

**The Madison Courier, Inc. and Louisville Typographical Union No. 10, International Typographical Union, AFL-CIO. Case 25-CA-2217**

March 30, 1973

**SECOND SUPPLEMENTAL DECISION  
AND ORDER**

BY MEMBERS FANNING, JENKINS, AND  
PENELLO

On January 4, 1967, the National Labor Relations Board issued a Decision and Order<sup>1</sup> in the above-entitled proceeding, finding that the Respondent, The Madison Courier, Inc., had violated Section 8(a)(1) of the National Labor Relations Act, as amended, by interfering with and coercing its employees in the exercise of their protected right of self-organization and, in addition, had violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, Louisville Typographical Union No. 10, International Typographical Union, AFL-CIO, thereby causing its employees to engage in an unfair labor practice strike. As a remedy for the foregoing violations, the Board, among other things, ordered the Respondent, upon application, to reinstate a number of unfair labor practice strikers to their former or substantially equivalent positions and to make them whole for any loss of earnings resulting from the Respondent's failure to tender such reinstatement. Thereafter, on December 22, 1967, the Board's Order was enforced in full by the United States Court of Appeals for the District of Columbia Circuit.<sup>2</sup> When the Respondent and the Board's Regional Director were subsequently unable to agree upon the amount of backpay due each striker, supplemental proceedings were instituted pursuant to Section 102.52, *et seq.*, of the Board's Rules and Regulations, for the purpose of making such a determination with respect to employees Allen Arbuckle, David R. Ashby, Bernard A. Corbin, Albert Lee Dowell, Walter Dowell, Paula B. Feltner, Louis D. Giltner, Rudolph D. Juett, Virginia F. Kerr, Henry Lorenz, Jr., August Mead, Judith A. Moore, James H. Nichols, and Mickie D. Storie. On November 12, 1968, the Acting Regional Director for

Region 25 issued and served on the parties a backpay specification and notice of hearing which, as amended, showed the backpay period broken down by calendar quarters, the precise amounts of gross backpay due and interim earnings for each employee. Although the Respondent did not dispute the method of computation used by the Acting Regional Director or the general bounds of the backpay period,<sup>3</sup> it did assert an affirmative defense in mitigation of the alleged backpay liability, to wit, that the claimants were not entitled to backpay due to their alleged failure to make reasonable efforts to obtain appropriate interim employment. After a hearing in February 1969, Trial Examiner Benjamin Blackburn and later the full Board rejected the said defense of the Respondent and found that 13 claimants were entitled to backpay in certain specified amounts.<sup>4</sup> Subsequently, upon the Respondent's continued refusal to pay the backpay sums ordered, the Board applied to the United States Court of Appeals for the District of Columbia for enforcement of its Order.

On August 9, 1972, the court of appeals issued its decision<sup>5</sup> remanding the case to the Board because of (1) the failure of the Board "to sufficiently explain why the claimants' election to continue their labor dispute with the Employer rather than actively seek the 'suitable' jobs which might have been available in the Madison area did not constitute a willful loss of earnings, in light of seemingly contrary reasoning" in other cases,<sup>6</sup> (2) the failure of the Board "to explain adequately, in terms of the policies of the N.L.R.A., the apparently arbitrary group-classification of all jobs outside the printing trade as 'unsuitable' interim employment for *all* of the claimants, in light of contrary holdings" in other cases,<sup>7</sup> and (3) the failure of the Board "to appropriately justify its findings that the claimants who made no attempt to obtain interim employment during the back pay period other than registering with the Indiana Employment Security Division and seeking job information through the Union, did not incur willful losses of earnings in light of apparently contrary holdings" in other cases.<sup>8</sup>

The Board, having accepted the remand, will reconsider the above-mentioned Supplemental Deci-

<sup>1</sup> 162 NLRB 550

<sup>2</sup> *Louisville Typographical Union No. 10, International Typographical Union, AFL-CIO v NLRB*, 67 LRRM 2462, 57 LC § 12, 647 (1967)

<sup>3</sup> The backpay period runs from July 22, 1966 (the date the Respondent received from the claimants an unconditional request for reinstatement), to January 1968 (the month during which the claimants were offered reinstatement by the Respondent)

<sup>4</sup> 180 NLRB 781 Inasmuch as discriminatee Arbuckle's interim earnings were consistently higher than his gross backpay, the General Counsel abandoned Arbuckle in the backpay hearing Accordingly, only 13 claimants are involved in the instant proceeding

<sup>5</sup> *NLRB v Madison Courier, Inc.*, 472 F 2d 1307 (1972), Judges McKinnon and Robb, Judge Leventhal concurring

<sup>6</sup> The court cited, e.g., *Ozark Hardwood Company*, 119 NLRB 1130, remanded 282 F 2d 1 (C A 8, 1960), and *Southwestern Pipe, Inc.*, 179 NLRB 364, remanded 444 F 2d 340 (C A 5, 1971)

<sup>7</sup> The court cited, e.g., *Knickerbocker Plastic Co.*, 132 NLRB 1209 (1961), *NLRB v Southern Silk Mills, Inc.*, 242 F 2d 697 (C A 6), cert denied 355 US 821 (1957), and *NLRB v Moss Planing Mill Co.*, 224 F 2d 702 (C A 4, 1955)

<sup>8</sup> The court cited *NLRB v Arduini Manufacturing Corp.*, 394 F 2d 420 (C A 1, 1968), *NLRB v Rice Lake Creamery Company*, 365 F 2d 888 (C A D C, 1966), *NLRB v Pugh and Barr, Inc.*, 207 F 2d 409 (C A 4, 1953), *Missouri Transit Company, Inc.*, 125 NLRB 1316 (1959), *Ozark Hardwood Co., supra*, and *American Bottling Company*, 116 NLRB 1303 (1956)

sion in conformity with the court's opinion, which we respectfully recognize as binding upon us only for the purpose of deciding this case.

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

The Board has again considered the record made at the supplemental hearing and the Trial Examiner's Supplemental Decision dated May 26, 1969, in light of the opinion of the United States Court of Appeals for the District of Columbia Circuit dated August 9, 1972, and has decided to affirm the rulings, findings, and conclusions of the Trial Examiner which are not inconsistent herewith.

Before the Board, as noted above, the Respondent raised an affirmative defense to negate or mitigate its backpay liability, viz, that the strikers willfully incurred a loss of earnings by refusing to seek and accept suitable interim employment. For the reasons hereinafter set forth we conclude that the Respondent's defense is without merit as to all of the unfair labor practice strikers except Ashby, Feltner, and Moore. With respect to employees Corbin, Albert and Walter Dowell, Giltner, Juett, Kerr, Lorenz, Mead, Moore, Nichols, and Storie, we conclude that the backpay order which we set forth in our prior proceeding<sup>9</sup> is necessary and proper to protect fully the employees' rights herein involved. In so concluding, we have, in the following analysis, considered the sufficiency of the strikers' efforts to obtain suitable interim employment in terms of applicable legal precedent and in light of the skill, background, and experience of each individual claimant.

The Supreme Court recently set forth the Board's authority over the backpay remedy in *N.L.R.B. v. J. H. Rutter-Rex Manufacturing Co.*,<sup>10</sup> stating as follows:

We start with the broad command of § 10(c) of the National Labor Relations Act . . . 29 U.S.C. § 160(c), that upon finding that an unfair labor practice has been committed, the Board shall order the violator "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies" of the Act. This Court has stated that the remedial power of the Board is "a broad discretionary one, subject to limited judicial review." *Fibreboard Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1964).

The legitimacy of back pay as a remedy for unlawful discharge or unlawful failure to reinstate is beyond dispute, *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 278 (1956), and the purpose of the remedy is clear. "A back pay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice." *Nathanson v. N.L.R.B.*, 344 U.S. 25, 27 (1952). As with the Board's other remedies, the power to order back pay "is for the Board to wield, not for the courts." *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). "When the Board, 'in the exercise of its informed discretion,' makes an order of restoration by way of back pay, the order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'" *Id.* at 346-347.

The law is also clear that "the finding of an unfair labor practice and discriminatory discharge is presumptive proof that some back pay is owed"<sup>11</sup> and the General Counsel's burden is limited to showing "what would not have been taken from [the employees] if the Company had not contravened the Act."<sup>12</sup> This allocation of the burden is aptly expressed in *N.L.R.B. v. Brown & Root, Inc.*,<sup>13</sup> as follows:

. . . in a back pay proceeding the burden is upon the General Counsel to show the gross amounts of back pay due. When that has been done, however, the burden is upon the employer to establish facts which would negative the existence of liability of a given employee or which would mitigate that liability.

The court in the instant proceeding stated that the Board's decision appears to have viewed the primary issue in the backpay proceeding as whether the claimants had to choose between concerted activity and backpay.<sup>14</sup> The court found that the claimants' right to picket after the Respondent improperly refused to reinstate them was a protected right and that the picketing did not *per se* negate their right to backpay. "Nevertheless," the court said, "such activity did not relieve the claimants from their well established obligation to take reasonable steps to

<sup>9</sup> 180 NLRB 781

<sup>10</sup> 396 U.S. 258, 262-263 (1969)

<sup>11</sup> *N.L.R.B. v. Mastro Plastics Corporation*, 354 F.2d 170, 178 (C.A. 2), cert. denied 384 U.S. 972 (1966)

<sup>12</sup> *Virginia Electric and Power Company v. N.L.R.B.*, 319 U.S. 533, 544 (1943)

<sup>13</sup> 311 F.2d 447, 454 (C.A. 8, 1963) Accord *N.L.R.B. v. Reynolds*, 399 F.2d 668, 669 (C.A. 6, 1968), *Florence Printing Co. v. N.L.R.B.*, 376 F.2d 216, 222-223 (C.A. 4), cert. denied 389 U.S. 840 (1967), *N.L.R.B. v. Mooney Aircraft, Inc.*, 366 F.2d 809, 812-813 (C.A. 5, 1966) Cf. *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 198-200 (1941)

<sup>14</sup> 472 F.2d 1307

secure work and thereby mitigate the Company's back pay liability."<sup>15</sup> *Ozark Harwood*<sup>16</sup> and *Southwestern Pipe*,<sup>17</sup> cited by the court, stand for the general proposition that employees who engage in picketing at the expense of seeking alternate employment incur willful losses of earnings by their failure to make the requisite search for work or by their withdrawal from the labor market. But the court also cited *N.L.R.B. v. Rice Lake Creamery*<sup>18</sup> which held that the backpay eligibility of picketing discriminatees is "to be determined with respect to each employee considering the record as a whole, and not merely from the fact of picketing." (Emphasis supplied.)

In the instant case, there is no record evidence indicating that the unfair labor practice strikers' picketing activities prevented them from seeking or accepting suitable employment. To the contrary, they were told by the Union that they were obligated to accept available employment to be eligible for strike benefits, and as discussed *infra*, they, in fact, did so. Likewise, there is no record evidence indicating that the strikers' attendance at union-sponsored training courses (held during the backpay period to familiarize members with the cold-type offset press operation with which the Respondent replaced its hot-type letterpress system shortly after the unfair labor practice strike began) prevented them from seeking or accepting suitable employment. In addition, there is no record evidence indicating that the receipt of strike benefits by the unfair labor practice strikers in any way interfered with their efforts to locate suitable interim employment. In the absence of such evidence we find that the claimants' right to receive backpay should not be diminished by the fact that the claimants picketed, attended union-sponsored training sessions, or received strike benefits roughly comparable to their take-home pay during the period of the Respondent's liability.<sup>19</sup>

In so holding we do not ignore the fact that claimant Corbin refused to accept an available full-time job as a clerk in a grocery store due to the fact that it would have conflicted with his picketing duties. However, we note that at the time of the strike, Corbin was a linotype operator who was earning \$2.38 an hour, and the available grocery store job would have paid only \$1.25 an hour. Moreover, Corbin had gained 9 years of experience in the printing trade prior to the backpay period by

working for the Respondent since his graduation from high school and was a linotype operator at the time of the strike. In light of Corbin's skill, experience, and background we find that the grocery clerk job which he refused was not suitable employment within the meaning of the mitigation doctrine. Accordingly, we conclude that Corbin's refusal to accept unsuitable employment cannot serve as a basis to negate or mitigate the Respondent's backpay liability to him.

The court in the instant proceeding noted that the Board dismissed the failure of the claimants to seek available nonprinting positions as may have been commensurate with a particular claimants' background and experience by deciding that the entire group only had to seek printing industry positions. This clear error, the court stated, "must be rectified on remand, by the thorough consideration of whether *particular* claimants should be denied back pay due to their failure to seek such available nonprinting jobs."<sup>20</sup>

In considering the sufficiency of each claimant's search for employment in light of his particular work experience, the court would have the Board use, as guidelines, principles enunciated in cases such as *Knickerbocker Plastic*,<sup>21</sup> *Southern Silk Mills*,<sup>22</sup> and *Moss Planing*.<sup>23</sup> In *Knickerbocker Plastic* the Board held that "it is incumbent on a claimant to seek a job for which he has *extensive* experience." (Emphasis supplied.) In that case the Board found that the claimant, who had been a moulder for an unspecified period of time, was obligated to seek and accept a job as a waiter, pointing out that the claimant had 12 years of experience as a waiter.<sup>24</sup> In *Moss Planing* and *Southern Silk Mills*,<sup>25</sup> the Board rejected the contention that after a period of time the claimants were obligated to lower their sights and seek employment of a lower caliber than they had experienced with the respondents involved. In both cases, the circuit courts refused enforcement, taking a view contrary to that of the Board. The *Southern Silk* court concluded that, during a backpay period of approximately 3 years, knitters in a textile mill should have accepted, as suitable interim employment, available, lower paying employment which consisted of picking crops or working in a retail store or food freezing plant. The *Moss Planing* court concluded that a semiskilled worker in a lumber mill, who had a long background of experience as a farm

<sup>15</sup> *Id*

<sup>16</sup> *Ozark Harwood Co.*, 119 NLRB 1130, remanded 282 F 2d 1 (C A 8, 1960)

<sup>17</sup> *Southwestern Pipe, Inc.*, 179 NLRB 364, remanded 444 F 2d 340 (C A 5, 1971)

<sup>18</sup> 365 F 2d 888, 894 (1966)

<sup>19</sup> See cases cited at fn 12 herein and accompanying text

<sup>20</sup> 472 F 2d 1307

<sup>21</sup> *Knickerbocker Plastic Co., Inc.*, 132 NLRB 1209 (1961)

<sup>22</sup> *N.L.R.B. v. Southern Silk Mills, Inc.*, 242 F 2d 697 (C A 6), cert denied 355 US 821 (1957)

<sup>23</sup> *N.L.R.B. v. Moss Planing Mill Co.*, 224 F 2d 702 (C A 4 1955)

<sup>24</sup> 132 NLRB 1209, 1219

<sup>25</sup> *Moss Planing Mill Co.*, 110 NLRB 933 (1954), *Southern Silk Mills, Inc.*, 116 NLRB 769 (1956)

laborer, should have accepted jobs harvesting or processing tobacco as suitable interim employment during a liability period of almost 3 years.<sup>26</sup>

However, as the court in the present proceeding stated, the *Southern Silk* and *Moss Planing* decisions are not really very broad. "Both decisions", the court notes, "expressly emphasized the fact that no discriminatee is required to ever accept anything but 'suitable' interim employment."<sup>27</sup> Moreover, as the court in the instant case stressed, "there is no requirement that [a claimant] seek employment which is not consonant with his particular skills, background, and experience;" nor is a claimant "obliged to seek work which involves conditions that are substantially more onerous than his previous position."<sup>28</sup> The court concluded that a permissible means of effectuating statutory policy would be to resolve doubts in this area in favor of the discriminatee and against the party who violated the Act, thereby depriving the Respondent of a method of subverting the Act.<sup>29</sup>

In applying standards not unlike those set forth by the court in the instant proceeding, we have held, in other cases involving employees engaged in the printing industry, that a striker will not be obligated to accept interim employment which is unsuitable simply to reduce the employer's liability for his unlawful conduct. For example, in *Florence Printing Company*<sup>30</sup> we held that journeymen and apprentices in the typographical trades were not required to lower their sights during a liability period of approximately 21 months by taking lower paying jobs which were in occupations unrelated to the typographical trades. And in *Lozano Enterprises*,<sup>31</sup> where we duly noted the *Southern Silk* decision, *supra*, we also noted that there was no indication in that decision or any other court opinion that janitorial work would be deemed suitable employment for a skilled linotype operator. We have, therefore, recognized that the skill, background, and experience of one employed in the printing trade may set him apart from one who is engaged in some other means of employment which will more readily accommodate alternative employment opportunities.

With the foregoing in mind and in conformity with the court's remand, we now reconsider the availability of nonprinting jobs in the Madison area.

In the instant case, nonprinting work was available at Olin-Mathieson Chemical Corporation's shell loading plant in Charlestown, Indiana, 32 miles from Madison. The work consisted primarily of loading, assembling, and packing ammunition charges for the

Federal Government. During the backpay period, the record shows that Olin-Mathieson hired 13, 679 new employees in various job classifications, which included warehousemen, guards, clerical workers, and technical and production employees. Most jobs paid \$2.50 to \$3 per hour. Reliance Electric, located just outside Madison, manufactured fractional horsepower motors. Of 301 employees hired during the backpay period, most were hired at approximately \$1.70 per hour to perform jobs which included lathe operator, punch press operator, assembler, and stock handler. During the backpay period, 432 persons were hired at the U.S. Army's Jefferson Proving Ground, located 6 miles from Madison. The function of this employer was to test and fire conventional ammunition. Jobs included munitions operators, civilian gunners, proof technicians, and observers, and paid \$2.57 and \$2.65 per hour at the entry level. Dow Corning Corporation hired 76 persons during the backpay period at its chemical plant near Carrollton, Kentucky, 17 miles from Madison. Employees, involved in producing basic silicon materials, included an engineering staff, clerical workers, and production and maintenance personnel. Hiring rates ranged from \$2.50 to \$3 per hour. Indiana Kentucky Electric Corporation, which operated an electricity generating plant at Madison, hired 45 employees during the backpay period at wage rates ranging from \$2.25 to \$2.44 an hour. Jobs included such classifications as laborer, utility man, helper, and clerical employee. American Can Company hired 155 employees during the backpay period at its plant at Austin, Indiana, 25 miles from Madison. Production people, who were hired to perform tasks related to tin can manufacturing, began at wage rates ranging from \$2.65 to \$2.72 an hour. Grote Manufacturing Company had a plant in Madison which fabricated metal and which, during the backpay period, hired 63 employees at an average starting rate of \$1.45 to \$1.88 an hour in job classifications such as assembler, cabinet packer, and material handler. Rex Chain Belt manufactured construction machinery at its plant in Madison. During the backpay period it hired about 130 employees at wage rates ranging from \$1.73 to \$1.80 an hour to work in job classifications such as helper, press operator, punch operator, and assembler. Williamson Company, which is engaged in metal work at its manufacturing plant in Madison, hired 96 employees during the backpay period at wages ranging from \$1.70 to \$1.82 an hour for job

<sup>26</sup> *NLRB v. Moss Planing Mill Co.*, 256 F.2d 653, 654 (C.A. 4, 1958)  
<sup>27</sup> 472 F.2d 1307

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> 158 NLRB 775, 793, enf'd 376 F.2d 216, 221 (C.A. 4), cert. denied 389 U.S. 840 (1967)

<sup>31</sup> 152 NLRB 258, 261, fn. 6 (1956)

classifications such as shear operator, press operator, welder, and grinder.

In addition to the foregoing nonprinting jobs which were available in the Madison area during the backpay period, the record shows that other nonprinting employment existed which some of the claimants were able to obtain. Thus, during all quarters of the backpay period Giltner worked as a grocery store clerk and Storie found part-time employment as a motorcycle dealer. Corbin and Giltner received referrals from the employment office for a job at a distillery 50 miles from Madison. Neither applied because of the unreasonable commuting distance the work would have involved. Corbin unsuccessfully applied for part-time work at a grocery store. Ashly applied for a job as an aviation ordinance man at the Jefferson Proving Ground, but was unsuccessful because of a Government freeze on hiring.

The fact that two claimants were able to obtain nearby alternative employment opportunities which were not in keeping with their trade in no way detracts from the skill, background, and experience in the printing industry which they and the other unfair labor practice strikers possessed. In this regard, we note that David Ashby worked as an automobile body repairman, automobile salesman, and farmer for 6 years, but during the next 11 years he worked for the Respondent and was a compositor-pressman at the time of the strike. Corbin, who was a linotype operator at the time of the strike, began working for the Respondent immediately upon graduation from high school and continued to work for the Respondent for the next 9 years. Albert Dowell was employed by the Respondent immediately after graduation from high school. He had worked for the Respondent for 11 years and was employed as an advertising compositor at the time of the strike. Walter Dowell worked for 15 years in the shipping department of a nail factory, but during the subsequent 19 years he worked for the Respondent and was an advertising compositor at the time of the strike. Giltner worked for the Respondent for 6 years as a pressman after brief employment over a period of 2 years as a farmer and as an employee in a poultry processing plant. Juett, who was 66 years of age at the time of the backpay hearing, had been with the Respondent for 41 years and was a linotype operator at the time of the strike. Kerr had "grown up in the printing industry," working as a linotype operator for her family, for a printing establishment in Louisville for 7 months, and then for the Respondent for 4 years. Lorenz, who was 62 years

old at the time of the backpay hearing, worked for the Respondent for more than 40 years and was a linotype operator at the time of the strike. Mead, who was 63 years old at the time of the backpay hearing, had worked for the Respondent on a part-time basis for 2 years as an ad compositor. Nichols had been employed for 18 months as a civilian gunner at the Jefferson Proving Grounds, following a 2-year tour of military duty, but he was subsequently employed by the Respondent for 11 years and was a linotype operator at the time of the strike. Storie had worked for brief periods of time as an auto mechanic, but he was subsequently employed by the Respondent during the next 7 years. He worked as an assistant pressman at the time of the strike.

After considering the skill, background, and experience of each of the claimants we conclude that the above-described alternative employment which existed outside, and wholly unrelated to the printing industry during the backpay period was not suitable for claimants Ashby, Corbin, Albert and Walter Dowell, Feltner, Giltner, Juett, Kerr, Lorenz, Mead, Moore, and Storie, so that these unfair labor practice strikers were not required to lower their sights to seek such employment. To hold otherwise would be to force an experienced member of a specialized trade to abandon his chosen craft in order to diminish the Respondent's liability for its established wrongdoing. Moreover, to force such abandonment would hamper production and employment by causing a discriminatee to prejudice his skills in a highly complex and constantly changing industry. The resulting loss of proficiency and experience would be an inhibiting factor in obtaining new employment in the printing trade as well as in progressing with any job a striker was already performing before the Respondent's unlawful act.

In considering claimants Feltner and Moore we note that their skills in the printing trade were limited to reading proofs and operating the typewrite-like keyboard of a teletypesetter, for which Feltner earned \$1.35 and Moore earned \$1.40 an hour. With respect to their background and experience, both were recent high school graduates, Feltner having worked for the Respondent slightly less than a year and Moore slightly more than a year prior to the strike. Moore had completed a year of business school and had prior employment as a clerical employee in a business office. Both employees had done some general office work for the Respondent.

Unlike the situation with respect to printing jobs, available clerical jobs existed during the backpay period at several nonprinting sources of employment.

Upon review, we find that such jobs were suitable interim employment for claimants Feltner and Moore. In light of the fact that such employment existed and because neither claimant Feltner nor Moore made any inquiry or application for any such job, other than through the state employment agency by inquiries on their behalf made by the Union,<sup>32</sup> we conclude that claimants Feltner and Moore each failed to make a reasonable effort to obtain suitable interim employment during the backpay period. Accordingly, we strike from the backpay specification the sums which we heretofore determined were due to employees Feltner and Moore.

In its decision in the instant case, the court characterized the claimants' registration with the state employment agency and their utilization of the Union "grape vine" as seemingly inadequate efforts to obtain employment.<sup>33</sup> The court noted that while the Board described registration by the unfair labor practice strikers as "the only meaningful way" of seeking employment, it excused the failure of claimant Ashby to register with the agency by characterizing such registration as a "futile act."<sup>34</sup> In addition, the court stated that the Board had not adequately explained the failure of the claimants to seek positions with the five weekly newspapers in the Madison area.<sup>35</sup> As for the possibility that no printing work existed in the Madison area even if the claimants had diligently sought such work, the court stated that "with such diligence lacking, the circumstance of a scarcity of work and the possibility that none would have been found even with the use of such diligence is irrelevant."<sup>36</sup>

We agree with the court that the claimants' registration with the employment office is not *conclusive* evidence of a reasonable search for employment. It is, nevertheless, evidence that the claimants did, in fact, seek work.<sup>37</sup> As one of the claimants, Lorenz, stated, "if there was any work available, why certainly it should have shown up there." The record shows that all of the claimants with the exception of Ashby filed a continuing registration with the employment office during the first quarter of the backpay period.<sup>38</sup> Subsequently the claimants again visited the employment office on the following dates: Corbin—9/8/66, 10/27/66, 12/29/66, 2/16/67, 4/13/67; Albert Dowell—9/8/66, 10/13/66; Walter Dowell—9/8/66, 10/6/66; Juett—9/8/66, 10/6/66, 11/17/66,

12/8/66, 1/5/67, 2/9/67, 3/2/67, 4/13/67, 5/25/67; Kerr—10/13/66, 1/12/67, 2/23/67, 5/25/67; Lorenz—9/8/66, 10/20/66, 1/19/67, 3/16/67, 5/4/67, 6/29/67, 8/31/67, 10/5/67; Nichols—9/8/66, 11/17/66, 2/23/67, 4/13/67; and Storie—9/18/66, 11/3/66, 4/13/67. In addition, claimant Mead visited the employment office twice within a month after filing his application for employment.

The claimants' utilization of the Union to obtain work by means of the labor "grape vine" and their individual word of mouth inquiries are not without significance. Indeed, because of the "country shop" nature of the local printing establishments, the jobs that did become available were frequently obtained by "word of mouth" or by a secretary of one local union contacting a secretary of another local union to learn what jobs, if any, existed in a particular location. In this regard, we note that a representative of the International Union, Donald McFee, and a local union officer, Nichol Bachert, contacted chapel chairmen of other local unions, foremen, newspaper owners, and other appropriate sources in an attempt to obtain employment opportunities for the strikers.

The strikers were aware that the Union was seeking work for them and so testified. Corbin testified that the Union's secretary-treasurer would get in touch with him if there was an opportunity for employment. The Dowells were advised by the Union's secretary-treasurer of job openings in Louisville, which they applied for and received. Juett testified that he knew the Union was seeking work for him. Kerr was aware that the Union sought work for her as shown by a job which the Union obtained for her at the Dunne Press in Louisville.<sup>39</sup> Mead testified that he was aware of the Union's effort to find employment for him. Nichols testified that he had knowledge that the Union was seeking work for him within the industry. Moreover, as was the case with Kerr, who shared work with Corbin, Nichols, and Lorenz, other strikers would let each other know of any available work within the printing trade.

With respect to printing work which may have been available in the Madison area, the Madison Courier was the only daily newspaper in the nearby vicinity. The closest other daily papers were all 50 or more miles from Madison. In addition, there were five area weekly publications within the immediate area: The Trimble Democrat and Banner, in Pratiford, Kentucky, 10 miles away; the Gallatin County

<sup>32</sup> The record shows that claimants Feltner and Moore registered for work with the state employment agency during the first quarter of the backpay period. Thereafter, Feltner again visited the employment office on 9/1/66, 10/13/66, and 1/12/67. Moore revisited the office on 9/29/66, 11/10/66, 1/15/67, and 5/25/67. Both claimants testified that they knew that the Union was looking for employment for them.

<sup>33</sup> 472 F.2d 1307.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See *Fibreboard Paper Products Corporation*, 180 NLRB 142, 148.

<sup>38</sup> Although Giltner, unlike other claimants, failed to revisit the employment office after registering there for work, we note as did the court, that the claimants' applications for employment remained on file during the entire backpay period. See 472 F.2d 1307.

<sup>39</sup> The court agreed with the Board that Kerr's rejection of the job was reasonable in light of her personal circumstances. 472 F.2d 1307.

News, in Warsaw, Kentucky, 35 miles away; the North Vernon Plain Dealer and Sun in North Vernon, Indiana, 20 miles away; the Carrollton Mirror in Carrollton, Kentucky, 12 miles away; and the Versailles Republican, in Versailles, Indiana, 25 miles away. There were also several small print shops in the Madison area which are discussed, *infra*.

As to possible employment opportunities at the five area weekly publications which were within a 25-mile radius of Madison, the Respondent offered two witnesses to meet its burden of establishing facts which would negate or mitigate its liability as to a given employee.<sup>40</sup> The owner of the North Vernon Plain Dealer testified that "he could have put a man on," but he did not testify that he did, in fact, hire anyone within the backpay period. The Versailles Republican did actually hire four or five printers during the backpay period, but these were untrained employees who were paid the minimum wage. The publisher testified that "It is practically impossible for a weekly paper to go out and hire a trained person" and if one were available it is doubtful that "we could pay the wages that he would be willing to accept." The significance of this testimony becomes apparent in light of the fact that all claimants except Feltner and Moore, the two typesetter tape punch operators discussed *supra*, were earning between \$2.16 and \$2.50 an hour when the strike began.

During the backpay period some of the claimants were able to obtain employment at small print shops in the Madison area. Claimants Kerr, Corbin, Nichols, and Lorenz shared a temporary 3-day-a-week job at the Trimble Democrat and Banner. Corbin worked there during the first four quarters of the backpay period, Kerr during the first four and the sixth quarters, Lorenz during the first two quarters, and Nichols during the first four quarters. During the last two quarters of the backpay period, Nichols worked for 2 days a week at the Gallatin County News. After working for the Trimble Democrat and Banner, Lorenz unsuccessfully applied for work at the Democrat Publishing Company. Mead obtained casual work at the Madison Press and at Chapman Printing Company during the entire backpay period. Walter Dowell worked part time at the Madison Press during the first four quarters of the backpay period. In addition, Albert and Walter Dowell worked for the Courier-Journal in Louisville for all but the first quarter of the backpay period. Thus, because of the slight labor market, only six claimants were able to obtain suitable nearby

employment within the printing industry, and such employment was only at four printing establishments and was casual or part time.

Although the court noted that the possibility that no work could be found is irrelevant where due diligence on the part of a claimant to find alternate employment is lacking, the court appeared to recognize that scarcity of work does, nevertheless, reflect upon what the standard of diligence should be.<sup>41</sup> Thus, the court noted<sup>42</sup> (1) that although the strikers' applications for work remained on file with the state employment agency throughout the entire 18-month backpay period, none received a printing job referral, (2) that the reason for this scarcity of available printing work was simply the limited number of printing employers located in and around the rural Madison area, and (3) that the claimants also sought printing work through the Union, but were only able to locate jobs for employees Walter and Albert Dowell and Virginia Kerr, and that such employment was all in Louisville, Kentucky, an unsuitable distance of over 50 miles away.

Mindful of the lack of opportunities for employment existing in the printing trade during the backpay period and in the absence of a showing by the Respondent that unfilled jobs comparable to those held by the claimants at the time of the strike actually existed during the backpay period, we conclude that the Respondent has failed to establish that any of the claimants incurred a willful loss of earnings by not making an inquiry or application for each and every possible job that might have existed within the printing industry.<sup>43</sup> We further conclude that, in the circumstances of this case, the unfair labor practice strikers' continuing registration with the state's employment agency and their utilization of the Union "grape vine" constituted adequate efforts on their part to obtain work in the printing industry.<sup>44</sup>

Because employee Ashby failed to take action to obtain employment by registering with the Indiana Employment Security Division, and in the absence of evidence that he performed any work during the 18-month backpay period, we find, upon reconsideration, that the Union's effort to find employment for him and the single application which he made to obtain the job of aviation ordinance man with the U.S. Government do not constitute an adequate effort by Ashby to find suitable interim employment within the backpay period. Accordingly, we strike from the backpay specification the sum which we heretofore determined was due to employee Ashby.

<sup>40</sup> See cases cited at fn 12 herein and accompanying text

<sup>41</sup> See, e.g., *NLRB v Pugh and Barr, Inc.*, 207 F 2d 409 (CA 4, 1953), cited by Judge Leventhal in his concurring opinion, 472 F 2d 1307

<sup>42</sup> 472 F 2d 1307

<sup>43</sup> See, e.g., *Bonnar-Vawter, Inc.*, 135 NLRB 1270, 1278, fn 12, and see cases cited at fn 12 herein and accompanying text

<sup>44</sup> See *Fibreboard Paper Products Corp.*, 180 NLRB 142, 148

## ORDER

On the basis of the opinion of the United States Court of Appeals for the District of Columbia Circuit dated August 9, 1972, the Administrative Law Judge's Supplemental Decision dated May 26, 1969, as modified herein, and the entire record in this case, the National Labor Relations Board hereby

orders that the Respondent, The Madison Courier, Inc., its officers, agents, successors, and assigns, shall pay the claimants involved in this proceeding as net backpay the amounts determined to be due by the Administrative Law Judge in the said Supplemental Decision except that no backpay shall be due to employees David R. Ashby, Paula B. Feltner, and Judith A. Moore.