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Labor Law—Back Pay Computed According to Woolworth Formula Approved by Supreme Court

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LABOR LAW—BACK PAY COMPUTED ACCORDING TO WOOLWORTH FORMULA APPROVED BY SUPREME COURT

Respondent, found to have discriminatorily discharged certain employees, was ordered to reinstate them with back pay computed according to the "Woolworth formula." *Held* (6-3): The order of the N. L. R. B. should be enforced. *N. L. R. B. v. Seven-Up Bottling Co.*, 73 S. Ct. 287 (1953).

In the first case decided under the National Labor Relations Act, 49 STAT. 449, 29 U. S. C. § 160 (c) (1935), as amended, 61 STAT. 136, 29 U. S. C. § 160 (c) (1947), the N. L. R. B. ruled that a discriminatorily discharged employee was entitled to back pay from the date of the discharge to the date of offer of reinstatement. *Pennsylvania Greyhound Lines Inc.*, 1 N. L. R. B. 1, 51, 1 L. R. R. M. 303, 336 (1935), *enforcement granted* 303 U. S. 261 (1938). Later it was decided that the employee's interim net earnings were to be deducted from this amount. *Crossett Lumber Co.*, 8 N. L. R. B. 440, 2 L. R. R. M. 483 (1938), *enforcement by consent*, 102 F. 2d 1003 (8th Cir. 1938). In *F. W. Woolworth Co.*, 90 N. L. R. B. 289, 26 L. R. R. M. 1185 (1950), the Board adopted a new formula to correct two specific abuses: (1) "Some employers . . . have deliberately refrained from offering reinstatement, knowing that the greater the delay the greater would be the reduction in back pay liability" where the employee's subsequent job provided greater remuneration; and (2) "Employees . . ., faced with the prospect of steadily diminishing back pay, have frequently countered by waiving their right to reinstatement in order to toll the running of back pay and preserve the amount then owing." *Supra* at 289, 26 L. R. R. M. 1185.

Under the "Woolworth formula" back pay is computed on the basis of each separate calendar quarter, rather than on the basis of the total period for which the employee is discharged. And earnings in one particular quarter have no effect upon the back pay liability for any other quarter. See 15 NLRB ANN. REP. 155 (1950). The formula has been applied where an employer was guilty of a discriminatory discharge, *N. L. R. B. v. Kanmak Mills*, ___ F. 2d ___, 31 L. R. R. M. 2187 (3d Cir. 1952). and where the discrimination was practiced by the union. *N. L. R. B. v. Operating Engineers*, ___ F. 2d ___, 31 L. R. R. M. 2344 (1st Cir. 1953). The union and the employer were held jointly and severally liable for back pay under the "Woolworth formula" where the employer was coerced into discriminatory practices. *N. L. R. B. v. Pinkerton's Detective Agency*, ___ F. 2d ___, 31 L. R. R. M. 2336 (9th Cir. 1953). After enforcement of its back pay order against the em-

ployer, the Board may conduct supplemental proceedings, without a court order, to determine the precise amount due the employee. *N. L. R. B. v. Royal Palm Ice Co.*, __ F. 2d __, 31 L. R. R. M. 2308 (5th Cir. 1953); see also, note, 62 YALE L. J. 488 (1953).

The Supreme Court has held that the power of the Board to make a back pay order is remedial and not punitive. *Republic Steel Co. v. N. L. R. B.*, 311 U. S. 7 (1940); *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 235, 236 (1936); see also, 16 NLRB ANN. REP. 239 (1951). So long as the award does not require more of the employer than to make the employees whole, the award is not punitive. *N. L. R. B. v. Gullett Gin Co.*, 340 U. S. 361 (1951). But a back pay order which required the employer to repay work relief payments to the government, as well as to make the employee whole, was held punitive and not enforced. *Republic Steel Co. v. N. L. R. B., supra.* In refusing to set aside an award, the Supreme Court said, "This is not a case in which the Board has ordered the payment of sums to third parties, or has made employees more than whole . . ." *Virginia Electric and Power Co. v. N. L. R. B.*, 319 U. S. 533, 544 (1943). In those situations, including the instant case, where the nature of the work is seasonal, computation of back pay on a quarterly basis could result in more total compensation to the employee than he would have received had he not been discharged. See Brief for Respondent, p. 6. A back pay award, computed according to the "Woolworth formula" could, therefore, make the employee more than whole and be considered punitive. See dissenting opinions, instant case.

Respondent sought to argue before the Supreme Court that the "Woolworth formula," as applied to its seasonal business, was punitive. Brief for Respondent, p. 7. However, the objection had not been raised before the Board or the Circuit Court of Appeals. Objections not urged before the Board will not be considered by the Supreme Court. *Marshall Field & Co. v. N. L. R. B.*, 318 U.S. 253 (1943); see also, *English Mica Co.*, 101 N. L. R. B. 179, 31 L. R. R. M. 1177 (1952). The Court in the instant case refused to rule on the punitive nature of the "Woolworth formula" for this reason.

Thus, though the Supreme Court upheld the "Woolworth formula" in the instant case, the formula has not yet withstood the argument that it is punitive to an employer in certain circumstances. It is submitted that the "Woolworth formula" is not yet soundly established, and that it will suffer further scrutiny by the Supreme Court in a case where the punitive objection is validly raised.

J. Edmund de Castro, Jr.