Wilson Freight Company *and* Paul A. Smith. Case 1–CA–12355

February 10, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND MURPHY

On October 6, 1977, Administrative Law Judge Bruce C. Nasdor issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, to modify his remedy,[1] and to adopt his recommended Order, as modified.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Wilson Freight Company, Chelmsford, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(c):

"(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

[1] The Administrative Law Judge in citing *Florida Steel Corporation*, 231 NLRB 651 (1977), inadvertently specified interest to be paid at 7 percent; however, interest will be calculated according to the "adjusted prime rate" used by the U.S. Internal Revenue Service for interest on tax payments. See *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), for rationale on interest payments.

[2] The Administrative Law Judge, in finding an 8(a)(3) and (1) violation, failed to use the broad injunctive language required for such a finding. We shall, therefore, modify his recommended Order and notice accordingly.

APPENDIX

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

After a hearing in which all parties had an opportunity to present their evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice and to carry out its provisions.

WE WILL NOT discharge employees because they engaged in protected concerted or union activity.

WE WILL NOT discharge employees because they file charges with the National Labor Relations Board or participate in the processing of charges filed by other employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer Paul A. Smith immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges.

WE WILL make Paul A. Smith whole for any loss of pay he may have suffered as a result of the discrimination against him, with interest.

WILSON FREIGHT COMPANY

DECISION

STATEMENT OF THE CASE

BRUCE C. NASDOR, Administrative Law Judge: This proceeding under Section 10(b) of the National Labor Relations Act, as amended, was heard pursuant to due notice on April 28, 1977, at Boston, Massachusetts.

The charge in this proceeding was filed by Paul A. Smith, hereinafter referred to as Smith, on October 20, 1976, and the complaint in this matter issued on January 28, 1977. The issue to be resolved is whether the Respondent discharged Smith in violation of Section 8(a)(1) and (3) of the Act because he engaged in union and other protected concerted activities, or because he engaged in activities coming within the purview of Section 8(a)(4) of the Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged at its Chelmsford, Massachusetts, terminal in the transportation of freight and related products. Respondent, in the course and conduct of its business, at all times material herein, has caused large quantities of goods used by it in the operation of its freight transportation business to be purchased and transported in interstate commerce from and through various States of the United States other than the Commonwealth of Massachusetts. It annually receives revenue in excess of $50,000 directly from interstate business or from services to interstate shippers or carriers. It is admitted in the pleadings, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 25 (herein referred to as the Union), is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

Smith, the Charging Party herein, was employed by Respondent from May 1967 until September 3, 1976. From approximately 1973 until September 3, 1976, he worked as a tractor-trailer driver at Respondent's Chelmsford, Massachusetts, location. Smith held the position of shop steward during the last 4 years of his employment with Respondent.

On September 4, 1976, Smith received a copy of a warning letter from Respondent dated September 2, 1976, as set forth below:

> As Shop Steward, at the Wilson Freight Company, your actions are controlled by Article 41, of the New England Supplement and the National Master Freight Agreement.
>
> Your authority specified by contract is not to exceed the provisions of Article 41 and any authority delegated to you in writing by the Teamsters Local 25.
>
> In the past, letters written and signed by you and personal complaints as Shop Steward, at Wilson Freight Company, have been sent to many Government Agencies, including D.O.T., OSHA and NLRB. Furthermore, you have written to Governor Dukakis, of the Commonwealth of Massachusetts, and demeaned Mr. E. Grady, Director of Labor Industries.
>
> In none of the above instances did you refer these matters to the grievance machinery, nor were you authorized by Teamsters Local 25 to represent the Wilson Freight Company personnel in these matters.
>
> Recently, you called the National Labor Relations Board concerning the discharge of Colin Swain, although Swain's discharge had been filed with and was pending disposition before the Joint Area Committee. Swain was represented by Agent Lee, of Teamsters Local 25. Your action exceeds your authority as Shop Steward.
>
> The Company's position is that you are interfering with its business in excess of your authority as Shop Steward and this conduct amounts to gross harassment and will not be tolerated.
>
> This letter will serve as a warning that any further interference in the business of the Company or any conduct in excess of your authority as Shop Steward will result in your instant dismissal.

On September 7, 1976, Smith received, by certified mail, the signed original of the warning letter set forth above. This warning letter was signed by F. X. Rudolph, terminal manager.

On September 9, 1976, Smith received a letter of discharge dated September 3, 1976, as set forth below:

> This letter is to advise that your actions of exceeding your authority as Shop Steward is in violation of Article 41, whereby you caused an interruption in your employer's business, not authorized by Teamsters Local #25, is cause for instant dismissal.
>
> This action is taken in accordance with Article 47 of the National Master Freight Agreement and the New England Supplement Freight Agreement.
>
> All monies due to you are enclosed.

Smith filed a grievance which was heard by an arbitration panel to determine if Respondent had violated Article 47 of the Contract by discharging Smith. On October 21, 1976, the panel rendered a decision upholding Smith's discharge. The following is a summary of the letters written by Smith and other relevant activities engaged in by him over the course of 2 years preceding his discharge. The bulk of this evidence has been gleaned from documents and exhibits introduced by the General Counsel and from Smith's testimony. Where there is a conflict or where Respondent's witnesses have refuted any aspects of this evidence, it will be pointed out.

On May 23, 1975, Smith filed an unfair labor practice charge with the Board's Boston Regional Office alleging that he had been discharged by Respondent because of protected and concerted union activity. He also filed a grievance which went to an arbitration panel. The panel rendered a decision wherein it recommended that Smith be reinstated with backpay, and as a result the unfair labor practice charge was ultimately withdrawn.

On May 13, 1975, Smith filed a formal complaint with the U.S. Department of Labor Occupational Safety and Health Administration, hereinafter referred to as OSHA, concerning, *inter alia,* Respondent's failure to provide personal protective clothing for the handling of acids and chemicals. As a result of this formal complaint, Respondent received a citation from OSHA.[1] Smith testified that he had several discussions with Pat Lee, the union business agent, and company representatives regarding the issue of

[1] Rudolph testified that a small fine may also have been levied against Respondent.

protective clothing, but Lee took no action, and Respondent did not furnish same. He further testified that the reason he wrote to OSHA was that he believed protective clothing was required by contract and by law.

On September 17, 1975, Smith wrote a letter to Dave Gantz, president of Respondent, regarding the issue of protective clothing. A carbon copy of this letter was sent to Pat Lee of the Union.

On August 25, 1975, Smith wrote a letter to Dave Gantz complaining about the condition of Respondent's vehicles and the failure of Respondent to file reports as required by Department of Transportation (hereinafter referred to as DOT) regulations. Smith also requested tire chains for the vehicles at Respondent's terminal, noting that, although it was August and obviously there would be no snow at this time of the year, he was making the request early so that the Company might have time to purchase the chains. A copy of this letter was sent to the Union.

As a result of Smith's efforts, Respondent did provide tire chains for its vehicles during the winter months.

On November 13, 1975, Smith called on the Office of Motor Carriers Safety in Boston, Massachusetts, concerning the three issues he had raised in his letter to Gantz, i.e., unauthorized passengers, vehicle condition reports, and tire chains. In response he received a letter from DOT, Bureau of Motor Carriers Safety, dated December 29, 1975, wherein it stated that "the matter has been thoroughly investigated and it is believed that the action taken will result in prompt correction."

On January 30, 1976, Smith again wrote to the DOT concerning the same three issues. He received a response dated February 12, 1976, stating that it was forwarding his correspondence to the Regional Office in Homewood, Illinois, requesting that it conduct an investigation for possible violations of the Federal Motor Carriers Safety regulations.

On April 2, 1976, Smith wrote a letter to Donald Trull, Regional Administrator for the Bureau of Motor Vehicle Safety. This letter was in response to a letter Trull had sent to Congressman Joseph D. Early concerning Smith's complaints to the DOT. Trull's letter suggests that Respondent may be exempt from certain DOT regulations due to commercial zone exemptions. Smith's letter to Trull contains a postscript, "I have given copies of your letter to the other city drivers at our terminal. It should prove very interesting the next time they are stopped for a DOT safety check and shown your letter of exemption."

Smith received a letter dated June 8, 1976, from A. R. McAndrew, chief of compliance division DOT Bureau of Motor Carrier Safety. This letter stated that there had been an error in the interpretation of the DOT rules and regulations by Trull, and that an investigator would determine if Respondent had been misinterpreting certain DOT rules and regulations.

Rudolph testified that he was contacted by DOT several times in July and August 1976, concerning the tire chains. Rudolph stated that one of the reasons for the warning letter to Smith was that hearing about tire chains in July and August, "that blew my mind."

At the hearing, counsel for the General Counsel moved to amend the complaint with respect to paragraph 10(b) as follows: That he filed a charge in Case 1–CA–10745 with the National Labor Relations Board or contacted the National Labor Relations Board concerning the investigation of the charge filed by another employee in Case 1–CA–12018. Hearing no objection from Respondent, the motion was granted. The evidence in this regard reveals that a unit employee, Colon Swain, filed an unfair labor practice charge with the Regional Office on July 16, 1976. Apparently, the Board found no merit to Swain's charge and, as a result, Swain withdrew the charge on August 9, 1976. Sometime thereafter, Smith called the Regional Office identifying himself as Paul Smith, shop steward for Respondent, in an effort to find out why the case had no merit. This incident, according to Rudolph's testimony on direct examination, was another reason which prompted Rudolph to write the warning letter to Smith. In Rudolph's words, "the Colon Swain incident was something that just aggravated the hell out of me."

It is uncontroverted that Smith discussed the various issues raised in his letters to the DOT with Pat Lee, other employees, and Rudolph. According to Smith's testimony, Pat Lee never took care of the problems and, when Smith made followup calls to Lee, they were rarely, if ever, returned. Smith testified that he took the various measures, as set forth above, because of the derelictions on the part of Lee. Furthermore, he testified that there was a general feeling of dissatisfaction among the employees and Smith had the employees sign a petition to remove Lee as business agent. He filed the petition with William McCarthy, president of the Local, but apparently no action was taken. Smith, himself, campaigned for the position of business agent but was unsuccessful.

As early as October 1974, Smith wrote letters to Governor Dukakis and Sargent concerning the lack of heat for dockmen at the Chelmsford facility. Record testimony revealed that Smith brought this complaint to the attention of Respondent and discussed the problem with fellow employees.

Voiding Bids

Testimony by Smith and Rudolph reflect that there had been a continuing dispute for at least 5 months with respect to bidding[2] practices. Respondent was seeking to eliminate bidding of under 25 miles and posting the starting times for road drivers. According to testimony by Respondent's witnesses, the bidding practice was a factor contributing to the loss of money at this terminal.

On several occasions, Rudolph met with Lee and Smith to discuss issues regarding the bidding procedure. The Union took the position that the manner in which Rudolph was posting the bids was in violation of the contract and maintenance of standards.

On September 1, 1976, Rudolph posted a bid sheet outside the dispatcher's office. Smith saw that the bid sheet was posted in the manner unacceptable to him and to the Union, so he proceeded to discuss the situation with the

[2] Bids are job assignments that are posted and bid by the driver for starting times and jobs, according to seniority. Based on the uncontradicted record evidence, bid sheets are posted several times a year.

other drivers. He asked them what they wanted to do and they responded that they did not want to bid. According to Smith's testimony, he, Rudolph, and quite a few of the drivers had a heated argument about whether the sheet, as posted, should be bid. The employees did not want to bid and thus Smith wrote "void" on the bid sheet. Smith took this action when Rudolph stepped inside the dispatch office. Prior thereto, at approximately 10 o'clock that morning, Pat Lee of the Union attempted to meet with Rudolph to discuss the bidding procedure. Rudolph was busy dispatching and Lee stated that he would return at 5 p.m. Lee never returned to the Company at 5 p.m.

On September 3, at approximately 11:30 a.m., Rudolph inquired of Smith as to whether he had voided the bid and Smith responded affirmatively. Rudolph asked Smith whether or not he had authority to void the bid and Smith responded that he had authority from Lee and McCarthy, president of the Local. Thereafter, a three-way telephone conversation ensued between Lee, Rudolph, and Smith. Lee told Smith to bid the jobs and they would take the case to arbitration. Smith responded that there was no way the men could bid the jobs at that time because there was a notice posted with the bid sheet that the bids had to be bid by 12 noon. At that time it was 11:45 a.m. Smith told Lee that the city men were all out on the street and the nightmen had gone home, so there was no way that these employees could be contacted in 15 minutes to bid. Smith also stated that in the past the bids were posted until 5 p.m. Rudolph stated that "if the bid sheet isn't signed by 12 noon it was coming down." Lee responded again that they would take it to arbitration.

That evening on September 3, Rudolph told Smith he was being discharged under articles 41 and 47 of the contract.[3] Rudolph testified that, at the arbitration hearing, Lee denied that he or McCarthy had ever given Smith authority to void bids.

Smith testified that he previously had voided approximately six bid sheets that had been posted by Respondent. The record is quite clear that the issue of the bid sheets had been an ongoing dispute between the Union and Respondent for many months. Smith testified that the first time he voided a bid was in February 1976, and the last time was the September 1, 1976, incident. Rudolph admits having had conversations with Smith in the past about the bidding procedure, but denies being aware of who the individual was who had voided the bids in the past. According to Smith, in February 1976, when he voided the bid he was asked by Rudolph who was responsible and Smith told him that he, Smith, was responsible. Smith testified further that he could not reach Lee to discuss the bidding procedure in February, and he took it upon himself to write void on the bid. Subsequently, the company representatives and Lee met and came to an agreement that the bids would be put up with the starting time on them. According to Smith Respondent did in fact post the bids as agreed upon but apparently sometime thereafter reverted to posting the bids without starting times. Rudolph testified that he made no investigation of a bid that had been voided on August 2, 1976.

[3] Approximately 1 week later, when Lee and Smith met with Rudolph, Rudolph told Smith that he was terminated for marking void on the bid sheet.

Rudolph admitted that Respondent did not lose any business as a result of the voiding of the bids. Moreover, the record is devoid of any evidence that drivers were late in making their deliveries or failed to make any deliveries.

Paul Tedesco testified on behalf of Respondent that he was present at a meeting on September 7, 1976, in Mr. Rudolph's office at which Lee and Smith were present. According to his hearsay testimony, in response to a question from Rudolph, Lee replied that he did not give authority to Smith to void the bid.

Smith testified that in May or June 1976, Rudolph asked him whether he would void the bid sheet if Rudolph posted it that day. Smith asked Rudolph how he was going to post it, to which Rudolph responded the way he had in the past; i.e., no starting times for the roadmen, and no jobs for the city men except for runs over 25 miles. Smith stated that if Rudolph was going to post them that way it was a departure from past practice and he definitely would void the bid sheet. Rudolph responded, "Well, there's no sense then in me even posting them." Smith testified that on each occasion he discussed voiding of these bids with Lee and with fellow employees.

Analysis and Conclusions

The record clearly demonstrates that Smith was engaged in union and protected concerted activity prior to his discharge on September 3, 1976. It is a violation of Section 8(a)(1) of the Act to discharge an employee who complains about safety matters or other matters encompassed in the collective-bargaining agreement, so long as the employee is acting not only in his own interest, but is also attempting to enforce such contract provisions in the interest of other employees in the unit. The record is replete with evidence that Smith was acting on behalf of other employees and discussed with coworkers most, if not all, of the complaints, including the bidding procedure. In *Roadway Express, Inc.*, 217 NLRB 278 (1975), the Board held that the respondent's discharge of an employee for asserting his Section 7 rights, by insisting on performance of a contract, was in violation of Section 8(a)(1) of the Act. The Board found that the employee was insisting on his contract rights when he refused to drive a tractor. Although the employee acted alone in refusing to drive the tractor, and he did not at the time of his refusal specifically refer to the contract as granting him this right, the Board found that the nature of his complaint has significance and relevance under the contract in the interest to all of the respondent's employees, whose employment is governed under the contract. The instant case leaves no room for doubt, in that the record contains evidence which is very specific in naming employees that Smith had discussions with.

Respondent argues that Smith's complaints were personal attacks on Rudolph, calculated to bring him into disrepute, and demonstrations of disloyalty to his employer. Furthermore, Respondent contends Smith was engaged in a personal effort to attain the position of business agent for the Local.

In support of these contentions, Respondent cites *N.L.R.B.* v. *Red Top, Inc.*, 455 F.2d 721 (C.A. 8, 1972), and a Supreme Court case, *N.L.R.B.* v. *Local Union No. 1229, International Brotherhood of Electrical Workers, A.F.L. [Jefferson Standard Broadcasting Company]*, 346 U.S. 464 (1953).

In *Red Top Inc.*, the discharge of employees was found to be for cause for the reason that the employees did not press grievances against their manager in good faith, but instead were engaged in a conspiracy to undermine him. Furthermore, some of the employees lost their protection under the Act as a result of their having threatened bodily harm and physical violence to the local manager.

In *Jefferson Standard Broadcasting*, the Supreme Court found that the discharge of technicians was not violative of the Act because the technicians had sponsored and distributed handbills making disparaging attacks on the quality of their employer's television broadcasts. Respondent cites these cases in defense of the warning letter which was directed to Smith. It still maintains that the sole cause of Smith's discharge was his voiding of the bids. Smith's activities in regard to sending the letters to the various government agencies, governors, and his pursuance of the Colon Swain charge, fall far short of the acts engaged in by the employees in the above cases. Perhaps Smith is a litigious individual, but I do not agree with Respondent that he engaged in said activities maliciously, or for the purpose of undermining Respondent or its agent Rudolph. Nor in my opinion did Smith engage in these activities for personal aggrandizement or to enhance his own position.

The warning letter which I view as evidence of antiunion animus was sent to Smith on the heels of the phone calls received by Rudolph from the DOT regarding the snow chains.[4]

The record testimony of Smith, which I credit in all respects, reveals that the various attempts to press the grievances with Business Agent Lee were futile. Accordingly, in my opinion, Smith was not exceeding his authority as shop steward in attempting to discharge his responsibility by representing the unit employees.

Throughout his testimony, Rudolph was vague and inconsistent. Furthermore, on cross-examination, in several instances I believe Rudolph was feigning ignorance and did understand the questions propounded to him. On several occasions throughout the hearing, Rudolph was prompted, and supplied answers to questions he was asked while on the witness stand, by Respondent's other witnesses and representatives who were present in the hearing room. After being admonished this conduct ceased.

Rudolph maintained throughout the hearing that the sole reason for Smith's discharge was voiding of the bids. Yet he was unable to explain why, if the voiding of the bids was so important, he failed to investigate any of the bids voided in the past, at least two of the bids including those that were voided in February and August 1976. Apparently he did not feel it was important enough to find out who voided those bids, yet he testified he did consider this a serious infraction, serious enough to terminate Smith. With the history of this dispute and its ongoing discussions between Rudolph and Smith, there leaves no doubt in my mind that Rudolph knew throughout and all along who was voiding the bids. Smith, whom I credit over Rudolph, testified that Rudolph questioned him after a bid was voided the first time. Smith admitted his responsibility for voiding the bid. I therefore conclude that the Respondent discharged Smith in violation of Section 8(a)(1) and (3) of the Act.

I also credit Smith's version that he apprised Rudolph he had been given authority to void the bids. Whether the authority was in written or oral form is immaterial.

There is sufficient evidence in the record in my view for a finding that one basis for Smith's discharge was the filing of the unfair labor practice charge on his own behalf. The warning letter to Smith makes reference to the many complaints sent to government agencies, including the National Labor Relations Board. The only letter or complaint sent to the NLRB by Smith prior to the warning letter is the charge filed by him on May 23, 1975. Therefore, this charge is the only thing Respondent could have been referring to in the warning letter. Furthermore, the warning letter to Smith refers to the Colon Swain incident. In my judgment, Section 8(a)(4) is broad enough to afford Smith the protection sanctioned by that Section of the Act.[5] These warnings expose Rudolph's motivation and state of mind and furnish the bases for two of the reasons for the discharge. Accordingly, I find that Respondent violated Section 8(a)(4) of the Act.

Respondent argues that the arbitration award is binding and precludes the finding of a violation of the Act. I disagree. There is evidence in the record that the arbitration panel did not consider the unfair labor practice issues in making its decision, i.e., they did not entertain evidence on the subjects of Smith's letters to the various agencies. Apparently Respondent acknowledges this fact, but argues that the panel's refusal to hear this evidence was an expression by the panel that they did not consider that the discharge was based upon, or motivated by, any factors other than Smith's voiding the bids. In so arguing, Respondent is attempting to read the minds of the arbitration panel. Although the forum was available to Smith, he was not allowed to present all of the evidence nor fully litigate the issues. In this regard, see *Electronic Reproduction Service Corporation, et al.*, 213 NLRB 758 (1974).

Moreover, the Board stated in *Filmation Associates, Inc.*, 227 NLRB 1721 (1977), "Accordingly as we conclude that issues involving Section 8(a)(4) of the Act are solely within the Board's province to decide we will not apply the *Spielberg*[6] doctrine to such issues."

Therefore, I find that deferral to the panel's decision would be inappropriate.

Respondent in its answer raised, as an affirmative defense, that it was being denied due process of law by

[4] Rudolph testified that he received the last phone call from Mr. Pratt of the Department of Transportation sometime after August 16, 1976. Smith's phone call to the NLRB, although the record is not clear as to the exact date, apparently occurred the end of July or the beginning of August 1976. Rudolph on the witness stand was quite graphic in his displeasure with Smith over these two incidents. In my view, these incidents and the other complaints referred to in the warning letter to Smith are the reasons Respondent terminated him. Voiding of the bids was merely the reason given, the pretext, to cover up the real reasons for the discharge.

[5] Cf. *First National Bank & Trust Co.*, 209 NLRB 95 (1974); *Fuqua Homes (Ohio), Inc.*, 211 NLRB 399 (1974).

[6] *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955).

reason of being faced with complaints both by the National Labor Relations Board and OSHA, emanating from the same facts.

It also raised as an affirmative defense that the activities in which Smith is alleged to have engaged in occurred more than 6 months prior to the filing of the unfair labor practice charge, therefore the matter is barred by Section 10(b) of the Act.

There is no evidence in the record or before me that Smith filed a charge both with the National Labor Relations Board and OSHA based upon the same set of facts. Additionally, on June 13, 1977, I issued an order granting the motion to reopen the record for the purpose of receiving a document into evidence. This document reflects that the complaint in *Paul A. Smith* v. *Wilson Freight Company,* Case No. 1–D–0120–77–2, was withdrawn, and that the withdrawal was approved by the U.S. Department of Labor (OSHA). Thus, Respondent's defense in that regard is without merit.

Section 10(b) of the Act is unambiguous in clearly stating that it is the unfair labor practice, not the employees' concerted or union activity, which must be within the 10(b) period. The unfair labor practice in the present case occurred with Smith's discharge on September 3, 1976. Smith filed the unfair labor practice charged based upon this discharge on October 20, 1976. Therefore, Smith is well within the 10(b) period and I reject Respondent's affirmative defense in this regard.

I therefore find that Smith's discharge constituted a violation of Section 8(a)(1), (3), and (4) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By contacting various government agencies, and officials of various government agencies, and by complaining about working conditions at the Chelmsford terminal, Paul A. Smith engaged in union and concerted activities.
4. By filing a charge with the National Labor Relations Board on his own behalf and by participating in the processing of the charge filed by Colon Swain, Paul A. Smith engaged in conduct protected under Section 8(a)(4) of the Act.
5. By discharging Paul A. Smith, because of his complaints concerning working conditions and his processing of charges with the National Labor Relations Board, Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed to them by Section 7 of the Act thereby engaging in unfair labor practices within the meaning of Section 8(a)(1), (3), and (4) of the Act.
6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent illegally discriminated against Paul A. Smith in violation of Section 8(a)(1), (3), and (4) of the Act, I shall recommend that Respondent be ordered to offer him immediate and full reinstatement to his former position or, if such position no longer exists, to one which is substantially equivalent thereto, without prejudice to any seniority or other rights and privileges and to make him whole for any loss of pay suffered as a result of his unlawful discharge, with backpay computed as prescribed in *F. W. Woolworth Company,* 90 NLRB 289 (1950). Payment of 7-percent interest per annum shall be computed in the manner prescribed by the Board in *Florida Steel Corporation,* 231 NLRB 651 (1977).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[7]

The Respondent, Wilson Freight Company, Chelmsford, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees because they engage in union and concerted activity.

(b) Discharging employees because they file charges with the National Labor Relations Board and/or participate in the processing of charges filed by other employees.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them in Section 7 of the Act.

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

(a) Offer to Paul A. Smith immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

(b) Make Paul A. Smith whole for any loss of pay he may have suffered as a result of his unlawful discharge in the manner set forth in the Remedy section of this Decision.

(c) Post at its Chelmsford, Massachusetts, terminal copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by an authorized representative of Respondent, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Respondent shall take reasonable steps to insure that said notices are not altered, defaced, or covered by any other material.

(d) Preserve and, upon request, make available to the Board or its agents, for examining and copying, all payroll records and reports and all other records necessary to

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ascertain and compute the amount, if any, of backpay due under the terms of this recommended Order.

(e) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.