

Ambrose Distributing Company and General Teamsters, Warehousemen, Chauffeurs & Helpers Union Local No. 483, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Independent). Case 19-CA-2825

September 30, 1969

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND ZAGORIA

On November 13, 1964, Trial Examiner Wallace E. Royster issued a Decision and Recommended Order in the above-entitled case, finding that Respondent had engaged in and was engaging in certain unfair labor practices, and directing it, *inter alia*, to offer immediate reinstatement to certain employees who were unlawfully discharged to discourage membership in or activities on behalf of the Union, and to make these employees whole for any losses sustained as a result of any denial of reinstatement. The Respondent having filed exceptions, the National Labor Relations Board, after due consideration, issued an Order on February 9, 1965, adopting the Recommended Order. The Order of the Board was enforced by the United States Court of Appeals for the Ninth Circuit on March 9, 1966, and on July 26, 1967, the same court adjudged the Respondent in civil contempt in certain respects.

On October 22, 1968, the Regional Director for Region 19 issued and served upon the parties a Backpay Specification and Notice of Hearing. The Respondent filed an Answer to the Backpay Specification on December 19, 1968.

On February 4, 1969, Trial Examiner Robert Cohn conducted a hearing to determine the sufficiency of Respondent's conduct in respect to reinstatement and to ascertain the amounts of backpay owing under the Board's Order as enforced. On April 17, 1969, the Trial Examiner issued his Supplemental Decision, attached hereto, which awards backpay to one employee, the parties having reached a settlement with respect to the backpay due the other employee. Thereafter, the Respondent and the General Counsel filed exceptions to the Trial Examiner's Supplemental Decision and briefs in support of their exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Trial

Examiner's Supplemental Decision, the exceptions and the briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following modification and comment.

The Trial Examiner inadvertently concluded that the revised computations of the General Counsel, which set forth gross backpay without eliminating those employees' earnings under 60 percent of the average, also included in the principal amount the amount of interest to April 15, 1968. We find merit in the General Counsel's exception to this, and therefore direct that interest be computed on the General Counsel's revised computations, and that the backpay be adjusted accordingly.

The Respondent excepts to the payment of the travel expenses claimed. We find no merit in this exception. The Respondent contends that, during his prior employment by the Respondent, employee Byrd travelled to work a distance of approximately 35 miles, and that he travelled approximately the same distance to his interim employment. However, the round-trip to his interim employment was made on a daily basis, whereas the round-trip to his employment by the Respondent was made only once per week. The General Counsel therefore deducted the cost of 13 round trips per quarter from Byrd's interim travel expense in computing the backpay due him. The Respondent contends that since the distances between his home and his places of employment were the same, and, since he was not paid for this travel by the Respondent, the Respondent should not be required to pay for his travel to his interim employment.

The evidence does not support the Respondent's argument. The record shows that, while working for the Respondent, Byrd operated on long hauls with another driver, and that he was assigned to this work on a trip-by-trip basis. As a result, Byrd made only one round trip per week to his employment with Respondent. During his interim employment, however, according to the General Counsel's backpay specification, Byrd was required to make considerably more round trips to continue working. While the Respondent points out that the distances Byrd travelled to his interim work were approximately the same, it failed to show that the greater number of trips made by Byrd was unnecessary. The undenied testimony of Byrd was that his interim employment involved both short and long trips, thereby justifying the additional travel expenses to and from his interim employment.

ORDER

On the basis of the foregoing Supplemental Decision and the entire record in this case, the National Labor Relations Board hereby orders that the Respondent, Ambrose Distributing Company, its officers, agents, successors, and assigns, shall pay Richard F. Byrd as net backpay the amount of

\$12,466, with interest at the rate of 6 percent per annum computed on the basis of the quarterly amounts of net backpay due, less any tax withholding required by law.

TRIAL EXAMINER'S SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ROBERT COHN, Trial Examiner: On February 9, 1965, the National Labor Relations Board (herein the Board) issued its Decision and Order finding, *inter alia*, that Ambrose Distributing Company (herein the Respondent or Company) discriminated against Richard F. Byrd and Thomas L. Smith, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (herein the Act), and ordered that they be reinstated and made whole for any loss of earnings suffered by reason of the discrimination.¹ On March 9, 1966, the Court of Appeals for the Ninth Circuit enforced in full the Board's Order,² and on July 26, 1967, the same court adjudged the Respondent in civil contempt in certain respects.³ The court decreed that the Respondent, in order to purge himself of contempt, *inter alia*, do each of the following:

(a) Forthwith and in good faith offer to Richard Byrd and Thomas Smith immediate and full reinstatement each to his former or substantially equivalent position without prejudice to seniority or other rights or privileges.

* * * * *

(c) Make Richard Byrd and Thomas Smith each whole for all loss of pay due to the discrimination against him, the amount to be fixed by the Board, and approved by further order of the court.

The parties having been unable to agree upon the amount of backpay due the discriminatees, the case is before me on a backpay specification and notice of hearing issued by the Acting Regional Director for Region 19 of the Board on October 22, 1968. Following the granting of several requests for extension of time within which to file answer, the Respondent, on December 19, 1968, duly filed his answer to the backpay specification, and hearing was held before me in Twin Falls, Idaho, on February 4, 1969.

At the hearing, counsel for the General Counsel moved to amend the specification as respects amounts due thereunder because of an error in computation, which motion was granted. Also at the hearing the parties announced that a settlement had been reached with respect to the backpay due the discriminatee Thomas L. Smith, and the latter testified that the settlement was satisfactory to him in every respect. Under these circumstances, I indicated approval of the settlement⁴ and the case proceeded solely as respects the backpay due Richard Byrd.

Both parties were represented by counsel and afforded all rights of due process. Oral argument was waived, but posthearing briefs have been filed by counsel for the General Counsel and counsel for the Respondent, which have been carefully considered. Upon the entire record in

the case and from my observation of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

I. STATEMENT OF THE ISSUES

The principal issue in this case is whether the formula utilized by the General Counsel for the computation of gross backpay is sustainable under law. Secondary issues are (1) whether the proper cutoff date for the computation of backpay should be January 12, 1967, as proposed by Respondent, or August 20, 1967, as contended by the General Counsel; (2) whether Byrd is entitled to claim certain travel expenses during the backpay period; (3) whether Byrd's backpay should be diminished by his alleged failure to seek or accept other employment within the first month or two following his discharge by the Respondent.

A. The Cutoff Date

The record shows that on January 10, 1967, Respondent's counsel sent the following letter to each of the discriminatees:

Under the terms of the Order issued by the Board in the above entitled case, Ambrose Distributing Company is required to offer you re-instatement in your job with the Company. We suggest that you contact the Butte, Montana, office pertaining to re-employment.

The Respondent contends that the language of the foregoing letter constitutes compliance with the Order of the Board, as enforced by the court, that he should offer the discriminatees "immediate and full reinstatement each to his former or substantially equivalent position without prejudice to seniority or other rights and privileges"

The court, in its opinion on the contempt petition, stated in plain and unambiguous language:

We find that the January 10 letters to Byrd and Smith do not comply with the requirements of paragraph 2(a) of our decree.⁵

The record further shows that on July 26, 1967, Respondent sent each of the discriminatees the following letter:

In order to remove any question of the intent and purpose of our letter addressed to you dated January 10, 1967, pertaining to your reinstatement with the Ambrose Distributing Company, we hereby unconditionally offer you reinstatement to your former job without prejudice.

We suggest you contact either the main office at Butte, Montana, or the sub-office at Wendell, Idaho, as soon as conveniently possible, which we assume will not exceed ten days.⁶

The Respondent, at the hearing and in his brief, contends that he had the right to have the issue of the cutoff date "decided on its own merits," and not merely as part of an ancillary (contempt) proceeding. It is contended that the above-quoted finding of the court was *obiter dictum*.

I disagree. The issue before the court was whether the Respondent had complied with the affirmative provisions of the court decree which were set forth in its opinion.

¹Ambrose Distributing Company, 150 NLRB 1642

²358 F.2d 319

³382 F.2d 92

⁴The amount paid in settlement, as the Trial Examiner was advised subsequent to the hearing, was \$3,500.

⁵65 LRRM 3057, 3059

⁶Appendix 9 attached to Respondent's Answer. The record (Appendix D-15 attached to the specification) further shows that Byrd was reinstated on August 21, 1967.

The court made 13 findings of fact, one of which respected the issue of the validity of the offer of reinstatement. Thus, this issue was squarely before the court, evidence was adduced thereon, and the finding was made I deem myself bound by this finding, and conclude that by the January 10 letter to Byrd, the Respondent did not comply with the order of the Board, as enforced by the court. Additionally, I find that the Respondent's offer by its July 26 letter, above quoted, did constitute a valid, unconditional offer of reinstatement in compliance with the court decree.⁷

B. The Claimed Travel Expenses

Respondent objects to the inclusion in the specification of certain "transportation expenses" incurred by Byrd during the backpay period, which expenses were deducted from interim earnings. It is well established that reasonable expenses which are incurred by claimants in seeking new employment are properly deductible from their interim earnings.⁸ Respondent here argues, however, that during Byrd's period of employment with Respondent no payment was made for mileage traveling to or from work and that now Byrd is commuting to Twin Falls from his home near Wendell, Idaho, and incurring unnecessary traveling expense. However, in the specification, there is deducted from claimed traveling expenses the estimated cost incurred by Byrd in traveling from his home to Wendell, Idaho, where he worked for Respondent.⁹ While it is not altogether clear on the record the reason for commuting from his home to Twin Falls during the backpay period while he made only one round trip per week from his home to Wendell during his period of employment with Respondent, I do not deem this an unreasonable expense incurred as a necessity of Byrd's seeking and securing new employment, particularly when it is recalled that Byrd was placed in this position as a result of the Respondent's unlawful conduct.¹⁰ Accordingly, the Respondent's contention in this regard is denied.

⁷Even were I to accept, *arguendo*, the Respondent's contention and consider the issue *ab initio*, I would reach the same conclusion as the court. Upon scrutiny, the January 10 letter, in fact, does not offer the discriminatees anything. The first sentence thereof merely recites the fact that the Respondent has been required to offer *reinstatement*, and then suggests that the discriminatees contact the Respondent "pertaining to *reemployment*." Anyone slightly versed in labor relations parlance is aware of the distinction between those two terms. Moreover, the court found that Respondent's counsel on April 13, 1967, suggested to his client that "either you or I write an unequivocal firm offer to reinstate the two employees in question." That Respondent knew how to write such an unconditional offer, if he so desired, is confirmed by his letter of July 26.

⁸*Harvest Queen Mill & Elevator Company*, 90 NLRB 320, 323

⁹This mileage is computed at one round trip per week.

¹⁰See, e.g., *Crossett Lumber Company*, 8 NLRB 440, 497-498, where it is stated:

It is to be noted in this connection that many of the employees against whom the respondent discriminated found it necessary, in view of the limited employment opportunities at Crossett and its immediate vicinity, to seek work in California, Arizona, Louisiana, or other places. Some of the employees maintained homes in Crossett or its immediate vicinity, where they lived with their families, and in going to other places to work, they incurred expenses such as for transportation, room, and board, which they would not have incurred had they continued to work for the respondent and not been forced, by virtue of the respondent's unfair labor practices, to leave their homes.

The foregoing language was approved by the Supreme Court in *Helms Dodge Corp v NLRB*, 313 U.S. 177 at fn. 7. See also *Herman Brothers Pet Supply, Inc.*, 150 NLRB 1419, 1422, and cases cited.

C. Diligence in Seeking New Employment

Respondent contends that Byrd should be denied backpay during the first several months of the backpay period because he was not diligent in seeking new employment.

The record shows that following his discharge by the Respondent on March 11, 1964, Byrd thereafter sought employment with several trucking firms in the area as well as registering for employment with the state unemployment office.¹¹ He also testified that he had been registered with the Teamsters Union, but that he had been unable to secure employment as a truckdriver from any of these sources until early May 1964, when he finally secured employment from Winn & Company in Buhl, Idaho.¹² With the single exception of the first quarter of 1967, the record shows that Byrd worked rather steadily, albeit for different employers, during the remainder of the backpay period.

Respondent argues that there were possible job openings on nearby farms which were available and which Byrd did not seek and would not accept. Byrd testified that these were known as "farm hand jobs" which required that one move on to the farm and work there earning approximately 250 to 300 dollars per month.

Under all circumstances, I do not deem this kind of job to be substantially equivalent to the position from which he was discharged or suitable for a person of his background and experience.¹³ Accordingly, I conclude that Byrd was not required to "lower his sights" and accept such employment, and therefore find that Respondent did not sustain his burden of proving that Byrd did not make a reasonably diligent effort to find desirable employment during the first part of the backpay period. I will therefore recommend that there be no deduction from gross backpay on this account.¹⁴

D. The Validity of the Backpay Formula

The Respondent contends that the formula advanced by the General Counsel for the purpose of computing Byrd's gross backpay during the backpay period is improper and reflects a gross distortion of the amount which Byrd would have earned had he remained in Respondent's employ. General Counsel's formula was arrived at in the following manner:

A representative group of drivers was chosen, such representative group consisting of all drivers (with five exceptions including the two discriminatees) who received earnings in each pay period of the fourth quarter of 1963, such quarter being the last full quarter which the discriminatees worked prior to being discharged in March 1964.¹⁵ This representative group, consisting of 23 drivers,

¹¹He registered with the unemployment service on April 21, 1964, after he had exhausted the other employment possibilities.

¹²The foregoing findings are based upon the uncontradicted testimony of Byrd, which I credit.

¹³*Southern Silk Mills, Inc.*, 116 NLRB 769, 773. I am aware that the Board's Order in this case was denied enforcement by the Court of Appeals for the Sixth Circuit (242 F.2d 697, cert. denied 355 U.S. 821). However, it seems that the reason for the court's action was because of the failure of the two discriminatees in that case "to seek or take other suitable, available employment, although at a lower rate of pay, over a period of approximately three years, constitute[d] to some extent at least loss of earnings 'willfully incurred.'" The instant case is thus clearly distinguishable on its facts.

¹⁴*Mastro Plastics Corp.*, 136 NLRB 1342, enfg. 354 F.2d 170 (C.A. 2), cert. denied 384 U.S. 972 (1966), see also *Cornwell Company, Inc.*, 171 NLRB No. 43.

¹⁵While Byrd was employed by Respondent during the third quarter of

was thereafter utilized throughout the backpay period for the purpose of computing gross backpay. That is to say, whenever any individual in the group earned wages during any quarter involved in the computation, such earnings were averaged with the earnings of all other individuals in the representative group who worked during that quarter. However, from the average earnings of the entire group were excluded the earnings of those drivers whose earnings were below 60 percent of the group's average. Such exclusions were justified, according to the General Counsel, to eliminate those employees who worked only a very short period of time during the quarter, and, as a result, whose earnings would tend to distort the average.¹⁶ General Counsel relies on, *inter alia*, the following cases in support of his contention that this formula has received Board sanction in the past: *Venetian Blind Workers' Union Local No 2565 (Ambassador Venetian Blind Co)*, 110 NLRB 780, 786; *Tennessee Packers, Inc., Frostv Morn Division*, 158 NLRB 1316, 1322-23; *Herman Brothers Pet Supply, Inc.*, 150 NLRB 1419, 1421

Respondent vigorously opposes such formula contending that it greatly distorts the true picture of what Byrd would have earned had he remained in Respondent's employ. Thus the Respondent argues that Byrd was not generally a steady worker, pointing to the irregular pattern of his employment with Respondent since 1959.¹⁷ Nevertheless, Respondent, in its brief, acknowledges that Byrd "did work the third and fourth quarters of 1963 quite steadily."¹⁸ Secondly, the Respondent objects to the group utilized by the General Counsel on the ground it was unrepresentative in that the size of the group steadily decreased during the backpay period so that during the latter quarters thereof the average consisted only of some half dozen employees, whereas, in fact, the Respondent's payroll numbered over 40. The Respondent contends that gross backpay should more properly be based upon the average earnings of all the truckdrivers employed by the Respondent during the backpay period.¹⁹

Respondent further contends that the General Counsel's elimination of the lower 60 percent from the average resulted in the gross backpay figure reflecting the earnings that only the very top driver would earn, and is thus clearly erroneous. This particularly when, according to Respondent's figures, Byrd's earnings were only approximately 77.84 percent of the average earnings of the truckdrivers during the third and fourth quarters of 1963.

¹⁶1963, he did not work the full quarter, having been hired on July 10, 1963, and missing 2 weeks because of an injury

¹⁷Truckdrivers are paid on a trip and mileage basis rather than an hourly basis

¹⁸The company records (Resp. Exh. 3) show that from 1960 through 1963 Byrd worked for the Respondent several months of each year in an irregular pattern, quitting on each occasion. The last continuous period of employment with Respondent commenced July 10, 1963, and continued until his discharge in March 1964

¹⁹General Counsel counters that it is improper to consider the past employment history of Byrd with the Respondent as a basis of concluding whether or not he was a steady worker since the periods of employment involved were not long enough upon which to adequately base such a conclusion, and that he should not be penalized for quitting a job in order to secure a better one

²⁰The General Counsel counters this argument by pointing out that many of the employees employed by the Respondent during the backpay period were unskilled and untrained truckdrivers who only worked sporadically for Respondent and perhaps had earnings in only one quarter of the whole backpay period which extended from the first quarter of 1964 until the third quarter of 1967. To include such workers in the average, argues the General Counsel, would grossly distort the same.

(Resp. Exh. 2.)

Finally the Respondent argues that the General Counsel's formula was wrong because "it is actually computed on a pay period (bimonthly) basis and the pay periods added together to get quarterly earnings. The Board should have added all the pay periods in the quarter together before making their computation." (Resp. Br., p. 7)

Analysis and Concluding Findings

In considering the relevant legal principles applicable to a resolution of the present issue, I cannot improve upon the following statement of my colleague, Trial Examiner Rosanna A. Blake, in *International Trailer Company, Inc.*²⁰

The proposition that an employer is required to make discriminatees whole only for actual losses is easier to state than to apply. If uncertainty exists, as it frequently does, it results from the employer's illegal conduct and should be resolved against the company rather than against the victims of the discrimination. *N.L.R.B. v. Remington Rand, Inc.*, 94 F.2d 862, 872 (C.A. 2); *N.L.R.B. v. Spitzer Motor Sales, Inc.*, 211 F.2d 235 (C.A. 2), enfg. 102 NLRB 437, 453, *Ozark Hardwood Company*, 119 NLRB 1130, 1133. As the Supreme Court pointed out in *Storv Parchment Paper Co v Paterson Paper Co.*, 282 U.S. 555, 562, "There is a clear distinction between the measure of proof necessary to establish the fact that [a party] sustained some damage and the measure of proof necessary to enable [a tribunal] to fix the amount." See also *Palmer v. Connecticut Ry & Lighting Co.*, 311 U.S. 544, 561, in which the Court said that "Certainty in the fact of damage is essential. Certainty as to the amount of damage goes no further than to require a basis for a reasoned conclusion." See also *N.L.R.B. v. Kartarik, Inc.*, 227 F.2d 190, 192-193 (C.A. 8), in which the court concluded that the principles set forth in the above cases are equally applicable to backpay proceedings and are intended to "permit a solution of the problem of amount to be made upon any range of facts, circumstances, or reasonable inferences, which afford a rational basis for a conclusion."

Broadly speaking, a discriminatorily discharged employee is entitled to receive what he would have earned had he remained in the company's employ throughout the backpay period (gross backpay) less what he actually earned in other employment during that period. [Fn. omitted.] The determination of gross backpay, for example, is not always a matter of arithmetic for, as in this case, questions can arise concerning how much the claimant would have earned had he not been discharged. In cases in which such questions exist, the Board "may use as close approximations as possible, and may adopt formulas reasonably designed to produce such approximations." In other words, "In solving the problems which arise in backpay cases the Board is vested with a wide discretion in devising procedures and methods which will effectuate the purposes of the Act." *N.L.R.B. v. Brown & Root, Inc., etc.*, 311 F.2d 447, 452 (C.A. 8).⁶ It follows, therefore, that the Board is not required to use one formula only but may use a combination of

²⁰150 NLRB 1205, at 1207. See also, to the same effect, statement of Trial Examiner George Downing in *Local 1566, Intl Longshoremen's Assn (Marvin Gould)*, 145 NLRB 1417, 1420

methods in arriving at the amount or amounts due if it appears that such is necessary to effectuate, as nearly as possible, the policies of the Act.

*The court also stated when reviewing the formulas used by the Board, its inquiry was ordinarily limited to satisfying itself that the method selected was not "arbitrary or unreasonable in the circumstances involved" 311 F 2d 447, 453

As previously noted, the formula utilized by the General Counsel, i.e., a representative group whose earnings were averaged through the backpay period, has been sanctioned by the Board in the past, and, while it is subject in the infirmity that the number of the employees utilized diminished in time,²¹ the alternative theory posed by the Respondent, i.e., utilizing an average earnings of all truckdrivers employed by Respondent during the backpay period, distorts the average by including many new and inexperienced drivers who worked perhaps only in one quarter of the backpay period and then left Respondent's employ. While it is true that Byrd had worked for Respondent on several occasions in the past, quitting on each such occasion presumably for the purpose of securing more desirable employment, the fact remains that, admittedly, he worked regularly and steadily during the last period of employment which extended 8 months. It is only reasonable to assume such a state of affairs would have continued had it not been interrupted by the discharge. Thus it was the Respondent's unlawful conduct which prevents us from knowing what actually would have occurred, and therefore any doubts must be held against him (Ambrose) in the absence of any substantial evidence to the contrary.

In this connection, Respondent contends in its brief that "the Board should take into consideration Byrd's poor work record and unavailability." However, there is a decided lack of evidence in this record to substantiate this argument. Preliminarily, I note an absence of such contention in the original decision of Trial Examiner Royster in this case. Indeed, it was there found that "Byrd was not discharged because of any shortcoming in the performance of his work" (150 NLRB at 1645.)

In this record, there is lacking any direct testimony that Byrd refused to accept employment opportunities (trips) offered him while in Respondent's employment, and I deem the evidence that Byrd was not a steady employee when he worked for Respondent several times in the past insufficient to prove that he was not a willing and reliable employee on those occasions, since the period of employment was not long enough to make a reasoned judgment. This is particularly so here where there is no evidence of other factors which might bear on the issue.²² Moreover, Respondent concedes that during the last period of his employment which extended for 8 months — Byrd did work "quite steadily."

But Respondent argues that Byrd's earnings during the last two quarters of 1963 were only 77.84 percent of the total (Resp. Exh. 2). However, as General Counsel points out, Byrd's earnings were diminished during the third quarter of 1963 because he was not hired until July 10,

and thereafter was absent from work 2 weeks because of an injury.

Under all circumstances, I am not prepared to hold that the formula proposed by the General Counsel thus far is so distorted and exaggerated as to declare it invalid. However, for reasons hereinafter set forth, I am not inclined to agree with General Counsel to eliminate the lower 60 percent of the average.

Thus, the reason for excluding a minority of the employees in a group for purposes of ascertaining a fair average is because "It is reasonable to assume that they did so for reasons not applicable to the group as a whole such as illness or because they were hired or fired in the middle of the week."²³ I am in agreement that it is proper for the purpose of computing average earnings of the group to eliminate the minority who worked infrequently or sporadically in a given period, since it tends to distort the average. However, in this case the General Counsel seemingly rectified that problem initially by choosing a representative group prior to the backpay period and utilizing their earnings during the period. That the use of that method eliminates the sporadic and "floating" employees in advance is reflected by the record here which shows a diminished complement of employees — indeed a minority of employees in the classification — utilized for the purpose of computing average earnings. It is true that one or more of this group may have sub-par earnings during any given pay period, but that is offset by including an abnormally higher earner.²⁴ In short, it would seem that to further eliminate the earnings of the lower 60 percent of this already select group would unduly weight the average earnings upward. Accordingly, I accept the revised computations attached to the General Counsel's brief which sets forth gross backpay without eliminating those employees' earning under 60 percent. Under those figures the resulting net backpay amounts to \$12,466.

RECOMMENDED ORDER

Upon the basis of the foregoing findings and conclusions, it is ordered that the Respondent, Ambrose Distributing Company, its officers, agents, successors, and assigns, shall pay Richard F. Byrd as net backpay the amount of \$12,466, with interest at the rate of 6 percent annum computed on the basis of the quarterly amounts of net backpay due,²⁵ less any tax withholding required by law

²¹General Counsel in his brief (p 8) acknowledges that of the original 23 employees utilized in the representative group, "only 9 drivers of this group remained employed by the Respondent as of July 31, 1964, and the number never exceeded 9 in any subsequent quarter of the backpay period."

²²These would include considerations such as amount of business, weather, his position on the seniority roster (if any), etc

²³*International Trailer Company, Inc.* 150 NLRB 1205, 1211

²⁴*Cl. Local 1566, Intl Longshoremen's Assn (Marvin Gould)*, 145 NLRB at 1422.

²⁵It appears that interest to April 15, 1968, has already been included in the principal amount. See Appendix E attached to the original specification G C Exh 1(a)