

In the Matter of SQUIRT DISTRIBUTING COMPANY and GORDON J. ELLWOOD, AN INDIVIDUAL

In the Matter of INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, GENERAL TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL 249, A. F. L. and GORDON J. ELLWOOD, AN INDIVIDUAL

Cases Nos. 6-CA-256 and 6-CB-91.—Decided January 29, 1951

DECISION AND ORDER

On August 25, 1950, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, finding that Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel and the Respondent Union filed exceptions to the Intermediate Report only with respect to the back pay aspects of the remedy. The Respondent Squirt Distributing Company filed no exceptions.

The Board¹ has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and except as noted below, hereby adopts the findings, conclusions,² and recommendations of the Trial Examiner.³

The Remedy

For the reasons set forth in *Acme Mattress Co., Inc.*,⁴ 91 NLRB 1010, we shall, unlike the Trial Examiner, require that the Em-

¹ 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 Houston, Reynolds, and Styles].

² In the section of the Intermediate Report entitled Conclusions of Law, the Trial Examiner inadvertently omitted the conclusion that the Employer violated Section 8 (a) (2) of the Act by assenting to an unlawful union-security clause since July 24, 1949.

³ We agree with the Examiner that the operations of the Respondent Employer affect commerce. We find further that it would effectuate the policies of the Act to assert jurisdiction in this case. *Seven Up Bottling Company of Miami Inc.*, 92 NLRB 1622.

⁴ Although Member Reynolds dissented in that case, he considers himself bound by the majority opinion therein.

ployer and the Union be jointly and severally liable for loss of wages incurred by Ellwood as a result of his second discharge as well as his first discharge. We shall accordingly order that the Respondents, the Employer, and the Union, jointly and severally make Ellwood whole for loss of wages incurred from January 23, 1950, the date of his first discharge, to February 9, 1950, the date of his reemployment and from February 15, 1950, the date of his second discharge, to April 10, 1950, the date on which he was permanently reemployed.

In *F. W. Woolworth Company*,⁵ the Board adopted a method of computing back pay, on the basis of each separate calendar quarter or portion thereof during the period from the date of the discharge or other discrimination to the date of a proper offer of reinstatement. Under this formula an employee's loss of pay is determined by deducting from a sum equal to that which he would normally have earned for each quarter or portion thereof, his net earnings, if any, in other employment during that period. Earnings in one particular quarter have no effect upon the back-pay liability for any other quarter.

This new method of computing back pay was rejected by the Trial Examiner in this case. The Examiner stated that the division of responsibility for back pay in this case between the Union and the Employer made application of the *Woolworth* formula impracticable. We do not agree. We will, accordingly, modify the remedy recommended by the Trial Examiner by requiring that back pay be computed in accordance with the foregoing formula.

As no exceptions were filed to the Examiner's failure to recommend the setting aside of the entire contract and the withdrawal of recognition from the Union until certified by the Board, we shall adopt his remaining recommendations without any change.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders:

I. That the Respondent, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, General Teamsters, Chauffeurs and Helpers, Local 249, A. F. L., its officers and agents, shall:

a. Cease and desist from:

(1) Restraining or coercing employees of Squirt Distributing Company, its successors or assigns, in the exercise of their right to refrain

⁵ 90 NLRB 289.

from any or all of the concerted activities protected by Section 7 of the Act, except to the extent that such right may be affected by a valid agreement requiring membership in the Union as a condition of employment as authorized in Section 8 (a) (3) of the Act;

(2) Causing or attempting to cause Squirt Distributing Company to discriminate against Gordon J. Ellwood or any other employee, in violation of Section 8 (a) (3) of the Act;

(3) Giving effect to the union-security clause in the existing contract with Squirt Distributing Company until it is amended to conform with Section 8 (a) (3) of the Act.

b. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Notify Gordon J. Ellwood and Squirt Distributing Company in writing that it has withdrawn its objection to the employment of Ellwood;

(2) Jointly and severally with Squirt Distributing Company make whole Gordon J. Ellwood in the manner prescribed in this Decision and Order for any loss of pay he may have suffered by reason of the discrimination against him for the periods from January 23 to February 9, 1950, and from February 15 to April 10, 1950;

(3) Post at its business office in Pittsburgh, Pennsylvania, and wherever notices to its members are customarily posted, copies of the notice attached hereto and marked Appendix A.⁶ Copies of said notice, to be furnished by the Regional Director for the Sixth Region, shall be duly signed by a representative of the Respondent Union, immediately upon receipt thereof, and shall be promptly posted and maintained by it for a period of at least sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to insure that such notices are not altered, defaced, or covered by any other material;

(4) Notify the Regional Director for the Sixth Region in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

II. That the Respondent, Squirt Distributing Company, Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall:

a. Cease and desist from:

(1) Refusing to employ or continue in employment, Gordon J. Ellwood, or any other employee because he is not a member of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen

⁶ In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words, "A Decision and Order" the words "A Decree of the United States Court of Appeals Enforcing."

and Helpers of America, General Teamsters, Chauffeurs and Helpers, Local 249, A. F. L., or any other labor organization, except to the extent that employment or continued employment may be conditioned upon membership in a labor organization pursuant to a valid contract in accordance with the requirements of Section 8 (a) (3) of the Act;

(2) By any like or related conduct, or by giving effect to the union-security clause in the contract now existing, interfering with, restraining, or coercing its employees in the exercise of their rights to refrain from any or all of the concerted activities protected by Section 7 of the Act, except as authorized by Section 8 (a) (3) of the Act.

b. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Credit Gordon J. Ellwood with seniority and other rights and privileges as a permanent employee from January 23, 1950;

(2) Jointly and severally with the Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, General Teamsters, Chauffeurs and Helpers Local 249, A. F. L., make Ellwood whole in the manner set forth in this Decision and Order for any loss of pay suffered by him as a result of the discrimination against him for the periods from January 23 to February 9, 1950, and from February 15 to April 10, 1950;

(3) Upon request make available to the National Labor Relations Board, or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary for a determination of the amount of back pay due under the terms of this Order;

(4) Post at its place of business in Pittsburgh, Pennsylvania, copies of the notice attached hereto and marked Appendix B.⁷ Copies of said notice, to be furnished by the Regional Director for the Sixth Region, shall be duly signed by the Respondent Employer's representative immediately upon receipt thereof and promptly posted and maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent Employer to insure that said notices are not altered, defaced, or covered by any other material;

(5) Notify the Regional Director for the Sixth Region in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

⁷ In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words, "A Decision and Order" the words "A Decree of the United States Court of Appeals Enforcing."

APPENDIX A

NOTICE

TO ALL MEMBERS OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, GENERAL TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL 249, A. F. L., AND TO ALL EMPLOYEES OF SQUIRT DISTRIBUTING COMPANY

Pursuant to a Decision and Order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT cause or attempt to cause SQUIRT DISTRIBUTING COMPANY to discriminate against Gordon J. Ellwood or any other employee, in violation of Section 8 (a) (3) of the Act.

WE WILL NOT restrain or coerce any employee of SQUIRT DISTRIBUTING COMPANY in the exercise of his right to refrain from any or all of the concerted activities protected by Section 7 of the Act, except in accordance with the provisions of Section 8 (a) (3) of the Act.

WE WILL NOT give effect to the union-security provisions in our contract with SQUIRT DISTRIBUTING COMPANY until it is amended to conform with Section 8 (a) (3) of the Act.

WE WILL MAKE Gordon J. Ellwood whole for any loss of earnings sustained by reason of the discrimination against him.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA, GENERAL TEAMSTERS, CHAUFFEURS
AND HELPERS, LOCAL 249, A. F. L.

Labor Organization.

By _____
(Representative) (Title)

Dated _____

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT by discharge, layoff, or refusal to hire, or in any like or similar manner interfere with, restrain, or coerce our employees in the exercise of their right to refrain from self-organization, from forming, joining, or assisting labor organizations, from bargaining collectively through representatives of their own choosing, and from engaging in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

WE WILL NOT give effect to the union-security provision in our contract with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, GENERAL TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL 249, A. F. L., unless or until it is amended to conform to the requirements of Section 8 (a) (3) of the Act.

WE WILL MAKE Gordon J. Ellwood whole for any loss of earnings he has sustained as a result of the discrimination against him.

All our employees are free to become, remain, or to refrain from becoming or remaining, members in good standing of the above-named union or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the amended Act.

SQUIRT DISTRIBUTING COMPANY,

Employer.

By -----
(Representative) (Title)

Dated -----

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Emil E. Narick, Esq., for the General Counsel.

William C. Blesch, Esq., of Pittsburgh, Pa., for the Respondent-Employer.

STATEMENT OF THE CASE

Upon charges and amended charges duly filed January 24, June 6, and June 16, 1950, by Gordon J. Ellwood, an individual, in Case No. 6-CA-256, against Squirt Distributing Company, herein called the Employer, and in Case No. 6-CB-91, against International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, General Teamsters, Chauffeurs and Helpers, Local 249, A. F. L., herein called the Union, the General Counsel of the National Labor Relations Board, herein called respectively the General Counsel and the Board,

by the Regional Director for the Sixth Region, consolidated the cases for hearing, and issued his complaint dated June 16, 1950, alleging that the Employer had engaged in and was engaging in unfair labor practices within the meaning of Section 8 (a) (1), (2), and (3), and Section 2 (6) and (7) of the National Labor Relations Act, 61 Stat. 136, herein called the Act, and that the Union had engaged in and was engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) and (2) of the Act. Copies of the charges, the order consolidating the cases, the complaint, and a notice of hearing were duly served upon the Employer and the Union, herein called Respondents, and Ellwood.

With respect to unfair labor practices the complaint alleged that: (1) The Employer on or about the dates of January 24 and February 13, 1950, unlawfully discharged Ellwood and after the latter date refused to reinstate him because he was not a member of the Union; (2) the Employer entered into, on May 14, 1949, and on May 1, 1950, a collective bargaining agreement with the Union containing an unlawful union-security clause; and (3) the Union on or about January 18, January 24, and February 13, 1950, insisted and demanded that the Employer discharge Ellwood because Ellwood was not a member of the Union.

The answer of the Employer, dated June 23, 1950, denied the commission of unfair labor practices.

Pursuant to notice, a hearing was held in Pittsburgh, Pennsylvania, on July 5, 1950, before the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel and the Employer were represented by counsel, participated in the hearing, were afforded full opportunity to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues. The Union, although duly served, filed no answer and did not appear at the hearing. At the opening of the hearing, the General Counsel moved for judgment on the pleadings, as provided in the Board's Rules and Regulations, against the Union. I reserved ruling on the motion. It is hereby granted.

At the close of the hearing, a discussion in the nature of oral argument was had and all parties were given opportunity to file briefs. None has been received.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT¹

I. THE BUSINESS OF THE EMPLOYER

The Employer is a Pennsylvania corporation with its sole office and place of business located in Pittsburgh, Pennsylvania, where it is engaged in the sale and distribution at wholesale of "Squirt," a nationally distributed, carbonated beverage, and "Kayo Chocolate," a nationally distributed chocolate drink. The Employer holds exclusive franchises for such distribution in Allegheny County and Ambridge, Beaver County, in the State of Pennsylvania, from the Squirt Bottling Company, herein called the Bottling Company, and from Alan Zeeman, herein called Zeeman, both of Pittsburgh.

During the 12-month period preceding the hearing, the Employer purchased from the Bottling Company, beverages having an approximate value of \$175,000, all of which originated in Pennsylvania. During the same period the Employer

¹ These are made upon the undisputed and credited testimony of Ellwood and Sam Berkowitz, the only witnesses called, and upon stipulations made at the hearing.

sold these beverages to various retail outlets in its assigned territory for a price of approximately \$230,000. During the same period the Employer purchased, within Pennsylvania, Kayo Chocolate to the approximate amount of \$55,000, and sold this product to retail outlets within Pennsylvania for approximately \$80,000.

The Bottling Company is a Pennsylvania corporation engaged in the bottling of Squirt products for distribution in 10 counties in western Pennsylvania under an exclusive franchise from the Squirt Company, Beverly Hills, California. During the 12-month period preceding the hearing, the Bottling Company purchased syrups and other supplies necessary for the production of Squirt to the approximate value of \$140,000, about 85 percent of which was shipped to the Bottling Company from points outside Pennsylvania. During the same period, the Bottling Company sold Squirt, all in Pennsylvania, to the approximate value of \$330,000.

Zeeman bottles Kayo Chocolate under exclusive franchise from Chocolate Products Corporation, Chicago, Illinois. During the past year, Zeeman and his predecessor purchased supplies used in the bottling operation to the amount, approximately, of \$22,000, all of which was shipped from points outside Pennsylvania, and sold the bottled product through the Employer and other distributors for an amount approximating \$84,000.

I find that the Employer is an essential link in a chain of national distribution from the Squirt Company in California and the Chocolate Products Corporation in Illinois, to retailers in western Pennsylvania. I find that the operations of the Employer, as it concedes, are in commerce and affect commerce within the meaning of the Act.²

II. THE UNION

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, General Teamsters, Chauffeurs and Helpers, Local 249, is a labor organization affiliated with the American Federation of Labor, admitting to membership employees of the Employer.

III. THE UNFAIR LABOR PRACTICES

A. *The several discharges of Gordon J. Ellwood*

During the cooler seasons of the year, the Employer operates seven or eight truck routes using the services of seven or eight driver-salesmen. During the summer months, two or three routes, and driver-salesmen, are added.

In July 1949, Gordon J. Ellwood was hired as a driver-salesman, with the understanding that his employment would terminate in the fall, as it did. Sam Berkowitz, the Employer's president and active manager, suggested to Ellwood that the latter, after working 30 days, apply for membership in the Union. In July, Ellwood approached Edward Michalak, the Union's shop steward, in that connection. Michalak replied that Ellwood would be admitted to membership when his employment became permanent. Ellwood again brought up the subject of membership with Michalak in August and received the same reply.

Ellwood's job ended in September but Berkowitz, impressed by the former's industry and ability, called him back during the fall months whenever the need for an extra driver arose. The Union made no protest in respect to this intermittent employment of one who was not its member.

² *The Red Rock Company and The Red Rock Cola Company*, 84 NLRB 521.

One of the permanent drivers having been discharged, Berkowitz recalled Ellwood on January 17, 1950, and informed him that he was being given permanent employment. Ellwood worked the remainder of the week which ended January 20.

On January 23³ Ellwood reported for work to learn that the Union had protested his employment; that Melvin Humphreys, vice president and business agent for the Union, was insisting that Berkowitz replace the discharged driver with a member of the Union.

Shop Steward Michalak, frequently consulting by telephone with Humphreys, urged that a man be dispatched from the Union to fill the vacancy. Berkowitz insisted that the job be given to Ellwood. When Michalak told Berkowitz that unless he complied, the drivers would not work, Berkowitz capitulated, one, Rumpler, a member of the Union, was dispatched to the job. Ellwood was terminated.

Berkowitz testified credibly that he quickly became dissatisfied with Rumpler and that, on Wednesday, February 8, 1950, he told Steward Michalak that Rumpler was to be discharged. Michalak asked that Rumpler be permitted to finish the week. Berkowitz consented.

On Thursday, however, Rumpler was ill and did not appear for work. Berkowitz called Ellwood who substituted for Rumpler that day and the next. On Friday, the other drivers at first refused to start their routes until they were advised by Business Agent Humphreys that Ellwood was substituting for Rumpler on a temporary basis. At the close of the day, Berkowitz told Ellwood to return on Monday; that his job would then be permanent.

Hopeful, as ever, Ellwood did so. Whatever premonition of difficulty he may have held was quickly shown to have substantial basis in actuality. Steward Michalak insisted to Berkowitz that Rumpler be retained. Berkowitz refused. Michalak (fortified by telephonic consultation with Humphreys) retreated in good order to his next strong point and there stood immovable behind his final insistence that no one not supplied by the Union could work the route if Rumpler did not. The battle lines were drawn. Berkowitz stubbornly clung to his position that the job was Ellwood's.

There being no further "give" in Berkowitz and no disposition not to "take" on the part of Michalak, a stalemate resulted. The Union would not permit its members to work; Berkowitz would not discharge Ellwood. So, neither Squirt nor Kayo Chocolate was distributed in Berkowitz's territory on Monday or Tuesday, causing a loss of about \$500 to Berkowitz.

On Tuesday, Humphreys met with Berkowitz and upon the promise that Ellwood could be given the next permanent job that might open if a man dispatched from the Union was put in Rumpler's place, a compromise was reached. The drivers returned to work on Wednesday. Ellwood retired to the ranks of the unemployed.

On April 10, without objection from the Union, Ellwood was given a permanent job as driver-salesman by Berkowitz.

To state the facts is to decide the case. By terminating Ellwood's employment on January 23 and February 15, 1950, at the insistence of the Union, because Ellwood was not a member of the Union and had not been dispatched by it, the Employer discriminated in regard to Ellwood's hire and Tenure of employment thus encouraging membership in the Union in violation of Section 8 (a) (3) of the Act. It is so found. I also find that by such discrimination the Employer

³ Ellwood placed these happenings on the 24th, I believe mistakenly.

interfered with, restrained, and coerced employees in the exercise of their rights under Section 7 of the Act and thereby violated Section 8 (a) (1) of the Act.

The discrimination found may not be justified by the "union shop" clause in the agreement, then existing between the Respondents, as will appear.

B. The contracts; assistance and support to the Union

On May 14, 1949, Respondents entered into a collective bargaining contract covering a unit of driver-salesmen and, the Union having been successful in a UA election conducted by the Board, incorporating a union-security clause reading:

All drivers and helpers in the employ of the Employer shall come under this Agreement and shall as a condition of employment become members and maintain membership in good standing in the Union for duration of this Agreement. All new employees in the employ of the Employer coming under this Agreement shall join the Union as a condition of employment and continue their membership for the duration of this agreement.

The contract remained in effect until April 30, 1950, and was succeeded by another, expiring April 30, 1951, containing the same clause. By requiring membership in the Union of all who are, or become employees of the Employer, without allowing the 30-day period required by the Act, the clause is patently unlawful. In practice, in the case of Ellwood, it was given application even more stringent and discriminatory than its language could justify. True enough Ellwood was not required, or indeed permitted, to join the Union when he had temporary employment but as soon as he was offered a permanent job, the Union acted as if it had a closed-shop agreement with the Employer and demanded that only its members be given such employment.

The union-security provision, failing as it does to satisfy the requirements of the proviso in Section 8 (a) (3) of the Act is illegal.⁴ By continuing such a clause in effect after July 24, 1949,⁵ and by incorporating it in the new contract on June 14, 1950, the Employer imposed a restraint upon those employees desiring to refrain from union activities within the meaning of Section 7 of the Act and thereby violated Section 8 (a) (1) of the Act. Further, by assenting to the unlawful union-security clause since July 24, 1949, the Employer has lent its support to the Union in securing members and has coerced its employees to become members of the Union in violation of Section 8 (a) (2) and (1) of the Act.⁶

C. The Union's violations of the act

I find, that by failing to answer the complaint and by not offering any excuse for such failure, the Union has admitted the pertinent allegations of the complaint with respect to violations of Section 8 (b) (1) (A) and (2).

I find, therefore, that by causing the Employer in violation of Section 8 (a) (3) of the Act, on January 23 and February 15, 1950, to terminate the employment of Ellwood and by attempting to cause such termination on February 13 and 14,⁷ the Union violated Section 8 (b) (2) of the Act.

⁴ *Salant & Salant, Incorporated*, 87 NLRB 215.

⁵ The beginning of the 6-month period before the charge was filed.

⁶ *Salant & Salant, Incorporated, supra*.

⁷ The strike on these dates had but one objective, the unlawful one of forcing the discriminatory discharge of Ellwood. Thus the Union alone caused Ellwood to lose his employment for those 2 days.

By such conduct and by continuing in effect since July 24, 1949, a collective bargaining agreement containing an unlawful and union-security clause, the Respondent Union restrained and coerced employees in the exercise of their rights under Section 7 of the Act and thereby violated Section (b) (1) (A) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondents set forth in Section III, above, occurring in connection with the operations of the Employer, described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Ellwood having been discriminatorily deprived of opportunity for permanent employment with the Employer from January 23 to April 10, 1950, I will recommend that he be made whole for any loss of earnings he sustained as a result of the discrimination against him by payment to him of a sum of money equal to that which he would have earned as wages during the period less his net earnings.⁸ The Employer shall make available to the Board upon request, payroll and other records to facilitate the computation of the amount of back pay.⁹

Where, as here, an employer and a union commit unfair labor practices which in combination result in a discriminatory discharge, the Board has uniformly required, where the pleadings and the statute permitted that both make whole the subject of discrimination without attempt to prorate or allocate the financial burden between them. The concern of the Board in this aspect of the case is, in the public interest, to restore to the extent practicable, the *status quo*. However, counsel for the Employer argued at the hearing that the Union was the active, motivating force which made it a practical impossibility for Ellwood to continue as a permanent employee on January 23 and February 13; that the Employer was willing, and indeed eager, to keep Ellwood in its employ. The evidence fully supports the argument. I am convinced that the strike of February 13 presented to the Employer the unhappy choice of violating the Act by discharging Ellwood or suffering a protracted and expensive shutdown of its business. That it succumbed only to strong economic pressure does not of course, excuse the violation but it is convincing proof of the Employer's bona fides. The facts of this case require, I believe, that consideration be given to inherent equities; that recognition be taken of the fact that here the Employer was actually helpless to resist the demands of the Union; and that it be said that he who forces the commission of an unfair labor practice is in a different situation from the reluctant, protesting, and coerced tool through which the violation is accomplished. I will recommend therefore that the Union alone¹⁰ be required to make Ellwood whole for the period from February 13 to the date he was given permanent employment, April 10.

⁸ *Crossett Lumber Company*, 8 NLRB 440, 497-8.

⁹ *F. W. Woolworth Company*, 90 NLRB 289.

¹⁰ The objection suggests itself that by such a disposition of the back-pay problem I am encouraging employers to accede to an unlawful demand for discharge; that such an employer may understand that if he does so in the face of a threatened strike he will not be required to make whole the discharged employee. This remedy does not stand for such a principle and is fashioned for use only in the case here presented where the Employer did resist the unlawful demand, was subjected to a strike, and suffered a substantial financial loss.

As for the earlier period of discrimination, from January 23 to February 9, no novel problem appears. The Union demanded Ellwood's discharge, unlawfully. The Employer complied, unlawfully. The mitigating circumstance of an actual strike with attendant financial loss to the Employer was not present. I will recommend that the Employer and the Union jointly and severally make Ellwood whole for his loss of wages during that period.¹¹

As Ellwood is now permanently employed by the Employer, it is unnecessary to order his reinstatement. It will be recommended, however, that he be granted seniority and other rights and privileges from the first date of discrimination, January 23, 1950.

As there is no evidence to the contrary, I assume that the Union did, in fact, represent a majority of the Employer's employees when recognition first was gained. The General Counsel concedes that subsequent to recognition the Union was successful in a union-security election conducted by the Board and thus was authorized to negotiate a union-shop agreement. As has been found the union-security clause in the agreements exceeds the bounds permitted by the Act. In a case¹² where the Board found such a clause to be illegal and made with a minority union, it required a disaffirmance of the contract and a withdrawal of recognition. The same remedy was imposed in another case¹³ where, although the contracting union was a majority representative, it had not been authorized by the employees by an appropriate election to negotiate on union security and had secured an agreement which required the employer to prefer its members in hiring.

In the latter case the Board expressly rejected the recommendation of the Trial Examiner that only the offending clause be excised. In the situation here presented, the Union was a majority representative, it had won the authorizing election, and the union-security provisions it secured in its contracts offend the Act only in that they require, in connection with union membership, to be done immediately that which the Act would permit to be delayed for 30 days. I believe that here to require a disavowal of the existing contract and a withdrawal of recognition would be doctrinaire. Such a remedy instead of tending to effectuate the policies of the Act would appear rather to subvert them by depriving the employees of representation. The Union is a majority representative, it has authority to negotiate a union-shop agreement, and there is little reason to believe that its majority status has been maintained because under the illegal clause employees could be required to join the Union immediately rather than at the expiration of 30 days. I will recommend therefore that Respondents cease giving effect to the union-security clause as now drawn and not the disavowal of the entire contract or withdrawal of recognition.

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

CONCLUSIONS OF LAW

1. Squirt Distributing Company is an employer engaged in commerce within the meaning of Section 2 (2), (6), and (7) of the Act.
2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, General Teamsters, Chauffeurs and Helpers, Local 249, A. F. L., is a labor organization within the meaning of Section 2 (5) of the Act.

¹¹ This division of responsibility for back pay makes impracticable the application of the Woolworth formula, *supra*.

¹² *Salant & Salant, Incorporated, supra*.

¹³ *Julius Resnick, Inc.*, 86 NLRB 38.

3. By restraining and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, the Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

4. By causing the Employer to discriminate against Gordon J. Ellwood in violation of Section 8 (a) (3) of the Act, the Respondent Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

5. By interfering with, restraining, and coercing employees in the exercise of their rights under Section 7 of the Act, the Employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

6. By discriminating in regard to the hire and tenure of employment of Gordon J. Ellwood, thereby encouraging membership in a labor organization, the Employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

[Recommended Order omitted from publication in this volume.]