2. Woodruff Randolph, Larry Taylor, Elmer Brown, and Don Hurd, their agents and successors, shall:

(a) Cease and desist from refusing specifically, or by insistence, upon a 60-day cancelable contract, or by any other means, to bargain collectively with any employer in the newspaper industry, where the employees of such employer comprise a unit appropriate for the purpose of collective bargaining, and a majority of such employees have designated or selected the Respondent ITU to represent them for the purposes of collective bargaining.

(b) Take the following affirmative action, which the Board finds will effectuate the purposes of the Act: Post immediately in conspicuous places at all halls and offices of the Respondent ITU and its locals, and all other places where notices to members are customarily posted, and publish in the Typographical Journal, official paper of the Respondent ITU, a copy of the notice attached hereto and marked "Appendix A."[16] These notices shall be signed by a duly authorized officer of the Respondent ITU and by the individual Respondents herein or their successors in office, and shall remain so posted and maintained for a period of 60 days.

[16] In the event this Order is adopted by a United States Court of Appeals, there shall be substituted for the words, "Pursuant to A Decision and Order" the words "Pursuant to A Decree of the United States Court of Appeals for the Seventh Circuit, Adopting an Order."

THE HULL BREWING COMPANY *and* WILLIAM LAWRENCE

THE HULL BREWING COMPANY *and* WILLIAM LAWRENCE.

Cases Nos. 1-CA-1062 and 1-CA-1241. May 6, 1953

DECISION AND ORDER

On March 20, 1953, Trial Examiner Dent D. Dalby issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief.

The Board[1] has reviewed the rulings made by 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 General Counsel's exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

[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 [Chairman Herzog and Members Styles and Peterson].

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 that the complaint issued herein be, and it hereby is, dismissed.

Intermediate Report

STATEMENT OF THE CASE

William Lawrence filed an original charge with the National Labor Relations Board, called the Board herein, on November 19, 1951, and filed a second charge on July 16, 1952. These charges, separately docketed and served, resulted in a single complaint filed by the General Counsel on November 7, 1952, alleging that The Hull Brewing Company, called the Respondent herein, violated Section 8 (a) (1), (3), and (4) of the National Labor Relations Act, as amended (61 Stat. 136), called the Act herein. The complaint in substance alleges that Respondent, a Connecticut corporation producing and selling substantial quantities of beer and ale in interstate commerce, discharged William Lawrence on or about November 10, 1951, because his membership in Local 37, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C.I.O., had been terminated for reasons other than nonpayment of dues; that he was recalled on January 14, 1952, but assigned to more arduous work until his discharge on May 12, 1952, because of his nonunion status and because of the filing of the November 19, 1951, charge. In answer to the complaint Respondent admitted the jurisdictional allegations and the November 10, 1951, and May 12, 1952, discharges, but denied the alleged unfair labor practices.

Upon notice, a hearing was held on December 19, 1952, at New Haven, Connecticut. All parties were present at the hearing and were heard. The parties were afforded an opportunity to introduce relevant evidence, to examine and cross-examine witnesses, to argue the issues orally upon the record, and to file briefs, proposed findings of fact, and conclusions of law. Briefs were filed by the General Counsel and the Respondent.

Upon the record in this case and from my observation of the witnesses, I make the findings of fact, conclusions of law, and recommendations which follow.

FINDINGS OF FACT

I. BUSINESS OF THE RESPONDENT

The Hull Brewing Company is a Connecticut corporation with its principal office and place of business at 820 Congress Street in New Haven, Connecticut. Respondent owns and operates a brewery manufacturing beer and ale which it sells and distributes in and outside Connecticut. Respondent annually purchases materials exceeding $1,000,000 in value from points outside Connectuicut, chiefly malt, grits, barley, hops, bottles, and caps, and sells beer and ale valued in excess of $25,000 outside Connecticut.

II. THE LABOR ORGANIZATION

Local 37, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C.I.O., herein called the Union, is a labor organization within the meaning of Section 2 (5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

William Lawrence was first employed by Respondent in 1940 or 1941 as a driver. He was subsequently transferred to work in the washhouse and then to the brewery where he was assigned to work during successive periods corking barrels, filtering, and hosing. Hosing consists of the transfer of brew from tanks. Lawrence has performed this job for the past 4 or 5 years either as an assistant or as hoseman. Although this work required the services of two employees part of the time, it did not provide full-time employment for either. During the time the hoseman and his assistant were not occupied in transferring the brew, they performed maintenance work such as cleaning tanks, painting, and cleaning the plant.

On January 29, 1951, the hoseman, Quetkat, quit and Lawrence, his assistant, was assigned to his job. Another employee, Kenneth Cook, was assigned to assist Lawrence. However, Cook was reassigned to other work from time to time for periods varying from several hours to a few days. When Lawrence needed assistance during those periods his foreman either personally assisted or assigned another employee to assist.

In September 1951 the Union sponsored the Brewery Workers Ball and required each member to purchase a $2.50 ticket. Lawrence refused, and as a consequence was expelled from the Union. Respondent's plant supervisor, Brewmaster Thomas F. Healey, afraid that Lawrence's continued employment after expulsion from the Union would cause difficulty between the Union and Respondent, urged Lawrence to buy the ticket and even offered to pay for it. This Lawrence refused to permit. A second attempt by Healey to adjust this matter with Lawrence was also unsuccessful. Lawrence explained this encounter with his supervisor: "He met me up on the rue cellar that day and I was very, very busy there and started to talk about this ticket and I says I'm sorry, Mr. Healey, I'm very busy. I have to get down to see to my work."

In November 1951 Respondent laid off 5 employees because of a shortage of work. Included in these 5 was Lawrence, the only brewhouse employee to lose his job. Lawrence was laid off out of seniority.[1] Although the contract between Respondent and the Union contains a union-security provision,[2] Healey, who discharged Lawrence, claimed that the discharge was not made because of nonunion membership. He was selected for discharge, according to Healey, under the belief that the union agreement and particularly the seniority provisions did not apply to nonunion employees. Another nonunion employee, Charles C. Carruthers, was also laid off.

After Lawrence's discharge Cook was assigned to the hosing job. Cook performed this work without a regular assistant calling upon the foreman, Francis F. Zaehringer, for as-

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[1] Section IV of the contract between Respondent and the Union reads in part:

> Paragraph A. Should it become necessary to lay off employees, all temporary employees in the respective departments shall be laid off before any regular employee is laid off. If further layoffs are necessary, regular employees shall be laid off in their respective departments in accordance with their seniority, the last employee hired being the first to be laid off, and so on in that order.

Thirteen employees in the brewhouse (the department in which Lawrence worked) had greater seniority than Lawrence. Nine had less seniority.

[2] Section II of the contract provides:

> Paragraph A: All employees covered by this agreement shall, as a condition of continued employment, become members of the union not later than 31 days from the date of execution of this agreement and shall thereafter maintain their membership in the union in good standing.
>
> All employees hired hereafter shall, as a condition of continued employment, become members of the union not later than 31 days after the commencement of their employment and shall thereafter maintain their membership in the union in good standing.
>
> B: An employee who is expelled or suspended from the union because of non payment of initiation fees and dues (including such other obligations to the union, failure to pay subject to discharge under the Labor Management Relations Act of 1947) and an employee who is expelled or suspended from the union for any reason for which he may lawfully be discharged under the legislation which may be applicable during the term of this agreement shall be subject to dismissal two days after notification, in writing, to the employer by the secretary of the local union; provided, however, that if the expulsion or suspension is for non payment of initiation fees or dues and payment of such arrearage is made within such two-day period, the employer shall not be required to discharge such employee.
>
> C: In the event that legislation is enacted during the term of this agreement permitting the execution of a closed-shop union security clause, the parties agree to meet and negotiate with regard thereto. Any agreement which may be reached as a result of such negotiation shall automatically replace Paragraph A of this section, beginning with the date of that agreement.
>
> The history of bargaining in the brewing industry recognizes the principle of closed shop, but the terms and conditions under which the closed shop may be established are subject to negotiation.

sistance when needed. Zaehringer then assigned a man to assist Cook on a temporary basis or personally assisted himself.

The discharges of Lawrence and Carruthers were the bases of charges filed with the Board, the one filed by Lawrence (1-CA-1062) being the original charge involved in this proceeding. These charges were adjusted by a settlement agreement dated January 22, 1952, between the Board and Respondent pursuant to which Respondent reemployed Lawrence and Carruthers, made them whole for loss of wages resulting from their discharges, and posted at its plant a notice assuring employees it would not restrain or coerce them in their right to refrain from concerted activities guaranteed by Section 7 of the Act. In anticipation of the settlement agreement which provided for reinstatement of Carruthers and Lawrence "to their former or substantially equivalent positions," Lawrence was reemployed on January 14, 1952, and reassigned the following day to his former position replacing Cook. Carruthers was also reemployed. After Lawrence resumed his position as hoseman he continued to work on the same basis as Cook, that is, calling upon Zaehringer for assistance when needed but having no full-time assistant.

An increase in production necessitated more frequent requests by Lawrence to Zaehringer for assistance. Lawrence also requested on occasions (estimated by him to be about once every 2 weeks) for a regular assistant. On 1 such occasion Zaehringer indicated he would get Lawrence a regular assistant. Subsequently, Lawrence again asked Zaehringer for a helper and was advised by Zaehringer that he had talked to Healey about it. Zaehringer shrugged his shoulders to indicate the results of his conversation with Healey. Lawrence also discussed the need of a regular helper with Thomas Cunningham, the shop steward. However, no regular assistant was assigned to the hosing job.

On Friday, May 9, 1952, the following conversation, as related by Lawrence, occurred:

> Mr. Healey came down and he says "Monday you go upstairs to work." He said "you're always complaining you can't do this work," and, he says, "Monday you go upstairs."
>
> And I said "Have you read the order that the Labor Board posted at the clock there where we punch in?" I says, "Go read the notice." I says, "That notice says I work down here in cellar." I said, "What type of work do I do upstairs?" He says, "You work on the filter." I told him I wouldn't go up on the filter. I said, "I'm coming here to work because the Labor Board had directed me to come down here to work."
>
> And then I says to him as he walked away, I says, "You have discriminated against me ever since I came back." He says "I haven't said a word." I said "I'm going to report you to the Labor Board " He said "I wish you would."
>
> And that was that.

After this conversation Lawrence told his foreman, Zaehringer, that he couldn't do the filtering work because "it bothers me around here . around my abdomen." Lawrence also protested to Cunningham, the shop steward, his pending transfer to a new job. Both Zaehringer and Cunningham urged him to try the new assignment.

Lawrence reported for work the following Monday indicating that he was ready to go to work at his old job. Zaehringer urged him to work at his new assignment but Lawrence refused. Zaehringer then reported the situation to Healey. As a result Lawrence had a further conversation with Healey which Lawrence related as follows:

> Mr. Healey came out of the cellar and says "Did you go up on the filter?" I says "No, I didn't go up on the filter." He said "What work can you do?" I says "That's my job in the cellar. I says "The Labor Board says I go back to the cellar." I says to him "You didn't want me in that cellar for a long, long time." He says "You're right." I says "For what reason?" He walked away; he wouldn't answer me. That was that. Then I went home.

Lawrence left the job and did not return. Cook was assigned to take Lawrence's place and performed the job without a regular assistant. Lawrence had been afflicted with a hernia in the course of his employment with Respondent. He had undergone an operation which corrected this condition, the cost of which had been paid for by Respondent. Consequently, Respondent's supervisory employees including Healey were aware of Lawrence's condition.

The issues thus presented are (1) whether Lawrence's reemployment as a hoseman without an assistant was discriminatory and a breach of the settlement agreement; and (2) whether this reemployment and his subsequent transfer from the hosing job to filtering was motivated by his nonunion status and his filing of charges with the Board and therefore a violation of the Act.

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Before determining whether Respondent by the outlined course of conduct has engaged in unfair labor practices, preliminary consideration of the effect to be accorded the settlement appears desirable. The Board has determined that settlement agreements reached with the approval of an agent of the Board are to be honored, unless the alleged unfair labor practices have been continued in such a way that it seems necessary to go behind the agreement in order to effectuate the provisions of the Act. Wooster Brass Company, 80 NLRB 1633, 1634, and cases cited. And see The Wallace Corporation v. N. L. R. B., 323 U. S. 248, 254-5; Poole Foundry & Machine Co. v. N. L. R. B., 192 F. 2d 740 (C. A. 4); N. L. R. B. v. May Department Stores Company, 154 F. 2d 533, 539(C. A. 8). The Board's practice in such cases is not to consider as evidence of unfair labor practices conduct of a respondent antedating the settlement, unless respondent has failed to comply with the agreement or has engaged in independent unfair labor practices since the settlement. Larrance Tank Corporation, 94 NLRB 352, 353; Rice-Stix of Arkansas, Inc., 79 NLRB 1333, 1334, and cases cited.

In determining whether Lawrence's reemployment as a hoseman without an assistant was a continuation of Respondent's discrimination, it should be noted that he was reemployed in January 1952 during the slack winter season. In previous years the hoseman was not provided with a regular assistant during the slack season. However, Respondent's production gradually increased until it reached a peak during the summer months of June, July, and August. While there is a conflict in the testimony, the fair preponderance indicates that prior to Lawrence's reemployment an employee was regularly assigned part of the year to assist the hoseman. After Lawrence's reemployment a helper was assigned to assist him only as needed. This need was determined by Zaehringer from a study of the plant's projected production plans or from the hoseman's request for help. There is no showing that needed assistance was ever refused. While recognizing that there is a distinction between having a regular assistant even though he is not constantly needed and having a temporary assistant available upon request, that distinction is not of sufficient substance to warrant a finding of discriminatory conduct by Respondent. Consequently, I find that Respondent did comply with the settlement agreement in its reemployment of Lawrence.

This leaves for decision the crux of the case--whether, as contended by the General Counsel, the transfer of Lawrence was part of a discriminatory design by Respondent to precipitate a termination of his services by assigning him to work he could not or would not perform.

The hosing job involves the transfer of beer between tanks or from a tank through the filter. The operation is performed by connecting hoses and opening valves to send compressed air into the tank to be emptied. The hoseman also mixes a solution in a large can and empties this into the tank. If, as sometimes happens, the lines become frozen the hoseman carries buckets of hot water from the upper part of the plant which he uses to thaw out the lines. During the time the beer is being transferred it is necessary that the operation be watched closely to prevent air from getting into the beer lines which would cause the beer to become cloudy and unsaleable. This process sometimes lasts a full workday. As previously indicated, during part of this period when a close watch must be maintained at two places at once the services of a helper are required. There are substantial periods during the workweek that the hoseman devotes to maintenance work such as cleaning tanks, painting, and cleaning up when an assistant is not required. Other manual work is involved in the hoseman's work such as moving ladders, moving hoses, and carrying water.

The filtering job is performed by 2 men working together. It consists in removing 22 plates from the filter each weighing 30 or 35 pounds and replacing them with unused plates. The unused plates are produced by the filtermen by mixing a filter mass with water in a washtub and emptying the mixture in a hydraulic press which is activated to compress the filter mass and remove the water. The filter work is performed from 2 to 3 days during the week although at times when the plant is busy filters are changed more often. During periods in the workweek when work on the filters is not required the filter operators, like the hoseman, perform maintenance work.

Of the 2 jobs the hosing job requires less manual effort but necessitates a greater degree of responsible attention to the job. The difference between the 2 jobs was accurately described by Zaehringer:

> And on the filter you set a pace and work without being driven. There [on the filtering job] you can set your own pace, but downstairs [on the hosing job] the cellar can run you. There's the difference.

The compensation on both jobs is the same.

In obtaining perspective, the facts heretofore presented should be viewed against the background of the Respondent's normal labor relations. Respondent operates a small brewery, about the only one remaining in the State of Connecticut Its employees are organized and protected by a union-shop contract.[3] One of Respondent's operational problems is to provide a full workweek for its employees. In this respect the Company's policy as expressed by Assistant Brewmaster James J. Reynolds is "to keep this union proposition happy." Respondent thus hoped to obtain more lenient demands from the Union, and preserve its competitive position with other breweries.

Lawrence's expulsion from the Union and its consequences--the discharge and reinstatement by Respondent--caused an increase in the antipathy which other employees felt toward him to a point where some avoided speaking to him. That this feeling was either shared or anticipated by Healey is indicated by his conversation with Lawrence on January 14, 1952, the day of his reinstatement. Lawrence related this conversation with Healey:

> The very first day in two hundred cellar he says to me "your not paying any dues," he says, "What will the fellows think?" I said "Our dues have been offered." And he said "What will they think?"

This conversation, which was not denied or explained by Healey, discloses that Respondent was concerned with the effect on other employees of Lawrence's nonunion status.

Healey told Lawrence that he was being transferred because he was always complaining that he could not do the work. At the hearing, however, Healey stated that the transfer was prompted by his fear that a possible mistake in the performance of the hosing job resulting from a failure of cooperation between Lawrence and his helper would cause spoilage of a batch of beer. A third reason for the transfer was given by Assistant Brewmaster Reynolds.[4]

Although unsatisfactory explanations do not themselves spell out discriminatory motivation, Radio Industries, Inc., 101 NLRB 912, these differing reasons for the transfer create a suspicion that they were presented to conceal an unlawful motive N. L. R. B. v. Yale & Towne Manufacturing Company, 114 F. 2d 376, 378 (C. A. 2). This suspicion is strengthened by other circumstances. The decision to transfer Lawrence was made by Healey after consultation with Respondent's board of directors. It was made with the knowledge that Lawrence had had an operative hernia. Lawrence had performed the filtering job on a temporary basis subsequent to his operation and had complained to Zaehringer of abdominal pains as a result On 3 or 4 of these occasions he had gone home early. Respondent's supervisors were aware, too, that Lawrence performed the filtering job under an arrangement that Lawrence made with his coworker to have him remove the last six filters. "He [Lawrence] said that he didn't like to pick up those because it might strain him, so the other fellow picked them up."[5] The transfer of Lawrence to the filtering job would place him in a close working relationship with at least one other employee, when on hosing he generally worked alone with sporadic assistance from another worker. Considering the animus which some of the other employees felt toward Lawrence, it would appear that greater plant harmony would result from maintaining the existing work assignments.

However in divining the motive which prompted the transfer, consideration must also be given to the factors that tend to allay this suspicion. Lawrence's foreman urged him to try the filtering job and assured him that it was not "too bad." When Lawrence protested the transfer Healey asked him what work he could do, disclosing a willingness to consider other suggestions. The attitudes indicated by both of these statements runs counter to the theory that the reassignment was made for the purpose of placing Lawrence in a job too difficult for him to perform in order to induce his resignation If this theory were correct, Respondent's supervisors would not have encouraged him to try his new job or left open the possibility of another assignment. While, based upon his previous experience, there is some doubt as to Lawrence's ability to perform the filtering job, Respondent was not unreasonable in expecting him to try it again since that previous experience occurred some 3 years before and closely followed his hernia operation.

Upon balancing these conflicting considerations, I have concluded that the evidence here, though raising a strong suspicion that a discriminative motive prompted the decision to

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[3] See footnote 2.

[4] Reynolds testified that it was made to provide a position for Cook in order that Cook could effectively act as assistant to Foreman Zaehringer, Lawrence not being qualified for the assistant's job. However, no logical reason was given as to why Cook could not act as Zaehringer's assistant in any other job supervised by Zaehringer. I do not credit Reynolds' testimony.

[5] Reynolds' testimony.

transfer Lawrence, yet fails to constitute the preponderance necessary to establish that Respondent was illegally motivated. W. C. Nabors Company, 89 NLRB 538, enfd. 196 F. 2d 272; Radio Industries, 101 NLRB 912. A violation of the Act cannot be established "on suspicion alone." Strachan Shipping Co., 87 NLRB 431, 433. It is therefore found that Respondent did not, in making the May 12, 1952, transfer of Lawrence to the filtering job, discriminate against him. Consequently the termination of Lawrence's services which followed did not constitute a constructive discharge.

CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of Section 2 (5) of the Act.
2. Respondent is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.
3. Subsequent to January 14, 1952, when William Lawrence was reemployed, Respondent has not engaged in unfair labor practices within the meaning of Section 8 (a) (1), (3), and (4) of the Act.

[Recommendations omitted from publication.]

REYNOLDS & MANLEY LUMBER COMPANY, INC. *and* INTERNATIONAL UNION OF MINE, MILL & SMELTER WORKERS.

Case No. 10-CA-1125. May 6, 1953

NOTICE TO SHOW CAUSE

On November 30, 1951, the Board issued its Decision and Order in the above-entitled case.[1] In finding with the Trial Examiner that the Respondent's refusal to reinstate striker Joe Brown was violative of the Act, the Board relied on the principle enunciated in Mid-Continent Petroleum Corp.[2] Thereafter, the Board issued its Decision in Rubin Brothers,[3] modifying in certain respects the Mid-Continent doctrine. On April 13, 1953, the Court of Appeals for the Fifth Circuit denied enforcement of the Board's Decision and Order in the Rubin Brothers case (203 F. 2d 486). Under these circumstances, the Board deems it appropriate to reexamine its decision as to Brown. Upon reconsideration, it appears to the Board that said Decision should be amended in the manner set forth in the Proposed Amendment to Decision and Order, attached hereto.

Please take notice that unless on or before May 18, 1953, proper cause to the contrary is shown (with affidavit of due service of copies upon the parties to this proceeding), the National Labor Relations Board will issue as an amendment to Decision and Order, the proposed amendment attached hereto.

PROPOSED AMENDMENT TO DECISION AND ORDER

Paragraph 2 of the Decision and Order herein (97 NLRB 188, 191) is hereby deleted.

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[1] 97 NLRB 188.
[2] 54 NLRB 912, 933-34.
[3] 99 NLRB 610.