Although the strike, since the offer of reemployment to Olga Roth on December 11, has not been one prolonged by unfair labor practices, the participants, to the extent that they have not been replaced, remain employees of the Respondent and upon unconditional application must be returned to the jobs remaining open for them. Roth has the same rights in this connection as the other strikers. Respondent, having offered her reemployment, is not now required to repeat that action. It will be recommended, however, that Respondent make Roth whole for any loss of pay suffered by her from December 6 through 11 by payment to her of whatever sum she would have earned as wages for those days, less her net earnings if any during that period.

It is apparent from the entire record that there is danger of the commission in the future by the Respondent of other unfair labor practices proscribed by the Act. In order to make effective the interdependent guarantees of Section 7 and to effectuate the policies of the Act, it will be recommended that the Respondent cease and desist from infringing in any manner upon the rights of employees guaranteed in Section 7.

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

CONCLUSIONS OF LAW

1 Leather Workers Union of Los Angeles, Local 213 of International Fur and Leather Workers Union, is a labor organization within the meaning of Section 2 (5) of the Act.

2. By interrogating employees and threatening them with reprisals for engaging in union activities or joining the Union, thereby interfering with, restraining, and coercing them in the exercise of rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

3. By discharging Olga Roth on December 6, 1951, to discourage membership in a labor organization, Respondent has violated Section 8 (a) (3) and (1) of the Act.

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

5. The Respondent has not refused to bargain with the Union in violation of Section 8 (a) (5) of the Act.

[Recommendations omitted from publication.]

JERSEY COAST NEWS COMPANY, INC. *and* RALPH RUGGIERO. Case No. 4-CA-651. June 8, 1953

DECISION AND ORDER

On March 2, 1953, Trial Examiner Eugene F. Frey issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report.[1]

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this proceeding to a three-member panel [Chairman Herzog and Members Murdock and Peterson].

The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the

[1] The Respondent's request for oral argument is hereby denied, as the record, in our opinion, adequately reflects the issues and positions of the parties

Intermediate Report, the Respondent's exceptions thereto, and the entire record in this proceeding, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[2]

ORDER

Upon the entire record in this proceeding, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Jersey Coast News Company, Inc., Asbury Park, New Jersey, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Encouraging membership in Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization of its employees, by discriminating in regard to the hire and tenure of employment, or any term or condition of employment, of any of its employees because of their nonmembership in such organization, or by any like or related conduct interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to join labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, 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.

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

(a) Make whole David Carbone, Walter Clark, Joseph Villapiano, Thomas DiFrance, James Martelli, Ralph Ruggiero, Steve Santenello, John Siliate, Frank Scannapieco, Edward McNamara, Eugene Louis Camoosa, Alphonse Santenello, Edward Westlake, Joseph Donofrio, and George Strong, and all other nonunion employees who were similarly situated, for any loss of pay they may have suffered by reason of Respondent's discrimination against them, in the manner set forth in the section of the Intermediate Report entitled "The Remedy."[3]

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[2] According to the testimony of the secretary-treasurer of the Union, a change in the Union's membership policy to take in all steady situation holders occurred on January 1, 1952. The record shows that the constitution was officially amended on May 4, 1952, to incorporate the change in policy Although in this connection the Trial Examiner inadvertently stated that the constitution was amended on January 1, 1952, this fact does not affect the Trial Examiner's ultimate conclusions or our concurrence in such conclusions. In thus agreeing with the Trial Examiner's ultimate conclusions, however, we note that, to the extent that the Union became an open union during a period when part of the discrimination found herein occurred, the instant case is distinguishable on this point both from the case of Reliable Newspaper Delivery Inc., 187 F. 2d 547 (C. A. 3) relied on by the Respondent, and the case of Gaynor News Co., 197 F. 2d 719 (C. A. 2) relied on by the General Counsel

[3] Employees' names appear as in the transcript of the hearing.

(b) Upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social-security payment records, timecards, personnel records and reports, and all other records necessary to analyze and compute the amount of back pay due under the terms of this Order.

(c) Post at its place of business in Asbury Park, New Jersey, copies of the notice attached to the Intermediate Report and marked "Appendix A."[4] Copies of said notice, to be furnished by the Regional Director for the Fourth Region, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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

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[4] This notice shall be amended by substituting for the words "The Recommendations of a Trial Examiner," the words "A Decision and Order." In the event that this Order is enforced by a decree of a United States Court of Appeals, the notice shall be further amended by substituting for the words "Pursuant to a Decision and Order", the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

Intermediate Report

STATEMENT OF THE CASE

Upon a charge and amendments thereto filed by Ralph Ruggiero, an individual, the General Counsel of the National Labor Relations Board (herein called General Counsel and the Board) issued a complaint on October 1, 1952, through the Regional Director of the Board for the Fourth Region (Philadelphia, Pennsylvania), against Jersey Coast News Company, Inc. (herein called Respondent), alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Sections 8 (a) (1) and (3) and 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. Copies of the complaint, the charges on which it was based, and notice of hearing thereon, were duly served upon Respondent, the charging party, and Newspaper and Mail Deliverers' Union of New York and Vicinity (herein called the Union).

The complaint, as amended, alleged in substance that (1) since July 1951, Respondent discriminated against 13 named employees by refusing to pay them basic wage rates, overtime rates, double time for holidays, and certain vacation benefits, as specified in an agreement made between Respondent and the Union on or about October 25, 1948, because of their nonmembership in the Union and for the purpose of encouraging membership in the Union; and (2) since April 22, 1952, Respondent discriminated against 9 named employees by refusing to pay them wage increases retroactive to October 24, 1950, and January 25, 1951, as provided in an agreement made between Respondent and the Union on or about April 1, 1952, because of their nonmembership in the Union, and for the purpose of encouraging membership in the Union, and (3) such conduct discriminated against employees in regard to their hire and tenure or conditions of employment, and thereby encouraged and tended to encourage membership in the Union, and interfered with, restrained, and coerced employees in the exercise of rights guaranteed them by Section 7 of the Act. Respondent's answer admitted the jurisdictional facts and the two agreements with the Union, but denied the commission of any unfair labor practices.

Pursuant to notice, a hearing was held at Asbury Park, New Jersey, on October 22 and November 7, 1952, before the undersigned Trial Examiner, in which all parties participated,

the General Counsel and Respondent being represented by counsel and the charging party appearing pro-se, and were accorded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues, to present oral argument, and to file briefs, or proposed findings of fact and conclusions of law, or both. General Counsel and Respondent made oral arguments and have filed briefs with the Trial Examiner. Motions of Respondent at the conclusion of the General Counsel's case and the whole hearing to dismiss the complaint on the merits were denied.

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

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT; THE LABOR ORGANIZATION INVOLVED

Respondent is a New Jersey corporation with its principal office and place of business located in Asbury Park, New Jersey, where it is engaged in the sale and distribution of newspapers and periodicals. In the course of its business during 1951, Respondent purchased and caused to be delivered at the above place of business, newspapers and periodicals valued in excess of $200,000, of which about 40 percent came from points outside the State; in that year Respondent purchased periodicals from Curtis Publishing Company of Philadelphia, Pennsylvania, and Fawcett Publishing Company of Greenwich, Connecticut, and also purchased and distributed, among others, newspapers known as the New York Times, New York Herald Tribune, New York Daily News, and New York Daily Mirror, all of which utilize the wire services of the United Press and the Associated Press. Respondent is a member of the Suburban Wholesalers Association, which has members in the States of New York and New Jersey. Respondent admits, and I find on the basis of the above facts, that Respondent is engaged in commerce within the meaning of the Act. [1]

Newspaper and Mail Deliverers' Union of New York and Vicinity is a labor organization within the meaning of Section 2 (5) of the Act, which admits to membership employees of the Respondent.

II. THE UNFAIR LABOR PRACTICES [2]

A. Collective-bargaining contracts between Respondent and the Union

On October 25, 1948, Respondent and the Union executed a collective-bargaining agreement, in which Respondent recognized the Union as the exclusive bargaining representative of all Respondent's employees in about 15 categories of work involved in the delivery and handling of newspapers, periodicals, etc. That agreement expired on October 25, 1950. [3] In its pertinent provisions, the agreement fixed the work shifts, specified wage rates payable for straight time, overtime rates for overtime hours, and double time for certain holidays, and also provided for paid vacations, the amount varying according to the number of days a man worked in the preceding year.

On April 1, 1952, the Union made another collective-bargaining agreement with Respondent which was effective retroactively to October 25, 1950, and prospectively to January 31, 1953. [4] This agreement, in pertinent part, provided for: Recognition of the Union as the exclusive bargaining agent of all employees in the same categories covered by the 1948 contract; overtime, double time, and vacation benefits substantially similar to those in the 1948 agreement; and increased wage rates for all categories of employees involved, to be retroactive in part to October 24, 1950, and in part to January 25, 1951.

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[1] WBSR, Inc., 91 NLRB 630; Press, Incorporated, 91 NLRB 1360; Record Publishing Company, 91 NLRB No. 215; Hollow Tree Lumber Company, 91 NLRB 635, Newark Newsdealers Supply Company, 94 NLRB 1667; Rockaway News Supply Company, Inc., 94 NLRB 1056. See also Jersey Coast News Co. Inc., Case 4-UA-1901.

[2] The findings herein are based on uncontradicted and credited testimony of witnesses of General Counsel, documentary proofs, and stipulations of counsel.

[3] The Union became the bargaining representative of the employees and executed its first contract with Respondent in 1944.

[4] Eleven other wholesale newsdealers were parties to the agreement, with separate rate schedules for each being attached to the contract.

B. Disparate treatment of union and nonunion employees

From July 4, 1951, to March 23, 1952, Respondent paid its employees who were members of the Union the base, overtime, and double-time rates, and accorded them the vacation benefits, as prescribed by the 1948 contract, but paid less than those rates and benefits to the following employees, who were employed in the categories covered by the 1948 contract but were not members of the Union: David Carbone, Walter Clark, Joseph Villapiano, Thomas DiFranco, John Siliato, Frank Scannapieco, and Steve Santaniello. In the same period, it also paid less than the prescribed overtime and double time rates, and vacation benefits, to James Martelli, Ralph Ruggiero, Edward McNamara, Eugene Louis Camoosa, Alphonse Santanello, and Edward Westlake. After the 1948 contract expired on October 25, 1950, Respondent continued the same disparate threatment of its union and nonunion employees.

In accordance with the terms of the contract of April 1, 1952, Respondent on April 22, 1952, paid wage increases, in the amounts and retroactive to the dates required by that contract, to all employees, members of the Union, who were on the payroll on April 6, 1952, but has never made such payments to the 13 nonunion employees named above, or to Joseph Donofrio and George Strong,[5] although each of them fell within the categories of work covered by that contract.

Under the terms of a settlement agreement executed March 14, 1952, by Respondent, and approved by the Fourth Regional Director March 21, 1952, Respondent on March 22, 1952, paid to the employees named above (except Donofrio and Strong) certain sums in settlement of any back-pay claims arising from Respondent's admitted disparate treatment of them, and the employees on the same date executed general releases to Respondent. Respondent also posted a notice announcing it would not encourage membership in the Union by discrimination against employees, nor in like or related manner interfere with, restrain, or coerce its employees.

C. Contentions of the parties

General Counsel contends that the disparity of treatment of union and nonunion employees in payment of compensation and allowance of vacation benefits, as found above, constitutes discriminatory treatment of nonunion employees because of their lack of membership in the Union, which tends to encourage membership in that labor organization, and thereby violates Section 8 (a) (3) and (1) of the Act; and that such violations render ineffective as a defense the settlement agreement of March 14, 1952, and the payments made thereunder. As to the illegality of the disparate payments, General Counsel relies principally on the case of N.L.R.B. v. Gaynor News Company, Inc., 197 F. 2d 719 (C A 2), enforcing the Board's order in 93 NLRB 299.[6] Fundamentally, he relies on the broad proposition that any disparate treatment by an employer of union and nonunion employees, consisting of preferential treatment of union members over nonunion employees, has a tendency to encourage membership in the labor organization, and in that respect tends to interfere with the employees' free exercise of their choice of bargaining representative guaranteed by Section 7 of the Act, and thus violates both Section 8 (a) (3) and Section 8 (a) (1) of the Act.

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[5] These two employees were nonregular, or temporary, situation-holders or employees, who received the union rates and benefits under the contracts, except the retroactive wage increases.

The record also shows that Steve Santaniello, Villapiano, and DiFranco had worked as summer "extra" help in 1951, 5 shifts a week for at least 5 consecutive weeks, which entitled them to the status of regular situation-holders, or employees, within the seniority provisions of both contracts; however, apparantly by oral arrangement with the Union, such employees were never considered permanent employees, or regular situation-holders, but always as "extras." The distinction between regular and nonregular situation-holders appears immaterial to the issues here, for the record shows that some nonregular situation-holders, such as Ruggiero, Donofrio, and Strong, received some, but not all, benefits accorded union members under the contracts; and employees in the same work categories performed the same work, whether they were regular, or nonregular, situation-holders. Section 6-f of the 1948 contract provided the same holiday payments for "substitutes" or "extras" as for regular employees, and section 9-b provided the same vacation benefits for "regular," "extra," and "substitute" employees.

[6] The employer filed a petition for certiorari in the U. S. Supreme Court on October 2, 1952; no decision on the application has yet come down.

Respondent argues two propositions:

(1) The violation of Section 8 (a) (3) of the Act is not the discrimination against employees in itself (in this case the admitted disparate treatment of nonunion employees), but rather the encouragement or discouragement of membership in a labor organization by means of such discrimination; to support this contention, Respondent relies on the decision of the Court of Appeals for the Third Circuit in N.L.R.B. v. Reliable Newspaper Delivery, Inc., 187 F. 2d 547.

(2) In this case the record demonstrates that in fact the nonunion employees were encouraged to seek membership in the Union by facts and circumstances other than Respondent's disparate treatment of them, which clearly negated rather than supported any conclusion that such treatment "tended" to encourage memberhip in the Union, and that in this respect General Counsel has failed to prove an essential element of his case by a preponderance of proof.

In support of its second contention, Respondent adduced uncontradicted testimony showing the following facts. Since it was organized in 1901, the Union has attained a prominent place in the newspaper distribution industry in the New York Metropolitan Area and its environs, in that it has organized most of the delivery employees of newspaper and periodical distributors in that area. Under its constitution, an applicant for admission to the Union must be between the ages of 21 and 35 years, active for 3 consecutive years in the craft, a United States citizen, and in good health;[7] however, no new applications had been accepted or new members taken in, by the Union under this provision for at least 17 years prior to 1952, because the membership lists had been closed at the beginning of that period by vote of union membership;[8] the only change in this ban occurred in 1949, when the general body voted to open the lists to permit issuance of unclaimed cards of deceased members to first sons of deceased or living members (the so-called "father-son" amendment). None of Respondent's nonunion employees fell within the above exception to the general membership ban so that they were barred from membership in the Union until January 1, 1952, when the constitution was amended to suspend the operation of the above-mentioned restrictions for the year 1952, thus lifting the ban on new memberships, for the purpose of taking in all incumbent regular situation-holders in the craft in order to clean up nonunion conditions in the industry. Under this amendment, eight nonunion regular employees of Respondent were admitted to membership in the Union on or about May 20, 1952.[9]

During 1951 and 1952, Respondent knew which of its employees were members of the Union and which were not, and was aware of the desires of its nonunion employees to join the Union, and of their inability to attain that goal because of the Union's restrictive policy.

It is clear from these facts that for many years prior to 1952, nonunion employees in the craft could not gain membership in the Union (except in one situation not applicable to Respondent's nonunion employees) and that this condition was well known to Respondent and throughout the industry.

The parties also stipulated that: In 1950, the Union petitioned the Board under Section 9 (e) (1) of the Act (Case No. 4-UA-1901) for authority to make an agreement with Respondent requiring membership in the Union as a condition of employment; an election to ascertain the employees' desires was held March 6, 1950, at which only union employees voted; it was set aside on the Union's objection, and at a new election held April 10, 1950, all employees of Respondent, including nonunion employees, were permitted to vote, and unanimously expressed their desire for a union-security contract.

Respondent claims that the Union's longstanding and notorious closed-union policy conclusively shows that its nonunion employees had long known that it was impossible to get into

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[7] Section 2 of the constitution. These requirements do not apply to employees in a shop newly organized by the Union, a situation not existing here.

[8] Section 5 of the constitution provides that no application for membership can be received during such time as the "general body" of members, by two-thirds vote at a regular meeting, rules that the membership books shall be closed. Section 6 provides that when the books have been closed, only a like vote of the general body can open them.

[9] Camoosa, Clark, Martelli, McNamara, Alphonse Santanello, Siliato, Scannapieco, and Westlake. The Union apparently did not admit Steve Santaniello, Villapiano, or Carbone, regular employees, though the first two worked until March 23, 1952, were off the payroll in April, and returned in May or June; Carbone worked through to April 27, 1952 DiFranco and Ruggiero terminated their employment December 30, 1951, and January 28, 1952, respectively, and never returned to work for Respondent

the Union, and were thus discouraged from seeking membership therein long before Respondent's disparate treatment of them. It also points to their vote for the union-security contract in the UA election as conclusive proof of their own desire, and attempt, uninfluenced by any acts of Respondent, to break through the Union's membership ban. If Respondent's first proposition is legally correct, requiring a consideration of its second point, then the above facts and circumstances furnish strong support for a finding that the nonunion employees were not in fact encouraged to seek membership in the Union by Respondent's disparate treatment of them, but rather had actually been discouraged from seeking such membership long before the period covered by the complaint, by the Union's own "closed-corporation" policy, and that, by joining in the 1950 UA election, they attempted of their own volition, long before Respondent's disparate treatment of them, to circumvent the Union's policy and gain membership therein.

However, the issue raised by Respondent's first point is basic. The crux of it is whether the purpose of Section 8 (a) (3) of the Act is to prohibit "discrimination" which is designed or reasonably calculated to encourage or discourage union membership, or to proscribe such encouragement or discouragement itself, occurring by means of discriminatory conduct. Which are the key words of the section, "discrimination," or "to encourage or discourage membership, etc?" Respondent admits that if "discrimination" is the keyword, it is clearly guilty of violation of the Act as charged However, Respondent adopts the other interpretation, relying solely on the Reliable case, supra. In that case, the employer, a newspaper and periodical distributor like Respondent, made a collective-bargaining contract in 1946 with this Union "for and in behalf of the members thereof now employed or hereafter to be employed . . . ," and supplementary contracts in 1946 and 1947 providing for wage increases and retroactive wage payments. These contracts in effect created a closed shop in favor of the Union, but allowed the employer to hire nonunion employees whenever the Union could not furnish union men for the work. The record also included an agreement of October 25, 1948, similar to that involved here, whereby the Union was recognized as the exclusive bargaining representative of all employees in certain categories of work, but the stipulated facts indicate that the discrimination complained of involved payment of retroactive wage increases to union, but not nonunion, employees, for a period in 1948 immediately preceding the execution of the 1948 agreement, and that this discrimination against nonunion employees occurred solely because they were not members of the Union and thus were not covered by the 1946 and 1947 agreements. The court found that the 1946 contract and its supplements created a closed shop in favor of the Union but constituted it as a bargaining agent only for its own members, and that in the period covered by those contracts, a majority of the employees involved were nonunion and had no bargaining agent at all. On these facts, the court found that the employer gave the union employees the benefits to which they were entitled under the contracts covering them, but did not thereby deprive the nonunion workers of anything to which they were entitled, as they were not within the contracts and thus not entitled to those benefits. The court held that in these circumstances the disparate payments did not amount to discrimination. Basically, the court took the position that, under the wording of Section 8 (a) (3), the particular offense proscribed is encouragement or discouragement of union membership by means of discrimination, and that a violation of the provision can only be founded upon proof that (1) there was actual discrimination against nonunion employees because of their lack of union membership, and (2) such discrimination actually encouraged membership in the Union. Accepting for sake of argument, however, the Board's view that "discrimination" alone is the keyword of the provision, the court concluded that the above facts, particularly the "members-only" coverage of the contracts of 1946 and 1947, failed to show actual discrimination against nonunion workers. Reverting to its own view of the elements of Section 8 (a) (3), and assuming that the admitted disparate treatment amounted to discrimination, the court concluded that the well-known circumstance that membership in the Union for nonunion workmen was a practical impossibility, because of the Union's exclusive membership policy, precluded a finding that the inevitable effect of the disparate wage payment was to encourage union membership. On this conclusion, the court set aside the Board's order. In reaching this conclusion, the court relied on judicial decisions under the Wagner Act, involving alleged discriminatory discharges, including language of the Court of Appeals for the Second Circuit in N.L.R.B. v. Air Associates, Inc., 121 F. 2d 586, purporting to indicate that Section 8 (3) of the Wagner Act required proof that the discrimination had both the purpose and effect of encouraging union membership.

In N.L.R.B. v. Gaynor News Co., 197 F. 2d 719 (C. A. 2), on which General Counsel relies, the employer, a newspaper distributor and member of the same association as Respondent, had made retroactive wage payments and payments in lieu of vacations to its delivery em-

ployees who were members of the Union, under the terms of a collective-bargaining contract of October 25, 1948, which Respondent concedes is identical in terms with the 1948 contract under consideration here. The employer did not make the same payments to its nonunion employees, although they were covered by the contract and eligible therefor; and the admitted reason for the disparate treatment was their lack of membership in the Union.[10]

The Board found that this disparate treatment of employees was a violation of Section 8 (a) (1) and (3) of the Act.[11] In resisting the Board's application to the Court of Appeals for the Second Circuit for enforcement of its order, the employer claimed that its disparate treatment of employees had neither the purpose nor effect of encouraging union membership, as required by Section 8 (a) (3), and that the Board had failed to prove such purpose or effect, relying on proof that the complaining nonunion employee had previously done everything he could, though unsuccessfully, to enter the Union, and that nothing the employer could do would further "encourage" such membership. The employer based these contentions on the Reliable case, supra. After reviewing the facts of that case, the court said (p. 722)

> There is, however, one significant distinction between that case and this one. There discrimination resulted from what the court considered the entirely legal action of the minority union in asking special benefits for its members only. The union made no pretense of representing the majority of employees or of being the exclusive bargaining agent in the plant. The other non-union employees, reasoned the Court, were quite able to elect their own representative and ask for similar benefits. Not so here The union here represented the majority of employees and was the exclusive bargaining agent for the plant. Accordingly, it could not betray the trust of non-union members, by bargaining for special benefits to union-members only, thus leaving the non-union members with no means of equalizing the situation.

As the facts in the Gaynor case are similar to those at bar, I believe that the distinction between that case and the Reliable case noted by the court applies equally well here and renders the Reliable case inapposite here.

The court in the Gaynor case also disagreed with the holding of the Court of Appeals for the Third Circuit that the Board must prove that the discrimination had the purpose and effect of encouraging union membership, to support a violation of Section 8 (a) (3). The court said (p. 722):

> Our own view comes to this: Discriminatory conduct, such as that practiced here, is inherently conducive to increased union membership. In this respect, there can be little doubt that it "encourages" union membership, by increasing the number of workers who would like to join and/or their quantum of desire. It may well be that the union, for reasons of its own, does not want new members at the time of the employer's violations and will reject all applicants. But the fact remains that these rejected applicants have been, and will continue to be, "encouraged," by the discriminatory benefits, in their desire for membership. This backlog of desire may well, as the Board argues, result in action by nonmembers to "seek to break down membership barriers by any one of a number of steps, ranging from bribery to legal action." A union's internal politics are by no means static; changes in union entrance rules may come at any time. If and when the barriers are let down, among the new and now successful applicants will almost surely be large groups of workers previously "encouraged" by the employer's illegal discrimination. We do not believe that, if the union-encouraging effect of discriminatory treatment is not felt immediately, the employer must be allowed to escape altogether. If there is a reasonable likelihood that the effects may be felt years later, then a reasonable interpretation of the Act demands that the employer be deemed a violator. To this extent, we find ourselves in disagreement with the Reliable case, and do not hesitate in holding the action here violative of both § 8 (a) (1) (2) and (3)

This reasoning of the court is equally applicable here, even though the facts show that Respondent's nonunion employees had taken some action on their own, by participating in the UA election before the discriminatory treatment accorded them, to break down the Union's mem-

[10] Respondent concedes that its disparate treatment of union and nonunion employees, and the reason therefor, is the same as in the Gaynor case.

[11] 93 NLRB 299.

bership barriers Although their desire for membership may have existed before the discrimination, it is still a reasonable conclusion that the quantum of that desire existing at the time of and during the discrimination was probably increased when they saw their union coworkers receiving additional and retroactive benefits, to which the nonunion workers were also clearly entitled under the contract for the same work which all were performing, but which they were being denied solely because of their lack of union membership

On the basic issue as to the elements comprising a violation under Section 8 (a) (3), I believe that the weight of judicial authority supports the rule enunciated in the Gaynor case. The court there cited and drew support for its conclusions from Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793. In that case the Supreme Court found no error in the Board's presumption that a plant rule prohibiting union solicitation by employees outside working hours, though on company property, was an unreasonable impediment to self-organization and amounted to a restraint upon employees' rights guaranteed by the Act. The Court held that under the plan of proceeding set up by the original Wagner Act, the Board's orders on complaints of unfair labor practices must be based on "findings on known evidence," and that "such a requirement does not go beyond the necessity for the production of evidential facts, however, and compel evidence as to the results which may flow from such facts." The Court said, "An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven."

The Court also concurred in the Board's conclusion that an employee discharged for violation of the invalid plant rule was discriminatorily discharged in violation of Section 8 (3). To the argument that the application of the rule was not discriminatory because it was impartially applied against all types of solicitation, the Court replied, "It seems clear, however, that if a rule against solicitation is invalid as to union solicitation on the employer's premises during the employee's own time, a discharge because of violation of that rule discriminates within the meaning of Section 8(3) in that it discourages membership in a labor organization." There was apparently no direct proof in that case as to the effect which the discriminatory enforcement of the rule had had upon the employees' organizational efforts or desires for union membership.

Various circuit courts have enunciated the same rules of presumptive effect, holding in substance that a finding of violation of Section 8 does not turn on the employer's intent, motivation, or on whether the conduct complained of actually interfered with any rights of employees protected by the Act, but that the test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise by employees of such rights. N.L.R.B. v. Illinois Tool Works, 153 F. 2d 811 (C. A. 7) (see cases cited therein); N.L.R.B. v. Ford, 170 F 2d 735, 738(C A 6); and N.L.R.B. v Aintree Corp , 132 F 2d 469, 472, (C. A 7), cert. den 318 U.S. 774, all involving violations of Section 8 (1) The same rule has been applied in cases of discriminatory discharges under Section 8 (3). In N.L.R.B. v. J. G. Boswell Co., 136 F. 2d 585, 595, the Court of Appeals for the Ninth Circuit held it was immaterial that there was no independent evidence that a discharged employee was either discouraged from joining (or encouraged to join) a union. The court noted the Board had expressly found that the discharge did discourage membership in a specific labor organization as well as in unions generally. The court held that "such discrimination necessarily discourages union membership--at the very least that of the discharged employee--and that therefore such discharge is ipso facto a violation of Section 8(3)," citing the Associated Press, Fansteel Metallurgical Corp., Phelps-Dodge Corp., and Link-Belt cases in the Supreme Court. This decision was followed by the Court of Appeals for the First Circuit in N.L.R.B. v. Brezner Tanning Co., 141 F. 2d 62, 65, where the court noted that an apparent contrary holding of the Second Circuit in the Air Associates, Inc., case, 121 F. 2d 586, had later been narrowly limited by that court to the particular facts of that case, in N.L.R.B. v. Cities Service Oil Co., 129 F. 2d 933, 937.

The Court of Appeals for the Third Circuit itself has followed the rule of presumptive effect in N.L.R.B. v. John Engelhorn & Sons, 134 F. 2d 553, 557, and in General Motors Corporation, 59 NLRB 1143, 1145, enforced 150 F. 2d 201. In fact, its approval of the rule in these cases involving discriminatory discharges, contrasted with its contrary holding on the admitted unusual fact situation it found in the Reliable case, compels the conclusion that the decision in the latter case can be regarded as authority only with regard to the particular facts therein. It has often wisely been said that every judicial opinion is to be read with regard to the facts as understood by the court, and the question actually decided. [12] For the same reason, the

[12] N.L.R.B. v. Cities Service Oil Co., 129 F. 2d 933, 937 (C A 2).

recent decisions of the Court of Appeals for the Eighth Circuit in N.L.R.B. v. Del E. Webb Const. Co., 196 F. 2d 702, and N.L.R.B. v. J. I. Case Co., etc., 198 F. 2d 919, which cited and followed the Reliable decision, must be considered as authority only with respect to the peculiar facts in those cases, which are distinguishable from those at bar. Thus, the Del E. Webb case involved a layoff of a union apprentice, member of Sublocal 101B composed entirely of apprentices, because of the operation of the seniority rule of the parent journeyman Local 101 under which apprentices must be laid off before journeymen, the laid-off worker was subject to the seniority rules because of his membership in the international union which chartered both locals, and his acceptance of the seniority rule governing both locals, he could not have attained membership in the journeyman local at the time of layoff because he lacked the necessary years of apprentice work, in this situation the court held his layoff for lack of membership in Local 101 could not have encouraged membership in that local because his status in the union was fixed by its rules irrespective of any acts of the employer Thus, lack of seniority status within a union, not lack of union membership, was the cause of the discrimination against him, unlike the case at bar The J. I. Case decision is similarly inapposite, for there union employees were discharged for a spontaneous temporary work stoppage and parade in the plant in protest over the discharge of a fellow union employee The court held this was a protected concerted activity, and the discharge of the participants therefor violated Section 8 (a) (1), but it held no violation of Section 8 (a) (3) occurred because the discharges appeared to have no proximate relation to their union membership, there was no fact or circumstances from which it could be inferred that the discharges were because of their union membership, and that they would not have occurred had it not been for such membership

I therefore conclude that the rule enunciated in the Gaynor News case, supra, is controlling here, [13] and on the basis thereof I conclude and find that Respondent's refusal to pay the same benefits and compensation, which it gave its union employees under the 1948 and 1952 contracts, to its nonunion employees because of their lack of union membership, was a discrimination in regard to their terms and conditions of employment which reasonably tended to encourage membership in the Union, and that Respondent thereby violated Section 8 (a) (3) and (1) of the Act. [14]

III. THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section II, above, occurring in connection with the operations of Respondent 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.

IV. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action in order to effectuate the purposes and policies of the Act.

I have found that Respondent violated Section 8 (a) (1) and (3) of the Act by paying base, overtime, and double-time rates, and vacation benefits, as prescribed by the 1948 union contract, and retroactive wage increases as required by the 1952 union contract, to its delivery

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[13] This conclusion is subject, of course, to whatever action the Supreme Court may take on the pending application for certiorari therein.

[14] See also Rockaway News Supply Company, Inc., 94 NLRB 1056; Newark Newsdealers Supply Company, Inc., 94 NLRB 1667.

Although Respondent settled the back-pay claims of all employees named in the original complaint (excluding Strong and Donofrio), and posted an appropriate antidiscrimination notice, in accordance with the settlement agreement of March 14, 1952, that settlement is no defense to the complaint herein, because the subsequent discrimination against nonunion employees in payment of retroactive wage increases under the April 1952 contract violated that agreement and the notice posted thereunder, and further violated the Act as found above. The Board will go behind a settlement agreement and consider matters antedating it and purporting to be settled by it, where the employer breached the agreement by continuing his unlawful conduct and it appears that the settlement has not served its purpose of ending the unfair labor practices. Taylor Mfg. Co., Inc., 83 NLRB 142; Carolina Mills, Inc., 92 NLRB 1141; Victor Chemical Works, 93 NLRB 1012

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department employees who were members of the Union, while refusing to make such payments to delivery department employees who were not union members although covered by those contracts. I shall recommend that Respondent make whole its nonunion employees named above, and all other nonunion employees who are similarly situated, [15] for any loss of pay they may suffered by reason of Respondent's discrimination against them as aforesaid. [16]

Respondent's violations of the Act found herein appear to be of a technical nature, based on its erroneous conception of its legal obligations under the facts found above. There is no evidence of other contemporaneous or past conduct which would indicate a predilection to commit other unfair labor practices in the future. I shall therefore recommend an order directing Respondent to cease and desist only from engaging in the unfair labor practices found herein and any like or related conduct.

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

CONCLUSIONS OF LAW

1. Newspaper and Mail Deliverers' Union of New York and Vicinity is a labor organization within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the terms and conditions of employment of David Carbone, Walter Clark, Joseph Villapiano, Thomas DiFranco, James Martelli, Ralph Ruggiero, Steve Santaniello, John Siliato, Frank Scannapieco, Edward McNamara, Eugene Louis Camoosa, Alphonse Santanello, Edward Westlake, George Strong, and Joseph Donofrio, and of other nonunion employees similarly situated, thereby encouraging membership in the above Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By such discrimination, Respondent has also interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

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

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[15] Gaynor News Company, Inc., 93 NLRB 299. It is not clear from the record that the 15 nonunion employees named in the amended complaint were the only nonunion delivery employees in the period in question.

[16] The eight nonunion employees admitted to the Union in May 1952, and Steve Santaniello, Carbone, and Villapiano, were entitled to reimbursement from July 4, 1951, to March 23, 1952, for losses in base, overtime, and double-time pay, and vacation benefits, and for the full retroactive pay increases required by the 1952 contract. Thomas DiFranco and Ralph Ruggiero are entitled to similar reimbursement from July 4, 1951, but as to DiFranco the period ends December 30, 1951, the date of his termination, and as to Ruggiero it ends January 28, 1952, the date of his termination. George Strong and Joseph Donofrio are entitled only to the full retroactive pay increases. The settlement agreement of March 14, 1952, is no bar to the backpay award, where it was breached by subsequent unfair labor practices. C & D Coal Co., 93 NLRB 799. However, in computing the amounts due, Respondent should receive credit for payments made to the above employees thereunder.

[Recommendations omitted from publication.]

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

> WE WILL NOT encourage membership in Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization of our employees, by discriminating in regard to their hire and tenure of employment, or any term or condition of employment of any of our employees because of their membership in such organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining, or other mutual aid or protection, or to refrain from any or all of such activities, 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 National Labor Relations Act, as amended.

WE WILL make the employees named below, and all other nonunion employees who were similarly situated, whole for any loss of pay they may have suffered as a result of our discrimination against them:

David Carbone	Frank Scannapieco
Walter Clark	Edward McNamara
Joseph Villapiano	Eugene Louis Camoosa
Thomas DiFranco	Alphonse Santanello
James Martelli	Edward Westlake
Ralph Ruggiero	Joseph Donofrio
Steve Santaniello	George Strong

John Siliato

All our employees are free to become, remain, or refrain from becoming members of any labor organization, except to the extent that this right may be affected by agreements in conformity with Section 8 (a) (3) of the National Labor Relations Act, as amended.

JERSEY COAST NEWS COMPANY, INC.,
Employer.

Dated..... By.....
(Representative) (Title)

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

NATIONAL CARBON DIVISION, UNION CARBIDE AND CARBON CORPORATION AND NATIONAL CARBON COMPANY, INC. *and* LOCAL 85, UNITED GAS, COKE AND CHEMICAL WORKERS, CIO. Case No. 3-CA-177. June 8, 1953

AMENDMENT TO DECISION AND ORDER

On August 22, 1952, the Board issued its Decision and Order in the above-entitled case (100 NLRB 689). Upon further consideration, it appeared to the Board that said Decision and Order should be amended. Accordingly, on April 27, 1953, the Board issued a Notice to Show Cause (104 NLRB 416), returnable on or before May 11, 1953, which return date was thereafter extended to May 25, 1953, why the Proposed Amendment to Decision and Order attached to said Notice should not issue as an Amendment to Decision and Order. None of the parties has responded to said Notice.

IT IS HEREBY ORDERED that said Decision and Order be, and it hereby is, amended by deleting the second paragraph thereof, and by substituting therefor the following: