

BACK PAY REVISITED†

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PREAMBLE

This article is gratefully dedicated to Professor Richard S. Sullivan by Robert S. Fuchs, Regional Director of the National Labor Relations Board for New England, and Henry M. Kelleher, a partner in the law firm of Foley, Hoag & Eliot of Boston, Massachusetts.

Co-author Fuchs attended Boston College Law School with Professor Sullivan in the days when the law school was located at 11 Beacon Street and Copley Square, successively. Years later, upon the invitation of Professor Sullivan, co-author Fuchs was, for fifteen years, privileged to conduct a seminar in labor law following Professor Sullivan's labor law course. The class was conducted on Saturday mornings and initially combined the night and day school students, many of whom desired to specialize in the field of labor law. Thereafter, some twenty to forty percent of the class succeeded in obtaining appointments with the Board as trial attorneys and many of those have "graduated" from the Board and are making their mark in private practice, specializing in labor relations. Among them are Henry M. Kelleher, co-author of this article and a former student of Dick Sullivan.

Those students who took the seminar after taking Professor Sullivan's course were a source of constant amazement, for it seemed inconceivable that they could absorb and retain so much knowledge of the subject matter in so short a period of time. This, then, is our perfect tribute to Professor Richard Sullivan. There are many superb teachers of labor relations in the New England area, but in our experience no one has demonstrated a greater talent for molding the future of budding labor-management lawyers or has obtained finer results than has Dick Sullivan. In his quiet, unassuming manner, always avoiding the limelight, he has devoted his life to preparing young men and women for the extraordinary success which so many of them now enjoy.

The purpose of this article is to update and enlarge an article by co-authors Fuchs and Kelleher which originally appeared in this law review in 1968. It is a self-contained article which will not require the reader to refer back to the original 1968 article. Rosemary Pye, a third-year student at Cornell Law School, assisted in researching the new material and adding the section entitled "Union Responsibility."

I. INTRODUCTION

Administration of the National Labor Relations Act (the Act)¹ involves a process designed to prevent as well as remedy the com-

¹ 29 U.S.C. §§ 151-87 (1970).

mission of unfair labor practices. Section 10(c) of the Act provides that where the National Labor Relations Board (the NLRB or the Board) makes an unfair labor practice determination and issues a cease-and-desist order, it may also take such affirmative action, including reinstatement of employees, with or without back pay, as will effectuate the policies of the Act.² In addition to cases involving discharges and layoffs, back pay may be ordered to remedy discriminatory demotions, transfers, pay reductions or other changes in employment status involving financial loss.³ The back pay order generally provides that employees shall be made whole for any loss of pay resulting from the unlawful action of the employer, who is required to pay each individual a sum of money equal to the amount which that individual would normally have earned between the date of the discrimination and, in an appropriate case, the date of the employer's offer of reinstatement, less the individual's earnings during that period. A typical remedial order of the Board provides that the respondent employer shall

OFFER to the employees named below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed, and *make them whole for any loss of pay suffered as a result of the discrimination against them*, with interest thereon at 6 percent.⁴

The simplicity of this order is deceptive, and its application in individual cases gives rise to a myriad of complex problems and extensive litigation before the Board and the courts. This article is designed to trace the history and development of back pay law and provide a handy substantive reference to back pay proceedings.

Computation of back pay is not undertaken during the hearing on the merits of an unfair labor practice charge, but during a separate proceeding following the issuance of the Board order, or, if

² 29 U.S.C. § 160(c) (1970).

³ *Nabors v. NLRB*, 323 F.2d 686, 690, 54 L.R.R.M. 2259 (5th Cir. 1963), cert. denied, 376 U.S. 911 (1964). See, e.g., *Hollywood Brands, Inc.*, 169 N.L.R.B. 691, 67 L.R.R.M. 1371 (1968) (discriminatory failure to give employee opportunity to qualify for higher-paying job held to entitle employee both to the opportunity and to back pay even if he does not qualify); *Leeds & Northrup Co.*, 162 N.L.R.B. 987, 64 L.R.R.M. 1110 (1967) (unilateral discontinuance of supplemental compensation plan triggered remedy); *Hall Elec. Co.*, 111 N.L.R.B. 68, 35 L.R.R.M. 1414 (1955) (employees discriminatorily transferred entitled to back pay for loss of overtime); *Wyandotte Chem. Corp.*, 108 N.L.R.B. 1406, 34 L.R.R.M. 1220 (1954), enforced, 35 L.R.R.M. 2533 (6th Cir. 1955) (discriminatory denial of overtime work); *Dinion Coil Co.*, 96 N.L.R.B. 1435, 29 L.R.R.M. 1049 (1951), enforced, 201 F.2d 484, 31 L.R.R.M. 2223 (2d Cir. 1952) (reduction in pay); *Rockaway News Supply Co.*, 94 N.L.R.B. 1056, 28 L.R.R.M. 1133 (1951) (discriminatory work assignments and denial of extra pay when shifts were changed without notice).

⁴ NLRB Form 577 (emphasis added).

the substantive questions are appealed, following a court decree enforcing or affirming the order.⁵ This is generally referred to as the compliance stage of the proceeding. The parties to the proceeding are the General Counsel of the NLRB, the respondent (employer or union) and the charging party. The employees who will benefit if the General Counsel prevails are referred to as claimants.

In order to compute back pay, the Board must reconstruct the economic life of each claimant and place him in the same financial position he would have enjoyed had he not been discriminated against. Thus, it is necessary to determine as accurately as possible the sum he would have earned in the employment he lost through the discrimination. This is known as "gross back pay." The Board must then determine how he actually fared financially during the period between the discrimination and the reinstatement offer, the period known as the "back pay period," and then subtract any sum earned during this period. This amount is called "interim earnings." After certain expenses are deducted from interim earnings, the result is the amount of back pay due, the "net back pay." For the present, it will be useful to set out the formula in its simplest form:

$$\text{Net Back Pay} = \text{Gross Back Pay} - (\text{Interim Earnings} - \text{Expenses}).$$

This article will first discuss the historical development of back pay as a remedy and will then cover in detail the computation of each of the elements of net back pay: gross back pay, interim earnings and expenses. Then, after an elucidation of the burdens of proof and procedure before the Board in the back pay proceeding, the article will consider certain knotty problems which arise frequently enough to warrant specialized consideration: strike situations, subcontracting situations, plant closures and relocations, the liability of purchasers of the respondent's business operation, the claims of creditors, union responsibility, and the problem of the personal liability of corporate officers and union agents in the back pay area. Finally, the article will conclude with a discussion of the back pay remedy in refusal-to-bargain situations.

II. THE HISTORY OF BACK PAY

In the congressional debates preceding the passage of the Wagner Act⁶ and the Taft-Hartley Act,⁷ there is scarcely any mention of the back pay remedy. There is certainly nothing in the

⁵ See 29 C.F.R. §§ 102.52-.59 (1968).

⁶ 49 Stat. 450 (1935), as amended, 29 U.S.C. §§ 151-87 (1970).

⁷ 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 151-87 (1970).

legislative histories of these acts which has proved useful to courts in construing the language of section 10(c).

Development of the intricacies of the remedy was thus left to the Board, subject to a limited review by the courts. This development began with *Republic Steel Corp. v. NLRB*,⁸ where the Supreme Court first stated that back pay is a remedy and not a punitive device. Prior to *Republic Steel*, the Board required employers not only to make whole the wrongfully discharged employee but also to reimburse the Government for money it had paid the employee while he worked on relief projects.⁹ The Court held that this type of order was punitive rather than remedial, and therefore invalid, for Congress had not intended to vest in the Board discretion to devise measures in the nature of penalties or fines in order to effectuate the policies of the Act.

The back pay remedy underwent further evolution in *Phelps Dodge Corp. v. NLRB*,¹⁰ when the Court struck down the Board's policy of deducting from gross back pay only actual interim earnings and not amounts representing other losses willfully incurred by the claimant.¹¹ In argument before the Supreme Court, the Board urged acceptance of its simple formula, contending that it would otherwise be faced with an impossible administrative burden.¹² The Supreme Court, however, rejected the Board's argument. While acknowledging the mechanical simplicity of the rule propounded by the Board, Mr. Justice Frankfurter, speaking for the Court, stated: "But the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment."¹³

While the Supreme Court in *Phelps Dodge* placed a considerable administrative burden upon the Board, it also acknowledged the broad discretion entrusted by Congress to the Board in fashioning its remedial provisions. In this regard, the Court stated:

Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaption of means to end to the empiric process of administration. The

⁸ 311 U.S. 7 (1940).

⁹ See *id.* at 8-9.

¹⁰ 313 U.S. 177 (1941).

¹¹ E.g., by failure to seek or accept other suitable employment.

¹² 313 U.S. at 198.

¹³ *Id.*

exercise of the process was committed to the Board, subject to limited judicial review.¹⁴

In subsequent cases, the Court has reemphasized this principle, holding that a back pay order of the Board "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."¹⁵ In *NLRB v. Brown & Root, Inc.*,¹⁶ the Eighth Circuit Court of Appeals described the scope of judicial review as follows:

It is not the function of this Court to try the case de novo or to substitute its own appraisal of the evidence for that of the Board. If the Board has conceived the law correctly, if it has not acted arbitrarily or capriciously, and if its findings are supported by "substantial evidence on the record considered as a whole," they are conclusive and binding on this Court even though we might have made different findings upon an independent consideration of the same evidence.¹⁷

The "broad reach" of the Board's discretion to determine "how the effect of unfair labor practices may be expunged" has long been established.¹⁸

Though back pay is a remedy, it is designed to vindicate not the private rights of the employees involved but the policies of the statute itself. It is a remedy serving the public interest and designed to correct a public wrong, and the compensation inuring to the discriminatees is not theirs as a matter of right but is viewed as an incidental consequence of the Board's remedial process.¹⁹ It was established in the earliest days of the Wagner Act that a back pay proceeding is not comparable to a suit for damages in which the litigants are entitled to a trial by jury.²⁰ Pursuant to this well-settled

¹⁴ Id. at 194.

¹⁵ *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346-47 (1953); *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

¹⁶ 311 F.2d 447, 52 L.R.R.M. 2115 (8th Cir. 1963); enforcing 132 N.L.R.B. 486, 48 L.R.R.M. 1391 (1961).

¹⁷ 311 F.2d at 451, 52 L.R.R.M. at 2117-18. See also *Nabors v. NLRB*, 323 F.2d 686, 692, 54 L.R.R.M. 2259, 2263 (5th Cir. 1963), cert. denied, 376 U.S. 911 (1964); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

¹⁸ *NLRB v. District 50, UMW*, 355 U.S. 453, 458 (1958); *NLRB v. Link-Belt Co.*, 311 U.S. 584, 600 (1940).

¹⁹ *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938) (the Board may not punish a particular employer); *Salmon & Cowin, Inc. v. NLRB*, 148 F.2d 941, 16 L.R.R.M. 655 (5th Cir.), cert. denied, 326 U.S. 758 (1945) ("not . . . to vindicate . . . private rights . . . , but the National Labor Relations Act"); *NLRB v. Carlisle Lumber Co.*, 99 F.2d 533, 3 L.R.R.M. 725 (9th Cir. 1938) (the purpose of effectuating the policies of the Act is not one of rewarding an individual employee).

²⁰ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

principle, the Board held that "the desires of individuals cannot be allowed to block the public purpose behind the Board's requirement that they be made whole."²¹ In addition, laches are not generally available to respondents as a defense. In *Southland Manufacturing Corp. v. NLRB*,²² no merit was found in the employer's contention that the Board was guilty of laches in instituting back pay proceedings five years after the original unfair labor practice decision, since laches may not defeat an action by the government to enforce a public right.

Accordingly, the Board does not consider any strike settlement agreement between an employer and a union as binding upon it and will not recognize it unless it effectuates the policies of the Act.²³ Neither do releases or waivers of back pay executed by claimants bar a back pay order against the employer.²⁴ The courts have found employers in civil contempt for causing employees to endorse to them checks for back pay.²⁵ Further, it has been held that a back pay order may contain the names of employees even though they requested that their names be removed from the complaint issued by the General Counsel.²⁶ The Board reasons that the Act, designed as it is to vindicate a public policy, precludes individuals from relinquishing back pay as a matter of right where the remedy is necessary to effectuate the policies of the Act.

In its decisions immediately following the *Phelps Dodge* case, the Board rigidly interpreted the Supreme Court's mandate, restricting its inquiry in the area of willful loss to the question whether the employee had unjustifiably refused to accept or had given up desirable new employment. However, in 1943, the Board announced a broader policy, to apply for the duration of World War II, under which it permitted an employer to present evidence not only as to whether a discharged employee had unjustifiably refused to accept or had given up suitable employment, but also as to whether he had made a "reasonable effort" to obtain such employment.²⁷ The Board added that it would regard registration with an office of the United

²¹ J.B. Wood, 95 N.L.R.B. 633, 642, 28 L.R.R.M. 1358, 1361 (1951).

²² 475 F.2d 414, 82 L.R.R.M. 2897 (D.C. Cir. 1973). See also *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969), rev'g 399 F.2d 356 (5th Cir. 1968), in which the Supreme Court, reversing the court of appeals, held that even if the delay violated the Administrative Procedure Act, a reviewing court may not interfere with the Board's discretion to balance the rights of the employer and the employees.

²³ *F.W. Judge Optical Works, Inc.*, 78 N.L.R.B. 385, 386, 22 L.R.R.M. 1217, 1219 (1948).

²⁴ *NLRB v. Threads, Inc.*, 308 F.2d 1, 8, 51 L.R.R.M. 2074, 2079-80 (4th Cir. 1962); *Waterman S.S. Corp. v. NLRB*, 119 F.2d 760, 763, 8 L.R.R.M. 670, 671 (5th Cir. 1941).

²⁵ E.g., *NLRB v. Lawley*, 182 F.2d 798, 26 L.R.R.M. 2267 (5th Cir. 1950).

²⁶ J.B. Wood, 95 N.L.R.B. 633, 28 L.R.R.M. 1358 (1951).

²⁷ *Ohio Public Serv. Co.*, 52 N.L.R.B. 725, 729, 13 L.R.R.M. 30, 31 (1943), enforced, 144 F.2d 252, 14 L.R.R.M. 953 (6th Cir. 1944).

States Employment Service as "conclusive evidence" that the employee had made a reasonable search for work.²⁸

In 1950, the Board decided to continue this rule under peacetime employment conditions. It also extended the "conclusive evidence" principle to cover registration with a state as well as a federal employment office and elaborated on what it meant by "desirable" new employment, explaining that a back pay claimant is neither required to accept employment that is not the substantial equivalent of his former position nor compelled to accept employment that requires him to leave his home and incur expenses.²⁹

Again, in 1957, the Board modified the "conclusive evidence" rule, holding that henceforth it would not give conclusive weight to registration with a government employment office but would treat it as a factor to be given as much weight as the circumstances of each case demand.³⁰ In the same case, the Board refused to adopt the recommendation of a trial examiner (now called an administrative law judge) who had held that, failing to find "substantially equivalent" employment, the employee should be required to "lower his sights" and accept less remunerative employment.

III. THE COMPUTATION OF BACK PAY

A. *Generally*

As noted previously, back pay is determined by first computing the total amount which the claimant would have earned if he had not been discriminated against by respondent and had remained in his employ. Certain deductions are then made from this figure, and the result is the amount of net pay actually due the claimant. It is the purpose of this section of the article to explore first the elements of gross back pay and then the deductions which are made from that figure. We will then consider the mechanical, mathematical computation of the award.

B. *The Elements of Gross Back Pay*

Gross back pay is the amount which would have accrued to a claimant during the back pay period had there been no discrimination. In addition to basic wages, this includes promotions,³¹ wage

²⁸ *Id.*

²⁹ *Harvest Queen Mill & Elevator Co.*, 90 N.L.R.B. 320, 321-22, 26 L.R.R.M. 1189, 1191 (1950).

³⁰ *Southern Silk Mills, Inc.*, 116 N.L.R.B. 769, 38 L.R.R.M. 1317 (1956), enforcement denied, 242 F.2d 697, 39 L.R.R.M. 2647 (6th Cir.), cert. denied, 355 U.S. 821 (1957).

³¹ E.g., *Underwood Mach. Co.*, 95 N.L.R.B. 1386, 1403, 28 L.R.R.M. 1447, 1448 (1951).

increases,³² bonuses,³³ overtime pay³⁴ and other incidents of the employment relationship such as a taxicab driver's tips.³⁵ The computation of these amounts requires an evaluation of the employer's policies on promotions, layoffs, rehiring and seniority, and of the availability of employment during the back pay period. Records commonly used in computing gross back pay include payroll records, personnel history cards, quarterly social security tax returns, production records and daily time cards.

The selection of the gross back pay formula to be used is not mechanical but depends upon the circumstances of each case. One of the most reliable methods of computing gross back pay, known as the "comparability formula," is based upon the earnings of the claimant's replacement or of other similarly classified employees in the same plant who performed comparable work during the same period. In appropriate circumstances the Board employs the "adjusted average hours" formula, under which gross back pay of each claimant is arrived at by computing the average hours of all employees working in each claimant's job classification for each of the back pay periods and multiplying the result by the appropriate hourly wage rate.³⁶

There are some variations of this formula. In *Rice Lake Creamery Co.*,³⁷ the gross back pay was computed on the basis of the average number of straight time and overtime hours worked by all full-time employees who performed production work during the back pay period, rather than on the basis of the hours worked only by each claimant's replacement. Under this formula, the resulting averages of time and overtime are multiplied by the appropriate hourly wage rate of each production employee discriminated against to arrive at the amount of gross back pay due each such employee for each quarter.³⁸ In *Oman Construction Co.*,³⁹ the Board, to arrive at gross back pay, averaged the earnings of two other em-

³² E.g., *Peyton Packing Co.*, 129 N.L.R.B. 1275, 47 L.R.R.M. 1170 (1961); *Indianapolis Wire-Bound Box Co.*, 89 N.L.R.B. 617, 26 L.R.R.M. 1005 (1950).

³³ E.g., *Crater Lake Mach. Co.*, 131 N.L.R.B. 1106, 48 L.R.R.M. 1211 (1961); *Industrial Fabricating, Inc.*, 119 N.L.R.B. 162, 41 L.R.R.M. 1038 (1957), enforced sub nom. *NLRB v. Mackneish*, 272 F.2d 184, 45 L.R.R.M. 2136 (6th Cir. 1959); *Dinion Coil Co.*, 96 N.L.R.B. 1435, 1461, 29 L.R.R.M. 1049, 1050 (1951), enforced, 201 F.2d 484, 31 L.R.R.M. 2223 (2d Cir. 1952).

³⁴ E.g., *Marcus Trucking Co.*, 137 N.L.R.B. 1378, 1379-80, 50 L.R.R.M. 1441, 1442 (1962).

³⁵ *City Transp. Co.*, 131 N.L.R.B. 814, 48 L.R.R.M. 1146 (1961), enforced, 303 F.2d 299, 50 L.R.R.M. 2330 (5th Cir.), cert. denied, 371 U.S. 920 (1962).

³⁶ *Brown & Root, Inc.*, 132 N.L.R.B. 486, 488, 48 L.R.R.M. 1391 (1961).

³⁷ 151 N.L.R.B. 1113, 58 L.R.R.M. 1542 (1965), enforced in part, 365 F.2d 888, 62 L.R.R.M. 2332 (D.C. Cir. 1966).

³⁸ *Id.*

³⁹ 144 N.L.R.B. 1534, 1536, 53 L.R.R.M. 2029 (1963).

ployees who drove equipment similar to that which the claimant would have driven but for the discrimination.⁴⁰ In *East Texas Steel Castings Co.*,⁴¹ the Board, with court approval, required the respondent employer to increase the wages of the claimants to the hourly rate of pay that other welders of similar skill and ability were earning on the date of their reinstatement.

On the other hand, there are circumstances where the comparability formula would not serve to make the claimants whole. For example, where an employer was high bidder on a government contract and discriminatorily refused to hire the employees of his predecessor who had been represented by a union, the Board computed gross back pay at the rate the employees had received under the union contract rather than at the lesser rate paid their replacements.⁴²

In a number of recent cases the Board, with approval of the courts, has held that the use of a seniority type formula is a rational and appropriate method of computing gross back pay whether or not the concept of seniority is a principal determinate in the personnel policies of the particular employer. In *Superior Roofing Co.*,⁴³ the Board applied such a back pay formula on the concept that, even though the employer did not hire or terminate employees on the basis of seniority, the use of a seniority formula to compute earnings of "a representative employee" resulted in a reasonable approximation of what an unlawfully discharged employee would have earned during the back pay period. The Board's use of the seniority formula in those circumstances was endorsed by the Court of Appeals for the Ninth Circuit.⁴⁴

Again, in *Congdon Dye Casting Co.*,⁴⁵ the Board fashioned a back pay remedy based upon the seniority concept. In this case the employer had granted wage increases at one of two plants prior to a Board election, but had denied increases at the other plant on the basis of anti-union considerations. The employer asserted in mitigation of its back pay liability that the discharged employees would have been laid off even absent discrimination. The Board rejected that contention, however, and in fashioning a remedy utilized the seniority concept even though the facts indicated that the respondent

⁴⁰ *Accord*, *Pugh & Barr, Inc.*, 110 N.L.R.B. 1353, 35 L.R.R.M. 1259 (1954), enforced, 231 F.2d 558, 37 L.R.R.M. 2827 (4th Cir. 1956); *C & D Coal Co.*, 93 N.L.R.B. 799, 27 L.R.R.M. 1472 (1951).

⁴¹ 116 N.L.R.B. 1336, 38 L.R.R.M. 1470 (1956), enforced, 255 F.2d 284, 42 L.R.R.M. 2109 (5th Cir. 1958).

⁴² *New England Tank Indus., Inc.*, 147 N.L.R.B. 598, 56 L.R.R.M. 1253 (1964).

⁴³ 186 N.L.R.B. 542, 76 L.R.R.M. 1701 (1970), enforced, 460 F.2d 1240, 80 L.R.R.M. 2458 (9th Cir. 1972).

⁴⁴ 460 F.2d 1240, 80 L.R.R.M. 2458 (9th Cir. 1972).

⁴⁵ 176 N.L.R.B. 482, 71 L.R.R.M. 1285 (1969).

did not follow seniority in implementation of its personnel policies. The Board stated that the seniority concept is a "normal industrial practice" which may properly be utilized by the Board in fashioning remedial orders.

While in some circumstances the former earnings of the claimant are used to compute his gross back pay, in cases of mass discrimination the Board has on occasion employed a lump sum back pay figure. For example, where the restored work force is considerably smaller than before a strike or shutdown, the Board has computed a lump sum consisting of the wages paid to those working in the bargaining unit between the time that the employer reopens the plant and the time that he complies with the Board order to offer reinstatement to the employees. The money is divided as equitably as possible among the strikers illegally refused reinstatement upon their unconditional request therefor.⁴⁶

Where employment is seasonal in character, the Board recognizes this factor in its back pay computations and, in order to avoid making a claimant more than whole, excludes those periods during which the claimant would not have worked.⁴⁷ The Board, with the approval of the courts of appeals, has approximated gross back pay in situations where an exact amount cannot be arrived at.⁴⁸

In considering whether to include in back pay bonuses, gifts and the like, the Board has taken the position that the "make whole" concept does not turn on whether the payment was wholly obligatory or gratuitous, but rather on the principle of restoring the status quo ante. In one case,⁴⁹ the employer instituted a profit-sharing plan based upon the regular hours of employment each employee had worked during a given period, the sole eligibility requirement being that the employee be on the payroll at the time the payment was made. On a number of occasions, he specifically told employees this was *not* part of their pay. The profit-sharing

⁴⁶ Jack G. Buncher, 164 N.L.R.B. 340, 65 L.R.R.M. 1139 (1965); F.W. Woolworth Co. v. NLRB, 121 F.2d 658, 663, 8 L.R.R.M. 515, 519 (2d Cir. 1941).

⁴⁷ E.g., Sebastapol Apple Growers Union, 118 N.L.R.B. 1181, 40 L.R.R.M. 1355 (1957), enforced in part, 269 F.2d 705, 44 L.R.R.M. 2755 (9th Cir. 1959).

⁴⁸ Golay & Co. v. NLRB, 447 F.2d 290, 76 L.R.R.M. 1110 (7th Cir. 1971); NLRB v. Rice Lake Creamery Co., 365 F.2d 888, 62 L.R.R.M. 2332 (D.C. Cir. 1966); NLRB v. Charley Toppino & Sons, Inc., 358 F.2d 94, 97, 61 L.R.R.M. 2655, 2656 (5th Cir. 1966); NLRB v. Ellis & Watts Prods., Inc., 344 F.2d 67, 58 L.R.R.M. 2790 (6th Cir. 1965); NLRB v. Decker, 322 F.2d 238, 245, 54 L.R.R.M. 2063, 2069-70 (8th Cir. 1963); NLRB v. Brown & Root, Inc., 311 F.2d 447, 52 L.R.R.M. 2115 (8th Cir. 1963); NLRB v. Ozark Hardwood Co., 282 F.2d 1, 7-8, 46 L.R.R.M. 2823, 2827-28 (8th Cir. 1960); NLRB v. East Texas Steel Castings Co., 255 F.2d 284, 42 L.R.R.M. 2109 (5th Cir. 1958); NLRB v. Kartarik, Inc., 227 F.2d 190, 192-93, 37 L.R.R.M. 2104, 2105-06 (8th Cir. 1955); Marlin-Rockwell Corp. v. NLRB, 133 F.2d 258, 260-61, 11 L.R.R.M. 808, 810-11 (2d Cir. 1943).

⁴⁹ Nabors v. NLRB, 323 F.2d 686, 54 L.R.R.M. 2259 (5th Cir. 1963), modifying and enforcing 134 N.L.R.B. 1078, 49 L.R.R.M. 1289 (1961), cert. denied, 376 U.S. 911 (1964).

plan, with apparent tacit agreement of the Wage and Hour Division of the Department of Labor was *not* taken into consideration in determining the regular hourly rates of employees, nor was it considered in determining the employer's premium rate for coverage under the Louisiana Workmen's Compensation Act, which rate is computed on a percentage of compensation paid to employees. It was, however, included in the employees' W-2 income tax withholding forms. The Court of Appeals for the Fifth Circuit stated:

The Board's discretion to take such affirmative *remedial* action as will effectuate the purposes of the Act includes more than placing the employee in position to assert contractual or legally enforceable obligations. "Back pay" as used in section 10(c) includes the money, whether gratuitous or not, which it is reasonably found that the employee would actually have received in the absence of the unlawful discrimination.⁵⁰

Thus, the amount of profit shares paid to all employees on the basis of specified percentages of the employees' wages, even though purely voluntary and within the discretion of the employer, were included in the back-pay computation. In another case, the Board included in its computation of gross back pay \$675 per year in prizes which an unlawfully discharged salesman would have won in manufacturer sales contests had he not been discharged.⁵¹

In *Niles-Bement-Pond Co.*,⁵² the respondent had for many years given "Christmas gifts" to most of its employees. These gifts consisted of money, the amount being either a percentage of the recipient's entire earnings or his pay for a designated period. The respondent, however, had refused to discuss this subject with the recognized union, contending that it had no legal duty to bargain about gifts. The Board found that Christmas bonuses constitute wages within the meaning of the Act. In agreement with the Board, the Court of Appeals for the Second Circuit stated:

It does, of course, merely beg the question to call them "gifts" and to argue, however persuasively, that gifts per se are not a required subject for collective bargaining. But if these gifts were so tied to the remuneration which employees received for their work that they were in fact a part

⁵⁰ 323 F.2d at 690, 54 L.R.R.M. at 2262.

⁵¹ *Nickey Chevrolet Sales, Inc.*, 195 N.L.R.B. 395, 79 L.R.R.M. 1460 (1972).

⁵² 97 N.L.R.B. 165, 29 L.R.R.M. 1074 (1951), enforced, 199 F.2d 713, 31 L.R.R.M. 2057 (2d Cir. 1952).

of it, they were in reality wages, and so within the statute.⁵³

The court equated such bonuses with other special kinds of remuneration such as pensions, retirement plans or group insurance, subjects upon which an employer is required to bargain.⁵⁴

A sampling of other Christmas gift cases discloses that the Board, with court approval, has included clothing previously given as a bonus as part of the gross back pay.⁵⁵ In *Story Oldsmobile, Inc.*,⁵⁶ the Board held that even if Christmas bonuses were discretionary and voluntary they should be added to the gross back pay of commission salesmen who had been discriminatorily discharged.

In *Rice Lake Creamery Co.*,⁵⁷ the Board held that the claimants were entitled to amounts equivalent to the employer's contribution to a pension insurance plan accruing during the back pay period. Moreover, the Board held that neither the employees' share in the annual insurance premium nor monies received as the cash surrender value of pension policies constituted allowable deductions from gross back pay. Here the trust plan provided for an annuity covering eligible employees at age 65 as well as a life insurance policy. Employees participated in premium payments. Respondent ceased paying premiums during a strike and entered into a private agreement with employees, who executed releases in return for the cash surrender value of the policies. As heretofore noted, it is well settled that private agreements to which the Board is not a party are not binding on the Board in the exercise of its authority to enforce the public policy of the Act.⁵⁸ Thus, the Board held that to permit deductions from gross back pay would be to allow respondent to benefit from its own wrongdoing.

Special problems are created respecting back pay claimants who were compensated in their employment on a commission basis. The Board's handling of such a situation is indicated by its decision in *Folk Chevrolet*.⁵⁹ In computing back pay for discriminatorily

⁵³ NLRB v. Niles-Bement-Pond Co., 199 F.2d 713, 714, 31 L.R.R.M. 2057, 2058 (2d Cir. 1952).

⁵⁴ See *McLoughlin Mfg. Corp. v. NLRB*, 463 F.2d 907, 80 L.R.R.M. 2716 (D.C. Cir. 1972); *NLRB v. Electric Steam Radiator Corp.*, 321 F.2d 733, 736-37, 43 L.R.R.M. 2092, 2095 (6th Cir. 1963); *NLRB v. Toffenetti Restaurant Co.*, 311 F.2d 219, 51 L.R.R.M. 2601 (2d Cir. 1962), cert. denied, 372 U.S. 977 (1963); *NLRB v. Wheeling Pipe Line, Inc.*, 229 F.2d 391, 395-96, 37 L.R.R.M. 2403, 2406-07 (8th Cir. 1956).

⁵⁵ *NLRB v. Moss Planing Mill Co.*, 206 F.2d 557, 559, 32 L.R.R.M. 2530, 2532 (4th Cir. 1953).

⁵⁶ 145 N.L.R.B. 1647, 55 L.R.R.M. 1217 (1964).

⁵⁷ 151 N.L.R.B. 1113, 1126-29, 58 L.R.R.M. 1542, 1544-45 (1965).

⁵⁸ See text at notes 23-26 *supra*.

⁵⁹ 176 N.L.R.B. 277, 76 L.R.R.M. 1701 (1970). See also *Story Oldsmobile*, 145

discharged automobile salesmen who had worked on a commission basis, the Board, selecting a prior year as the base period, established a ratio between the earnings of the four full-time salesmen who worked during the entire back pay period, and the earnings of the discriminatees. The Board then applied this ratio for each discriminatee to the average earnings of the four full-time salesmen for relevant quarters and days of the following year, and then to various portions of the back pay period. Through this method the Board determined the commissions which each discriminatee would normally have been expected to have earned in the portion of the back pay period relevant to his discharge situation.

Claimants are also entitled to the value of their accrued vacations where they suffered losses attributable to the discrimination.⁶⁰ However, where employees are paid when the plant is closed for vacation, they receive back pay for this period but are not allowed vacation pay in addition since this type of program involves payment in lieu of, and not in addition to, their regular pay.⁶¹ Further, no allowance for vacation benefits accrues while claimants are out of work during a strike. The Board reasons that vacations are a form of deferred wages to which employees are not entitled during a strike regardless of whether the strike is economic or is caused or prolonged by the respondent's unfair labor practices. Thus, in one case, the respondent's vacation plan provided for one week's vacation after one year of work. If strike time had been counted, claimants who were reinstated but no longer employed by respondent would have been entitled to this benefit. By deducting strike time, they worked for less than a year and were not eligible for vacation pay.⁶²

An important factor in assessing gross back pay is the availability of employment at the respondent's plant. The Board tolls back pay during those periods where a discriminatee would have been laid off or separated from his employment in any event as the result of a legitimate general reduction of personnel.⁶³ However,

N.L.R.B. 1647, 55 L.R.R.M. 1217 (1964); *American Mfg. Co.*, 167 N.L.R.B. 520, 66 L.R.R.M. 1122 (1967).

⁶⁰ *Brophy Engraving Co.*, 94 N.L.R.B. 719, 725, 28 L.R.R.M. 1096, 1098 (1951).

⁶¹ *Moss Planing Mill Co.*, 110 N.L.R.B. 933, 35 L.R.R.M. 1165 (1954), set aside on other grounds, 224 F.2d 702, 36 L.R.R.M. 2534 (4th Cir. 1955).

⁶² *Mooney Aircraft, Inc.*, 148 N.L.R.B. 1057, 57 L.R.R.M. 1133 (1964); *General Elec. Co.*, 80 N.L.R.B. 510, 23 L.R.R.M. 1094 (1948).

⁶³ *Ellis & Watts Prods., Inc.*, 143 N.L.R.B. 1269, 53 L.R.R.M. 1491 (1963), enforced, 344 F.2d 67, 58 L.R.R.M. 2791 (6th Cir. 1965); *Cleaver-Brooks Mfg. Corp.*, 120 N.L.R.B. 1135, 42 L.R.R.M. 1130 (1958), set aside on other grounds, 264 F.2d 637, 43 L.R.R.M. 2722 (7th Cir.), cert. denied, 361 U.S. 817 (1959); *H. Paul Prigg*, 69 N.L.R.B. 97, 18 L.R.R.M. 1195 (1946), enforced, 172 F.2d 948, 23 L.R.R.M. 2386 (5th Cir. 1949); *Bermite Powder Co.*, 66 N.L.R.B. 678, 17 L.R.R.M. 348 (1946); *Huntington Precision Prods.*, 65 N.L.R.B. 1439, 17 L.R.R.M. 293 (1946).

where a night shift on which the claimant worked was eliminated during the back pay period, he still obtained full back pay. Here the evidence revealed that more machines of the type the claimant had operated were used on the day shift than were formerly operated on both the day and night shift combined.⁶⁴

In determining gross back pay the Board must be careful to approximate as nearly as possible the employment situation which the claimant would have been in absent the discrimination. In carrying out this task the Board must draw a fine line between various portions of an employer's operation, and between various employee groups within the work force. The Board has held, for example, that an employee unlawfully denied reemployment was not entitled to back pay computed on the basis of what he would have earned had he worked during the back pay period at one facility where the discrimination against him occurred at another facility.⁶⁵

In other cases the Board has held that an employee reinstated to his old job, but on a different shift, was entitled to the shift rate differential.⁶⁶ In addition, earnings of independent hauling contractors may be used to compute the gross back pay of a driver where it appears to be the most reasonable method of constructing the expectable economic life of the claimant during the back pay period.⁶⁷

In some cases the jobs of discriminatorily terminated employees are later permanently abolished for nondiscriminatory reasons, such as operational changes or automation. Such an occurrence tolls back pay since the claimants would have been laid off even absent the discrimination. However, if a job which has been abolished can be traced to another job to which the claimant could reasonably have expected to be transferred, back pay will not be tolled.⁶⁸

In computing gross back pay the Board normally takes into account wage increases and other employment attributes that would have benefited the claimant had he not been discharged or otherwise discriminated against. For example, in *Griffin Manufacturing Co.*,⁶⁹ the Court of Appeals for the Fifth Circuit enforced a Board order directing respondent employer to pay quarterly wage increases to reinstated strikers who would have achieved the maximum pay ceiling of their classification "but for" their absence during the strike, even though the employer normally granted such increases on

⁶⁴ Reynolds Int'l Pen Co., 70 N.L.R.B. 932, 18 L.R.R.M. 1425 (1946), enforcement denied on other grounds, 162 F.2d 680, 20 L.R.R.M. 2321 (7th Cir. 1947).

⁶⁵ Associated Truck Lines, Inc., 196 N.L.R.B. No. 36, 80 L.R.R.M. 1220 (1972).

⁶⁶ Western Wirebound Box Co., 188 N.L.R.B. 164, 76 L.R.R.M. 1818 (1971).

⁶⁷ Bowen Transp., 196 N.L.R.B. No. 100, 80 L.R.R.M. 1783 (1972).

⁶⁸ Nibco, Inc., 119 N.L.R.B. 277, 41 L.R.R.M. 1076 (1957).

⁶⁹ Griffin Mfg. Co., 127 N.L.R.B. 417, 46 L.R.R.M. 1030 (1960), enforced, 410 F.2d 1161, 71 L.R.R.M. 2067 (5th Cir. 1969).

a merit basis. This approach represents another example of the Board, with court approval, constructing a fictional situation in order to best effectuate a remedy based upon normal industrial practice, and in the process resolving doubts against the respondent.

C. Deductions from Gross Back Pay

1. Illness During Back Pay Period

If an employee is ill during the back pay period and the employer has no sick leave program, compensation for this period has been held to be deductible from gross back pay.⁷⁰ Thus, back pay is tolled during periods of pregnancy.⁷¹ On the other hand, where there is a direct causal relationship between the claimant's illness and the discrimination, back pay is not tolled. Thus, where a claimant became ill during the back pay period because he was allergic to the paint he was handling in his interim employment, the Board awarded him full back pay during his eleven-month illness since he would not have been disabled but for the respondent's discrimination against him.⁷²

In *American Manufacturing Co.*,⁷³ the Board explicated its position on the illness rule as follows:

The origins and causes of infections and organic infirmities, such as influenza and heart attacks, for example, are usually not known and cannot be determined or assumed. It is ordinarily reasonable to assume, however, that absences from work because of such illnesses would probably have occurred even if the employee had not been discharged. As the claimant's loss therefore cannot be said to have a likely relationship to the unlawful discrimination, disallowance of back pay for all periods of unavailability because of such illnesses is proper. Not only does this approach appear equitable in view of the impossibility of reconstructing a possible cause, but it also affords simplicity of administration in an area which would otherwise be confused and difficult.⁷⁴

⁷⁰ *United States Air Conditioning Corp.*, 128 N.L.R.B. 117, 46 L.R.R.M. 1319 (1960); *Industrial Cotton Mills*, 102 N.L.R.B. 1265, 31 L.R.R.M. 1387, modified and enforced, 208 F.2d 87, 33 L.R.R.M. 2158 (4th Cir. 1953), cert. denied, 347 U.S. 935 (1954); *Niles Fire Brick Co.*, 30 N.L.R.B. 426, 8 L.R.R.M. 61 (1941), enforced, 128 F.2d 258, 10 L.R.R.M. 642 (6th Cir. 1942).

⁷¹ *Happ Bros. Co.*, 90 N.L.R.B. 1513, 26 L.R.R.M. 1356 (1950), enforcement denied on other grounds, 196 F.2d 195, 29 L.R.R.M. 2698 (5th Cir. 1952); *Empire Worsted Mills, Inc.*, 53 N.L.R.B. 683, 13 L.R.R.M. 123 (1943); *California Walnut Growers Ass'n*, 18 N.L.R.B. 493, 5 L.R.R.M. 419 (1934), modified mem., 7 L.R.R.M. 655 (9th Cir. 1941).

⁷² *Charles T. Reynolds*, 155 N.L.R.B. 384, 386, 60 L.R.R.M. 1343, 1344 (1965).

⁷³ 167 N.L.R.B. 520, 66 L.R.R.M. 1122 (1967).

⁷⁴ *Id.* at 522, 66 L.R.R.M. at 1125.

Then, modifying this per se approach, the Board noted that its past practice of disallowing back pay without inquiry as to the nature or cause of the disability was convenient but not always equitable, and held that:

Where an interim disability is closely related to the nature of the interim employment or arises from the unlawful discharge and is not a usual incident of the hazards of living generally, the period of disability will not be excluded from back pay.⁷⁵

In *Hickman Garment Co.*,⁷⁶ for example, the Board held that back pay due an unlawfully discharged employee would not be reduced where intermittent absences during the back pay period did not greatly exceed absences during the base period used in the computation of back pay. In accordance with its obligation to establish deductions from back pay,⁷⁷ the respondent bears the burden of establishing that a period of illness has taken place. The burden then shifts to the General Counsel to show the unusual nature of the disability, its causes and its probable relation to the unlawful discharge.

2. *Interim Earnings*

a. *Elements of Interim Earnings*

Interim earnings, the products of a claimant's fulfillment of his duty to mitigate back pay, are deducted from gross back pay. Generally, all income from employment is deducted as interim earnings whether it results from steady employment or from the performance of odd jobs. However, where a claimant is not credited with gross back pay for varying periods because of lack of work at respondent's plant, the seasonal nature of respondent's operation, or the like, the tolling of gross back pay will also toll deduction of any interim earnings for this period.⁷⁸

There are situations where employment-related income during the back pay period is not deducted from gross back pay as interim earnings. This includes income from "second jobs," strike benefits and assistance, unemployment compensation, a part of workmen's compensation awards, gifts, gratuities and legacies. This section will consider each of these in turn.

Income from a second job which a claimant held during his employment is not charged against him as interim earnings, since it

⁷⁵ Id.

⁷⁶ 196 N.L.R.B. No. 59, 80 L.R.R.M. 1684 (1972), enforced, 471 F.2d 610, 82 L.R.R.M. 2540 (6th Cir. 1973).

⁷⁷ See text at notes 190-206 *infra*.

⁷⁸ *San Juan Mercantile Corp.*, 135 N.L.R.B. 698, 49 L.R.R.M. 1549 (1962).

results from work he would have performed in any event.⁷⁹ For example, a claimant's earnings during the back pay period from a home improvement business which he operated while in the employ of respondent were held not to constitute interim earnings.⁸⁰ Of course, if the claimant increases the hours and earnings in his second job as a result of his forced unemployment, an amount equal to the increase would constitute interim earnings deductible from gross back pay.⁸¹

Where strike benefits were paid to employees who were required to do some picketing as a condition of obtaining the benefits, the Board held that the benefits paid were unrelated to the number of hours devoted to picketing and were not included in interim earnings since they represented collateral benefits flowing from the claimants' association with their union and were not wages or earnings.⁸²

Unemployment compensation payments are not regarded as earnings and may not be charged against claimants as interim earnings.⁸³ Inasmuch as back pay constitutes wages,⁸⁴ those claimants who draw unemployment compensation during the back pay period and who eventually receive back pay as a result of Board proceedings have, in fact, been in receipt of "overpayments." Consequently, some states require the claimants to return the compensation for those periods for which they were awarded back pay.

Income from public works relief projects do not constitute interim earnings where they are in the nature of welfare payments or are subject to repayment following the award of back pay.⁸⁵ Neither are Veterans Administration disability payments chargeable as interim earnings.⁸⁶

⁷⁹ *Belle Steel Co.*, 135 N.L.R.B. 1378, 49 L.R.R.M. 1719 (1962); *Acme Mattress Co.*, 97 N.L.R.B. 1439, 29 L.R.R.M. 1247 (1952); *Link-Belt Co.*, 12 N.L.R.B. 854, 4 L.R.R.M. 200 (1939), enforced in part, 110 F.2d 506, 6 L.R.R.M. 869 (7th Cir. 1940), rev'd as to those portions not enforced, 311 U.S. 584 (1941); *Louis Hornick Co.*, 2 N.L.R.B. 983, 1 L.R.R.M. 71 (1937).

⁸⁰ *Rice Lake Creamery Co.*, 151 N.L.R.B. 1113, 1114 n.4, 58 L.R.R.M. 1542 (1965).

⁸¹ *R.M. Johnson*, 41 N.L.R.B. 263, 285, 10 L.R.R.M. 111 (1942).

⁸² *Lozano Enterprises*, 152 N.L.R.B. 258, 59 L.R.R.M. 1076 (1965); *Rice Lake Creamery Co.*, 151 N.L.R.B. 1113, 58 L.R.R.M. 1542 (1965); *Standard Printing Co.*, 151 N.L.R.B. 963, 58 L.R.R.M. 1540 (1965); *Florence Printing Co.*, 145 N.L.R.B. 141, 54 L.R.R.M. 1325 (1963), enforced, 333 F.2d 289, 56 L.R.R.M. 2503 (4th Cir. 1964).

⁸³ *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1957); *NLRB v. Marshall Field & Co.*, 129 F.2d 169, 10 L.R.R.M. 753 (7th Cir. 1942), aff'd, 318 U.S. 253 (1943); *Aerosonic Instrument Corp.*, 128 N.L.R.B. 412, 46 L.R.R.M. 1337 (1960); *Rockwood Stove Works*, 63 N.L.R.B. 1297, 17 L.R.R.M. 58 (1945).

⁸⁴ *Social Security Bd. v. Nierotko*, 327 U.S. 358 (1946).

⁸⁵ See *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940); *Vegetable Oil Prods. Co.*, 5 N.L.R.B. 52, 53, 1A L.R.R.M. 468 (1938).

⁸⁶ *Burk Bros.*, 21 N.L.R.B. 1281, 6 L.R.R.M. 174 (1940), enforced, 117 F.2d 686, 7 L.R.R.M. 373 (3d Cir.), cert. denied, 313 U.S. 588 (1941).

The Board does not toll back pay during a period of incapacity due to an industrial accident on an interim job.⁸⁷ There has been a change of policy, however, respecting the qualification of workmen's compensation awards as interim earnings deductible from gross back pay. In *American Manufacturing*, the Board included as interim earnings that portion of the award which represented partial payment for loss of earnings.⁸⁸ In so doing, the Board overruled its decision in *Melrose Processing Co.*,⁸⁹ where it had held that workmen's compensation payments are not to be considered as interim earnings. But in *American Manufacturing* the Board pointed out that workmen's compensation awards consist of two components—one being a payment for lost wages and the other being reparation for physical damage suffered.⁹⁰ In order to avoid double payment to a claimant, the Board now considers as interim earnings that portion of the workmen's compensation award which is reparation for lost wages but not that portion which compensates the claimant for physical damages suffered and which is unrelated to wages earned.

Where a claimant performs some work for another sporadically and gratuitously during the back pay period and the other repays in kind, the Board has generally held that the value of this work does not constitute interim earnings. However, in some cases an arrangement to perform such work in return for another's services may constitute interim earnings even though neither party receives cash for the work rendered. Such an arrangement must be established convincingly and shown to amount to a firm mutual agreement. No such agreement was found in a case where the claimant occasionally lent a hand to his nephew on weekdays without hope or expectation of compensation. The Board held that the value of these services did not constitute interim earnings.⁹¹ A legacy is not treated as interim earnings. Thus, where during the back pay period a claimant entered into a firm arrangement to take care of an elderly man until he died in consideration of a legacy, the legacy was held to be a gift and not interim earnings. However, the claimant was considered to be off the labor market from the day she moved into the legator's home to care for him and back pay was tolled from that date until the legator died.⁹²

⁸⁷ Charles T. Reynolds, 155 N.L.R.B. 384, 60 L.R.R.M. 1343 (1965); Moss Planing Mill Co., 110 N.L.R.B. 933, 35 L.R.R.M. 1165 (1954), set aside on other grounds, 224 F.2d 702, 36 L.R.R.M. 2534 (4th Cir. 1955).

⁸⁸ 167 N.L.R.B. 520, 66 L.R.R.M. 1122 (1967).

⁸⁹ 151 N.L.R.B. 1352, 58 L.R.R.M. 1638 (1965).

⁹⁰ 167 N.L.R.B. at 523, 66 L.R.R.M. at 1123.

⁹¹ Belle Steel Co., 135 N.L.R.B. 1378, 49 L.R.R.M. 1719 (1962), supplementing 131 N.L.R.B. 1083, 48 L.R.R.M. 1205 (1961).

⁹² Empire Worsted Mills, Inc., 53 N.L.R.B. 683, 693-95, 13 L.R.R.M. 123, 124 (1943).

Another respondent claimed a setoff allowance based upon the fact that a claimant paid a lesser amount for her meals while employed at a hospital than she had paid while employed by respondent. The Board rejected this claim, holding that the hospital operated a cafeteria for its own, not the employee's, benefit and that this benefit permitted the hospital to have the employee more accessible to it. Further, respondent gave no consideration to the comparative quality of the meals involved.⁹³

There are benefits other than wages, however, which are considered to be interim earnings. For example, where an interim employer furnished meals as part of the claimant's wages, the fair value of such meals was added to interim earnings.⁹⁴ Again, where a claimant who unsuccessfully sought work after his discriminatory discharge purchased a cafe and engaged in self-employment, the Board added \$50 per month to his interim earnings as the fair value of the food which the claimant and his family consumed in their cafe.⁹⁵ Where a respondent gives a claimant severance pay at the time of his discriminatory discharge, this amount does not constitute interim earnings.⁹⁶

It sometimes happens, of course, that there is a discrepancy between oral testimony concerning interim earnings and the available documentary evidence. The Board normally accepts Social Security records as the best evidence of a claimant's interim earnings, and gives such records a preferred evidentiary status vis-à-vis contradictory oral testimony. In one case, the Board held Social Security records to be controlling as to interim earnings where a dischargee's testimony conflicted with the records; the Board also refused to include as interim earnings amounts testified about which did not appear in the Social Security records.⁹⁷

b. *Expenses Deductible from Interim Earnings*

During the course of the back pay period a claimant often incurs out-of-pocket expenses which result directly from his loss of employment and the fulfillment of his duty to mitigate back pay by making a reasonable effort to find work. Claimants are generally entitled to credit for such reasonable expenses, which are deductible from interim earnings. The most common expense involves travel in seeking work and travel to the new job.

⁹³ *I. Posner, Inc.*, 154 N.L.R.B. 202; 214-15, 59 L.R.R.M. 1720 (1965).

⁹⁴ *Empire Worsted Mills, Inc.*, 53 N.L.R.B. 683, 692, 13 L.R.R.M. 123, 124 (1943).

⁹⁵ *W.C. Nabors*, 134 N.L.R.B. 1078, 1099, 49 L.R.R.M. 1289 (1961).

⁹⁶ *Press Co.*, 13 N.L.R.B. 630, 4 L.R.R.M. 333 (1939), modified and enforced, 118 F.2d 937, 7 L.R.R.M. 631 (D.C. Cir. 1940), cert. denied, 313 U.S. 595 (1941).

⁹⁷ *Associated Transp. Co.*, 194 N.L.R.B. 62, 78 L.R.R.M. 1678 (1971). See also *Hickman Garment Co.*, 196 N.L.R.B. No. 59; 80 L.R.R.M. 1684 (1972), enforced, 471 F.2d 610, 82 L.R.R.M. 2540 (6th Cir. 1973).

Thus, the Board allows expenses, such as mileage and other travel expenses, where such travel is necessary to secure interim employment as, for example, where claimants are forced to go to other cities to obtain work.⁹⁸ Also, the estimated expense which a claimant incurred in traveling to his interim employment in excess of the sum he would have spent in traveling to respondent's plant is an allowable expense.⁹⁹ Generally an employee's private automobile expense is computed on a fixed-sum-per-mile basis. However, where a claimant shares expenses with other claimants while traveling to an interim job, or while seeking interim employment, such expenses are computed on the basis of his out-of-pocket cost rather than on a mileage basis.¹⁰⁰

Union dues are not ordinarily an allowable item of expense, even though the claimant incurred expenses for dues over and above what he normally would have had to pay if he had continued in the employ of respondent.¹⁰¹ On the other hand, registration fees for the use of a union hiring hall during the back pay period have been recognized by the Board as an allowable expense.¹⁰² And where a claimant was required to pay a union initiation fee as a condition of his interim employment, this was held by the Board to constitute an allowable deduction from interim earnings since it would not have been incurred by the claimant but for the discrimination.¹⁰³

The expenses must be reasonable. Where a claimant made an extended round trip of 1170 miles, purportedly in search of work, the Board disallowed the expense of the trip, holding that it was not reasonable for the claimant to travel such a distance, particularly where he had no positive assurance that a job would be available for him.¹⁰⁴ However, with respect to a discriminatee who accepted interim employment 477 miles from his home, the Board allowed as

⁹⁸ Charles T. Reynolds, 155 N.L.R.B. 384, 60 L.R.R.M. 1343 (1965); Morrison Cafeterias Consol., Inc., 148 N.L.R.B. 139, 56 L.R.R.M. 1483 (1964); Ampruf Paint Co., 132 N.L.R.B. 87, 48 L.R.R.M. 1323 (1961); Kohler Co., 128 N.L.R.B. 1062, 46 L.R.R.M. 1389 (1960), enforcement denied, 300 F.2d 699, 47 L.R.R.M. 2609 (D.C. Cir.), cert. denied, 365 U.S. 869 (1961); Symms Grocer Co., 109 N.L.R.B. 346, 34 L.R.R.M. 1326 (1954); Climax Spinning Co., 101 N.L.R.B. 1193, 31 L.R.R.M. 1206 (1952); Williams Lumber Co., 96 N.L.R.B. 635, 28 L.R.R.M. 1545 (1951), enforced, 195 F.2d 669, 29 L.R.R.M. 2633 (4th Cir.), cert. denied, 344 U.S. 834 (1952); Pacific Mills Co., 91 N.L.R.B. 60, 26 L.R.R.M. 1453 (1950); Indianapolis Wire-Bound Box Co., 89 N.L.R.B. 617, 26 L.R.R.M. 1005 (1950); Abbott Worsted Mills, Inc., 36 N.L.R.B. 545, 9 L.R.R.M. 163 (1941), enforced, 127 F.2d 438, 10 L.R.R.M. 590 (1st Cir. 1942).

⁹⁹ West Texas Utils., Inc., 109 N.L.R.B. 936, 34 L.R.R.M. 1476 (1954).

¹⁰⁰ Rice Lake Creamery Co., 151 N.L.R.B. 1113, 1114, 58 L.R.R.M. 1542, 1548 (1965).

¹⁰¹ Id.; West Texas Utils., Inc., 109 N.L.R.B. 936, 34 L.R.R.M. 1476 (1954).

¹⁰² Miami Coca-Cola Bottling Co., 151 N.L.R.B. 892, 58 L.R.R.M. 1675 (1965); NLRB v. Houston Maritime Ass'n, 337 F.2d 333, 57 L.R.R.M. 2170 (5th Cir. 1964).

¹⁰³ Rice Lake Creamery Co., 151 N.L.R.B. 1113, 1114, 58 L.R.R.M. 1542, 1548 (1965), enforced in part, 365 F.2d 888, 62 L.R.R.M. 2332 (D.C. Cir. 1966).

¹⁰⁴ W.C. Nabors, 134 N.L.R.B. 1078, 1098, 49 L.R.R.M. 1289 (1961).

an expense deductible from his interim earnings fifty dollars per week for room and board, and travel expenses for one round trip to his home during the four-week back pay period.¹⁰⁵

The Board draws a distinction between expenses directly attributable to a search for interim employment and other losses or damages incidental to the discrimination. For example, where a claimant suffered a \$200 loss on recently purchased furniture which she had to sell in order to accept a job in another state, the Board refused to allow such loss as a deductible expense.¹⁰⁶ Also disallowed as expenses are foreclosures on houses, automobiles, appliances and the like, resulting from a claimant's inability to maintain installment payments during the back pay period.¹⁰⁷

Although a claimant is entitled to the difference between his net earnings, if any, from self-employment and his gross back pay, the Board holds that he is not entitled to back pay for any losses he incurs in self-employment.¹⁰⁸

3. *Willful Loss of Earnings*

Since the *Phelps Dodge*¹⁰⁹ decision, both the Board and the courts have agreed that discriminatees have a duty to mitigate back pay. This duty requires only an honest, good faith effort to obtain interim employment, in which success is not the measure of the sufficiency of the search.¹¹⁰ Some commentators would describe the obligation of a discriminatee in other terms. For example, Corbin says:

It is not infrequently said that it is the "duty" of the injured party to mitigate his damages so far as that can be done by reasonable effort on his part. Since there is no judicial penalty, however, for his failure to make this effort, it is not desirable to say that he is under a "duty." His recovery against the defendant will be exactly the same whether he makes the effort and mitigates his loss, or not; but if he fails to make the reasonable effort, with the result that his injury is greater than it would otherwise have been, he cannot recover judgment for the amount of this avoidable and unnecessary increase. The law does not

¹⁰⁵ Southern Household Prods. Co., 203 N.L.R.B. No. 138, 83 L.R.R.M. 1247 (1973).

¹⁰⁶ Empire Worsted Mills, Inc., 53 N.L.R.B. 683, 693-94, 13 L.R.R.M. 123, 124 (1943).

¹⁰⁷ Moss Planing Mill Co., 110 N.L.R.B. 933, 35 L.R.R.M. 1165 (1954), set aside on other grounds, 224 F.2d 702, 36 L.R.R.M. 2534 (4th Cir. 1955).

¹⁰⁸ English Mica Co., 101 N.L.R.B. 1061, 31 L.R.R.M. 1177 (1952).

¹⁰⁹ Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

¹¹⁰ East Texas Steel Castings Co., 116 N.L.R.B. 1336, 38 L.R.R.M. 1470 (1956); Cashman Auto Co., 109 N.L.R.B. 720, 34 L.R.R.M. 1429 (1954), enforced, 223 F.2d 832, 836, 36 L.R.R.M. 2269, 2271-72 (1st Cir. 1955).

penalize his inaction; it merely does nothing to compensate him for the loss that he helped to cause by not avoiding it.¹¹¹

As the efforts by different claimants in their quest for employment present widely varying factual situations, it is manifest that the Board cannot lay down a single standard which will fit the circumstances of every case. The trial examiner in *Mastro Plastics Corp.*,¹¹² a leading case, noted:

But it can be said that in broad terms a good-faith effort requires conduct consistent with an inclination to work and to be self-supporting and that such inclination is best evidenced not by a purely mechanical examination of the number or kind of applications for work which have been made, but rather by the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment. Circumstances include the economic climate in which the individual operates, his skill and qualifications, his age, and his personal limitations.¹¹³

The law relating to willful loss generally involves the adequacy of the search, the suitability of the job, the quitting of interim employment and the claimant's venture into self-employment during the back pay period.

a. *Adequacy of the Search for Work*

In *Southern Silk Mills, Inc.*,¹¹⁴ the Board ruled that the obligation of the discriminatee is satisfied if he makes a reasonable effort to find new employment substantially equivalent to the position from which he was discharged and suitable to a person of his background and experience. The Sixth Circuit Court of Appeals refused to enforce the Board's order, holding that after a reasonable time the claimant must lower his sights. The court explained that:

We are of the opinion, however, that the usual wage earner, reasonably conscious of the obligation to support himself and his family by suitable employment, after inability over a reasonable period of time to obtain the kind of employment to which he is accustomed, would consider

¹¹¹ 5 A. Corbin, Contracts § 1039, at 242-43 (1964).

¹¹² 136 N.L.R.B. 1342, 31 L.R.R.M. 1494 (1953), enforced in part, 354 F.2d 170, 60 L.R.R.M. 2578 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966).

¹¹³ 136 N.L.R.B. at 1359.

¹¹⁴ 116 N.L.R.B. 769, 38 L.R.R.M. 1317 (1956), enforcement denied, 242 F.2d 697, 39 L.R.R.M. 2647 (6th Cir.), cert. denied, 355 U.S. 871 (1957).

other available, suitable employment at a somewhat lower rate of pay "desirable new employment."¹¹⁵

Here the court ruled that the employees, discharged textile workers, should have accepted jobs in the retail trade or in a freezing and preserving plant.

Other appellate courts have, on occasion, disagreed with the Board. In one case, for example, the Court of Appeals for the Ninth Circuit reversed the Board and held that an employee's insistence on waiting for a position in the same company amounted to a willful refusal to accept equivalent employment.¹¹⁶ The Court of Appeals for the Fourth Circuit held in another case¹¹⁷ that the Board had erred in holding that discharged sawmill workers did not have to accept agricultural jobs in the area. On remand, the Board noted that the court had not said that a claimant had to lower his sights immediately after discharge but only after a reasonable time, leaving it up to the Board to decide what period was reasonable; the Board found a three-month period to be reasonable and the court affirmed on appeal.¹¹⁸ In complying with this rule, the claimant must walk a tightrope since, paradoxically, if he accepts a lower paying job too quickly, respondent employer may seek to disqualify him from receiving back pay by contending that he willfully incurred losses by *not* persisting in his search for more lucrative employment. This was the argument of the respondent in *J.H. Rutter-Rex Manufacturing Co.*,¹¹⁹ where plastic factory employees, unable to find factory work, took jobs as domestics. The Board found that because of their lack of education and training these claimants had not engaged in an unjustifiable refusal to seek desirable interim employment, and the Court of Appeals for the Fifth Circuit enforced the Board's order with some modifications. Respondents raised the same defense, albeit without success, in *East Texas Steel Castings Co.*,¹²⁰ where a welder accepted a job as a taxicab driver, and in *Moss Planing Mill Co.*,¹²¹ where a fireman sought and found work as an agricultural worker.

The Board recognizes that a claimant may not be able to secure

¹¹⁵ 242 F.2d at 700, 39 L.R.R.M. at 2649.

¹¹⁶ NLRB v. Alaska S.S. Co., 211 F.2d 357, 33 L.R.R.M. 2636 (9th Cir. 1954).

¹¹⁷ NLRB v. Moss Planing Mill Co., 224 F.2d 702, 36 L.R.R.M. 2534 (4th Cir. 1955).

¹¹⁸ Moss Planing Mill Co., 119 N.L.R.B. 1733, 41 L.R.R.M. 1381, enforced, 256 F.2d 653, 42 L.R.R.M. 2393 (4th Cir. 1958).

¹¹⁹ 158 N.L.R.B. 1414, 62 L.R.R.M. 1456 (1966), enforcement denied in part and granted in part, 399 F.2d 356, 68 L.R.R.M. 2916 (5th Cir. 1968), rev'd on other grounds, 396 U.S. 258 (1969).

¹²⁰ 116 N.L.R.B. 1336, 1357, 38 L.R.R.M. 1470, 1472-73 (1956).

¹²¹ 119 N.L.R.B. 1733, 41 L.R.R.M. 1381, enforced, 256 F.2d 653, 42 L.R.R.M. 2393 (4th Cir. 1958).

interim employment immediately following his unlawful termination, and thus exercises some latitude in allowing such an individual to commence his search for work in an orderly fashion. This approach of the Board constitutes in effect a moderating factor concerning the claimant's obligation to mitigate damages. In one recent case where it applied this principle, the Board held that an employee was entitled to back pay for a two-week period immediately following his discriminatory layoff despite a claim that he did not seek new employment during that period.¹²²

The difficult issue in every case is whether a claimant's effort to find work is reasonable. In *Seamprufe, Inc.*,¹²³ the Board found that the claimant garment worker was discharged on January 3, 1948, and was offered reinstatement by respondent almost four years later on November 31, 1951. She failed to register with the United States Employment Service and did not obtain any employment during this period. She made her first application for work on June 15, 1948, to the only garment factory other than respondent's in McAllister, a town with a population of 12,000. She was told that she would be called if needed and that this factory already had a long waiting list of applicants. There were in McAllister some 22 manufacturing plants, which in 1947 employed a total of 341 employees. At that time, the garment factory to which she applied had only 11 employees on its payroll. She then applied unsuccessfully at the telephone company. Her next attempt was a year later in August 1949, at which time she again applied, without success, at the same garment factory. Then, in October 1950, she applied for a position as a nurse's aide at the McAllister Hospital and was told that she would have to take a training course without pay and that, even then, there was no assurance that she would be employed. In July 1951, she applied at the garment factory for the third time with unfavorable results. By this time, the garment factory had only six employees. A majority of the Board first found that, since the claimant did not seek work from January 3, 1948, to June 15, 1948, she was not entitled to back pay for that period. However, from that date she waited a year before seeking work. Because of the limited opportunities available, the Board held that she could not be expected to make a daily canvas of business establishments absent some evidence that such a search would prove fruitful. The Board majority also held, however, that she should have made efforts at least every six months and, accordingly, awarded her back pay for a period of six months from the date on which she made a search for work. Member Peterson dissented, pointing out that the claimant

¹²² *Saginaw Aggregates, Inc.*, 198 N.L.R.B. No. 78, 81 L.R.R.M. 1025 (1972).

¹²³ 103 N.L.R.B. 763, 31 L.R.R.M. 1566 (1953).

had not only failed to register with the Employment Service but had only applied at four different establishments in 46 months. This did not, in his opinion, constitute a reasonable search. He observed that during this period she had no income other than her husband's, that she was not a skilled worker, and that there was no showing that employment opportunities were limited in the vicinity in which she lived.

On reconsideration,¹²⁴ the Board reversed itself and disqualified the claimant entirely, holding that although she may have been justified in not reapplying for the hospital job because of her lack of training in that field, no reason appeared why she could not have reapplied at the telephone company, applied at a local laundry, or made other applications elsewhere during the lengthy back pay period. The Board observed that employees may be awarded back pay only during periods when they are "on the labor market."

In another case, a garment worker went to nursing school during the back pay period, ultimately qualifying as a nurse. The Board held that no back pay was due while she was attending school. It also concluded that she had removed herself from the sewing labor market upon completion of her training and had thus cut off back pay.¹²⁵ Another garment worker became an apprentice bricklayer during his back pay period. The Board held that he remained on the labor market and was eligible for back pay until he became a journeyman bricklayer and ceased seeking other employment, at which point he was held to have abandoned the garment industry and his back pay was cut off.¹²⁶

A claimant was self-employed in sewing work at her home, averaging about \$10 a week. She did this to support her children. The Board found that she was unable to earn more money during this period because she preferred to stay at home and care for her children. Thus, the Board found a partial loss and concluded that her gross back pay should be computed on the basis of two days a week at respondent's plant. The money she earned in sewing was deducted from this amount as interim earnings. The respondent's contention that she would not have returned to the plant during this period was rejected since full employment with respondent would have enabled her to afford a baby sitter.¹²⁷

One claimant had virtually no earnings over a two-year period and yet the Board found no willful loss of earnings under the special

¹²⁴ *Seamprufe, Inc.*, 106 N.L.R.B. 1143, 32 L.R.R.M. 1630 (1953).

¹²⁵ *J.H. Rutter-Rex Mfg. Co.*, 158 N.L.R.B. 1414, 1420, 62 L.R.R.M. 1456 (1966).

¹²⁶ 158 N.L.R.B. at 1419-20.

¹²⁷ *Id.* at 1422, 62 L.R.R.M. at 1457.

circumstances which existed. The claimant was a 59 year-old woman who had worked for respondent for more than twelve years before her discharge. She sought work and answered advertisements for domestic work, but was rejected because of her age and lack of experience as a domestic. The Board found that she was inclined to work and the fact that she was not successful did not bar her back pay claim.¹²⁸

In *Harvest Queen Mill & Elevator Co.*,¹²⁹ an employee failed to register with the Employment Service after his August 7, 1947, discharge, and did not make a serious effort to secure employment in his home town. He drove to Amarillo, Texas, where he was offered a job in the Fire Department at \$140 a month. He refused the job as it would have meant moving to Amarillo and he considered the pay inadequate. He then went to Fort Worth, Texas, and unsuccessfully applied at only one mining company. On September 20, 1947, he obtained a job at a concern where the work was sporadic, leaving that position on April 1, 1948. He then went to work as a tractor operator until July 17, 1948. The trial examiner, with Board approval, concluded that the claimant had not made a serious effort to find work from August 7, 1947, through July 17, 1948. He characterized the claimant's trips to Amarillo and Fort Worth as "junkets" and disallowed his claim for expenses for these trips.¹³⁰ With respect to the job at which work was spasmodic he concluded that the claimant could have found work during the time he was idle, and noted that during this period the claimant had only earned \$300, or about \$54 per month.

Another claimant failed to seek work in his own home town. Instead he made a round trip of 1170 miles, purportedly seeking employment. He then moved some distance from his home state of Louisiana to Arkansas, where his wife's mother had a vacant house. He sought work there, but no jobs were available. He did look for work in a town thirty miles away. The trial examiner found that the claimant's primary reason for moving to Arkansas was to enable his wife to be near her aged mother and that the claimant had not made a good faith, diligent effort to seek gainful employment. Accordingly, the claimant was denied back pay for this period of time.¹³¹

A garment worker, following a period during which she was off the labor market due to pregnancy, worked at home doing ironing and earned \$7 a week. Since she made no other search for work the Board deemed the self-employment insufficient and denied her back

¹²⁸ 158 N.L.R.B. at 1450.

¹²⁹ 90 N.L.R.B. 320, 26 L.R.R.M. 1189 (1950).

¹³⁰ Id. at 332-34, 26 L.R.R.M. at 1190-91.

¹³¹ W.C. Nabors, 134 N.L.R.B. 1078, 1098, 49 L.R.R.M. 1289 (1961).

pay for this period.¹³² Another claimant who held various jobs during the back pay period accepted work for a time as a baby sitter, working about twenty-five hours a week. This was held not to constitute a willful loss of earnings.¹³³

A claimant who had been employed as a garment worker worked as a maid two days a week during the back pay period. The Board held that she incurred a partial loss by not seeking work for at least five days a week and awarded her only forty percent of her quarterly back pay. On the other hand, another garment worker attempted unsuccessfully to obtain work in that industry and finally accepted housework from two to five days a week. She testified credibly that she was not satisfied with what she earned but "was picking what she could get at the time." Here the Board found no willful loss, holding that under the circumstances it was reasonable for her to lower her sights to housework after she was unable to find any work in the garment factories and by so doing mitigating her back pay amount rather than incurring a willful loss of earnings.¹³⁴ Thus, it may be said that it is the adequacy of the search and the state of mind of the claimant which governs the question whether he has incurred a willful loss. The fact that he remains unemployed for an extended period is not conclusive, although it may be evidence of the inadequacy of his search.

The Board is not quick to draw the conclusion that an unlawfully terminated employee has demonstrated a disinclination to seek or obtain gainful employment. Where, for example, the evidence at a back pay hearing showed that the claimant had rejected interim employment with another company more than fifty miles away from his home, the Board held that such rejection was reasonable under the circumstances and did not charge the claimant with a willful loss during the period of time following such rejection.¹³⁵ In another case a court of appeals enforced the Board's back pay order despite the employer's contention that many discharged employees had moved to less industrialized areas. The court held that such generalizations that employees did not want to work could not prove that specific back pay claimants had incurred willful loss of earnings.¹³⁶

¹³² *J. H. Rutter-Rex Mfg. Co.*, 158 N.L.R.B. 1414, 1454, 62 L.R.R.M. 1456 (1966).

¹³³ 158 N.L.R.B. at 1488.

¹³⁴ *Id.* at 1455, 1467.

¹³⁵ *Madison Courier, Inc.*, 180 N.L.R.B. 781, 76 L.R.R.M. 1802 (1970), affirmed in part, 460 F.2d 1240, 80 L.R.R.M. 3377 (D.C. Cir. 1972).

¹³⁶ *Reynolds Box Co.*, 155 N.L.R.B. 389, 60 L.R.R.M. 1343, enforced, 399 F.2d 668, 68 L.R.R.M. 2974 (6th Cir. 1968).

b. *Quitting an Interim Job*

Another type of willful loss may occur when claimants quit interim jobs. In *Mastro Plastics Corp.*,¹³⁷ the Board held that a claimant who willfully incurs losses by either quitting or refusing substantially equivalent employment is not deprived of his entire claim, but only so much of it as he would have earned had he retained or obtained that interim job. Thus, in *Knickerbocker Plastic Co.*,¹³⁸ claimants had obtained employment which the Board found was not inconvenient, distasteful or malodorous. Since the jobs were not unsuitable the claimants were not justified in quitting them. Thus, from the date they quit and for the balance of the back pay period, each of the claimants was deemed to have earned the hourly wage being earned at the time the quitting occurred. This was offset as interim earnings from gross back pay. Should the claimants have secured other positions thereafter and earned more than the offset, the actual amount of interim earnings rather than the lesser amount would have been deducted from gross back pay.

On the other hand, it has long been established that a discriminatee is not required to mitigate his damages by continuing in a job which is dangerous to life or limb or which is not "suitable."¹³⁹ Where a claimant quit an interim job after three or four weeks because he was required to work alone on a machine which customarily required two men and thus feared an injury while no one would be in attendance, the quitting was found to be for good cause.¹⁴⁰ In another case, a claimant quit his interim employment because he had been switched from the day to the night shift and the lighting was poor. Rather than endanger his eyesight, he quit and attempted, unsuccessfully, to operate a gas station which he had leased. The Board, reversing the trial examiner, ruled that his departure did not constitute a willful loss since he was not obligated to work under dangerous conditions.¹⁴¹

When claimants undertake to do more than is required in seeking employment, they may disqualify themselves. Thus in *Ozark Hardwood Co.*,¹⁴² four employees left the state and found interim employment which was substantially equivalent to the jobs from

¹³⁷ 136 N.L.R.B. 1342, 50 L.R.R.M. 1006 (1962).

¹³⁸ 132 N.L.R.B. 1209, 1215, 48 L.R.R.M. 1505, 1507 (1961).

¹³⁹ *Mastro Plastics Corp.*, 136 N.L.R.B. 1342, 50 L.R.R.M. 1006 (1962); *Columbia Pictures Corp.*, 82 N.L.R.B. 568, 23 L.R.R.M. 1615 (1949).

¹⁴⁰ *J.H. Rutter-Rex Mfg. Co.*, 158 N.L.R.B. 1414, 62 L.R.R.M. 1456 (1966).

¹⁴¹ *L.B. Hosiery Co.*, 99 N.L.R.B. 630, 30 L.R.R.M. 1115 (1952).

¹⁴² 119 N.L.R.B. 1130, 41 L.R.R.M. 1243 (1957), enforced in part, 282 F.2d 1, 46 L.R.R.M. 2823 (8th Cir. 1960).

which they had been discharged. They then quit to return home. The Board held that, although they had no obligation to leave the state to find jobs, once having done so and having found substantially equivalent work, to quit was to incur willful loss of earnings. Thus back pay was cut off at the time of the quitting. So, too, in *American Bottling Co.*,¹⁴³ a claimant left Corpus Christi, Texas, and went to Chicago, where he found a job paying higher wages than he had received from the respondent. After returning for the hearing before the Board on a thirty-day leave of absence, he spent time with his father who had been taken ill. Instead of returning to Chicago, he accepted lower paying interim jobs. Then he returned to Chicago to his higher paying job, from which he was discharged because of excessive absenteeism. Thereafter, he secured other lower paying jobs. The Board cut off back pay as of the day he first secured the higher paying job in Chicago, holding that he incurred willful losses by not maintaining this position.

Where an employee quits, without good cause, a higher paying job for a lower paying one in the same area, the monetary difference between the two will be deducted from the gross back pay. Thus, in one case,¹⁴⁴ the claimant quit an interim job and accepted a position as a trainee in the electronics field, paying \$20 less per week. As a trainee he also received \$20 per week from the Government under the G.I. Training Bill in addition to his wages. Nevertheless, the Board held that by taking a job at \$20 per week less than he had received, he had incurred willful loss to the extent of \$20 per week.

A claimant who quit her job after an unfair labor practice strike had ended and applied for reinstatement was told by respondent that there were no vacancies. She attempted to return to her interim job but found that it had been filled. The Board held that she had not incurred willful loss of earnings and awarded her back pay for this period.¹⁴⁵

c. *Self-Employment*

It is well established that bona fide self-employment will be regarded as compliance with the obligation imposed upon a discharged employee to use reasonable diligence to keep himself in gainful employment and thus discharge his obligation of minimizing or mitigating his damages.¹⁴⁶ In *NLRB v. Armstrong Tire & Rubber Co.*,¹⁴⁷ the Fifth Circuit Court of Appeals held that an employee's

¹⁴³ 116 N.L.R.B. 1303, 38 L.R.R.M. 1465 (1956).

¹⁴⁴ *Somerville Cream Co.*, 106 N.L.R.B. 1155, 32 L.R.R.M. 1638 (1953).

¹⁴⁵ *J.H. Rutter-Rex Mfg. Co.*, 158 N.L.R.B. 1414, 1494, 62 L.R.R.M. 1456 (1966).

¹⁴⁶ *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

¹⁴⁷ 263 F.2d 680, 43 L.R.R.M. 2577, motion for leave to file petition for rehearing denied, 265 F.2d 212, 44 L.R.R.M. 2203 (5th Cir. 1959).

part-time work in his wife's ice-house was not, in fact, bona fide self-employment. On the other hand, in *Nabors v. NLRB*,¹⁴⁸ the court held that the claimant had engaged in bona fide self-employment when he leased and operated a gasoline station. Another claimant was held to be so engaged when he operated a farm.¹⁴⁹ Also qualifying was the operation of a taxi business by a 57 year-old man for whom opportunities for obtaining interim employment were limited.¹⁵⁰

The Board has also held that it is "reasonable to assume absent special circumstances, that a person who leaves a job for self-employment expects to improve his financial position" rather than incur a willful loss.¹⁵¹ In *Cashman Auto Co.*,¹⁵² for example, two employees sought work without success and then opened a small private auto repair business which was also financially unsuccessful during a large portion of the back pay period. They continued to seek employment while operating their private business. It was held that where, as here, the claimants made an earnest and continuous attempt to find jobs, would have returned to respondent's employ had they been asked at any time during this period, and started and continued their own business in the hope of making a profit, they incurred no willful losses. The Court of Appeals for the First Circuit observed that the most that can be said about these employees

is that their judgment was poor in not putting in full time at their repair shop, or that their managerial and book-keeping skills were so undeveloped that it was poor judgment for them to have undertaken their business venture at all.¹⁵³

The court concluded that "the principle of mitigation of damages does not require success; it only requires an honest good faith effort, and the Board found on ample evidence that both men made such an effort."¹⁵⁴

In other cases, the Board, with the approval of the courts of appeals, has likewise held that mere lack of success in self-employment does not in and of itself disqualify a back pay claimant. For example, in one case, the Board disregarded the statement of a

¹⁴⁸ 323 F.2d 686, 52 L.R.R.M. 2259 (5th Cir. 1963).

¹⁴⁹ *Cashman Auto Co.*, 109 N.L.R.B. 720, 34 L.R.R.M. 1429 (1954), enforced, 223 F.2d 832, 36 L.R.R.M. 2269 (1st Cir. 1955).

¹⁵⁰ *Greenville Steel Car Co.*, 54 N.L.R.B. 608, 13 L.R.R.M. 179 (1944).

¹⁵¹ *Harvest Queen Mill & Elevator Co.*, 90 N.L.R.B. 320, 26 L.R.R.M. 1189 (1950).

¹⁵² 109 N.L.R.B. 720, 34 L.R.R.M. 1429 (1954), enforced, 223 F.2d 832, 36 L.R.R.M. 2269 (1st Cir. 1955).

¹⁵³ 223 F.2d 832, 36 L.R.R.M. 2269, 2272 (1st Cir. 1955).

¹⁵⁴ *Id.*

self-employed individual that he did not desire reinstatement on the ground that it was irrelevant to the issues of willful loss of earnings and adequacy of post-discharge efforts to mitigate damages.¹⁵⁵

D. *Mathematical Computation*

1. *Quarterly Computations*

During its first fifteen years, the Board applied the back pay formula¹⁵⁶ in its elementary form, calculating back pay on the basis of the entire period between the unlawful discharge and the employer's offer of reinstatement.¹⁵⁷ Its experience over these years, however, indicated to the Board that in some cases the application of the back pay formula in its elementary form created an antagonism between the companion remedies of back pay and reinstatement. The Board observed that the application of the basic formula tended to discourage employers from offering reinstatement in cases where discriminatees had suffered lengthy periods of unemployment following their discriminatory discharges and had then obtained employment at a wage rate exceeding that which they had obtained in their original employment. In such situations the result was progressive reduction or complete liquidation of the back pay liability. Thus, the opportunity was presented for an employer deliberately to refrain from offering reinstatement, knowing that delay would progressively reduce his back pay liability. The discriminatee, for his part, was under pressure to react to such a tactic by waiving his right to reinstatement, thus tolling the running of back pay liability and preserving the amount then owing.

In 1950 the Board refined the formula in its decision in *F.W. Woolworth Co.*¹⁵⁸ by compartmentalizing back pay calculations into separate calendar quarters. The Board held that "the loss of pay [shall] be computed on the basis of each separate calendar quarter or portion thereof during the period from the Respondent's discriminatory action to the date of a proper offer of reinstatement" and the "[e]arnings in one particular quarter shall have no effect upon the back pay liability for any other quarter."¹⁵⁹

Some commentators denounced the Board's *Woolworth* formula as an unwarranted departure from the common law principles of

¹⁵⁵ *Heinrich Motors Inc.*, 166 N.L.R.B. 783, 65 L.R.R.M. 1668, enforced, 403 F.2d 145, 69 L.R.R.M. 2613 (2d Cir. 1969).

¹⁵⁶ See text at notes 5-6 *supra*.

¹⁵⁷ The formula was applied this way in the Board's first case. *Pennsylvania Greyhound Lines, Inc.*, 1 N.L.R.B. 1, 1 L.R.R.M. 303 (1935), enforced in part, 91 F.2d 178, 1 L.R.R.M. 629 (3d Cir. 1937), rev'd and remanded for enforcement, 303 U.S. 261 (1938).

¹⁵⁸ 90 N.L.R.B. 289, 26 L.R.R.M. 1185 (1950).

¹⁵⁹ *Id.* at 292-93, 26 L.R.R.M. at 1185-86.

mitigation of damages, arguing that delimitation of monetary damages into quarterly sectors removed the back pay liability from the realm of the purely remedial and invested it with a punitive aspect. The Supreme Court, however, in *NLRB v. Seven-Up Bottling Co.*,¹⁶⁰ endorsed the Board's *Woolworth* formula, reversing a contrary decision of the Fifth Circuit. Declining to enter the "bog of logomachy" as to what is remedial and what is punitive, the Supreme Court concluded that the *Woolworth* formula does bear appropriate relation to the policies of the Act and accordingly enforced the order of the Board.¹⁶¹ In doing so, the Court deferred to the experience of the Board, and stated that a back pay order of the Board "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."¹⁶²

While some commentators have argued that the *Woolworth* formula imposes a punitive sanction upon the employer by disallowing earnings in one quarter for mitigation of damages in another, others have pointed out that the mechanical and inflexible approach of the formula can also work a hardship upon the discriminatee by disallowing expenses incurred in seeking interim employment as a set-off against the earnings from such employment. Consider, for example, the case of an employee earning \$120 per week who is unlawfully discharged at the end of February, spends \$300 to find interim employment requiring relocation of his family, and starts his new job at \$100 per week during the last week in March. His back pay figures for the first quarter will appear as follows:

Net Back Pay =	Gross Back Pay -	(Interim Earnings =	Expenses)
\$480	\$480	\$100	\$300
	(4 weeks at \$120)	(1 week at \$100)	

In this computation the \$300 of expenses will simply serve to extinguish the \$100 deduction for interim earnings. The net back pay, then, will be the same as the gross, \$480, and the claimant will be left uncompensated for the remaining \$200 of expenses. Assuming that he continues the same employment during the second quarter, his back pay figures for that quarter will appear as follows:

Net Back Pay =	Gross Back Pay -	(Interim Earnings -	Expenses)
\$260	\$1,560	\$1,300	0
	(13 weeks at \$120)	(13 weeks at \$100)	

¹⁶⁰ 344 U.S. 344 (1953), rev'g 196 F.2d 424, 30 L.R.R.M. 2036 (5th Cir. 1952).

¹⁶¹ 344 U.S. at 348.

¹⁶² Id. at 346-47, quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

Although he has sufficient interim earnings in this quarter from which his expenses could be set off, he will not be allowed to carry over the expenses unaccounted for in the first quarter and will remain uncompensated to the extent of \$200. Thus it can be seen that there are factual situations, albeit relatively uncommon, in which the principle of separate quarterly computations can act to the disadvantage of the back pay claimant.

2. *Interest on Back Pay Awards.*

In 1962, in *Isis Plumbing & Heating Co.*,¹⁶³ the Board first awarded interest on back pay. In *Isis* the Board observed that back pay is an indebtedness arising out of an obligation imposed by a statute governing the employer-employee relationship, and is thus a quasi-contractual liability rather than a fine or penalty. Acknowledging that its decision represented a departure from precedent, the Board nevertheless noted that the principle that a wrongdoer should pay interest on an amount wrongfully withheld "is not a revolutionary pronouncement."¹⁶⁴ The Board held that the interest would be computed at the rate of six percent per annum and, conforming to the *Woolworth* formula, would accrue on the last day of each calendar quarter on the amount then due for each quarterly period and would continue until compliance with the Board's order. The Board's policy of awarding interest has received approval from the courts of appeals.¹⁶⁵

In 1970 the Board rejected attempts to extend the *Isis* doctrine by increasing the rate of interest and by building in additional factors designed to recognize the impact of an inflationary economy. In *B & G Chrysler-Plymouth*,¹⁶⁶ the Board refused to increase the interest on back pay awards from six percent to nine percent or to augment the back pay award with a cost of living adjustment designed to reflect the decline in the value of the dollar since the unlawful discharges. A short time later the Board rejected a similar attempt to increase the interest on back pay awards from six percent to eight percent.¹⁶⁷

3. *The End of the Back Pay Period*

In addition to adding interest to back pay in 1962, the Board departed from precedent and strengthened its back pay remedy in

¹⁶³ 138 N.L.R.B. 716, 51 L.R.R.M. 1122 (1962), enforcement denied on other grounds, 322 F.2d 913, 54 L.R.R.M. 2235 (9th Cir. 1963).

¹⁶⁴ 138 N.L.R.B. at 718, 51 L.R.R.M. at 1123.

¹⁶⁵ *Marshfield Steel Co. v. NLRB*, 324 F.2d 333, 54 L.R.R.M. 2648 (8th Cir. 1963); *Operative Potters v. NLRB*, 320 F.2d 757, 53 L.R.R.M. 2489 (D.C. Cir. 1963); *Reserve Supply Corp. v. NLRB*, 317 F.2d 785, 53 L.R.R.M. 2374 (2d Cir. 1963).

¹⁶⁶ 186 N.L.R.B. 282, 75 L.R.R.M. 1370 (1970).

¹⁶⁷ *National Cash Register Co.*, 190 N.L.R.B. 581, 77 L.R.R.M. 1342 (1971).

another respect. Prior to 1962 the Board, in cases where it found a discriminatory discharge following a contrary conclusion by a trial examiner, had tolled back pay as of the date of the trial examiner's decision and excluded from the computation of back pay the period between the issuance of such decision and the date of the Board order.¹⁶⁸ The rationale underlying the tolling practice was that, in the event of a finding by a trial examiner that the discharge was not unlawful, the employer could not have been expected to reinstate the dischargee on the basis of the trial examiner's decision. In its 1962 decision in *A.P.W. Products Co.*,¹⁶⁹ the Board rejected this reasoning and abandoned its tolling practice on the ground that it benefited the wrongdoer at the expense of the wronged. Since then the Board has awarded back pay for the full period from the date of the discrimination to the date of an offer of reinstatement or other cutoff date found appropriate in the particular case regardless of the nature of the trial examiner's findings and recommendation.

Although it has reversed its historical practice of tolling back pay in cases involving discriminatory discharges and other terminations under section 8(a)(3) of the Act, the Board has not completely abandoned the tolling concept. On the contrary, the Board has continued to utilize the device in special circumstances which it feels warrant the application of an equitable rather than a mechanistic approach. During the two years following its *A.P.W.* decision, the Board tolled back pay in three cases. In *Fibreboard Paper Products Corp.*,¹⁷⁰ the Board tolled back pay at the time of the trial examiner's decision where employees were terminated as a result of unlawful subcontracting. The Board's rationale rested upon the fact that the existence of the duty to bargain over the decision to subcontract was unsettled in Board law at the time the employer awarded the subcontract and that, consequently, the employer could not reasonably be expected to offer reinstatement prior to a final order of the Board. In *Kohler Co.*,¹⁷¹ the Board again tolled back pay in a case where strikers were denied reinstatement because of unprotected acts of misconduct. The Board found for the employer in its original decision but later reversed itself upon remand from the court of appeals. In view of the employer's belated appraisal of the legal principles to be applied, the Board considered it appropriate to consider the equities favoring the employer in fixing the back pay

¹⁶⁸ R.E. Smith, 131 N.L.R.B. 513, 48 L.R.R.M. 1093 (1961); *Time-O-Matic, Inc.*, 121 N.L.R.B. 179, 42 L.R.R.M. 1316 (1958).

¹⁶⁹ 137 N.L.R.B. 25, 50 L.R.R.M. 1042 (1962), enforced, 316 F.2d 899 (2d Cir. 1963).

¹⁷⁰ 138 N.L.R.B. 550, 51 L.R.R.M. 1101 (1962), enforced, 322 F.2d 411, 53 L.R.R.M. 2666 (D.C. Cir. 1963), aff'd, 379 U.S. 203 (1964).

¹⁷¹ 148 N.L.R.B. 1434, 57 L.R.R.M. 1148 (1964), enforced, 345 F.2d 748, 58 L.R.R.M. 2847 (D.C. Cir.), cert. denied, 382 U.S. 836 (1965).

period. The third case, *Walls Manufacturing Co.*,¹⁷² involved substantially the same equitable considerations as in *Kohler*.

In February 1966, the District of Columbia Circuit called upon the Board to explicate clearly its post-*A.P.W.* tolling practice and to develop minimal standards respecting such practice.¹⁷³ Complying with the mandate of the court, the Board indicated, in its second supplemental decision in *Ferrell-Hicks Chevrolet, Inc.*,¹⁷⁴ that back pay will not be tolled in section 8(a)(3) cases involving discriminatory motive (even where a trial examiner erroneously concluded that the employer's conduct was lawful), but that the tolling device will be reserved for those infrequent cases where (1) the unlawful termination is free of mala fides intent, and (2) the employer is justifiably reliant on a decisional error or on an expectation that the Board would adhere to a particular view of the law. Thus the Board made it clear that it now considers the tolling device an extraordinary measure to be utilized only where the equities in a case weigh strongly in favor of the employer. The Board has also held that such equities did not exist simply because the General Counsel experienced a year's delay in issuing a complaint after the filing of a charge, and thus refused to toll back pay for strikers refused reinstatement until the date on which the complaint was issued.¹⁷⁵

IV. PROCEDURAL ASPECTS OF BACK PAY

A. *Practice and Procedure*

At every stage of a Board proceeding from the time that a complaint has been authorized by the general counsel, every effort is made to settle the case without resort to litigation. In this connection, the Board holds that discussions and statements made in the course of such explorations prior to the back pay hearing, including statements made to Board agents to the effect that the claimants would waive reinstatement, are not admissible at the hearing so as to bar reinstatement, or toll back pay. Thus, such statements do not relate to "testimony" within the meaning of section 8 of the Act, as interpreted under the *Jencks* rule, but rather they relate to internal management of the regional office.¹⁷⁶

¹⁷² 137 N.L.R.B. 1317, 50 L.R.R.M. 1376 (1962), enforced, 321 F.2d 753, 53 L.R.R.M. 2428 (D.C. Cir.), cert. denied, 375 U.S. 923 (1963).

¹⁷³ *Burinskas v. NLRB*, 357 F.2d 822, 827, 55 L.R.R.M. 2300 (D.C. Cir. 1966).

¹⁷⁴ 160 N.L.R.B. 1692, 63 L.R.R.M. 1177 (1966).

¹⁷⁵ *H & F Binch Co.*, 188 N.L.R.B. 720, 76 L.R.R.M. 1735 (1971).

¹⁷⁶ *Triple AAA Water Co.*, 142 N.L.R.B. 803, 810 n.10, 53 L.R.R.M. 1153 (1963). See also Alleyne, *The "Jencks Rule" in NLRB Proceedings*, 9 B.C. Ind. & Com. L. Rev. 891 (1968). If such statements were held to relate to "testimony," then, under the "Jencks Rule" they could be used at the hearing to impeach the testimony of the particular witness. The

Where a respondent is unable to agree with the Board's regional office upon the amount of back pay due under a Board order, a supplemental hearing is conducted to determine the amount.¹⁷⁷ Prior to 1957, such a supplemental proceeding was initiated merely by the issuance of a notice of hearing. Since 1957 the Board has accompanied the notice of hearing with a back pay specification setting forth the regional office's evaluation and computation of back pay, including such elements as gross back pay, interim earnings, allowable expenses incurred by the employee, and deductions for periods of unavailability for employment, and culminating in a figure representing net back pay.¹⁷⁸ The respondent is required to file an answer within fifteen days admitting, denying or explaining each element of the specification,¹⁷⁹ thus placing in issue those elements upon which there is a disagreement. The respondent must specifically meet the substance of the allegations which he has denied and a general denial will not suffice.¹⁸⁰ Failure to deny any allegation constitutes an admission and the Board may make a finding thereon without taking evidence.¹⁸¹ The burden of proof respecting gross back pay rests upon the General Counsel, while the respondent bears the ultimate burden of proving mitigating factors.¹⁸² The regional director may issue a notice of hearing without a specification, in which case the respondent need not file an answer.

Board orders are not self-enforcing and, consequently, in the event that the respondent refuses to comply, the Board must petition for enforcement of its order in an appropriate court of appeals.¹⁸³ Alternatively, the respondent may petition for review of the Board's order. The procedure is slightly different in a back pay case. Although the court of appeals retains jurisdiction following the entry of its decree, the Board has the power under section 10 of the Act to conduct formal proceedings without court authority to ascertain the precise amount of back pay.¹⁸⁴ Following the formal back pay hearing, the Board prepares a motion for entry of a supplemental decree specifying the amount of back pay due. In its motion, the Board requests the entry of a preliminary procedural order directing

effect, therefore, of this policy is to preclude the use of such statements to frustrate the public rights protected via the back pay remedy.

¹⁷⁷ 29 C.F.R. § 102.52 (1968).

¹⁷⁸ 29 C.F.R. § 102.53 (1968).

¹⁷⁹ 29 C.F.R. § 102.54(a) (1968).

¹⁸⁰ 29 C.F.R. § 102.54(b) (1968).

¹⁸¹ 29 C.F.R. § 102.54(c) (1968). See *Triton Constr. Co.*, 194 N.L.R.B. 452, 78 L.R.R.M. 1703, supplementing 191 N.L.R.B. 376, 77 L.R.R.M. 1702 (1971).

¹⁸² See text at notes 188-206 *infra*.

¹⁸³ See, e.g., 29 C.F.R. §§ 101.13-.15 (1968).

¹⁸⁴ *NLRB v. Royal Palm Ice Co.*, 201 F.2d 667, 31 L.R.R.M. 2308 (5th Cir. 1953).

the respondent to file a response and supporting memorandum stating in detail any objections it has to the granting of the Board's motion within a time to be fixed by the court. In this connection, the Board suggests that the respondent be allowed thirty days to file a response. The Board also requests the court to fix a time after the Board's receipt of the respondent's response and supporting memorandum within which the Board may file an answering memorandum, again suggesting a thirty-day period. The Board furnishes the court with an original and eight copies of a proposed supplemental decree, together with an entire supplemental certified record consisting of the pleadings and testimony upon which the supplemental order of the Board was entered.¹⁸⁵

A novel procedural ruling resulted in the 1973 *United Aircraft Corp.* decision of the Board.¹⁸⁶ At the back pay hearing, the charging party moved the administrative law judge to order the respondent company to make whole immediately those employees whose back pay specifications were not disputed by the respondent's answer. The administrative law judge denied the motion, and exceptions were filed to her ruling with the Board. The Board affirmed the administrative law judge's ruling, because it would not effectuate Board policy to issue interim or fragmented orders. However, in its decision, the Board stated that, having determined the amounts of back pay, the large time lapse since the commission of the unfair labor practices could allow further delay by the respondent to undermine the back pay remedy. Therefore, in the event of respondent's failure to comply immediately with the Board order, the Board stated that

the General Counsel could, at his discretion, petition the Court of Appeals for appropriate immediate interim relief under Sec. 10(e) of the Act to require Respondent forthwith to pay the uncontested amounts of back pay due to the claimants preliminary to seeking enforcement of the Board Order concerning the remaining amounts of back pay that Respondent has disputed.¹⁸⁷

B. *Burden of Proof in Back Pay Proceedings*

Throughout the history of back pay proceedings under the Act, there has been no dispute that the Board bears the burden of proving the gross amount of back pay due each claimant. There has,

¹⁸⁵ This procedure is undertaken pursuant to 29 C.F.R. §§ 101.141-.16 (1968) and the appropriate rules of court.

¹⁸⁶ *United Aircraft Corp.*, 204 N.L.R.B. No. 131, 83 L.R.R.M. 1616 (1973).

¹⁸⁷ 83 L.R.R.M. at 1617.

however, been some confusion about which party must carry the burden of proving the amount of interim earnings, the availability of employment for the particular claimant, or the extent to which the claimant may have suffered willful loss of earnings. The United States Supreme Court addressed these issues in the *Phelps Dodge* case.¹⁸⁸ In this case, the Supreme Court approved the Second Circuit's exclusion from the back pay award of "willful losses."¹⁸⁹ Since *Phelps Dodge*, the Board has considered, in the computation of back pay awards, the questions whether the employer would have had work available for the discriminatee had no unfair labor practice occurred and whether the discriminatee had willfully incurred a loss of earnings.¹⁹⁰ However, the Board has placed the burden of alleging and proving such affirmative defenses upon the employer, and the Board's allocation of such burden has been consistently upheld by the courts of appeals. As the Ninth Circuit observed in *NLRB v. J.G. Boswell Co.*:¹⁹¹

While it is true that the Board should order deductions from back pay on account of "clearly unjustifiable refusal to take desirable new employment," the matter of showing a basis for such deductions is an affirmative defense which must be put in issue by respondents and is in no sense a part of the Board's case.¹⁹²

In *Nabors v. NLRB*¹⁹³ the Fifth Circuit held that "[p]roof that the employer had no available jobs was an affirmative defense and the burden of establishing it rested upon the employer."¹⁹⁴

Notwithstanding the unequivocal allocation to the employer of the burden of proof respecting the availability of employment and willful loss of earnings, the actual practice of the Board has had a moderating effect upon the impact of such allocation. Thus, the Board has followed a policy of producing claimants for examination by all parties wherever the employer has raised the defense of willful loss. Moreover, the Board has reduced or denied back pay awards to claimants who have been shown by the Board's own investigation to have incurred willful losses even if the employer itself has taken no steps to meet its burden of proof.¹⁹⁵ Where the Board has been

¹⁸⁸ 313 U.S. 177 (1940).

¹⁸⁹ See text at notes 10-14 *supra*.

¹⁹⁰ The rule that back pay liability depends upon the availability of work in the respondent's plant was observed by the Board even before *Phelps Dodge*. See Ray Nichols, Inc., 15 N.L.R.B. 846, 5 L.R.R.M. 171 (1939).

¹⁹¹ 136 F.2d 585, 12 L.R.R.M. 776 (9th Cir. 1943).

¹⁹² *Id.* at 597, 12 L.R.R.M. at 785.

¹⁹³ 323 F.2d 686, 54 L.R.R.M. 2259 (5th Cir. 1963).

¹⁹⁴ *Id.* at 690, 54 L.R.R.M. at 2262.

¹⁹⁵ *Ozark Hardwood Co.*, 119 N.L.R.B. 1130, 41 L.R.R.M. 1243 (1957), enforced in

unable to locate a claimant, and thus has been unable to satisfy itself that he has not incurred willful losses, it has historically placed his award in escrow until he has appeared and the employer has been afforded an opportunity to cross-examine on the issue of willful loss. In *NLRB v. Brown & Root, Inc.*,¹⁹⁶ the Eighth Circuit approved the escrow provisions of the Board's order relating to twenty-eight nontestifying claimants and decreed that the escrow should be continued in force for a period of one year after the decision became final. Disbursements from escrow should be made only upon application by or on behalf of a claimant and only after the Board had made such claimant available for examination.

While in effect shouldering much of the burden placed by law upon the employer respecting the issue of willful loss, the Board has taken the position that its efforts are performed in the public interest and are, as to the employer, purely gratuitous and not a matter of obligation. In *Brown & Root*,¹⁹⁷ the Board had characterized as "advisory and cooperative" the function of the General Counsel in producing discriminatees to testify at the back pay hearing. In affirming this decision the Eighth Circuit observed that the Board could have required immediate payment to nontestifying claimants and that its action in placing such claims in escrow pending examination went beyond its obligations under the law and "was beneficial rather than prejudicial to respondents."¹⁹⁸

In 1965 the Second Circuit, in *NLRB v. Mastro Plastics Corp.*,¹⁹⁹ departed from precedent and declared that the General Counsel's custom of producing the discriminatees at a back pay hearing was a legal obligation and an ingredient of the prima facie case. In considering the issues of willful loss and availability of work, the court distinguished between the ultimate burden of proof and the more immediate burden of going forward with the evidence. Respecting the ultimate burden of persuasion, the Second Circuit adhered to the universal view that this burden is the employer's. The court placed the burden of going forward on the question of available work upon the employer and required the General Counsel to produce evidence on the issue of willful loss. Noting that information as to willful loss is peculiarly within the knowledge of the discriminatees themselves and, moreover, that the General Counsel normally has prehearing contact with the discriminatees, the *Mastro*

part, 282 F.2d 1, 46 L.R.R.M. 2823 (8th Cir. 1960); *East Texas Steel Castings Co.*, 116 N.L.R.B. 1336, 38 L.R.R.M. 1470 (1956), enforced, 255 F.2d 284, 42 L.R.R.M. 2109 (5th Cir. 1958).

¹⁹⁶ 311 F.2d 447, 52 L.R.R.M. 2115 (8th Cir. 1963).

¹⁹⁷ *Brown & Root, Inc.*, 132 N.L.R.B. 486, 48 L.R.R.M. 1391 (1961).

¹⁹⁸ 311 F.2d at 455, 52 L.R.R.M. at 2121.

¹⁹⁹ 354 F.2d 170, 60 L.R.R.M. 2578 (2d Cir. 1965).

Plastics court held, in specific disagreement with the decision of the Eighth Circuit in *Brown & Root*, that the General Counsel must produce testimony by each discriminatee before the award to such discriminatee becomes final. The court was careful to state that its decision did not disturb the requirement that an employer must raise the affirmative defense in its pleadings, nor did it condemn the Board's practice of requiring payment of gross back pay into escrow for claimants who fail to appear at the initial hearing, and did not preclude the Board's reliance upon other evidence in the event a claimant was deceased or otherwise unable to testify.

Other courts of appeals have declined to subscribe to the *Mastro Plastics* formula and have adhered to the traditional allocation of the burden of proof. The Fifth Circuit, for example, has questioned the realism of a rule imputing to the Board the employees' knowledge about their efforts to find interim work and has concluded that it would be an "intolerable burden" to require the Board to call every claimant, particularly where large numbers of employees were involved and little or no basis appeared to dispute the Board's calculations set forth in the back pay specification.²⁰⁰ In *Hickman Garment Co.*,²⁰¹ where the back pay claimant did not appear at the hearing although subpoenaed by the General Counsel, the Board held that where it appeared that there was little additional information which the employer could acquire by examining the claimant on the witness stand, she was entitled to the amount set forth in the back pay specifications. The Board further provided that if the claimant could not be located within one year, the money would be returned to the employer with the understanding that this return of the money would not extinguish the employer's back pay liability.²⁰² The Fourth Circuit, also declining to follow the lead of the Second Circuit, observed:

To say that the opponent of one who has the burden of proof, nevertheless, has the burden of producing evidence for his adversary is in reality to shift the burden of proof. This we are unwilling to do in light of overwhelming authority that the burden of proof rests on the employer.²⁰³

The Board, for its part, has indicated that it will, in forums

²⁰⁰ *NLRB v. Mooney Aircraft, Inc.*, 366 F.2d 809, 813-14, 63 L.R.R.M. 2208, 2211 (5th Cir. 1966); *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575-76, 62 L.R.R.M. 2155, 2159 (5th Cir. 1966).

²⁰¹ 196 N.L.R.B. No. 59, 80 L.R.R.M. 1684 (1972).

²⁰² Cf. *Robert Haws Co.*, 161 N.L.R.B. 299, 63 L.R.R.M. 1302 (1966). See also *Mastro Plastics Co.*, 354 F.2d 170, 60 L.R.R.M. 2578 (2d Cir. 1965).

²⁰³ *Florence Printing Co. v. NLRB*, 376 F.2d 216, 223, 65 L.R.R.M. 2047, 2052 (4th Cir. 1967).

other than the Second Circuit, adhere to its traditional allocation of the burden of proof.²⁰⁴ Thus the rule, as adopted by the Board, is that the General Counsel's function in producing back pay claimants for examination by the respondent is merely advisory and cooperative.²⁰⁵ As the Board stated in *Mastro Plastics*:

[W]hile the general burden of proof is upon the General Counsel to establish the damage which has resulted from Respondent's *established* discriminatory discharges, i.e., the gross back pay over the back pay period, the burden of proof is upon the Respondent as to the diminution of damages, whether from the willful loss of earnings by the failure to either look for or keep a substantially equivalent job or from the unavailability of a job, at respondent's plant for some reason unconnected with the discrimination.²⁰⁶

In this case, the administrative law judge tolled back pay for the specific quarters in which he found that there was no substantial evidence that the claimant looked for work. This was an incorrect standard, since the administrative law judge treated each quarter as a completely severable period, divorced from all others, for the purpose of determining the reasonableness of the claimant's job-seeking efforts. Rather, the entire back pay period must be scrutinized to determine whether, in the light of all circumstances (among other things a 61 year-old woman located in an area where there was a lack of opportunity for a woman with her skills and experience), there had been a reasonable continuing search so as to foreclose a finding of willful loss.

V. SPECIAL SITUATIONS

A. Back Pay Awards in Strike Situations

The principle was early established that strikers, whether economic or unfair-labor-practice strikers, are not entitled to back pay for periods when they were on strike. In one of its earliest decisions,²⁰⁷ the Board drew a clear distinction between employees

²⁰⁴ Hickman Garments Co., 196 N.L.R.B. No. 59, 80 L.R.R.M. 1684 (1972); Fibreboard Paper Prods. Corp., 180 N.L.R.B. 142, 148, 72 L.R.R.M. 1617, 1623 (1969); Heinrich Motors, Inc., 166 N.L.R.B. 783, 65 L.R.R.M. 1668 (1967).

²⁰⁵ Cornwall Co., 171 N.L.R.B. 342, 343, 68 L.R.R.M. 1200, 1201 (1968).

²⁰⁶ 136 N.L.R.B. 1342, 1346, 50 L.R.R.M. 1007, 1008, enforced, 354 F.2d 170, 60 L.R.R.M. 2578 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966).

²⁰⁷ Sunshine Hosiery Mills, 1 N.L.R.B. 664, 1 L.R.R.M. 49 (1936). See also Hickman Garment Co., 172 N.L.R.B. 1168, 69 L.R.R.M. 1517 (1968), enforced, 408 F.2d 379, 71 L.R.R.M. 2048 (6th Cir.), cert. denied, 396 U.S. 838 (1969).

discriminatorily discharged and other employees who struck in protest of such unfair labor practice. The dischargees were awarded back pay from the date of their discharge but the strikers were held entitled to back pay only from the date of their unconditional application for reinstatement. Several years later the Supreme Court endorsed this policy in *Phelps Dodge Corp. v. NLRB*.²⁰⁸ In *Volney Felt Mills, Inc.*,²⁰⁹ the Board stated that it would adhere to this practice no matter how flagrant the unfair labor practices might be, observing that a contrary policy would encourage, and place a premium upon, the resort by employees to industrial strife in order to obtain redress of wrongs rather than promote recourse to the orderly administrative process established by the Act.

To state it briefly, then, the period of back pay for a striker begins when he makes an unconditional application for reinstatement and ends when the employer offers him reinstatement to his former or a substantially equivalent position, or when it appears that no work is available for him.²¹⁰ The remedy depends upon the unconditional nature of the request for reinstatement. The expression of a mere conditional availability for work will not trigger any obligation on the part of the employer.²¹¹

Looking at the other side of the coin, neither will an offer of less than full reinstatement satisfy the employer's obligation and toll the running of back pay.²¹² In *Knickerbocker Plastic Co.*,²¹³ the Board held that an offer to reinstate strikers as "new employees" tolled back pay liability only to the extent of the starting wage rate and that the employer continued to be liable for the difference between the starting rate and the rate with the employees' seniority taken into account.

This principle of a partial satisfaction of the employer's obliga-

²⁰⁸ 313 U.S. 177 (1941). If the employer refuses the offer of unconditional reinstatement, a continuation of the strike will not be considered a willful loss of earnings if the strikers accept suitable work in the area and take reasonable measures to find work. *Madison Courier, Inc.*, 180 N.L.R.B. 781, 788, 76 L.R.R.M. 1802, 1803 (1970).

²⁰⁹ 70 N.L.R.B. 908, 18 L.R.R.M. 1422 (1946), enforced, 162 F.2d 204, 20 L.R.R.M. 2195 (2d Cir. 1947).

²¹⁰ *Madison Courier, Inc.*, 180 N.L.R.B. 781, 788, 76 L.R.R.M. 1802, 1803 (1970).

²¹¹ *Crosby Chems., Inc.*, 85 N.L.R.B. 791, 24 L.R.R.M. 1481 (1949), enforced in part, 188 F.2d 91, 27 L.R.R.M. 2541 (5th Cir. 1951).

It should be noted that there is a significant difference between economic and unfair labor practice strikers respecting entitlement to reinstatement. Economic strikers are entitled to reinstatement only if they have not been permanently replaced by their employer. *NLRB v. MacKay Radio & Tel. Co.*, 304 U.S. 333 (1938). Unfair labor practice strikers are entitled to reinstatement even if they have been replaced and even if their reinstatement necessitates the discharge of the replacement. *Remington Rand Corp.*, 40 N.L.R.B. 1100, 10 L.R.R.M. 92 (1942).

²¹² *Kohler Co.*, 148 N.L.R.B. 1434, 57 L.R.R.M. 1148 (1964), enforced, 345 F.2d 748, 58 L.R.R.M. 2847 (D.C. Cir. 1965).

²¹³ 132 N.L.R.B. 1209, 48 L.R.R.M. 1505 (1961).

tion applies also in a case where the less-than-full offer is accepted. In *Mooney Aircraft, Inc.*,²¹⁴ where the employer reinstated unfair-labor-practice strikers but placed them on a reduced work week to permit the retention of strike replacements, the Board awarded back pay in the amount representing the difference between what the employees received for a reduced work week and what they would have received for a normal work week.

Despite the employer's failure to offer reinstatement to the entire group of strikers, his back pay liability is tolled as to those strikers who are offered reinstatement but choose to continue their strike. This rule was announced in a 1969 Board decision, *Southwestern Pipe, Inc.*,²¹⁵ which overruled prior law denying the efficacy of piecemeal offers of reinstatement to unfair-labor-practice strikers to toll back pay. Since the failure to offer group reinstatement to strikers who have made an unconditional offer to return to work is a section 8(a)(3) violation, strikers who refuse reinstatement to protest such discrimination continue to be unfair-labor-practice strikers. The Board believed that the entitlement to reinstatement as a result of this status was sufficient, without awarding back pay. The dissent was concerned about the protection of the strikers as a group and criticized the divisive effect of this change in the law.²¹⁶ This tolling of back pay does not change the principle that a group request by unfair-labor-practice strikers for reinstatement is not made conditional by insistence that all be reinstated.²¹⁷ Therefore, back pay will accrue for individual strikers until the employer makes an offer of reinstatement.

The limits of the *Southwestern Pipe* doctrine are drawn in *My Store, Inc.*²¹⁸ Back pay is tolled only when the employer's offer of reinstatement to less than the whole group is without a discriminatory motive. The Board refused to toll back pay for those employees offered reinstatement where the court of appeals had found that the employer's anti-union animus revealed that the piecemeal offers were knowingly defiant of the court's enforcement order.

Entitlement to back pay may be affected by any misconduct so grave as to warrant a denial of reinstatement by the employer. In

²¹⁴ 148 N.L.R.B. 1057, 57 L.R.R.M. 1133 (1964).

²¹⁵ 179 N.L.R.B. 364, 72 L.R.R.M. 1377 (1969), enforced in part, denied in part and remanded in part, 444 F.2d 340, 77 L.R.R.M. 2317 (5th Cir. 1971). The Board decision overruled *Robert S. Abbott Publishing Co.*, 139 N.L.R.B. 1328, 51 L.R.R.M. 1500 (1962), enforcement denied, 331 F.2d 209, 55 L.R.R.M. 2994 (7th Cir. 1964), and cases relying on it.

²¹⁶ 179 N.L.R.B. at 365-67, 72 L.R.R.M. at 1381-82 (dissenting opinion).

²¹⁷ *National Business Forms, Inc.*, 189 N.L.R.B. 964, 77 L.R.R.M. 1026 (1971), enforced, 457 F.2d 737, 79 L.R.R.M. 2945 (6th Cir. 1972).

²¹⁸ 181 N.L.R.B. 321, 76 L.R.R.M. 1773 (1970), modified, 468 F.2d 1146, 81 L.R.R.M. 2225 (7th Cir. 1972).

such situations the Board balances the seriousness of the misconduct against the seriousness of the employer's violations of employee rights and the resultant provocation of the employees.²¹⁹ The misconduct which defeats reinstatement and back-pay rights may itself be in the nature of a strike. The Board has held, for example, that employees entitled to reinstatement and back pay by reason of discriminatory suspensions forfeited the right to reinstatement and tolled the running of back pay by participating in a strike held to be unlawful by reason of a contractual no-strike clause.²²⁰

The right to reinstatement, by its terms, presupposes the availability of work to be performed. It is commonplace during a strike, however, that an employer's operations are curtailed to such an extent that they cannot immediately be resumed afterwards. In the first place, there is the normal delay arising from logistical and administrative problems connected with the resumption of full production after a period of inactivity and confusion. Secondly, there is the possibility that jobs may have been eliminated by reason of the permanent loss of orders during a lengthy strike. The Board and the courts historically have treated the two situations differently for back-pay purposes. In recognition of the normal delay inherent in the resumption of full operations, the Board usually orders back pay to begin five days after the strikers have submitted their unconditional applications for reinstatement.²²¹ The courts have upheld the five-day period as being within the discretion of the Board and have rejected arguments that it is punitive or unreasonably short. In *NLRB v. Trinity Valley Iron & Steel Co.*,²²² where the strike was in protest of the employer's unfair labor practices, the Fifth Circuit commented that:

[t]he duty of reinstatement, the practical problems growing out of replacement of employees hired during the strike, and any confusion or plant inefficiencies related to the assimilation of a large number of former employees after a somewhat extended absence due to the strike are all a foreseeable "direct byproduct" of the employer's violation of the Act²²³

The Board does not order immediate reinstatement or the im-

²¹⁹ See *Kohler Co.*, 148 N.L.R.B. 1434, 1435, 57 L.R.R.M. 1148, 1149 (1964).

²²⁰ *Mid-West Metallic Prods., Inc.*, 121 N.L.R.B. 1317; 42 L.R.R.M. 1552 (1958).

²²¹ When the Board first addressed itself to this problem, it ordered back pay to begin when the application for reinstatement was made. *Sunshine Hosiery Mills*, 1 N.L.R.B. 664, 1 L.R.R.M. 49 (1936). The five-day grace period was instituted in *Tiny Town Togs, Inc.*, 7 N.L.R.B. 54, 2 L.R.R.M. 236 (1938).

²²² 290 F.2d 47, 48 L.R.R.M. 2110 (5th Cir. 1961).

²²³ *Id.* at 48, 48 L.R.R.M. at 2111.

mediate accrual of back pay, however, where work is simply not available at the conclusion of a strike. The Board, for example, refused to order back pay for a replaced economic striker during the period between his unconditional application (on which date no work was available for him) and his recall four months later, when work became available.²²⁴ In cases involving unfair-labor-practice strikers for whom no work was available on the date of their unconditional application, the Board has ordered the strikers placed on a preferential hiring list and has tolled their back pay as of the time of such placement.²²⁵

Respecting the economic striker for whom no work is available at the time of his unconditional application for reinstatement, the courts until recently have declined to place upon employers any continuing obligation to seek out economic strikers for whom no work is available as job vacancies arise or to prefer them in any way in the matter of future employment.²²⁶ The Supreme Court, however, has enlarged the rights of economic strikers in this respect in *NLRB v. Fleetwood Trailer Co.*²²⁷ In overruling the Ninth Circuit, the Supreme Court rejected the concept that an economic striker's right to reinstatement is to be measured only in the limited context of the employment situation as it exists on the date on which reinstatement is requested. In *Fleetwood*, six strikers were denied reinstatement upon their application on the ground that jobs were then unavailable due to the curtailment of production caused by the strike. Although the strikers indicated their continuing availability for employment, the employer, some six weeks after the strike ended, hired six new employees for jobs which the striker-applicants were qualified to fill. The strikers were reinstated two months later and the Board ordered back pay for the two-month period on the ground that the employer had discriminated against them by hiring the new employees for jobs which the strikers were qualified to fill. The Supreme Court characterized as error the contrary view of the Ninth Circuit that the rights of strikers expired as of the date of their initial application for reinstatement, when no work was available for them. Mr. Justice Fortas, speaking for the Court, observed that the "basic right to jobs cannot depend upon job availability as of the moment when the applications are filed."²²⁸ Noting that strikers normally apply for reinstatement immediately after the end

²²⁴ Jack C. Robinson, 129 N.L.R.B. 1040, 47 L.R.R.M. 1127 (1960).

²²⁵ Walsh-Lumpkin Wholesale Drug Co., 129 N.L.R.B. 294, 46 L.R.R.M. 1535 (1960).

²²⁶ *NLRB v. Fleetwood Trailer Co.*, 366 F.2d 126, 63 L.R.R.M. 2155 (9th Cir. 1966); *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 52 L.R.R.M. 2115 (8th Cir. 1963); *Teamsters Local 200 v. NLRB*, 233 F.2d 233, 38 L.R.R.M. 2095 (7th Cir. 1956).

²²⁷ 389 U.S. 375 (1967).

²²⁸ *Id.* at 381.

of a strike and before full production is resumed, the Court went on to hold that "[i]f and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement. The right can be defeated only if the employer can show 'legitimate and substantial business justifications.'"²²⁹

The thinking of *Fleetwood* was extended in *Laidlaw Corp.*,²³⁰ where the Board overruled prior cases which restricted the rights of replaced economic strikers to nondiscriminatory treatment of their applications for new employment:

We hold, therefore, that economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees, (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.²³¹

The remedial aspects of strike situations are often complicated by unlawful discharges, either of those already on strike or of other employees who then make common cause with the strikers. As to the discharged striker, back pay does not commence on the date of the discharge, but only if and when the employee abandons the strike. Thus, the discharged striker is in no better position than any other striker respecting back pay. The Board's theory is that when an employee has voluntarily chosen to withhold his services by striking, his loss of earnings cannot conclusively be attributed to his later discharge during the strike until he indicates a desire to return to work.²³² Entitlement to back pay does arise, however, when the strike ends, whether or not the dischargee makes an individual application for reinstatement.²³³ Entitlement likewise arises where

²²⁹ *Id.* For the general method of computing gross back pay in strike situations, see notes 31-35 *supra*.

²³⁰ 171 N.L.R.B. 1366, 68 L.R.R.M. 1252 (1968), enforced, 414 F.2d 99, 71 L.R.R.M. 3054 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970).

²³¹ 171 N.L.R.B. at 1369-70, 68 L.R.R.M. at 1258. See *Universal Servs., Inc.*, 184 N.L.R.B. No. 42, 76 L.R.R.M. 1327 (1970), enforcement denied on other grounds, 467 F.2d 579, 81 L.R.R.M. 2492 (9th Cir. 1972); *Sea View Indus., Inc.*, 127 N.L.R.B. 1402, 46 L.R.R.M. 1212 (1960).

²³² *Astro Electronics, Inc.*, 188 N.L.R.B. 572, 76 L.R.R.M. 1530 (1971); *Sea-Way Distrib., Inc.*, 143 N.L.R.B. 460, 53 L.R.R.M. 1326 (1963); *E.A. Holcombe*, 140 N.L.R.B. 618, 52 L.R.R.M. 1090, enforced in part, 325 F.2d 508, 54 L.R.R.M. 2739 (5th Cir. 1963); *Central Okla. Milk Producers Ass'n*, 125 N.L.R.B. 419, 45 L.R.R.M. 1133 (1959), enforced, 285 F.2d 495, 47 L.R.R.M. 2294 (10th Cir. 1960); *Mastro Plastics Corp.*, 103 N.L.R.B. 511, 518-19, 31 L.R.R.M. 1494 (1953).

²³³ *Universal Servs., Inc.*, 184 N.L.R.B. No. 42, 76 L.R.R.M. 1327 (1970), enforcement

the dischargee unequivocally abandons the strike, even in the case of an economic striker who is replaced between his discharge and his abandonment of the strike.²³⁴ However, the abandonment of a picket line, without more, is not considered tantamount to the unequivocal abandonment of a strike and does not trigger the back pay liability.²³⁵

The distinction between an individual's rights as a striker and as a discriminatee is illustrated in the Board's decision in *Sakrete of Northern California, Inc.*²³⁶ The Board there held that where employees were unlawfully discharged during a strike and then abandoned the strike prior to the employer's offer to reinstate them, the reinstatement offer satisfied the employer's obligation and tolled back pay, which was then computed from the date on which the employees abandoned the strike until the date of the employer's offer. The Board observed, however, that if the employees had not abandoned the strike prior to the employer's offer, no back pay would have accrued and the employer would have remained obligated to reinstate the employees upon application. It can thus be seen that the employees' rights as dischargees were controlling in the situation as it existed (where the strike had actually been abandoned), while their rights as strikers were controlling in the hypothetical situation constructed by the Board (where the strike continued). In *Paterson Steel & Forge Co.*,²³⁷ the Board was presented with a close issue as to the status of unfair-labor-practice strikers who returned to the plant in response to the employer's instructions but were never put to work and were discriminatorily discharged after a fracas provoked by the employer. The Board held that their status as strikers had ended with their physical return to the plant and awarded back pay from the date of their discharge rather than from the date of their subsequent application for reinstatement. The Board has yet to recognize strikers as constructive dischargees as a result of an employer's harassment or flagrant unfair labor practices to entitle them to back pay for the period of the strike.²³⁸

denied on other grounds, 467 F.2d 579, 81 L.R.R.M. 2492 (9th Cir. 1972); *Sea View Indus., Inc.*, 127 N.L.R.B. 1402, 46 L.R.R.M. 1212 (1960).

²³⁴ *Central Okla. Milk Producers Ass'n*, 125 N.L.R.B. 419, 45 L.R.R.M. 1133 (1959), enforced, 285 F.2d 495, 47 L.R.R.M. 2294 (10th Cir. 1960).

²³⁵ *United States Cold Storage Corp.*, 96 N.L.R.B. 1108, 29 L.R.R.M. 1011 (1951).

²³⁶ 140 N.L.R.B. 765, 52 L.R.R.M. 1103 (1963), enforced, 332 F.2d 902, 56 L.R.R.M. 2327 (9th Cir. 1964), cert. denied, 379 U.S. 961 (1965).

²³⁷ 96 N.L.R.B. 129, 28 L.R.R.M. 1492 (1951).

²³⁸ *King Radio Corp.*, 172 N.L.R.B. 1051, 70 L.R.R.M. 1204 (1968), enforced with exceptions, 416 F.2d 569, 72 L.R.R.M. 2245 (10th Cir. 1969), cert. denied, 397 U.S. 1140 (1970).

Respecting employees who join a strike following their discriminatory discharge, the Board includes the strike time in the back pay period for purposes of computing gross back pay.²³⁹ In *Merchandise Press, Inc.*,²⁴⁰ the Board refused to accept the employer's contention that discharged employees would not, in any event, have worked during the strike, holding: "Because the Respondent's unlawful discrimination has made it impossible to ascertain whether these employees would have gone on strike in the absence of such discrimination, the uncertainty must be resolved against the Respondent."²⁴¹ However, while participation in a strike does not automatically defeat the right to back pay, it can affect the amount recoverable if the employer can sustain the burden of showing willful loss in that the strike hampered the efforts of discharged employees to mitigate damages by seeking new employment.²⁴² But evidence that a discriminatorily discharged employee has engaged in picketing, taken alone, is not sufficient to establish such willful loss.²⁴³

Where discriminatorily discharged employees refuse reinstatement unless the employer meets certain conditions, they thereby place themselves in the status of strikers and toll the accrual of back pay. This is so even though the conditions are limited to the remedying of unfair labor practices. For example, where discriminatorily discharged employees refused to return to work unless the employer also reinstated other discriminatees, the Board held that they became unfair-labor-practice strikers who thereupon forfeited their right to further back pay.²⁴⁴ The transformation of status from that of a discriminatee to that of a striker can occur even in the absence of a rejected offer of reinstatement. Where unfair-labor-practice strikers who had once been discriminatorily denied reinstatement testified at a Board hearing that they would be unwilling to return to work unless the employer recognized the union, the Board denied them back pay from the date on which they so testified until the date on which they again applied for reinstatement.²⁴⁵

²³⁹ See, e.g., *Ozark Hardwood Co.*, 119 N.L.R.B. 1130, 41 L.R.R.M. 1243 (1957).

²⁴⁰ 115 N.L.R.B. 1441, 38 L.R.R.M. 1105 (1956).

²⁴¹ *Id.* at 1442, 38 L.R.R.M. at 1106.

²⁴² *NLRB v. Cowell Portland Cement Co.*, 148 F.2d 237, 16 L.R.R.M. 586 (9th Cir. 1945); *Bon Hennings Logging Co.*, 132 N.L.R.B. 97, 48 L.R.R.M. 1327 (1961), enforced in part, 308 F.2d 548, 51 L.R.R.M. 2085 (9th Cir. 1962).

²⁴³ *Rice Lake Creamery Co.*, 151 N.L.R.B. 1113, 58 L.R.R.M. 1542 (1965).

²⁴⁴ *George W. Ball*, 134 N.L.R.B. 1007, 49 L.R.R.M. 1268 (1961), vacated and remanded sub nom. *Wheeler v. NLRB*, 314 F.2d 260, 52 L.R.R.M. 2138 (D.C. Cir. 1963); *Olin Indus., Inc.*, 86 N.L.R.B. 203, 24 L.R.R.M. 1600 (1949), enforced, 191 F.2d 613, 28 L.R.R.M. 2474 (5th Cir. 1951), cert. denied, 343 U.S. 919 (1952).

²⁴⁵ *James Thompson & Co.*, 100 N.L.R.B. 456, 30 L.R.R.M. 1299 (1952), enforced in part, 208 F.2d 743, 33 L.R.R.M. 2205 (2d Cir. 1953).

B. *Back Pay in Subcontracting Cases*

It has long been a well-established precept that the subcontracting of bargaining unit work for anti-union purposes is a violation of section 8(a)(3). The principle that economically motivated subcontracting of unit work is a mandatory subject for collective bargaining, and that failure to bargain about such subcontracting can be a violation of section 8(a)(5), is of more recent origin.²⁴⁶ Where the Board orders a resumption of the subcontracted operation it also orders back pay. For example, the Board's decision in *Hugh Major*²⁴⁷ found a violation where an employer discriminatorily discontinued the operation of certain trucking services with its own employees, and contracted for the services to be performed by leased operators. The Board's order required the employer to resume operation of the service with its own employees and to reinstate the drivers with back pay. In fashioning this remedy, the Board pointed out that the case, although in a borderline area, involved an arrangement which was essentially a subcontracting, rather than a discontinuance, of an operation inasmuch as the trucking operation was still required in the employer's business and was still being performed albeit on a contracted basis. Thus the Board reasoned that a status quo ante remedy was appropriate, whereas it might not have been in the case of an actual discontinuance of trucking services.

When the employer is ordered to bargain about the effect on the

²⁴⁶ In its first look at the *Fibreboard* case, the Board held that economically motivated subcontracting of bargaining unit work was a prerogative of management and not a mandatory bargaining subject, dismissing a complaint under § 8(a)(5) of the Act. 29 U.S.C. § 158(a)(5) (1970); *Fibreboard Paper Prods. Corp.*, 130 N.L.R.B. 1558, 47 L.R.R.M. 1547 (1961). Several years later, in *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022, 49 L.R.R.M. 1918 (1962), enforced, 316 F.2d 846, 53 L.R.R.M. 2054 (5th Cir. 1963), the Board overruled its *Fibreboard* decision. Although *Town & Country* involved discriminatory motivation, the Board specifically held that the unilateral subcontracting would have violated § 8(a)(5) even in the absence of discrimination. On the basis of *Town & Country*, the Board reconsidered the *Fibreboard* case and found a violation of § 8(a)(5). 138 N.L.R.B. 550, 51 L.R.R.M. 1101, aff'd sub nom. *Machinists Local 1304 v. NLRB*, 322 F.2d 411, 53 L.R.R.M. 2666 (D.C. Cir. 1963), aff'd, 379 U.S. 203 (1964). The Board ordered a restoration of the status quo ante, requiring the employer to reinstitute the subcontracted operations, to reinstate the employees who had been terminated, and to pay them back pay in an amount equal to the earnings they normally would have received.

The argument that the Board's remedy contravened the provision of § 10(c), 29 U.S.C. § 160(c) (1970), that "no order of the Board shall require the reinstatement of any individual—or the payment to him of any back pay, if such individual was suspended or discharged for cause . . ." was rejected by the Supreme Court. The Court concluded that the limitation did not prevent the Board from fashioning a remedy where an unfair labor practice had been committed even though, as in this case, the subcontract and the resultant terminations were economically motivated. 379 U.S. at 217.

²⁴⁷ 129 N.L.R.B. 322, 46 L.R.R.M. 1543 (1960), enforced in part, 296 F.2d 466, 48 L.R.R.M. 2595 (7th Cir. 1961).

employees and the resumption of operations rather than to restore the subcontracted work, the back pay formula of *Wittcock Supply Co.*²⁴⁸ may be used. Since it is assumed that there would be no loss of work before the employer fulfilled his bargaining duty, back pay is allowed from the

date of the unfair labor practice to the occurrence of the earliest of one of the following events, (1) reaching mutual agreement with the Union relating to the subjects which Respondent is herein required to bargain about; (2) a bona fide impasse in such bargaining; (3) the failure of the Union to commence negotiations within five days of the receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the failure of the Union to bargain thereafter in good faith.²⁴⁹

*Fibreboard Paper Products Corp.*²⁵⁰ applied the principle that back pay should be measured by the earnings of replacements or comparable employees in the context of a subcontracting case. The Board decided to use the standard of the contract rates immediately before the subcontracting rather than the negotiated wages when the employer finally bargained about this issue. Since it is unclear what the results would have been had the employer bargained originally, the employer, who is responsible for this uncertainty, must assume the costs. The six-year lag before the negotiations, plus the standard factors of the company's limited duty in bargaining, its concern for preserving the economic benefits of the subcontracting, and the union's interest in avoiding impasse, influenced the Board determination.

The Board's decisions in the subcontracting area evidence a clear disinclination to follow any sort of mechanical approach in the matter of remedy. On the contrary, the Board has tailored its remedies to fit the particular fact situations presented, which have often been complicated by the interests of third parties and by equitable considerations running counter to purely legal considerations. Thus where a tempering of the conventional remedy has been indicated by the presence of unusual factors, the Board has declined to order a return to the status quo ante or the reinstatement of displaced employees and has even decreed an abbreviated back pay period.

²⁴⁸ 171 N.L.R.B. 201, 68 L.R.R.M. 1043 (1968), enforced sub nom. *Teamsters Local 328 v. NLRB*, 419 F.2d 688, 72 L.R.R.M. 2654 (D.C. Cir. 1969).

²⁴⁹ 171 N.L.R.B. at 204, 72 L.R.R.M. at 1048.

²⁵⁰ 180 N.L.R.B. 142, 72 L.R.R.M. 1617 (1969), enforced, 436 F.2d 908, 75 L.R.R.M. 2609 (D.C. Cir. 1970).

In *Carl Rochet*,²⁵¹ the Board found a violation of section 8(a)(5), but not of section 8(a)(3), when two employers who published weekly newspapers closed their composing rooms and subcontracted their composition work. This action was taken in concert with several other weekly newspapers and involved the purchase by the group of a new and recently perfected offset press. In connection with this venture, two new companies were formed, one to operate the new press for all of the participating newspapers and the other to perform the cold-type composition necessary for the offset printing process. Although finding an unlawful refusal to bargain about the change in operations, the Board, in recognition of unusual and mitigating factors, declined to order a return to the status quo ante or to award reinstatement or back pay, but instead, limited its remedy to an order to bargain about the effects of the change. The Board was persuaded that the change, which involved the automation of certain operations, was the result of important and desirable technological improvements and that the employers, by reason of their precarious economic condition, were faced with a choice of adopting the new process or going out of business. The Board's disinclination to order a return to the status quo ante was heightened by the involvement in the joint venture of other employers not parties to the proceeding.

In *Jersey Farms Milk Service, Inc.*,²⁵² the Board found a violation of section 8(a)(5) when an employer unilaterally subcontracted its transportation operations and laid off its transport drivers. The Board declined to order a restoration of operations in view of the history of harmonious labor relations between the parties, the absence of any anti-union motivation, the economic hardship that a restoration order would work upon the employer and upon innocent third parties, and the employer's subsequent willingness to bargain with the union about the subcontracting and its effects. The remedy adopted by the Board included an order to bargain about the subcontracting, including possible resumption of the operations, and back pay for a four-week period. The four-week limitation on back pay was not arbitrarily established but was grounded, as was the remainder of the remedy, in the employer's obligation to bargain about the subcontracting. Four weeks after the violation occurred, the employer had met with the union and discussed only the question of reinstating the drivers. Although the parties did not bargain to an impasse on that occasion concerning the subcontracting, the Board held that, to the extent that reinstatement of the employees

²⁵¹ 136 N.L.R.B. 1294, 49 L.R.R.M. 1972 (1962). This case is frequently known as the *Renton News Record* case.

²⁵² 148 N.L.R.B. 1392, 57 L.R.R.M. 1166 (1964).

was discussed, the employer had discharged its duty to bargain on that aspect of the matter. The Board concluded that the full measure of back pay relief was not warranted in the circumstances of this case and tolled back pay as of the date of such meeting.

There have been other cases in which the Board has awarded a less-than-full measure of back pay and has adopted a less-than-full time span as the boundary of the back pay period. In *Cities Service Oil Co.*,²⁵³ the Board found a violation of section 8(a)(5) when an employer cancelled forty-five accounts and entered into a distribution agreement with another oil company under which he serviced the accounts. There were no layoffs or discharges but there was a substantial loss of customary overtime work by unit employees. Recognizing the economic motivation underlying the subcontract and the hardship that would result to the other company and its employees under a status quo ante remedy, the Board refused to order restoration of the direct delivery system but limited its remedy to an order that the employer reimburse the affected employees for their lost overtime pay for a period of one year. The parties at the hearing had agreed to limit the matters to be litigated to a one-year period immediately following the transfer of accounts. The Board adopted the one-year period as an appropriate delimitation of the back pay period since it felt that, in any event, reduction in overtime earnings beyond one year could not reasonably be attributed to the employer's unilateral action in view of the cumulative effect of other changes in the employer's operation.

The Board has imposed full back pay liability when it has found that the subcontracting violates section 8(a)(1) and (3), as well as section 8(a)(5). In *Dodson's Market, Inc.*,²⁵⁴ the reduction in working hours linked to the subcontracting was part of an anti-union campaign. Consequently, the Board rejected the Trial Examiner's reasons for not awarding back pay, that is, the remedy of a bargaining order and the economic gain resulting from the subcontracting.

It is not unusual in subcontracting cases for the employees whose work has been unlawfully subcontracted to be offered other jobs by the offending employer, or even to be offered the same work by the subcontractor. Two questions arise in connection with such offers. First, does the offer of another job by the offending employer either moot the violation or mitigate the back pay liability? Second, does an offer of the subcontractor to employ the discriminatees on the subcontracted work qualify as an offer of interim employment, refusal of which constitutes willful loss of earnings? The Board has

²⁵³ 158 N.L.R.B. 1204, 62 L.R.R.M. 1175 (1966).

²⁵⁴ 194 N.L.R.B. 192, 78 L.R.R.M. 1628 (1971).

answered both questions in the negative, but has encountered opposition from the courts of appeals.

In *Brown Transportation Corp.*,²⁵⁵ the Board considered a situation in which employees terminated as the result of an unlawful subcontract were offered employment by the subcontractor. The employer had subcontracted the operations of its Atlanta terminal and discharged fifty-eight employees. The action was taken unilaterally and for the purpose of avoiding the obligation to bargain with a local of the Teamsters. Before effectuating the subcontract, the employer advised the affected employees that they had been recommended for employment with the subcontractor. The subcontractor thereafter called each of the employees and stated that jobs were available for them if they desired employment. The Board found violations of section 8(a)(3) and (5) and ordered the employer to resume its terminal operations and reinstate the employees with full back pay, notwithstanding the rejection by the employees of the subcontractor's offer of employment. In refusing to toll back pay on the day the offer was rejected, the Board expressed its rationale as follows:

To hold that employees who have been discriminatorily discharged must, under peril of sustaining willful loss of employment, cooperate with a wrongdoing employer by accepting less than the full reinstatement which is their due, while the effects of that employer's unlawful conduct remain unremedied, would provide a discrimination-minded employer with a ready device whereby he might be assured of the benefit of his unlawfulness while being insured against its costs.²⁵⁶

The Fifth Circuit, while enforcing the Board's order generally, disagreed with the Board's view on the back pay question and refused to enforce that portion of the order.²⁵⁷

In *Bon Hennings Logging Co.*,²⁵⁸ an employer unilaterally consummated an agreement purporting to be a lease of its trucking operations to one of its foremen and discriminatorily discharged its trucking employees. After taking over the operations the foreman offered jobs to the discharged employees, which they rejected. The Board found that the arrangement was not a bona fide lease but that the foreman continued to conduct the operations as agent of the

²⁵⁵ 140 N.L.R.B. 954, 52 L.R.R.M. 1151 (1963), modified and enforced, 334 F.2d 243, 55 L.R.R.M. 2878 (5th Cir. 1964).

²⁵⁶ 140 N.L.R.B. at 958, 52 L.R.R.M. at 1154.

²⁵⁷ 334 F.2d at 245, 55 L.R.R.M. at 2879.

²⁵⁸ 132 N.L.R.B. 97, 48 L.R.R.M. 1327 (1961).

employer. It ordered the employer to cease and desist from its unlawful conduct and to reinstate the discharged employees with back pay. The Board held that the offer of employment by the foreman-agent did not toll back pay. Although these offers in reality emanated from the employer itself, for whom the foreman was acting as agent, they were not offers of employment in connection with which the employees' former rights would be restored and thus did not qualify as offers of reinstatement. Nor were they valid as offers of interim employment. In this connection, the Board stated that since the offers were made by an agent of the culpable employer posing as a new employer, it would not effectuate the policies of the Act to require the employees to cooperate with the culpable employer by accepting such offers.

In *National Food Stores, Inc.*,²⁵⁹ the Board again refused to toll back pay on the basis of an employer's offer of other employment to employees whose jobs were eliminated by an unlawful subcontract. About two weeks before unlawfully subcontracting its inventory work, the employer conducted personal interviews with the inventory clerks whose jobs were being eliminated. During these interviews each such employee was offered employment elsewhere in the company with the understanding that there would be no loss of wages but without any definite understanding as to precisely what the other job would be. Each employee indicated an unwillingness to accept other employment with the employer. In view of the unlawful elimination of their original jobs the Board held that they were not required to cooperate with the offending employer by accepting such other employment and that their refusals did not toll back pay. A court of appeals, this time the Seventh Circuit, again took issue with the Board's view of the back pay question and refused to enforce that portion of the order.²⁶⁰

C. *Back Pay in Cases Involving Plant Closures and Relocations*

In *Textile Workers v. Darlington Manufacturing Co.*,²⁶¹ the Supreme Court held that an employer may completely terminate his business for anti-union reasons without violating section 8(a)(3) of the Act. The Court also held that an employer may partially terminate his business for anti-union reasons provided that the purpose and effect is not to "chill unionism" in the remainder of the business. The Board has concluded, however, that the Supreme Court's *Dar-*

²⁵⁹ 142 N.L.R.B. 340, 53 L.R.R.M. 340 (1963), modified and enforced, 332 F.2d 249, 56 L.R.R.M. 2296 (7th Cir. 1964).

²⁶⁰ 332 F.2d at 253, 56 L.R.R.M. at 2298.

²⁶¹ 380 U.S. 263 (1965).

lington decision does not suggest that the collective bargaining requirement of the Act is inapplicable to such a partial closing, and has held that an employer must bargain about the decision to terminate part of his business as well as about the effects of such action upon the bargaining unit employees.²⁶² The refusal to bargain about a partial termination, then, continues to be a violation of section 8(a)(5) of the Act, just as a partial termination motivated by a desire to chill unionism in the remainder of the business continues to be a violation of section 8(a)(3).

In cases involving unlawful partial shutdowns, the Board's remedies, including back pay features, reflect an effort to tailor the remedy to fit the particular fact situation presented in each case. In general, there is a significant difference between the remedies fashioned in cases involving anti-union motivation and those in cases involving economically motivated action taken without bargaining. In cases involving discriminatory motivation, the Board is more inclined to order a restoration of the status quo ante, or, in cases where that is impractical or impossible, an extensive back pay liability designed to compensate for the absence of the optimum remedy. The Board decisions in *Bonnie Lass Knitting Mills, Inc.*²⁶³ and *St. Cloud Foundry & Machine Co.*²⁶⁴ are illustrative of situations wherein the Board has utilized a broad back pay remedy in the absence of an order to restore the status quo ante. In *Bonnie Lass* an employer discriminatorily discontinued its manufacturing operation, discharged fifty employees and continued in business as a jobber. In *St. Cloud* an employer unlawfully closed down the foundry portion of its operation, resulting in the refusal of reinstatement to ten strikers. Neither case involved a restoration remedy. In both cases, however, the Board ordered the employers to pay the discriminatees back pay from the date of the discrimination until the date they secured substantially equivalent employment and to place them on a preferential hiring list to insure their recall in the event their employers decided to resume the discontinued operations.²⁶⁵

²⁶² *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 63 L.R.R.M. 1264 (1966). The general implications of this case have been somewhat qualified by the Board's recent decision in *General Motors Corp.*, 191 N.L.R.B. 950, 77 L.R.R.M. 1537 (1971), *aff'd sub nom. Local 864, UAW v. NLRB*, 470 F.2d 422, 81 L.R.R.M. 2439 (D.C. Cir. 1972). In this case, the Board indicated that the employer's sale of his business was not a mandatory subject of bargaining. For a full discussion of the implications of this case, see *Swift, Plant Relocation: Catching Up with the Runaway Shop*, 14 B.C. Ind. & Com. L. Rev. 1135, 1145-47 (1973).

²⁶³ 126 N.L.R.B. 1396, 45 L.R.R.M. 1477 (1960).

²⁶⁴ 130 N.L.R.B. 911, 47 L.R.R.M. 1412 (1961).

²⁶⁵ According to *Saginaw Aggregates, Inc.*, 198 N.L.R.B. No. 78, 81 L.R.R.M. 1025 (1972), the preferential hiring list must be in writing, include the names of the individual employees, and be furnished to the union and the listed employees to toll the employer's back pay liability. In contrast, an employer's oral promise at the time of the lay-off to rehire the employees as soon as possible was adjudged insufficient.

In other cases this basic remedy has been varied to fit unique fact situations. In *Missouri Transit Co.*,²⁶⁶ where an employer discriminatorily discontinued the operation of a shuttle bus line, the Board ordered the employer to reinstate the discharged drivers in other bus operations as jobs became available and to pay them back pay until such reinstatement. In *J.M. Lassing*,²⁶⁷ where an employer, for discriminatory reasons, accelerated the economically planned discontinuance of its transportation operation, the Board fashioned an alternative remedy dependent upon a determination to be made at the compliance stage as to the employer's operational policy. If the employer's policy was to reassign displaced drivers to other jobs, the order would require it to offer such other employment with back pay to the date of such offer. If the employer had no such policy, the order would require it to bargain with the union about possible job transfers and to pay back pay to the discriminatees from the date of their discharge until the date on which they would have been discharged for nondiscriminatory reasons.

In *Savoy Laundry, Inc.*,²⁶⁸ upon a remand from the Second Circuit, the Board articulated the theories underlying its back-pay orders predicated upon the securing of new employment. *Savoy* involved the discriminatory discontinuance by a laundry employer of its wholesale shirt operation resulting in the discharge of seventeen employees. In its original decision²⁶⁹ the Board ordered a restoration of the operation, a preferential hiring list, and, for those employees for whom no vacancies existed, back pay until they secured substantially equivalent employment elsewhere. The Second Circuit, however, deleted the restoration order from the remedy and remanded the case to the Board for further consideration of the back pay issue, expressing concern about the lack of a definite time limitation in the Board's back pay order.²⁷⁰ In its supplemental decision,²⁷¹ the Board retained the back-pay order in its original form despite the deletion by the court of the restoration portion of the remedy. The Board explained, however, that all of the established back pay rules governing the conduct of discriminatees, such as the necessity to seek interim employment and the set-off of interim earnings, are applicable to this type of remedy. The Board also noted that this remedy, even with its extensive back pay feature, falls far short of a restoration of the status quo ante, since the

²⁶⁶ 116 N.L.R.B. 587, 38 L.R.R.M. 1301 (1956), enforced, 250 F.2d 261, 41 L.R.R.M. 2256 (8th Cir. 1957).

²⁶⁷ 126 N.L.R.B. 1041, 45 L.R.R.M. 1430 (1960).

²⁶⁸ 148 N.L.R.B. 38, 56 L.R.R.M. 1450 (1964).

²⁶⁹ 137 N.L.R.B. 306, 50 L.R.R.M. 1127 (1962).

²⁷⁰ *NLRB v. Savoy Laundry, Inc.*, 327 F.2d 370, 55 L.R.R.M. 2285 (2d Cir. 1964).

²⁷¹ 148 N.L.R.B. 38, 56 L.R.R.M. 1450 (1964).

new employment which terminates back pay liability will not afford the employees the protection of their seniority and other rights and privileges which would have attended a return to their old jobs.

It should be borne in mind that the back pay remedy discussed in the foregoing paragraphs is predicated upon a finding of a discriminatory motive underlying the partial shutdowns in question and that the determination as to the legitimacy of the actions involved might well have been otherwise in the post-*Darlington* era. In *A.C. Rochat Co.*,²⁷² for example, the Board initially found violations of §§ 8(a)(1), (3) and (5) in an employer's shutdown of its sheet metal operation and, although declining to restore the status quo ante, ordered back pay to run until the laid-off employees obtained substantially equivalent employment elsewhere, or with the offending employer in the event it resumed the sheet metal operation. Reconsidering its decision in the light of *Darlington*, the Board reversed itself on the section 8(a)(3) issue and found that the shutdown violated section 8(a)(5) only.²⁷³ Accordingly, the Board modified its order to provide that back pay should commence in each case on the date of layoff and terminate on the date on which the sheet metal operation was terminated.

Turning to a consideration of other cases involving a unilateral but economic decision to close down part of a business, it may be observed that the back pay remedy in such cases is geared, as the violation is directed, toward the bargaining obligation.²⁷⁴ For example, in *Winn-Dixie Stores, Inc.*,²⁷⁵ the Board found a violation of section 8(a)(5) where the employer unilaterally discontinued its cheese processing and packaging operation, resulting in the termination of six employees. In view of the economic nature of the change and the existence of evidence that the discontinued operation may have become outmoded, the Board did not order a restoration of the status quo ante. The Board did, however, order the employer to bargain about the possible resumption of the discontinued operation as well as about the effects of the change upon the unit employees.

²⁷² 150 N.L.R.B. 1402, 58 L.R.R.M. 1242 (1965).

²⁷³ 163 N.L.R.B. 49, 64 L.R.R.M. 1321 (1967).

²⁷⁴ *ILGWU v. NLRB*, 463 F.2d 907, 80 L.R.R.M. 2716 (D.C. Cir. 1972), enforcing as modified 182 N.L.R.B. 958, 74 L.R.R.M. 2501 (1970), presents an exception to this generalization. Where the union learned of the relocation but did not request the employer to bargain, the Board ended the back pay period at the approximate date that the union received this information rather than the date of impasse in the Board-ordered negotiations. The Board also limited back pay recipients to employees terminated within the six-month § 10(b) statute of limitations. 29 U.S.C. § 160(b) (1970). However, the court of appeals tolled the statute of limitations to include employees laid off after the last collective bargaining session on the basis of the employer's fraudulent assurance to the union that a final decision to close had been made.

²⁷⁵ 147 N.L.R.B. 788, 56 L.R.R.M. 1266 (1964).

As a preface to its back pay order, the Board observed that, if the employer had complied with its bargaining obligation in the first instance, the shutdown might have been avoided and that, in any event, it must be presumed that the employees would have retained their jobs at least until the employer had fulfilled its bargaining obligation. Proceeding on the basis of this rationale, the Board ordered back pay for the affected employees, such obligation to cease upon any of the following occurrences: (1) reaching mutual agreement with the union relating to the subjects about which the employer is ordered to bargain; (2) bargaining to a genuine impasse; (3) the failure of the union to commence negotiations within five days of the receipt of the employer's notice of its desire to bargain with the union; or (4) the failure of the union to bargain thereafter in good faith.²⁷⁶ In addition to tying the back pay remedy to the fulfillment of the bargaining portion of the order, the Board also provided that back pay should cease in the event the employer should resume the discontinued operation and offer proper reinstatement to the employees involved.

In *Royal Plating & Polishing Co.*,²⁷⁷ the Board found a refusal to bargain about the effects of a partial shutdown and prescribed, in addition to a bargaining order, a back pay order similar to that in *Winn-Dixie* but limited to the narrow area of bargaining wherein the violation occurred—i.e., the effect of the shutdown upon unit employees. Further explicating the rationale underlying this type of back pay provision, the Board stated that it could not assure meaningful bargaining under its order without first restoring some measure of economic strength to the union, since the employer should have bargained at a time when it was still in need of the employees' services. In order to assure such meaningful bargaining without disturbing the existing economic posture of all concerned,²⁷⁸ the Board ordered the fourfold *Winn-Dixie* type back pay remedy, but also provided that in no event should the sum paid to any employee exceed the amount he would have earned from the date of the partial shutdown until the date on which he secured equivalent employment elsewhere, or the date on which the employer went out of business, whichever occurred sooner.

In its later decision in *Transmarine Navigation Corp.*,²⁷⁹ the Board, addressing itself to another unilateral partial shutdown, adopted the same remedial order as that utilized in *Royal Plating*,

²⁷⁶ Id. at 792, 56 L.R.R.M. at 1268.

²⁷⁷ 160 N.L.R.B. 990, 63 L.R.R.M. 1045 (1966).

²⁷⁸ The employer went out of business completely several months after the unilateral partial closing.

²⁷⁹ 170 N.L.R.B. 389, 67 L.R.R.M. 1419 (1968).

adding a proviso that in no event should the amount of back pay be less than the affected employees would have earned during a two-week period of employment with the respondent. Voicing the principle that the wrongdoer, rather than the victim, should bear the consequences of his own unlawful conduct, the Board stated that the back pay portion of its remedy constituted an attempt "to re-create in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent."²⁸⁰

A second variation on *Royal Plating* appears in *Summit Tooling Co.*²⁸¹ The section 8(a)(5) violation was deemed to be the refusal to bargain about the effects of a closing, which was economically motivated. The *Winn-Dixie* criteria for setting the end of the back pay period were considered appropriate. However, back pay was awarded only to four employees who were laid off, not transferred, at the date of the closing.

In *Ozark Trailers, Inc.*,²⁸² the Board refused to adopt a trial examiner's recommendation in favor of a *Winn-Dixie* type back pay remedy on the ground that it was too speculative in the particular circumstances of the case at bar. *Ozark Trailers* involved the unilateral shutdown of one plant in a multiplant operation. The Board was satisfied that the employer's decision was prompted solely by pressing economic necessity.²⁸³ Back pay was ordered for the affected employees from the date on which the decision to close was made to the date on which the plant was actually closed.

The cases involving relocation of operations, as opposed to shutdowns, also evidence an effort on the part of the Board to mold remedies designed to fit the particular factual situations presented. In cases where the relocation is discriminatorily motivated but where there are strong factors militating against a status quo ante remedy, the Board customarily orders the offending employer not only to offer reinstatement at the new location, but also to bear travel and moving expenses for those employees who elect to accept the offer of reinstatement. For example, in *Bermuda Knitwear Corp.*,²⁸⁴ the Board found a violation of section 8(a)(3) where an employer discriminatorily moved its shipping operation from New York City to Saugerties, New York, and discharged twenty-six

²⁸⁰ Id. at 4, 67 L.R.R.M. at 1421.

²⁸¹ 195 N.L.R.B. 479, 79 L.R.R.M. 1396 (1972), enforced, 83 L.R.R.M. 2044 (7th Cir. 1973).

²⁸² 161 N.L.R.B. 561, 63 L.R.R.M. 1264 (1966).

²⁸³ In this connection the Board cited the *Renton News Record* case, 136 N.L.R.B. 1294, 49 L.R.R.M. 1972 (1962), a subcontracting case in which the Board softened its usual remedy in recognition of the clear economic hardship underlying the decision in question.

²⁸⁴ 120 N.L.R.B. 332, 41 L.R.R.M. 1500 (1958).

shipping and clerical employees. The employer was ordered to reinstate the employees to their former or substantially equivalent positions wherever such positions may be located, to pay the travel and moving expenses of those employees who desired reinstatement, and to pay back pay to the affected employees from the date of their discharge until the offer of reinstatement.²⁸⁵

In cases involving relocations which are economically motivated but are carried out in violation of a bargaining obligation, the Board often ties the back pay remedy to the fulfillment of the bargaining obligation in the manner discussed in connection with partial shutdowns. In *Spun-Jee Corp.*,²⁸⁶ involving a unilateral relocation of a plant operation from New York City to Bergen, New Jersey, the Board ordered the employer to bargain about a resumption of the operation in New York, and if the operation were not moved back to New York as a result of such bargaining, then to bargain about the effects of the relocation upon bargaining-unit employees, to offer reinstatement to such employees of their former or substantially equivalent jobs as may exist at Bergen, and to make them whole for loss of earnings. In awarding back pay, the Board followed the *Winn-Dixie* formula. In other cases involving unilateral plant relocations, the Board has tied the back-pay remedy solely to reinstatement or to the securing of new employment. *Standard Handkerchief Co.*²⁸⁷ involved the unilateral transfer of plant operations from New York City to Amsterdam, New York. The Board adopted the trial examiner's order including an offer of reinstatement at the new location, travel and moving expenses, and back pay. It was provided that the back pay would cease upon reinstatement at the new location, a failure to notify the employer that such reinstatement was desired, or the obtaining of other substantially equivalent employment.²⁸⁸

*Fraser & Johnston v. NLRB*²⁸⁹ considered the issue of wage rates for back pay and work at the new location. In transferring its operation a distance of twenty-five miles, the company had ignored evidence that a majority of the employees would have been willing to transfer. To avoid violating the section 8(d) prohibition against compelling contract terms, the Ninth Circuit refused to follow the Board's decision to impose the rates and benefits established by the contract which was in effect at the time of relocation. The court

²⁸⁵ See also *Tennessee-Carolina Transp., Inc.*, 108 N.L.R.B. 1369, 34 L.R.R.M. 1209 (1954).

²⁸⁶ 152 N.L.R.B. 943, 59 L.R.R.M. 1206 (1965).

²⁸⁷ 151 N.L.R.B. 15, 58 L.R.R.M. 1339 (1965).

²⁸⁸ See also *Die Supply Corp.*, 160 N.L.R.B. 1326, 63 L.R.R.M. 1154 (1966).

²⁸⁹ 469 F.2d 1259, 81 L.R.R.M. 2964 (9th Cir. 1972), enforcing in part and denying in part 189 N.L.R.B. 142, 77 L.R.R.M. 1036 (1971).

reasoned that the company would have been unlikely to maintain these terms had it bargained over the move. Instead, the rates produced by the Board-ordered bargaining sessions would apply. The court did enforce the Board's requirement that employees hired after the relocation be replaced by the original employees who desired to transfer.

VI. LIABILITY FOR BACK PAY

A. Generally

In most cases, there is no problem on the question of who is liable on the back pay award: it is the respondent employer, as an individual, partner, or corporation, or the respondent union, or both. Two problems can arise, however. The first occurs when the respondent employer sells his business to a third party, and the second when a third party, a creditor of the respondent, makes a claim upon the money paid as back pay. Each of these will be treated in turn.

B. Liability of Purchasers of Respondent's Business

The Board has traditionally drafted its remedial orders so that their proscriptions and obligations run not only to a particular respondent but also to "its officers, agents, successors and assigns."²⁹⁰ During the Board's early years, the Supreme Court had several occasions to consider the effect of Board orders upon successor employers. In *Southport Petroleum Co. v. NLRB*,²⁹¹ the Court held that Board orders are, as a matter of law, binding upon successors or assigns who operate merely as a disguised continuance of the old employer. Several years later, in *Regal Knitwear Co. v. NLRB*,²⁹² the Court approved the Board's practice of including the provision relating to successors and assigns in all of its orders as a matter of course. Although no successor was involved in the *Regal Knitwear* case, the Supreme Court addressed itself to the issue in the abstract because of a conflict between several courts of appeals. In approving the order of the Board in the *Regal Knitwear* case, however, the Court cautioned that the inclusion of the term "successors and assigns" in the enforcement order could not operate to enlarge its scope beyond that defined in Rule 65(d) of the Federal Rules of Civil Procedure, which provides that injunctions and restraining orders are "binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon

²⁹⁰ *Hill Bus Co.*, 2 N.L.R.B. 781, 800, 1 L.R.R.M. 525, 537 (1937).

²⁹¹ 315 U.S. 100 (1942).

²⁹² 324 U.S. 9 (1945).

those persons in active concert or participation with them who receive actual notice of the order. . . ."

The Supreme Court did not, in the *Regal Knitwear* case, attempt to delineate either the characteristics of a successor employer or the precise circumstances under which a successor would be bound by a Board order. The Board itself, however, has developed a body of law relating to successor employers and their obligations. In determining whether a new employer is the "successor" of the old, the Board inquires whether there is a substantial continuity in the business operation; whether the new employer uses the same plant, machinery and methods of production; whether the same jobs exist under the same working conditions; whether the new employer retains the same work force and supervisory hierarchy; and whether the business manufactures the same product or offers the same service.²⁹³

The type of successor which has proved most vexing to the Board is the bona fide purchaser who takes over a business with knowledge of an unfair-labor-practice proceeding pending against the seller. In 1947, the Board extended the *Regal Knitwear* doctrine to such a successor in *Alexander Milburn Co.*²⁹⁴ In *Milburn*, the successor acquired the business and assets of the predecessor some four months before the Board issued its decision in a pending unfair-labor-practice proceeding, of which the successor had knowledge at the time of the sale. The acquisition was a bona fide sale and there was no showing that the successor was acting in concert with the predecessor. In a supplemental decision, the Board held the successor, as well as the original respondent, liable for the payment of back pay to four employees and the reinstatement of two of them.

Seven years later, in *Symms Grocer Co.*,²⁹⁵ the Board reversed this policy. Reexamining the Supreme Court's decision in *Regal Knitwear*, and particularly the discussion therein concerning the limiting effect of Rule 65(d), the Board concluded that it lacked statutory authority to hold a bona fide purchaser liable for unfair labor practices which he did not commit. Three years later in the *Ozark Hardwood* case,²⁹⁶ the Board made it clear that this general immunity did not apply where the successor was but an alter ego of the predecessor. *Ozark Hardwood* involved a scheme to evade the respondent's obligation through intentional default on a bank loan and the purchase of the assets at the resultant foreclosure sale by a

²⁹³ See, e.g., *Valley Nitrogen Producers, Inc.*, 207 N.L.R.B. No. 41, 84 L.R.R.M. 1424 (1973); *Ranch-Way, Inc.*, 203 N.L.R.B. No. 118, 83 L.R.R.M. 1197 (1973).

²⁹⁴ 78 N.L.R.B. 747, 22 L.R.R.M. 1249 (1948).

²⁹⁵ 109 N.L.R.B. 346, 31 L.R.R.M. 1570 (1954).

²⁹⁶ *Ozark Hardwood Co.*, 119 N.L.R.B. 1130, 41 L.R.R.M. 1243 (1957).

new corporation formed for that purpose. In holding the successor liable for payment of back pay to twenty-seven employees, the Board stated that, as an alter ego, its liability would have been the same even if it had not been the instrumentality of evasion. Then, in 1967, the Board, in *Perma Vinyl Corp.*,²⁹⁷ reexamined its position respecting the liability of bona fide purchasers for remedying the unfair labor practices of their predecessors, and overruled *Symns* and reverted to the rule of *Alexander Milburn*.

Perma Vinyl involved a sale of the corporation's facilities and business to United States Pipe and Foundry Company during the pendency of unfair-labor-practice proceedings, of which U.S. Pipe had knowledge. U.S. Pipe, which continued to operate the business without substantial change, was neither an alter ego of its predecessor nor a participant in an attempted evasion of the obligations imposed upon Perma Vinyl by the Board. In holding U.S. Pipe responsible for remedying the unfair labor practices, the Board noted that a successor, even if a bona fide purchaser, becomes the beneficiary of unremedied unfair labor practices and generally is best able to remedy these violations. In *Perma Vinyl*, the Board expressed a disinclination to allow the violator of the Act to shed responsibility for unfair labor practices despite the sale of its business, and announced a policy of placing upon the offending employer and its successor joint responsibility in the matter of back pay.²⁹⁸

An exception to imposing liability on the successor employer, however, will be made if the work force, because of legitimate business reasons, has changed to the extent that there are no longer appropriate jobs available for the discriminatees.²⁹⁹ The back pay for an employee discriminatorily terminated is computed as if he had been employed continuously from the date of his severance, first as an employee of the original employer, and then as an employee of the successor.³⁰⁰ The courts of appeals have upheld the authority of the Board, in a back pay proceeding, to consider the derivative liability of a successor employer without beginning a new unfair-

²⁹⁷ 164 N.L.R.B. 968, 65 L.R.R.M. 1168 (1967), enforced in part sub nom. *United States Pipe & Foundry Co. v. NLRB*, 442 F.2d 742, 68 L.R.R.M. 2913 (5th Cir. 1968).

²⁹⁸ 164 N.L.R.B. at 968, 65 L.R.R.M. at 1169-70. Recently, the Supreme Court reaffirmed the Board's authority to hold the successor as well as the predecessor employer liable for back pay. The Court, however, was careful to stress that although the successor was innocent of any unfair labor practices or collusion, it was fully aware of its predecessor's wrongdoing when it purchased the company. See *Golden State Bottling Co. v. NLRB*, 42 U.S.L.W. 4039 (U.S. Dec. 5, 1973).

²⁹⁹ *UAW v. NLRB*, 442 F.2d 1180, 77 L.R.R.M. 2401 (9th Cir. 1971).

³⁰⁰ *Pugh & Barr, Inc.*, 102 N.L.R.B. 562, 31 L.R.R.M. 1332 (1953).

labor-practice proceeding even though the successor was not a party to the original proceeding.³⁰¹

Where the successor employer unlawfully refuses to hire its predecessor's employees, there is no question of derivative liability since it is the successor which violates the Act. There is presented, however, an interesting question as to whether back pay should be computed according to the predecessor's wage rate or according to the scale adopted by the successor. The Board addressed itself to this issue in *New England Tank Industries, Inc.*,³⁰² where an employer took over the operation of a tank farm and fuel pipeline under a government contract. The employer departed from its usual practice of hiring the employees of the predecessor operator to avoid paying the contractually established union scale. Instead, the employer hired new employees and paid them at a lower rate. Rejecting the employer's contention that back pay should be computed at the new rate which it had instituted, the Board computed back pay at the predecessor's higher union rate, reasoning that the discriminatees would have continued working at that rate had it not been for the successor's unlawful refusal to hire them and its unilateral change in the rate of pay. The Board likewise refused to accept the employer's contention that the number of back pay claimants should be limited to the number of new employees which it had hired. Holding that the employer had not met its burden of proving, as to each back pay claimant, that it would not have positions available for reasons unconnected with the discrimination, the Board awarded back pay to all fifty-two claimants.

In *Chemrock Corp.*,³⁰³ the Board considered essentially the same issue in the context of a section 8(a)(5) case. *Chemrock* involved the sale of a business with no change in operations. After the acquisition, the successor employer refused to deal with the bargaining representatives of the company's drivers and advised the drivers that they would be hired only as "free agents." When the drivers insisted upon representation by their union, the employer hired new drivers. The Board held that the predecessor's drivers became the "employees" of the successor, which was then obliged to bargain with their representative. In addition to a bargaining order, the Board ordered the drivers reinstated with back pay. Although the successor had not assumed the predecessor's contract, the Board

³⁰¹ *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 60 L.R.R.M. 2578 (2d Cir. 1965); *NLRB v. C.C.C. Associates, Inc.*, 306 F.2d 534, 50 L.R.R.M. 2882 (2d Cir. 1962).

³⁰² 147 N.L.R.B. 598, 56 L.R.R.M. 1253 (1964).

³⁰³ 151 N.L.R.B. 1074, 58 L.R.R.M. 1582 (1965).

once again computed back pay on the basis of the contract rates. In so doing, the Board stated:

As it is speculative, and cannot be determined, what rate or rates of pay might have governed their employment had the Respondent fulfilled its obligation to bargain with their representative, and as in any event their existing rate could not have been changed until and unless the Respondent has fulfilled its bargaining obligation, we shall direct that back pay due them shall be computed at the rate provided in the contract governing their employee relationship at the time the Respondent acquired the enterprise.³⁰⁴

Although a successor employer may be obligated for back pay because of its own discriminatory refusal of employment to its predecessor's employees, such obligation is contingent upon the employees' demonstrated desire to work for the successor. In *Druwhit Metal Products Co.*,³⁰⁵ for example, the Board declined to order reinstatement or back pay for certain employees where one of an employer's operations was sold, although it was probable that, had the employees applied for employment shortly after the sale, they would have been denied such. There was no evidence that these individuals had any interest in being employed by the successor or that their failure to apply was because they were aware of any discriminatory hiring policy. The Board refused to base a remedial order upon any such inchoate right.

The Supreme Court foreclosed a potentially extensive area of back pay liability for successors in *NLRB v. Burns International Security Services, Inc.*³⁰⁶ As a consequence of this decision, the successor's duty to bargain is limited to negotiating with the representative of a largely intact bargaining unit during the certification year and until there is objective evidence to doubt majority representation. The Board's expansion of liability requiring the successor to honor the predecessor's collective bargaining agreement³⁰⁷ was overruled and the make-whole order to compensate the employees for the loss of contract benefits was vacated.

³⁰⁴ Id. at 1082, 58 L.R.R.M. at 1585.

When a successor who had made a unilateral change in commission rates refused to reinstate unfair labor practice strikers despite their unconditional offer to return, the Board ordered reinstatement and back pay based on either the predecessor's or successor's pay schedule, whichever would be more profitable for individual employees. *Spruce Up Corp.*, 194 N.L.R.B. 841, 79 L.R.R.M. 1122 (1972).

³⁰⁵ 153 N.L.R.B. 346, 59 L.R.R.M. 1359 (1965).

³⁰⁶ 406 U.S. 272 (1972).

³⁰⁷ 182 N.L.R.B. 59, 74 L.R.R.M. 1047 (1970), enforcement denied, 441 F.2d 911, 77 L.R.R.M. 2081 (2d Cir. 1971).

A second major issue in *Burns* was whether the successor's unilateral selling of initial terms of employment violated section 8(a)(5). The Court held that it did not. When there has been no prior employment relationship, the employer is not making changes in his position. Once a majority of the former employees have been hired and the employer's status as a successor employer is otherwise clear, the duty to bargain matures and subsequent changes will be a violation unless the parties have bargained to impasse. Since the fact pattern in *Burns* showed that no changes were made after the unit was established, the make-whole order was not enforced on that basis.

A case which was remanded to the Board after the *Burns* decision, *Ranch-Way, Inc.*,³⁰⁸ illustrates a limitation on back pay orders based on unilateral change by successors. The employer had made unilateral changes in seniority, vacation, and health benefits after the duty to bargain arose. Since *Burns* prohibits the enforcement of the collective bargaining agreement against the successor and there was no express or implied assumption of the contract, the Board could not determine monetary losses and therefore could not formulate a make-whole remedy. The implication is that changes in wages and other financial benefits would permit such an order.

Burns, however, did designate an exception to the general rule of allowing the employer to set the initial terms of employment: when the successor clearly intends to retain the old unit intact, an immediate duty to bargain results. In *NLRB v. Bachrodt Chevrolet Co.*,³⁰⁹ the successor employer offered jobs to all the former employees, maintaining the existing employment terms. After the employees were rehired, unilateral changes were made in wages, vacation pay, and overtime. The Seventh Circuit held that these circumstances justified enforcing the Board's order of restitution of the benefits lost by failure to adhere to the previous terms.

C. Claims of Creditors

An award of back pay is sometimes complicated by the claim of a third party upon the monies involved. The third party may be a

³⁰⁸ 203 N.L.R.B. No. 118, 83 L.R.R.M. 1197 (1973).

³⁰⁹ 468 F.2d 963, 81 L.R.R.M. 2244 (7th Cir. 1972), enforcing in part 186 N.L.R.B. 1035, 76 L.R.R.M. 1597 (1970). Accord, *Howard Johnson Co.*, 198 N.L.R.B. No. 98, 80 L.R.R.M. 1769 (1972). *Bachrodt* was recently vacated by the Supreme Court, 93 S. Ct. 1547 (1973). The case was remanded to the Seventh Circuit in light of *Burns*. This remand does not alter the validity of the Seventh Circuit's interpretation of *Burns*, since the remand is based on the underlying conviction that the Board, rather than the court, should have the first chance to reconsider *Bachrodt* in light of *Burns*. For a full discussion of these developments, see 1972-1973 Annual Survey of Labor Relations Law, 14 B.C. Ind. & Com. L. Rev. 1173, 1212-14 (1973).

creditor of the respondent employer, as in a bankruptcy proceeding, or of the individual claimant, as in a garnishment proceeding.

The leading case in the area of bankruptcy is *Nathanson v. NLRB*,³¹⁰ which arose out of an involuntary petition for bankruptcy filed against a respondent in a Board case, after a back pay order had been assessed by the Board but before it had been enforced by a court of appeals. When the court of appeals enforced the Board's order, the Board filed a proof of claim which was disallowed by the referee in bankruptcy. The District Court for the District of Massachusetts set aside the disallowance³¹¹ and the Court of Appeals for the First Circuit affirmed,³¹² holding that the Board's order was a provable claim, that the Board could liquidate the claim, and finally, that the claim was entitled to a priority as a debt due to the United States under section 64(a)(5) of the Bankruptcy Act. This holding conflicted with the view taken by the Court of Appeals for the Eighth Circuit in *NLRB v. Killoren*,³¹³ and the Supreme Court granted certiorari.³¹⁴ The Court agreed with the Board and the First Circuit as to the first and second findings but not as to the third. The Court did not subscribe to the reasoning that because the Board is an agency of the United States any debt owed it is a debt owing to the United States. The priority granted by the Bankruptcy Act was designed to safeguard and secure adequate revenue to sustain public responsibilities and discharge public debts. The Court noted that a back pay claim does not involve public revenue since the beneficiaries are private individuals. The Court went on to distinguish *Bramwell v. United States Fidelity & Guaranty Co.*,³¹⁵ which granted a priority to a claim of the United States for Indian monies on the ground that Indians are wards of the United States. In response to the Board's argument that the interest of the United States in eradicating unfair labor practices is so great that the back pay order should be given the additional sanction of priority of payment, the Court concluded that this would be a legislative, and not a judicial, decision.

In this connection, it is interesting to note that wages (and back pay constitutes wages)³¹⁶ are granted a second priority under the Bankruptcy Act, limited, however, to \$600 and the further restriction that a claim therefor must be filed within three months of the

³¹⁰ 194 F.2d 248, 29 L.R.R.M. 2430 (1st Cir.), rev'd, 344 U.S. 25 (1952).

³¹¹ *In re MacKenzie Coach Lines, Inc.*, 100 F. Supp. 489, 28 L.R.R.M. 2628 (D. Mass. 1951).

³¹² *Nathanson v. NLRB*, 194 F.2d 248, 29 L.R.R.M. 2430 (1st Cir. 1952).

³¹³ 122 F.2d 609, 9 L.R.R.M. 584 (8th Cir.), cert. denied, 314 U.S. 696 (1941).

³¹⁴ 343 U.S. 962 (1951).

³¹⁵ 269 U.S. 483 (1926).

³¹⁶ *Social Security Bd. v. Nierotko*, 327 U.S. 358 (1946).

commencement of the proceeding. However, in a Board case, as pointed out by the dissenting justices in *Nathanson*,³¹⁷ the claimants can rarely qualify under this priority because of the long time lag occasioned by Board proceedings to establish the unlawful character of the discharge and the necessity of computing back pay thereafter, either through negotiations or a formal back pay proceeding.

The Court also upheld the Board and the courts below in denying the trustee's claim that the liquidation or computation of the back pay award was a matter for the Bankruptcy Court and not the Board. Under section 10(c) of the Act, the fixing of back pay is one of the functions entrusted solely to the Board. In this connection the Supreme Court observed that:

The computation of the amount due may not be a simple matter. It may require, in addition to the projection of earnings which the employee would have enjoyed had he not been discharged and the computation of actual interim earnings, the determination whether the employee wilfully incurred losses, whether the back pay period should be terminated because of offers of reinstatement or the withdrawal of the employee from the labor market, whether the employee received equivalent employment, and the like. . . . Congress made the relation of remedy to policy an administrative matter, subject to limited judicial review, and chose the Board as its agent for this purpose.³¹⁸

Respecting garnishment proceedings, the weight of authority favors the proposition that, until a claimant actually receives a back pay award, his future interest therein may not be attached. In *NLRB v. Sunshine Mining Co.*,³¹⁹ creditors of twenty-three back pay claimants issued writs of attachment and process of garnishment upon respondent employer after the Court of Appeals for the Ninth Circuit had issued its decree enforcing the Board's order³²⁰ but before the back pay amounts were liquidated. The Board petitioned the court to enjoin such action.

The Ninth Circuit held that, although the construction of state laws pertaining to garnishment generally is a matter for local determination, the subject matter here was nevertheless within the full control of the court of appeals until final compliance with the order of the Board, as enforced by the court's decree. The court pointed out that if third persons were permitted to obtain fixed rights against

³¹⁷ *Nathanson v. NLRB*, 344 U.S. 25, 31-32 (1952).

³¹⁸ *Id.* at 29-30.

³¹⁹ 125 F.2d 757, 9 L.R.R.M. 618 (9th Cir. 1942).

³²⁰ *NLRB v. Sunshine Mining Co.*, 110 F.2d 780, 6 L.R.R.M. 981 (9th Cir. 1940).

the employer growing out of back pay awards, the power of the court to enforce its decree would be subject to partial or complete frustration. The court then alluded to the fact that the award of back pay is not a private judgment belonging to the employee, who has no property right therein pending actual receipt of the award. Consequently, the court issued an injunction permanently restraining state litigants from proceeding against the respondent employer to attach the claimants' prospective awards.

In *NLRB v. Stackpole Carbon Co.*,³²¹ the Board and the respondent employer, following the entry of the decree of the court of appeals, entered into a stipulation under which \$50,000 was deposited in a bank account under the trusteeship of the Board's Regional Director to be paid to the back pay claimants in twelve installments. Many of the claimants had executed assignments of their back wages in favor of the Department of Public Assistance of the Commonwealth of Pennsylvania, which had granted the employees financial aid during the back pay period. The Board sought to void such executions. The Commonwealth and the Department took the position that as a result of the Board order and court decree, a "private" substantive right vested in each employee equal to the sum awarded to him by the Board and, further, that the employee could assign, sell or dispose of that right in any manner he saw fit. The court concluded that if the purposes of the Act are to be effected, the right of the employee to the back pay award must be deemed to be a public right. The Board's order cannot be deemed to be complied with by the respondent until the employee to whom the award is due has received the money, which money has no private character at all until it is in the employee's hands. Thus, the right to the award is a public right and the claimant is paid as a result of the function of a public body carrying out the intent of Congress. On the basis of this reasoning, the court of appeals granted the injunction sought by the Board.

D. Union Responsibility

The Taft-Hartley amendments regarding union unfair labor practices, also necessitated the proviso to section 10(c) of the Act: "that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him."³²² The Supreme Court in *Radio Officers' Union v. NLRB*,³²³ utilized this proviso in affirming the validity of sole union liability for back pay in the hypothetical case where the union, in violation of section

³²¹ 128 F.2d 188, 10 L.R.R.M. 619 (3d Cir. 1942).

³²² 29 U.S.C. § 160(c) (1970).

³²³ 347 U.S. 17 (1954).

8(b)(2) attempts to cause the employer to discriminate against a particular employee. The Court interpreted the congressional purpose of the proviso as an attempt to give the Board the power to remedy union unfair labor practices similar to its power with respect to employer violations. The union argument that a failure to require the employer to share the responsibility would frustrate the purpose of the Act was rejected.

In the more usual case, where the employer is joined in the proceeding, the union and employer are jointly and severally liable for back pay. The principle was first established by the Board in *H. M. Newman*,³²⁴ where it was held that when both the employer and union are responsible for the discrimination, they will be jointly and severally liable without any attempt to apportion liability according to responsibility for the violation. *Union Starch & Refining Co. v. NLRB*³²⁵ explored the legislative history to refute the argument that the amended section 10(c) allows only the employer or the union to be held liable for back pay. Stressing the congressional intent to maintain the Board's discretion in formulating remedies for union violations, the Seventh Circuit maintained that the proviso phrase, "back pay may be required of the employer *or* labor organization," does not require limiting the remedy against only one party when both participated in the discrimination, but does permit joint and several liability.

The question of refusal to apportion damages in *Newman* and *Union Starch* was reopened in *Acme Mattress Co.*³²⁶ Here, the employer's discriminatory discharge and unlawful execution of a union-security clause were induced by a strike and refusal to sign a contract. The court deemed the economic coercion no greater than in *Newman* and the principle of apportionment remained inappropriate. The Board's basic position was that since economic coercion is not a defense to the unfair labor practice, it should not absolve the employer of responsibility for remedial back pay.³²⁷ The rationale

³²⁴ 85 N.L.R.B. 725, 24 L.R.R.M. 1463 (1949), enforced, 187 F.2d 488, 27 L.R.R.M. 2484 (2d Cir. 1950).

³²⁵ 87 N.L.R.B. 779, 25 L.R.R.M. 1176 (1949), enforced, 186 F.2d 1008, 27 L.R.R.M. 2342 (7th Cir.), cert. denied, 342 U.S. 815 (1951).

³²⁶ *Acme Mattress Co.*, 91 N.L.R.B. 1010, 26 L.R.R.M. 1611 (1950), enforced, 192 F.2d 524, 29 L.R.R.M. 2079 (7th Cir. 1951).

³²⁷ Chairman Herzog and Member Reynolds, in their dissent, turned to the use of the word "or" in the § 10(c) proviso, 29 U.S.C. § 160(c) (1970), to support their belief that the congressional intent was for the Board to exercise discretion in assessing back pay liability against either or both parties according to their relative responsibility for the violations. They recognized that *Newman* set the precedent for refusal to make such a determination, but expressed their belief in the Board's ability to set new policy. The dissenters evidenced greater faith in the deterrent effect of sole liability on the union. 91 N.L.R.B. at 1021-22, 26 L.R.R.M. at 1617-18 (dissenting opinion).

was that the acceptance of a defense of economic coercion would undermine employer resistance to unlawful union demands. Furthermore, sole liability would not be a greater deterrent for unions since full financial liability is already a contingency under joint and several liability. Analogizing to the tort doctrine of last clear chance, the Board underscored the employer's ultimate control in discriminatory hiring and discharges. The shared liability of joint tortfeasors, despite the presence of duress against one, was seen as additional support for the Board's holding. Finally, while acknowledging that back pay is a public, not a private right, the Board hesitated to cut off a source of reimbursement. The courts of appeals followed the Board in rejecting the coercion argument.³²⁸

While retaining this general principle of joint and several liability, the Board has found one party to be primarily liable and the other secondarily liable under special circumstances. Most common are those cases where one party has invoked a legal method of settling the dispute and resorted to the unlawful practice only when that has failed. In *NLRB v. Lexington Electric Products Co.*,³²⁹ Local 3 of the IBEW called a strike at the company's Lexington plant with the illegal objective of closing down the Imperial plant, which was beyond the union's jurisdiction, and bringing the Imperial employees with the Local's jurisdiction. The strike was effective; Lexington Electric Products closed the Imperial plant and discharged the employees working there. Both the union and the employer were found to have unlawfully encouraged union membership by these discharges. However, the Third Circuit refused to enforce the Board order of joint and several liability, noting that the company had filed an unfair labor practice charge against the union, which had not led to an end to the strike, before the company yielded to the union pressure. The court reasoned that where the employer resists the union pressure to the maximum extent possible, joint liability will not be a deterrent.³³⁰ Similarly, in *Zoe Chemical Co.*,³³¹ the Board held that the company violated the Act by the unlawful enforcement of a union-security clause. However, since a state court arbitrator's award had directed this method of enforcement, the company was held only secondarily liable.³³²

³²⁸ *NLRB v. Pinkerton's Nat'l Detective Agency*, 202 F.2d 230, 31 L.R.R.M. 2336 (9th Cir. 1953); *NLRB v. Newspaper & Mail Deliverers' Union*, 192 F.2d 654, 29 L.R.R.M. 2136 (2d Cir. 1951).

³²⁹ 283 F.2d 54, 46 L.R.R.M. 3028 (3d Cir. 1960), cert. denied, 365 U.S. 845 (1961).

³³⁰ *Id.* See *Bulletin Co.*, 181 N.L.R.B. 647, 74 L.R.R.M. 1122 (1970), enforced, 443 F.2d 863, 77 L.R.R.M. 2599 (3d Cir. 1971).

³³¹ 160 N.L.R.B. 1001, 63 L.R.R.M. 1052 (1966), enforcement denied, 406 F.2d 574, 70 L.R.R.M. 2276 (2d Cir. 1969). The Second Circuit found that these circumstances not only mitigated the employer's liability, but prevented the finding of a violation.

³³² In other cases the union has been found to be primarily liable because of the nature of

The special problem of the union's inability to correct the discrimination in the employee's job status to end its back pay liability was treated in *Pinkerton's National Detective Agency*.³³³ Written notification to the employer that the union wished to cease discrimination against the employees will toll back pay liability against the union, despite the employer's refusal to end the discrimination.³³⁴ Following *Pen & Pencil Workers Local 19593*³³⁵ which established the principle that the union must notify both the employer and discriminatees when it is the sole respondent, the Board specifically held in *Iron Workers Local 595*³³⁶ that such notification would toll back pay liability. In discussing this decision in *NLRB v. Teamsters Local 182*,³³⁷ the Second Circuit did not see it as a reversal of policy, but an adaptation to the situation where the employer, not being a respondent, had no incentive to offer reinstatement to the discriminatee.

The Board's doctrine with respect to union liability for back pay in strike situations was extensively reviewed in *Teamsters Local 901*.³³⁸ Since the finding of a section 8(b)(1)(A) violation may be based upon the misconduct of even a few pickets, the Board was fearful of chilling the right to strike by imposing back pay liability. Consequently, the Board exercised its discretion to reject an appro-

the violation. In *NLRB v. Operating Engineers Local 138*, 293 F.2d 187, 48 L.R.R.M. 2743 (2d Cir. 1961), there were § 8(a)(1) and (3) violations by the employer and § 8(b)(1)(A) and (3) violations by the union in the maintenance of a closed shop and discriminatory hiring. 29 U.S.C. §§ 158(a)(1), (3), (b)(1)(A), (3) (1970). The union had been carrying out work stoppages and otherwise forcing the discharge of union members who were advocating internal union reform. In *Laborers Local 573*, 196 N.L.R.B. No. 62, 80 L.R.R.M. 1329 (1972), two unions cooperated in forcing discriminatory discharges; but the one which was the chief beneficiary and instigator of the discrimination against non-members of that union was held primarily liable and the other only secondarily liable.

As a practical matter, the union was made primarily liable in *National Cash Register Co.*, 190 N.L.R.B. 581, 77 L.R.R.M. 1342 (1971), enforced, 466 F.2d 945, 81 L.R.R.M. 2001 (6th Cir., 1972), when the union had collected the fine imposed on employees who worked during the strike, although the company had also violated the Act in permitting the imposition of fines. Although both the union and the employer were liable, the dissenters in *National Cash Register* did not feel that the evidence warranted holding the company secondarily responsible. 466 F.2d at 965, 81 L.R.R.M. at 2018 (dissenting opinion). For a full discussion of these issues, see 1972-1973 Annual Survey of Labor Relations Law, 14 B.C. Ind. & Com. L. Rev. 1173, 1245-48 (1973).

³³³ 90 N.L.R.B. 205, 26 L.R.R.M. 1193 (1950), enforced, 202 F.2d 230, 31 L.R.R.M. 2336 (9th Cir. 1953). Accord, *General Am. Aerocoach Co.*, 90 N.L.R.B. 239, 26 L.R.R.M. 1188 (1950).

³³⁴ To toll liability the notification must be unequivocal. See, e.g., *Iron Workers Local 426*, 192 N.L.R.B. 97, 77 L.R.R.M. 1654 (1971), review denied, 81 L.R.R.M. 2479 (D.C. Cir. 1972). Similarly, notification does not toll liability if the union continues to discriminate against the employee. *NLRB v. Operating Engineers Local 925*, 460 F.2d 589, 80 L.R.R.M. 2399 (5th Cir. 1972).

³³⁵ 91 N.L.R.B. 883, 26 L.R.R.M. 1583 (1950).

³³⁶ 109 N.L.R.B. 73, 34 L.R.R.M. 1285 (1954).

³³⁷ 228 F.2d 83, 37 L.R.R.M. 2174 (2d Cir. 1955).

³³⁸ 202 N.L.R.B. No. 43, 82 L.R.R.M. 1525 (1973).

priate, but excessively stringent, remedy in favor of the traditional section 10(j) injunction or the *Laura Modes Company*³³⁹ remedy of refusal to issue a bargaining order and the direction of an election. This decision upholds a line of cases from *Colonial Hardwood Flooring*³⁴⁰ in 1949 through *Operating Engineers Local 513*³⁴¹ in 1963, denying back pay for union interference with the employees' access to the place of employment. The *Teamsters, Local 901* opinion also distinguished two recent cases, *National Cash Register Co.*³⁴² and *Teamsters Local 212*.³⁴³ While *National Cash Register* imposed back pay liability for strike activity, the court felt that the union's levy of a percentage of the wages of employees who worked during the strike was a direct interference with the employment relationship in violation of section 8(b)(1)(A). This type of interference was also present in *Teamsters Local 212*, where three non-striking employees were laid off when the union president threatened their safety in a context of violence by the strikers.

The development of the substantive law with respect to a union's duty of fair representation has been accompanied by a consideration of imposing back pay liability for such violations. *Local 485, IUE*,³⁴⁴ discussed this issue extensively. Local 485 had violated section 8(b)(1)(A) in refusing to process a grievance by an employee who had dissented from union policy. Since the union had not complied with the original order to fulfill its obligation, the Board imposed liability for back pay from the time the grievance was presented until the fulfillment of the duty of fair representation. Observing that the company's failure to follow the procedure required by the collective bargaining agreement made the discharge questionable, the Board attributed the employee's continued ambiguous status to the union's subsequent failure to process the grievance. This conclusion justified burdening the union with a back pay order. The Board rejected the dissent's suggestion that a section 301 suit would be available against the employer and union where the collective bargaining agreement assigned the employee's cause of action for breach of contract to the union and required the exhaustion of the contract remedies before bringing suit. The Board also

³³⁹ 144 N.L.R.B. 1592, 54 L.R.R.M. 1299 (1963).

³⁴⁰ 84 N.L.R.B. 563, 24 L.R.R.M. 1302 (1949).

³⁴¹ 145 N.L.R.B. 554, 54 L.R.R.M. 1429 (1963). The court reasoned that determining damages in cases involving personal injuries as well as back pay claims was beyond the expertise and authority of the Board and could be left to state court police power to remedy.

³⁴² 190 N.L.R.B. 581, 77 L.R.R.M. 1342 (1971), enforced, 466 F.2d 945, 81 L.R.R.M. 2001 (6th Cir. 1972).

³⁴³ 200 N.L.R.B. No. 83, 82 L.R.R.M. 1165 (1972).

³⁴⁴ 183 N.L.R.B. No. 131, 74 L.R.R.M. 1396 (1970), supplementing 170 N.L.R.B. 1234, 67 L.R.R.M. 1609 (1965), enforcement denied, 454 F.2d 17, 79 L.R.R.M. 2278 (2d Cir. 1972).

outlined the limits of section 301 suits in remedying the union's violation and in neglecting the protection of the arbitration clause. Basic to the decision was the Board's opinion that its processes should provide relief without requiring resort to a section 301 suit.

The Second Circuit, in refusing to enforce *Local 485, IUE*,³⁴⁵ echoed the themes of the Board's dissent. The court held that the Supreme Court's decision in *Vaca v. Sipes*,³⁴⁶ requiring apportionment of liability between the employer and the union according to the damages caused by each, prevented the imposition of sole liability on the union for breach of the duty of fair representation. The court noted that, until there was a determination that the discharge was improper, a back pay order would appear punitive. A Board ruling on the validity of the discharge would present jurisdictional problems. The Second Circuit also deferred an opinion about the alternative, a Board order based on an arbitrator's determination of the legality of the discharge and apportionment of damages. The Second Circuit did enforce the original cease and desist order.

E. *Personal Liability of Employer Officers,
Union Officers and/or
Business Agents*

Generally, absent special circumstances, such as fraud or situations in which the corporate officer is a disguised continuance of the corporation or dissipates corporate assets or intermingles personal and corporate funds or attempts to evade the back pay obligation, corporate officers, union officers or business agents have not been held personally liable for the back pay obligation by the Board or the federal courts.³⁴⁷

In *Riley Aeronautics*,³⁴⁸ the General Counsel sought to assess personal liability, naming an officer of a corporation in a back pay proceeding on the theory that he, rather than the corporation, committed the unfair labor practice and delayed complying with the Board order until the corporate respondents (predecessor and successor employers) got into financial difficulties. The trial examiner and the Board did not agree, pointing out that the evidence was not sufficient to cause the Board to pierce the corporate veil, absent special circumstances. Furthermore, the Board pointed out that if

³⁴⁵ *NLRB v. Local 485, IUE*, 454 F.2d 17, 79 L.R.R.M. 2278 (2d Cir. 1972), enforcing 170 N.L.R.B. 1234, 67 L.R.R.M. 1609 (1965).

³⁴⁶ 386 U.S. 171, 196-98 (1967).

³⁴⁷ *NLRB v. West Texas Util. Co.*, 206 F.2d 442, 445, 32 L.R.R.M. 2043, 2047 (D.C. Cir. 1953); *NLRB v. Hopwood Retinning Co.*, 104 F.2d 302, 304, 305, 4 L.R.R.M. 555, 558 (2d Cir. 1939). See also *Chef Nathan Sez Eat Here*, 201 N.L.R.B. No. 41, 82 L.R.R.M. 1264 (1973).

³⁴⁸ 154 N.L.R.B. 340, 59 L.R.R.M. 1796 (1965).

the officer refused to discharge his duty to satisfy a court-enforced order, including disbursing corporate funds to meet the corporate back pay obligation, he risked punishment for contempt.³⁴⁹

In *NLRB v. Local 925, IUDE (J. L. Manta, Inc.)*,³⁵⁰ the trial examiner, in a decision adopted by the Board, did assess personal liability against a union business agent on the theory that he was not merely implementing the policy of the union but was the architect of that policy. The trial examiner reasoned that the agent was the moving force behind the anti-union campaign and should not now be allowed to plead his representative status as a defense against the finding of personal liability. However, the court pointed out that the Board's ruling was a departure from its policy of not holding agents personally liable.³⁵¹ Accordingly, the court remanded the case to the Board but the matter was disposed of by agreement among the parties.

VII. THE BACK PAY REMEDY AND REFUSAL-TO-BARGAIN SITUATIONS

In refusal-to-bargain cases where the Board can look to a negotiated, existing, or recent contract to determine damages, the Board has required the employer to reimburse the employees for loss of contract benefits. Thus, the Board has ordered an employer to make whole its employees for losses suffered as a result of a refusal to execute a contract which has been fully agreed upon by the payment of contract benefits,³⁵² and ordered employers to compensate employees for losses resulting from unilateral changes.³⁵³ In *NLRB v. Strong*,³⁵⁴ the Supreme Court confirmed the Board's authority to issue back-pay orders in refusal-to-bargain situations. A finding of bad faith or anti-union conduct is not necessary to issue a

³⁴⁹ Id. at 364, 59 L.R.R.M. at 1798.

³⁵⁰ 460 F.2d 589, 80 L.R.R.M. 2399 (5th Cir. 1972).

³⁵¹ *NLRB v. Operating Engineers Local 925*, 460 F.2d 589, 80 L.R.R.M. 2399 (5th Cir. 1972); *United Brewery Workers*, 166 N.L.R.B. 915, 65 L.R.R.M. 1704 (1967); *Hoisting & Portable Engineers Local 4*, 141 N.L.R.B. 1231, 52 L.R.R.M. 1487 (1963); *Marble Polishers Local 121*, 132 N.L.R.B. 844, 48 L.R.R.M. 1439 (1961); *Hod Carriers Local 1445*, 126 N.L.R.B. 226, 45 L.R.R.M. 1301 (1960); *Motion Picture Operators Local 244*, 126 N.L.R.B. 376, 377 n.3, 45 L.R.R.M. 1318 (1960). See also *Journeymen Local 420*, 111 N.L.R.B. 1126, 1127-28, 35 L.R.R.M. 1656, 1657 (1955), enforced, 239 F.2d 327, 39 L.R.R.M. 2176 (3d Cir. 1956); *H.E. Stoudt & Sons, Inc.*, 114 N.L.R.B. 838, 37 L.R.R.M. 1050 (1955).

³⁵² *NLRB v. Strong*, 393 U.S. 357 (1969); *Beverage-Air Co.*, 185 N.L.R.B. 168, 76 L.R.R.M. 1711 (1970); *Schill Steel Prods. Co.*, 161 N.L.R.B. 939, 63 L.R.R.M. 1388 (1966); *Huttig Sash & Door Co.*, 151 N.L.R.B. 470, 475, 58 L.R.R.M. 1433, 1434 (1965), modified and enforced, 362 F.2d 217, 220, 62 L.R.R.M. 2271, 2272 (4th Cir. 1966).

³⁵³ *Petrolane-Franklin Gas Serv.*, 174 N.L.R.B. 594, 70 L.R.R.M. 1342 (1967); *Overnite Transp. Co.*, 157 N.L.R.B. 1185, 61 L.R.R.M. 1520 (1966), enforced, 372 F.2d 765, 64 L.R.R.M. 2359 (4th Cir. 1967); *Central Ill. Pub. Serv. Co.*, 139 N.L.R.B. 1407, 51 L.R.R.M. 1508 (1962), enforced, 324 F.2d 916, 54 L.R.R.M. 2586 (7th Cir. 1963).

³⁵⁴ 393 U.S. 357 (1969).

make-whole order in these cases.³⁵⁵ The principle of restitution is designed to prevent the wrongdoer from benefitting from the unfair labor practice during the period of breach. Thus, when bargaining is ordered, the Board restores the employees to the position they would have been in had the violation not occurred.³⁵⁶ In establishing the remedy, contract terms must be observed.³⁵⁷ Further deference to the principle of free bargaining is found in the avoidance of restrictions on future bargaining.³⁵⁸

In *H.K. Porter v. NLRB*³⁵⁹ the Supreme Court established a limit on back pay orders for section 8(a)(5) violations by barring the imposition of substantive contract terms upon either of the parties. The Court construed section 8(d) as a limit on remedial powers and evaluated the interplay between sections 8(d) and 10 of the Act:

It would be anomalous indeed to hold that while §8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad faith bargaining, the Act permits the Board to compel agreement in the same dispute. The Board's remedial powers under §10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to do so would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.³⁶⁰

The Court also noted that inadequacy in the Board's present remedial powers must be solved by Congress, not the courts.

*IUE v. NLRB (Tiidee)*³⁶¹ was the first major case to adopt the theory that the Board has the authority to grant a make-whole remedy to reimburse the work force for the loss of benefits from the employer's failure to bargain with a newly certified union.³⁶² The

³⁵⁵ *Zink Co.*, 196 N.L.R.B. No. 135, 80 L.R.R.M. 1232 (1972); *Exchange Parts Co.*, 139 N.L.R.B. 710, 51 L.R.R.M. 1366, enforced, 339 F.2d 829, 58 L.R.R.M. 2097 (5th Cir. 1965).

³⁵⁶ *Zink Co.*, 196 N.L.R.B. No. 135, 80 L.R.R.M. 1232 (1972).

³⁵⁷ In *Beverage-Air Co.*, 185 N.L.R.B. 168, 76 L.R.R.M. 1711 (1970), it was held that the employees would be made whole for the loss of benefits which would have accrued to them under the contract. Since the contract allowed the employer to set the wages for employees brought into the unit during the contract term, employees who were hired after the employer's refusal to sign the contract were not included in the back pay order.

³⁵⁸ *Petrolane-Franklin Gas Serv.*, 174 N.L.R.B. 594, 70 L.R.R.M. 1342 (1967).

³⁵⁹ 397 U.S. 99 (1970).

³⁶⁰ *Id.* at 108.

³⁶¹ 426 F.2d 1243, 73 L.R.R.M. 2870 (D.C. Cir.), cert. denied, 400 U.S. 950 (1970).

³⁶² See, e.g., 36 NLRB Ann. Rep. 23, 91-92 (1971); 37 NLRB Ann. Rep. 136-39 (1972);

Board had issued a traditional bargaining order in this case, and the union petitioned for further relief. The District of Columbia Circuit found that the employer's objections to the election were "patently frivolous." The orienting principle in the opinion was the central importance in the Act of collective bargaining and the need to devise adequate remedies for the breach of this duty. The court stressed that section 10(c) required the Board to take affirmative action which would fulfill this purpose. The inadequacy of prospective relief was reflected by the economic benefits to the employer resulting from the delay in bargaining and the resulting weakening of the union. By limiting the remedy to what would actually have been achieved by the two parties, not to what the Board determines should have been negotiated, the court believed it had complied with the law of *H.K. Porter*. Similarly, the order was a remedy for past violations, not a present imposition of terms. A further purpose was to deter unjustified litigation which would burden the courts. The court of appeals remanded the case to the Board to consider a make-whole remedy or appropriate alternatives.

The District of Columbia Circuit qualified its position in two subsequent cases, *United Steelworkers v. NLRB (Quality Rubber Manufacturing Co.)*³⁶³ and *Southwest Regional Joint Board, Clothing Workers v. NLRB*.³⁶⁴ Where the employer's defense in the section 8(a)(5) case was not frivolous, but presented a debatable issue, the procedural right to appellate court review prevailed and a make-whole remedy would not be ordered. As these two cases make clear, the District of Columbia Circuit considered the legitimacy of the defense, not the presence of section 8(a)(1) and (3) violations, to be critical.

Before the Board heard *Tiidee* on remand, it decided *Ex-Cell-O Corp.*,³⁶⁵ a section 8(a)(5) case in which the employer refused to bargain as the only means of obtaining appellate review of its objections to an election. A divided Board held that it did not have the statutory authority to impose a make-whole remedy in such a case. The Board recognized the inadequacy of the remedy, but suggested congressional reform and the use of the section 10(j) and (e) injunction powers to get temporary relief in federal court while

Johannesen, Continuing Controversy: New Remedies for Old Unfair Labor Practices, 23 Lab. L.J. 100, 105-06 (1972); Swerdlow, Freedom of Contract in Labor Law: H.K. Porter and Section 8(d), 51 Texas L. Rev. 1, 20-29 (1972); 1970-1971 Annual Survey of Labor Law, 12 B.C. Ind. & Com. L. Rev. 1026, 1122-28 (1971); 1971-1972 Annual Survey of Labor Law, 13 B.C. Ind. & Com. L. Rev. 1347, 1452-55 (1972).

³⁶³ 431 F.2d 519, 74 L.R.R.M. 2747 (D.C. Cir. 1970).

³⁶⁴ 441 F.2d 1027, 76 L.R.R.M. 2033 (D.C. Cir. 1970).

³⁶⁵ 185 N.L.R.B. 107, 74 L.R.R.M. 1740 (1970).

an unfair labor practice case is pending and during the period of enforcement. The Board observed that imposing hypothetical contract terms would run counter to the purpose of the Act as clarified in *H.K. Porter*. Section 10(c) also barred punitive orders, and the speculative nature of the remedy risked violating this restriction. The Board also rejected the subjective distinction made by the court of appeals in *Tiidee* between frivolous and debatable challenges, which distinction would result in excessive litigation and injustice.

The *Ex-Cell-O* dissenters, Members McCulloch and Brown, based their belief in the Board's authority to impose back pay on the broad power given by section 10(c). A view of this policy as the promotion of peaceful collective bargaining shaped their opinion. Reviewing the range of compensatory remedies, the proposed make-whole relief was seen as merely an extension, differing from other section 8(a)(5) compensatory orders primarily in the method of proof. Rather than setting contract terms, it would simply measure the loss. Only the uncertainty of injury, not damages, would bar recovery from the wrongdoer. The dissent suggested such means of measurement as other contracts negotiated in the area by the union and government wage statistics. The courts of appeals have, however, followed the majority view and in subsequent cases denied monetary damages on the basis of *Ex-Cell-O*.³⁶⁶

The District of Columbia Circuit granted a summary reversal of *Ex-Cell-O* to the extent it denied make-whole relief, remanding the case to the Board to determine whether or not the challenge to the certification presented a debatable issue.³⁶⁷ Before the Board confronted this challenge, the court issued a supplemental decision concluding that the objections were debatable and vacated the remand.³⁶⁸ When *Tiidee* reached the Board on remand,³⁶⁹ it was the unanimous decision of the Board that it did not have the authority to grant a make-whole order:

We know of no way by which the Board could ascertain from the above [area and national contract statistics] what the parties "would have agreed to" if they had bargained in good faith. Inevitably, the Board would have to decide

³⁶⁶ *Lipman Motors, Inc.*, 187 N.L.R.B. 346, 76 L.R.R.M. 1039 (1970), enforced, 451 F.2d 823, 78 L.R.R.M. 2808 (2d Cir. 1971); *General Dynamics Corp.*, 187 N.L.R.B. 679, 76 L.R.R.M. 1540 (1970), enforced, 447 F.2d 1370, 78 L.R.R.M. 2480 (5th Cir. 1971).

³⁶⁷ *Auto Workers v. NLRB (Ex-Cell-O)*, 449 F.2d 1046, 76 L.R.R.M. 2753 (D.C. Cir. 1971).

³⁶⁸ *Ex-Cell-O Corp. v. NLRB*, 449 F.2d 1058, 77 L.R.R.M. 2547 (D.C. Cir. 1971).

³⁶⁹ *Tiidee Prods., Inc.*, 194 N.L.R.B. 1234, 79 L.R.R.M. 1175 (1972).

from the above what the parties *should* have agreed to. And this, the court stated, the Board must not do.³⁷⁰

In *Tiidee*, the Board awarded litigation costs to the union to deter unfounded refusals to bargain and ordered non-monetary remedies to aid the union in reacquiring its initial strength. These methods of restoring the status quo included the mailing of notices to the homes of the employees, allowing the union to use the company bulletin boards to post organizational material, and requiring the employer to furnish a list of the employees' names and addresses. The Board rejected proposals to award pre-election organizational expenses and union fees and dues which might have been collected under a union-security agreement.

Other Board decisions have shown that litigation costs will be awarded only when the insubstantiality of the challenge to the election allows the inference that the employer's motive was to delay bargaining.³⁷¹

CONCLUSION

This article has traced the historical development of the back pay remedy and has presented a review of the substantive and procedural aspects of this remedy as it is currently applied by the National Labor Relations Board. The flexibility of the back pay remedy has made it adaptable, in one form or another, to many of the novel and complex situations which constantly challenge the ingenuity and expertise of the General Counsel and his staff, the Board and its administrative law judges, and the many private labor law practitioners who dedicate themselves to the cause of industrial harmony through the sound administration of national labor policy.

³⁷⁰ Id. at 1235, 79 L.R.R.M. at 1177; *Ex-Cell-O Corp. v. NLRB*, 449 F.2d 1058, 77 L.R.R.M. 2547 (D.C. Cir. 1971); *Heck's, Inc.*, 191 N.L.R.B. 886, 77 L.R.R.M. 1513 (1971), enforced as amended, 476 F.2d 546, 82 L.R.R.M. 2955 (D.C. Cir. 1973).

³⁷¹ In *Heck's, Inc.*, 191 N.L.R.B. 886, 77 L.R.R.M. 1513 (1971), enforced as amended, 476 F.2d 546, 82 L.R.R.M. 2955 (D.C. Cir. 1973), decided the previous year, the Board rejected the idea of litigation costs on the grounds that the General Counsel has the prime responsibility for the litigation and the charging party's litigation expenses serve private, not public, interests. The District of Columbia Circuit amended the order to allow both litigation costs and organizational expenses, believing that the Board's decision in *Tiidee* would permit a remedy when extraordinary organizational costs were attributable to the unfair labor practices. In *Tiidee Prods., Inc.*, 196 N.L.R.B. No. 27, 79 L.R.R.M. 1692 (1972), the Board ordered litigation costs on the basis of frivolous election objections. Although the Board made a like finding in *John Singer, Inc.*, 197 N.L.R.B. No. 7, 80 L.R.R.M. 1340 (1972), litigation costs were not considered. Instead, the Board ordered the *Tiidee* non-monetary remedies provided for the certification year to begin upon the commencement of good faith bargaining, and required the General Counsel to get § 10(e) relief if the decision were appealed or not complied with. 29 U.S.C. § 160(e) (1970).