

Yellow Freight System, Inc. and Troy Dean Smith.
Case 9-CA-26338

July 11, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On November 9, 1989, Administrative Law Judge Walter H. Maloney issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

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 and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Yellow Freight System, Inc., Columbus, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a) and (b), and reletter the subsequent paragraphs.

"(a) Offer Troy Dean 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 any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision."

2. Substitute the attached notice for that of the administrative 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge made several minor factual errors in his decision. The Union represents 425 over-the-road drivers, in addition to 235 local cartage drivers and about 60 shop employees. Also, the Respondent receives approximately 200 to 220 grievances per year.

² We shall modify the Order and notice to include the standard provision regarding reinstatement and backpay for Troy Dean Smith.

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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage membership in or activities on behalf of Teamsters Local Union No. 413, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, or any other labor organization, by discharging employees or otherwise discriminating against employees in their hire or tenure.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Troy Dean 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 any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

YELLOW FREIGHT SYSTEM, INC.

James E. Horner, Esq., for the General Counsel.
James D. Kurek, Esq., of Akron, Ohio, for the Respondent.
Phillip L. Harmon, Esq., of Worthington, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

I. FINDINGS OF FACT

WALTER H. MALONEY, Administrative Law Judge.
This case came on for hearing before me at Columbus,

Ohio, upon an unfair labor practice complaint,¹ issued by the Regional Director for Region 9, which alleges that Respondent Yellow Freight System, Inc.² violated Section 8(a)(1) and (3) of the Act. More specifically, the complaint alleges that the Respondent discharged Troy Dean Smith, a casual employee, because he filed a grievance under the terms of a collective-bargaining agreement in which he sought a permanent place on the Respondent's seniority roster. The Respondent stated that it was in the process of terminating Smith when it received his grievance and that it discharged him (or decided not to call him as a casual) because Smith was unqualified to be a regular mechanic. It also argued that Smith's retention as a casual could, under the new contract with the Union, require the Respondent to enlarge its seniority roster. Upon these contentions, the issues were framed.³

II. THE UNFAIR LABOR PRACTICES ALLEGED

Respondent operates a nationwide trucking company. As a part of that operation, it maintains a truck terminal at Columbus, Ohio. At this terminal about 60 mechanics are employed around the clock on a 7-day-a-week basis to provide various levels of maintenance for company vehicles which are brought to them for servicing. These mechanics, as well as about 300 local cartage and over-the-road drivers, are represented by the Union. The mechanics are covered by a contract which is a supplement to the Teamsters' National Master Freight Agreement. The first mechanics' contract ran from March 1, 1984, to March 31, 1988. Negotiations for a new agreement were not completed until July 1988, well after the earlier contract had expired. In August 1988, the parties agreed locally to work under the new agreement, with wage increases retroactive to April 1, 1988. However, the Teamsters International did not approve this contract until the

spring of 1989 and it was not formally executed until August 3, 1989. It expires March 31, 1991.

The Respondent maintains a seniority roster for mechanics at its Columbus terminal which contains about 58 names. These men are considered to be regular full-time employees; 90 percent of them are guaranteed a 40-hour workweek by contract. Job assignments are periodically put up for bid, at which time regular mechanics may, in order of seniority, select days off and shift assignments. Respondent has only one class of mechanics all of whom are expected to be able to perform maintenance on diesel engines. However, the terminal also pulls routine maintenance on trucks which require little or no skill and experience. Mechanics are rotated into these assignments during their shifts.⁴ It has been the regular practice of the Respondent to assign all mechanics, regardless of the degree of their skill or expertise, to work on the fuel line gassing trucks and changing oil and tires on the day they return from their 2 days off each week. The only difference in pay among mechanics is that a mechanic must be on the seniority roster 3 years to draw the contract rate. During the first year he draws 80 percent of that rate and receives 10-percent increases each year until he reaches the maximum amount.⁵ The contract between the parties also provides for a 30-day probationary period, during which time a candidate for a permanent position on the seniority roster may be employed without any guarantee of future employment while his abilities and qualifications are being reviewed by the Respondent's supervisors.

In addition to seniority and probationary employees, the Respondent may, under the contract, employ casual employees. In theory, these individuals work only on a daily basis and have no contractual guarantee of work beyond the day on which they are called for work. In practice, the Respondent has hired casual employees for a period of as much as 4 years and, at the time of the hearing in this case, had one casual mechanic employee on its payroll who had been with it for 2 years. The contract distinguishes between casuals: a supplementary casual is one who is hired during peak periods to help handle an overload of work, while a replacement casual is hired to replace one or more employees who are absent for illness, vacation, or other reasons. Casuals are further distinguished from regular employees in that they receive no fringe benefits.

The contract defines journeyman mechanic as "one who has served at the auto mechanics' trade or any specialized branch thereof, which meets the Company's requirements and is qualified to be able to perform any and

¹ The principal docket entries in this case are as follows:

Charge filed by Troy Dean Smith, an individual, against the Respondent on April 9, 1989; complaint issued against the Respondent by the Regional Director for Region 9, on May 19, 1989; Respondent's answer filed on May 30, 1989; hearing held in Columbus, Ohio, on August 29, 1989.

² Respondent admits, and I find, that it is a corporation which maintains a place of business in Columbus, Ohio, where it is engaged in the interstate and intrastate trucking business. During the preceding 12 months, the Respondent derived in excess of \$50,000 in the transportation of freight and various commodities from the State of Ohio directly to points and places located outside the State of Ohio. Accordingly, the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. Teamsters Local Union No. 413, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Union) is a labor organization within the meaning of Sec. 2(5) of the Act.

³ On October 5, 1989, Respondent filed with me a motion to strike the General Counsel's brief, alleging that the General Counsel waited until he received the Respondent's brief before filing his own. Accordingly, if the Respondent were correct, the briefs received would not be simultaneous briefs. While the practice is to file simultaneous briefs, the Rules and Regulations do not specifically require such submissions. The Rules do require the filing of briefs on or before the date set by the administrative law judge. In this case, the brief from the General Counsel was transmitted to me with a cover memo from Cincinnati, Ohio, dated October 2, 1989, the date on which briefs were due to be actually received in Washington, D.C. The General Counsel's certificate of service bears the same date. The brief was not actually received in Washington, D.C., until October 3. The General Counsel was specifically requested by me to respond to the Respondent's motion but did not do so. Accordingly, I grant the Respondent's motion and strike the General Counsel's brief.

⁴ When asked how the Employer could afford to utilize a skilled diesel mechanic doing unskilled work such as gassing trucks and changing tires, the Respondent gave no responsive answer other than to say that it has worked out all right. One explanation is that there is only one class of mechanic. Mechanics with the same number of years on the Respondent's payroll receive the same pay. This fact suggests that individuals employed as permanent mechanics are not as highly skilled as the Respondent has portrayed them to be and lends substance to the statement of employee Todd Swackhammer, who testified that Maintenance Manager Campbell once told him that "you don't have to be a mechanic to work here. Just show up on time, protect your bid, and do what you are told."

⁵ Formerly this progression required 4 years.

all operations on any of the Company's equipment." In addition to holding a chauffeur's license and passing a Department of Transportation physical examination, the phrase "meets the company's requirements and is qualified to be able to perform any and all operations" has not been further refined, either by contract or by written company regulations or personnel guidelines. Respondent's maintenance manager, Dennis Campbell, testified that, in hiring permanent employees, he looks for a mechanic who has had 2 years of verifiable experience working on diesel motors. In most instances, this means employment with a competitor in the industry. Trade school counts, in his estimation, for some of that experience. The Respondent, however, does not give newly hired mechanics any kind of examination or training other than the surveillance which a new employee might expect during the 30-day probationary period. In hiring a casual employee, experience standards are not invoked although a casual might have diesel repair experience. Casuals have progressed from time to time to a place on the seniority roster after serving a 30-day probation; however, in Campbell's estimation, service with the Company as a casual does not constitute the kind of experience in the industry he is looking for in a permanently employed diesel mechanic.⁶

Troy D. Smith was hired by the Respondent in September 1987, as a casual mechanic. There is no dispute that, prior to this date, he did not have any formal training or experience in the industry as a diesel mechanic. He was hired at the recommendation of a truckdriver steward. Campbell told Smith at this time that he needed some farm boys who knew how to improvise. It was also made clear to Smith that employment as a casual did not entitle him to consideration as a permanent employee.

For the first month or so of his employment, Smith worked about 3 days a week. He was then assigned a slot which became vacant when Tracy Harless, a regular mechanic, went on extended leave because of an industrial injury. Until the time he was discharged on October 14, 1988, Smith worked a full 40-hour week in Harless' bid spot. When that bid spot fell into a different shift because of the periodic rebidding of shifts by regular employees, Smith changed shifts in order to continue in the Harless spot. About 98 percent of Smith's working time was spent on one of the six fuel lanes in the Respondent's terminal. In this position he gassed trucks, changed tires, changed light bulbs, and did preventive maintenance on trailers. On one occasion Smith was assigned to the tractor repair section of the shop; while he performed this assignment with technical proficiency, he was slow so he was not given another assignment in that shop. Smith's rate of pay was \$12.35 an hour, as compared with the \$14.71 paid to a mechanic with 4 years' experience. However, he received no fringe benefits.

From time to time, Smith approached Campbell and asked for assignment on the company seniority list. He was regularly refused. In July 1988, Smith took a 2-day course, at his own expense and on his own time, with Cummins Engines in order to learn diesel preventive

maintenance and tune-up procedures. Cummins supplies the Respondent with many of its trucks. Its school is open only to individuals who are referred to it by companies in the trucking industry. The Respondent provided Smith with such a reference although it did not pay his tuition. After Smith returned to work, Campbell asked several supervisors to rate Smith's performance with respect to permanent employment on the seniority roster. While Smith was given good marks for dependability and performance on the gas line, no one recommended him for hire as a permanent mechanic because of his lack of skill in that area.

In August or September 1988, the Respondent hired additional casuals; some were asked to work with Smith to learn the requirements of the job. The Respondent also hired some permanent mechanics. When this occurred Smith went to Campbell, reminded him he had worked in the shop for nearly a year, asked whether that record did not count for anything, and requested permanent employment. Campbell said that he had not promised Smith anything and suggested that he get a job in another shop where he could acquire experience as a diesel mechanic. Campbell told Smith that he did not have sufficient experience to qualify as a diesel mechanic, although he had no problem with Smith's performance in the gas lanes. Campbell offered to give Smith a letter of recommendation.

In early October, Smith had an interview for a job as a diesel mechanic with Penske Truck Leasing Company⁷ at its Dayton, Ohio location. He told Campbell about the interview and asked for a letter of recommendation. Campbell prepared and signed a letter of recommendation, dated October 11, 1988, which was given to Smith on that date. It read:

To Whom It May Concern:

Troy Smith has been employed by Yellow Freight System since September, 1987. As a casual mechanic, his main duties consisted of fueling, safety, inspecting, and making minor repairs to tractor/trailer units.

Mr. Smith has an excellent attendance record and is a cooperative, productive employee.

On October 8 or 9, Vern Bell, the Union's business agent, phoned Rodney Boothe, labor relations manager for the Respondent's Columbus terminal, and told Boothe that the Respondent had an "unqualified" man on its payroll. Bell mentioned no names but told Boothe that he was going to force the Company to place the man on the seniority roster under the terms of the new collective-bargaining agreement.⁸ Boothe said that the contract did not permit the Union to force an employee onto the seniority roster. Since Boothe did not know

⁷ Smith is now working at Penske as a grade A mechanic, although he did not obtain this job until 6 months after leaving the Respondent.

⁸ The new contract provides, inter alia, that the Respondent furnish the Union a monthly list of all extra casual or probationary employees showing their names, dates worked, classification of work performed and hours worked, and the name "if applicable" of the employee replaced by each listed casual or probationary employee.

⁶ The current collective-bargaining agreement provides that "casuals shall not be discriminated against for future employment."

who Bell was referring to, he called Campbell and asked the latter if the Company was employing someone who was unqualified. Campbell replied that Smith was unqualified. Boothe told Bell that it was not advantageous for the Company to have an unqualified individual on the payroll because it could create a problem as far as bidding was concerned. Boothe said that he wanted to get together the paperwork on Smith to examine his qualifications and "work ethic." According to Boothe's testimony, a decision had been made to fire Smith shortly after the receipt of Bell's phone call. However, no decision had been made as to when the Company would discharge him.

Smith worked the afternoon shift on October 13 as scheduled. Before coming to work he typed up a grievance on the Union's grievance form which stated:

I am filing this grievance for full-time employment and the seniority in which [sic] I am entitled to according to the maintenance contract effective April 1, 1988; Article #4, Section 1a; 1b; 1d. A casual may be either a replacement casual or a supplemental casual. I have been a replacement for Tracey Harless since October 1987. According to Article #4, Section 1b since I have worked for more than (90) days as a replacement for Mr. Harless this puts me as a supplemental casual. As a supplemental casual: Section 1d. Thirty days later 5-1-88 I should have been hired as a probationary employee since I was the only employee available who could be classified as a supplemental casual under this contract. Since the contract went into effect 4-1-88 and it states that it will revert back (30) days, this would be 4-1-88 as my seniority date of hire. Furthermore my probationary period has already been fulfilled. I wish to be notified and present [sic] at all proceeding connected with this grievance.⁹

At the end of the second shift, Smith handed the signed grievance to Donald Kunkle, the third-shift shop steward, and asked Kunkle to file it. Kunkle told Smith

that "Dennis [Campbell] isn't going to like this too well." Smith simply asked Kunkle if he would turn it in. Kunkle said that he would. Kunkle then observed that "this could cost you your job." Before leaving the plant the following morning, Kunkle gave Smith's grievance to Campbell.

Shortly after noon on that day, Campbell phoned Smith at Smith's home and told him not to bother coming to work. Smith asked Campbell if his message had anything to do with the grievance which had been filed. Campbell said that it did, in part. He also accused Smith of "not being up front" with him. Smith replied that Campbell had told him to "go somewhere else. My somewhere else was the Teamsters. I felt this was the only way I was going to get on." Campbell concluded the conversation by telling Smith that he did not work for the Company any longer.

Following Smith's termination, the grievance in question was processed as far as the Ohio Joint State Committee created by the grievance provisions of the Teamster contract. On November 2, 1988, the Committee dismissed the grievance with a notation on the grievance form that it was improperly before the Committee. There is nothing in the record which discloses why the Committee felt that the grievance was improperly before it.

III. ANALYSIS AND CONCLUSIONS

Whether or not an employee is denominated as casual or regular and whether or not he has standing to present and process a grievance under a contractual grievance procedure is immaterial with respect to his rights under the National Labor Relations Act. It has long been held that a casual employee enjoys the protections of Section 7 of the Act and is entitled to any rights and remedies which the Act provides. *Tamphon Trading Co.*, 88 NLRB 597 (1950). One of these statutory rights is the right to file and to press a grievance, either within or outside a contractual grievance machinery, free from employer retaliation. *Roadway Express Co.*, 217 NLRB 278 (1975); *Drury Construction Co.*, 260 NLRB 721 (1982); *NLRB v. Ford Motor Co.*, 683 F.2d 156 (6th Cir. 1982); *Republic Die & Tool Co. v. NLRB*, 680 F.2d 463 (6th Cir. 1982); *NLRB v. Magnetics International*, 699 F.2d 806 (6th Cir. 1983). It is immaterial whether the grievance being pressed does or does not have merit. *Top Notch Mfg. Co.*, 145 NLRB 429 (1963); *Baywood Industries*, 249 NLRB 403 (1980).

In this case, Smith was fired from a job, which he had held for nearly a year and which he had performed satisfactorily, about 12 hours of filing a grievance seeking an improvement in his employment status.¹⁰ In his terminal interview—a telephone call from Campbell telling him not to report for work any more—Smith was told by

⁹ The cited provisions of art. IV of the new contract are as follows: Section 1(a) A casual employee is an individual who is not on the regular seniority list and who is not serving a probationary period. A casual may be either a replacement casual or a supplemental casual as hereinafter provided. Casuals shall not be discriminated against further employment. Section 1(b) Replacement casuals are defined as employees who may be utilized by an employer to replace regular employees when such regular employees are off due to illness, vacations or other absence. However, it is understood and agreed that days worked by casuals to replace a regular employee who is absent from work for a known extended illness in excess of a ninety (90) days period shall not be considered as replacement days worked in excess of ninety (90) days. To be considered a replacement, the casual must work on the shift that the absence occurred, or within two (2) hours thereafter.

Section 1(d) Where an Employer uses casuals to supplement his work force thirty (30) cumulative work days within any ninety (90) calendar day period, such employer shall be required to add one probationary employee from among those that have worked during the qualifying period for each occurrence and such probationary employee to be added shall be designated no later than the beginning of the next payroll period. The seniority date for the probationary employee hired will revert back to the thirtieth (30th) day supplemental casuals were used. Failure to comply with this provision shall be subject to the grievance procedure.

¹⁰ Respondent clings to the terminology that Smith was never fired because he had no permanent status and was merely an on-call casual who had no right to expect, from one day to the next, that he would work the following day. In fact, Smith worked a regular 40-hour week for a period of 10 months up to the day he was separated permanently from the respondent's payroll. His termination was a discharge from employment which was regular and recurring.

Campbell that the reason for this action on the part of the Company was, in part, the grievance Smith had left with the union steward the previous evening. In his testimony in this proceeding, Campbell testified that he was miffed at Smith for filing the grievance because he felt that Smith had not been "up front" with him, meaning that Smith had filed the grievance after having obtained from Campbell a favorable letter of recommendation to other employers. There can be no prudent doubt that the event which triggered the discharge of Smith on October 14 was his action in filing a grievance on October 13. Accordingly, the discharge was taken in reprisal for protected activity and union activity on the part of Smith and violated Section 8(a)(1) and (3) of the Act.

The Respondent's basic defense was that it was getting ready to fire Smith anyhow so the grievance actually had no bearing on its decision. Respondent also points out that, as a unionized employer, it receives several grievances each month from employees in its large terminal and has never taken umbrage at a grieving employee by discharging anyone. The latter contention is a makeweight argument and is essentially irrelevant. Respondent has received few, if any, grievances from, casual employees. More to the point, it took serious umbrage at *this* grievance and admitted as much from the stand.

Campbell, the operations manager, and Boothe, the labor relations director, had different responses when asked whether Smith's grievance had accelerated the timing of his discharge. If, in fact, Smith was terminated sooner than he would otherwise have been fired because he had filed a grievance, the termination would be a discriminatory discharge, although the backpay to be awarded in a supplementary proceeding might be limited. In this case, the Respondent's primary defense, in and of itself, amounts to an unfair labor practice because the events setting it in motion were initially prompted by union considerations. Before Smith had informed the Respondent, by filing a grievance, that he would try to enforce the contract, the Union had also told the Respondent that it too was going to enforce the contract. While Bell, in his phone call to Boothe, did not mention Smith by name, he was in fact referring to Smith when he said he was going to force the Company to hire somebody. The Respondent soon came to realize the identity of the individual to whom Bell was referring. It was in order to avoid enlarging its seniority list that Respondent, according to its version of this case, discharged Smith. However, it would not have been concerned with enlarging that list had Bell not threatened to force it to do so.

Whether or not Smith was a qualified mechanic is not an essential element in resolving this case. There is ample evidence in the record to support either contention. Smith was, by all reports, fully competent to continue to work on the gas lanes as he had for many months, and the Respondent has had casuals working for it for as long as 4 years who presumably do little else. At present, even under the terms of its existing contract, there is a casual on the company payroll who has worked for it for 2 years. Had the Respondent been required to enlarge its seniority roster by one name rather than to continue to man its operation with a long-term casual, it would not

have had to hire Smith as a permanent employee. His presence in the shop, even under the disputed terms of the new contract,¹¹ would not have required the Respondent to hire either him or any other specific individual. Respondent could have fulfilled its contractual requirement by hiring a mechanic off the street, if necessary, or from the pool of qualified casuals for whom it already had job applications. Rather than enlarge its seniority roster, the Respondent chose to fire Smith, at least according to the company story. It was called upon to make such a choice because the Union was threatening to make trouble. The provision in the new contract was obviously inserted because the Union did not care to have unit work performed by a category of employees who were not being paid union fringe benefits through the device of employing casual employees on a long-term basis. The Union wanted to bring this practice to an end by making and then enforcing the new contract provision. If we are to accept the Respondent's version and all of its implications, Smith's grievance, filed a few days after Bill's phone call, was essentially the second round in an ongoing effort to do the same thing that Bell was trying to do. Accordingly, Smith's discharge violated Section 8(a)(1) and (3) for these reasons as well as those advanced by the General Counsel.

On the foregoing findings of fact and upon the entire record here considered as a whole, I make the following

CONCLUSIONS OF LAW

1. Yellow Freight System, Inc. is now and at all times material has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Teamsters Local Union No. 413, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging Troy Dean Smith because he filed a grievance under the terms of a collective-bargaining agreement, the Respondent violated Section 8(a)(1) and

¹¹ There is a very real question as to whether the core of the Respondent's defense—its obligation under the new contract to enlarge its seniority roster in October 1988, after having a replacement casual on its payroll for more than 90—days has any substantive merit. Arguably, the Respondent might have been obligated to take this action on August 6, 1988, the day the parties say they orally agreed to begin abiding by the terms of the new agreement. Smith had been on its payroll for about 9 months at that time as a replacement casual, and a good case could be made that his entitlement began as of the date the contract took effect, not 90 days thereafter. Smith felt that it took effect on April 1 since the contract by its terms said that it took effect on that date. Accordingly, the obligation to enlarge the roster would have been retroactive to that date. The Respondent felt that the 90 days began to run on the date parties agreed to begin observing the contract, thus triggering a compliance obligation about November 3, some 3 weeks after the Respondent discharged Smith. Another argument could be made responsibly that no obligation arose until many months later when the contract was actually executed by the parties, since the International had not approved the agreement and no contract could come into effect without its approval. There has been no definitive interpretation resolving these conflicting views and the action of the Ohio Joint State Committee in dismissing Smith's grievance simply avoided the question. It need not be resolved here, even if it could be.

(3) of the Act. The unfair labor practice has a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes and policies of the Act. I will recommend that the Respondent be required to offer Troy Dean Smith full and immediate reinstatement to his former or substantially equivalent employment, without prejudice to his seniority or to other benefits which he previously enjoyed, and to make him whole for any loss of pay or benefits which he may have suffered by reason of the discrimination found in this case, in accordance with the formula set forth in the *F. W. Woolworth* case,¹² with interest thereon computed at the short-term Federal rate used to calculate interest on underpayments and overpayments of Federal income taxes under the Tax Reform Act of 1986. *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I will also recommend that the Respondent be required to post the usual notice advising its employees of their rights and of the results in this case.

On the basis of these findings of fact and conclusions of law, and on the entire record considered as a whole, I make the following recommended¹³

ORDER

The Respondent, Yellow Freight System, Inc., Columbus, Ohio, its officers, agents, supervisors, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in or activities on behalf of Teamsters Local Union No. 413, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO by discharging employees or otherwise discriminating against them in their hire or tenure.

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

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

(a) Offer to Troy Dean Smith full and immediate reinstatement to his former or substantially equivalent employment.

(b) Make whole Troy Dean Smith for any loss of pay or benefits which he may have suffered by reason of the discrimination found, in the manner described above in the remedy section.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at the Respondent's Columbus, Ohio terminal copies of the attached notice marked "Appendix."¹⁴ Copies of said notice, on forms provided by the Regional Director for Region 9, after being signed by Respondent's authorized representative, shall be posted immediately on receipt and maintained by the Respondent for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹² *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

¹³ 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.

¹⁴ 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."