ACF Industries, Incorporated *and* Samuel F. Dreisbach. Case 4–CA–18015

January 14, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On June 30, 1992, Administrative Law Judge Frank H. Itkin issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

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,[1] and conclusions,[2] and to adopt the recommended Order, as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, ACF Industries, Inc., Milton, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order except that the attached notice is substituted fn. that of the adminidrative law judge.

[1] The Respondent has 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Where, as here, the judge has evaluated the employer's explanation for its actions and found that the reasons it has advanced either did not exist or were not relied on, we find that the judge's findings satisfy the analytical objectives of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). See *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

[2] We modify the judge's recommended remedy to provide that any backpay necessary to make the Charging Party whole during his periods of unlawful reassignment shall be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971).

[3] We modify the judge's recommended Order to correct the name of the Charging Party to Samuel F. Dreisbach and include a revised notice as an Appendix to reflect that modification.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT retaliate against our employees because they have engaged in Union or other protected concerted activities by eliminating job classification 134-26; by reclassifying job classification 134-26 to 134-27; and by eliminating job classification 134-27 and laying off employee Samuel F. Dreisbach.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them in Section 7 of the National Labor Relations Act.

WE WILL reinstate the 134-26 job classification; offer employee Dreisbach immediate and full reinstatement to this job without prejudice to his seniority or other rights and privileges; and make him whole for any loss of earnings he may have suffered by reason of our unlawful conduct, with interest.

WE WILL expunge from our files any reference to the laying off of Dreisbach as found unlawful by the Board, and notify him in writing that this has been done and that evidence of this unlawful layoff will not be used as a basis for future personnel action against him.

ACF INDUSTRIES, INCORPORATED

Lea F. Alvo, Esq., for the General Counsel.
Charles J. McKelvey, Esq., for the Respondent.

DECISION

FRANK H. ITKIN, Administrative Law Judge. An unfair labor practice charge was filed in this case on April 11, 1989; an amended charge was filed December 10, 1991; and a complaint issued on December 17, 1991. General Counsel alleges in his complaint that Respondent and United Steelworkers of America, Local 1928 were parties to a collective bargaining agreement covering the Employer's production and maintenance employees; that about March 10, 1989 the Employer reclassified the job classification of ''134-26 Operator Truckdriver–Trackmobile'' to ''134-27 Truck Operator–Pick Up''; that about March 21, 1989 the Employer eliminated the ''134-27'' classification and laid off unit employee Charles F. Dreisbach from that position; and that the Employer engaged in this conduct because Dreisbach had filed and pursued a grievance under the collective-bargaining agreement, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.

Respondent Employer denies in its answer violating the Act as alleged. Respondent Employer also asserts that all issues raised in the amended charge filed on December 10,

1991, are time barred by Section 10(b) of the Act; and, further, that an arbitrator's decision issued on June 3, 1991, bars this proceeding under principles of res adjudicata, collateral estoppel and the ''Board's *Collyer* doctrine.''

A hearing was held on the issues raised in Lancaster, Pennsylvania, on April 8, 1992. On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

Respondent Employer manufactures and leases railroad freight cars at its facility in Milton, Pennsylvania. Its production and maintenance employees have been represented by the Union for the past 50 years. The collective-bargaining agreement between the Employer and the Union during the time period pertinent to this case was effective from July 3, 1985, through July 2, 1991. The agreement provided for a three-step grievance procedure culminating in ''final and binding'' arbitration. (See Jt. Exh. 4, arts. 7 and 8.) The Employer and the Union executed a later agreement effective July 3, 1991, through July 2, 1994. (See R. Exh. 2.) It is undisputed that Respondent Employer is an employer engaged in commerce and the Union is a labor organization as alleged.

The facts in this case are essentially undisputed.[1] The Employer created job classification 134-26 in May 1988. This job consisted of operating a trackmobile and pickup truck. The trackmobile duties consumed about 1 hour's work on an 8-hour shift. The pickup truckdriving duties were previously performed by nonunit salaried personnel. Job 134-26 was created for unit employee Donald Pursell who had sustained a severe injury at work resulting in the loss of a portion of one heel and had been on workman's compensation leave for a number of months. As the Employer's former manager of labor relations, Edward Rosko explained:

> This was created to find a job for Pursell to . . . be employed with his physical limitations . . . .

Rosko noted that the Employer was also trying to avoid a potential permanent workman's compensation disability award in excess of $350,000.

The 134-26 job was then put up for ''bid'' pursuant to the collective-bargaining agreement. Pursell ''bid'' on the job and, as the most senior employee ''bidding,'' was awarded the job. Rosko testified:

> Q. Mr. Rosko, is it not a fact that the Company talked to Mr. Pursell about coming back to work after his injury as a salaried employee and he refused?
>
> A. That was discussed, yes.
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> Q. . . . When you set up these new job classifications . . . in order to accommodate Mr. Pursell, did you take into consideration the ramifications of the contractual agreement . . . as far as the [bidding or] bumping situation?
>
> A. Yes.
>
> Q. Had you a contingency plan if a senior employee to Mr. Pursell would have bid [or bumped] on that job?
>
> A. No, it was a crap shoot.

Unit employee Samuel F. Dreisbach was laid off by the Employer on January 12, 1989, because he ''was unable to perform'' his pipefitter job duties as a result of a nonwork related ''physical condition.''[2] Dreisbach, who had greater seniority than Pursell, decided on January 16 to ''bump'' into the 134-26 job pursuant to the collective-bargaining agreement. As Union Representative Robert English testified, Dreisbach ''had a contractual right to do it'' and the Employer ''reluctantly'' ''accepted Dreisbach's bump'' into the 134-26 job. However, shortly thereafter, on January 19, the Employer laid off Dreisbach from the 134-26 job. Rosko then apprised Dreisbach that ''based upon [his] physician's certification of [his] physical abilities and/or restrictions'' the 134-26 ''job requires frequent lifting . . . in excess of [his] 50 pound lifting restriction.''

Later, on January 25, 1989, Dreisbach's doctors ''re-evaluated'' Dreisbach's condition. One doctor concluded:

> [He] should refrain from activities of a pipefitter and it sounds like a job of truck driver/trackmobile operator is an ideal one for him even though it requires occasional heavy lifting.

The other doctor concluded:

> I do not want [him] pushing or pulling pipe wrenches or climbing. There is no weight restriction as far as lifting.

Dreisbach was certified as ''able to return to work as truckdriver/trackmobile operator.''

Dreisbach returned to work and again ''bumped'' into the 134-26 job pursuant to the collective-bargaining agreement. Dreisbach, however, was instead assigned the ''receiving dock attendant's job'' which was classified as 134-24. Dreisbach then worked as a ''checker . . . at the receiving dock.'' Although job 134-24 paid less wages than 134-26, Dreisbach was given the rate he would have earned in the 134-26 job. In the meantime, Pursell continued to perform the 134-26 job.

Dreisbach complained to Union Representative English about not being permitted to perform the 134-26 job. The Union and the Employer were unable to resolve this complaint and on February 21, 1989, the Union and Dreisbach filed two grievances pertaining to this assignment and the fact that Pursell had earned overtime in job 134-26 which Dreisbach would have otherwise received. These grievances were apparently ''settled.'' As Union Representative English explained, the Employer ''eventually put the 134-24 job up for bid and awarded it to'' another unit employee; and Dreisbach ''received two checks'' for lost overtime from the

[1] The record principally consists of the formal pleading file and joint exhibits which include the transcript of and documents adduced in an earlier arbitration proceeding. Counsel for General Counsel called no additional witnesses and counsel for Respondent supplemented this record with the testimony of two witnesses.

[2] As Dreisbach's doctor wrote on January 5, 1989:

> Because of the patient's condition with his neck, he will no longer be able to do a lot of lifting and pulling. He will be able to be employed but I think he is at risk for developing a rupture of a disc in his neck. . . . [He] is having difficulty with his arms getting numb. He is having symptoms of dizziness when he lifts or works. . . . [His] work will have to restricted and limited.

134-26 job. In addition, on February 24 Dreisbach ''was transferred back to the maintenance department on the job that he had been laid off from for physical reasons,'' ''the pipefitter craft job,'' ''on a temporary assignment.'' Management explained to the Union that ''we don't want [Dreisbach] to do any work . . . just to help us lay out a job, the piping of a job . . . .''

Thereafter, on March 2, 1989, the Employer notified Dreisbach that he would be transferred back to the 134-26 job effective March 6. And, on March 6 Dreisbach returned to the 134-26 job where he was permitted to operate the trackmobile. Pursell, however, continued to perform the truckdriving duties of that job. Then, on March 10, as Union Representative English explained, the Employer reclassified the 134-26 job into 134-27. The Employer thus eliminated the trackmobile duties from the job and added the duties of changing tires, work previously done by the maintenance department. The trackmobile duties were assigned to production workers. Both Dreisbach and Pursell were assigned to this new job classification. However, on the same day, March 10, Dreisbach was again laid off because he was ''unable to perform'' the new job duties of 134-27 as a result of his ''medical restrictions.''

Dreisbach, upon the advice of Union Representative English, again went back to his doctor who now certified that

> Samuel Dreisbach is physically capable of performing the job of a truckdriver, even though it requires occasional heavy lifting, pushing, pulling and changing tires.

The Employer thereupon put Dreisbach back on the 134-27 job although he was not assigned any pickup truckdriving duties which were still being performed by Pursell.

Union Representative English testified:

> Q. [A]fter Mr. Dreisbach bumped into that 134-27 position, after being laid off for physical limitations, did you have occasion to talk to Mr. John Bower, the plant manager, to have a discussion on this situation on or about March 17, 1989?
>
> A. Yes I did. By this time, after going through all of this, I was getting highly agitated . . . and I went in to talk to Mr. John Bower . . . about it. . . . I told him I felt that . . . Mr. Dreisbach had a contractual right to the job, to bump it, and he should be placed on the job. Mr. Bower . . . conceded that . . . Sam did in fact have a contractual right to it, but he wanted Mr. Pursell to be on the job. . . . He asked me to talk to Mr. Dreisbach and see if he would back off wanting the job . . . .
>
> Q. [D]id you talk to Mr. Dreisbach about this situation?
>
> A. I did. I went right up and talked to Mr. Dreisbach . . . . He told me in so many words that he felt that he was right and he wanted the job. He wanted to be placed on the job and do the duties of the truckdriver . . . .
>
> Q. And did you go back and relate your conversation with Mr. Dreisbach to the plant manager, Mr. Bower?
>
> A. I did. I went back and told Mr. Bower that Sam Dreisbach wanted the job . . . he wasn't going to back off . . . . Mr. Bower told me that if that was the case the job was history.

Dreisbach and Pursell were notified that they would be laid off effective March 21, 1989. And, on March 21 the Employer eliminated the 134-27 job.[3] On March 23 Dreisbach filed two grievances pertaining to this layoff and the fact that the work was being performed by salaried nonunit and unit employees. On April 10 Pursell was recalled to another job as a material expeditor. On April 26 Dreisbach filed a third grievance complaining that a nonbargaining unit employee was performing the claimed work. On May 1 Dreisbach was recalled as a crane operator pendant control and still holds that position. On May 5 the trackmobile duties were added to the job which Pursell still holds.

On June 3, 1991, Arbitrator Theodore High issued his decision involving Dreisbach's three outstanding grievances. The issues before the arbitrator, as stated in his decision, were whether the Company had violated the collective bargaining agreement by the elimination of the 134-27 pickup truck job and by assigning the duties of the eliminated job to nonbargaining unit personnel. The Arbitrator, although noting that ''it appears that the Company's action in laying off [Dreisbach] and abolishing the job was the direct result of [Dreisbach] bumping Pursell,'' concluded that ''the Company's actions . . . complained of created no violation of the collective bargaining agreement'' and he therefore denied the grievances.

Discussion

Section 7 of the National Labor Relations Act guarantees employees ''the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,'' as well as ''the right to refrain from any or all such activities.'' Section 8(a)(1) of the Act makes it an unfair labor practice ''to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.'' Section 8(a)(3) of the Act forbids ''discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .''

In *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), the United States Supreme Court stated:

> The NLRB's decision in this case applied the Board's longstanding *Interboro* doctrine, [157 NLRB 1295 (1966), enf'd 388 F.2d 495 (C.A. 2, 1967)], under which an individual's assertion of a right grounded in a collective bargaining agreement is recognized as concerted activity and therefore accorded the protection of Section 7. . . . As the Board first explained in the *Interboro* case, a single employee's invocation of such rights affects all the employees that are covered by the collective bargaining agreement. . . . The invocation of

[3] Rosko, in his supplemental testimony, asserted that Dreisbach was ''laid off'' ''because of the cost of maintaining two incumbents in a one man job'' which was ''a make work classification for Pursell.'' See Tr. 54–55.

> a right rooted in a collective bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement . . . beginning with the organization of a union, continuing into the negotiation of a collective bargaining agreement and extending through the enforcement of the agreement . . . . [T]he principal tool by which an employee invokes the rights granted to him in a collective bargaining agreement is the processing of a grievance . . . . No one doubts that the processing of a grievance in such a manner is concerted activity within the meaning of Section 7. Indeed, it would make little sense for Section 7 to cover an employee's conduct while negotiating a collective bargaining agreement, including the grievance mechanism by which to protect rights created by the agreement, but not to cover an employee's attempt to utilize the mechanism to enforce the agreement.

The Court concluded:

> The NLRB's *Interboro* doctrine recognized as concerted activity an individual employee's reasonable and honest invocation of a right provided for in his collective bargaining agreement. We conclude that the doctrine constitutes a reasonable interpretation of the Act.

The essentially undisputed facts in the instant case show that the Union had negotiated and secured for the Employer's unit employees, including Dreisbach, a collective-bargaining agreement which contained, inter alia, seniority bidding and bumping rights for unit jobs and a grievance mechanism by which to enforce these rights. The Employer, with full knowledge of these contractual obligations, created unit job 134-26 in May 1988 solely for the benefit of unit employee Pursell. Pursell, as recited above, had sustained a severe work-related injury and this job would enable the employee to return to work despite his physical limitations and thus avoid a substantial workman's compensation liability on the part of the Employer.

The Employer, as noted, was well aware of its contractual obligations at the time. As former labor relations manager Rosko testified:

> Q. . . . When you set up these new job classifications . . . in order to accommodate Mr. Pursell, did you take into consideration the ramifications of the contractual agreement . . . as far as the [bidding or] bumping situation?
>
> A. Yes.
>
> Q. Had you a contingency plan if a senior employee to Mr. Pursell would have bid [or bumped] on that job?
>
> A. No, it was a crap shoot.

Unit employee Dreisbach thereafter sustained a nonwork-related injury which resulted in physical limitations. The Employer laid off Dreisbach from his pipefitter job because of these limitations. Dreisbach, who had greater seniority than Pursell, decided on January 16, 1989 to ''bump'' into the 134-26 job pursuant to the collective bargaining agreement. The Employer at first ''reluctantly'' recognized Dreisbach's ''contractual right'' and ''accepted Dreisbach's bump'' into the 134-26 job. However, about 3 days later, the Employer laid off Dreisbach from the 134-26 job citing his medical restrictions. Dreisbach went back to his doctors and obtained certification that he could perform the duties of the 134-26 job. Dreisbach again ''bumped'' into the 134-26 job pursuant to the collective-bargaining agreement. He was, however, instead assigned another job and Pursell continued to perform the 134-26 job.

Dreisbach thereupon complained to Union Representative English, and Dreisbach and the Union filed grievances. These grievances were resolved and, ultimately, on March 2 Dreisbach was notified by the Employer that he would be returned to the 134-26 job effective March 6. On March 6 Dreisbach returned to the 134-26 job where he was permitted to operate the trackmobile. Pursell, however, continued to perform the truckdriving duties of that job.

Then, 4 days later, on March 10, the Employer reclassified the 134-26 job into 134-27. The Employer eliminated the trackmobile duties from this job and added the duties of changing tires. Both Dreisbach and Pursell were assigned to this new job classification. However, on that same day, March 10, Dreisbach was again laid off because he was ''unable to perform'' the new job duties of 134-27 as a result of his ''medical restrictions.'' Dreisbach, upon the advice of his union representative, again obtained medical certification that he could perform this job. The Employer again put Dreisbach back on the 134-27 job although he was still not assigned any pickup truckdriving duties which were being performed by Pursell.

On March 17 Union Representative English, ''highly agitated'' over this apparent runaround, complained to Plant Manager Bower. Bower acknowledged that Dreisbach ''had a contractual right'' to the disputed unit job, but Bower urged English ''to talk to Mr. Dreisbach and see if he would back off.'' English later apprised Bower that Dreisbach ''wanted the job'' and ''wasn't going to back off.'' Bower responded: ''If that was the case the job was history.'' The job was eliminated and both Pursell and Dreisbach were laid off. Dreisbach filed further grievances protesting the Employer's action.

On this record, I find and conclude that Respondent Employer's reclassification of the 134-26 job, the elimination of the 134-27 job and the consequent layoff of Dreisbach were solely in retaliation for employee Dreisbach's persistence, with the Union's aid, in grieving and attempting to enforce his rights under the collective-bargaining agreement. The Employer's drastic response to the employee's and Union's attempt to thus enforce the collective-bargaining agreement both impinged upon employee Section 7 rights and discouraged union activities, in violation of Section 8(a)(1) and (3) of the Act.[4]

Counsel for Respondent Employer argues that Arbitrator High's decision ''is res adjudicata as to ACF's right under the labor contract to create and abolish job classifications 134-26 and 134-27'' and the ''Board should defer . . . under

[4] I reject the Employer's assertions that its response here was for lawful economic reasons alone or that such action would have occurred in any event for lawful economic reasons. On the contrary, I find and conclude on this record that Respondent Employer took such drastic action for the statutorily proscribed retaliatory reasons as explained above. Specifically, on this record, I reject as incredible Rosko's assertions to the effect that the Employer's reclassification and elimination of the claimed job was for economic and nonretaliatory reasons.

the principles enunciated in the *Spielberg* doctrine.'' The Board, however, has made clear that it will not defer to an arbitration award where ''the contractual and unfair labor practice issues were not factually parallel'' or where the arbitrator's decision is ''clearly repugnant to the purposes or policies of the Act,'' that is, the arbitrator's decision ''is not susceptible to an interpretation consistent with the Act.'' See *K-Mechanical Services*, 299 NLRB 114 (1990), and *Garland Coal & Mining Co*., 276 NLRB 963 (1985).

In the instant case, the issues before the arbitrator, as stated in his decision, were whether the Company had violated the collective-bargaining agreement by the elimination of the 134-27 pickup truck job and by assigning the duties of the eliminated job to nonbargaining unit personnel. The arbitrator concluded that ''the Company's actions . . . complained of created no violation of the collective bargaining agreement.'' Under the circumstances, I find that the ''the contractual and unfair labor practice issues were not factually parallel.'' The arbitrator was only concerned with contractual authority for the action taken. The propriety of Employer retaliatory conduct for Section 7 activities or Employer unlawful purpose were not before him.

In any event, assuming that the ''contractual and unfair labor practice issues'' were ''parallel,'' I find that the arbitrator's decision—upholding the Employer's actions in retaliation for employee Dreisbach's and the Union's persistence in grieving and attempting to enforce rights under the collective-bargaining agreement—is ''clearly repugnant to the purposes or policies of the Act'' and ''not susceptible to an interpretation consistent with the Act.'' For, as recited above, the Board and courts have long ''recognized as [protected] concerted activity an individual employee's reasonable and honest invocation of a right provided for in his collective bargaining agreement.'' The arbitrator, although reciting in his decision,

> [T]he Union representatives had a number of discussions with the Company as to whether [Dreisbach] was going to bump Pursell and that when the Union reported that [Dreisbach] in fact wished to exercise his rights to do so the Company representative replied that, in that case, the job was ''history'' [and] . . . the Company's action in laying off [Dreisbach] was the direct result of [his] bumping Pursell . . . .

nevertheless concluded that the ''Company's actions . . . complained of created no violation of the contract'' because the Company had the contractual ''power to eliminate the job'' and the ''power to lay off the incumbent of that job.'' The arbitrator's decision, to the extent it would thus permit such retaliatory conduct, is ''clearly repugnant'' to well-accepted principles under the Act.

Finally, counsel for Respondent Employer argues that the 8(a)(3) issue raised by the complaint is not supported by a timely charge under Section 10(b) of the Act. Charging Party had filed timely 8(a)(1) charges on April 11, 1989. (See G.C. Exh. 1(a).) Later, on December 10, 1991, Charging Party filed an amended charge to allege that Respondent Employer's conduct was also a violation of Section 8(a)(3) of the Act. (See G.C. Exh. 1(c).) A complaint issued shortly thereafter alleging that the Employer's conduct was both violative of Section 8(a)(1) and (3) of the Act. (See G.C. Exh. 1(e).) Under the circumstances, I find that the challenged complaint allegation was ''factually related to the allegation in the underlying charge'' and amply satisfied the Board's ''closely related test.'' See *Harmony Corp.*, 301 NLRB 578 (1991). Accordingly, I reject this argument.

CONCLUSIONS OF LAW

1. Respondent Employer is an employer engaged in commerce as alleged.

2. The Union is a labor organization as alleged.

3. Respondent Employer and the Union were parties to a collective-bargaining agreement covering the Employer's production and maintenance employees; about March 10, 1989 the Employer reclassified the job classification of ''134-26 Operator Truckdriver–Trackmobile'' to ''134-27 Truck Operator–Pick Up''; about March 21, 1989, the Employer eliminated the ''134-27'' classification and laid off unit employee Charles F. Dreisbach from that position; and the Employer engaged in this conduct because Dreisbach, with the assistance of the Union, had filed and pursued a grievance under the collective-bargaining agreement, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.

4. The unfair labor practices found above affect commerce as alleged.

REMEDY

To remedy the unfair labor practices found above, Respondent Employer will be directed to cease and desist from engaging in the conduct found unlawful or like or related conduct and to post the attached notice. Affirmatively, Respondent Employer will be directed to reinstate the 134-26 job classification; offer employee Dreisbach immediate and full reinstatement to this job without prejudice to his seniority or other rights and privileges; and make him whole for any loss of earnings he may have suffered by reason of the Employer's unlawful conduct by making payment to him of a sum of money equal to that which he normally would have earned from the date of Respondent's unlawful conduct to the date of its offer of reinstatement, less net earnings during such period, with backpay to be computed as prescribed in *F. W. Woolworth Co*., 90 NLRB 651 (1977), and interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co*., 138 NLRB 716 (1962).

Further, Respondent Employer will be directed to preserve and make available to the Board or its agents upon request all payroll records and reports and all other records necessary to determine backpay under the terms of this decision. Respondent Employer will also be directed to expunge from its files any reference to the laying off of Dreisbach found unlawful herein, in accordance with *Sterling Sugars*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

[5] 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.

ORDER

The Respondent, ACF Industries, Incorporated, Milton, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Retaliating against its employees because they have engaged in Union or other protected concerted activities by eliminating job classification 134-26; by reclassifying job classification 134-26 to 134-27; and by eliminating job classification 134-27 and laying off employee Charles F. Dreisbach.

(b) 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) Reinstate the 134-26 job classification; offer employee Dreisbach immediate and full reinstatement to this job without prejudice to his seniority or other rights and privileges; and make him whole for any loss of earnings he may have suffered by reason of the Employer's unlawful conduct, with interest, as provided in this decision.

(b) Expunge from its files any reference to the laying off of Dreisbach as found unlawful by the Board, and notify him in writing that this has been done and that evidence of this unlawful layoff will not be used as a basis for future personnel action against him.

(c) Preserve and, on request, make available to the Board or its agents for examination or copying all payroll records, social security payment records, timecards, personnel records and reports, as well as all other records necessary or useful in analyzing and computing the amount of backpay and compliance, as provided in this decision.

(d) Post at its Milton, Pennsylvania facility copies of the notice attached marked ''Appendix.''[6] Copies of said notices, on forms provided by the Regional Director for Region 4, shall, after being signed by Respondent, be posted immediately upon receipt thereof in conspicuous places, including all places where notices to employees are customarily posted, and be maintained for 60 consecutive days. Reasonable steps shall be taken to ensure that notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date what steps have been taken to comply.

[6] If 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.''