In the circumstances set forth above, I am also not persuaded that the General Counsel has sustained his burden of proving by a preponderance of the evidence that the Respondent fostered and permitted the circulation of the petition among its employees to revoke an increase in the Union's dues. I therefore shall recommend that this allegation of the complaint likewise be dismissed.[8]

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I reach the following:

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 28, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not interfere with, restrain, or coerce its employees in the exercise of their rights under Section 7 of the Act by fostering and permitting the circulation of a petition among its employees to revoke an increase in the union's dues in violation of Section 8(a)(1) of the Act, as set forth in section III, above. The Respondent did not discharge or refuse to reinstate Frank Faulks in violation of Section 8(a)(3) and (1) of the Act, as set forth in section III, above.

RECOMMENDED ORDER

Having found and concluded that the Respondent has not engaged in any unfair labor practices in violation of the Act, it is therefore recommended that the complaint in this matter be dismissed in its entirety.

[8] See *Union Screw Products*, 78 NLRB 1107, 1108. See also *Tennessee Coach Company*, 84 NLRB 703, 736.

Burnup and Sims, Inc. ***and*** **Robert J. Davis.** *Case No. 12-CA-2156. March 4, 1966*

SUPPLEMENTAL DECISION AND ORDER

On June 25, 1962, the National Labor Relations Board issued a Decision and Order in the above-entitled case, finding that the Respondent had discriminated against certain named employees in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended.[1] The Board's Order directed, *inter alia*, that the Respondent offer immediate and full reinstatement to two employees and make them whole for any loss of pay suffered by reason of Respondent's discrimination against them.

On November 9, 1964, the United States Supreme Court upheld the Board's Order [2] and on January 18, 1965, the United States Court of Appeals for the Fifth Circuit entered an amended decree enforcing in full the Board's Order, including the reinstatement and backpay provisions.

On April 7, 1965, the Regional Director for Region 12 issued and served upon the parties a backpay specification and notice of hearing and issued an amendment to this specification on May 5, 1965. The Respondent filed an answer thereto on May 11, 1965. Upon appro-

[1] 137 NLRB 766.

[2] *N.L.R.B.* v. *Burnup and Sims, Inc.*, 379 U.S. 21.

priate notice issued by the Regional Director, a hearing was held before Trial Examiner Lowell Goerlich, for the purpose of determining the amounts of backpay due to the claimants.

On September 27, 1965, the Trial Examiner issued his Decision in Backpay Proceedings, which is attached, and in which he found that the claimants were entitled to specific amounts of backpay and he also made findings and recommendations concerning certain offers of reinstatement and backpay. Thereafter, the Respondent and the General Counsel filed exceptions to the Trial Examiner's Supplemental Decision and supporting briefs and the Respondent filed a reply brief.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Fanning, Brown, and Zagoria].

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 Decision and the entire record in this case, including the exceptions and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner to the extent consistent herewith.

We adopt the Trial Examiner's findings and determination of backpay in the case of Joseph H. Harmon. However, we reject the Trial Examiner's finding that by August 23, 1962, Robert J. Davis had unmistakably declared he would not accept reinstatement and thus terminated Respondent's liability for backpay accrued after that date.

As more fully detailed in the Trial Examiner's Decision, Respondent's attorney, Muller, indicated to the Board's agents that Respondent might settle the backpay claim of Davis but only in the event that Davis did not desire reinstatement and this fact was communicated to Davis by the Board. Davis agreed to accept the backpay offer because "there was no chance for reinstatement." Thereafter, on August 23, 1962, Muller telephoned Davis. The testimony as to this conversation is conflicting and the conflict was not resolved by the Trial Examiner. According to Muller's version, he stated his understanding that Davis did not want to return to Respondent's employ and, upon receiving confirmation of this fact, extended an offer of reinstatement, which Davis declined, observing that he had a better job.[3]

As noted, the Trial Examiner had found that, by August 23, 1962, Davis had manifested an unwillingness to be reinstated. Plainly, however, Respondent had made no valid offer of reinstatement prior to August 23 such as was required by our order enforced by the court. On August 23, Muller testified, he offered to return Davis to work.

[3] Davis testified that he was offered reinstatement or backpay and, when he chose backpay, was told he would be receiving a check in the mail. He has not received any backpay from Respondent.

But this followed Respondent's earlier expressed desire, communicated to Davis, not to reinstate this employee and was made only after Muller first announced his understanding that Davis did not want reinstatement and secured confirmation of this understanding. We are not persuaded that the August 23 offer was intended, or understood by Davis, to be a sincere one.

It is in these circumstances that Davis' expressions of satisfaction with backpay alone must be evaluated. Having been put on notice that Respondent was opposed to reinstating him, and having been offered backpay without reinstatement, and never having received a genuine offer to return to work, Davis' responses cannot be held to show an unequivocal declaration against reinstatement as found by the Trial Examiner; as of August 23 he had not even been put to a true test of having to make a reinstatement decision. Clearly, it could not effectuate the policies of the Act to terminate Davis' backpay rights as of August 23, 1962, as the Trial Examiner has recommended. We shall award Davis backpay from September 29, 1961, the date of the discrimination against him, to and including March 31, 1965, at which time Respondent did make a valid, written offer of reinstatement. Accordingly, the Regional Director is instructed to take such steps as may be necessary to determine the amount of additional backpay, if any, which may be due Davis. Payment of backpay determined by the Trial Examiner to be due, and which we hereby affirm, shall not, however, await such further action.

[The Board ordered the Respondent to pay the employees involved in this proceeding the amounts set forth opposite their names in the Trial Examiner's Recommended Order and, in addition, pay to Robert J. Davis net backpay computed from August 23, 1962, to and including March 21, 1965, all with interest at the rate of 6 percent per annum accruing from the date of the Trial Examiner's Decision.]

TRIAL EXAMINER'S DECISION IN BACKPAY PROCEEDINGS

HISTORY OF PROCEEDINGS

Upon the basis of a charge filed October 3, 1961, a complaint was issued in this matter charging violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein referred to as the Act. The complaint among other things charged the discriminatory discharge of Robert J. Davis and Joseph H. Harmon in violation of Section 8(a)(3) of the Act. A hearing was held before Trial Examiner Albert P. Wheatley, in Cocoa, Florida, on December 12, 13, and 14, 1961. Ray C. Muller, a witness in these proceedings, appeared as counsel for Burnup & Sims, Inc., the Respondent. Trial Examiner Wheatley rendered his Decision on February 13, 1962. Exceptions were filed to the Trial Examiner's Intermediate Report and Recommendations which were finally resolved by the Supreme Court November 9, 1964, in *N.L.R.B.* v. *Burnup & Sims, Inc.*, 379 U.S. 21.

The Supreme Court held on the following facts that the Board was right in holding that the discharges of Davis and Harmon violated Section 8(a)(1) and (3) of the Act: "Two employees in Respondent's plant, Davis and Harmon, undertook to organize the employees who worked there. The superintendent was advised by another employee, one Pate, that Davis and Harmon, while soliciting him for mem-

bership in the Union, had told him that the Union would use dynamite to get in if the Union did not acquire the authorizations. Respondent thereafter discharged Davis and Harmon because of these alleged statements."

The Court said "In sum, Section 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct."

An amended decree was entered by the United States Court of Appeals for the Fifth Circuit on January 18, 1965. A part of such decree ordered the Respondent to "offer to Robert J. Davis and Joseph H. Harmon immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges and make whole said employees . . . for any loss of pay they may have suffered by reason of the discrimination against them in the manner set forth in the section of the Board's Decision and Order entitled 'The Remedy.'" The Board's remedy required that each of the above-mentioned discriminatees should be paid "a sum of money he would normally have earned as wages from the date of such discrimination to the date of an offer of reinstatement less his net earning during said period." The Board further added "The backpay will be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289." In the present proceedings the General Counsel claims a backpay period for Harmon from October 2, 1961, to March 15, 1964, and for Davis from October 2, 1961, until April 5, 1965, upon which dates respectively the General Counsel concedes that the discriminatees were offered unconditional reinstatement which each refused.

On April 7, 1965, the Regional Director for Region 12 of the National Labor Relations Board pursuant to authority conferred upon him by the Board issued a backpay specification and notice of a hearing alleging, among other things, that a controversy had arisen over the amounts of backpay due Robert J. Davis and Joseph H. Harmon. Attached to the backpay specification and notice of hearing were computations of backpay claimed for Davis and Harmon. An amendment to backpay specification and notice of hearing was filed by the above Regional Director May 5, 1965, to which was attached a revised computation of Davis' claimed backpay. Thereafter the Respondent filed answer on May 11, 1965. The Respondent raised several defenses and attached to its answer its contentions in respect to the backpay due Harmon and Davis. For Davis the Respondent's computation showed a total net backpay of $1,624.54, and for Harmon $5,664.87.

Pursuant to Section 102.59 of the Board's Rules and Regulations, Series 8, as amended, these backpay proceedings came on for hearing before Trial Examiner Lowell Goerlich in Cocoa, Florida, on June 8, 9, 10, and 11 and July 7, 1965, at which time the hearing was continued. Upon the request of the Respondent the hearing was resumed in Charleston, West Virginia, on July 26, 1965; it continued through July 27 and terminated on July 28, 1965.

During the hearing the General Counsel prepared a second revised computation of net backpay for Robert J. Davis, which was allowed as an amendment to the backpay specification.

Upon the consideration of the backpay specification, the amendments thereto, the Respondent's answer, the evidence adduced at the hearing, the posthearing brief of the Respondent, and the oral argument of the General Counsel [1] and in view of my observation of the demeanor of the witnesses, I make the following findings of fact and conclusions of law:

I. THE BACKPAY CLAIM OF ROBERT J. DAVIS

At the time of Davis' discharge on September 29, 1961, Davis lived in Eau Gallie, Florida, 6 miles distant from the Respondent's establishment, where he worked as a ready-mix concrete truckdriver. After his discharge he sought work at various establishments in the vicinity and finally procured employment for 3 or 4 weeks with Vic Stornelli. Failing to find further work, Davis went to Orlando, Florida, a distance of about 60 miles. There he found work with the Peninsular Manufacturing Company for which he worked about 3 or 4 weeks. In December 1962, he obtained work with the Pan American Airways which is located 5 miles inside the gate at Cape Kennedy, Florida. The gate of Cape Kennedy is 58.7 miles distant from Orlando, Florida.

[1] Respondent submitted a carefully prepared and helpful brief. The General Counsel was content to argue orally.

On November 15, 1961, Davis moved to Orlando, Florida, where he lived until October 30, 1962, at which time he moved to Chuluota, Florida, a distance of 45 miles from the Cape Kennedy gate. According to Davis, whose testimony is credited, he obtained a house in Chuluota through the aid of a friend. He was unable to qualify as a purchaser because of his bad credit. Payments on the Chuluota residence were $56 a month. At the time Davis moved from Eau Gallie to Orlando, his monthly rental payments were $125 a month. In Orlando, Davis paid $85 a month.

After Davis commenced working at Pan American Airways, he traveled a distance of 127.4 miles, which was 115.4 miles more per day than he would have traveled had he remained employed by the Respondent. In addition to such excess mileage [2] and Davis' loss of gross pay, the General Counsel claims for meals away from home seeking work $9, mileage in and around Eau Gallie and Melbourne looking for work $12.50, and moving expenses from Eau Gallie to Orlando $16. The General Counsel has made no claim for mileage during weeks in which Davis did not furnish his own transportation or pay others for it. During those weeks when Davis paid others for his transportation, the General Counsel has made claim for reimbursement.

The Board's Decision, issued on June 25, 1962, required in part that Davis be reinstated and be paid "a sum of money he would normally have earned from the date of such discrimination [September 29, 1961] to the date of an offer of reinstatement less his net earnings during said period." Thereafter on July 18, 1962, Davis submitted a waiver to the Board's Regional Office in Tampa, Florida, as follows:

> I, Robert Davis, of 1407 Woodward Avenue, Orlando, Florida, Social Security No. 385–24–8107, for reasons set forth below, do hereby waive reinstatement to my former or substantially equivalent position with Burnup & Sims, Inc.
>
> This waiver releases Burnup & Sims, Inc., from any obligations to offer me reinstatement in accordance with the Decision and Order issued on June 25, 1962, in the above-filed cases.
>
> However it does not constitute a release from the obligations and requirements of the Decision and Order with respect to loss of pay suffered as a result of the discrimination against me.
>
> At the present time, I am employed by Pan American World Airways, this employment is satisfactory to me and is considered permanent; therefore, I do not wish to be reinstated to my former employment with Burnup & Sims, Inc.[3]

Davis described the waiver:

> My interpretation of the waiver of reinstatement is that you waiver [sic] your rights to go back to work.

On July 18, 1962 [the date appearing on the waiver], Woodrow G. Strickland, compliance officer for the Board, informed the counsel for the Employer by letter that:

> Davis, employed at the Cape, indicated by telephone his inclination (presumably for purposes of voluntary compliance) is not to accept any offer of reinstatement, and formal waiver of reinstatement has been mailed to Mr. Davis for signature.

Davis testified that he had advised Ray Muller, attorney for the Respondent, on August 23, 1962:

> No, sir I don't intend to take reinstatement with Burnup & Sims, I have a better job.

Thus by August 23, 1962, Davis had unequivocally declared that he would not accept reinstatement to his former job with Burnup & Sims, Inc., which he had made known not only to the Board's agent but to the Respondent as well, even though at the time Davis was aware of the Board's Order requiring that he should be reinstated which is evident from language used in the waiver. Thus I find that by August 23, 1962, both the Board agents and the Respondent knew that it would be a futile gesture to offer Davis reinstatement in that by that date his declination had been unmistakably stated both orally and in writing. Moreover, such declination had not been conditioned either by the Respondent's insistence or persuasion but was an expression of Davis' own free choice expressed in writing to a Board agent. Davis by this con-

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[2] After Davis moved to Chuluota, Florida, the General Counsel used the distance between Chuluota and Davis' place of employment to compute excess mileage traveled to and from work.

[3] The waiver was apparently prepared by the Board's agents in the Tampa, Florida, office.

duct voluntarily removed himself from the labor market of his employer, and Davis did not repudiate his declination at any time subsequent to August 23, 1962. Thus it is my conclusion that on and after August 23, 1962, the Respondent in order to comply with the decree of the court was not obliged to offer Davis reinstatement and on that date the accrual of any backpay for Davis ceased. This conclusion is drawn from the following Board precedent by which I deem myself bound.

In *Deena Artware, Incorporated,* 112 NLRB 371, 378, the Board said:

> Under the terms of the Order [4] an employee's gross pay is that which the Respondent would have paid the employee, but for the discrimination, from the date of the discrimination to either the employer's offer of reinstatement or the employee's waiver of reinstatement, whichever came first.

See also *English Freight Company,* 67 NLRB 643. It appears to be obvious that after August 23, 1962, losses suffered by Davis were not the result of the Employer's discrimination but were caused by Davis' choice to continue in the employment of another employer. Backpay is not awarded "to employees who have voluntarily removed themselves from the labor market of their employers." *English Freight Company, supra,* 644.

To effectuate the purposes of the Act is the thrust of every proceeding before the Board. When an employee who has been discharged because of his union sympathies refuses, fails, or is enticed for a money consideration to refuse reinstatement, other employees are left with a sense of insecurity and a lack of assurance that they in fact may join a union and remain an employee of the employer. The return to employment of a union adherent is not only the final achievement of the Act's protection in respect to such employee but it is the most realistic and articulate demonstration of the Act's paramount protection to other employees.[5] The Act specifically provides for reinstatement without the discretion which is lodged in the words "with or without backpay." [6] Indeed it may be within a sound discretion to deny backpay if the employee refuses reinstatement, for such would discourage bargaining over the price of a job as measured against the benefits to be derived by the employer in excluding a union partisan from the employer's place of business. When, as here, the employee unequivocally and voluntarily renounces reinstatement, the purposes of the Act no longer command that the employee be restored loss of pay thereafter since loss of pay [7] thereafter results solely from the employee's own free will and not by reason of the employer's discrimination. To impose an additional burden upon the Respondent because of Davis' refusal to return to employment is punitive in nature by which no dissipation of the effects of the prohibited action is achieved. Cf. *Local 60, United Brotherhood of Carpenters (Mechanical Handling Systems)* v. *N.L.R.B.,* 365 U.S. 651, 655.

The Respondent contends that Davis should be barred from transportation allowances because he "should have moved to within a reasonable distance of his interim employment" at Pan American Airways. As noted Davis moved to Chuluota, Florida, on October 30, 1962. Backpay has been allowed to August 23, 1962, at which time Davis was living in Orlando, Florida. Respondent concedes "that by moving to Orlando, Davis was fulfilling his duty to mitigate Respondent's damages." In view of the uncertainties normally attached to a new job tenure and the pending prospects of Davis' returning to employment with the Respondent at Melbourne, Florida, and in view of the lack of qualifications on Davis' part to easily obtain credit, it was not unreasonable for Davis to have remained in Orlando as of August 23, 1962. Thus while residing in Orlando Davis, under the circumstances,

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[4] Under the Order the Respondent was required to offer Davis full reinstatement and make him whole "for any loss of pay [he] may have suffered by reason of the discrimination against [him]."

[5] In *Local 833, UAW (Kohler Co.)* v. *N.L.R.B.,* 300 F. 2d 699, 703 (C.A.D.C.), the court said "reinstatement is the only sanction which prevents an employer from benefiting from his unfair labor practices through discharges which may weaken or destroy the Union."

[6] Section 10(c) of the Act provides in part: ". . . the Board . . . shall issue and cause to be served on such person an order requiring said person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act."

[7] The decree required Davis to be made whole "for any loss of pay [he] may have suffered by reason of the discrimination."

did not live such an unreasonable distance from his work at Pan American Airways as to bar him from the transportation allowances claimed by the General Counsel. *Crossett Lumber Company*, 8 NLRB 440.

I find that under the decree the Respondent must pay Davis the sum of $2,143.70.[8]

II. THE BACKPAY CLAIM OF JOSEPH H. HARMON

At the time of Joseph H. Harmon's discharge he was employed by the Respondent as a ready-mix concrete truckdriver. Uncontradicted testimony, which is credited, reveals that Harmon upon his discharge registered at the Florida State Security office, Melbourne, Florida, on October 2, 1961, and that he returned to such office later on several occasions but did not receive any referrals for employment from such agency. Harmon also applied for work with a substantial number of employers [9] in the Cocoa-Melbourne-Eau Gallie area. On October 16, 1961, he obtained employment with Melvin J. Haan where he continued to work until December 27, 1961, at which time he was laid off. Thereafter he again visited the Florida State Security office and again contacted various employers for work. He applied for work at Cape Kennedy through the Teamsters Union. He became employed at the Kayo Oil Company on January 22, 1962, and was laid off in the latter part of March 1962. He continued to look for work in the Melbourne-Cocoa-Eau Gallie area but was unsuccessful. The latter part of April he left for his former home in Rand, West Virginia, where he moved into his mother's residence. Rand is a small community on the outskirts of Charleston, West Virginia.

In October 1962, Harmon returned to Melbourne for a period of 6 days because he had learned through a friend that the Respondent was holding a backpay settlement check for him; he did not receive such check. However, while he was in the Melbourne area he again attempted to find employment and applied at a number of establishments including the Respondent's place of business. The Respondent did not employ him. Thereupon Harmon returned to West Virginia where he resided until October 1964, when he went to Detroit, Michigan, where he procured a job with Brandex Machinery for which he still works.

Harmon credibly testified that he was unable to find employment in the Melbourne area, that he was "running out of monetary funds to live on," and "went back to West Virginia because [he] had friends and relatives around there, working, who would know if there was any employment, and also [he] knowed [he] could live with [his] mother and minimize expenses." Harmon said that he had no funds for travel after 1963 and used hitchhiking as a means of transportation.

On June 4, 1962, Harmon registered with the West Virginia Department of Employment Security and filed a claim for unemployment compensation against the State of Florida. Thereafter he reported to the Employment Security office every 2 weeks during his claim period which expired sometime in September 1962. In 1963, he worked for Belich Construction Company for approximately 4½ days after which he was laid off in that the job ended. He also worked for Universal Cast Stone for approximately 3 days after which he was laid off. He worked for Kanawha Block for 7 hours. Thereafter he obtained employment with the West Virginia State Road Commission, driving a truck and planting grass, where he worked on and off from September 1963 to late October 1964. While in West Virginia he visited a number of employers seeking work but was generally unsuccessful in obtaining employment.

Harmon testified that in September 1962, upon the expiration of his unemployment benefit payments, he continued his registration with the West Virginia Employment Security office and filled out an application for employment; however, he was never referred for any employment.

In January 1964 Harmon learned that aptitude tests were to be given at the West Virginia Employment Security office in Charleston. On January 20, he appeared for an aptitude test and was permitted to take the test although the Employment

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[8] The General Counsel's computations which I confirm show Davis' net backpay for the fourth quarter of 1961, $985 76, for the first quarter of 1962, $337.80; for the second quarter of 1962, $595 50, and for the third quarter of 1962 (to August 23, 1962) (8 weeks at $28.08) $224.64.

The total is $2,143.70 The Respondent's objection to the assessment of 10 cents a mile for defraying transportation costs by private automobile is overruled upon the authority of *Rice Lake Creamery Company*, 151 NLRB 1113.

[9] Among the employers listed by Harmon were Abco Concrete, Universal Concrete, Gandy Block, Lindsley Lumber, Pepsi-Cola Bottling Co., South Side Garage, Carrol's Body Shop, Sinclair Gas Station, Melvin J. Haan, and Sunoco Gas Station.

Security office was unable to locate his work application on file. It was suggested that he register for employment at the conclusion of the test. However, when he observed a long line of prospective registrants he decided not to register. Harmon explained, "I was pretty well disgusted, I guess you would call it, to find out I wasn't registered because I had been I don't know how many times in '63 and all '62 and '63 all the way through and then they tell me I am not registered for work. I said, 'well, I took the test, maybe I can find out what the deal is on this test without registering' so I walked on out, I didn't feel like standing in line. I was disgusted with it." Harmon testified that it was not known to him at the time that he did not have a work application on file. On February 7, 1964, Harmon filled out an application for training with the West Virginia Employment Security Office.

Virginia Flanagan, manager of the West Virginia Department of Employment Security at Charleston, West Virginia, testified that after a search she was unable to find a work application for Harmon among the records of the Employment Security office. She explained that when an employee registers he is given an identification card and his work application is placed in the active file for a period of 30 days. According to Mrs. Flanagan, "At the end of 30 days if we have had no contact [a personal visit to the office for the purpose of selecting employment] they [work applications] are removed from the active file and placed in the inactive file. If there has been no contact within a 12-month period because of the number we have we destroy them." "[A]pplicants are told they must report once each 30 days to keep their work applications active." Upon the employee's reporting, "If his file is already in the inactive file and there has been no change in his status insofar as address, telephone number, additional work history training then depending on the local office receptionist would remove that application from the inactive file, date both the application card and his little identification card so that they will have corresponding dates. If there has been any change whatsoever in his status such as his address, work history or anything of this sort then he is sent back for an interview with one of the interviewers."

Flanagan testified that in March or April 1962 a new plant, the FMC Corporation, commenced hiring employees. For this reason the employment demands were "unusually good" because the staffing of this new plant "gave employment to many people who hadn't had a job for years and years." The Employment Security office referred in the "neighborhood of 2500 or more" applicants to the FMC Corporation. Flanagan referred to this as an "abnormal situation" and said, "It was just a big placement year and a big year of activity." The "abnormal situation" continued until April or May 1964. During that time the Employment Security office "processed thousands and thousands of applications for Food Machinery Corporation." Although Harmon testified that he had made personal application for employment at FMC Corporation, he was offered no job.

The credited evidence discloses that while Harmon remained in the Cocoa-Melbourne-Eau Gallie area he registered with the Florida State Security office for employment and visited many employers in the search for work. The fact that he did find work is proof of his efforts and the fact that he did work is evidence of his desire. Moreover, he remained in the area as long as work was available. Davis, who searched for work in the same locality, was unsuccessful and moved to Orlando. The Respondent conceded that Davis was "diligent in seeking interim employment." Thus I find that while in the Cocoa-Melbourne-Eau Gallie area Harmon did not conduct himself in such a manner as to cause a disqualification for backpay. Nor was Harmon disqualified for further backpay because he left the State of Florida for his former home in West Virginia. Harmon returned to West Virginia because he thought the work opportunities were greater there and in order to reduce his living expenses by residing at his mother's residence. Moreover, according to Flanagan, there were an "abnormal" number of jobs available in the Charleston area at the time of Harmon's arrival. Under these circumstances the Board has ordered reinstatement and backpay to discriminatees who left a State to seek employment. *Crossett Lumber Company,* 8 NLRB 440; *Southern Furniture Manufacturing Company,* 91 NLRB 1159. Harmon was not barred from further backpay in that he moved to West Virginia in order to reduce his living expenses and enhance his opportunities for work. *International Trailer Company, Inc., et al.,* 150 NLRB 1205.

As noted above when Harmon reached West Virginia he registered on June 4, 1962, at the West Virginia Employment Security office in Charleston and reported thereafter until such time as he had been paid in full for unemployment compensation, which occurred sometime in September 1962. Thereafter in October 1962, he returned to the Cocoa-Melbourne-Eau Gallie area where he again made a search for work. Upon his return to West Virginia, after 6 days in the area, he did visit

employers for the purpose of obtaining employment. There is, however, considerable doubt whether during the period from the time Harmon returned to West Virginia until he was employed by the West Virginia State Road Commission, he did visit the prospective employers to whom he reported visits on the Board's forms [10] provided for such purpose.[11]

After Harmon had concluded the required reporting to obtain unemployment compensation through West Virginia from the State of Florida, there is no credible evidence that he continued a current registration with the West Virginia Employment Security office. Harmon was required to report each 30 days to maintain his application in the active file. On January 20, 1964, there was no application for him in the files of the Employment Security office. Thus it is apparent that he had not contacted the Employment Security office within the year prior to January 20, 1964. Moreover, in view of the "abnormal" demand for jobs, the fact that Harmon was not referred to employment lends support to the conclusion that Harmon's work application was not lodged in the active file. Thus Harmon's claim that he did contact the Employment Security office is of doubtful validity. Not only was he unable to produce an identification card but the testimony of the witnesses whom he produced was indefinite, uncertain, and of little probative value. Upon the preponderance of the evidence it is clear that Harmon did not continue an active registration with the West Virginia Department of Employment Security after the expiration of his claim for unemployment compensation against the State of Florida in September 1962. Under these circumstances his application, if any, would have been placed in the inactive file during the month of October. Thus I recommend that Harmon be disallowed backpay commencing with the month of November 1962 and continuing thereafter until he was gainfully employed on September 3, 1963. Failure to continue an active registration for work under the circumstances above detailed is a sufficient basis for the denial of backpay to Harmon between November 1, 1962, and September 3, 1963; see *East Texas Steel Castings Company, Inc.*, 116 NLRB 1336, 1348; *Seamprufe, Incorporated*, 103 NLRB 763; *Venetian Blind Workers' Union Local No. 2565, etc. (Ambassador Venetian Blind Company, Consolidated Interiors, Inc.)*, 110 NLRB 780.

The Respondent contends that the period for which Harmon should be barred from backpay should be extended to March 15, 1964, the date upon which he was offered unconditional reinstatement; however, on September 3, 1963, Harmon secured employment with the West Virginia State Road Commission and continued in its employment until October 1964. After Harmon obtained employment, there was no purpose for continued registration with the Employment Security office. Thus it does not follow that Harmon should be denied backpay because he failed to register. The fact that Harmon was working was proof of his desire to be employed. During such period there is no proof that he voluntarily remained in idleness. Thus during such period the duty to minimize loss of earnings imposed upon Harmon which stems from the policy "of promoting production and employment" was satisfied. *Southern Silk Mills, Inc.*, 116 NLRB 769, 772; *Mastro Plastics Corporation, and French-American Reeds Manufacturing Co., Inc.*, 136 NLRB 1342, 1346, 1347.

Harmon is entitled to backpay from September 29, 1961, to November 1, 1962, and from September 3, 1963, to March 15, 1964, in the amount of $7,018.07.[12]

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[10] The forms do not show the names and addresses of employers where Harmon looked for work after September 3, 1963, the date upon which Harmon became employed by the West Virginia State Road Commission.

[11] This conclusion is supported by the testimony of a number of the Respondent's witnesses who were representatives of the employers claimed to have been canvassed by Harmon. These witnesses generally testified that they had no records of Harmon's applications for employment and no personal recollection of his appearance as an applicant. Typical of the unreliability of Harmon's testimony is Harmon's claim that he returned to the Goodrich-Gulf Chemicals, Inc., six or seven times for employment although a large sign was located in the entrance way to the employment office, "In order to be considered for employment you must have a high school diploma." Harmon did not have a high school diploma.

[12] The General Counsel's computations which I confirm show net backpay for the fourth quarter, 1961, $690.88; for the first quarter, 1962, $1,157.72; for the second quarter, 1962, $926.69; for the third quarter, 1962, $1,252.69; for the fourth quarter, 1962 (1 month, $1,307.00÷3) $435.66; for the third quarter, 1963 (1 month, $1,342 95÷3) $447.65; for the fourth quarter, 1963, $813 88; for the first quarter 1964 (to March 15, 1964), $1,292.90. The total is $7,018 07

RECOMMENDED ORDER

On the basis of all of the foregoing I recommend that the Board award to Robert J. Davis $2,143.70 and to Joseph H. Harmon $7,108.07 which shall include interest at the rate of 6 percent per annum commencing upon the date hereof.[13]

[13] See *Local 138, International Union of Operating Engineers, etc. (Nassau and Suffolk Contractors' Association, Inc.)*, 151 NLRB 972.

Building and Construction Trades Council of Orange County, AFL-CIO *and* Sullivan Electric Company

Building and Construction Trades Council of Orange County, AFL-CIO *and* H. L. Gutsch Construction Co. *Cases Nos. 21-CC-511-1, 21-CC-511-2, 21-CC-512-1, and 21-CC-51-22. March 4, 1966*

SUPPLEMENTAL DECISION AND ORDER

On January 29, 1963, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] in which it found that the Respondent had violated Section 8(b)(4)(i), (ii)(A) and (B) of the National Labor Relations Act, as amended. This holding was based on its findings, *inter alia*, that Respondent picketed to force H. L. Gutsch Construction Co., referred to herein as the general contractor, to execute certain hot cargo clauses, including a subcontracting clause [2] which was exempted from the proscription of Section 8(e) by the first proviso thereto; and that a further object of Respondent's conduct was to force or require the general contractor to cease doing business with Sullivan Electric Company, herein referred to as Sullivan.

[1] 140 NLRB 946.

[2] The subcontracting clause provides as follows:

IV. The Employer, Developer and/or Owner-Builder agrees that he shall contract or subcontract work as provided in Article I only to a person, firm, partnership or corporation that is party to an executed current agreement with the appropriate union having work and territorial jurisdiction, affiliated with the Council in which area the work is performed.

V. The Employer, Developer and/or Owner-Builder agrees that in the event he contracts or subcontracts any work as provided in Article I there shall be contained in his contract with the subcontractor a provision that the subcontractor shall be responsible for the payment of all wages and fringe benefits provided under the agreement with the appropriate Union affiliated with the Council. In the event that any subcontractor fails to pay the wages or fringe benefits provided under the agreement with the appropriate Union affiliated with the Council, the Employer, Developer and/or Owner-Builder shall become liable for the payment of such sums and such sums shall immediately become due and payable by the Employer, Developer and/or Owner-Builder, provided, however, he shall be notified of any such nonpayment by registered letter by the appropriate union no later than 90 days after notice of and/or completion of the entire project.