

ADAMS MOTORS, INC. *and* LODGE 1898, INTERNATIONAL ASSOCIATION OF MACHINISTS. *Case No. 1-CA-273. October 31, 1951*

Supplemental Decision and Determination

On February 24, 1950, the Board issued an Order in this case adopting the findings, conclusions, and recommendations in the Trial Examiner's Intermediate Report dated January 6, 1950, which Order was thereafter enforced in a decree entered on September 28, 1950, by the United States Court of Appeals for the First Circuit. On February 27, 1951, the Board issued an Order that the record in this case be reopened, that a further hearing be held before a Trial Examiner to determine the amount of back pay due Benjamin Lancaster, and that the case be remanded to the Regional Director for the First Region for the purpose of conducting such further hearing. Pursuant to said remand a hearing was duly held before Trial Examiner Sidney Lindner.

On July 13, 1951, the Trial Examiner issued a Supplemental Intermediate Report, a copy of which is attached, finding that Benjamin Lancaster was entitled to net back pay in the amount of \$578.81. The Union filed exceptions to the Supplemental Intermediate Report, together with a supporting brief. The Respondent filed a reply brief.

The Board¹ has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Supplemental Intermediate Report, the exceptions and brief filed by the Union, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions and modifications:

Under the Board's Order and the decree of the court the Respondent was required to make Lancaster whole "for any loss of pay he may have suffered . . . by payment to him of a sum of money equal to that which he would normally have earned as wages" during the period of discrimination against him.

The Trial Examiner found, and we agree, that, for the reason detailed in the Supplemental Intermediate Report, Lancaster was entitled to back pay only for the periods (1) September 20 and 21, 1948, (2) October 8 to December 31, 1948, and (3) January 1 to 11, 1950.

In determining the amount of wages which Lancaster would normally have earned during those periods if he had remained in the

¹ Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Herzog and Members Reynolds and Styles].

Respondent's employ, the Trial Examiner rejected the General Counsel's contention that it should be assumed that Lancaster would have put in a full day's work on each day of the back-pay period. Citing the fact that Lancaster, during the period of his employment by the Respondent, had been unable to work steadily because of a chronic heart condition, and in view of the absence of any credible evidence that this condition had improved, the Trial Examiner, in effect, found that this condition had continued during the foregoing back-pay periods and had impaired Lancaster's availability for work during those periods to the same extent as during his period of employment by the Respondent. The Trial Examiner accordingly based his back-pay award on Lancaster's *average* weekly earnings during his period of employment by the Respondent, rather than on the pay he would have received for a full week's work.

We believe that, under the circumstances of this case, this was an appropriate method of determining the loss of pay that Lancaster "would have *normally* earned."² We will, therefore, adopt the method of computation used by the Trial Examiner and determine that Lancaster is entitled to back pay in the amount of \$578.81.

Determination

Upon the basis of this Supplemental Decision and the entire record in the case, the National Labor Relations Board hereby determines that net back pay is due Benjamin Lancaster in the amount of \$578.81.

Supplemental Intermediate Report and Recommendations

By direction of the Board, the Executive Secretary on February 27, 1951, issued the following:

ORDER REMANDING PROCEEDINGS TO REGIONAL DIRECTOR FOR FURTHER HEARING

On February 24, 1950, the Board issued an Order adopting the findings, conclusions, and recommendations as contained in the Trial Examiner's Intermediate Report dated January 6, 1950, which Order was thereafter enforced in a decree entered on September 28, 1950, by the United States Court of Appeals for the First Circuit. The Respondent and representatives of the Board having been unable to reach an agreement concerning the amount of back pay due Benjamin Lancaster, and it appearing that the question of back pay can best be resolved by a hearing,

² Cf. *Empire Worsted Mills*, 53 NLRB 683, 691-692. In that case the Board took into account, in computing back pay for each discriminatee, the *general* rate of absenteeism of all regular employees of the respondent who had continued to work in the discriminatee's occupation during the back period. However, where, as in the instant case, it is necessary to determine the extent to which the discriminatee was precluded from working by a chronic physical condition peculiar to himself, his own past record of absenteeism due to that condition is more significant than the general rate of absenteeism among his former fellow employees.

IT IS HEREBY ORDERED that the record in the above-entitled proceeding be reopened, and that a further hearing be held before a duly designated Trial Examiner for the purpose of determining the amount of back pay due Benjamin Lancaster; and

IT IS FURTHER ORDERED that this proceeding be remanded to the Regional Director for the First Region for the purpose of conducting such further hearing, and that the said Regional Director be and he hereby is, authorized to issue notice thereof.

Pursuant to a notice of further hearing issued by the Regional Director and served on the charging Union and the Respondent, a hearing was held at Boston, Massachusetts, on March 26, 27, 29, and 30 and April 11 and 12, 1951, before the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. The General Counsel and Respondent were represented by counsel and participated in the hearing. The Union was represented by a Grand Lodge representative. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence was afforded all parties.

At the opening of the hearing, counsel for the Respondent moved for further particulars regarding the amount of the claim of Benjamin Lancaster, herein referred to as the discriminatee, an analysis of the amount of his other earnings, the source of such other earnings, and a complete statement as to the efforts of the discriminatee to obtain other income. The motion was granted in part and denied in part.

When the General Counsel and counsel for the Respondent had concluded their presentation of evidence at the hearing, they waived oral argument. Both of them, however, submitted briefs on June 15, 1951, which have been duly considered. Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

In an Intermediate Report, dated January 6, 1950, Trial Examiner Horace Ruckel found that Adams Motors, Inc., herein called the Respondent, discriminatorily laid off Benjamin Lancaster, a mechanic in the repair shop, on September 20 and 21, 1948, and on October 8, 1948, discriminatorily discharged Lancaster. The Board, in its Order of February 24, 1950, adopting the findings, conclusions, and recommendations as contained in the Trial Examiner's Intermediate Report, and the United States Court of Appeals for the First Circuit, in decreeing its enforcement, directed the Respondent, among other things, to:

(a) Offer Benjamin Lancaster immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges;

(b) Make whole Benjamin Lancaster for any loss of pay he may have suffered by reason of Respondent's discrimination against him by payment to him of a sum of money equal to that which he would have normally earned as wages on September 20 and 21, 1948, and from the date of discharge on October 8, 1948, to the date of Respondent's offer of reinstatement less his net earnings during said period.

In a letter dated January 11, 1950, the Respondent offered Lancaster reemployment. Lancaster reported to Walter Smith, Respondent's service manager at the repair shop, on January 20, 1950. He was told that he would receive \$1.25 per hour, the same rate of pay as when he was discharged. A time card was made out for him which he punched and he then asked Smith for time to get his

tools. Within a few minutes Lancaster returned without the tools and told Muldoon, the Respondent's shop foreman, "I don't like the atmosphere here, I'm not going to work for you," punched the time card out and left.¹ The General Counsel concedes that a proper offer of reinstatement was made to Lancaster on January 11, 1950, and that the back-pay period terminates as of that date. There remains the question of the amount of back pay to which Lancaster is entitled under the Board's Order and the court's decree for loss of earnings until January 11, 1950.

From the time of his discharge until December 31, 1948, Lancaster sought employment in at least 12 named mercantile establishments, gas stations, and automobile repair shops, without success. During this period, he earned \$20.80 for 2 days' temporary work at the Duane Company in Quincy, Massachusetts, and approximately \$100 for automobile repair jobs at Charles Franklin's service station in Quincy, Massachusetts.

On January 1, 1949, as a result of arrangements between Lancaster and Charles Monroe, landlord of the premises at 442 Sea Street, Quincy, Massachusetts, the location of Franklin's service station, Lancaster took over the operation of the service station to carry on an automobile repair business and sell gasoline and oil. He continued to operate it, allegedly at a loss, until December 31, 1949. There was received in evidence a copy of Form 1040, U. S. Individual Income Tax Return for the year 1949, filed by Benjamin J. and Mary G. Lancaster (his wife) and prepared by Morris Snyder, an accountant employed by Lancaster for this purpose, which showed that Lancaster's business suffered a net loss of \$1,353.42. While carrying on his business, Lancaster continued his search for employment during the entire year but was unable to find a job. It is within the framework of these general facts, the details of which will be related hereinafter, that the General Counsel claims that Lancaster is entitled to full back pay for the 2 days in September 1948, when he was discriminatorily laid off, and from October 8, 1948, the date of the discriminatory discharge, to January 11, 1950. Counsel for the Respondent contends that Lancaster is not entitled to any back pay because he ran a business from which he received income and for the further reason that while running the business, Lancaster had withdrawn from the labor market and did not seek employment.

Lancaster testified that he did not obtain other employment on either September 20 or 21, 1948.

Subsequent to his discriminatory discharge, Lancaster testified he obtained temporary work for 2 days in November 1948, at the Duane Company in Quincy, Massachusetts, doing acetylene torch burning for which he was paid \$20.80 and also during the months of November and December 1948, he did about 4 automobile repair jobs for Franklin and earned "close to \$100." Although, as noted previously, he sought other employment without success, the record does not reveal that Lancaster registered with U. S. E. S. for employment during this period.

Lancaster testified that about the last week of December 1948, "close to the end of December," Charles Monroe came to his home to talk to him about taking over the service station and garage which Franklin was then operating. Monroe, according to Lancaster, prevailed upon him, since he was not working, to open up the service station which Franklin was going to vacate.² Lancaster agreed that if he was able to borrow some money he would rent the garage at \$50 per

¹ The record reveals that the time card was punched in at 12:29 p. m. and punched out at 12:37 p. m.

² Lancaster was unable to recall precisely when Franklin went out of business. He thought it was the last week of December. Upon cross-examination Lancaster admitted Franklin occupied the premises until December 31, 1948.

month and the adjacent dwelling for his living quarters at \$35 per month Lancaster began to operate the service station on January 1, 1949, doing business under the name of Lancaster & Son. Raymond, the son, corroborated by his mother, testified he was a partner in the business. Lancaster disclaimed this and stated the only reason for the title was to "just to have his name in there; that was all."

Mary Lancaster testified that her husband started to discuss with Monroe the renting of the garage a week before they took occupancy.

At another point in his testimony, Lancaster stated that Franklin had given up the garage and was out of business when he made arrangements with Monroe to take over the garage. As previously noted, Lancaster admitted that Franklin occupied the service station until December 31, 1948.

On cross-examination, Lancaster testified that Monroe talked to him on the street in Quincy sometime in the latter part of November and said "Mr. Franklin is getting out of there I don't want him in there." Lancaster stated he refused at that time to take over the garage when asked by Monroe. He was approached again in December and their negotiations resulted in his renting the premises.

Lancaster testified that on December 22, 1948, he procured a loan in the names of Benjamin and Mary Lancaster in the amount of \$325 which money was used to set him up in the service station business. Mary Lancaster, in answer to the General Counsel's questions regarding the amount of money borrowed for this purpose, was unable to state the exact amount. She testified at first it was \$150, later she changed her testimony and stated it was \$300.

Lancaster testified that he had not done much business at the service station and, as a matter of fact, in February 1949, when it became necessary to borrow money from a friend for the purchase of gasoline, the pumps having run dry, he decided he would have to go out of business. He stated he never thereafter changed his mind about going out of business. In spite of this and the further fact that neither Lancaster nor Raymond, who worked full time at the service station, were drawing no salary from the business, William Lancaster, another son, was hired in the latter part of March under the GI Training Bill to learn the automotive electrician trade and was paid a salary of \$25 per week. Lancaster's only explanation for hiring William as an apprentice when business was so bad was that he thought it might help the business. William continued to work at the service station for the remainder of the year. Raymond testified that business picked up in March when William came to work only sufficiently to pay him the \$25 weekly salary regularly. It is worthy of note that after leaving his father's service station, William did not make use of the trade he learned.

During the year he was in business, Lancaster testified he did not draw any salary, nor did he take any money from the receipts of the business for his own purpose. He stated further that he "never went as much as to a moving picture show or anything." Raymond testified that he did not receive a salary but on occasion would take \$2, \$3, or \$4 a week, sometimes nothing. Mary Lancaster testified she handled the cash receipts and disbursements of the business and established a checking account in her name for this purpose. On cross-examination she admitted that she might have paid the house rent by check but that it was money that she had budgeted for household use and that it did not come from the business receipts.

As noted hereinabove, there was received in evidence a copy of Form 1040, U. S. Individual Income Tax Return for the year 1949, filed by Benjamin J. and

* Lancaster and his wife and son Raymond were then living in a rented house for \$25 per month.

Mary G. Lancaster. The said return contains the following Schedule C.—“Profit (or Loss) from business or Profession”:

Schedule C.—Profit (or Loss) From Business or Profession

State (1) nature of business: Gas Station, (2) business name _____;
(3) business address _____

Do not include in this schedule cost of goods withdrawn for personal use or deductions not connected with business or profession.

1. Total receipts.....		\$6,828.29
COST OF GOODS SOLD		
(To be used where inventories are an income-determining factor)		
(Enter the letters “C” or “C or M” on lines 2 and 8 if inventories are valued at either cost, or cost or market, whichever is lower:)		
2. Inventory at beginning of year.....	\$-----	
3. Merchandise bought for sale.....	5,513.37	
4. Labor.....	-----	
5. Material and supplies.....	-----	
6. Other costs (explain in Schedule G).....	-----	
7. Total of lines 2 to 6.....	-----	
8. Less inventory at end of year.....	-----	
9. Net cost of goods sold (line 7 less line 8)....	\$5,513.37	
10. Gross profit (line 1 less line 9).....	1,314.92	
11. Salaries and wages not in line 4.....	\$1,000.00	
12. Rent.....	-----	
13. Interest on business indebtedness.....	-----	
14. Taxes on business and business property....	6.50	
15. Losses (explain in Schedule G).....	-----	
16. Bad debts arising from sales or services.....	-----	
17. Depreciation, obsolescence, and depletion (explain in Schedule F).....	180.00	
18. Repairs.....	-----	
19. Other expenses (explain in Schedule G).....	1,481.84	
20. Net operating loss deduction (attach statement).....	-----	
21. Total of lines 11 to 20..	2,668.34	
22. Total of lines 9 and 21..	8,181.71	
23. Net profit (or loss) (line 1 less line 2).....	\$1,353.42	

Neither Lancaster nor his wife was able to produce any bills, canceled checks, bank statements, or other documentary evidence to substantiate the items in the income tax return. Mary Lancaster testified that the documents were either lost when the family moved or she destroyed them because she felt they were no longer needed since the auditor had taken care of the necessary filing of the income tax return.

Questioned regarding the sole entry under “cost of goods sold,” \$5,513.47 for “merchandise bought for sale,” Lancaster was unable to state what items he purchased and in what amounts. As to the purchases and sales of gasoline, Lancaster testified that upon opening the business he borrowed \$150 from Williams⁴ to buy 800 gallons of gasoline. He stated that the tanks ran dry and remained empty several times during the year for lack of money to refill them.

⁴ William obtained a loan of \$150 from a loan company on December 27, 1948, which money he claimed he turned over to his father to enable him to purchase gasoline.

His only specific testimony in elucidation of this general assertion was that the tanks were dry for about 4 days in February 1949, and that it was necessary for him to borrow \$300 from a friend, \$200 of which he used for the purchase of gasoline to refill the tanks. On cross-examination, Lancaster was unable to state precisely the number of occasions the tanks ran dry. He did testify, however, that on each such occasion he was able after a while to purchase a new load of gasoline, using monies from previous gasoline sales. In fact, he stated that gasoline sales receipts were always put aside for future gasoline purchases and that after he sold "a lot of gasoline," he had not only enough money for a new load, but a profit as well to buy parts.

Under the heading "Other Business Deductions" the item "depreciation, obsolescence, and depletion" in the amount of \$180 appears. This amount represents 10 percent of \$1,800 of fixtures and equipment acquired in 1948. Lancaster could testify only with respect to approximately \$131 worth of tools and equipment purchased in 1949. It is the Respondent's contention set forth in its brief that the purchase of tools and equipment prior to 1949 is irrelevant to the substantiation of the 1949 return. In view of the findings hereinafter made, the undersigned will not determine the validity of this contention. Suffice it to say that Lancaster could not confirm the purchases of \$1,669 (the difference between \$1,800 claimed and \$131 purchased) of tools and equipment in 1948. Lancaster did not turn over receipts for his 1948 purchases to the auditors who made up his income tax return. Nor did he remember ever having told the auditors that he owned \$1,800 worth of tools and fixtures in 1948.

Under "Other Business Deductions" there appears the item "other expenses" in the amount of \$1,481.84. This item is separately broken down and attached to the return. Lancaster was unable to shed any light as to the "miscellaneous" entry in the amount of \$156.60, testifying that he did not know what it represented. As to the "contract work" item in the amount of \$708.26, which refers to repair work done on a subcontract basis, Lancaster testified on cross-examination as follows:

Q. (By Mr. EPSTEIN:) When did you first start subcontracting work?

A. I don't remember when I first started.

Q. When did you stop?

A. I don't remember that.

Q. Did you do more of it at first than you did later?

A. I don't remember.

Q. Did your business improve as you went on?

A. I don't remember that.

Q. Did it get worse as you went on?

A. I don't remember.

The Lancaster household consisted of the discriminatee, his wife, and son Raymond. William testified that during the period from March 1949 to the end of the year, he ate lunch at his mother's home. As noted hereinabove, Lancaster testified he did not draw any monies from the business and since he did not have any income from other sources, he did not contribute to the household. Mary Lancaster testified that none of the business receipts was used for household expenses.

Testifying with respect to the sources of money used to defray the household expenses for 1949, Mary Lancaster stated that she was the recipient of unemployment compensation in the approximate amount of \$300.⁵ In addition, re-

⁵ Mary Lancaster was employed until the last week of December 1948. She applied for and received unemployment compensation shortly after the requisite waiting period of 4 weeks.

funds from the Bureau of Internal Revenue for excess taxes paid in previous years were received by both Benjamin and Mary Lancaster in the amounts of approximately \$70; \$170; and \$27, respectively, all of which monies were used for the household. A friend of the family, Gertrude Keating, loaned Lancaster \$300 in February 1949 of which \$200 was used to purchase gasoline and \$100 was given to his wife to be used in the home. Another \$100 for household expenses was borrowed from Magnus Hallson, a friend. William Lancaster, according to his mother, lent them "something like—about a \$100 or \$125, all in all" over a period of several months.⁶ The record does not reveal that any other money was obtained or used for maintaining the household.

Mary Lancaster testified that of the \$917, hereinabove itemized, \$350 was used in payment of 10 months' rent. She stated further that the household money was used to make payments on the loans of Lancaster and William Lancaster hereinabove described.⁷ The record reveals that a total of \$307.65 was repaid on such loans. Lancaster testified that he incurred expenses of \$125 in his search for employment during 1949 and that this money was given to him by his wife from the household monies. Thus, there remained for the family \$134 35, ostensibly for the purchase of food and clothing and the payment of utilities, including a telephone. It is hardly conceivable that this could have been accomplished without going deeply into debt and the record does not reveal that this was the case.

In view of the inconsistencies in Lancaster's testimony regarding his business venture in 1949, the conflicts between his and his wife's testimony, the failure adequately to explain the items set forth in the income tax return, the failure to produce any documentary evidence to substantiate the receipts and disbursements of the business, Lancaster's sporadic lapses of memory while under cross-examination, the unconvincing testimony regarding the hiring of William and the payment to him of a regular salary when neither Lancaster nor Raymond was drawing any money from the business, and from his demeanor on the witness stand which was unconvincing, the undersigned does not feel that Lancaster's testimony with regard to the events and circumstances of his business, and particularly the alleged losses sustained in the said venture, can be relied upon. Nor does the undersigned credit the testimony of Mary Lancaster, Raymond, or William in the same regard.

Even though Lancaster on January 1, 1949, undertook a full-time business he testified that throughout 1949 while thus engaged in this venture he at no time gave up his search for other employment. Thus Lancaster testified he spent on the average of three full days a week during the year when he absented himself from the service station, seeking employment throughout Greater Boston, as well as Boston proper. He stated that he sought work not only as an automobile mechanic, but also as a truck driver, an industrial worker, a shipyard worker, a fireman, and common laborer but met with no success whatsoever.⁸

In addition to the regular business establishments contacted by him, Lancaster testified he went to the Social Security Board office in Quincy eight or nine times and looked at the board where job notices are posted. On none of these occasions did he register for employment with U. S. E. S. Nor did he at any time in 1949 apply for unemployment compensation. His only explanation for not doing so

⁶ William testified specifically that he loaned his mother money on six occasions in the amounts respectively of \$50; \$40; \$30; \$20; and two \$5 loans.

⁷ Mary Lancaster's testimony regarding the repayment of loans is in direct conflict with Lancaster's who stated he made the monthly payments from receipts of the business.

⁸ Lancaster enumerated approximately 33 establishments where he sought work on at least one and in most cases more than one occasion. He also testified he followed the "Help Wanted" columns in the Boston Globe.

was that he knew that because he had been discharged from his previous job he was not entitled to apply.

Hyman Lesberg, who operated an employment bureau under the name Motor Industries Employment Bureau in Boston from 1947 through August 1950, dealing exclusively with help requirements of automotive employers in Greater Boston in that period, testifying as a witness for the Respondent stated that during 1949 his agency always had jobs available for first-class mechanics; that his agency never experienced difficulty in placing a first-class mechanic applicant; and that any first-class mechanic could obtain employment as a first-class mechanic without difficulty throughout the period here in question, even without resort to employment agencies. The undersigned credits Lesberg's testimony⁹ and finds that while Lancaster may have sought employment on occasion during 1949, he did not seek it in the proportions testified to by him.

By this finding the undersigned does not intend to imply that Lancaster was wilfully idle; the fact remains that he did engage in a business throughout 1949 and the Board has held that self-employment under such circumstances does not constitute wilful idleness.

Within the terms of the reference of the remand, the General Counsel assumed the burden of demonstrating (1) that during 1949 Lancaster did not wilfully incur losses and (2) that during the period of Lancaster's business venture he suffered losses and did not draw any monies from the business thus entitling him to full back pay for the entire discharge period. With respect to (1) the undersigned agrees with the contention of the General Counsel that by engaging in a private business venture during 1949, Lancaster did not thereby deprive himself of the right to have this time included in the period for which the back pay computation should be made. The Respondent's contention that by so doing Lancaster voluntarily removed himself from the labor market is rejected. See *Harvest Queen Mill-Elevator Co.*, 90 NLRB 320; *Columbia Pictures Corporation, et al.*, 82 NLRB 568.

As to (2), however, there is in issue here the relatively novel situation of a discriminatee engaged in a private business venture who has peculiarly within his possession the facts on which a finding must be made that he either realized a profit from his business or drew monies therefrom which might be construed as interim earnings to be offset against gross back pay or, as contended by the General Counsel, he sustained losses as a result of his venture and therefore there were no interim earnings. With respect to this issue, the record contains only the testimony of Lancaster, his wife, and sons, whose testimony the undersigned has found to be unreliable and has discredited. In view of these circumstances the undersigned is unable to make any findings with respect thereto. Further, it is found that the General Counsel has not sustained the burden assumed by him of demonstrating that Lancaster suffered losses in his business venture because of the lack of credible evidence in this regard.¹⁰

Upon the foregoing considerations, the undersigned concludes that Lancaster is not entitled to any back pay for the year 1949 when he was engaged in his business venture.

⁹ The General Counsel in an effort to contradict Lesberg's testimony adduced evidence from David McSweeney, business representative of the Union, who testified generally that work in the automotive industry was slack during the period in question. McSweeney's contacts and experience were mainly with the trucking branch of the industry and the undersigned is of the opinion that his testimony is not entitled to the same weight as Lesberg's.

¹⁰ Lancaster's income tax return showing losses is an uncorroborated self-serving statement and does not constitute adequate proof of the statements made therein.

Back Pay Due Lancaster

The mechanics in Respondent's shop worked a 9-hour day, 5 days a week, and a 5-hour day on Saturday, a total of 50 hours per week.

Counsel for the Respondent in his brief sets forth the contention that because of a continuous pattern of absenteeism by Lancaster throughout the period of his employment with Respondent, there is raised from the record in the instant hearing "the strong and un rebutted inference" that Lancaster's absenteeism would have continued at the same rate during the discrimination period.

Lancaster admitted that during the course of his employment with the Respondent he was unable to work for periods of time because of a chronic heart condition. On this issue of absenteeism from work and the reason for it the Board, in adopting the Intermediate Report in Case No. 1-CA-273, concluded as follows:¹¹

The record shows that Lancaster had a chronic heart condition which the Respondent knew when it hired him, that he had frequently been absent for this reason, and on occasion had been driven home by his supervisor during working hours because of illness.

The undersigned does not accept Lancaster's testimony that his heart condition had not rendered him unable to work at any time during the discrimination period nor had it prevented him from seeking employment during the period.

The Board's Order and the court's decree enforcing it provides that Lancaster be made whole for "any loss of pay . . . he would have normally earned. . . ." (Emphasis supplied.) The undersigned agrees with the Respondent's contention that the computation of gross back pay will present an erroneous version of Lancaster's potential "normal" earnings unless it "fairly reflects normal absenteeism." See *Empire Worsted Mills, Inc.*, 53 NLRB 683, 691-692.

The undersigned in computing the gross back pay due Lancaster took an average of his earnings during a 47-week period when he earned \$1 25 per hour, including 2 days additional pay for the week ending September 23, 1948 (excepting the week ending October 8, 1948, during which he worked only 9 hours, this was not a complete week's payroll period), to arrive at Lancaster's average weekly earnings.

In accordance with the findings hereinabove made, the undersigned concludes and finds that Lancaster is entitled to back pay during the following periods;

- | | |
|-----------------------------|---|
| 1. From: September 20, 1948 | To: September 21, 1948—2 days |
| 2. From: October 8, 1948 | To: December 31, 1948—12 weeks |
| 3. From: January 1, 1950 | To: January 11, 1950—1 week and
3 days |

Gross Back Pay

1. Average weekly earnings-----	\$51. 77	
2. Number of weeks in back-pay period-----	13	
3. Gross back pay for weeks-----	\$673. 01	
4. Average daily earnings-----	9. 32	(\$51. 77)
		(5 5/9)
5. Number of additional days in back-pay period--	5	
6. Gross back pay for days-----	\$46. 60	
7. Total gross back pay-----		\$719. 61

Interim Earnings

1. Total net interim earnings-----	140. 80
Net back pay-----	\$578. 81

¹¹ Page 5, lines 30-34.

Conclusions and Recommendations

Upon the foregoing findings and the computations made in accordance therewith, the undersigned makes the following determination, as directed by the Order of the Board entered on February 27, 1951, and recommends its adoption by the Board:

That back pay in the sum of \$578.81 is due to Benjamin Lancaster from the Respondent, Adams Motors, Inc., under the Board's Order in Case No. 1-CA-273 and the Decree of the United States Court of Appeals for the First Circuit enforcing said Order on September 28, 1950.

TRI-STATE CULVERT & MANUFACTURING COMPANY¹ and SHOPMEN'S LOCAL UNION #616 OF THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, A. F. OF L., PETITIONER. *Case No. 10-RC-1429. October 31, 1951*

Decision and Direction of Election

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held on July 17, 1951, before Jerold B. Sindler, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.²

¹ As the Employer appeared specially to challenge the Board's jurisdiction, the Employer refused to indicate whether its name as given in the Petitioner's petition is correct. However, numerous references thereto at the hearing and the Employer's exhibits indicate that the petition contains the Employer's correct name.

² At the hearing and in its brief the Employer moved to dismiss the petition or reopen the hearing, in substance, for the reasons, among others: (1) That the petition contains no allegation as to compliance with Section 9 (f), (g), and (h) of the amended Act; (2) that such compliance is a matter litigable at the hearing; (3) that if non-Communist affidavits were filed, they were improperly sworn; (4) that the hearing officer improperly revoked subpoenas addressed to the Board and the Petitioner, and by his rulings adverse to the Employer otherwise impeded the Employer's efforts to secure information concerning the compliance status of the Petitioner; (5) that a subpoena addressed to the Secretary of Labor was not honored.

The fact of compliance by a labor organization which is required to comply, is a matter for administrative determination and is not litigable by the parties. Moreover, the Board is administratively satisfied that the petitioning Local, its International, and the A. F. of L. are in compliance. See *Sunbeam Corporation*, 94 NLRB 844; *Swift & Co.*, 94 NLRB 917; cf. *Highland Park Mfg. Co.*, 71 S. Ct. 489. The Board will not go behind the affidavits filed under the provisions of Section 9 (h), as neither the statute itself nor its legislative history authorizes the Board to investigate the authenticity or truth of the affidavits which have been filed. *Stationers Corporation*, 96 NLRB 196. In revoking the subpoenas for compliance data and in refusing to do likewise with respect to the subpoena requiring the Employer's representative to testify on issues material to this proceeding, the hearing officer was properly exercising his authority. *Bill Heath, Inc.*, 89 NLRB 67. As the subpoena directed to the Secretary of Labor called for compliance evidence which is inadmissible in this proceeding, no prejudice resulted from the fact that it was not honored. The other rulings made by the hearing officer are also free from prejudicial error. The Employer's motion to dismiss the petition or reopen the hearing is hereby denied.

In accordance with the Employer's motion made subsequent to the hearing, the subpoena to the Secretary of Labor and the registered receipt therefor are hereby made an official part of the record as Company Exhibit No. 16.