

As I stated in my concurring opinion in *United Packinghouse Workers of America, CIO, etc. (Wilson & Co., Inc.)*, 89 NLRB 310 at 319, the language of Section 8 (d) is plain and unambiguous. It sets forth the procedure to be followed in the termination or modification of a contract at its expiration date. My reasons for reaching this conclusion are discussed fully in my opinion in the *Wilson & Co.* case. It is sufficient here to say that not only does the wording of the several subsections of Section 8 (d) show that Congress was prescribing certain standards of conduct during the period around the expiration of a contract, but the legislative history concerning the proviso also supports this view.

In the present case, the Union notified the Respondent on August 24, 1951, of its desire to amend the contract. It also notified the Federal Mediation and Conciliation Service and the State labor commissioner of the existence of a labor dispute. However, under the terms of the contract that notice did not terminate the contract, and, when October 23, 1951, the end of the 60-day period after the notice to modify and the end of the initial term of the contract, arrived, the contract did not expire, but under its terms was converted into a contract terminable at will upon the giving of a 60-day notice to terminate. At any time thereafter, upon the giving of the 60-day notice of termination required by its terms, the contract was subject to termination, but it was not so terminated.

Section 8 (d) (4) required the Union to refrain from striking for a period of 60 days after notice was given or "until the expiration date of such contract, *whichever occurs later.*" It is questionable to me that the "notice" given by the Union here, and in the circumstances of this case, is the kind of notice contemplated by the statute. However, it is not necessary to determine that question, for, in any event, the extension of the contract continued, as neither of the parties gave the notice to terminate. Even assuming that the notice to modify given on August 24, 1951, met the requirements of the statute, the expiration date, which occurred later, became the significant date and the one which marked the end of the Union's obligation to refrain from striking. As the Union did strike within this period, it violated Section 8 (d) (4) and the strikers thereby lost their status as employees of the Respondent and were not entitled to reinstatement at any time after they struck on April 30, 1952.

In view of the Union's failure to comply with Section 8 (d) of the Act and the Respondent's genuine attempts to reach a collective-bargaining agreement from August 29, 1951, to August 3, 1952, when a new contract was executed, I would not find a violation of Section 8 (a) (5) in the isolated incidents upon which the majority finds a technical violation.

As I would find neither a violation of Section 8 (a) (3) nor Section 8 (a) (5), I would dismiss the complaint herein.

CASHMAN AUTO COMPANY *and* LOCAL 841, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, AND LODGE 1898 OF DISTRICT 38 OF INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL

RED CAB COMPANY *and* LOCAL 841, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, AND LODGE 1898 OF DISTRICT 38 OF INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL. *Cases Nos. 1-CA-875 and 1-CA-876. August 5, 1954*

Supplemental Decision and Order

On March 26, 1952, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding, which order was thereafter enforced by the United States Court of Appeals for the First Circuit by a decree entered on December 11, 1952. The decree provided, *inter alia*, that the Respondents make whole certain of their

employees for losses of pay suffered by reason of the Respondent's discrimination against them. Thereafter, pursuant to notice, issued by the Regional Director for the First Region, a hearing was held for the purpose of adducing evidence with respect to the amounts of back pay to which the discriminatees might be entitled.

On December 10, 1953, Trial Examiner George Bokat issued his Intermediate Report disposing of a number of collateral issues and recommending that the Respondents be required and directed to pay discriminatees Marshall and Shawcross \$1,403.81 and \$1,866.83, respectively, as the amounts of back pay required to make them whole. Thereafter, the Respondents filed exceptions to the Intermediate Report with a supporting brief.

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

1. The Respondents except to the ruling by the Trial Examiner revoking a subpoena *duces tecum* served upon the Division of Employment Security of the Commonwealth of Massachusetts. The subpoena, issued at the request of the Respondents, directed production of records of the division pertaining to the registration, referrals, and compensation payments of discriminatees Marshall and Shawcross. The Trial Examiner revoked the subpoena on the ground that a statute of the Commonwealth of Massachusetts prohibited the division from disclosing the information sought. The Board has previously held that subpoenas directed to State officials for the production of such material may properly be quashed upon showing that State law prohibits disclosure of the information.¹ Accordingly, we affirm the ruling of the Trial Examiner.

2. As set forth in the Intermediate Report, Marshall and Shawcross ran a small private auto repair business during a large portion of the back-pay period. Until almost the end of that period, when Marshall succeeded in finding employment elsewhere, the two men were unsuccessful in their search for other employment. The Trial Examiner found that both men, however, made earnest and continuous attempts to find jobs; that they would have returned to the Respondents' employ if they had been asked at any time during this period; and that they started and continued the auto repair work in the hope of making a profit.

The Respondents, in their exceptions, contend, first, that self-employment carries with it a recognized element of risk the burden of

¹ See *New Britain Machine Company*, 105 NLRB 646; *David Goetz, d/b/a Federal Silk Mills*, 107 NLRB 876

which the Respondents should not be required to bear; and, secondly, that the self-employment in this case was not undertaken in good faith with a reasonable expectation of earnings. We find no merit in these contentions. The Board has consistently ruled that discriminatees who are self-employed during the back-pay period are entitled to back pay less their net earnings accruing from such self-employment.² The Board has further held that it is "reasonable to assume, absent special circumstances, that a person who leaves a job for self-employment expects to improve his financial position" rather than incur a willful loss.³

We cannot agree with our dissenting colleague's premise that self-employment alone should operate to disqualify discriminatees from receiving back-pay awards during the period in which they are so employed because their employer may be compelled to finance their "business losses." Such a broad rule would, in our opinion, give rise to inequities equally as grave as those about which the dissenting Member complains, particularly where, as here, the discriminatees' "business" consists in whole or in major part of the expenditure of their labor or services. The problem presented here, of course, has nothing to do with financing business losses. The issue is whether or not discriminatorily discharged employees lose any right to lost wages simply because they have the initiative to embark upon a business endeavor. If they had been successful, it would have redounded to Respondent's benefit for their profits would have then been deducted from their back wages. If we should hold that these employees disqualified themselves from receiving any back pay during this period, we would discourage discharged employees from engaging in self-employment, although as in this case they are at the same time diligently seeking jobs with other employers. We are satisfied that our present rule, recognizing that the special circumstances of a particular case may warrant denying back pay to a discriminatee who incurs a willful loss by engaging in a business of his own, effectively insures that the discretionary power to award back pay which Congress delegated to this Board will be exercised "with due regard to the equities of all parties." In any event, we would note that the record in this proceeding fully supports the Trial Examiner's findings that, notwithstanding their self-employment, Marshall and Shawcross nevertheless engaged in a diligent albeit unsuccessful quest for other suitable employment during that period, and did not withdraw themselves from the labor market. Moreover, the record amply substantiates the conclusion of the Trial Examiner that these discriminatees did not, at

² *L. B. Hosiery Co., Inc.*, 99 NLRB 630; *Harvest Queen Mill & Elevator Company*, 90 NLRB 320; *Rathbun Molding Corporation*, 76 NLRB 1019.

³ *Harvest Queen Mill & Elevator Company*, *supra*.

any time, attempt to incur a willful loss of income, and that they established and ran their repair business in the hope that it would return a profit. Accordingly, we find, in agreement with the Trial Examiner, that Marshall and Shawcross are entitled to back pay minus their net earnings during this period.

3. The General Counsel, at the hearing, submitted an analysis of the accounts kept by Marshall and Shawcross while the repair shop was in existence. On the basis of this analysis, the General Counsel contended that the operation of the repair shop resulted in a loss rather than a profit and that the discriminatees did not, accordingly, derive any net earnings from this source. The Trial Examiner, while finding that the Respondents had not seriously controverted the analysis, also found that the summary was inaccurate to the extent that it apparently included, as expenditures, an unknown amount of purchases of parts for friends rather than for use in the repair business. In place of this analysis, the Trial Examiner concluded, from a study of the repair shop accounts, that the business did return some profit; this profit consisting of the revenues derived from the sale of labor and amounting to \$326.68 in the case of each of the two discriminatees. He accordingly recommended that the Respondents pay Marshall \$1,403.81 and Shawcross \$1,866.83, their potential earnings minus their net earnings during the back-pay period.

The Respondents except to these conclusions and recommendations of the Trial Examiner on the general ground that the accounts and records offered by the General Counsel are too inaccurate and indefinite to establish any amount of back pay due and on the specific ground that the Trial Examiner did not further deduct certain amounts withdrawn by the two discriminatees during the course of the business.

With regard to the first contention of the Respondents, the record as noted by the Trial Examiner, contains receipts, bills, and a record of monies received and paid. The Respondents, although afforded ample opportunity, did not controvert the accuracy of these records other than by showing, on cross-examination, that some purchases of parts were for friends rather than for use in the repair shop. In any event, the Trial Examiner specifically sought to exclude the effect of any questionable parts purchases by restricting his finding and analysis to the income actually derived from operation of the shop. As to the second contention of the Respondents, the record shows that Marshall received \$147.29 and Shawcross received \$60.34 in money withdrawn from the business while it was in existence. The Respondents asserted that these amounts should be deducted from the back pay totals as recommended by the Trial Examiner. These withdrawals, however, were not extra income but clearly are a part of the \$326.68

of net income which, in agreement with the Trial Examiner, we find that each of the discriminatees made during operation of the repair shop.

Order

Upon the basis of this Supplemental Decision and the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Cashman Auto Company and Red Cab Company, Brookline, Massachusetts, their officers, agents, successors, and assigns, shall pay to the employees listed below, who were found to have been discriminated against by the Respondents by a Board Decision and Order issued on March 26, 1952, as enforced by a decree of the United States Court of Appeals for the First Circuit entered on December 11, 1952, the following respective amounts of net back pay:

Glennon E. Shawcross-----	\$1, 866. 83
Francis D. Marshall-----	\$1, 403. 81

MEMBER RODGERS, dissenting:

I am unable to agree with my colleagues that Marshall and Shawcross are entitled to back pay. My concern with this finding rests primarily on broad policy considerations. The rule to which the majority subscribed is that discriminatees who are self-employed during a back-pay period are entitled to gross back pay less net earnings. This rule conflicts, in my view, with the requirement basic to the awarding of back pay that discriminatees must endeavor to minimize their losses by seeking or accepting work elsewhere, and that if they are remiss in doing so, back pay will not be awarded. Where an individual continues in the labor market and makes a genuine attempt to secure other employment, it is not unreasonable to hold the employer liable for back pay to the extent that the efforts of the individual in question prove unsuccessful. That a discriminatee may not succeed in obtaining other employment is a reasonably foreseeable circumstance well within the contemplation of the parties, and ordinarily not subject to the control of the discharged employee.

But this is not true where an individual voluntarily withdraws himself from the labor market to engage in business for himself. Self-employment carries with it a recognized element of risk which in great part is dependent upon the business abilities of the entrepreneur. There is no logical reason why the employer should be required to bear that risk and to underwrite, as it were, the employee's efforts to estab-

lish himself in business. In effectuating the policies of the Act, it is important for the Board not to go far afield in assessing back-pay liability, but rather to exercise its authority with restraint as well as with fairness. A rule that subjects an employer's back-pay liability to factors as capricious and arbitrary as the business abilities of a discharged employee is not my idea of fair administration of the Act.

Moreover, the rule subscribed to by the majority is inherently contradictory. As applied in this case, the rule requires the discriminatee to make "earnest and continuous efforts" to seek employment while at the same time he is supposed to be diligently working for himself. Now, it is axiomatic, and indeed the Holy Scripture tells us, that "no man can serve two masters." Either the discriminatee will neglect his own business, or he will neglect his duty to seek employment elsewhere. If he does the former, there is surely no justification in equity or logic for making the employer liable. If he does the latter, he is not entitled under the majority's rule to back pay. The majority chooses to ignore this manifest contradiction by refusing to consider whether the discriminatee has been diligent in working for himself. Since the amount of back pay for which the employer is liable depends upon the discriminatee's success or failure in business, it is unconscionable, in my opinion, to fail to consider his diligence in working for himself. Admittedly such consideration is difficult to prove and to value, but, if that is so, then the Board ought not to compel the employer to make good the discriminatee's "business losses" in the form of back pay.

It is important to emphasize that the awarding of back pay was left by the Congress to the discretionary power of the Board, and like all discretionary authority must be exercised with due regard to the equities of *all* parties. Back pay is a remedial, not a punitive measure, and should not be treated as such. Where, as here, the employer is made to assume the full risk of a discriminatee going into business for himself, back pay becomes a penalty rather than a remedy. I cannot, therefore, agree that the Board should, with a due regard to a fair and equitable administration of the Act, go so far afield in awarding back pay as to require employers to make up the losses of individuals who choose to go into business for themselves rather than remain in the labor market and thus make them themselves available for other employment.

MEMBER BEESON took no part in the consideration of the above Supplemental Decision and Order.