

tenure of employment of most of these temporary employees is measured by the duration of the project on which they are employed, which varies from 6 months to several years. Some temporary employees are employed for shorter periods of time, varying from several weeks to several months, depending upon the nature and scope of the job they are to perform. With respect to all temporary employees the date of termination of employment is uncertain. For these reasons we find, contrary to the Employer's contention, that the temporary construction employees are eligible to vote in the election.³

Order

IT IS HEREBY ORDERED that the petition of the CIO (Case No. 1188) for a separate unit of construction department employees of the Employer's Berkeley Springs, West Virginia, plant be, and it hereby is, dismissed.

[Text of Direction of Election omitted from publication in this volume.]

³ *Fall River Gas Works Co.*, 82 NLRB 962; *Snively Groves Inc.*, 98 NLRB 1146.

PUGH AND BARR, INC. *and* BENJAMIN S. BRAMER. *Case No. 6-CA-243.*
January 23, 1953

Decision and Determination

On July 20, 1951, the National Labor Relations Board, hereinafter called the Board, issued an Order in this case, adopting the findings, conclusions, and recommendations set forth in the Trial Examiner's Intermediate Report and Recommended Order, dated June 20, 1951. The Board's Order provided, among other things, that the Respondent make whole Benjamin S. Bramer in the manner set forth in section V of the Intermediate Report and Recommended Order, entitled "The Remedy," for any loss of pay he may have suffered because of the discrimination against him. Thereafter, the Board filed a petition for enforcement of its Order and a motion for the summary entry of a decree upon the transcript of the record in the United States Court of Appeals for the Fourth Circuit. On January 25, 1952, the court entered a decree enforcing the Board's Order. Thereafter, the Respondent and representatives of the Board were unable to agree as to the amount of back pay due Bramer, and, on June 13, 1952, the Acting Regional Director issued a notice of further hearing, ordering that the record herein be reopened, and that a further hearing be held before a Trial Examiner for the purpose of determining the amount of back

pay due Bramer. Pursuant to said notice, a hearing was held before Trial Examiner Wallace E. Royster.

On August 15, 1952, Trial Examiner Royster issued his Intermediate Report and Recommended Order, a copy of which is attached hereto, finding that Bramer was entitled to back pay in the amount of \$5,394.73. Thereafter, the Respondent filed exceptions to this Intermediate Report and Recommended Order, and a supporting brief.

The Board¹ has reviewed the rulings made by Trial Examiner Royster at the reopened hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report and Recommended Order, the Respondent's exceptions and brief, and the entire record in the case,² and hereby adopts the findings, conclusions, and recommendation of Trial Examiner Royster, with the following modification:

The Trial Examiner based Bramer's normal gross earnings on the earnings of one Charles Trader. However, he inadvertently calculated Trader's earnings for the third quarter of 1949 as \$542.84. The record shows that the correct amount for this quarter is \$529.51. We therefore reduce the amount of back pay found due Bramer by the difference between the two foregoing amounts, or \$13.33, and find the total back pay due Bramer to be \$5,381.40.

Determination

Upon the basis of these supplemental findings of fact and the entire record in the case, the National Labor Relations Board hereby determines that net back pay is due Benjamin S. Bramer in the amount of \$5,381.40.

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

² Because, in our opinion, the record and the brief adequately set forth the issues and the positions of the parties, we deny the Respondent's motion for oral argument before the Board.

Intermediate Report and Recommended Order

STATEMENT OF THE CASE

On July 20, 1951, the National Labor Relations Board, herein called the Board, issued its Order in the above-entitled proceeding adopting the findings, conclusions, and recommendations contained in the Intermediate Report of Trial Examiner Earl S. Bellman dated June 20, 1951. The Order thereafter was enforced in a decree entered January 25, 1952, by the United States Court of Appeals for the Fourth Circuit. Pugh and Barr, Inc., the Respondent, and representatives of the Board, having been unable to reach agreement concerning the amount of back pay due Benjamin S. Bramer, the record has been reopened and further hearing held for the purpose of such determination.

Pursuant to notice, a hearing was held before me, the undersigned Trial Examiner, in Clarksburg, West Virginia, on June 30 and July 1, 1952. The Gen-

eral Counsel and the Respondent were represented by counsel and were afforded full opportunity to examine and cross-examine witnesses and to introduce evidence in respect to the back pay question. Briefs have been received from each party. Upon the basis of the evidence in the reopened hearing and on the entire record in the case, I make the following:

FINDINGS OF FACT

Subsequent to the discharge of Bramer on June 16, 1949, the Respondent continued to operate in strip mining until about the end of June 1950. About July 1 of the latter year another corporation, Pugh and McDonald, Inc., herein called McDonald, using the same machinery and equipment and the same work force, began strip mining operations at another location in the vicinity of Clarksburg, West Virginia. The General Counsel contends that absent the discriminatory discharge, Bramer would have continued in the employ of Respondent to the time it ceased its operations and thereafter with McDonald, as did all of Respondent's employees. From this premise the General Counsel contends that Bramer's gross earnings must be calculated as if he had been employed continuously from June 16, 1949, to April 9, 1952, when he refused reinstatement, as an employee first of the Respondent, and then of McDonald.

The Respondent denies the validity of such a theory and offered evidence to establish that both corporations were formed in 1946 with charter authority to engage in practically the same type of operation, but that Respondent came into existence primarily as a trucker of coal, while McDonald was designed primarily to engage in strip mining. Such a division did exist for a time in 1946, but shortly thereafter McDonald appears to have ceased any type of operation while Respondent mined and trucked coal. About July 1, 1950, McDonald was again activated after the Respondent had completed working a "stump and pillar" mine. From that date until sometime in the spring of 1952 the evidence is that Respondent has had no employees. Mark C. Pugh is now and has been the president of both corporations and for a period of several years antedating June 16, 1949, the stock in both has been held in the same ratio by the same three individuals. Although I recognize that for some purposes the Respondent and McDonald may be separate entities, I find that for the purposes of the questions raised here the operations of McDonald constituted clearly a continuation of the operations of the Respondent; that both were and are the business of the same three individuals distinguishable here only by name. I find further that Bramer's gross earnings for the period of discrimination must be calculated as if he had been transferred to the payroll of McDonald on July 1, 1950, as were all other employees of the Respondent on that date.

I credit the testimony of Bramer, buttressed as it is by records of the West Virginia State Employment Service, that following his discharge on June 16, 1949, he made reasonable effort to obtain other employment. There is no specific contention that Bramer suffered any willful loss in that respect, and I find that he did not.

The problem of finding a yardstick by which to measure the amount of wages lost by Bramer by reason of Respondent's discrimination against him is one of some difficulty. Respondent offered evidence at the original hearing and again before me to the effect that no one was hired to replace Bramer,¹ that subsequent to some date in the fall of 1949 only one employee, Charles Trader, re-

¹ However, the names of two new employees G. Hurst and D. Deems appear on the payroll for August 31, 1949. Each was paid \$1 25 an hour—the rate for laborers or truckdrivers. Their specific work assignment is not shown.

mained in the classification of laborer. Respondent further asserts that conditions which in 1949 made it advisable for it to employ laborers soon ceased to exist, that coal sweeping, which it is asserted occupied much of Bramer's time, has not been necessary, except sporadically, since then, and that Bramer lacked qualifications which would permit that he be shifted to other work. By adopting the recommendations of Trial Examiner Bellman, the Board found that Respondent's need for laborers in general had not been reduced by changes in operations; that Bramer was about as good a worker as the average of Respondent's employees; and, in effect, that, had not Bramer been discharged, there was sufficient work other than sweeping coal for which he was qualified and on which he would have been used.

Respondent's payroll records, including those of McDonald, do not indicate with any clarity the job classifications of employees.² The evidence does, however, establish with certainty, and I find, that ever since June 16, 1949, first the Respondent and then McDonald continued Charles Trader in his employment as a laborer; that Trader was one who primarily was responsible for the "high wall" work in which he was assisted by 1 or 2 other workers; and that Harry Downs, who worked as a laborer with Trader and Bramer, was made a dumpster operator in 1949. There is evidence, which I believe, that the operation of a dumpster requires no particular skill and little training. It is also clear that for a very substantial period during the operations of McDonald and the Respondent, dumpsters have not always been operated. Considering the evidence at the reopened hearing and the findings at the first hearing in respect to the operations of the Respondent and of McDonald, the conclusion is here reached that both corporations employed a force of laborers; that some of them found their principal occupation in the operation of dumpsters with occasional assignment to building high walls, "popping" coal, sweeping coal, and other unskilled tasks. From the record before me, it is not found that the Respondent or McDonald employed any workers in jobs to be described as skilled, other than shovel operators. I do not ignore what appears to be fact that shovel oilers may require some period of training and that all laborers do not possess the ability to drive trucks or operate other mechanical equipment. Bramer's testimony that he has in the past been employed as a shovel oiler and that he performed such work for the Respondent for a few weeks is believed. The additional testimony taken at the reopened hearing in connection with Bramer's classification supports the findings of Trial Examiner Bellman, as adopted by the Board, that Bramer's usefulness to the Respondent as an employee was not limited to sweeping coal, building high walls, or coal popping.

With this in mind, it is only necessary to examine the payrolls of Respondent and McDonald to discover what work was available to employees, from the period of Bramer's discharge to the date when he refused reinstatement, of a character which, it might be supposed, would have been assigned to Bramer. The condition of the payroll records is, however, such that it is perhaps impossible, absent detailed testimony in respect to each of the individuals whose names appear thereon, to discover just what work they did. Of course no such confusion arises in connection with the shovel operators, for their hourly rate indicates their classification. However, dumpster operators, truck drivers, and others received substantially the same pay. In consequence, and for the lack of a better standard, I have concluded that, in these circumstances, it is reasonable to assume that Bramer would have been afforded the same work opportunity and have received the same wages as did Charles Trader, a laborer who has been employed throughout the entire period in question. My recom-

² Except for the first half of 1950.

mentations in connection with back pay are made upon the basis of Trader's earnings for that period.

On April 3, 1952, Respondent offered reinstatement to Bramer—an offer which he refused on April 9. In view of the refusal, I am of the opinion that back pay should be tolled on the date of the offer. Hence the period for which I will recommend that Bramer be made whole will run from June 16, 1949, to and including April 3, 1952.

The General Counsel also contends that Bramer should be made whole for transportation expenses which he incurred in seeking employment. Such expenses may be deducted from interim earnings.³ A further claim is made for living expenses away from Clarksburg during certain periods of other employment. I am of the opinion that these expenses are allowable during any period of a *bona fide* search for employment or during a period of temporary employment when Bramer reasonably, it would seem, left his family at home. In August 1951 Bramer secured permanent employment at Columbiana, Ohio, which he still holds. As he brought his wife to Ohio in July of that year and appears permanently to have settled there, I believe that he is not entitled to claim reimbursement for board and lodging after his wife joined him.

The tables which follow will show, in one column, gross earnings which are based upon the earnings of Charles Trader with the Respondent or with McDonald for the periods shown; a column designated Interim Earnings, showing Bramer's earnings in other employment for the periods indicated; an indication of those expenses incurred by Bramer in his search for employment for which he is to be reimbursed; and a final recapitulation showing the full amount which the Respondent is to pay Bramer in order that he be made whole under the terms of the Board's Order and the court decree.

1949

Second Quarter

(6/16 to 6/30)

Gross earnings.....	\$86. 87	
Interim earnings.....	0. 00	
Net amount due.....		\$86. 87

Third Quarter

Gross earnings.....	\$542. 84	
Interim earnings.....	0. 00	
Net amount due.....		542. 84

Fourth Quarter

Gross earnings.....	\$415. 88	
Interim earnings.....	104. 00	
Net amount due.....		311. 88

1950

First Quarter

Gross earnings.....	\$571. 51	
Interim earnings.....	23. 00	
Net amount due.....		548. 51

³ *Harvest Queen Mill & Elevator Company*, 90 NLRB 320, 323.

Second Quarter

Gross earnings.....	\$608.25	
Interim earnings.....	84.00	
Net amount due.....		\$524.25

Third Quarter

Gross earnings.....	\$745.51	
Interim earnings (less expenses \$8 round trip to Pittsburgh, Pa., and \$60 board and room for 2 weeks).....	83.20	
Net amount due.....		662.31

Fourth Quarter

Gross earnings.....	\$914.62	
Interim earnings.....	0.00	
Net amount due.....		914.62

1951

First Quarter

Gross earnings.....	\$787.88	
Interim earnings.....	0.00	
Net amount due.....		787.88

Second Quarter

Gross earnings.....	\$560.25	
Interim earnings.....	0.00	
Net amount due.....		560.25

Third Quarter

Gross earnings.....	\$961.50	
Interim earnings (less transportation expenses 660 miles at 7 cents a mile, \$46.20. No deduction for board and room).....	506.18	
Net amount due.....		455.32

Fourth Quarter

Gross earnings (including \$25 Christmas bonus).....	\$508.76	
Interim earnings.....	931.61	
Net amount due.....		0.00

1952

First Quarter

Gross earnings.....	\$670.88	
Interim earnings.....	1,030.08	
Net amount due.....		0.00

Second Quarter

(4/1 to 4/3)

Gross earnings (25 hours at \$1.50 per hr.).....	\$37.50	
Interim earnings (not shown, hence no back pay awarded).....		

Total back pay due.....		\$5,394.73
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