

KARTARIK, INC. and DISTRICT LODGE 77, INTERNATIONAL ASSOCIATION OF MACHINISTS, A. F. OF L. Case No. 18-CA-406. February 16, 1955

Supplemental Decision and Order

On March 13, 1953, the National Labor Relations Board issued a Decision and Order in the above-entitled case,¹ finding, *inter alia*, that the Respondent had violated Section 8 (a) (3) and (1) of the Act by discharging employees John Suchan, Libo Napoli, and Frank Koch because of their membership in the Union. The Board therefore ordered that the Respondent make these employees whole for any loss of pay which they may have suffered as a result of the discrimination practiced against them.

In due course, the Board petitioned the United States Court of Appeals for the Eighth Circuit for enforcement of its Order. On January 20, 1954, the court, by consent decree, enforced the Board's Order. Thereafter, on February 11, 1954, the Regional Director for the Eighteenth Region issued a notice of hearing for the purpose of determining the amounts of back pay due Napoli, Suchan, and Koch. A hearing was held on March 24, 25, and 26, 1954, before Trial Examiner Max M. Goldman. On August 12, 1954, the Trial Examiner issued his Supplemental Intermediate Report and Recommendation attached hereto, in which he recommended that the discriminatees be awarded specified amounts of back pay. Thereafter, the Respondent filed exceptions to the Supplemental Intermediate Report.

The Board 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 the entire record in this case and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.²

Order

Upon the basis of the supplemental findings of fact and the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent Kartarik, Inc., St. Paul, Minnesota,

¹ 103 NLRB 500.

² The Respondent has excepted to the Trial Examiner's recommendation that the Respondent, Kartarik, Inc., and "its officers, agents, successors, and assigns" should be ordered to make the discriminatees whole, contending that only the Respondent Corporation, and not the individual agents, officers, and assigns, should be liable for back pay. While we agree that the agents and officers are not liable in their individual capacities for the amounts of back pay, they are nevertheless liable in their official capacities if they fail to comply with the terms of this Supplemental Decision and Order. As to possible successors and assigns of Respondent corporation, see *Symms Grocer Co. and Idaho Wholesale Grocery Co.*, 109 NLRB 346.

its officers, agents, successors, and assigns, shall pay to John Suchan, Libo Napoli, and Frank Koch, who were found to have been discriminated against by the Respondent by a Board Decision and Order issued March 13, 1953, as enforced by a decree of the Court of Appeals for the Eighth Circuit entered on January 20, 1954, net back pay in the following amounts:

John Suchan	\$562. 22
Libo Napoli.....	403. 34
Frank Koch	1, 393. 83

Supplemental Intermediate Report

STATEMENT OF THE CASE

On February 11, 1954, the General Counsel by the Regional Director for the Eighteenth Region (Minneapolis, Minnesota), of the National Labor Relations Board, herein called the Board, issued a notice of hearing for the purpose of determining the amount of back pay due Libo Napoli, John Suchan, and Frank Koch, under a decision and order of the Board dated March 13, 1953, 103 NLRB 500, enforced by a decree of the Court of Appeals for the Eighth Circuit, dated January 20, 1954.

Pursuant to the aforesaid notice, a hearing was held before the duly designated Trial Examiner at Minneapolis, Minnesota, on March 24, 25, and 26, 1954. The General Counsel and the Respondent were represented by counsel and the Union by its representatives. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded the parties. The General Counsel and the Respondent filed briefs with the Trial Examiner.

Upon the entire record in the case, and from his observation of the witnesses, the Trial Examiner makes the following:

FINDINGS OF FACT

1. Gross back pay

The parties are in agreement that the back-pay period for Libo Napoli and John Suchan is April 17, 1952, to March 31, 1953, and that the back-pay period for Frank Koch is April 18, 1952, to February 10, 1953. The parties disagree, however, as to the method of computing the gross back pay so as to place these claimants in the same position they would have been but for the discriminatory discharges. Prior to the discrimination the Respondent operated its shop with 12 men. Beginning immediately after the discrimination the Respondent operated with 9 men until July 1952, when the Respondent first hired an additional man.

The Respondent contending that there was a decline in business operations after the discharges proposes that the claimants would be made whole by dividing equally the earnings of the employees who remained and performed similar work, among the claimants and those employees who remained just as if all had remained in the Respondent's employ and shared the work equally. There is no evidence of the Respondent's having had a practice of sharing the work in this fashion. Although Joseph Kartarik, president of the Respondent, testified that he had a practice of giving his men at least 40 hours work each week and would transfer skilled men to less skilled work, such as painting or repairing machinery or even sweeping the shop to accomplish this end, he also testified that if he had no work for a man during the week he might send him home and not provide him with work for the remainder of the week. The Respondent's proposal assumes either that it would have kept all its men and paid them for a full week's work for a substantial period of time although the men would have worked for only part of a given week, or that the men would have accepted less than a full week's pay for a substantial period of time and remained in the Respondent's employ. The Trial Examiner finds both assumptions to be unreasonable and does not accept this proposal.

The General Counsel proposes that the back pay due be determined by paying the claimants the amounts earned by certain comparable employees during the back-pay period. The General Counsel urges that the conclusion that the claimants were discharged for illegal reasons and not because of business considerations has already been decided and is not open to further litigation at this stage of the pro-

ceeding. He contends further that, in any event, the Respondent's failure to hire after the discharges was brought about by the Respondent itself to support its defense of economic justification offered in the prior hearing. The General Counsel points to a certain subcontracting arrangement the Respondent entered into with two of its employees during the back-pay period under which the employees were permitted to do some of the subcontracted work at the Respondent's plant and use some of the machinery. There is also an admission by Joseph Kartarik that certain business was lost to the Respondent because of its discharge of one of the claimants, Napoli, who Kartarik explained was the only one capable of performing the work.

Whether or not cognizance is given to the Respondent's failure to hire replacements immediately after the discharges or its reasons for not hiring replacements, the net back pay, if any, due these claimants is not affected. Under the General Counsel's approach the claimants' earnings would be based upon a relationship to the comparable employees who remained. If recognition were given to the Respondent's contention of a decline in business, there would have been a reduction in force among the comparable men to accommodate the size of the staff to the business conditions and the Respondent would have terminated the services of three men, the same number as the number of claimants involved, as the Respondent did not for sometime after the discharges terminate any other employees or hire any new employees. Under either view the same group of comparable remaining employees is involved.

In the Napoli and Suchan cases, the Respondent urges that the men named below constitute the comparable group. They are listed with their service date¹ and hourly rate of pay at the time of the discharges.

Name	Service date	Rate of pay
Emil Falteisek.....	February 1947.....	\$1 82
Libo Napoli.....	February or March 1947.....	2 00
John Suchan.....	May 1948.....	2 00
Clarence La Mott.....	April 1949.....	2 00
Wallace Brindamour.....	February 1952.....	1 90

In the prior hearing, however, it appears from the testimony of Henry Kartarik, the son of the Respondent's president who had immediate supervision of the employees and who is a mechanical engineer in charge of production, development, and sales, that it was Napoli, Suchan, La Mott, and Brindamour who had substantially the same work experience and capabilities. This admission is corroborated by an analysis of the quarterly earnings of Napoli, Suchan, La Mott, Brindamour, and Falteisek which shows that the latter's earnings were not comparable with the earnings of the others. Expressed as a percentage of La Mott's average weekly earnings in the first calendar quarter of 1952, which is the last full calendar quarter of employment preceding the illegal discharges, the average weekly earnings of Napoli, Suchan, Brindamour,² and Falteisek are respectively, 93.7 percent, 98.7 percent, 95.9 percent, and 74.0 percent of La Mott's earnings, Falteisek will accordingly be excluded from this grouping.

In the Koch case the Respondent proposes and the Trial Examiner finds that the men named below with their service dates and hourly rates of pay at the time of the discharges constitute the proper grouping of comparable employees.

Name	Service date	Rate of pay
William Shonka.....	January 1949.....	\$1.66
Frank Koch.....	April 1951.....	1 50
George Swanson.....	December 1951.....	1.40

If cognizance were given to the Respondent's contention of poor business beginning at the very time of the discharges—as if the Board had found that the 3 claimants had been discriminatorily selected for layoff in distinction to its finding of discriminatory discharges—the Respondent would have reduced its force by 3 men at the time of the discharges because of curtailed operations. The next question which would be presented is which members of its staff would have been laid off. Joseph Kartarik testified in the earlier hearing that there was no established practice regard-

¹ The dates given for Napoli and Brindamour will be explained in footnote 4.

² See footnote 5 for the explanation of Brindamour's earnings in this period.

ing selections for layoff for lack of work, there having been only two instances in the past of this nature. The Respondent does, however, recognize service with the Company in its vacation policy. Accordingly and for the reasons stated in *Sifers Candy Co.*,³ the Trial Examiner would use the objective standard provided by length of service in deciding which of the employees would have been laid off.

Under the service dates in the Napoli and Suchan group⁴ they would not have been laid off. Koch, too, would not have been laid off in his group. It thus appears that whether or not consideration were given to the Respondent's contention relating to its business conditions during the back-pay period, the back pay, if any, due the claimants to make them whole would not be affected.

Gross back pay will therefore be computed on the basis of the earnings of the other employees the claimants would have displaced or the other employees comparable to the claimants in work qualifications and earnings during the respective back-pay periods. The employees comparable to or the employees Suchan and Napoli would have displaced are Brindamour and La Mott. The employee comparable to or the employee Koch would have displaced is Swanson. The earnings records of all the above-named individuals indicate that some variation existed in earnings ability. The variation in earnings capacity which existed at the time of the discharges is presumed to have continued during the back-pay period and an adjustment for this variation will be made in the computations to allow for this variation.

The adjustment to allow for this variation will be made by ascertaining the percentage relationship of the average weekly earnings of the claimants to the similar earnings of the comparable employees or the employees whom they would have displaced during the first quarter of 1952, the quarter next preceding the discharges. With reference to Napoli, Suchan, Brindamour, and La Mott, their average weekly earnings in the first calendar quarter of 1952 were, respectively \$113.63, \$120.31, \$116.84,⁵ and \$121.88. The average of Brindamour's and La Mott's average weekly earnings in this period is \$119.36, and their average earnings during the back-pay period will be taken as standard for measuring back pay for Napoli and Suchan. The relationship of Napoli and Suchan to this standard in the period prior to the discrimination is established by determining the percentage Napoli's and Suchan's average weekly earnings in the last complete calendar quarter before the discharges bear to La Mott's and Brindamour's average weekly earnings combined during that period. Napoli's average weekly earnings in the first calendar quarter of 1952 was \$113.63, and so he earned 95.2 percent of the combined average weekly earnings of Brindamour and La Mott. Suchan's average weekly earnings in the same period was \$120.31, and so he earned 100.8 percent of the combined average weekly earnings of Brindamour and La Mott.

In Koch's case the same procedure will be used. On the basis of their experience and capacity it is found that as between Shonka and Swanson that Swanson is the

³ 92 NLRB 1220, 1236-1240.

⁴ Napoli was first employed by the Respondent in June 1946 and left the Respondent in July 1950. When he returned in March or April 1951, the Respondent informed him that he would maintain the seniority under the vacation plan he had had in July 1950. In establishing February or March 1947, as Napoli's service date the Respondent's petition regarding Napoli's earlier employment was adopted and the period he was not employed by the Respondent was excluded. Brindamour was first employed by the Respondent in 1936 and he left the Respondent's employ in 1947. He was thereafter rehired in February 1952. It does not appear that any arrangement was made by the Respondent for Brindamour's service several years earlier.

⁵ Specific information is lacking as to when Brindamour was hired in the first quarter of 1952, the record showing only that he was hired sometime in February 1952, and that his earnings in that period amounted to \$627.22. In order to make the computation of the average weekly earnings given in the text the following method was used: The average weekly earnings of La Mott who was comparable to Brindamour, were \$121.88 and \$126.25, in the first and second calendar quarters respectively. Expressed in percentage terms La Mott's average weekly earnings in the first quarter were 96.54 percent of his average weekly earnings in the second quarter. Brindamour's weekly earnings in the second quarter, the first full calendar quarter of employment for him, were \$121.03. Assuming that in the second quarter Brindamour's earnings reflected an increase over those of the first quarter similar to La Mott's, then Brindamour's average weekly earnings in the first quarter would come to \$116.84 (i. e., 96.54 percent times \$121.03). This result is supported by the fact that if this average weekly figure of \$116.84 is divided into Brindamour's given earnings during that quarter, \$627.22, the \$627.22 represents earnings for about 5½ weeks. Counting back 5½ weeks from the last payroll date in the first calendar quarter of 1952, or March 28, would place Brindamour's hiring date in February, more particularly at about February 20.

more comparable employee or that he should be considered the displaced employee. In the first calendar quarter of 1952, Koch's average weekly earnings was \$78.09 or 109.82 percent of Swanson's average earnings of \$71.11.

The following table shows the given earnings during all calendar quarters included in the back-pay period of La Mott and Brindamour and total average earnings. The table also shows the earnings given for Swanson,⁶ during all calendar quarters included in the back-pay period.

Period		La Mott	Brindamour	Total of La Mott and Brindamour	Average of La Mott and Brindamour	Swanson
Year	Quarter					
1952.....	II.....	\$1,641 28	\$1,573 40	\$3,214 68	\$1,607 34	\$1,059 62
	III.....	1,484 15	1,341 00	2,825 15	1,412 58	869 40
	IV.....	1,627 40	1,346 50	2,973 97	1,486 99	1,079 98
1953.....	I.....	1,497 68	1,396 97	2,894 65	1,447 33	633 55

Gross back pay will be computed for each of the claimants by multiplying the percentage applicable to his earnings in the calendar quarter before the discharge by the average earnings of the displaced or representative employees, Brindamour and La Mott in the case of Napoli and Suchan, and to the earnings of the displaced or representative employee Swanson in the case of Koch, for the respective back-pay periods. Since the back-pay periods do not coincide exactly with the calendar quarters, and the earnings information has not been presented in greater detail, the amount of gross back pay in the initial back-pay quarter for all 3 claimants and for Koch in 1 terminal quarter will be adjusted. This will be done by prorating the portion of the back-pay period within such quarters to the nearest week. Thus, in the initial back-pay quarter, Napoli and Suchan having been discharged on April 17, they will be credited with $11\frac{2}{13}$, of the average quarterly earnings of Brindamour and La Mott adjusted to reflect the claimants percentage relationship to the earnings of Brindamour and La Mott prior to the discharges. Koch who was discharged on April 18, will be credited with $11\frac{1}{13}$ of the adjusted quarterly earnings of Swanson in the same period, the second quarter of 1952. By agreement of the parties the back-pay period for Napoli and Suchan ends on March 31, 1953, and hence no adjustment is necessary in their terminal back-pay quarter. Also by agreement of the parties the back-pay period for Koch ends on February 10, 1953, and an adjustment will be made in this case. February 10, 1953, is 5 weeks and 1 day after the beginning of the first calendar quarter in 1953. Koch is therefore credited with $5\frac{2}{13}$ of the adjusted earnings of Swanson in the first quarter of 1953. The following table shows the computation of gross back pay in accordance with the above.

Period		Napoli	Suchan	Koch
Year	Quarter			
1952.....	II.....	\$1,318 32	\$1,395 86	\$984 64
	III.....	1,344 78	1,423 88	954 78
	IV.....	1,415 61	1,498 89	1,186 03
1953.....	I.....	1,377 86	1,458 91	278 30

The Respondent has had for sometime a vacation plan under which employees receive vacation pay varying with their length of service. At the times material employees with between 1 and 3 years of service received 1 week's pay (40 hours), employees with 3 to 5 years' service received 1½ weeks' pay (60 hours), and employees with more than 5 years' service received 2 weeks' pay (80 hours). Napoli, Suchan, and Koch have service dates of February or March 1947, May 1948, and April 1951, respectively, and but for the discriminatory discharges would have received, 80 hours (\$168), 60 hours (\$126), and 40 hours (\$60), respectively, during the third calendar quarter of 1952. These amounts will be accordingly added

⁶ Swanson's earnings of \$633 55 in the first quarter of 1953 may be for a partial quarter. Since the General Counsel presented the earnings figures on a quarterly basis and there is no way of determining precisely when these amounts were earned within the quarter, the figures given were accepted as representing earnings for a full calendar quarter.

to the gross back-pay computations. In the Napoli and Suchan cases 10 cents was added to their hourly rate of pay at the time of discharge in view of the fact that La Mott and Brindamour each received a 10 cents hourly increase in April 1952. No increase to the hourly rate at time of discharge was added in Koch's case because the record fails to show what increase, if any, Swanson received preceding vacation time in 1952.

There are some issues as to exclusions from gross back pay for willful idleness. The Respondent contends that Napoli was willfully idle between January 9 when he quit certain employment at St. Paul, Minnesota, until January 27, 1953, when he was next employed at El Segundo, California. Napoli expecting to be recalled by the Respondent in about a month testified that he quit his employment in St. Paul and left for California to see his mother and to obtain employment more in accordance with his skills. Napoli admitted that work closer to his skills was available in the St. Paul area at that time. It is accordingly found that Napoli left for California for reasons not connected with employment and the period from January 9 to 27, 1953, will therefore be excluded. This period covers 2 weeks and 2 days of working time and therefore $2\frac{2}{13}$ of the \$1,377.86, previously credited to Napoli for the first quarter of 1953 or \$254.37, will be deducted from his gross back pay for that quarter to make this adjustment.

The Respondent also raises an issue of willful idleness as to Koch for the period from October 29 to December 18, 1952, when Koch was unemployed. On October 29, Koch was terminated by an interim employer when operations there were reduced. Koch then registered with the employment service and reported there regularly every 2 weeks. Koch also looked for employment 2 or 3 times a week and checked the newspapers. When he was interviewed for employment he disclosed to his prospective employers that he had been notified that he would serve on jury duty for a few weeks beginning about December 1. Koch thereafter served on jury duty and on December 18, obtained employment which he held until he was recalled by the Respondent. The Trial Examiner does not find that Koch incurred willful losses during this period of unemployment.

The General Counsel made no contention at the hearing that Napoli and Koch had been improperly reinstated but contends in his brief for an addition to the gross back pay in these cases to allow for wage increases they should have received when they were reemployed and for a certain period thereafter. Under these circumstances and in view of the agreement of the parties as to the back-pay period in each of the cases, the Trial Examiner will not recommend that this allowance be granted.

2. Interim earnings

The claimants earned the following amounts in the periods shown.

Period		Koch	Napoli	Suchan
Year	Quarter			
1952.....	II.....	\$511.86	\$1,095 00	\$1,095 00
	III.....	1,040 20	1,547 70	1,557.60
	IV.....	1,384 04	1,452 11	1,648.01
1953.....	I.....	445 30	1,213 92	1,952 94

¹ This total includes the amount Koch received for jury duty.

3. Expenses

Each of the claimants incurred travel expenses in the use of his car at his interim employment in excess of the expenses which he would have had incurred had he remained in the Respondent's employ. The parties are in agreement that 7 cents a mile should be allowed in the cases of Suchan and Napoli, but the Respondent contends that 5 cents a mile should be used in the Koch case because his was an older car. It is found that 7 cents a mile is a reasonable and proper allowance for each of the claimants.⁷

⁷ This rate corresponds with the amount allowed employees of the United States Government using automobiles in their official business. The amount was established by the Congress after a comprehensive study of the actual cost of operating automobiles by Federal, State, and private agencies. See pp. 3-4, Senate Report No. 428, which accompanied the bill (H. R. 3005) that became the Travel Expense Act of 1949, P. L. 92, 81st Cong., 1st Sess

During the back-pay period the normal workweek at the Respondent's plant was 5 days. In making the determination of the travel expenses of the claimants the difference in number of trips and the difference in mileage to the interim employment as compared with the travel the claimants would have had had they remained with the Respondent (allowing a full round trip for Saturdays and excluding holidays) will be computed in the following manner taking the third quarter of 1952 in the Napoli case as an example:

Round-trip mileage, interim employment.....	22
Round-trip mileage, the Respondent.....	6
Mileage differential.....	16
64 trips, weekdays (64 x 16 x 7¢).....	\$71. 68
13 trips, Saturdays (13 x 22 x 7¢).....	20. 02
	91. 70

The table which follows shows the additional travel expenses the claimants incurred as a result of the Respondent's unfair labor practices computed in the manner described above which will be allowed as deductions from the claimants' interim earnings in the calendar quarter shown.

Period		Koch	Napoli	Suchan
Year	Quarter			
1952.....	II.....	\$46 83	\$68 04	\$114 52
	III.....	67 06	91 70	154. 56
	IV.....	30 59	91 70	102. 62
1953.....	I.....	32 06	8. 26	78. 12

4. Recapitulation

Appearing below is a summary of the matters already discussed giving the details as to each of the claimants by calendar quarters and showing also net interim earnings, net back pay, and the total back pay due.

Period		Frank Koch			
Year	Quarter				
1952	II. Gross Back Pay.....		\$984. 64		
	Interim Earnings.....	\$511 86			
	Less Expenses.....	46 83			
	Net Interim Earnings.....		465 03		
	Net Back Pay.....				\$519 6
	III. Gross Back Pay.....				
	Regular Pay.....	954 78			
	Vacation Pay.....	60 00			
	Total Gross Back Pay.....		1, 014 78		
	Interim Earnings.....	1, 040 20			
	Less Expenses.....	67 06			
	Net Interim Earnings.....		973 14		
	Net Back Pay.....				41 64
IV. Gross Back Pay.....			1, 186 03		
Interim Earnings.....	384 04				
Less Expenses.....	30 59				
Net Interim Earnings.....			353 45		
Net Back Pay.....				832. 58	
1953	I. Gross Back Pay.....		278 30		
	Interim Earnings.....	445 30			
	Less Expenses.....	32 06			
	Net Interim Earnings.....		413 24		
	Net Back Pay.....				0. 00
	Total Back Pay Due.....				1, 393 831

Libo Napoli

Period
Year Quarter
1952

II	Gross Back Pay.....		\$1,318 32	
	Interim Earnings.....	\$1,095 00		
	Less Expenses.....	68 04		
	Net Interim Earnings.....		1,026 96	
	Net Back Pay.....			\$291.36
III.	Gross Back Pay.....			
	Regular Pay.....	1,344 78		
	Vacation Pay.....	168 00		
	Total Gross Back Pay.....		1,512 78	
	Interim Earnings.....	1,547 70		
	Less Expenses.....	91 70		
	Net Interim Earnings.....		1,456 00	
	Net Back Pay.....			56 78
IV	Gross Back Pay.....		1,415 61	
	Interim Earnings.....	1,452 11		
	Less Expenses.....	91 70		
	Net Interim Earnings.....		1,360 41	
	Net Back Pay.....			55 20

1953

I.	Gross Back Pay.....		1,377 86	
	Less Amount Excluded.....		254 37	
	Adjusted Gross Back Pay.....		1,123 49	
	Interim Earnings.....	1,213 92		
	Less Expenses.....	8 26		
	Net Interim Earnings.....		1,205 66	
	Net Back Pay.....			0 00
	Total Back Pay Due.....			403 34

John Suchan

Period
Year Quarter
1952

II.	Gross Back Pay.....		\$1,395 86	
	Interim Earnings.....	\$1,095 00		
	Less Expenses.....	114 52		
	Net Interim Earnings.....		980 48	
	Net Back Pay.....			\$415 38
III.	Gross Back Pay.....			
	Regular Pay.....	1,423 88		
	Vacation Pay.....	126 00		
	Total Gross Back Pay.....		1,549 88	
	Interim Earnings.....	1,557 60		
	Less Expenses.....	154 56		
	Net Interim Earnings.....		1,403 04	
	Net Back Pay.....			146 84
IV.	Gross Back Pay.....		1,498 89	
	Interim Earnings.....	1,648 01		
	Less Expenses.....	102 62		
	Net Interim Earnings.....		1,545 39	
	Net Back Pay.....			0 00

1953

I.	Gross Back Pay.....		1,458 91	
	Interim Earnings.....	1,952 94		
	Less Expenses.....	78 12		
	Net Interim Earnings.....		1,874 82	
	Net Back Pay.....			0 00
	Total Back Pay Due.....			562 22

[Recommendations omitted from publication.]