

SOMERVILLE CREAM COMPANY, INC. and MILK WAGON DRIVERS AND CREAMERY WORKERS UNION, LOCAL 380, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL. Case No. 1-CA-744. September 28, 1953

### SUPPLEMENTAL DECISION AND RECOMMENDATION

On August 17, 1951, the Board issued a Decision and Order<sup>1</sup> in the above-entitled proceeding. Thereafter, on August 22, 1952, the Order was enforced by a decree of the United States Court of Appeals for the First Circuit. The Respondent and the representatives of the Board were subsequently unable to reach agreement with respect to the amounts of back pay due Richard H. Ayers, Michael Langone, and Charles D. Matthews under the terms of the decree, and the Board directed that a hearing be held to resolve such disagreement. Accordingly, hearings were held before Trial Examiner David London, who issued a Supplemental Intermediate Report on April 27, 1953, and an Additional Supplemental Intermediate Report<sup>2</sup> on July 15, 1953. As set forth in the copies of the Supplemental Intermediate Report and the Additional Supplemental Intermediate Report attached hereto, the Trial Examiner found specific amounts of back pay due Ayers, Langone, and Matthews, and recommended that the Respondent reimburse them in accordance with his findings. The Respondent filed exceptions to the Supplemental Intermediate Report and a supporting brief,<sup>3</sup>

<sup>1</sup>195 NLRB 1144.

<sup>2</sup>In its exceptions, the Respondent excepted, *inter alia*, to that portion of the Supplemental Intermediate Report which attributed to two of the dischargees, Langone and Ayers, the wage increases given by the Respondent to Beatty and Carey, the latter having been employed successively to do the same job and therefore constituting a single replacement for but one of the dischargees. This method of computation by the Trial Examiner did not conform to the decree of the aforesaid court of appeals, under the terms of which Beatty and Carey were considered jointly as the replacement for Langone, while another individual, Burrows, was considered the replacement for Ayers. Accordingly, the Board, by order dated June 9, 1953, remanded this proceeding to the Trial Examiner for the purpose of obtaining evidence as to wage increases which the Respondent paid to Burrows and any other employees who may have succeeded Burrows in the work formerly done by Ayers. Pursuant to the hearing on remand, the Trial Examiner issued the Additional Supplemental Intermediate Report herein computing correctly Ayer's back pay with respect to wage increases his replacement received.

<sup>3</sup>The General Counsel moved to strike, in their entirety, the Respondent's exceptions and brief in support thereof on the ground that the carbon copies thereof initially filed failed to conform to the requirements of Section 102.46 (e) of the Board's Rules and Regulations, Series 6, as amended. The Board's records show that, upon receiving the carbon copies of the Respondent's exceptions and brief, the Executive Secretary of the Board advised the Respondent that they were unacceptable and extended the time for filing exceptions to permit the Respondent to file required printed copies. Thereafter, the Respondent did, in fact, file printed copies of its exceptions and brief in conformity with the Board's instructions. We find that the granting of such extension of time for filing exceptions is clearly within the Board's administrative discretion. Rubin Brothers Footwear, Inc., et al, 91 NLRB 10, footnote 4. Accordingly, the General Counsel's motion to strike, in their entirety, the Respondent's exceptions and brief is hereby denied.

and the General Counsel filed exceptions to the Additional Supplemental Intermediate Report and a supporting brief.

The Board has reviewed the rulings made by the Trial Examiner at the hearings and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Supplemental Intermediate Report, the Additional Supplemental Intermediate Report, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following corrections<sup>4</sup> and modifications.<sup>5</sup>

1. The Respondent excepted to the Trial Examiner's finding that Langone was entitled to back pay from the date of his discharge, July 20, 1950, to the date he was offered reinstatement on September 27, 1951, arguing that Langone was hired initially as a temporary employee. With respect to this exception, the decree of the Court of Appeals for the First Circuit requires that Langone receive back pay for the period from his unlawful discharge to the date of the offer of reinstatement. Thus, for the purpose of computing back pay due Langone, we consider ourselves bound by the decree of the aforesaid court and believe the question of the nature of Langone's employment to be res judicata. Accordingly, we reject this contention of the Respondent.

2. As disclosed more fully in the Supplemental Intermediate Report, Ayers held several successive jobs after being discharged by the Respondent. One job was with the Monitor Controller Corporation (hereinafter called Monitor), which Ayers left to go to work for Herman Hosmer Scott, Inc. (hereinafter called Scott). Ayers' employment with Scott was as a trainee in the field of electronics, and he earned \$20 less per week than he had earned while with Monitor. However, at Scott he was training under the provisions of the veterans' on-the-job training program by virtue of the fact that he was a veteran of World War II. Under those provisions, Ayers received, in addition to the salary paid him by Scott, \$20 per week in subsistence payments from the United States Government.

In computing the back pay due Ayers, the Trial Examiner found that the \$20 per week received in the form of subsistence payments from the United States Government were not deductible

---

Alternatively, the General Counsel moved to dismiss section III of the Respondent's brief for the reason that the language therein was intemperate, immaterial, not in conformity with the facts, and based on matter clearly outside the record. Upon review thereof, we find that section III of the Respondent's brief does not exceed the bounds of proper argument. James Thompson & Co., Inc., 100 NLRB 456. Accordingly, we hereby deny the General Counsel's alternative motion to strike section III of the Respondent's brief.

<sup>4</sup>We make the following corrections of inadvertent errors appearing in the Supplemental Intermediate Report, which do not affect the ultimate conclusions:

At page 1159, paragraph 5: Langone registered with more than seven private employment agencies after his discharge by the Respondent.

At page 1161, par. 3: The figure \$2,389.29 is clearly a typographical error and should be \$2,383.29.

<sup>5</sup>The findings on page 2, par. 5 and of the Additional Supplemental Intermediate Report, that Preble's pay was increased to 95 cents on August 17, 1950, and to \$1 05 on March 22, 1952, are not supported by the record. Therefore, we do not adopt these findings.

from the back-pay liability of the Respondent as part of Ayer's net earnings. The Respondent excepted to this finding on two alternative grounds that: (1) The subsistence payments were part of Ayers' income and should therefore be considered part of his deductible net earnings; and (2) by leaving his job at Monitor to take the job at Scott, Ayers had wilfully lowered his income by \$20 weekly and that the Respondent should not be held liable in back pay for such a voluntary reduction in earnings.

Without ruling upon the Respondent's first contention, and assuming only for the limited purpose of our decision herein that the veterans' on-the-job subsistence payments are not part of income deductible as net earnings from the Respondent's back-pay liability to Ayers, we agree with the Respondent's second contention. For, by taking the job with Scott as a trainee Ayers removed himself from the labor market to the extent of the additional \$20 per week that he had received as an employee fully qualified to perform the type of work required of him while working for Monitor. Accordingly, in computing the back pay due Ayers, we shall, contrary to the Trial Examiner, increase Ayers' net deductible earnings by \$20 per week during the period he worked for Scott.

3. Also with respect to Ayers' back pay, the Trial Examiner attributed to his replacement, Burrows, a single wage increase of 10 cents per hour, starting on March 22, 1951. The General Counsel accepted to this finding and claimed that Ayers should be credited with an additional 5-cent per hour increase, starting from the date of Ayers' discharge on July 21, 1950. The record shows that Burrows was working for the Respondent at the time Ayers was discharged and that, at the time he was assigned to do Ayers' work, he was receiving 5 cents more per hour than Ayers had been paid. There is nothing in the record to show that the additional 5 cents per hour which Burrows was receiving at the time he took over Ayers' job was in any way related to his change in duties. We therefore reject the General Counsel's exception in this regard and affirm the Trial Examiner's finding that Ayers' replacement, as such, received only the single 10-cent per hour wage increase.

### RECOMMENDATION

Upon the basis of this Supplemental Decision and the entire record in the case, the National Labor Relations Board hereby respectfully recommends to the United States Court of Appeals for the First Circuit that its decree, entered on October 22, 1952, be amended to incorporate therein the respective amounts of net back pay required to be paid by the Respondent to each of the employees unlawfully discharged herein, as follows:

Charles D. Matthews	\$1,560.37
Michael Langone	\$1,372.94
Richard H. Ayers	\$745.01

Member Murdock took no part in the consideration of the above Supplemental Decision and Recommendation.

## Supplemental Intermediate Report and Recommendation

On August 17, 1951, the National Labor Relations Board, herein called the Board, issued its Decision and Order in the above-entitled proceeding (95 NLRB 1144) in which it found that Somerville Cream Company, Inc., herein called Respondent, had engaged in and was engaging in certain unfair labor practices within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act as amended, 61 Stat. 136, herein called the Act. Accordingly, the Board ordered Respondent to cease and desist from such unfair labor practices and to take certain affirmative remedial action.

In addition to other matters not here pertinent, the Board found that Respondent had discriminated with respect to the hire and tenure of employment of Charles D. Matthews, Michael Langone, and Richard H. Ayers, and ordered that Respondent offer them immediate and full reinstatement and to "make each of them whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him, by paying to each of them a sum of money covering his loss of pay; such loss to 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 the offer of reinstatement. The quarterly periods, hereinafter called 'quarters,' shall begin on the first day of January, April, July, and October. Loss of pay shall be determined by deducting from a sum equal to that which he normally would have earned for each quarter or portion thereof, his net earnings, if any, in other employment, during that period. Earnings in one particular quarter shall have no effect on the back-pay liability for any other quarter."

Respondent having failed to comply with the Board's Order, the Board petitioned the United States Court of Appeals for the First Circuit for enforcement thereof. On October 22, 1952, that court issued its decree enforcing the Board's order (199 F. 2d 257).

Thereafter, a question as to the amount of back pay due the three employees aforementioned having arisen, a "Notice of Further Hearing" was duly served upon the parties by the Board's Regional Director for the First Region for the purpose of determining the amount due the three employees pursuant to the Board order and court decree. Pursuant to this notice, a hearing was held at Boston, Massachusetts, on February 9, 1953, before the undersigned duly designated Trial Examiner. The General Counsel of the Board was represented by counsel, herein referred to as the General Counsel, and the Respondent was represented by counsel. Full opportunity to be heard, to examine and cross-examine witnesses, and introduce evidence was afforded all parties. Since the close of the hearing a brief has been received from the General Counsel.

Upon the entire record,<sup>1</sup> including the prior proceedings aforementioned, of which I have taken official notice, I make the following findings and recommendations:

At the hearing before me, the parties stipulated, and I find, that Matthews was discharged on July 19, 1950, Langone on July 20, 1950, and Ayers on July 20, 1950. It was further stipulated that all three of these employees were offered reinstatement by Respondent's letter dated September 27, 1951, and the General Counsel has conceded that Respondent's back-pay liability ceased as of that date.

In computing the gross back pay which Matthews and Ayers would have received from Respondent if they had not been discriminatorily discharged, I have computed the number of hours each would have worked, including overtime,<sup>2</sup> on the basis of their experience of 11 weeks prior to their discharge.<sup>3</sup> In the case of Langone, I am unable to use this same experience because he worked less than 1 month, and had only 2 full weekly periods prior to his discharge. Because, however, his overtime was steadily climbing to that achieved by Matthews and Ayers, I have credited him with the same overtime allotted to them. I have also adjusted the hourly rate of pay for all 3 employees to correspond to the adjustments Respondent made for their replacements.<sup>4</sup> All of these computations from the date of discharge to

---

<sup>1</sup>Page 5 of the transcript of testimony taken before me is hereby corrected as follows: In line 9, strike out "1951" and insert "1950"; in line 10 strike out "29" and insert "20". Page 65, line 25 of the same transcript is corrected by striking out "June" and inserting "July."

<sup>2</sup>Stover Bedding Co., 15 NLRB 635.

<sup>3</sup>I have used this method because no testimony was offered by Respondent to show how much time was worked by the replacements for the three men here involved. This, notwithstanding that Respondent's treasurer appeared as a witness and gave testimony as to the hourly rates paid these replacements.

<sup>4</sup>Condenser Corporation of America, 22 NLRB 347, 453.

September 27, 1951, are reflected and explained in Appendices 1A, 1B, and 1C, hereto attached and made a part hereof<sup>5</sup> Appendix 2, similarly attached and made a part hereof, summarizes the gross back pay each employee would have earned from Respondent to September 27, 1951, his interim earnings during the same period, and the net back pay due each man

Charles D Matthews

Matthews worked for Respondent from February 1949 until he was discharged on July 19, 1950, when he was given \$32 as 1 week's pay in advance, and in "lieu of notice." At the time of his discharge, he was working, as a bottler, 6 days a week earning 80 cents an hour with time and a half for work over 40 hours. On July 30, 1950, he was employed on a temporary basis by the Whiting Milk Company, having spent the interval in search for the job and undergoing physical examination. After a period of about 2 months, during which he was paid \$1 13 an hour and worked no overtime, his employment was terminated. On or about October 1, he registered with the United States Employment Service following which he was unemployed until February 5, 1951. On that day he was hired by Warren Bros. Roads Company at \$52 for a 40-hour week and also worked some overtime. He continued in that employment until after September 27, 1951, except for a period in midsummer when he remained away from work for a period of 2 weeks, less 1 day, to get married, an event which took place on June 24. During the week ending that day, he worked only 1 day of 9 hours and he was not at work during any part of the week ending July 1. Appendix 2 truly reflects his interim earnings during the period July 30, 1950, to September 27, 1951.

On the entire record and the calculations made in Appendices 1A and 2, I find that during the period July 19, 1950, to September 27, 1951, Matthews would have earned from Respondent the sum of \$3796 90. I further find that his actual earnings during the same interim were \$2236 53 and that the net back pay due him from Respondent is \$1560 37.

Michael Langone

Langone was hired during the workweek ending June 29, 1950, at 80 cents an hour and was discriminatorily discharged on the following July 20. In the interim, he was engaged as a truckdriver making special delivery of orders from the plant and also picking up and delivering cream to railroad depots. To succeed him, Hollis Geary was employed on July 18 and took over Langone's work on July 21. Geary was followed on August 17 by Lee Beatty who was replaced October 26, 1950, by John Carey. Carey worked until May 24, 1951, at which time he was replaced by Al Devlin. The latter worked until July 19, 1951, and was replaced that day by William Sisson who was still in Respondent's employ at the time of the instant hearing.

Following Langone's discharge by Respondent, he registered with seven private employment agencies in Boston and filed applications for work with several large employers of labor in adjacent areas. On September 5, 1950, he was hired by Anderson Products and was employed there at the time of the hearing before me. His interim earnings to the date he was offered reinstatement by Respondent on September 17, 1951, are shown on Appendix 2.

On the entire record and the calculations made in Appendix 1B and 2, I find that Langone would have earned from Respondent, during the period July 20, 1950, to September 27, 1951, the sum of \$3951 70. I further find that his actual earnings during the same interim were \$2578 76, and that the net back pay due him is \$1372 94.

Richard H. Ayers

Following his discharge by Respondent on July 21, 1950, Ayers registered with the United States Employment Service, and on or about August 1, 1950, found employment with the Panther-Panco Rubber Co. He remained there for approximately 2 months and immediately thereafter went to work for the Monitor Controller Corporation as a wirer. His rate of pay there was \$1 per hour, but he worked some overtime so that his average gross pay was approximately \$50 a week. In about mid-December 1950, he voluntarily left Monitor and immediately went to work for Herman Hosmer Scott, Inc., at \$.75 an hour and earned approximately \$30 per week. His employment there was as a trainee in the field of electronics for

<sup>5</sup> Footnotes (a) and (b) of Appendices 1A, 1B, and 1C explain the basis for the computation of the adjusted hourly rate and overtime for Matthews, Langone, and Ayers, respectively.

which he received an additional \$20 per week subsistence payment from the United States Government by reason of the fact that he was a veteran of World War II. On or about August 10, 1951, he left Scott and went to work for the Raytheon Manufacturing Co. at \$1.38 an hour, repairing electronic test equipment, and was so employed when he was offered reinstatement by Respondent on September 27, 1951.

Respondent strongly urges that in determining Ayers' interim earnings there be included therein the subsistence allowance of \$20 per week he received from the United States Government while working at Scott under a GI training program. Resolution of the issue thus posed rests on an analysis of the Board's direction that in determining Ayers' "loss of pay" suffered as a result of Respondent's discrimination, there shall be deducted "from a sum equal to that which he normally would have earned for each quarter or portion thereof, his net earnings, if any, in other employment, during that period." (Emphasis supplied.) Thus, it is only if the GI subsistence allowance may be deemed to be interim "earnings" that the position of Respondent may be sustained.

The subsistence payments under consideration are made pursuant to Veterans Regulation No. 1 (a), part V111, 38 U. S. C. ch. 12 and note following, promulgated by the President pursuant to Title I, Public Act No 2, 73rd Congress, as amended. They are payments made to World War II veterans under legislation which originally described such grants as "a pension."<sup>6</sup> As such, they can only be considered as a bounty paid by a grateful Government for sacrifices incurred by veterans while engaged in the defense of the United States "The payments were not made to discharge any liability or obligation of Respondent, but to carry out a policy of social betterment for the benefit of the entire [nation]."<sup>7</sup> They are not deemed to be earnings, or income, so as to be subject to Federal income taxation.<sup>8</sup> Unlike work-relief projects sponsored by Federal, State, or municipal governments pursuant to which veterans, and nonveterans alike, receive compensation for work rendered to the government involved and which compensation is computable as interim earnings,<sup>9</sup> here, no work was performed for the Government.

The subsistence allowance involved is more akin to unemployment compensation received by a discharged employee which the Supreme Court has decreed may not be credited as post-discharge or interim earnings. Unemployment compensation, like the GI benefit here, is "not made to the employees by Respondent, but by the state [or nation, respectively] out of . . . funds derived from taxation . . . Since no consideration has been given or should be given to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received " N. L. R. B. v. Gullett Gin Co., supra .

To allow these GI benefits as interim earnings and thus materially reduce Respondent's liability would permit the employer to enjoy the fruits of his unlawful conduct and serve to encourage, rather than discourage, unfair labor practices by other employers. Indeed, it would be a perversion of the Veteran's Act, and its objectives, to allow Respondent to reap the benefits of a statute enacted not for its benefit, but for that of the veteran whose rights it has violated. For the reasons aforementioned, I have not included in the calculations of Ayers' interim earnings the GI subsistence payments received by him while employed at Scott.<sup>10</sup>

<sup>6</sup> Under subsequent legislation, monetary benefits other than retirement pay for service-connected disability or death disbursed under laws administered by the Veterans Administration are now designated "compensation" and not "pension." Sec. 1, Public Law 494, 79th Cong. (38 U. S. C. 700); House Committee Print No. 310, 82nd Cong., 2nd Session, footnote 2.

<sup>7</sup> N. L. R. B. v. Gullett Gin Co., 340 U. S. 361.

<sup>8</sup> Unpublished ruling, Deputy Commissioner of Internal Revenue, Dec. 6, 1949, in re Everett K. Miller.

<sup>9</sup> Republic Steel Corporation v. N. L. R. B., 311 U. S. 7.

<sup>10</sup> Taylor Manufacturing Co., Inc., 83 NLRB 142, does not require a contrary result. There, the employer discriminatorily discharged one of a number of GI trainees to whom he had been paying 50 cents an hour and who was also receiving subsistence payments of the type involved in the instant proceeding. In its remedial order, the Board ordered that the computation of gross back pay necessary to make the discharged veteran "whole" include not only the 50 cents an hour paid by the employer, but also the GI benefits received from the Government. In that case, the direct result of the employer's discriminatory practice was not only the loss of the hourly wage of 50 cents an hour paid by him, but also a loss of the Government bounty. Because of that discrimination, the employee lost the subsistence payments which the Board

Respondent also contends that because Ayers voluntarily left a job paying \$50 a week at Monitor to accept the in-training job at Scott paying only \$30 a week, that his interim earnings while employed at Scott should be computed at \$50 per week. However, Ayers testified, and I find, that he left the higher paying job in order "to break into electronics" and to acquire "further skill and training." By thus seeking to equip himself for a more productive life,<sup>11</sup> even though it might involve a temporary loss of pay, Ayers "did not incur a wilful loss." Harvest Queen Mill & Elevator Co., 90 NLRB 320, 327

On the entire record, the conclusions above announced, and the calculations made in Appendices 1C and 2, I find that during the period July 21, 1950, to September 27, 1951, Ayers would have earned from Respondent the sum of \$3910 50 I further find that his actual earnings during the same interim were \$2389.29, and that the net back pay due him from Respondent is \$1527 21.

## CONCLUSIONS

Upon the foregoing findings and computations, I conclude that:

1. The total net back pay due Charles D Matthews is \$1560 37.
2. The total net back pay due Michael Langone is \$1372 94
3. The total net back pay due Richard H. Ayers is \$1527.21.

[Recommendations omitted from publication.]

found the employer agreed to obtain for him when he was employer. That employee could only be made "whole" by the payment to him of his hourly wage plus the subsistence payments. Accordingly, the Board's remedial order there provided that Taylor make the employee whole "for any loss of pay or income incurred by reason of its discriminatory action." (Emphasis supplied.) Here, however, the Board ordered that the only deductions from gross back pay shall be Ayers' "earnings in other employment." It did not require giving Respondent credit for other "income." Certainly, if instead of receiving this bounty from the Government, Ayers' father had paid him \$20 weekly, or his wife had contributed a like amount from her earnings to maintain his family so that he could have received the benefit of training in electronics, Respondent could not have offset the father's or wife's gratuity in computing Ayers' interim earnings.

<sup>11</sup> Ayers' subsequent employment at Raytheon, where his work was in electronics, enabled him to earn \$1.38 an hour as compared to the 90 cents he might have earned if he had not been discharged by Respondent, or the \$1 per hour he earned at Monitor. This increased hourly rate redounded to Respondent's benefit in the last quarter of the interim period.

Appendix 1A--Gross Back Pay  
Charles D. Matthews

Somerville Cream Co., Inc.  
Case No. 1-CA-744

Name : Charles D. Matthews  
Job : Bottler  
Date of discharge : 7/19/50  
Date of offer of reinstatement : 9/27/51  
Rate on 7/19/50 : .80¢ hr. (\$.1.20 hr. overtime)  
Increases to which entitled : 5¢ an hour in week ending 8/31/50; 5¢ an hour in week ending 3/22/51<sup>a</sup>

Workweek:

6-day week (average day 10 1/3 hrs.) Wednesday through Thursday. No Sunday work. Average hours: 62.<sup>b</sup> Time and one-half over 40  
(2 1/3 hrs. each weekday; 10 1/3 on Saturday)

Period	Weeks and days	St. Time Hrs.	St. Time Rate	St. Time Gross	Overtime Hrs.	Overtime Rate	Overtime Gross	Gross
1950: 3rd quarter								
7/20 to 9/21	9 weeks, 1 weekday	368	.80	294.40	200 1/3	1.20	240.40	502.80 <sup>e</sup>
9/22 to 9/30	1 week, 1 weekday, 1 Sat.	48	.85	40.80	34 2/3	1.275	44.20	85.00
								587.80
4th quarter								
10/1 to 12/31	13 weeks	520	.85	442.00	286	1.275	364.65	806.65
1951: 1st quarter								
1/1 to 3/15	10 weeks, 4 weekdays	432	.85	367.20	229 1/3	1.275	292.40	659.60
3/16 to 3/31	2 weeks, 1 weekday, 1 Sat.	88	.90	79.20	56 2/3	1.35	76.50	155.70
								815.30
2nd quarter								
4/1 to 6/30	13 weeks	520	.90	468.00	286	1.35	386.10	
	c(4 weekdays, 1 Sat.	32	.90	-28.80)	(19 2/3	1.35	-26.55)	798.75
				439.20			359.55	
3rd quarter								
7/1 to 9/30 <sup>d</sup>	13 weeks	520	.90	468.00	286	1.35	386.10	
	c(1 week	40	.90	-36.00)	(22	1.35	-29.70)	788.40 <sup>e</sup>
				432.00			356.40	3,796.90
				2,094.80			1,734.10	

<sup>a</sup> Increases based upon weeks in which "replacements" received adjustments; Killeen went to 85¢ in week ending 9/28/50, Duffy went to 90¢ in week ending 3/22/51.

<sup>b</sup> Workweek based upon average hours worked by Matthews and Ayers in 11 weeks prior to discharge. Week ending 7/19/50 was excluded since it was not a full week.

<sup>c</sup> Period Matthews went on vacation; June 19 thru June 30, 1951, deducted from gross.

<sup>d</sup> Although the back pay was stopped as of 9/27/50, the gross for the full quarter was computed because of ease of computation, and lack of detail as to hours and overtime in the interim period. In computing net back pay interim to 9/30/51 is also used. Gross and interim to 9/30 will roughly balance each other.

<sup>e</sup> The 1 week's severance pay of \$32 was deducted from the period 7/20 to 9/21. Given in lieu of weeks' notice.

Appendix 1B--Gross Back Pay  
Michael Langone

Somerville Cream Co., Inc.  
Case No. 1-CA-744

Name : Michael Langone  
Job : Truckdriver  
Date of discharge : 7/20/50  
Date of offer of reinstatement : 9/27/51  
Rate on 7/20/50 : .80¢ hr. (1.20 overtime rate)  
Increases to which entitled : 5¢ per hour beginning in week ending 8/31/50; 5¢ per hour beginning in week ending 3/29/50<sup>a</sup>  
 Workweek;

6-day week, Wednesday through Thursday (average day 10 1/3 hrs.) No Sunday work. Average hours: 62.6 Time and one-half over 40 (2 1/3 overtime hrs. each weekday; 10 1/3 on Saturdays)

Period	Weeks and days	St. Time Hrs.	St. Time Rate	St. Time Gross	Overtime Hrs.	Overtime Rate	Overtime Gross	Gross
1950: 3rd quarter								
7/21 to 8/24	5 weeks	200	.80	160.00	110	1.20	132.00	292.00
8/25 to 9/30	5 weeks, 1 weekday, 1 Sat.	208	.85	176.80	122 2/3	1.275	156.40	333.20
								625.20
4th quarter								
10/1 to 12/31	13 weeks	520	.85	442.00	286	1.275	364.65	806.65
1951: 1st quarter								
1/1 to 3/22	11 weeks, 4 weekdays	472	.85	401.20	251 1/3	1.275	320.45	721.65
3/23 to 3/31	1 week, 1 weekday, 1 Sat.	48	.90	43.20	34 2/3	1.35	46.80	90.00
								811.65
2d quarter								
4/1 to 6/30	13 weeks	520	.90	468.00	286	1.35	386.10	854.10
3rd quarter								
7/1 to 9/30 <sup>c</sup>	13 weeks	520	.90	468.00	286	1.35	386.10	854.10
				2,159.20			1,792.50	3,951.70

<sup>a</sup> Increases are based upon weeks in which "replacements" received adjustments; Beatty went to 85¢ in week ending 8/31/50; Carey went to 90¢ in week ending 3/29/50.

<sup>b</sup> Workweek based upon average hours worked by Matthews and Ayers for 11 weeks prior to discharge. Week ending 7/19/50 was excluded since it was not a full workweek. This average used for Langone since he worked only two full weeks prior to discharge.

<sup>c</sup> Although the back pay was stopped as of 9/27/51, the gross for the full quarter was computed because of ease of computation and lack of detail as to hours and overtime in the interim period. In computing net back pay interim to 9/30/51 is also used. Gross and interim to 9/30 will roughly balance each other.

Appendix IC--Gross Back Pay  
Richard H. Ayers

Somerville Cream Co., Inc.  
Case No. 1-CA-744

Name : Richard H. Ayers  
Job : Truckdriver  
Date of discharge : 7/21/50  
Date of offer of reinstatement : 9/27/51  
Rate on 7/21/50 : .80¢ hr. (1.20 overtime rate)  
Increases to which entitled : 5¢ per hour in week ending 8/31/50; 5¢ per hour in week ending 3/29/51 <sup>a</sup>  
Workweek

6-day, week, Wednesday through Thursday (average day 10 1/3 hrs.) No Sunday work. Average hours: 62. <sup>b</sup> Time and one-half over 40 (2 1/3 hrs. each weekday; 10 1/3 on Saturday)

Period	Weeks and days	St. Time Hrs.	St. Time Rate	St. Time Gross	Overtime Hrs.	Overtime Rate	Overtime Gross	Gross
1950: 3rd quarter								
7/22 to 8/24	4 weeks, 4 weekdays, 1 Sat.	192	.80	153.60	107 2/3	1.20	129.20	250.80 <sup>d</sup>
8/25 to 9/30	5 weeks, 1 weekday, 1 Sat.	208	.85	176.80	122 2/3	1.275	156.40	333.20
								584.00
4th quarter								
10/1 to 12/31	13 weeks	520	.85	442.00	286	1.275	364.65	806.65
1951: 1st quarter								
1/1 to 3/22	11 weeks, 4 weekdays	472	.85	401.20	251 1/3	1.275	320.45	721.65
3/23 to 3/31	1 week, 1 weekday, 1 Sat.	48	.90	43.20	34 2/3	1.35	46.80	90.00
								811.65
2nd quarter								
4/1 to 6/30	13 weeks	520	.90	468.00	286	1.35	386.10	854.10
3rd quarter								
7/1 to 9/30 <sup>c</sup>	13 weeks	520	.90	468.00	286	1.35	386.10	854.10
				2,152.30			1,789.70	3,910.50 <sup>d</sup>

<sup>a</sup> Increases based upon weeks in which "replacements" received adjustments: Beatty--went to 85¢ in week ending 8/31/50. Carey--went to 90¢ in week ending 3/29/51.

<sup>b</sup> Workweek based upon average hours worked by Matthews and Ayers in 11 weeks prior to discharge. Week ending 7/19/50 was excluded since it was not a full workweek.

<sup>c</sup> Although the back pay was stopped as of 9/27/51, the gross for the full quarter was computed because of ease of computation, and lack of detail as to hours and overtime in the interim period. In computing net back pay interim to 9/30/51 is also used. Gross and interim to 9/30 will roughly balance each other.

<sup>d</sup> The 1 week's severance pay of \$32 was deducted from the period 7/22 to 8/24. One week's pay given in lieu of notice.

Appendix 2--Back Pay Due Claimants

Somerville Cream Co., Inc.  
Case No. 1-CA-744

1950*	Richard H. Ayers			Michael Langone			Charles D. Matthews		
	Gross	Interim	Back Pay	Gross	Interim	Back Pay	Gross	Interim	Back Pay
3rd Quarter	584.00	222.29	361.71	625.20	159.10	466.10	587.80	372.38	215.42
4th Quarter	806.65	645.02	161.63	806.65	601.97	204.68	806.65	45.00	761.65
1951									
1st Quarter	811.65	446.25	365.40	811.65	647.98	163.67	815.30	383.18	432.12
2nd Quarter	854.10	376.86	477.24	854.10	573.95	280.15	798.75	705.07	93.68
3rd Quarter	854.10	692.87	161.23	854.10	595.76	258.34	788.40	730.90	57.50
Back Pay Due	3,910.50	2,383.29	1,527.21	3,951.70	2,578.76	1,372.94	3,796.90	2,236.53	1,560.37

## Additional Supplementary Intermediate Report

On August 17, 1951, the Board issued its Decision and Order in the above-entitled proceeding (95 NLRB 1144) in which it found, *inter alia*, that Respondent on July 21, 1950, discriminatorily discharged Richard H. Ayers and ordered that Respondent make him whole for loss of pay suffered as a result of that discrimination. On October 22, 1952, the United States Court of Appeals for the First Circuit entered its decree (199 F. 2d 257) enforcing that Decision and Order. Respondent and representatives of the Board being unable to reach agreement concerning the amount of back pay due Ayers and the other discriminatees, a hearing was held before me on February 9, 1953, to resolve such disagreement, following which I issued a Supplemental Intermediate Report and Recommendation on April 27, 1953.

On June 9, 1953, the Board ordered the record herein reopened and directed that "a further hearing be held for the limited purpose of obtaining more complete evidence with respect to wage adjustments Respondent made for [George H.] Burrows, Ayers' replacement, and any other employees who may have subsequently replaced Burrows."

Pursuant to said order, and notice duly given to all parties, a hearing was held before me at Boston, Massachusetts, on June 25, 1953. The General Counsel and Respondent were represented by counsel and were given full opportunity to be heard, examine and cross-examine witnesses, and introduce evidence. Upon the entire record herein, I make the following findings of fact:

Burrows, of whom no mention was made at the hearing before me on February 9, 1953, was employed by Respondent in the summer of 1946 and continued in his employment until April 1953. His work consisted of a variety of tasks--getting "things ready for pasteurizing," loading trucks, checking the drivers, cleaning up at night, making special deliveries, etc. When Ayers was discharged on July 21, 1950, Burrows, for a period of about 2 months, took over approximately half of Ayers' route. The remainder was serviced by Herbie Preble, a regular driver on another route and employed by Respondent even longer than Burrows, and Everett Bryan. Thereafter, for approximately a year, a number of stops were taken away from Burrows and his portion of the route was gradually diminished and taken over by Bryan.

On July 21, 1950, Burrows' rate of pay was 85 cents an hour, which was increased on March 22, 1951, to 95 cents. Burrows having testified that part of Ayers' route was taken over by Preble and Bryan, testimony relating to the hourly rate of these 2 drivers during the material period was also received. That testimony discloses, and I find, that Preble on July 21, 1950, was earning 90 cents an hour, and that his rate of pay was increased to 95 cents on August 17, 1950, and to \$1.05 on March 22, 1951. Bryan was earning 85 cents an hour on July 21, 1950, was raised to 90 cents on the following July 28 and to \$1 on April 5, 1951.

The record fails to disclose with exactness the area extent or time during which Burrows took over Ayers' route from July 21, 1950, to September 27, 1951, when Ayers was offered reinstatement. It is even less illuminating with respect to the extent and time during which Preble and Bryan took over parts of the same route. Accordingly, an accurate mathematical calculation of the wages and wage adjustments of Ayers' successors, as such successors, seems impossible.

Under the circumstances, and because the Board has found Burrows to be Ayers' replacement, I have concluded that the best available yardstick by which to measure the amount of wages lost by Ayers is to compute that loss on the basis of Burrows' rate of pay during the period in question. As previously found, Burrows was receiving 85 cents an hour on July 21, 1950, and was raised to 95 cents in the week ending March 22, 1951. Using the same projected workweek and overtime calculations reflected in Appendix 1C of my earlier supplementary report, and multiplying that number of hours by Burrows' rate of pay, I find that Ayers would have earned from Respondent the sum of \$3808.30 from July 21, 1950, to September 27, 1951. Deducting therefrom the sum of \$2383.29, Ayers' actual earnings during the same period as previously reported, I find that the net back pay due Ayers is the sum of \$1425.01. My supplementary report of April 27, 1953, and Appendices 1C and 2 attached thereto, are amended in accordance with the findings and conclusions last above announced.

It is my recommendation that the Board adopt the foregoing amending findings and conclusions.