

comprehend the same region and occupy the same office, the expenses of which, including rent, are paid by the District Council alone.

Under all the circumstances of this case, we are of the opinion that District 1 and District Council 1 are one and the same entity. The District Council is clearly a labor organization,<sup>8</sup> and as Pickman will negotiate and sign contracts in behalf of the regional organization, we find that District Council 1 has sufficient interest in the Employer's employees so as to require its compliance with the filing provisions of the Act on policy grounds.<sup>9</sup> Accordingly, the holding of the election directed herein is conditioned on the compliance of District Council 1. If District Council 1 fails to achieve compliance within 2 weeks from the date of the Direction, the Board's Regional Director will so advise the Board. No election shall be held unless and until compliance has been achieved.<sup>10</sup>

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9 (b) of the Act: All production and maintenance employees at the Employer's Dover, New Hampshire, plant, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act.<sup>11</sup>

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

MEMBER STYLES took no part in the consideration of the above Decision and Direction of Election.

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<sup>8</sup> *Metallic Building Company*, 98 NLRB 386; *National Clay Products Company et al.*, 98 NLRB 137.

<sup>9</sup> Cf. *Sunbeam Corporation*, 98 NLRB 525.

<sup>10</sup> Cf. *Libby, McNeill & Libby*, 90 NLRB 279; *Franklin Smelting & Refining Company*, 89 NLRB 1394.

<sup>11</sup> The parties stipulated to the appropriateness of the unit.

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SEAMPRUFE, INCORPORATED *and* INTERNATIONAL LADIES GARMENT WORKERS UNION, AFL. *Case No. 16-CA-39. March 19, 1953*

### Supplemental Decision and Determination

On April 8, 1949, the National Labor Relations Board issued its Decision and Order in this case,<sup>1</sup> which was thereafter enforced by a decree entered on February 19, 1951, by the United States Court of

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<sup>1</sup> 82 NLRB 892.

103 NLRB No. 84.

Appeals for the Tenth Circuit. The decree provided, *inter alia*, that Edna Clendenon, who had been discriminatorily discharged by the Respondent, was entitled to receive back pay from the Respondent for the period of the discrimination against her.

On November 25, 1952, the Board received a "Stipulation of Facts" executed by the General Counsel and by counsel for the Respondent and the Union. In this stipulation the parties agreed that the amount of back pay, if any, due Edna Clendenon be determined by the Board on the basis of certain facts set forth in the stipulation and agreed to by the parties. By this stipulation the parties waived notice of hearing, answer, hearing, and oral argument before the Board, reserving the right, however, to file objections and exceptions to the Board's findings, conclusions, and recommendations, and order herein, and to have such findings, conclusions, recommendations, and order reviewed by the United States Court of Appeals. On December 18, 1952, counsel for the Union submitted to the Board a memorandum in support of Clendenon's claim to back pay for the entire period from the date of her discharge on January 3, 1948, to the date of Respondent's offer of reinstatement on November 1, 1951.

The Board has considered the foregoing stipulation and memorandum, and makes the following findings of fact and determination:

Edna Clendenon was discriminatorily discharged on January 3, 1948, and the Respondent on November 1, 1951, terminated any liability for back pay by offering her reinstatement. During that period, she failed to register with the local office of the United States Employment Service, and to obtain any employment. However, she made independent efforts to obtain employment by applying directly to various business concerns in McAlester, Oklahoma, where she lived throughout the period in question.

Her first such application after her discharge was made on or about June 15, 1948, to Elsing's Manufacturing Company, the only garment factory in McAlester or its environs other than the Respondent. She was told that she would be called if needed and that Elsing's already had a long waiting list of applicants. Elsing's at that time had only 11 employees.

About the same time Clendenon unsuccessfully applied for work at the office of the McAlester Telephone Company. She next sought employment in August 1949, applying again to Elsing's and was again told she would be called if needed. In October 1950 she applied for a job as a nurse's aide at the General Hospital in McAlester, and was told that she would have to take a first-aid course (without pay), and even then would have no assurance of employment. She declined to

take the course. In July 1951 she again applied to Elsing's with the same result as before. (Elsing's then had only six employees.) About the same time, she applied for work at a local laundry and dry-cleaning establishment, but without success. On November 1, 1951, she was reinstated by the Respondent.

According to records of the United States Census Bureau, McAlester had a population of 12,401 in 1940 and 17,878 in 1950. The 1947 United States Census of Manufacturers (Department of Commerce) shows that McAlester had 22 manufacturing establishments, which during 1947 employed a combined average of 341 employees.

The Board has held that an employee's claim for back pay may be defeated by proof by the employer that during the period for which back pay is claimed the employee failed to make a reasonable search for employment.<sup>2</sup>

As Clendenon failed to register with the United States Employment Service,<sup>3</sup> it is necessary for the Board to determine in view of the facts set forth above whether the Respondent has established that she failed to make a reasonable effort to obtain employment in McAlester substantially equivalent to her most recent employment with the Respondent.<sup>4</sup> In the absence of any explanation for her failure to apply for work before June 15, 1948, we find that she is not entitled to back pay for the period from January 3 to June 15, 1948. On that date she applied to the only garment factory in town other than the Respondent and about the same time applied to the local telephone company. However, thereafter she waited more than a year before again seeking work. The burden is on the Respondent to establish that this was an unreasonably long interval. The only evidence offered by the Respondent is that set forth in the stipulation. There is no basis in the stipulation for inferring, as our dissenting colleague does, that jobs requiring such limited skill as Clendenon possessed were generally available during the period in question in McAlester. On the contrary, as already stated, the parties stipulated that the only available records show that during 1947 the average number of manufacturing employees in McAlester was not more than 341. Moreover, there is no basis for determining what proportion of the jobs filled by these employees were suitable for Clendenon or could be performed by a woman of her qualifications. The record

<sup>2</sup> *Harvest Queen Mill & Elevator Company*, 90 NLRB 320.

<sup>3</sup> Had she so registered, that fact would have been regarded as conclusive evidence that she made a reasonable search for employment. *Harvest Queen Mill & Elevator Company*, *supra*, at p. 321.

<sup>4</sup> An employee is not required to accept a job not substantially equivalent to his former employment, nor one which required him to leave his place of residence and incur transportation expense. *Harvest Queen Mill & Elevator Company*, *supra*, at p. 335.

shows only that the single garment factory in McAlester (other than the Respondent) had only 6 to 11 employees of all types, and that she was told at this factory that she would be called when needed. Upon such a record, we do not believe that the Respondent has established that Clendenon's employment prospects were such as to justify imposing on her the burden of a considerably more frequent search for work than she engaged in.<sup>5</sup> Certainly, we should not require that she make a daily canvass of business establishments absent more evidence than we have here that such a canvass might be fruitful. At the same time, considering all the factors in the case, it would not be unreasonable to expect her to make some search for work at intervals of 6 months, and any longer delay in resuming her quest for employment we do regard as establishing a failure on her part after such 6-month interval to make a reasonable search for work. We will, accordingly, grant her back pay only for a period of 6 months from each date on which she made a search for work. We find, under this formula, that she is entitled to back pay only for the following periods:

1. June 15 to December 15, 1948.
2. August 1, 1949,<sup>6</sup> to February 1, 1950.
3. October 1, 1950,<sup>7</sup> to April 1, 1951.
4. July 1, 1951,<sup>8</sup> to November 1, 1951.

We find, therefore, that Clendenon is entitled to back pay for a total of 21 months, and, in accordance with the stipulation herein, we find that, had she remained in the Respondent's employ, she would have earned \$27 per week during that period.<sup>9</sup> Her total back pay, so computed, is therefore \$2,595.86.

<sup>5</sup> Our dissenting colleague refers to the absence of any showing that employment opportunities were limited in the vicinity in which Clendenon lived. That such opportunities were in fact limited may be inferred from the available data, cited above, as to employment in McAlester factories. In any event, the burden was not on Clendenon to show that employment opportunities were limited, but rather on the Respondent to show, in mitigation of its liability for back pay, that there were suitable openings in McAlester for persons with Clendenon's qualifications.

<sup>6</sup> Although the stipulation does not show on what date in August 1949 Clendenon applied to Elsing's for the second time, we will assume that such application was made on August 1. Any error in this assumption would not, in any event, affect the total amount of back pay due.

<sup>7</sup> The October 1 date is assumed. See preceding footnote.

<sup>8</sup> In assuming the July 1 date, we recognize that if Clendenon's third application to Elsing's was in fact made later in July, Clendenon would benefit somewhat by the error in the assumed date. However, the burden in cases like this is properly on the employer to show circumstances in mitigation of its obligation to pay back pay. As the only evidence before us is that Clendenon applied for work in July 1951, we will, consistently with our rule as to the burden of proof, assume a date in July most favorable to her.

<sup>9</sup> It was stipulated that during that period she would have worked an average of 40 hours per week, less an allowance of 10 percent for absenteeism, and that she would have been paid 75¢ an hour.

### Determination

Upon the basis of this Supplemental Decision and the entire record in the case, the National Labor Relations Board hereby determines that the net back pay due Edna Clendenon under the terms of the decree of the United States Court of Appeals herein is \$2,595.86.

**MEMBER PETERSON**, dissenting:

The question here, under the Board's precedents, is whether Clendenon failed to make a reasonable effort to obtain desirable new employment. I am unable to agree with my colleagues, on the basis of the stipulation of facts before us, that she did.

The facts, as fully stated in the majority opinion, show that Clendenon waited 6 months before seeking any employment; in the next 40 months she made 4 further efforts, 2 of them being reapplications at an establishment where she had been offered no encouragement. At no time did she register with the U. S. Employment Service or the local State employment office, although apparently familiar with their facilities. In sum, she applied at 4 different establishments in the 46 months between the date of her discharge and the date she was re-employed pursuant to the Respondent's offer of reinstatement. During that period, she had no income other than through her husband. I do not think these facts show a reasonable effort to find new employment, considering the fact that Clendenon was not a skilled worker, the general availability of jobs during the period in question in occupations requiring no high degree of skill, and in the absence of any showing that employment opportunities were limited in the vicinity where Clendenon lived.

Nor do I think the method adopted by my colleagues for calculating back pay is warranted. It does not seem to me, in view of the negative reception accorded her applications, that Clendenon was free to wait 6 months after each application before resuming her efforts to find work. Especially is this true in connection with her October 1950 application, for she had no reason to believe that it might result in an offer of employment inasmuch as she declined to take the course which might qualify her for the job.

On the basis of the record before us, I would not find Clendenon entitled to back pay.

**MEMBERS HOUSTON** and **MURDOCK** took no part in the consideration of the above Supplemental Decision and Determination.