitrator had

1 decided that he had been properly fired.

2 MR. COME: Then you get into the further
3 question --

4 QUESTION: Yes.

5 MR. COME: -- as to the circumstances under
6 which the Board will defer to the arbitrators.

7 QUESTION: Suppose the employee had never
8 asked the Union to -- anything and suppose no grievance
9 had been filed. Why couldn't the employee, if this
10 is an unfair labor practice, why can't the employee
11 go right to the Board and forget the whole grievance
12 machine? All he has to do is say I have a right, it
13 is a joint right, I am expressing a collective right
14 under the contract, and it was violated by the employer.

15 MR. COME: He could.

16 QUESTION: So, the employee never needs to
17 exercise the machinery.

18 QUESTION: That would just make mincemeat
19 of the contract, wouldn't it?

20 MR. COME: No, it would not. I mean the
21 Section 7 rights can operate in tantem with contract
22 rights.

23 QUESTION: Well, Mr. Come, does the Board
24 make it a practice, when the employee, in fact, initiates
25 a grievance procedure, does the Board make it a practice

1 to pursue a complaint in cases like this? Interboro
2 says you may, but what is the Board's practice? Does
3 it do it as a matter of practice?

4 MR. COME: For a time under the Collier Doctrine
5 the Board would defer in these situations where there
6 was available a grievance arbitration.

7 QUESTION: And tell the employee go that
8 route even if he hadn't started?

9 MR. COME: If that were available.

10 The current Board policy is not to defer
11 unless the employee or the Union has pursued the grievance
12 procedure and there has been a determination.

13 QUESTION: By an arbitrator.

14 MR. COME: By an arbitrator.

15 QUESTION: You mean if initiated when the
16 complaint is filed, but not completed, that is the
17 arbitration proceeding, the Board then proceeds?

18 MR. COME: Well, if it has been initiated,
19 they will wait.

20 QUESTION: They will wait.

21 QUESTION: It was completed here.

22 MR. COME: Well, it wasn't completed in any
23 formal --

24 QUESTION: They filed a grievance. It was
25 rejected and the Union refused to go any further so

1 that terminated the entire procedure.

2 MR. COME: Well, the Union has, as Your Honor
3 pointed out, I believe, a lot of reason why they do
4 not proceed with the grievance.

5 QUESTION: But, their regular policy now
6 is that not to defer in circumstances like -- in this
7 case.

8 MR. COME: That is correct.

9 QUESTION: Even if a grievance has been filed,
10 it has been rejected by the employer, and then the
11 Union refuses to carry it any further, the Board regularly
12 does not defer. Whereas, if it goes to -- If the Union
13 agrees to take it to arbitration and that proceeding
14 is not completed, then it will defer.

15 But now if there is an arbitrator's decision
16 there against the employee, what then?

17 MR. COME: Well, the Board will look to see
18 whether that complies with the Spielberg criteria,
19 whether or not the procedure was fair and regular,
20 whether the determination is consistent with the policies
21 of the Act and whether the arbitrator, in fact, decided
22 the statutory issue.

23 QUESTION: So, they sort of sit in review
24 of the arbitrator?

25 MR. COME: Well, not to determine his fact

1 findings, redetermine his fact findings.

2 However, the issue before the Board and the
3 arbitrator is not necessarily the same as the Second
4 Circuit pointed out in the Interboro case which was
5 the first performance of this Doctrine. The arbitrator
6 is enforcing the contract. What the Board does under
7 Interboro is to protect the employee's right to make
8 a contract claim and in order to encourage the employee
9 to exercise his rights under the contract, the Board
10 merely requires a good faith, reasonable assertion
11 of that right, because otherwise, as Judge MacKinnon
12 pointed out in the Banyard case, which is cited in
13 our brief, employees would be discouraged from asserting
14 their contract rights except in the clearest cases.
15 So that Interboro, in effect, gives through Section
16 7, a little more than a contract does in order to ensure
17 that what the employees bargained for under the contract
18 they really get.

19 I would like to save the rest of my time
20 for rebuttal.

21 CHIEF JUSTICE BURGER: Mr. Ufer?

22 ORAL ARGUMENT OF ROBERT P. UFER, ESQ.

23 ON BEHALF OF THE RESPONDENT

24 MR. UFER: Mr. Chief Justice, and may it
25 please the Court:

1 Regarding the factual background of this
2 matter, it is Respondent's position that four facts
3 clarify the very narrow scope of the issues presented
4 by this case.

5 First, Mr. Brown did not warn or attempt
6 to warn any other employees of the alleged unsafe condition
7 of the truck. He made no verbal communication, he
8 made no bulletin-board message, he simply went home,
9 having never inspected the truck or driven the truck
10 for over a year prior to the morning he refused to
11 drive.

12 QUESTION: I thought he was told to go home.

13 MR. UFER: His final instruction by both
14 supervisors --

15 QUESTION: His preliminary instruction, he
16 was told to go home.

17 MR. UFER: There was some confusion in the
18 record as to that point, Justice Blackmun. His final
19 instruction, which Respondent submit is a binding instruction
20 upon that employee, was to drive the truck and he refused
21 to drive the truck.

22 As indicated on the dismissal sheet which
23 is in the Joint Appendix, he was discharged for disobeying
24 orders (refusing to drive Truck 244.)

25 QUESTION: Well, we don't have to decide

1 here, do we?

2 MR. UFER: No, that is not an issue before
3 the Court at this time.

4 Continuing with the facts about Brown, Brown
5 did not ask for his Union steward or seek Union assistance
6 of any nature on the morning of May 14th when he refused
7 to drive the truck. In fact, another employee drove
8 that truck the same morning without incident and the
9 following two days the truck was driven on its regular
10 shift.

11 The fourth factual point that we believe
12 is of critical importance in this case is that all
13 the parties had agreed to binding grievance arbitration
14 as the collective bargaining agreement dispute resolution
15 procedure.

16 Now, against this factual background, both
17 the Board and the Sixth Circuit found individual action
18 by Brown and the Board seeks to utilize the fiction
19 of constructive concerted activity under the Interboro
20 Doctrine to bring an individual employee's refusal
21 to perform assigned work within the scope of Section
22 7 and to activate the Board machinery to resolve a
23 collective bargaining agreement dispute.

24 QUESTION: Well, would you -- I take it you
25 wouldn't be here if Brown had said I won't drive the

1 truck because of the brakes and because I have a right
2 under the contract not to drive a truck with bad brakes.
3 Then, if he was ordered to drive and he refused --

4 MR. UFER: If he articulated -- If the reason
5 for his dismissal was the articulation of the grievance,
6 that is correct. We would not be here and we have
7 indicated that in our brief.

8 In this case, the reason for his dismissal
9 was the refusal to drive the truck, not to the submittal
10 of the grievance. The submittal of the grievance came --

11 QUESTION: Are you on firm ground so far
12 as the findings by the Administrative Law Judge and
13 the Board are concerned? Did the Administrative Law
14 Judge find the facts as you say they are?

15 MR. UFER: The indication -- The Administrative
16 Law Judge's opinion is that Brown was discharged for
17 refusing to follow a company order. There is not a
18 holding by the Administrative Law Judge that he was
19 discharged for filing a grievance.

20 QUESTION: I read it over and I frankly was
21 confused as to which of those it was.

22 MR. UFER: I think --

23 QUESTION: Wasn't he -- Isn't it clear though
24 that he refused to work -- He refused to work because
25 of his concern about the brakes and that the Board

1 and the Administrative Law Judge found that he was
2 exercising a contract right in refusing to do so?

3 MR. UFER: The Board -- It is our position
4 that the Board does not -- The arbitrator has provided
5 for -- Under the collective bargaining agreement, the
6 arbitrator is to make a decision as to whether or not
7 Brown's conduct was justified when he refused to drive
8 the truck under Section XXI of the collective bargaining
9 agreement.

10 In this case, we submit that what the Board
11 does, as indicated in its American Freight decision,
12 it will come in and apply a lesser standard, essentially
13 subjective, good faith standard, not the standard determined
14 and agreed upon by the parties to the contract.

15 And, for that reason, we don't believe the
16 Board made that determination or had the right to make
17 that determination.

18 We respectfully submit that Section 7 of
19 the National Labor Relations Act should be interpreted
20 by this Court according to its plain meaning. We believe
21 this is consistent with the legislative history.

22 QUESTION: But, the point you just made wouldn't
23 be foreclosed even if it were found that what he was
24 exercising was a collective right.

25 MR. UFER: That is correct.

1 QUESTION: You can still argue that it would be
2 a collective right, but the Board is just misapplying
3 the Act unless it wait for the arbitrator.

4 MR. UFER: That is correct.

5 QUESTION: Or it still has to be corrected
6 to be --

7 MR. UFER: Both issues are raised in this
8 case. Counsel for the Board has indicated that we
9 have not raised the protected issue. It is our position
10 that in exception number one we specifically raised
11 the issue whether Brown's refusal to drive the work --
12 I believe the language that we utilized in that situation
13 was -- We made the exception whether the charging party,
14 James Brown was engaged in concerted activity protected
15 by Section 7 of the Act when he refused to drive the
16 truck.

17 So, it is our position that both the protected
18 and the concerted issues are raised in this case and
19 under either ground there is no basis for an unfair
20 labor practice.

21 QUESTION: You are defending the decision
22 below that this was not an exercise of a collective
23 right?

24 MR. UFER: That is correct.

25 QUESTION: But, you are defending that position.

1 MR. UFER: We are defending that position.
2 We are also defending the position that it is not pro-
3 tected in that rather than working and grieving he
4 walked off the job. That violates the no-strike cause
5 which is very broad in this contract. And, even if
6 Mr. Brown had been accompanied by five other employees,
7 had they simply walked off the job while the conduct
8 may have been concerted under Section 7, it would not
9 have been protected. That is our position.

10 QUESTION: Let me get back to the facts again.
11 Is it admitted that this very truck almost had an accident
12 which his truck the day before?

13 MR. UFER: It was two days before.

14 QUESTION: Because of its brakes?

15 MR. UFER: Justice Marshall, two days before
16 there was almost an accident at the landfill, but the
17 driver of the truck at that time continued to drive
18 the subject truck and when he took it back to the mechanics,
19 the mechanics told him they would fix it over the weekend
20 or first thing Monday morning. Mr. Brown came in after
21 having already made a run Monday morning. He then
22 never went to the truck to make an inspection as required
23 by company policy.

24 QUESTION: Is all of your answer yes to my
25 question?

1 MR. UFER: All of my answer --

2 QUESTION: The question is is that the same
3 truck that almost had an accident with him two days
4 before?

5 MR. UFER: It was the same truck.

6 QUESTION: Your answer is yes.

7 MR. UFER: That is correct.

8 QUESTION: May I ask you a question while
9 we have got you interrupted? Just on the issue of
10 concerted activity, putting aside all the protected
11 questions, and you made reference to the plain language
12 of the statute, you would agree, as I understand it,
13 that if he had been discharged for filing a grievance
14 without regard to its merits that that would be covered
15 by the Act and that would be a concerted activity?

16 MR. UFER: If that was the motivation for
17 his discharge, that is correct.

18 QUESTION: How is that -- Why is that any
19 more concerted than what was involved here just looking
20 at the requirement of joint action?

21 MR. UFER: I don't believe this Court has
22 spoken to that issue. A number of circuit courts that
23 have spoken to that issue have found the submittal
24 of a grievance, the formal submittal of a grievance
25 to be concerted and they may have gone on the ground

1 that policy considerations, that that furthers the
2 grievance arbitration procedure and dispute resolution
3 mechanism.

4 QUESTION: But, you are prepared to assume
5 for purposes of your argument that that individual
6 action is "concerted" within the meaning of the Act?

7 MR. UFER: A formal assertion of a contract
8 violation and the formal grievance, if the motivation --
9 and we would, under the analysis this Court set forth
10 in Bernhart and Sims, if the motivation is the submittal
11 of that grievance and not the underlying --

12 QUESTION: Now you are focusing on the employer's
13 motivation --

14 MR. UFER: That is correct.

15 QUESTION: -- in order to decide whether
16 the employee's action was concerted.

17 MR. UFER: That is correct. In order to
18 constitute an unfair labor practice, you need in the
19 first instance --

20 QUESTION: I understand that, but I am just
21 interested in the word "concerted" at this point.

22 MR. UFER: Fine. We are conceding that a
23 formal grievance submittal, that act in and of itself,
24 is concerted.

25 QUESTION: So once you make that concession --

1 I find it hard to accept your plain language argument.
2 That is the reason I want to be sure I understood you correctly.

3 MR. UFER: We think there is some kind of
4 contradiction in that regard. We acknowledge that
5 difficulty.

6 In the face of the circuit court decisions,
7 I think, again, they went under the policy considerations
8 to promote the grievance and to make sure there isn't
9 a chilling effect of the access to grievance and they
10 indulge -- I think possibly you might under the Mushroom
11 Transportation test, where you are preparing for or
12 inducing concerted activity, that that explains a grievance
13 situation or very possibly a grievance situation could
14 be explained under the assisting labor organizations,
15 the earlier language in Section 7 of the Act, and that
16 it does not have to go --

17 QUESTION: There was a grievance filed here,
18 wasn't there?

19 MR. UFER: There was not a grievance at the
20 time of the discharge. There was a grievance subsequent
21 in time. I believe it was filed the next morning.
22 It is very clear in this case --

23 QUESTION: So, again, why would his assertion
24 be any less concerted than an actual grievance?

25 MR. UFER: We believe that in that situation,

1 if the Court is going to find --

2 QUESTION: In these facts, when he was fired,
3 there was no grievance?

4 MR. UFER: That is correct.

5 QUESTION: But, he was asserting the very
6 right that they filed a grievance over.

7 MR. UFER: The record is clear that there
8 is no reference whatsoever to the collective bargaining
9 agreement by Mr. Brown. There is simply a confrontation
10 between Mr. Brown and his supervisor where his supervisor
11 is instructing him to drive the truck and Brown is
12 saying he does not want to drive the truck and that
13 the truck is unsafe. There is no reference to any
14 term or section of the collective bargaining agreement.
15 There is no mention of the word "grieve" or even the
16 term "collective bargaining agreement," nor does he
17 ask for his Union steward or for an Union official.
18 And, in that case we would distinguish this situation
19 from a formal grievance for those reasons.

20 QUESTION: When did he refuse to drive the
21 truck?

22 MR. UFER: On the morning --

23 QUESTION: When he refused in the evening,
24 why didn't that give rise to a grievance right then
25 and there even without waiting until the following

1 morning when he could contact the business agent or
2 the shop steward?

3 MR. UFER: I believe, in fact, he made contact
4 with his shop steward and came in that afternoon.

5 And, what we are saying, to come within the protection
6 of Section 7, an employee has got to afford the employer
7 some notice as to what it is that he is doing besides
8 simply stating --

9 QUESTION: Should he drive the truck in the
10 meantime?

11 MR. UFER: He should drive the truck in the
12 meantime. He has -- It is Respondent's position that
13 if he does not drive the truck -- If he makes the uni-
14 lateral, individual determination not to drive the
15 truck, then he has either got to come within the justified
16 language set forth in the collective bargaining agreement
17 as found by the Union and ultimately an arbitrator
18 to excuse his refusal or he must come within the standard
19 in Section 502 of the National Labor Relations Act
20 where Congress spoke specifically and established a
21 standard where an individual employee can refuse to
22 undertake a job assignment. That standard is clearly
23 a higher standard of abnormally dangerous condition
24 in an objective showing as this Court indicated in
25 the Gateway Coal decision.

1 QUESTION: The only way that I could be protected,
2 because I drive an automobile, from a truck with no
3 brakes is for a man to go on and drive it.

4 MR. UFER: I believe what he would have to
5 do is make a showing --

6 QUESTION: I think you said a minute ago
7 that his only way was he would have to drive the truck
8 and I am sure you didn't mean that.

9 MR. UFER: What I meant to say, Justice Marshall,
10 is that if he does not drive the truck, if he makes
11 that determination, then he does so at his peril and
12 he must be vindicated by the arbitrator. And, if the
13 arbitrator finds --

14 QUESTION: If he knows the truck has no brakes,
15 he has to drive it?

16 MR. UFER: He has to -- There has to be --

17 QUESTION: On the road with me?

18 (Laughter)

19 MR. UFER: He has to make --

20 QUESTION: If you want me to make that ruling,
21 I am not going to make it.

22 MR. UFER: Justice Marshall, what I would
23 want in this case would be consistent with company
24 policy that if he is going to refuse to drive the truck
25 at a minimum he inspect the truck to ascertain whether

1 or not it has been fixed.

2 In this case, it is company policy to inspect
3 the truck and it is clear from the record he never
4 went anywhere near the truck nor had driven the truck
5 for a year prior to his refusing to drive it. Another
6 driver drove that same truck without incident later
7 that morning.

8 So, in that setting, we are stating that
9 the dismissal was justified.

10 QUESTION: I take it the company is lucky.

11 QUESTION: What is the fact with respect
12 to what repairs had been made over the -- in that interval?

13 MR. UFER: The record is silent, Mr. Chief
14 Justice.

15 QUESTION: Then what should the Administrative
16 Law Judge do, treat that as a presumption that the
17 condition had remained unchanged from Friday night
18 until Monday morning?

19 MR. UFER: I think, consistent with the Union
20 determination that the grievance didn't have merit,
21 that the substantial evidence in this case would indicate
22 that where he does not inspect the truck, contrary
23 to company policy, and where the truck is that same
24 morning driven by another employee without incident,
25 I think in that situation that the logical inference

1 and reasonable inference is that the truck had been
2 repaired, but the record is silent as to that point.

3 QUESTION: Then the case comes down to whether
4 or not this was a contumacious refusal even to determine
5 the facts. Is that the position of the employer, this
6 employee was guilty of that kind of conduct?

7 MR. UFER: That is correct.

8 We believe, returning to the definition of
9 concerted, looking to the legislative history of the
10 National Labor Relations Act, did Congress indicate
11 anything that would indicate something other than a
12 plain meaning interpretation of concerted. We submit
13 there is nothing to that effect. On the contrary,
14 Congress spoke in two important regards that support
15 a plain-meaning interpretation in this case.

16 In proposed Section 8(a)(6) in the Taft-Hartley
17 amendment, Congress considered and specifically rejected
18 this section 8(a)(6) which would have made an employer's
19 collective bargaining agreement contract violation
20 an unfair labor practice. We submit that the Board's
21 Interboro Doctrine effectuates the very end that Congress
22 considered and rejected when it adopted Section 8(a)(6).

23 The Interboro Doctrine transforms alleged
24 collective bargaining agreement violations and in some
25 instances non-violation into unfair labor practices

1 at the option of the employee.

2 In the C & C Plywood case, before this Court
3 which involved the unilateral company implementation
4 of a premium pay plan during the terms of a collective
5 bargaining agreement, this Court reviewed the Section
6 8(a)(6) legislative history and specifically concluded
7 that Congress had not given the Board the broad generalized
8 jurisdiction to determine the rights of parties under
9 all collective bargaining agreements, that Congress
10 has specifically chosen to leave collective bargaining
11 agreement enforcement to the usual processes of law
12 under Section 301. We believe Interboro contravenes
13 this principle of C & C Plywood.

14 Congress spoke in another regard. They imple-
15 mented Section 502 of the Act and provided a specific
16 safety standard to allow immediate work stoppage.
17 We submit there is no justification for the Board to
18 use the Interboro Doctrine to construe a lesser standard
19 from within this very same Act.

20 In the Gateway Coal decision, this Court
21 interpreted Section 502 as not allowing work stoppages
22 under the slender thread of subjective judgment.

23 There was a need for objective evidence
24 of an abnormally dangerous condition as required in
25 Section 502, yet the Board, through the Interboro Doctrine

1 construes a subjective standard in many instances in
2 contravention of 502 and in contravention of the Gateway
3 Coal holding.

4 We respectfully submit to affirm the Interboro
5 Doctrine is to disregard this legislative history and
6 this Court's pronouncements in C & C Plywood and in
7 Gateway Coal and it is to allow the Board to expand
8 its jurisdiction contrary to unambiguous language in
9 Section 7 and Congress' clear intention.

10 Faced with a problem of the Act's plain meaning
11 and the legislative history surrounding Section 502
12 and proposed Section 8(a)(6) --

13 QUESTION: As I understand the Court of Appeals,
14 it said that even if Brown was exercising a right under
15 the contract, he wasn't exercising a right protected
16 by Section 7, because he was doing it just for his
17 own account.

18 MR. UFER: That is correct.

19 QUESTION: Only for himself.

20 MR. UFER: That is correct.

21 QUESTION: Now, do you defend that?

22 MR. UFER: We do. We believe --

23 QUESTION: Suppose you are wrong on that.
24 Suppose we disagreed with you on that narrow ground
25 which is the ground of Court of Appeals relied on.

1 Shouldn't we send it back?

2 MR. UFER: We believe in this case it is
3 established in the record that his action, if it were
4 found to be concerted, it is nevertheless not protected
5 in that it is a violation of the no-strike clause also.

6 QUESTION: That may be, but you are now defending
7 the decision on an alternate ground.

8 MR. UFER: That is correct.

9 QUESTION: Which you have a perfect right
10 to present, but we certainly don't have to rule on
11 it.

12 MR. UFER: That is correct.

13 QUESTION: I suppose that issue was raised
14 before the Court of Appeals.

15 MR. UFER: We believe it was and the Court
16 of Appeals, when it expressed its complete agreement
17 with the Kohls decision of the D.C. Circuit, we believe
18 that that incorporated the protection argument and
19 I think the Board has acknowledged that in their reply
20 brief. Both issues were considered and, in fact, addressed
21 by implication by this --

22 QUESTION: So, you could lose on the very
23 narrow ground that the Court of Appeals used and still
24 win the case in the long run on two or three other
25 grounds that you have already argued.

1 MR. UFER: That is correct. That is our
2 position.

3 Now, faced with the Act's plain meaning in
4 the legislative history, the Board turns to a different
5 argument and asserts that the Court should defer to
6 its interpretation. We would simply like to point
7 out in this regard that in the Weingarten decision
8 of this Court, the Court indicated that it should not
9 step aside and rubber stamp the Board's determinations
10 that run contrary to the language and the tenor of
11 the Act.

12 Similarly, in the Edward DeBartolo Corporation
13 decision earlier this spring, a decision interpreting
14 Section 8(b)(4), the publicity proviso and the distri-
15 bution requirements provided therein, this Court expressly
16 did not allow the NLRB to apply so generous a standard
17 as to strip the statutory restriction from the Act.

18 If Congress had intended that broad a scope,
19 they would not have placed the restriction in the Act
20 in the first instance.

21 We submit that the Board is doing precisely
22 this thing with the Interboro Doctrine. They are asking
23 the Court to step aside and rubber stamp their determina-
24 tion and that determination is utilizing a standard
25 so generous as to strip the concerted requirement from

1 Section 7.

2 We would also like to point out that the
3 policy underlying deference to the Board as was articu-
4 lated in Weingarten was to allow the Board to construe
5 the statute in light of changing patterns of industrial
6 life, yet the most significant changing pattern here
7 is the imergence of binding arbitration as a favored
8 dispute resolution procedure, to utilize self-government
9 in the work place through grievance arbitration.

10 The Interboro Doctrine flies in the face
11 of this fundamental emerging pattern of industrial
12 life and we submit for that reason it is not appropriate
13 to afford the Board any deference in its determination.

14 Policy considerations, we would respectfully
15 submit, also do not justify a departure from a plain-
16 meaning interpretation of concerted. We submit that
17 it is clear the Interboro Doctrine frustrates and does
18 not serve fundamental national labor policies.

19 Addressing specific labor policies, the need
20 for certainty is of critical importance in labor relations
21 to maintain and promote industrial stability, particular
22 in situations of employee discharges and potential
23 work stoppages.

24 Yet, the Interboro Doctrine kept all of the
25 parties, including the employees, adrift on a sea of total

1 uncertainty. It takes only a cursory review of the
2 Board's Interboro decisions over the past few years
3 to appreciate the magnitude of this uncertainty.

4 There are conflicting Board and arbitration
5 decisions. We believe this is highlighted by the American
6 Freight decision. In American Freight, the Board found
7 the employer committed an unfair labor practice by
8 enforcing his contract right as affirmed by the arbitrator.
9 The arbitrator in that case concluded there was no
10 contract violation, yet the Board stepped in and said,
11 well, we apply a lesser standard and they found an
12 unfair labor practice.

13 QUESTION: Do you cite that in your brief,
14 Mr. Ufer, American Freight?

15 MR. UFER: We do.

16 QUESTION: Was it NLRB versus American Freight?

17 MR. UFER: That is correct.

18 There are similarly conflicting and contradictory
19 Board decisions. We would direct the Court's attention
20 to the very recent Board decision in Comet Fast Freight.
21 When that case is analyzed against the Kohls decision
22 in the D.C. Circuit and in the instant case, almost
23 all of the critical facts are identical. It is a truck
24 safety issue. The employee asserts he does not want
25 to drive the truck. There is no discussion or warning

1 to any other employees, and, in fact, another employee
2 in each one of these cases drove the truck that very
3 same day. Yet the Board reached opposite legal con-
4 clusions. They found there was no concerted activity
5 in Comet Fast Freight.

6 This Comet Fast Freight decision would seem
7 to invite inquiry by this Court of the Board's counsel
8 whether the NLRB has recently changed its position
9 on Interboro, whether the Board has stepped back from
10 Interboro. We would submit either the Board has changed
11 its position or its application of the doctrine is
12 totally inconsistent.

13 Similarly, the Yellow Fast Freight Board
14 decision which is another recent Board decision that
15 is cited in the Board's reply brief is also hopelessly
16 contradictory with earlier precedent. In that case,
17 there was an individual employee's refusal to drive
18 the truck and it was only a momentary refusal, engaging
19 for some 15 to 20 minutes with his supervisor as to
20 whether or not his driving a truck would violate the
21 contract term relating to safety.

22 The Board concluded that that conduct con-
23 stituted insubordination and, therefore, not protected
24 against. That conduct is lesser conduct than in the
25 instant case where the employee walks off the job and

1 doesn't perform the work at all.

2 We would submit that another fundamental
3 uncertainty arises from the Interboro Doctrine in that
4 it denies all of the parties their agreed-upon, substantive,
5 contract term. It essentially makes mincemeat out
6 of the contract because the Board is stepping in and
7 applying, as in American Freight -- It specifically
8 indicates it is applying a lesser substantive safety
9 standard.

10 We further submit with respect to uncertainty
11 that there are inordinate delays that compound the
12 uncertainty in this whole area where the Board intervenes.

13 In collective bargaining agreements, there
14 is often specific time frames provided for the grievance
15 procedure and ultimately arbitration. These often
16 conclude within 30 to 60 or 90 days at the outside.

17 Using this case as an example, the Board
18 decision was not reached until over two years after
19 the incident occurred and with the appeals through
20 the court there is even greater delay.

21 Turning to other policy considerations which
22 we believe are of vital important, Interboro creates
23 an entirely duplicative procedural structure for
24 collective bargaining agreement dispute resolution
25 with all of the attendant time, uncertainty and expense

1 of duplication.

2 QUESTION: Well, it is an old story though
3 that the Board will or will not find something an unfair
4 labor practice even though it may or may not violate
5 the contract.

6 MR. UFER: That is correct.

7 QUESTION: Isn't that right?

8 MR. UFER: That is correct. I think --

9 QUESTION: And also, even if some arbitrator
10 has held that it is not a violation of the contract,
11 the Board isn't necessarily foreclosed.

12 MR. UFER: That is correct.

13 QUESTION: You acknowledge that?

14 MR. UFER: We acknowledge that. We believe
15 the qualitative distinction with respect to the Interboro
16 Doctrine is that it transforms all collective bargaining
17 agreement disputes into unfair labor practices.

18 QUESTION: How would you sort them out?

19 MR. UFER: I would return to an actual plain
20 meaning interpretation of concerted is our position,
21 and, if, in fact, there are two or more employees under-
22 taking an action or agreeing upon a course of action --

23 QUESTION: So, you would say the Board could
24 never second guess an arbitrator if all the employee
25 ever was doing was asserting his own right.

1 MR. UFER: The Board -- I think the correct
2 standard for the Board's intervention in that case
3 would be the Spielberg Doctrine of fairness and reason-
4 able.

5 QUESTION: Well, why -- He doesn't mention
6 another employee or anything else. He wants his job
7 back, he wants back pay. Why is that concerted?

8 MR. UFER: It is our position that would
9 not be concerted.

10 QUESTION: Even if the arbitrator -- Even
11 if it had gone to arbitration.

12 MR. UFER: I think the clarification in that
13 regard -- The first position is that the action would
14 not be concerted by the individual, and the second
15 position would be it would be appropriate for deferral
16 to the arbitrator. And, I think on either of those
17 two grounds the employer's conduct could be affirmed.

18 QUESTION: But then why did you concede at
19 the beginning that a grievance filed by a single employee
20 is concerted?

21 MR. UFER: We don't -- In light of the Circuit
22 Court decision on that point, we believe that there
23 is an argument to be made to that effect, but again --

24 QUESTION: That just flies in the face of
25 your plain meaning.

1 MR. UFER: That is correct and if I made
2 that concession, then very possibly I ought to retreat
3 from that, because I think a plain meaning interpretation
4 offers certainty into this situation and that it is --

5 QUESTION: You should retreat from your sug-
6 gestion that Spielberg is enough protection for your
7 provision is an individual grievance has gone to
8 arbitration.

9 MR. UFER: I believe that is a separate issue
10 and those standards, as they have more recently evolved
11 in Board decisions, I think there has been a distortion
12 and a perversion of the Spielberg Doctrine.

13 But, focusing on Spielberg for a moment,
14 what we would submit the Board can determine is that
15 if the discharge is for -- If the affected employee
16 is contending that discharge is because he is the Union
17 organizer or he is the Union steward and the employer
18 is saying that he is discharged for failure to do his
19 job duties or to obey an instruction, then there can
20 be a Board review to undertake that motivational analysis.
21 But, as to whether or not he is doing his job, which
22 is the issue in this case, we would submit that there
23 is no position for the Board to make that determination.

24 We respectfully submit that the concerted
25 standard expressly set forth in Section 7 should be

1 defined according to its plain meaning. We believe
2 this is consistent with the legislative history and
3 we also believe it is consistent with this Court's
4 precedence defining the scope of protected activities
5 under Section 7 in other circumstances and the basic
6 labor principle set forth in those precedents, the
7 labor principles of majoritarianism, of not allowing
8 an individual to control the entire process and to
9 control the collective bargaining agreement administra-
10 tion, the precedence of presumption of arbitrability.

11 QUESTION: Let me interrupt you for a minute.
12 Let me be sure I get your position on this. Supposing
13 your client fired a man for filing a grievance. There
14 is no contract that says he has a right to, just say
15 they set up a grievance procedure. He files a grievance.
16 He gets discharged for that. Unfair labor practice
17 or not? What is your position?

18 MR. UFER: The act of filing a grievance?

19 QUESTION: This man had not been fired because
20 he wouldn't drive the truck, he was fired two days
21 later for filing the grievance.

22 MR. UFER: For filing a grievance.

23 QUESTION: What is your position on it?

24 MR. UFER: We would contend that the act
25 of filing a grievance is actual concerted activity

1 between the employee --

2 QUESTION: You say that would be an unfair
3 labor practice?

4 MR. UFER: That would be --

5 QUESTION: Is that -- Now that is three times.

6 (Laughter)

7 QUESTION: You answered it that way the first
8 time and then you answered Justice O'Connor another
9 way and now you have returned to your first position.

10 If you are filing a grievance, you are --

11 MR. UFER: Again, I would say --

12 QUESTION: You would say that is concerted
13 activity.

14 MR. UFER: I believe the analysis should
15 be an actual concerted analysis and if it is found
16 that the conduct between the individual and his Union
17 steward in the filing of that grievance could constitute
18 actual concerted activity.

19 Thank you.

20 CHIEF JUSTICE BURGER: Mr. Come, do you have
21 anything more? You have two minutes.

22 ORAL ARGUMENT OF NORTON J. COME, ESQ.

23 ON BEHALF OF THE PETITIONER -- Rebuttal

24 MR. COME: Yes, I would just like to make
25 two points.

1 In the first place, I would like to make
2 clear that our position is not that every violation
3 of a collective bargaining agreement is an unfair labor
4 practice. It is that discipline taken against an employee
5 for asserting a contract right is an unfair labor practice.

6 Now, in this case --

7 QUESTION: Any contract right?

8 MR. COME: Yes.

9 QUESTION: Any contract right.

10 MR. COME: Here the right asserted is to
11 refuse to carry out the employer's order. The right
12 not to drive an unsafe truck doesn't mean anything
13 unless it applies when the employer assigns the employee
14 to drive the truck. So, you can't separate out the
15 refusal from the contract right.

16 The ALJ and the Board found that factually
17 the employee had this contract right and he reasonably
18 and in good faith --

19 QUESTION: It is your position here though
20 that any assertion by an employee, whether on his own
21 behalf literally or on somebody else, is concerted
22 activity.

23 MR. COME: That is correct. If it is made
24 in good faith and is reasonably grounded in the contract.

25 Now --

1 QUESTION: Well, if the General Counsel filed --
2 Finds reason to file a complaint, why there is -- It
3 is concerted activity I suppose.

4 MR. COME: But, nonetheless, the mere issuance
5 of a complaint does not --

6 QUESTION: Doesn't bind the Board.

7 MR. COME: That is correct because it must
8 be established by a preponderance of the evidence and --

9 QUESTION: Well, yes, but it is concerted
10 activity if it is in good faith --

11 MR. COME: And reasonably based.

12 Now, the second point --

13 CHIEF JUSTICE BURGER: Your time has expired,
14 Mr. Come.

15 Thank you, gentlemen, the case is submitted.

16 (Whereupon, at 2:47 p.m., the case in the
17 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-960 - NATIONAL LABOR RELATIONS BOARD, Petitioner v. CITY
DISPOSAL SYSTEMS, INC.

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BY

Pine Hunsell

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