

44, AFL-CIO, with respect to the effects on our employees of our decision to close the Blecker Street plant, and reduce to writing any agreement reached as a result of such bargaining.

WE WILL pay the employees of the Blecker Street plant their normal wages for the period required by a Decision and Order of the National Labor Relations Board.

ROYAL PLATING AND POLISHING CO., INC.,
Employer.

Dated _____ By _____
(Representative) (Title)

Employees may communicate directly with the Board's Regional Office, 614 National Newark Building, 744 Broad Street, Newark, New Jersey 07102, Telephone Market 4-6151, if they have any question concerning this notice or compliance with its provisions.

Zoe Chemical Co., Inc. and Margaret Weber, Esther Hay, Florence Gagan, Mary Di Guiseppe, Madeline Gioletti, Margaret Pisarra, Elizabeth Enzman, Helen Sujkowski, Rose De Giacomo, Julia Struffolino, Mary Fink, Ana Bustos and Local 803, Allied Aluminum and Industrial Union, Party to the Contract

Local 803, Allied Aluminum and Industrial Union (Zoe Chemical Co., Inc.) and Mary Di Guiseppe, Madeline Gioletti, Elizabeth Enzman, Rose De Giacomo, Julia Struffolino, Margaret Pisarra, Esther Hay, Margaret Weber, Florence Gagan, Helen Sujkowski, and Zoe Chemical Co., Inc., Party to the Contract. *Cases 29-CA-39-1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, 29-CB-16-1, 2, 3, 4, 5, 6, 7, 8, 9, and 10. September 9, 1966*

DECISION AND ORDER

On September 30, 1964, Trial Examiner Samuel M. Singer issued his Decision in the above-entitled proceeding, finding that Respondent, Zoe Chemical Co., Inc., had not violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, and Respondent, Local 803, Allied Aluminum and Industrial Union, had not violated Section 8(b)(1)(A) and (2) of the Act, and he therefore recommended dismissal of the complaint, as set forth in the attached Trial Examiner's Decision. The Charging Parties filed exceptions to the Trial Examiner's Decision and the General Counsel also filed exceptions to the Decision and brief in support thereof.

On June 22, 1965, the National Labor Relations Board ordered that the proceeding be remanded to the Trial Examiner for the purpose

of resolving certain critical credibility issues involving an alleged tender of dues by the employees involved. The Board further ordered the Trial Examiner to prepare and serve upon the parties a Supplemental Decision containing his findings of fact in this regard and his conclusions in light of such determination.

After a hearing held on September 8, 9, and 10, 1965, the Trial Examiner issued his Supplemental Decision on December 28, 1965, resolving the credibility issues submitted to him and finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain action, as set forth in the attached Trial Examiner's Supplemental Decision. Respondents filed exceptions to the Trial Examiner's Supplemental Decision and briefs in support thereof. The General Counsel filed a brief in support of the Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Members Fanning, Brown, and Jenkins].

The Board has reviewed the rulings of the Trial Examiner made at the hearings and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's initial Decision, the Supplemental Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations contained in his Supplemental Decision, as modified hereinafter.

THE REMEDY

The Trial Examiner recommended that Respondent, Zoe Chemical Co., Inc., and Respondent Union, jointly and severally made whole the discriminatees for any loss of pay resulting from their unlawful discharge, with the Union's liability ending 5 days after the date it notified the Company that it had no objection to the employment of the discriminatees. Although the Respondent Company cannot be absolved of violating the Act, it resisted the Union's demands to discharge these employees from July 24 until October 4, 1963; it finally yielded to the Union's demands only after an arbitrator's award requiring employees to join the Union and pay dues and fees in order to avoid discharge was enforced by the Supreme Court for New York County, all in proceedings initiated by the Union. In view of these circumstances, we deem it appropriate to make the Respondent Union primarily liable for making the discriminatees whole for loss of pay from the date of their unlawful discharges until April 6, 1964, 5 days after the date the Union advised the Company it had

no objection to the reemployment of the discriminatees, with the Respondent Company only secondarily liable.¹ With respect to making the discriminatees whole for loss of pay after April 6, 1964, we shall make the Respondent Company solely liable from that date until the date on which each discriminatee has been offered reinstatement to her same or substantially equivalent position without prejudice to seniority or other rights and privileges. We believe, in the special circumstances of the case, that such an order will remedy the unfair labor practices committed and, in an equitable manner, fully effectuate the policies of the Act.² Backpay, less any net earnings in the period, shall be computed with interest on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

[The Board adopted the Trial Examiner's Recommended Order with the following modifications:

[1. Delete paragraph A, 3, (b) of the Recommended Order of the Trial Examiner's Supplemental Decision and substitute the following paragraph:

[“(b) In conjunction with the Respondent Union, with the Respondent Union primarily liable, make whole the above-named employees for any loss of earnings suffered by them from the date of their terminations until April 6, 1964.³ The Respondent Company shall be solely liable for backpay from April 6, 1964, until the date on which the employees are offered reinstatement to their former or substantially equivalent positions without loss of seniority or other rights and privileges, as provided in ‘The Remedy’ section of this Decision.”

[2. Delete paragraph B, 2, (a) of the Recommended Order of the Trial Examiner's Supplemental Decision and substitute the following paragraph:

[“(a) In conjunction with Respondent Company, with Respondent Union primarily liable, make whole Margaret Weber, Esther Hay, Florence Gagan, Mary Di Guiseppe, Madelyn Gioletti, Margaret Pisarra, Elizabeth Enzman, Helen Sujkowski, Rose De Giacomo, Julia Struffolino, Mary Fink, and Ana Bustos for any loss of pay suffered by reason of the discrimination against them, until April 6, 1964, as provided in ‘The Remedy’ section of this Decision.”

¹ As found by the Trial Examiner, Respondent Union's backpay liability terminated when it withdrew its objections to the employment of the discriminatees.

² See *NLRB v. Lexington Electric Products Co., Inc.*, 283 F.2d 54, 57 (C.A. 3); *NLRB v. Local 138, International Union of Operating Engineers (Nassau & Suffolk Contractors' Assn.)*, 293 F.2d 187, 199 (C.A. 2).

³ The record indicates that the Union's notification letter was dated March 31, 1964, and presumably was received by the Company on or about April 1, 1964. Any discrepancy in the dates utilized herein can be resolved in compliance proceedings.

[3. Delete the fourth indented paragraph of Appendix A attached to the Trial Examiner's Supplemental Decision and add the following paragraph:

[WE WILL, in conjunction with Local 803, Allied Aluminum and Industrial Union, with said Union primarily liable until April 6, 1964, make whole each of the above-named employees for any loss of earnings suffered by them by reason of our discrimination against them and, thereafter, WE WILL be solely liable for backpay until we offer reinstatement to the above-named individuals.

[4. Delete the third indented paragraph of Appendix B attached to the Trial Examiner's Supplemental Decision and add the following paragraph:

[WE WILL, in conjunction with the above-named Company, with ourselves primarily liable, make whole Margaret Weber, Esther Hay, Florence Gagan, Mary Di Guisepppe, Madelyn Gioletti, Margaret Pissarra, Elizabeth Enzman, Helen Sujkowski, Rose De Giacomo, Julia Struffolino, Mary Fink, and Ana Bustos for any loss of pay suffered by them by reason of the discrimination against them until April 6, 1964.]

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

Upon charges filed by the above-named individuals on various dates between October 8 and 30, 1963, the General Counsel of the National Labor Relations Board issued a consolidated complaint on February 11, 1964, against Local 803, Allied Aluminum and Industrial Union (herein called Local 803) and Zoe Chemical Co., Inc. (herein called Zoe or the Company). In general the complaint alleged that Local 803 violated Section 8(b)(1)(A) and (2) of the Act by unlawfully enforcing its union-shop contract with Zoe, by rejecting timely tenders of dues and initiation fees, and by causing Zoe to discharge the 12 charging parties because of their concerted activities on behalf of a rival labor organization, Local 8-149, International Oil, Chemical and Atomic Workers Union, AFL-CIO (herein called Local 8-149). The complaint alleged that Zoe violated Section 8(a)(1) and (3) of the Act by discharging the Charging Parties pursuant to the demands of Local 803. Respondents in their answers denied the commission of the unfair labor practices charged.

Pursuant to notice, a hearing was held before Trial Examiner Samuel M. Singer in New York, New York, on various dates between March 30 and April 15, 1964. All parties appeared and were afforded full opportunity to be heard and to examine and cross-examine witnesses. Briefs have been received from the General Counsel and Respondents.

Upon the entire record, the briefs of the parties, and from my observation of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT ZOE

Zoe, a New York corporation, maintains its place of business in New Hyde Park, New York, where it is engaged in the manufacture, sale, and distribution of floor waxes, soaps, aerosol sprays, and related products. During the past year, a repre-

sentative period, Zoe manufactured and shipped products valued in excess of \$50,000 from its plant directly to points outside the State of New York. During the same period Zoe received at its plant materials valued in excess of \$50,000 from points outside that State. I find that at all material times Zoe has been and is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Local 803 and Local 8-149 are labor organizations within the meaning of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The contractual relations between Zoe and Local 803 up to June 1963; the organizational activities of Local 149 in May-June 1963*

On March 5, 1962, Zoe and Local 803 entered into a 3-year collective-bargaining agreement, under which Zoe recognized Local 803 as the exclusive bargaining representative of its production employees.¹ The agreement contained a union-security clause requiring employees in the unit to become and remain members in good standing in Local 803 as a condition of employment "on the 31st day after date of employment." It is undisputed that for a year prior to June 1963, the union-security agreement had not been enforced, although the record indicates that dues continued to be deducted from employees who had signed checkoff authorization cards during the Union's original organizational drive. No representatives of Local 803 appeared at the plant, there was no union steward, and the shop was not serviced. Nor did management officials tell new employees anything about the Union, including the contractual requirement to join it after the first 30 days of employment.²

In the latter part of May 1963,³ William Hance, one of the employees who signed a Local 803 card,⁴ decided to seek representation for the employees through Local 149 and for this purpose contacted Patrick Duffy, a part-time organizer for that union. Hance arranged a meeting between Duffy and the employees, at which the latter signed Local 149 authorization cards. By June 10—the date Local 149 filed a petition for representation with the Regional Director (Case 2-RC-12795)—Duffy had obtained cards from a majority of the Company's then approximately 27 employees including all of the Charging Parties. On June 28, the Regional Director dismissed Local 149's representation petition, stating that "as a result of the investigation, it appears that, because there is a valid collective bargaining agreement in effect covering the employees in the unit set forth in the petition, further proceedings are not warranted at this time."

B. *Local 803's attempts to enforce the union-security contract; the resistance of Local 149's adherents*

In the meantime, on June 21, Local 803 made its first appearance at the plant in about a year. Bernard Kalisky, Local 803's president, came to the plant and addressed the employees. He said that he heard about Local 149's representation petition and came to tell them they could not bring in another union in view of the

¹ The execution of the collective agreement was preceded by an organizational campaign in January and February 1963, during which employees signed authorization cards.

² There is no specific evidence in the record demonstrating the extent to which the employees suffered any detriment for the lack of "servicing" of their interests by the Union—except that the record shows, and I find, that some employees had failed to receive the second (February) 1963 pay increase stipulated in the collective agreement between the Company and Local 803. Apparently the employees obtained the first (1962) wage increase provided for in the agreement.

³ Unless otherwise indicated, all dates refer to 1963.

⁴ Hance's testimony that he had signed a Local 522 Teamsters card, that Kalisky (who solicited his signature) introduced himself as a Local 522 agent, and that the March 1962 collective agreement with Zoe was with Local 522 (and not Local 803) is discredited. His testimony on this and on some other matters was vague and confusing. The documentary evidence (the collective agreement and Hance's signed card) establishes that Hance was in complete error.

existing collective agreement between Zoe and the Union. When employees complained that they never heard of Local 803, Kalisky acknowledged that his union was derelict in not servicing the shop and in effect apologized for the Union's neglect. Kalisky promised "to correct" the situation and "see that the shop is serviced the way it's supposed to be," and asserted that Romano—the Local 803 official who was supposed to service the shop—would be fired.⁵ Kalisky then read the union security clause from the contract, and explained that "after the 31st day, they must join or become members of Local 803"; that if they did not do so, he would "have to ask for their discharge"; that they could satisfy their union obligations by paying a \$25 initiation fee and \$5 monthly dues as required by the Union's constitution; and that "because of what transpired" he would forget all past dues, "start off with a clean sheet," and give them 30 days "to either become a member or join Local 803."⁶

Thereafter, in June and July, Kalisky (sometimes accompanied by other union agents) visited the plant at frequent intervals, urging employees to join Local 803, to sign authorization cards and to pay the required initiation fees and dues, and warning them that if they failed to do so they would lose their jobs. Kalisky pleaded with the girls to give him "a break" because he was new on the job and had a family to support. On one occasion (June 28), Valente, an official of a Teamsters local, met with Duffy (Local 149's organizer) and sought to prevail upon the latter not to give Kalisky a hard time. Valente pointed out that Kalisky "was trying to correct the situation that some other representative of 803 had loused up." In the course of the conversation, Valente reminded Duffy that Local 803 had a union-security agreement with Zoe and that unless the employees joined, they would be fired. Duffy replied, "I've got the people and if you try to fire one of them, we'll pull the shop."⁷

There is sharp testimonial conflict as to whether Kalisky in his solicitation of the employees in June and July had told them they had to sign Local 803 authorization cards to become union members and to retain their jobs. The card in question required the signatory to list his name, address, the type of work performed, and place of work. On the face of the card, before the space for signature, there appeared the following inscription:

I hereby accept membership in Local No. 803 and of my own free will hereby authorize Local No. 803 its agents or representatives to act for me as collective bargaining agency in all matters pertaining to rates of pay, wages, hours, or other conditions of employment.

I also agree to abide by the constitution and by-laws and the rules and regulations of the Union and its International Union.

On the reverse side of the card, there was a checkoff authorization clause with another space for date and signature.

Although Kalisky admitted asking employees to sign the cards, he denied telling them that they had to join or sign a card to avoid being fired. Kalisky testified, "I told them, 'I am leaving the cards, just in case any of them would desire to become members or join our local.' I said, 'I'm giving it to you because I don't want it ever to be said that you were never approached to join the union.'" Four of the Charging Parties (De Giacomo, Pisarra, Struffolino, and Weber) insisted that Kalisky did tell them they had to join the Union and sign cards. De Giacomo, and Pisarra stated that Kalisky told them that unless they signed they would be fired or would lose their jobs. There is no question in my mind, and I find, that Kalisky told employees that they would have to join Local 803 and sign authoriza-

⁵ Romano thereafter (on July 3) resigned his position as an officer of the Union.

⁶ The foregoing findings are based primarily on the testimony of Kalisky, in part corroborated by several General Counsel witnesses. General Counsel's witnesses either could not recall all the events at the June 21 meeting or deliberately withheld them. It is significant, as hereafter indicated, that the substance of Kalisky's remarks recited above is also incorporated in his letter to Zoe, dated July 24.

⁷ The foregoing findings respecting the June 28 encounter are based on the composite testimony of Duffy and Kalisky.

tion cards to retain their jobs.⁸ The employees, however, refused to join Local 803 and sign the cards, and adhered to their membership in Local 149. Obviously resentful of Local 803's failure to service the shop before the advent of Local 149, the Charging Parties wanted to have nothing to do with that Union. Thus, De Giacomo testified, "we ignored it [the card solicitation]." Struffolino testified, "I just didn't pay any attention to him [Kalisky]." Weber did not even ask to see the card handed her. It was stipulated at the hearing that none of the Charging Parties tendered any dues and initiation fees until at least August 30.⁹ Local 149 Representative Duffy testified he told the dissidents at various meetings that Local 149 "would keep up the pressure to have Zoe refuse to enforce the union-security clause," and he indicated that this pressure would result in forcing Local 803 to take the matter of company compliance with the clause to arbitration.

On July 15, Local 149 filed charges alleging, among other things, that the Company, in violation of the Act, had refused to recognize it as majority representative while continuing to recognize Local 803 which did not represent a majority. This charge was withdrawn by Local 149 with the approval of the Regional Director on August 2. On July 18, a union deauthorization (UD) petition was filed by an employee (on behalf of Local 149) seeking to nullify the union-security clause in Local 803's contract with Zoe, which petition is still pending and undisposed of.

C. Local 803's July 24 request of the Company to discharge the dissidents for refusing to comply with the union-security contract

On July 24, Kalisky wrote the Company:

On June 21, 1963, at a meeting I advised your employees who had not complied with the union shop clause of our union contract that we were forgetting the past non-compliance, that we would start with a clean sheet, let bygones be bygones, and that they now had an additional 30 days to comply until the 31st day after June 21, 1963.

At the June 21, 1963, meeting I read to them paragraph 2 of the March 5, 1962, contract, as follows:

As a condition of employment all covered employees shall become and remain members of the Union in good standing on the 31st day after date of employment.

I further told them that the requirement to become and remain a member of the Union in good standing would be fully satisfied if on the 31st day after June 21, 1963, each of them paid the regular initiation fee of \$25 and \$5 monthly dues and continued the \$5 dues monthly thereafter.

Please be advised that all employees within the bargaining unit who are employed more than 31 days except: Joel Markowitz, William Hance, Charles Metz, Max Cohen, Herman Najowitz, Stuart Axelrod, have not complied with the Union shop clause of the contract. Please fire them immediately, and advise me.¹⁰

The Company posted the letter on its bulletin board, near the timeclock, pursuant to advice from its attorney, Drimmer, but refused to comply with Local 803's request to discharge the employees not in compliance with the union-shop clause.

⁸ Based on the demeanor of Kalisky on the stand as well as the inherent probabilities of the situation, it was clear that Kalisky's testimony on this point was less than forthright. I cannot believe that Kalisky, who impressed me as an outspoken and persistent organizer, humbly told the employees (as he in effect sought to convey) that they really did not have to join the Union or sign cards. I discredit Kalisky's testimony so far as it is inconsistent with the aforesaid findings.

⁹ As noted, *infra*, the question whether such tender was made on even that date is in sharp conflict. Duffy, the Local 149 organizer, testified that the first time he told the Charging Parties to offer dues was on August 29.

¹⁰ Kalisky testified that he had been advised of the Union's and employees' rights and obligations by his attorney, Katz, before the June 21 meeting. It is clear that the letter in question was prepared after such consultation with Katz. It should be noted that the letter does not specify the names of the particular employees to be discharged at that time. The Company did not produce its payroll records listing the employees in the unit until the arbitration hearing on August 22 (presently to be discussed). It was stipulated that subsequent to July 24, the Union identified the employees involved and that these included the Charging Parties herein.

D. Local 803's arbitration award requiring Zoe to discharge employees not in compliance with the union-security agreement

On August 5, Local 803 instituted arbitration proceedings to enforce its union-shop contract against Zoe.¹¹ The contract between the parties provides for resolution of their differences by binding arbitration and banning strikes and lockouts during its term.¹² The submission agreement, jointly executed by Local 803 and the Company, listed the issue as whether "pursuant to the terms of the instant Collective Agreement between the parties hereto, are certain of the employees of the Employer obligated to join the Union? If so, what shall the remedy be, if any?" After a hearing held on August 22, attended by representatives of Local 803 and Zoe,¹³ Arbitrator Jerome J. Lande handed down his award on August 26 in favor of Local 803, ruling that the union-security agreement is "clear and succinct," and directed the Company to discharge those of the 23 listed employees (including the 12 Charging Parties) "who have failed to join the Union on or before September 3, 1963."¹⁴

During the pendency of the arbitration proceeding (August 5-26) Local 803 President Kalsky continued to solicit dues and initiation fees and signed cards from the employees. Toward the end of August (August 26-28) several men, characterized by various employee witnesses as "strangers," appeared in the plant and engaged in an intensive drive to induce employees to sign up with the Local 803, warning them that unless they did so they would lose their jobs.¹⁵ The employees persisted in their refusal to join Local 803, to pay any of its dues, and to have anything to do with that Union.¹⁶

¹¹ On the same day, Local 803 filed charges against Zoe, which, as amended on September 9, alleged that the Company's refusal "to honor" the union-security clause constituted a violation of the Act. By a letter dated October 15, the Regional Director dismissed the charges, stating that the "refusal by the company to enforce the requirements of your agreement for union membership as a condition of employment cannot, in circumstances of this case, be deemed to have constituted an unfair labor practice. Further, it does not appear that the Company violated the Act in any other manner encompassed by your charges."

¹² Section 16 of the contract states:

Should any dispute or difference arise between the Employer and the Union as to the meaning, application, performance or operation of any provisions of this agreement, either the Employer or the Union may give notice to the other of said dispute or difference, and an earnest effort shall be made promptly to adjust the dispute or difference. If the matter cannot be adjusted between the parties, then the matter shall be submitted, at the request of either party, to the New York State Board of Mediation for the designation of an arbitrator, whose decision shall be final, binding and conclusive upon the parties and enforceable in a court of competent jurisdiction. The costs of arbitration shall be shared equally by both parties.

¹³ Notice of the hearing, as well as other documents in connection with the arbitration proceeding, were posted on the employee bulletin board, but none of the employees attended the hearing or sought intervention therein.

¹⁴ The arbitrator rejected the Company's contentions that it was Local 803's function, not the Company's, to enlist the employees as members and, further, that a discharge of the designated employees (practically the entire unit) at its then busy season would constitute economic hardship.

¹⁵ General Counsel's witnesses estimated that 3 to 10 "strangers" were present. According to their testimony, the men were strategically placed at various locations in the plant in order to enable them to reach employees, were afforded extensive freedom (including longer break periods) by Zoe to move about and talk to the employees, and were frequently seen conversing with Kalsky. Only two of the "strangers" were identified by name—"Nick" and Rivera, the former being quoted as saying he belonged to the ambulance drivers union. One witness (Sidney Deresh) testified about an altercation he had with "Nick." At the hearing ruling was reserved on Respondent's motion to strike all testimony relating to the activities of the "strangers" on the ground that they were not shown to be agents of Respondents. Payroll records produced by the Company indicate that a Nick Perone, Wilfred Rivera, and four other new employees were on the payroll on August 26 and 27. In view of the ultimate findings made herein, it is unnecessary to pass on the question of Respondent's responsibility for the activities of the "strangers," and, therefore, on the motion to strike the testimony.

¹⁶ On August 23, the Company discharged several employees, which, according to charges filed by Local 149 on August 29 and September 5, were discriminatory and in violation of Section 8(a)(1) and (3). The Regional Director dismissed the charges on October 15 because of insufficient evidence.

E. *The alleged dues tender by the Charging Parties on August 30*

On August 27, immediately after receipt of the arbitration award, Zoe posted it on its bulletin board, as it had posted all documents in the arbitration proceeding.¹⁷ A day or two thereafter (August 28 or 29), Company President Axelrod displayed the award to the assembled employees, explaining that they would have to join Local 803 by September 3 or be discharged.

There is an extremely sharp conflict of testimony as to whether the Charging Parties tendered the dues and fees required by Local 803 on and prior to September 3. The four Charging Parties called by General Counsel uniformly testified that on August 29 (about 8 or 8:30 p.m.) they met with Duffy in Local 149's union hall; that after discussing the arbitration award and Axelrod's previous admonition that they would be fired unless they joined Local 803, it was agreed (after a telephone check with Local 149's attorney) that the employees would tender the required dues and initiation fees; that they would, however, under no circumstances sign Local 803 membership cards; that the first dues tender would be made by employee Struffolino in the presence of all of the Charging Parties during the lunch period (12-12:45 p.m.) the following day after receipt of their weekly pay; and that if Local 803 President Kalisky accepted Struffolino's tender, the others would follow suit and individually offer their money.¹⁸ The Charging Parties further testified—in minute detail—that in accordance with this plan, during lunch the next day (Friday, August 30), they grouped themselves near the timeclock and tendered the dues to Kalisky; that Struffolino, speaking for the group, told Kalisky they were willing to pay Local 803 dues (initiation fees were not mentioned) but were not legally required and refused to sign Local 803 membership cards; that Struffolino extended a \$5 bill in payment of the monthly dues, which Kalisky refused unless she also signed a Local 803 card; and that Struffolino repeated her statement that although she was under a legal obligation to pay dues, she was not required to sign the card, to which Kalisky replied that she was "misinformed." According to the Charging Parties, later the same day, around the 5 p.m. quitting time, the group again offered to pay dues to Kalisky, reiterating their refusal to sign cards. Kalisky allegedly rejected the offer with the statement that if they did not sign the cards, they were fired and need not return to work after the Labor Day weekend (the next Tuesday).¹⁹

Kalisky emphatically denied that the Charging Parties tendered any dues on August 30 (noontime or later) insisting that he was not even in the plant that day. According to his testimony, he was being interviewed by and signing a statement for counsel for General Counsel at the Board's New York City office at lunchtime (around 12:30 to 2 p.m.) in connection with pending charges²⁰ at the very time the Charging Parties supposedly were tendering dues to him at the company plant in New Hyde Park, Long Island. Counsel for General Counsel stipulated that Kalisky was indeed with him and that he took a statement from him on August 30, but that he (General Counsel) could not recall the specific time of day

¹⁷ At least one of the Charging Parties testified that she ignored the posted award because she "wanted to have nothing to do with it" since it involved joining Local 803.

¹⁸ The testimony of the Charging Parties is corroborated by General Counsel witnesses Duffy and Hance Bernard O'Relley, Nassau County assistant director of labor relations, likewise corroborated the employees' testimony as to what transpired at the meeting; he was apparently unsure about the date of the meeting but stated that after "I have heard the date August 29th mentioned here [in the hearing room before taking the stand] the best of my recollection is that it would be latter part of August." Respondents apparently do not question that a meeting of the nature alluded to did in fact take place, contending only that if it took place, it was after September 3.

¹⁹ General Counsel called Hance and Auld (the daughter of Charging Party Gagan) in an attempt to corroborate the testimony of the Charging Parties. According to some of the testimony, Rivera (an alleged Local 803 agent) was present and distributed cards at the described noontime offer. Gioletti, one of the Charging Parties, was not in the August 30 group, having allegedly left with Struffolino her \$5 (before quitting the plant at noon) to give to Kalisky in the event he accepted Struffolino's tender.

²⁰ As already noted (*supra*, footnote 11), on August 5 Local 803 filed its original charges against the Company alleging violation of Section 8(a)(1) and (3) of the Act through refusal to honor the union-security contract; the charges were subsequently dismissed.

when this took place.²¹ Kalisky further testified that shortly before the 5 p.m. quitting time (when the claimed second tender took place) he was in the downtown office of his attorney, Katz. Katz corroborated his "alibi," testifying that he distinctly remembered seeing Kalisky at the time in question and explaining in detail the circumstances why he recalled the particular afternoon visit. Kalisky gave a detailed account of his whereabouts during the entire day of August 30—including earlier morning visits to Attorney Katz and to another attorney, Nearing, in connection with pending litigation. Katz also corroborated Kalisky's testimony concerning his morning visit—purportedly to discuss Kalisky's forthcoming conference with counsel for General Counsel around noon—but his recollection of this visit was less definitive than that of the afternoon visit. Although Attorney Nearing (who handled Local 803's petition to confirm the Union's arbitration award in court, *infra*) had no specific recollection of Kalisky's visit to his office that day or of his signing the document in his presence, the document on its face indicates that it was executed and acknowledged before him on August 30. Kalisky insisted that the first time the Charging Parties tendered any dues to him was in September, after enforcement of the arbitration award by the State court (referred to below), long after the September 3 deadline set in the arbitration award.²²

It is apparent that the conflicting testimony regarding the dues tender of August 30 is irreconcilable. However, in view of the conclusions ultimately reached, it is unnecessary to resolve this conflict.

F. *The events immediately preceding the October 4 and 7 discharge of the Charging Parties*

Kalisky continued his attempts to collect union dues and initiation fees and to secure signed cards in September. He appeared at the plant for this purpose on September 3, the final day set by the arbitrator for joining Local 803. There is no credible evidence that any of the Charging Parties offered to pay Local 803's required dues and initiation fees that day. The credible evidence shows, and I find, that just before quitting time Kalisky told some of the Charging Parties that they "needn't bother coming in the next day" to work, and that they would not be paid (and were fired) because they failed to join or sign Local 803 cards. The next morning (September 4) Kalisky repeated the substance of these remarks to the girls just before they entered the plant. The employees then went to the Local 149 hall, where they discussed the matter with Duffy and Mozzacchi, respectively Local 149's organizer and president, who told them to return to work and talk the matter over with Company President Axelrod. Axelrod, angry that they had left the plant without notice, told them to go back to work, reminding them that it was he, not Kalisky, who did the firing.²³

During September, Local 803 filed in the New York State Supreme Court its petition (purportedly signed by Kalisky on August 30) to confirm and enforce the August 26 arbitration award. The Company gave as its reason for failing to comply with the award the pendency of the UD petition before the Board (i.e., the deauthorization petition seeking to rescind Local 803's authority to enter into a

²¹ Counsel for General Counsel entered into this stipulation after (but before formal Board disposition of) Local 803's appeal from my ruling quashing a subpoena requiring counsel to testify on this matter. Local 803 thereupon withdrew its appeal.

²² Kalisky testified that he rejected the September offer of \$5 dues by Struffolino because it was not accompanied by a tender of the \$25 initiation fee and because Struffolino by then owed 3 months' dues. He also testified that, though not required, he was willing to accept only 1 month's dues and waive the back dues, provided Struffolino agreed to sign a dues checkoff authorization to pay the initiation fee by installments—a proposal she rejected. He conceded talking to the Charging Parties individually several times (including lunch and quitting time) on August 28 asking them to note the arbitrator's award but stated that none of the Charging Parties tendered dues or fees at that time.

²³ The foregoing finding is based on the mutually corroborative testimony of the Charging Parties, whose testimony is credited in the respects recited. Kalisky admitted being at the plant on September 3, but stated he had no "meeting" with the employees that day. He also admitted returning to the plant the next morning and telling the employees, "This is the day I have been waiting for" to enforce the arbitrator's award and "to see that they are dismissed for not paying initiation and dues." Axelrod admitted the substance of the remarks attributed to him by the employees as above recited, but disputed the further testimony of the Charging Parties that they had informed him that Kalisky had rejected their previous dues offers—a testimonial conflict which it is not necessary to resolve.

union-shop agreement). On or about October 1, the court issued its order enforcing the arbitration award and directing the Company to discharge 23 named employees, including the Charging Parties.

On October 4, Company Attorney Drimmer informed Company Official Kupetz of the court's order, and advised him to determine which of the employees had not joined Local 803 and to discharge them in compliance with the court order. Pursuant to Drimmer's advice, Kupetz requested the Charging Parties—none of whom had "joined" Local 803—to meet with him before quitting time. Displaying the court's order, Kupetz told 11 of the 12 employees then present (Bustos was absent because of illness) that he was "sorry" but had to let them go because they had not joined Local 803.²⁴ Bustos was similarly informed of the court order and was discharged on October 7.²⁵

*G Conclusions respecting Local 803's alleged Section
(8)(b)(1) and (2) violations*

1. Introduction; the issues

Briefly stated, the facts found show that in March 1962, Local 803 and Zoe executed a union-security agreement requiring Zoe's employees to acquire membership in the Union after 30 days of employment. For approximately a year before June 1963, enforcement of the agreement was suspended, Local 803 having stopped servicing the shop. In the latter part of May and early June the Zoe employees joined another union (Local 149), which on June 10, filed a petition for an election on June 10. On June 28, the Regional Director dismissed this petition on the ground that there existed a valid collective agreement barring the conduct of an election.

In the meantime, on June 21, Local 803 President Kalisky served notice on the employees that he would thereafter enforce the union-security agreement. Acknowledging his union's past dereliction, he promised to correct the situation and fire the union agent who neglected the shop. Kalisky told the employees that they could satisfy their union obligation by payment within the next 30 days of the Union's \$25 initiation fee plus \$5 monthly dues, waiving back dues. The employees, resentful of Local 803's prior neglect and determined to remain loyal to their new union (Local 149), refused to have any dealings with Local 803. Kalisky continued to press for the dues and fees, warning employees that unless they joined Local 803 and signed membership cards they would be fired. Ignoring these admonitions, the employees neither tendered any moneys nor signed cards, deciding instead to adhere to Local 149 and to bring pressure on Zoe not to enforce the union-security contract.

On July 24, Kalisky requested the Company to discharge the noncomplying employees because of their failure to meet their financial obligations under the union-security contract—i.e., payment of the union dues and initiation fees. Upon the Company's failure to comply with this request, Local 803 on August 5 instituted arbitration proceedings, in accordance with the provision of the collective agreement requiring differences between the parties to be settled by arbitration. Though on full notice of the pending arbitration proceeding, neither Local 149 nor any of the Charging Parties intervened. On August 26, the arbitrator upheld Local 803's contractual right to enforce the discharge of the noncomplying employees, including the 12 Charging Parties herein, giving them, however, until September 3 (a total of 74 days from Local 803's June 21 initial demand) "to join the Union." There is sharp testimonial conflict as to whether the Charging Parties tendered dues on August 30, before the deadline fixed by the arbitrator. In any event, however, Kalisky continued his attempts to collect the dues and initiation fees and to sign up the employees after September 3. There is no evidence that the Charging Parties at any time—at the time of the alleged August 30 dues offer or subsequently—offered to pay the \$25 initiation fees.

²⁴There is testimonial conflict whether in the course of the meeting the Charging Parties informed Kupetz that although they refused to join Local 803 they had offered the dues to Kalisky—a conflict which also need not be resolved.

²⁵Subsequent to their discharge, some of the Charging Parties filed claims for unemployment compensation which, after a hearing participated in by all parties including the employees, were denied because of "voluntary leaving of employment without good cause." On appeal, the initial determination was upheld on the ground that the "claimants refused to meet one of the conditions of their employment," namely, joining the Union in accordance with the collective-bargaining agreement.

The issues, some apparently novel, here presented are:

(1) whether Local 803 could lawfully demand compliance with the union-security agreement after the long lapse of its nonenforcement;

(2) whether under the Board's *Union Starch* doctrine (87 NLRB 779), the non-complying employees were excused from tendering Local 803's periodic dues and uniform initiation fees between the time of the Union's request therefor (June 21) and its request for discharge (July 24) because the Union also requested that they sign membership cards;

(3) whether by invoking arbitration against Zoe to force it to discharge the employees delinquent in their dues and initiation fee obligations under the 30-day union-security agreement, Local 803 thereby waived the employees' delinquency and was bound by the arbitral award affording the employees 74 days within which "to join the Union";

(4) whether the Charging Parties made a full and complete tender of the required dues and initiation fees by September 3, the deadline set by the arbitrator;

(5) whether Local 803's willingness to accept belated tenders subsequent to September 3, operated as a waiver of the Charging Parties dues and fees delinquency;

(6) whether, in any event, Local 803's requests to discharge the Charging Parties were motivated by their activities on behalf of a rival union rather than their arrearages in financial obligations.

2. Applicable principles

Section 8(a)(3) of the Act, while forbidding discrimination to encourage or discourage union membership, specifically authorizes unions and employers to enter into agreements requiring "as a condition of employment membership . . . on or after the thirtieth day following the beginning of . . . employment . . ." One of the provisos to the section states that "no employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees required as a condition of acquiring or retaining membership." Correspondingly, Section 8(b)(2) makes it an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against an employee "with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

In *The Radio Officer's Union of the Commercial Telegraphers Union [Bull Steamship Co.] v. N.L.R.B.*, 347 U.S. 17, the Supreme Court made clear the reason why Congress departed from the general statutory scheme of forbidding discharges for union nonmembership where the discharge is based on nontender of the dues and initiation fees required by a valid union-security contract. It stated that "Congress recognized the validity of Union's concern about 'free riders,' i.e., employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason" (*id.* at 41). In *General Motors Corporation, Packard Electric Division*, 134 NLRB 1107, the Board, in giving effect to this congressional intent, emphasized that timeliness of tender of the required fees and dues is of paramount consideration. In that case the Board abandoned the rule previously enunciated in *Aluminum Workers International Union, Local No. 135*, 112 NLRB 619, that it was unlawful to discharge, or cause the discharge, of an employee delinquent in his dues and fees, so long as he tendered them before actual discharge. In holding that a union may insist on the discharge of a delinquent employee after requesting his discharge, even where the employee subsequently tenders his dues before discharge, the Board explained (*General Motors, supra*, 1109):

We believe . . . that the application of the *Aluminum Workers* rule is at odds with the congressional purpose of allowing parties to collective-bargaining relationships to enter into and effectively enforce union-shop agreements requiring membership in the union as a condition of employment. For, as illustrated by the circumstances of this case, there can be little if any union security if dissident members can frustrate the orderly administration of lawful collective-bargaining agreements by delaying payment of dues and fees they are lawfully

obligated to pay until the last minute before their actual discharge. We shall therefore no longer apply the *Aluminum Works* rule when the tender occurs after a lawful request, but shall in all such cases look to the record to determine the real reason for the parties' subsequent conduct.

See also *Acme Fast Freight, Inc.*, 134 NLRB 1131. The *General Motors* rule was in effect a reinstatement of the *Chisholm-Ryder* doctrine (94 NLRB 508), applied by the Board before *Aluminum Workers*. In holding that the employees' dues delinquency in that case was not cured by his belated tender before discharge, the Board stated that any other interpretation "would materially detract from the substance of union-security agreements which Congress vouchsafed to unions and would leave individual employees free to ignore an important condition of membership, which unions are permitted to impose" *Chisholm-Ryder, supra*, 510. In addition, the Board observed, "It is worthy to note that membership in a labor organization, being contractual in nature, contemplates the faithful performance of membership obligations imposed by the organization's constitution and bylaws in the manner therein provided" (*id.* at 510, footnote 6).

3. The effect of Local 803's nonenforcement of the union-security agreement prior to June 1963

As noted, during the period here involved a union-security contract was in effect between Local 803 and Zoe under which Zoe's employees, including the Charging Parties, were obligated to secure membership in Local 803 as a condition of employment. While Local 803 had not enforced the union-security contract and, indeed, had failed to service the shop for over a year, General Counsel maintains—correctly in my opinion—that this factor in itself did not estop the Union from enforcing it in the future. This is particularly true where, as here found, the Union after acknowledging its past laxity, gave the employees full notice of its intention to correct the situation, made no attempt to collect back dues, and gave the employees a full 30-day period in which to meet their initiation fee and dues obligations. Understandably, the employees, neglected by Local 803, sought affiliation with another union (Local 149), but Local 803 continued to be the employees' statutory representative by reason of its 3-year contract with Zoe and Local 803 could (pursuant to this contract) rightfully exact its periodic dues and initiation fees and demand the discharge of those failing to make payment thereof after 30 days of employment. "When an individual accepts employment with a company which is party to a union-security agreement, he is not free to choose whether he desires to join the union. Nor does he have a voice in the selection of his bargaining representative. He must become a member of the union currently representing the other employees, as a condition of his continued employment." *N.L.R.B. v. Hotel, Motel and Club Employees' Union, Local 568, AFL-CIO [Philadelphia Sheraton Corp.]*, 320 F.2d 254, 258 (C.A. 3).²⁶

The record shows, as found, that on June 21 Kalisky (Local 803's president) advised the employees, including the Charging Parties, of their obligations to comply with the union-shop provision. All of them were afforded a full 30 days thereafter to tender Local 803's \$25 initiation fee and \$5 monthly dues. Admittedly, none of the Charging Parties paid or tendered the initiation fee and dues within the 30-day period; even according to the Charging Parties' version they made no tender until August 30, long after Local 803's July 24 request for their discharge for nonpayment. It follows that the Charging Parties became vulnerable to discharge on July 24 unless, as General Counsel claims, they were excused from tender because: (1) Local 803 unlawfully conditioned membership and employment on the signing of authorization cards, (2) Local 803 extended the period during which the employees could satisfy their financial obligations by invoking arbitration against Zoe after the latter failed to comply with the discharge request; and (3) Local 803 engaged in other conduct by which it waived or forfeited its right to collect membership dues and initiation fees prior to July 24.

²⁶ It will be recalled that on June 28 (almost a month before Local 803's discharge request) the Regional Director dismissed Local 149's representation petition, holding that a valid collective-bargaining agreement existed between Local 803 and the Company. Although subsequently (July 18) a deauthorization petition was filed seeking to nullify the union-security agreement no action has been taken thereon.

4. Applicability of the *Union Starch* doctrine

I have already found that Kalisky, though informing the employees on June 21 that they could satisfy their union obligations by paying the \$25 initiation fees and \$5 monthly dues, thereafter (including the 30-day period after June 21) also told them that they would have to sign membership cards in order to avoid discharge. General Counsel, relying on *Union Starch & Refining Company (Grain Processors' Independent Union, Local No. 1)*, 87 NLRB 779, enfd. 186 F.2d 1008 (C.A. 7), contends that one of the conditions to membership and job retention—card signing—was unlawful, thereby rendering the Union's request for discharge unlawful.

In *Union Starch* the question before the Board was "whether an employee who tenders to a union holding a valid union-shop contract an amount equal to the initiation fees and accrued dues thereby brings himself within the protection from discharge contained in the provisos of Section 8(a)(3) and in Section 8(b)(2)" of the Act (87 NLRB at 781). The three employees in that case tendered the required fees and dues but the union rejected the tender because the men refused to attend a union meeting at which they were to be voted upon, take an oath of loyalty to the union, and pay 2 months' dues in advance. The Board held that since the employees "were willing to comply with the only term and condition for membership" required by the statute—"the tender of the periodic dues and the initiation fees uniformly required"—the employees were protected from discharge (*id.* at 785). In upholding the Board's finding, the Seventh Circuit Court agreed with the Board that "employees who request union membership and tender initiation fees and dues, but fail to comply with other union-imposed conditions for acquisition of membership, are protected by the Act from discharge under the terms of a valid union-security agreement." (*Union Starch*, 186 F.2d at 1010.)

In my view, *Union Starch* is not here applicable. Here it is conceded that the Charging Parties did not tender the periodic dues and initiation fees uniformly required for membership, during the first 30 days of their employment after request therefor had been made by Local 803. Indeed, as the record abundantly shows and employees themselves testified, the Charging Parties wanted nothing to do with the contracting union during this period, ignored the cards handed to them, and studiously avoided Local 803's representatives. Thus, unlike *Union Starch*, the Charging Parties here demonstrated that they "were entirely unwilling to become members" on any basis whatsoever (87 NLRB at 785).

I believe that the instant case is also distinguishable from *United Brotherhood of Carpenters and Joiners of America, Millmen's Local 824 AFL-CIO (B-unswick-Balke-Callender)*, 115 NLRB 518. There a Board majority held that a union illegally caused the discharge of an employee because he refused to attend a meeting to be initiated into membership. The majority pointed out that the employee had demonstrated willingness to meet his financial obligations to the union by actually paying his \$25 initiation fee, that the dues (which he had not paid or tendered) were not due and payable until after initiation at the meeting, that the union made it crystal clear that it would not be satisfied with anything but initiation, and that under the circumstances tender of the dues would have been "futile" and therefore unnecessary. In the present case, the employees made no payment or tender of fees or dues before the request for discharge and there is no evidence that tender would have been futile. Under the circumstances, it would seem that it was incumbent on the Charging Parties at least to make an effort to test Local 803's willingness to accord them membership by tender of the requisite initiation fees and periodic dues and thus to demonstrate that they were not "free riders," unwilling to pay for their ride (*Union Starch*, 87 NLRB at 786). Cf. Member Murdock's dissent in *United Brotherhood of Carpenters, supra*, 115 NLRB at 524-526.

In any event, it appears that the cards Local 803 solicited required the signatory to do nothing more than to designate the Union as his majority representative (a status the Union already enjoyed by reason of its collective agreement with the Company) and to abide by the Union's constitution and bylaws (which appears to impose on employees no more than payment of a \$25 initiation fee and \$5 monthly dues as obligations of membership).²⁷ From all that appears, the signing

²⁷ There is no evidence that any representative of Local 803 had requested any employee to sign the checkoff authorization clause (for which a separate signature was requested on the reverse side of the card) during the period here under consideration, i.e., prior to July 24. It was not until sometime in September that Kalisky for the first time mentioned the checkoff authorization. (See *supra*, footnote 22.)

of cards entailed a mere formalism indicating the employee's entrance into the required membership with payment of his financial obligation. The requirement to sign cards was purely incidental to the Union's right to collect dues and fees. Cf. *General Motors Corp.*, 134 NLRB 1107, 1117; *Stackhouse Oldsmobile, Inc.*, 140 NLRB 1239, 1241. This case is therefore distinguishable from others where the union conditioned membership and employment upon payment of fines and back dues,²⁸ or participation in union activity such as picketing,²⁹ or compliance with other internal rules of membership.³⁰

For the foregoing reasons, I am of the opinion that the *Union Starch* doctrine is not here applicable and that the Charging Parties were not excused from tendering the periodic dues and initiation fees demanded by Local 803, notwithstanding the Union's contemporaneous request that they execute authorization cards.

5. Local 803's alleged waiver of its demand for discharge of dues delinquents by invoking arbitration against the Company; the binding effect of the arbitrator's award

General Counsel's contention that the employees' time for tender of the required initiation fees and dues was extended by reason of the Union's invocation of arbitration presents an apparently novel point. It will be recalled that upon the Company's failure to comply with the Union's July 24 request to discharge the delinquents, Local 803 submitted to an arbitrator the issue whether the employees were required to comply with the union-shop clause, and the Union's remedy, if any, for their failure to do so. The arbitrator upheld Local 803's contractual right to require the Company to discharge the noncomplying employees. However, he *sua sponte* fixed September 3 as the deadline by which the employees must "join the Union," thereby allowing or purporting to allow the employees 74 days (from the Union's initial June 21 request) to pay the already overdue periodic dues and initiation fees in order to avoid discharge.³¹ General Counsel urges that Local 803, having submitted the indicated issue to arbitration without "restriction" thereby "tacitly agreed to whatever remedy the arbitrator deemed appropriate including an extension of time, and waived both its initial demand of July 24 and the demands uttered during the arbitration proceedings." However, Local 803 maintains that it is unrealistic to spell out of its invocation of the arbitration proceeding such a "waiver," which implies "the voluntary surrender or relinquishment of some known right, benefit or advantage." (See Black, *Law Dictionary* (4th ed. 1951).) The Union contends that its contract with Zoe banned strikes and lockouts, establishing arbitration as the exclusive method by which the parties could settle disputes; that by resorting to arbitration under these circumstances it did nothing more than abide by the required procedure to compel company compliance with its contractual obligation to discharge delinquents; and that the arbitrator's determination could not operate to alter its statutory rights under the 30-day union-security clause.

In my view, the question of whether the arbitrator's award should be honored by the Board does not turn on strict principles of waiver. Rather, the question here is whether the Board will give "hospitable acceptance to the arbitral process" in recognition of "the common goal of national labor policy of encouraging the final adjustment of disputes [by arbitration], 'as part and parcel of the collective bar-

²⁸ *N.L.R.B. v. International Association of Machinists, Local No. 504 (Westinghouse Electric Corp.)*, 203 F.2d 173 (C.A. 9); *The Electric Auto-Lite Company*, 92 NLRB 1073, enfd. 196 F.2d 500 (C.A. 6); *The Leece-Neville Company*, 140 NLRB 56, enfd. as modified 330 F.2d 242 (C.A. 6).

²⁹ *Eclipse Lumber Co., Inc.*, 95 NLRB 464, enfd. 199 F.2d 684, 685 (C.A. 9); *Local 450, International Union of Operating Engineers (Tellepsen Constr. Co.)*, 122 NLRB 564, 567, enfd. as modified 281 F.2d 313, 316 (C.A. 5).

³⁰ *Philadelphia Iron Works*, 103 NLRB 596, enfd. 211 F.2d 937 (C.A. 3); *Local 50, American Bakery & Confectionery Workers Union, AFL-CIO (Ward Baking Co.)*, 143 NLRB 233

³¹ The arbitrator did not indicate what he meant by his requirement that the employees "join the Union." Local 803 contends that the arbitrator's award required signing of membership applications, whereas General Counsel contends that the award may properly be construed merely to require tender of dues and initiation fees. I accept General Counsel's construction of the award.

gaining process.'” *International Harvester Company*, 138 NLRB 923, 927, 929, *enfd. sub nom. Ramsey v. N.L.R.B.*, 327 F.2d 784 (C.A. 7). This, in turn, depends on such factors as the nature of the controversy, the fairness of the proceeding, and whether the award is repugnant to statutory policy.³² The Board will “withhold its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act.” *International Harvester, supra*, 138 NLRB at 927.

The arbitration submission here—involving contractual rights paralleling statutory rights—was not uncommon. In fact, in *International Harvester*, as here, the question presented in arbitration concerned the union’s right to compel the employer to fulfill the contractual obligation to discharge an employee for alleged failure to meet financial obligations to the union under a union-security agreement. There the Board, without going into the merits of the unfair labor practice charges before it, gave effect to the award upholding the union’s right to require discharge of the noncomplying employee, even though the award—based on construction of the union-security contract—also had impact upon statutory rights and obligations, noting that the arbitration was fairly conducted and the award not clearly repugnant to the policies of the statute. There is no showing of fraud or irregularity in the conduct of the arbitration proceedings in this case.³³ As I see it, the sole question here is whether the Board should honor the award because, by extending the delinquent employees’ time for payment of union dues and initiation fees from 30 to 74 days from the date of the Union’s initial (June 21) request therefor, it contravenes statutory policy relative to the enforceability of union-security agreements.

I have already alluded to the Board’s emphasis in *General Motors*, 134 NLRB 1107, upon the desirability of requiring employees to promptly meet their financial obligations in the interest of sound and effective administration of union-security contracts.³⁴ The Board there enunciated the principle that a union’s right to require discharge of delinquents accrues with the employee’s default in payment and is not subject to defeasance through subsequent belated tender before discharge. If, as Local 803 contends, invocation of arbitration to force employer compliance with union-security provisions could automatically suspend or toll accrued obligations to pay dues and fees, an employer could indefinitely delay fulfillment of, if not frustrate, this essential employee obligation. See *IAM (New Britain Machine Co.)*, *supra*, 420. This could, indeed, as the Union points out, impair “industrial stability” (*Producers Transport, supra*, 441), a paramount objective of the Act.

The Union’s contentions only point up the constant necessity for accommodating or adjusting the balance of seemingly competing statutory policies in determining whether the Board should give effect to an arbitration award. Although, the “function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility” (*N.L.R.B. v. Truck Drivers Local Union No. 449, Teamsters*, 353 U.S. 87, 96), it is not one which is unusual even in other areas of Board competence. The policy of promoting effective union-security agreements may in certain circumstances indeed outweigh the policy of “hospitable acceptance”

³² See *International Harvester, supra*; *Spiegelberg Manufacturing Company*, 112 NLRB 1080, 1082; *Monsanto Chemical Company*, 130 NLRB 1097; *I Oscherwitz and Sons*, 130 NLRB 1078; *Dubo Manufacturing Corporation*, 148 NLRB 1073.

³³ General Counsel’s suggestion that the arbitration was “part of a joint scheme” by Local 803 and Zoe to give official sanction to their collusive attempt to rid themselves of dissident employees is based on sheer speculation and suspicion and is totally unwarranted as shown *infra*, footnote 38. It is noted that General Counsel relies on the award made in that very proceeding which he for other purposes regards as tainted, to support his position as to timeliness of dues and initiation fee tenders.

³⁴ See also *N.L.R.B. v. Technicolor Motion Picture Corporation*, 248 F.2d 348 (C.A. 9); *The International Association of Machinists and Lodge 1021, IAM (New Britain Machine Co.) v. N.L.R.B.*, 247 F.2d 414, 420 (C.A. 2); *Producers Transport, Inc. v. N.L.R.B.*, 284 F.2d 438, 441-442 (C.A. 7)

of arbitration awards. In the final analysis, "each case must rest on its own bottoms." (*Denver-Chicago Trucking Company, Inc.*, 132 NLRB 1416, 1421), the overriding consideration being whether "the public interest desires it [the Board] to act" (*N.L.R.B. v. Newark Morning Ledger Co.*, 120 F.2d 262 (C.A. 3), cert. denied 314 U.S. 693) see *Precision Fittings, Inc.*, 141 NLRB 1034, 1040. Upon close consideration of the circumstances of this case, I conclude that in balance the policy of honoring arbitration awards should prevail.

To begin with, I cannot ignore the fact that Local 803 had neglected the employees in the unit an entire year, during which the Union did nothing to serve the industrial stability which it now espouses. Moreover, I cannot overlook the fact that it was the Union's neglect that engendered the Charging Parties' antagonism toward it, prompting their dissident activity and stubborn refusal to deal with it and to defray their financial obligations toward it. Although unarticulated by him, I cannot assume that the arbitrator failed to take these circumstances into consideration in extending the employees' time to pay the required dues and fees beyond the 30-day period within which those obligations were due. The 74 days he gave the employees for this purpose was the arbitrator's response to the equities of the situation—equities he might properly take into account in fixing "the remedy." It is generally recognized that an arbitrator has broad authority "to completely resolve the dispute" submitted to him, and this includes formulation of the remedy, particularly where, as here, the submission agreement placed no restriction on his power to do so. See *Local 2130, IBEW, AFL-CIO v. Bally Case & Cooler*, 232 F Supp. 394 (D.C.E.D.Pa.) "'The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, . . . other factors of practical consequence.'" *Sinclair Refining Company v. N.L.R.B.*, 306 F.2d 569, 577 (C.A. 5), quoting from *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582.

I conclude that whatever might be said for giving effect to the statutory policy of effective administration of union-security agreements where a union by its conduct advances such policy, this is not such case. In the particular circumstances of this case, effectuation of the statutory policy of honoring arbitration awards would appear to predominate. Accordingly, I conclude that, in accordance with the arbitration award, the Charging Parties were immunized from discharge in the event that they made valid payment or tender of the Union's required dues and initiation fees on or before September 3, the date fixed for such purpose in that award.

6. The alleged dues tenders before September 3, and the effect of Local 803's willingness to accept subsequent tenders

The question whether the Charging Parties tendered the required dues and initiation fees on and before September 3, the deadline fixed by the arbitrator, presents a factual issue. As noted previously, the testimony of the four Charging Parties called by General Counsel that they offered to pay their financial obligations both at lunchtime and quitting time August 30, is sharply disputed by Local 803 President Kalisky, who testified that he was not present in the plant (in New Hyde Park, Long Island) that day but was being interviewed by counsel for General Counsel (at the Board's Manhattan office) at lunchtime and was consulting with the Union's attorney (at the latter's Manhattan office) at quitting time. I need not resolve these testimonial conflicts since I am satisfied that even if I credited the employees' testimony, their August 30 tenders were incomplete for reasons to be shown.

Apart from the fact that at least 2 months' dues had accrued to the Union by August 30, while the employees allegedly offered only 1 month's dues on that date, even the Charging Parties did not claim that they offered to pay the Union's \$25 initiation fee at that (or any other) time. I cannot accept General Counsel's contention (based on the testimony of some of the Charging Parties) that they were ignorant of the Union's dues and fees requirements. The record shows, as already found, that the employees were told and placed on clear notice of these requirements. Thus, in his first meeting with the employees on June 21, Kalisky informed

them that the Union's initiation fee and monthly dues were \$25 and \$5. The letter of July 24, posted on the employee bulletin board, likewise stated that union membership "in good standing would be fully satisfied if on the 31st day after June 21, 1963, each of the [employees] paid the regular initiation fee of \$25 and \$5 monthly dues and continued the \$5 dues monthly thereafter." At least two of the Charging Parties testified that they heard of the Union's dues requirements from others who had signed up with the Union. The record indicates that at least three of the original dissidents who joined Local 803 prior to September 3, paid the \$25 initiation fee.³⁵ Moreover, it seems unlikely that Hance (leader of Local 149's organizational drive), from whose pay monthly dues continued to be deducted throughout the period here involved, was unaware of and failed at any time to apprise his coworkers of Local 803's dues and fees structure. Finally, the Charging Parties were part of an organized dissident group led by an established presumably knowledgeable rival labor organization, and were even advised by legal counsel. Under these circumstances, I am unable to agree with General Counsel's contention that Local 803 took unfair advantage of the employees' alleged ignorance of or failure to comply with unknown requirements. Cf. *N.L.R.B. v. Hotel, Motel and Club Employees' Union, Local 568, AFL-CIO*, 320 F.2d 254, 258 (C.A. 3); *Philadelphia Sheraton Corporation*, 136 NLRB 888, 896.

General Counsel also contends that even if the Charging Parties did not make proper tenders on August 30, the record establishes that Kalisky expressed his willingness to accept belated tenders even after September 3;³⁶ that Kalisky, however, accompanied his requests for dues and fees (after as well as before September 3, including August 30) by demands that the employees also sign membership cards and, on one occasion, checkoff authorizations; and that the Charging Parties therefore were thereby excused from making further tender. On the other hand, Local 803 contends that it should not be penalized for "lean[ing] backwards in an attempt to prevent the employees involved from losing their jobs," urging that its actions were motivated only by forbearance toward delinquents.

The Board has on a number of occasions held that a union "should not be penalized for 'laudable leniency' with respect to collection of dues," pointing out that the failure to treat all delinquents alike does not necessarily bar invocation of the union-security clause against particular individuals. *Special Machine and Engineering Company*, 109 NLRB 838, enfd. 222 F.2d 429 (C.A. 6). See also *North American Refractories Company*, 100 NLRB 1151, 1155 ("Nor does the fact that Respondents have previously permitted delinquent members . . . additional days to pay dues by a liberal application of their union-security clause mean that they were thereafter required to extend the same leniency to all delinquent members as a fixed obligation of law."). The Board has cautioned, however, that a union's unequal treatment of delinquents must be exercised in good faith and not as a pretext for unlawful conduct such as eliminating employees for rival union activity. *Special Machine and Engineering Company*, *supra*. See also *N.L.R.B. v. Shear's Pharmacy, Inc. and Retail Drug Employees' Union, Local 1199*, 327 F.2d 479 (C.A. 2).

As found *infra*, the record presented herein does not support a finding that Local 803, when or after it started to enforce the union-security agreement in June, singled out the Charging Parties for reprisal because of their rival union activity, or that the Union's request for their discharge (and the Employer's compliance with that request) was motivated by unlawful considerations. Under all the circumstances, particularly since the Charging Parties never tendered the required fees, I conclude, for the reasons previously noted (*supra*, section G, 4) that it was incumbent on the employees to tender the accrued initiation fees and dues and thereby to test the Union's willingness to accept them in fulfillment of the condition of their tenure under the contract. For the same reason, the Charging Parties were not relieved of the necessity of tendering both initiation fees and dues because

³⁵ The dissidents in question are Coyne, Ingman, and Angrisano, who signed membership applications on August 26 and 30 and September 3, respectively.

³⁶ General Counsel does not claim that the Charging Parties actually tendered dues on any date other than August 30, nor initiation fees at any time.

Kalisky had once (in the middle or at the end of September) coupled acceptance of payment upon the employees' willingness to sign checkoff authorizations. It is to be noted that this request was made when the employees were already delinquent and in default at least as regards the requested initiation fees. See *General Motors Corp.*, 134 NLRB 1107, 1117, holding that in the circumstances of that case it was not improper for the union to require employees to sign checkoff authorizations in view of their dues delinquency. "The checkoff requirement . . . was merely incidental to the [Union's] right to timely receipt of dues and . . . such measure was both reasonable and necessary to a fair administration of the contract . . ." (134 NLRB at 1117.)

7. The claim that Local 803 enforced the union-shop contract as a pretext to discriminate against the Charging Parties for engaging in rival union activities

General Counsel alleges that in any event Local 803 invoked the union-security agreement against the Charging Parties and caused their discharge not because of the employees' arrears in dues and initiation fees but as a pretext to discriminate³⁷ against them because of their activities on behalf of a rival union, Local 149. In support of this position, General Counsel alleges that the 12 Charging Parties were members of the dissident group which encompassed nearly all of the employees in the unit in June 1963; that the group "became a constant source of annoyance and irritation to Kalisky and Local 803," rebuffing their efforts to have them join Local 803; that Local 803 resented Local 149 representative's (Duffy's) attempts "in all ways possible to put pressure on the Respondents . . . constantly harassing Respondents in his efforts to protect the employees' jobs"; and that "Local 803 invoked the union-security clause only against members of the dissident group."

In my view the record as a whole fails to support General Counsel's contentions, and I so find. I have no doubt that Kalisky resented the rival activities of the dissident group, including those of the Charging Parties—a reaction not unnatural in interunion rivalry. But the record shows, and I find, that Kalisky's primary concern after invoking the union-security clause in June was the employees' failure to comply with that clause, and not the dissident activity. In his initial talk with the employees (June 21) Kalisky told them that compliance with this agreement could be satisfied by payment of the current dues and initiation fees. Similarly, in his initial request to the Company (July 24) to discharge the defaulting employees gave nontender as the only reason for the request. There is no evidence that Kalisky took any retaliatory measures against the dissidents who satisfied their financial obligations to Local 803. Thus, Hance, the leading spirit of the dissident group and the initiator of Local 149's drive, who paid his dues, worked without molestation.³⁷ Similarly, Kalisky accepted dues and initiation fees from at least three other dissidents and these, too, remained in Zoe's employ. There is no reason to believe that the 12 Charging Parties would have been treated differently had they likewise made payment as required by the union-security contract.

Accordingly, I find that General Counsel failed to meet the burden of establishing that Local 803 invoked the union-security agreement and caused the discharge of the Charging Parties to punish them for their rival union activity. I conclude that the record as a whole does not support the allegation in the complaint that in causing and attempting to cause the discharge of these employees, Local 803 was motivated by some reason other than their failure to pay the periodic dues and initiation fees uniformly required as a condition of acquiring membership or retaining membership, in violation of Section 8(b)(2) and (1)(A) of the Act.

H. Conclusion respecting Zoe's alleged Section 8(a)(1) and (3) violations

Having found that Local 803 did not violate Section 8(b)(2) and (1)(A) by causing and attempting to cause the discharge of the Charging Parties on some ground other than their failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership, it follows

³⁷ Hance quit the plant of his own accord in November 1963. There is no evidence that his rival union activity was a factor in his decision to quit.

that Zoe's discharge of these employees on October 4 and 7 at the insistence and demands of Local 803 was not violative of Section 8(a)(3) and (1) of the Act.³⁸

CONCLUSIONS OF LAW

1. Respondent Zoe is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Respondent Local 803 is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondents have not engaged in the unfair labor practices alleged in the complaint.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, it is recommended that the complaint be dismissed.

³⁸ In his attempt to establish that Local 803's instigation and Zoe's effectuation of the discharges were pretexts to cloak the "real" reason for Respondents' action, i.e., the employees' rival union activities, General Counsel relies on the testimony of one of the Charging Parties quoting a company supervisor (Foreman Baptista) as saying on one occasion that the Company had paid the Union \$2,000 "to get lost". He also relies on the testimony of other employees quoting company officials Axelrod or Kupetz as saying on another occasion that they had "a special arrangement with the Union" whereby the Company and the Union assured each other that neither would "bother" the other. Based on the entire record, including the comparative demeanor of the witnesses, I credit the denials of Kupetz and Axelrod that they at any time told any employee that such arrangement existed, and that they at any time offered a \$2,000 bribe to the Union "to get lost". Furthermore, I credit Axelrod's testimony that immediately after learning of the rival organizational activities of Locals 149 and 803 (through the filing of Local 149's petition for representation on June 10) he contacted his attorney (Drimmer), that he received instructions from him to maintain strict impartiality, and that the Company then adhered to these instructions. There is nothing in the record even suggesting company hostility toward, and interference with, the dissidents' rival union activity. In fact, General Counsel's own witnesses Hance and Deresh adverted to incidents in which company official Kupetz reprimanded and chased away Local 803 Agent Kalisky when the latter allegedly "bothered" them and interfered with their work. Nor did the Company take any reprisal against the dissidents when they left in unison on September 4 (without notice to the Company) to meet with their organizers; it only docked them for time lost. General Counsel also points to the fact that the Company sanctioned Kalisky's "constant presence" in the plant to solicit memberships; I do not, however, deem this factor significant in view of the union-security provision in the contract requiring acquisition of membership after 30 days of employment and the further provision in the contract that Local 803 representatives "shall be permitted free access . . . for the purpose of observing if the conditions of this agreement are maintained." Finally, General Counsel suggests that the arbitration proceeding and the subsequent court proceeding to confirm the award were but "part of a joint scheme" of Local 803 and Zoe designed "to rid themselves of the troublesome employees with the imprimatur of official sanction." The record does not support this accusation and I reject it as unwarranted. The facts are that Zoe actively resisted Local 803's attempts to enforce the union-security agreement both before the arbitrator and before the court, and that the Charging Parties and Local 149, although fully aware of the pending proceeding and otherwise represented by counsel, made no attempt to intervene in the proceeding—at the very least to urge any alleged collusion between Local 803 and Zoe. Moreover, Local 149's representative, Duffy, in effect admitted at the hearing that his union pressured the Company not to comply with the union-security clause and thus to force Local 803 to arbitration.

TRIAL EXAMINER'S SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

On June 22, 1965, the Board issued an order remanding this proceeding to Trial Examiner Samuel M. Singer for the purpose of resolving a credibility issue. It appearing that proper determination of that issue required reopening of the record for the receipt of additional evidence, on July 15, 1965, I issued an order directing a further hearing on the remanded issue. That hearing was held before me on September 8-10, 1965, in Brooklyn, New York. General Counsel and Respondent

Company were represented by counsel; Respondent Local 803 was represented by its president, Bernard Kalisky. All parties were afforded full opportunity to participate in the hearing, to introduce evidence relevant to the issue litigated, to engage in oral argument on the record, and to file briefs. Briefs, received from General Counsel and Respondent Zoe, have been fully considered.

Upon the record of the entire case, as developed in both hearings, the briefs, and my observation of the witnesses, I hereby make the following supplemental findings of fact and conclusions of law:

FINDINGS AND CONCLUSIONS

I. HISTORY OF THE PROCEEDING; THE ISSUE PRESENTED BY THE BOARD'S ORDER REMANDING THE CASE

The complaint herein alleged that Local 803 violated Section 8(b)(1)(A) and (2) of the Act by unlawfully enforcing its union-shop contract with Zoe, by rejecting timely tenders of dues and initiation fees, and by causing Zoe to discharge the 12 Charging Parties because of their concerted activities on behalf of a rival labor organization, Local 8-149, International Oil, Chemical and Atomic Workers Union, AFL-CIO (herein called Local 149). The complaint alleged that Zoe violated Section 8(a)(1) and (3) of the Act by discharging the Charging Parties on October 4 and 7, 1963 pursuant to the demands of Local 803.

As found in my decision of September 30, 1964, in March 1962, Local 803 and Zoe executed a union-security agreement requiring Zoe's employees to acquire membership in the Union after 30 days of employment. For approximately a year before June 1963,¹ enforcement of the agreement was suspended, Local 803 having stopped servicing the shop. In the latter part of May and early June, the Zoe employees joined Local 149. On June 21, Local 803 President Kalisky served notice on the employees that he would thereafter enforce the union-security agreement. Acknowledging his union's past dereliction, he promised to correct the situation and fire the union agent who neglected the shop. Kalisky told the employees that they could satisfy their union obligation by payment within the next 30 days of the union's \$25 initiation fee plus \$5 monthly dues, waiving back dues. The employees, resentful of Local 803's prior neglect and determined to remain loyal to their new union (Local 149), refused to have any dealings with Local 803. Kalisky continued to press for the dues and fees, warning employees that unless they joined Local 803 and signed membership cards they would be fired. Ignoring these admonitions, the employees neither tendered any moneys nor signed cards, deciding instead to adhere to Local 149 and to bring pressure to Zoe not to enforce the union-security contract.

On July 24, Kalisky requested the Company to discharge the noncomplying employees because of their failure to meet their financial obligations under the union-security contract. Upon the Company's failure to comply with this request, on August 5, Local 803 instituted arbitration proceedings, in accordance with the provisions of the collective-bargaining agreement requiring differences between the parties to be settled by arbitration. Neither Local 149 nor any of the Charging Parties intervened. On August 26, the arbitrator upheld Local 803's contractual right to require the discharge of the noncomplying employees, including the 12 Charging Parties herein, giving them, however, until September 3 "to join the Union." On August 27, Zoe posted the arbitration award on its bulletin board. A day or two thereafter (August 28 or 29), Company President Axelrod displayed the award to the assembled employees, explaining that they would have to join Local 803 by September 3 or be discharged.

As stated in my Decision of September 30, 1964, there is an extremely sharp conflict of testimony as to whether the Charging Parties tendered the dues and fees required by Local 803 on and prior to September 3, the deadline fixed by the arbitrator. General Counsel's witnesses (including the Charging Parties called by him) uniformly testified that on August 29 (about 8 or 8:30 p.m.) the employees met with Local 149's leadership in its union hall and agreed on a plan for tendering dues and initiation fees to Local 803. They further testified—in minute detail—that in accordance with this plan, during lunchtime the next day (Friday, August 30), they tendered the dues to Kalisky, that the latter rejected the tender

¹ Unless otherwise stated, all dates herein are to the year 1963

because the employees would not sign authorization cards for Local 803; and that later in the day, around 5 p.m. quitting time, they again tendered, but Kalisky again rejected their tender.

Kalisky emphatically denied that the Charging Parties tendered any dues on August 30 (noontime or later), insisting that he was not even in the plant that day. According to his testimony, he was being interviewed by and signing a statement for General Counsel at the Board's New York City office between 12:30 to 2 p.m., in connection with pending charges at or around the time the Charging Parties supposedly were tendering dues to him at the company plant in New Hyde Park, Long Island. (Counsel for General Counsel stipulated at the first hearing that Kalisky was indeed with him and that he took a statement from him on August 30, but that counsel could not recall the specific time of day when this took place.) Kalisky further testified that shortly before 5 p.m. quitting time (when the second tender is alleged to have taken place) he was in the downtown office of his attorney, Katz. (Katz corroborated this, testifying that he distinctly remembered seeing Kalisky at the time in question.) Kalisky gave a detailed account of his whereabouts during the entire day of August 30—including earlier morning visits to Katz and to another attorney, Nearing, in connection with pending litigation. Kalisky insisted that the first time the Charging Parties tendered any dues to him was in September, after enforcement of the arbitration award by the New York Supreme Court, long after the September 3 deadline set in the arbitration award.

In my decision of September 30, 1964, I deemed it unessential to resolve the "irreconcilable" conflicting testimony regarding the August 30 dues tenders. I found that apart from the fact that at least 2 months' dues had accrued to the Union by August 30, while the employees allegedly offered only 1 month's dues (\$5) on that date, even the Charging Parties did not claim that they offered to pay the Union's \$25 initiation fee at that (or any other) time. Under all the circumstances, I concluded that it was incumbent on the employees to tender the accrued initiation fees *and* dues to test the Union's willingness to accept these in fulfillment of this condition of their tenure under the contract. However, the Board's order of June 22, 1965, directing me to resolve the above-discussed credibility issue, appears not to have accepted this view. The Board stated:

The testimony of the charging parties, if credited, would tend to establish that a tender was made prior to September 3, 1963, which was rejected because of the charging parties' failure and refusal to sign authorization cards, and not because of the inadequacy of the amount, and that the employees had, therefore, satisfied their obligation under the union security clause.

The Board in effect held that under the Charging Parties' version of the events (if credited), a tender of full dues and fees would have been futile and unnecessary since the Union had demanded more than it was legally entitled to, namely, signed authorization cards. Cf. *Union Starch & Refining Company*, 87 NLRB 779, enf. 186 F.2d 1008 (C.A. 7); *United Brotherhood of Carpenters and Joiners of America, Local 824 (Brunswick-Balke-Callender)*, 115 NLRB 518; *Eclipse Lumber Company, Inc.*, 95 NLRB 464, 467, enf. 199 F.2d 684 (C.A. 9).

In view of the crucial and difficult credibility issue presented, it appeared desirable to reopen the hearing to adduce additional evidence bearing upon that issue. All parties availed themselves of that opportunity.²

II. THE CREDIBILITY ISSUE INVOLVED IN THE ALLEGED 8(b) (2) VIOLATION

A. General Counsel's evidence

1. *The Charging Parties' testimony.* As related in my Decision of September 30, 1964, the four Charging Parties (Di Giacomo, Pisarra, Struffolino, and Weber)

² At my instance, *subpoenas duces tecum* were issued directing production at the reopened hearing of such documents as minutes and records of Local 149 and Local 803 meetings; diaries, travel vouchers, notes, etc., reflecting Kalisky's movements on August 30; and documentation bearing on Kalisky's visits to Katz. The Regional Director was requested to produce files, records, memoranda, etc., relating to the time and duration of Kalisky's August 30 visit to Spelfogel (counsel for General Counsel at the original hearing) or to other Board personnel on that date. A *subpoena ad testificandum* also was issued to Spelfogel, no longer in the Board's employ.

testified at the first hearing³ that around 8 p.m. Thursday, August 29, they met with Duffy and other Local 149 representatives in the Local's hall in Albertson, Long Island; that after discussing the arbitration award and Zoe President Axelrod's previous admonition that they would be fired unless they joined Local 803, it was agreed (after a telephone check with Local 149's Attorney Mozer) that the employees would tender the required dues and initiation fees; that they would, however, under no circumstances sign Local 803 membership cards; that the first dues tender would be made around noontime the next day by employee Struffolino in the presence of all of Charging Parties after receiving their pay; and that if Local 803 President Kalisky accepted Struffolino's tender, the others would follow suit and make their own payments. The Charging Parties further testified that, in accordance with this prearranged plan, the next day (Friday, August 30), after receiving their pay at 12 o'clock, they grouped near the timeclock and tendered the dues to Kalisky; that Struffolino, speaking for the group, told Kalisky they were willing to pay Local 803 dues, but were not legally required and refused to sign Local 803 membership cards; that Struffolino extended a \$5 bill in payment of the monthly dues, which Kalisky refused unless she also signed a Local 803 card; and that Struffolino repeated her statement that although she was under a legal obligation to pay dues, she was not required to sign the card, to which Kalisky replied that she was "misinformed."⁴

The Charging Parties also testified that later that day, around the 5 p.m. quitting time, the group again offered to pay dues to Kalisky, reiterating their refusal to sign cards, but that Kalisky rejected the offer with the statement that if they did not sign the cards they were fired and need not return to work after the Labor Day weekend.⁵

2. *Hance and Auld*, former Zoe employees, also testified at the first hearing. Hance, one of the instigators of Local 149 at Zoe, testified, among other things, that he reported the tenders (and Kalisky's rejection thereof) to Local 149 organizer Duffy on Friday evening, August 30, as had been arranged the night before at the Local 149 meeting. Auld, the married daughter of Charging Party Gagan, testified as a rebuttal witness for General Counsel mainly on the alleged 5 p.m. tender and incidentally on the noon tender.

3. *Patrick Duffy*, a Local 149 organizer, at the first hearing described the events leading to the union meeting which he, like the Zoe employees, fixed as Thursday, August 29. His testimony as to what took place at the meeting is substantially consistent with that of the Charging Parties. He stated that in addition to the approximately 20 employees, the meeting was attended by Anthony Mazzocchi (the local's president), Tom Hogan (an international representative), and Bernard O'Reilly (Nassau County assistant director of labor relations). According to Duffy, he had discussed the arbitrator's award with Hogan and Mazzocchi prior to the meeting. Duffy corroborated employee Hance's testimony that he instructed Hance to report on the employees' dues tender to Local 803 the next evening (August 30), and stated that Hance did as requested.

Duffy's brief testimony at the reopened hearing was limited to the nature of records maintained by his local. He indicated that the only record that could fix the date of the meeting here involved was the local president's "daytime book" or "calendar."

³ None of the Charging Parties testified at the reopened hearing.

⁴ Illustrative of the noon tender is Di Giacomo's testimony: "We told him [Kalisky] that we were willing to pay the dues, but we wouldn't sign any card. So J Struffolino took cash out of her envelope, she said, 'Here is my money. We will pay the dues. But no signing of cards.' He said he didn't want any dues; we had to sign the card." Struffolino thus described the tender: "I had my [pay] envelope in my hand . . . I took out \$5 . . . I offered it to him. I said, 'There is no law stating we have to sign the card but we have to pay the dues . . . Well, he refused the dues . . . he said if we don't sign the cards, we have the deadline to sign the cards until September 3'"

One of 12 Charging Parties, Madeline Gioletti, was not in the August 30 group, having allegedly left her \$5 with Struffolino to give to Kalisky if he accepted Struffolino's tender.

⁵ Labor Day was on Monday, September 2. Pissarra's testimony on the alleged second tender is typical: "At 5 o'clock when we punched our time card [Kalisky] was standing there at the hallway, at the doorway as we walked out . . . I was with J. [Struffolino and other "girls"] . . . He told us again that we have to sign the cards. Otherwise don't bother coming in to work. So we told him again we are not going to sign no cards, there is no law stating we have to. We are offering you the dues. If you don't want to accept the dues, that's not our fault."

4. *Thomas J. Hogan*, international representative in charge of district 8, including New York State, generally corroborated the testimony of other General Counsel witnesses as to what transpired at the meeting—including the deliberations respecting the dues and fees tenders and the telephone contact between Local 149's representatives and its attorney. Hogan testified (at the second hearing) that he attended only one meeting involving the Zoe employees; that "it just happened" that he was in Albertson that day on other business and got himself "involved with the [Zoe] discussions" incidentally; that he recalls Zoe employees starting to "wander into the meeting hall" around 5:30 p.m. and assembling in about "an hour or so"; and that he himself made the telephone call to the Union's attorney and then turned the telephone over to Mazzocchi and Duffy so that they could check on the question of the tender. Apart from estimating the date of the meeting to be late in August, he had no independent recollection of the date. He recalled, however, that he arrived at the union hall "earlier in the day" and stated that he might be able to fix the day more accurately by his personal "activity book" which he could not produce at the hearing.

Excerpts from the activity book, subsequently introduced in the record,⁶ show that Hogan was in Albertson on August 29, arranged for a committee meeting of the Sylvania unit of the local, worked on contract language, and returned home to Bridgeport at 10:15 p.m. The activity book also indicates that Hogan was often in Albertson before and after August 29 (including August 27, 28 and September 3) to discuss the Sylvania matter.

5. *Anthony Mazzocchi*, president of Local 149 (one of General Counsel's chief witnesses at the reopened hearing), testified that after Duffy "related the concern of the people about the question of dues, that they must pay it or be discharged," he decided to "meet with them and lay down a very specific and firm policy regarding the question." Like other General Counsel witnesses he stated that the meeting took place on the evening of August 29 (he had no independent recollection of the time); that there was "considerable discussion over events that transpired"; that after a telephone call to Local 149 Attorney Mozer "to verify" his view on the matter, he instructed the group that they should pay their dues and pay them [Local 803] initiation fees," but without signing cards; and that among those present were Duffy, Hogan, and O'Reilly.

Mazzocchi stated that Local 149 kept no minutes of meetings with a "newly organized group" like that at Zoe, explaining that minutes were kept for only regular "monthly meeting[s] of the general membership" covering employees of all plants. However, he produced a desk diary or calendar (8½ by 11 inches) showing "appointments & scheduled events" between the hours of 8 a.m. and 6 p.m. and in "night hours"; the calendar also catalogues items "to be done" and "services performed" on particular dates. It lists or notes four scheduled meetings between Mazzocchi and the "Zoe group" in his office at the Local 149 hall (Albertson, Long Island): August 29, between 5 and 6 p.m.; September 3, during "night hours"; September 4 at 8 a.m.; and September 18, again during "night hours." According to Mazzocchi, meetings noted for the end of the day (after 5 p.m.) did not necessarily signify their start or duration. Referring to the 5 to 6 p.m. August 29 entry, he stated that it only "mean[t] to me that I am to stay in the office, that I will be meeting in connection with Zoe Chemical after work." He buttressed this statement by pointing out that the calendar shows cancellation of an appointment scheduled for the "night hours" of August 29, apparently in anticipation that "the whole evening would be taken up." Mazzocchi estimated that the September 3 meeting during "night hours" "could have" started at 7 or 8 p.m. Explaining the September 4 meeting at 8 a.m., he stated, "I had been informed that the employer would not allow the people to go into work that morning. . . . It appears that 8 o'clock in the morning might be the morning when I met with the group for that purpose."

Other entries of interest in this proceeding pertain to meetings with or instructions to Bill Hance (Local 149's major contact with the Zoe employees) on the Deresh episode in which an alleged Local 803 representative assaulted Zoe employee Deresh (see, Decision footnote 15);⁷ and meetings (or cancellation of meetings) and action

⁶ By order dated November 15, 1965, I approved the stipulation of General Counsel and Respondent Zoe for the introduction of the "activity book," which was received as Respondent Zoe Exhibit 4(a)-4(1).

⁷ I deemed it unnecessary in my first Decision to pass on the question of Local 803's responsibility for the conduct of certain alleged agents; it is likewise unessential to pass on this question in this Decision.

taken with respect to contract negotiations with Sylvania on August 26 and 27, September 3, 4, 5, 12, and 23.

6. *Bernard J. O'Reilly's* testimony at the reopened hearing is fully consistent with that given at the original hearing. He testified that he went to Local 149's hall in Albertson in his capacity of assistant labor relations director, Nassau County, to resolve what he thought was a jurisdictional dispute between two unions, arriving at 8 or 8:30 p.m., while the meeting was in progress. As noted in the Decision of September 30, 1964 (footnote 18), O'Reilly was not sure of the date of the meeting. However, he recalled that this was the only meeting he attended with Duffy, Hogan, and Mazzocchi present; that the meeting was "fairly crowded" with approximately 20 people; that he heard Duffy and Mazzocchi tell the employees "that all the people are required to do is pay dues and initiation fees, but they do not have to sign cards"—a remark that "sticks in [his] mind . . . because it's an unusual position"; that that statement was made after Duffy had made a telephone call (which he observed him do); and that "there was a lot of dialogue between the people, Mazzocchi and Hogan and Duffy" concerning the employees' obligation to pay dues and "join the other labor organization." O'Reilly stated that although he soon discovered that his agency had "no jurisdiction" over the labor dispute at Zoe, he nevertheless stayed around for about an hour, leaving at approximately 9:30 p.m. when the meeting was over. In the course of the meeting, he had occasion to confer with International Representative Hogan (in another office of the hall) concerning a different labor matter (identified by him in the first hearing as the Sylvania contract negotiations).

7. *Evan J. Spelfogel*, counsel for General Counsel at the original hearing, but now in private practice, testified that although he had stipulated at the first hearing that he could not recall the specific time of day when Kalisky visited his office and that he had no records with which to refresh his recollection on this matter, an exhaustive search of his personal records made after receiving the subpoena from me resulted in his locating a home-made personal wall calendar showing an appointment with Kalisky at 2 p.m. on August 30. The calendar, consisting of 12 by 8 inch yellow sheets—lined off horizontally and vertically to form boxes for each weekday of the month like a monthly calendar—was used by Spelfogel to supplement his small desk calendar and was placed on the wall (or in the fly leaf of his desk) to record his appointments, hearing schedules, etc., so as to give him "a picture of the next few weeks in front of [him] at a glance." The calendar shows the entry "Kalisky 2 p.m." in the Wednesday (August 28) box circled and carried over by an arrow to Friday, August 30. According to Spelfogel, "this was my shorthand way of indicating that the appointment was shifted from Wednesday, the 28th, to Friday, the 30th."⁸

Spelfogel testified that "the calendar that I found. . . stimulated my chain of recollection . . . I began to search my mind as to these events. . . ." He recalled returning from lunch at approximately 2 p.m. (he usually lunched between 1 and 2 p.m.) and apologizing to Kalisky for his waiting (he was not sure whether he was a few minutes late or Kalisky a few minutes early). Kalisky stated he hoped that Spelfogel "wouldn't keep him too long" because he had a car double-parked or being driven around the block, stressing that he was "in a hurry." Spelfogel then proceeded to interview Kalisky concerning Local 803's pending unfair labor practice charges against Zoe (see Decision of September 30, 1964, footnote 11) and drafted a 3¼-page statement which Kalisky read over and signed. According to Spelfogel, Kalisky left around 3 p.m. Spelfogel stated that Kalisky reminded him several times during the interview that he was "in a hurry," referring to a Labor Day holiday trip he was going to take and mentioning that he had "a full schedule of appointments."

Spelfogel conceded making "a search of the available records that I had. . . to help me refresh my recollection" after Kalisky pleaded his "alibi" at the first hearing. He stated that he vainly "looked everywhere" in his office for such records, not realizing at the time that weeks before that hearing—in anticipation of leaving the NLRB (he left the Board about 2 or 3 weeks after the first hearing ended on April 15, 1964)—he had packed and stored his personal calendar in the basement of his

⁸ There is no dispute that Kalisky's original appointment was for 2 p.m. on Wednesday. In issue is whether the Friday appointment was for 2 p.m. (as claimed by Spelfogel) or 12:30 p.m. (as claimed by Kalisky). Spelfogel emphasized that the new appointment for Friday (carried over by the arrow) shows no changed time (e.g., 12:30 p.m.)—which would have been the case if a different time had been set for Friday.

home, "together with a lot of other materials which were my own possessions accumulated through 4 years with the NRLB." Spelfogel explained that "it was only after my receiving [the] subpoena and my searching and going through every box that I came across" the calendar.⁹

8. *Victor J. Nearing*, the attorney who handled Local 803's petition to confirm its arbitration award in court, testified only at the first hearing as a rebuttal witness for General Counsel. Nearing had "no independent recollection of seeing" Kalisky on August 30, although the petition on its face indicates that it was executed and acknowledged before him on August 30; nor did his appointment diary for August 30 show any entry concerning Kalisky. (He stated that his diary would not normally show clients' perfunctory visits to sign papers.) Nearing further testified that his office was usually not open before 9:30 a.m. and that his secretary was "normally" late for work.

B. Respondents' evidence

1. *Kalisky* testified at both hearings, tenaciously adhering to his claim that the Charging Parties did not tender dues to him at the Zoe plant on August 30 because he was not there. In detailing his whereabouts on August 30, he testified that he left home (Rego Park, Queens) at 8 or 8:30 a.m. and went by subway to the office of Attorney Nearing in midtown New York (36 West 44th Street, between 5th and 6th Avenues) between 9:10 and 9:15 a.m. According to Kalisky, Nearing's office girl told him, "You must be Mr. Kalisky . . . The papers [you are to sign] are not ready," and asked him to return around 11 a.m. He then walked to the office of Attorney Katz (who was handling Local 803's unfair labor practice charges against Zoe) at Lexington Avenue and 40th Street, stayed from 10 to 11 a.m., returned to Nearing's office around 11:30 a.m., signed papers in Nearing's presence, and then walked to the Board's offices (745 5th Avenue, between 57th and 58th Streets) to meet with Spelfogel, arriving around 12:30 p.m. Kalisky further testified that he stayed with Spelfogel until 2 p.m., walked to Hector's Cafeteria (Broadway and 43d or 44th Street) for lunch, and—after 1½ hours—returned to see Katz around 4:30–5 p.m., before going home.

At the reopened hearing, Kalisky stated that neither he, nor Local 803, had records (union minutes, correspondence, diaries, travel vouchers, etc.) bearing on his whereabouts or activities on August 30 except the statements notarized on that date by Nearing and Spelfogel.¹⁰ He conceded that his original appointment with Spelfogel had been for Wednesday, August 28. Although at first pleading inability to recall the time for which it had been scheduled, he later recalled it was for 2 p.m. He remembered requesting Spelfogel to postpone the meeting to Friday, so that he could check on the posting of the arbitrator's award at the Zoe plant, but stated that "to the best of [his] recollection" Spelfogel fixed Friday's meeting for 12:30 p.m. Kalisky testified in both hearings that he talked to the Zoe employees in the plant during both lunch time and at quitting time on August 28.¹¹ He recalled telling employees, including Struffolino, that in accordance with the arbitration award they had to pay their dues and initiation fees by September 3 or face discharge.

Kalisky disputed much of Spelfogel's testimony concerning the August 30 interview, Kalisky questioned Spelfogel's testimony as to its duration and content. He denied going to the Board's office by automobile. Although at first unable to remember telling Spelfogel that he was "in a hurry," he thereafter flatly denied making such statement. He claimed, contrary to Spelfogel, that the latter had drafted two statements, the first having been discarded because "there was a lot of mistakes." Although Spelfogel estimated the duration of the interview at 45 minutes to an hour, Kalisky stated it was about an hour and a half. Kalisky and Spelfogel agreed that the

⁹ At the hearing, Respondents objected to General Counsel's offer to introduce Spelfogel's calendar on the ground that General Counsel was "going behind [the] stipulation" and, indeed, contrary to the stipulation at the first hearing, to the effect that Spelfogel had no records with which to refresh his recollection as to the time of day Kalisky visited his office. In overruling this objection, I pointed out that although I would take into account inconsistency of evidence adduced in assessing credibility, the paramount interest in ascertaining the true facts outweighs technical effects of stipulations. See 50 Am. Jur., Stipulations, §§ 11 and 14; 9 Wigmore, *Evidence* § 2590 (3d ed. 1940).

¹⁰ Kalisky testified that he was the only person holding office in Local 803 after July 3 through at least September 30.

¹¹ Kalisky had difficulty at both hearings in fixing the time of his visits to the plant.

interview commenced after the latter returned from lunch, but Kalisky fixed the beginning at 12:45 p.m. or close to 1 p.m. (he allegedly waited around 15 minutes), and Spelfogel at around 2 p.m.

Although Katz's calendar, produced at the second hearing pursuant to subpoena, indicates that Kalisky had scheduled an appointment with Katz (his attorney) around 12 p.m. on August 28 to discuss Kalisky's forthcoming August 30 interview with Spelfogel, Kalisky could not, however, "remember" seeing Katz on August 28 or changing his appointment from the 28th to the morning of the 30th. Katz's calendar indicates that Kalisky had a 10 a.m. appointment with him on August 30, but Kalisky denied making any such appointment in advance, insisting that he saw Katz twice that day "on my own."

2. *Charles R. Katz*, Local 803's attorney at the first hearing,¹² testified that Kalisky twice visited him in his office on August 30. According to Katz, the first visit, around 10 a.m., lasted about a half hour and the subject was Kalisky's interview with Spelfogel later in the day on Local 803's refusal-to-bargain charges against Zoe.

Katz testified that Kalisky again visited him between 4:30 and 4:45 p.m. to report to him on his (Kalisky's) interview with Spelfogel. He stated that although he had "no independent recollection" of Kalisky's first (10 a.m.) visit, he positively remembered the second (afternoon) visit. Katz remembered telling Kalisky that he had no time to talk to him then because he had to make a 5:07 p.m. train to meet his wife for a dinner engagement. He vividly recalled the day and hour because his wife had been hospitalized with two serious operations shortly before and this was the first night after a long period of convalescence that they were going out socially with two other couples (including recently married relatives from Florida) joining them for dinner at the Lido Beach Hotel. Katz even recalled that the "headliner" that evening was Harvey Stone. According to Katz, he pleaded with Kalisky "to hold until after the weekend" whatever he had to say to him, but Kalisky managed to report on the Spelfogel interview and to talk about other things, as they walked together to Grand Central station, a block and a half from Katz's office.¹³

3. *Florence Gagan and Esther Ilay*, two of the Charging Parties, testified at the first hearing as witnesses for Respondent Zoe. Their testimony as to the noon and 5 p.m. tenders was generally in line with that of the Charging Parties called by General Counsel. Gagan admitted she was "very bad on dates." She also admitted that a week before she testified the Charging Parties met and discussed the events here in issue in order to "refresh" their memory. As I stated on the record, Hay's confusing testimony is entitled to little weight; Hay testified on the alleged 5 p.m. tender, although admitting, after confronted with her timecard, that she had checked out at 12:02 p.m. and, on account of illness, did not thereafter return to the plant.

4. *Marian Nothaft*, Zoe's bookkeeper, testified only at the first hearing. Respondent Company sought to show through her testimony that Struffolino could not have tendered a \$5 bill to Kalisky on August 30 because the \$53.67 pay she received in the envelope on that day did not contain any bill of that denomination. However, Nothaft testified only that "she did not get one from me." She had "no idea" whether Struffolino had a \$5 bill from another source. Nothaft admitted that nine \$5 bills were inserted in employees' pay envelopes on August 30. Furthermore, she had no independent recollection concerning the August 30 payroll; her testimony concerning the distribution of bills in the payroll makeup rests on inference and deduction.

C. Credibility resolution

As appears below, resolution of what appeared to be an irresolvable credibility issue in the posture in which the record was left at the conclusion of the first hearing has now been made possible through supplementation of that record by substantial documentary evidence and testimony of key witnesses. This is not to say that the credibility resolution task has been easy. It is to say that, as in other flat conflicts of this nature, the record as now developed contains sufficient and dependable clues as to the truth to facilitate determination of the issues.

¹² Katz did not represent Local 803 at the second hearing.

¹³ Katz's calendar entries on Kalisky's August 30 and 28 visits already have been referred to. A notation for 2 p.m., August 30, reads: "get gift for tonight re dinner"; Katz testified that he obtained the gift that afternoon for the newlyweds from Florida at Macy's Department store.

As I see it, the three major credibility questions to be decided are whether (1) the Charging Parties met with their leaders in the Local 149 hall in Albertson, Long Island, on Wednesday evening, August 29, and there received instructions to tender dues to Local 803; (2) whether they tendered the dues at noontime the next day (August 30), but Kalisky (the Local 803 president) rejected the tender because the employees refused to sign Local 803 membership cards; and (3) whether they again made a like tender, and Kalisky again rejected the tender for a same reason, at quitting time (5 p.m.) that same day.

1. The Local 149 meeting on August 29

In my view, the key to resolution of the question whether the Charging Parties met with their leaders on the evening of Wednesday, August 29, lies largely in the credibility of Anthony Mazzocchi, Local 149's president. Mazzocchi impressed me as a most meticulous and sincere witness. His disinclination to testify one way or another on certain remote events—beyond the normal range of memory—unless assisted by records, and his admission of matters not wholly favorable to the best interests of his union, evinced refreshing candor and frankness in a hearing in which proneness to exaggerate and to withhold facts—as it best suited interested witnesses—was not uncommon.

Furthermore, Mazzocchi's testimony is supported to a significant degree by documentary evidence, testimony of a completely disinterested witness, and corroborating circumstances. Thus, Mazzocchi's desk diary or calendar establishes that he met "with Zoe Chem. group" at Local 149's headquarters on August 29.¹⁴ International Representative Hogan's "activity book" shows that he was in Albertson (where Local 149 is located) on that day to handle the Sylvania contract negotiations. O'Reilly (Nassau County labor relations director)—a completely disinterested witness—although unable to name the particular date he attended the Local 149 meeting where the Zoe matter was discussed, identified it as the only meeting he attended with Hogan, Duffy, and Mazzocchi being present; and he recalled conferring with Hogan on the Sylvania matter in the course of the meeting. O'Reilly, Mazzocchi, Hogan, Duffy, and the Charging Parties mutually corroborated each other as to matters discussed at the meeting, including Mazzocchi's and Duffy's instructions regarding their dues tender the next day to Local 803. Finally, the very sequence of events—the Company's posting of the arbitration award on August 27 and Company President Axelrod's announcement the next day that all employees would have to join Local 803 by September 3 in order to avoid discharge—dictates the logical step of the Local 149 leadership to call the August 29 evening meeting to allay, as Mazzocchi testified, "the concern of the people" and to "lay down a very specific and firm policy regarding the [dues] question."

Respondent contends that the meeting could not have taken place on August 29 because: (1) Mazzocchi's calendar does not contain any entry concerning Sylvania contract negotiations on August 29; (2) if, according to Mazzocchi's calendar, the approximately 2-hour meeting started between 5 and 5:45 p.m., it was over by the time O'Reilly arrived at around "8:30 p.m." (O'Reilly actually gave 8 to 8:30 p.m. as the time); and (3) if, as the Charging Parties testified, the meeting started at "8:30 p.m." (they actually gave 8 or 8:30 p.m. as the time) Hogan could not have attended the meeting because his activity book shows that he returned from Albertson to Bridgeport (a "two hour" trip) by 10:15 p.m. that evening. As to (1), the fact is that Hogan, not Mazzocchi, was Local 149's principal Sylvania contract negotiator, and it was with Hogan, not with Mazzocchi, that O'Reilly conferred at the meeting; Hogan's activity book shows that he worked the entire day of August 29 on the Sylvania contract; and O'Reilly's testimony shows that his chief purpose for going to the meeting in the evening was to look into the Zoe labor dispute and not the Sylvania contract negotiations—certainly not pursuant to a previous appointment with Mazzocchi. As to (2), Mazzocchi credibly testified that appointments set for the last hour of the day (5–6 p.m.) did not necessarily signify that they were to be held within that hour; that such entry meant only that he was to stay for an appointment after working hours; and that this was especially true of the Zoe meeting because, as his calendar shows, he canceled a "night hours" appointment after 6 p.m. As to (3), it is evident that the 8 or 8:30 p.m. starting time was only an approxi-

¹⁴ The reliability of the calendar is demonstrated by entries as to other events in little or no dispute, e.g., a meeting around 8 a.m., September 4, between Mazzocchi and the Charging Parties; and the Deresh incident that took place at the end of August (Decision of September 30, 1964, footnote 15).

mation and, contrary to Respondent's claim, Hogan's activity book shows that he frequently made the trip between Albertson and Bridgeport in 1½ hours—so that if the meeting commenced as late as 8 p.m., Hogan could have left at 8:45 and still have arrived in Bridgeport at 10:15 p.m.

I further reject Respondent's contention that the "earliest that this crucial meeting could have taken place . . . was September 3rd." Every witness testifying on the meeting, including O'Reilly recalled it to be an evening meeting. Mazzocchi's calendar indicates that he had a "night hours" meeting with Zoe employees on September 3, but the Sylvania negotiations on that day (and O'Reilly's participation therein, if any) took place at noon. Nor is there any evidence from which I could reasonably infer that the meeting occurred on any later date, such as on September 18 (the next "night hours" meeting) when, according to Mazzocchi's calendar, the Sylvania negotiations again took place mid-day.

I find that the Local 149 union meeting in issue—at which the Charging Parties were instructed to tender dues and initiation fees the next day to Local 803—took place on August 29, as contended by General Counsel.

2. The noontime dues tender

Whether the Charging Parties tendered the dues at noontime, August 30, involves not only a basic confrontation between Kalisky (Local 803 president) and the Charging Parties, but also between Kalisky and Spelfogel (former counsel for General Counsel). For, as noted, Kalisky testified that he was being interviewed (on pending Local 803 charges) at the Board's Manhattan office around the time the employees supposedly were tendering dues to him in the Zoe plant at New Hyde Park, Long Island. Spelfogel, on the other hand, testified that the interview was between 2 and 3 p.m., which, as will be shown, would have enabled Kalisky to meet with the Charging Parties at noon and also with Spelfogel at 2 p.m.

I have already discredited Kalisky on a crucial issue in this case, namely, his testimony in the first hearing that he never told employees that they had to join or sign Local 803 cards in order to avoid discharge (Decision of September 30, 1964, page 5 and footnote 8). As I indicated, it stretches credulity to suppose that a persistent organizer like Kalisky would have humbly told employees, as he claims, "I am leaving the cards [with the employees], just in case any of [you] . . . desire to become members or join our local . . . I'm giving it to you because I don't want it ever to be said that you were never approached to join the Union." As between Kalisky and Spelfogel, I have no hesitancy in crediting the testimony of the latter. I accept Spelfogel's rather than Kalisky's version of the interview.

To begin with, Kalisky's "alibi" rests on his uncorroborated testimony, Kalisky could produce no records of any kind (such as diaries or expense vouchers) to support it. To be sure, this in itself is not decisive since there is no requirement that a person keep a timetable of all of his movements each day. This, however, does not change the fact that Kalisky's account of his whereabouts during the crucial time of day on August 30 (10:30 a.m.—4 p.m.) rests on his own say so and nothing more.

Thus, Attorney Katz estimated that Kalisky's visit to his downtown New York office—which began around 10 a.m.—lasted until around 10:30 a.m. Attorney Nearing could not substantiate Kalisky's claim that he [Kalisky] was in his Manhattan office around 11:30 a.m. There is no evidence corroborating Kalisky's testimony that he was in Spelfogel's office during the crucial 12:30–2 p.m. period. Nor is there any evidence supporting his claim that he spent the next 2½ hours (2–4:30 p.m.) strolling to and from Hector's Cafeteria, 1½ hours of that time at lunch. If anything, it is hard to believe that Kalisky took such long and leisurely walks and so long a lunch period on a day on which, as he testified, he was "in a rush" to attend to various matters before the Labor Day weekend.¹⁵

On the other hand, Spelfogel's testimony that the interview was between 2 and 3 p.m. is supported by his personal wall calendar showing that his appointment with Kalisky was carried over from 2 p.m., August 28 to the same time on August 30. Physical inspection of his home-made calendar (the Scotch tapes in corners of the sheets, the tears on them, and their general appearance) leaves no doubt as to its genuineness. To be sure, Spelfogel's failure to produce this calendar in the first hearing warranted more than usual scrutiny. However, under all of the circumstances, I am satisfied that Spelfogel, as he testified, was unaware at the time that his home-made calendar (which he used only to supplement his regular desk calendar, to give

¹⁵ Kalisky testified at the first hearing, "Actually, that day I was in a rush. It was the Labor Day weekend, I wanted to get as many things done as possible."

him a broad view of his future commitments "at a glance") contained such entry; and that, in any event, his failure, at that time, to check its contents is attributable to the fact that the calendar was packed away amongst other personal belongings, weeks before the first hearing, preparatory to his leaving the NLRB.

I am satisfied that Spelfogel's failure to produce this calendar at the first hearing was due to a lapse of memory—not uncommon even among honest witnesses—and that his production of the calendar at the second hearing was in response to a diligent search after being served with a subpoena to appear at that hearing. I refuse to brand Spelfogel's calendar and his testimony as sheer fabrication to advance what at best might be a sentimental interest "to win" a case formerly "his" as former counsel for General Counsel.¹⁶

Other aspects of Kalisky's testimony merit consideration in assessing the credibility issue:

(a) Kalisky admitted speaking to the Zoe employees at noon and again at quitting time on Wednesday, August 28, but insisted that he merely warned them to pay dues or face discharge. He also admitted that on a Friday, in the middle or end of September, Struffolino, in the presence of a dozen other employees, tendered a \$5 bill as dues. According to Kalisky, since the employees already owed 3 months' dues plus the \$25 initiation fee by this time, he conditioned acceptance of payment upon the employees' willingness to sign checkoff authorizations. The setting and content of the September dues offer, as Kalisky recounted it, are in material respects similar to the Charging Parties' account of the August 30 noontime offer, with the crucial difference in date.

(b) As a zealous partisan, Kalisky did not hesitate conveniently to forget or to withhold facts when it suited his purpose. His farfetched claim that he never approached employees to sign Local 803 membership cards has been mentioned. Another example is his failure to recall appointments with his attorney (Katz) on August 28 and 30, as shown by the latter's calendar entries. Kalisky's testimony is frequently punctuated with "I don't recall" responses on important matters, such as whether he had mentioned any employee dues offers or refusals to sign Local 803 cards in conversations with Zoe officials before the discharges (i.e., August 30–October 4).

(c) Kalisky testified that he invariably went to the plant (at New Hyde Park, Long Island) by automobile. A map introduced in the record by counsel for General Counsel purports to show that the distance between New Hyde Park and Manhattan (location of the Board) is 12 or 13 miles. A railroad timetable (also introduced by General Counsel) gives 18½ miles as the distance between the two points. Respondents contended that the distance is substantially greater (25 or 30 miles), but introduced no evidence, requesting me "to take notice of the fact" that the Long Island Expressway is a congested highway and that this was especially so around August 30, when the New York World's Fair was under construction. However, if, as I found (particularly on the basis of Spelfogel's credited testimony), that Kalisky drove to the Board office by automobile in order to keep his 2 p.m. appointment, it would appear that Kalisky could readily have made the trip from the plant to the Board office in the interval between a noon dues tender at the plant and a 2 p.m. appointment with Spelfogel, even allowing for "crowded" New York roads at that time—particularly since the trip involved mid-day (as opposed to rush hour morning and evening) travel. I so find.¹⁷

I find that the Charging Parties, as they testified, tendered dues to Kalisky at noontime, August 30. I further find that Kalisky rejected their tender because of their refusal to sign Local 803 membership cards.

3. The 5 p.m. dues tender

In resolving the question whether the Charging Parties, as they testified, again tendered dues at 5 p.m., August 30, I give controlling weight to Attorney Katz's

¹⁶ Contrary to Respondent Zoe's contention, I do not regard Spelfogel's alleged inability to recall all of the minor details pertaining to the August 30 interview (some on purely collateral matters), as reflecting on his credibility or as affecting the substance of his unequivocal testimony on the basic matters in issue.

¹⁷ For the foregoing reasons, I find that Kalisky could readily have made the trip (by automobile) from Katz' office (which he left around 10:30 a.m.) to receive the noontime tender at the plant; I do not credit Kalisky's testimony that he visited Attorney Nearing between 10:30 and 12 noon. (I note that according to the railroad timetable in evidence, the travel time between New Hyde Park and Manhattan (Pennsylvania Station—West 32d Street and 7th Avenue) is around 35 minutes.)

testimony. As is evidenced from my summary of his testimony (*supra*, B, 2), Katz was precise, unequivocal, and convincing on this point. He vividly portrayed the unusual circumstances prompting his recollection of Kalisky's visit to his office shortly before 5 p.m., including his hurried conversation with Kalisky enroute to Grand Central station to make a 5:07 Long Island train in order to meet a special 7 p.m. dinner engagement with his recently hospitalized wife and newly-married relatives from Florida. Such detailed specificity normally does not accompany fabrication. Although one of General Counsel's witnesses, Auld (daughter of Charging Party Gagan), gave a specific reason for remembering the incident (she was pregnant at the time and intended to quit on September 3), she gave confusing accounts of some of the events about which she testified and she impressed me as an unreliable witness. Furthermore, not without significance is Local 149 Organizer Duffy's testimony that although he first suggested to the employees at the August 29, (Local 149) meeting, that they tender dues the next day at the 5 p.m. quitting time, he agreed to change this to 12 noon after one of the girls remarked, "We get paid at 12 and we are all together then."

Accordingly, based on the credited testimony of Katz, I find that the Charging Parties did not tender dues to Kalisky on August 30 at 5 p.m. quitting time¹⁸

Having found that the Charging Parties tendered dues to Kalisky, Local 803's president, at noontime August 30, prior to the September 3 deadline fixed in the arbitrator's award, and that Kalisky rejected the tenders because of the employees' refusal to sign authorization cards, I conclude—under the law of the case set down in the Board's Order of June 22, 1965—that Local 803 caused the discharge of the Charging Parties for reasons other than their failure to tender the periodic dues and initiation fees uniformly required as a condition of union membership, in violation of Section 8(b)(2) and (1) (A) of the Act.

III. THE ALLEGED 8 (a) (3) AND (1) VIOLATION

Having found that Local 803 caused the discharge of the Charging Parties for reasons other than nonpayment of dues, the remaining question is whether Respondent Zoe had reasonable grounds for believing that Local 803's discharge request was predicated on the employees' failure to pay dues.¹⁹

A. The evidence

As found in my first Decision, Kalisky continued his attempts to solicit dues, fees, and signed cards after August 30. On September 3 (the final day set by the arbitrator for joining Local 803), just before quitting time, Kalisky told some of the Charging Parties not to come back the next day because they were not going to be paid; he said that they were fired because they failed to join Local 803 or sign cards. The next morning (September 4) Kalisky repeated these remarks to the girls before they entered the plant.²⁰ The employees then went to Local 149's hall and discussed the matter with Duffy and Mazzocchi (respectively, Local 149's organizer and president). According to the mutually corroborative, credible testimony of Duffy and several Charging Parties, Mazzocchi told them to return to

¹⁸ My failure to credit the Charging Parties' testimony as to the 5 p.m. tender does not affect my determination that they testified truthfully about the noon tender. *Falsus in uno, falsus in omnibus* is not an absolute rule. 3 Wigmore, *Evidence* § 1009 (3d ed 1940), *Virginian Mfg. Co. v. Armemtrout*, 166 F.2d 400, 405 (C.A. 4). "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." *N.L.R.B. v. Universal Camera Corporation*, 179 F.2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474. This is particularly true where, as here, the employees' testimony on the noontime tender is corroborated by other credible testimony and documentary evidence (*Oison Rug Company v. N.L.R.B.*, 304 F.2d 710, 715 (C.A. 7)), as well as by the inherent probabilities in the entire context of the case.

¹⁹ I did not reach this question in my Decision of September 30, 1964, since my findings therein that the Company did not violate Section 8(a)(3) and (1) of the Act was grounded on the underlying finding (on the basis of the legal theory I applied) that Local 803 did not violate Section 8(b)(2) and (1) (A). (See Decision, III, H.)

²⁰ Kalisky in the first hearing testified on direct-examination. "I told them that this is the day I have been waiting for. This is the day I'm going to enforce the arbitrator's award. This is the day I'm going to see that they are dismissed for not paying initiation and dues. . . . I told them not to go in . . . 'because you are not going to get paid for that day.'" Later, on cross-examination, Kalisky denied making these remarks.

work to report to the Company what happened, and to tell "the boss" that they previously offered Kalisky the dues but these were refused because they declined to sign cards

According to the Charging Parties, they did as directed. Giacomo testified, "I told [Company President] Axelrod, 'We offered him [Kalisky] the dues. According to law we are supposed to offer them. But we don't have to join any union.'" Struffolino testified to the same effect. Both quoted Axelrod as saying that he "didn't know anything about it." Weber also quoted Axelrod as saying that "we girls are causing him an awful lot of trouble." All testified that Axelrod ordered them back to work after reminding them that it was he, not Kalisky, who did the firing. Axelrod also told them that they "weren't going to get any coffee break that morning because we walked out"

Axelrod admitted talking to the employees that morning. He stated, however, "There was no discussion on anything except my telling them to go to work," and explaining that "no one has a right to fire them except Mr. Kupetz [the coowner of the business] and myself," and telling them that they would get "no coffee breaks inasmuch as it [already was] ten o'clock." He specifically denied that any employee mentioned anything about dues offers or about union cards. Nor could he "recall any of them" complain "during that discussion" that Kalisky or anyone else had said that employees were fired, explaining "I went right back into my office. I wanted to have no conversation with them." When closely questioned on cross-examination why he introduced the "right to fire" subject during the meeting, if no employee had raised it beforehand, Axelrod stated that this remark was addressed to a prior complaint from "someone, I don't remember who" that "Kalisky or somebody, I don't know who" told the employees "not to go to work."

The employees continued to work without further incident until October 4. In the meantime (on October 1), the New York State Supreme Court granted Local 803's petition to confirm and enforce the August 26 arbitration award. On October 4, Company Attorney Drimmer went to the plant and informed Kupetz of the court's order "directing the employer to discharge" 23 named employees, including the Charging Parties. After checking its records, the Company prepared "a list of the 12 employees [the Charging Parties herein] that were not members of Local 803." According to Kupetz, these were "the people who were not having dues deducted from their pay" according to company records. Drimmer then advised Kupetz to assemble the 12 employees at quitting time (5 p.m.), display the court order, "ask the employees if they were members of Local 803," and then discharge them if they were not.²¹

Pursuant to Drimmer's advice, Kupetz requested the Charging Parties—none of whom had "joined" Local 803—to meet with him before quitting time. Displaying the court's order, Kupetz told 11 of the 12 employees then present (Bustos was absent because of illness) that he "had to discharge" them because they were not "members of Local 803." Bustos was similarly informed of the court order and discharged on October 7.

As indicated in my Decision of September 30, 1964 (footnote 24), Kupetz' and the employees' versions of the terminal interview differ in only one material respect, i.e., whether the employees informed Kupetz that they had previously offered the dues to Kalisky.²² Thus, Struffolino testified that she told Kupetz, "Mr. Kupetz, we offered them the dues and they wouldn't accept it," to which Kupetz replied, "Well, it is out of my hands." Pisarra testified that she told Kupetz, "We, offered the dues . . . Can't we just pay our dues and still work here?"; and that Kupetz replied, "Well, I have nothing to do with that." De Giacomo, Weber, and Gagan (the last one—a company witness) testified that they heard Pisarra make statements of similar import. Kupetz, on the other hand, denied "any discussion" on (and before) October 4 about dues and, more specifically, that any employee had previously mentioned offering dues and fees to Local 803, or that Local 803 had refused to accept them because the employees failed to sign union cards. He admitted that at no time before the October 4 discharges had he asked Kalisky or any Local 803 representative "whether or not the employees had offered" or paid dues or initiation fees to Local 803. Axelrod testified that at no time did he ask any employees

²¹ The findings in the above paragraph are based on the testimony of Kupetz

²² As further stated in that Decision (footnote 24), in view of the conclusions reached therein it was unessential to resolve the above-noted testimonial conflict and other testimonial conflicts, including whether the Charging Parties told Axelrod on September 4 that Kalisky had rejected their previous dues offers. (Decision, footnote 23.)

whether they had tendered dues and fees. Kupetz said, "As I recall, he [Kalisky] only had—insisted that we fire those employees who were not members of Local 803, and that was the sum and substance of it."

On October 8, all 12 discharges filed unfair labor practice charges against the Company, alleging discriminatory discharge as a result of the Company's union-security agreement with Local 803 "although [each] tendered or offered to tender her initiation fee and periodic dues required for membership in Local 803." Between October 8 and 30, 10 of the 12 discharges filed unfair labor practice charges against Local 803 for causing the Company to take such action.

B. Conclusion

1.

As pointed out in my Decision of September 30, 1964 (III, G, 2), an employer may lawfully accede to a union's demand to discharge an employee under a valid union-security agreement only if he has reasonable grounds for believing that the request is based on employee nonmembership for failing to pay required dues and fees. Based on the entire record, I find that Respondent Zoe did not have such reasonable grounds.

a. As noted *supra*, after Kalisky on September 3 warned the Charging Parties not to return to work the next day because they had failed to join Local 803 or sign cards, they were advised by their own (Local 149) leaders to report the incident to the Company and to tell "the boss" that they previously offered Kalisky dues, but that the latter rejected the offer on account of their refusal to sign cards. The Charging Parties testified that they did as directed when they discussed the matter with Company President Axelrod on the morning of September 4. They further testified that later—in their October 4 discharge interview with company official Kupetz—they similarly advised Kupetz of their prior dues offer and Kalisky's rejection thereof. Axelrod and Kupetz denied that the employees ever mentioned or made reference to any dues tenders.

I credit the employees' testimony in this instance. If, as I found, they tendered the dues to Kalisky at noontime on August 30, reason and logic dictate that they would have so informed their employer after the incumbent Union's president (Kalisky) threatened them with discharge and, later, when the employer himself (Kupetz) attempted to effectuate the discharge. It must be remembered that the Charging Parties had been imbued by their leaders with the knowledge that their legal obligation to Local 803 extended to nothing more than payment of dues and fees. Under the circumstances, De Giacomo's testimony that she told Axelrod, "According to law we are supposed to offer them [dues]. But we don't have to join any union," and, further, that the employees already had offered the dues, is plausible and believable. The credited testimony of Mazzocchi and Duffy (respectively, president and organizer of Local 149) that they had instructed the employees to apprise the Company of the employees' previous tenders, and Company President Axelrod's admission that he addressed the employees on the "right to fire" matter, lends further credence to the employees' testimony.

Accordingly, I find, as the Charging Parties testified, that before and at the time of the discharges, they informed the Company of the fact that they had tendered dues to Kalisky and that the latter had rejected their tenders.

(b) Even apart from the disputed evidence just discussed, the record amply justifies the inference that the Company did not have reasonable grounds for believing that nonmembership of the discharges did not result from failure to tender required dues. There is no question that the Company knew that the Charging Parties were members of a dissident group, that Kalisky was constantly around the plant soliciting them to sign cards, and Kalisky threatened to have them fired on September 3 and 4 unless they joined Local 803. A prudent employer, familiar with these facts, would at least have investigated the matter to determine if Kalisky's discharge demands exceeded permissible limits. Cf. *May Department Stores, Inc., (Kaufmann Division)*, 133 NLRB 1096, 1098. There is no evidence that the Company did. To the contrary, Axelrod and Kupetz testified that at no time had they asked Kalisky or the employees whether the latter had attempted to comply with the union-shop provision by tendering dues and fees.²³ True, Local 803's original (July 24) discharge

²³ Nor could Kalisky remember ever discussing with the Company offers of money by employees, nor whether the Company asked him if any employee had offered money

request was predicated on dues delinquency. However, even assuming that the Union meant what it said and that Zoe reasonably took its representation at face value, the August 26 arbitral award, affording the employees new opportunity to satisfy the statutory requirement for (Local 803) membership (by tendering required dues and fees), would seem to have required the Company (under circumstances of this case) at least to check the validity of so serious a matter as the Union's wholesale discharge demand Respondent Zoe, however, checked only its own records to see whether "the people . . . were having dues deducted from their pay" under checkoff authorizations, without ascertaining whether other employees had in effect authorized, or lawfully declined to execute authorizations, or (as was the case), whether the employees were excused from the usual consequences of failure to pay dues by reason of the Union's exaction of illegal conditions to acceptance thereof. In any event, an employer cannot reasonably assume that his employees are delinquent in dues and that they must be fired out of hand, without reasonable inquiry as to the facts, merely because they had assumedly not executed checkoff authorizations. Employees may, for example, meet their monetary obligations under a union-security agreement by making payments directly to the union; neither union nor employer may coerce them into signing checkoff authorizations. See *General Drivers, Chauffeurs and Helpers, Local Union No. 886*, 119 NLRB 222, 223, enf'd. 264 F.2d 21, 22 (C.A. 10). Cf. *General Motors Corporation, Packard Division*, 134 NLRB 1107, 1117.

Accordingly, particularly in view of the fact that the Company had learned from the employees that they had made the required dues tender and in absence of evidence that it knew otherwise (from the Union or elsewhere) or took reasonable action with relation thereto, I find that the Company's discharge of the employees must have been based on a ground other than the employees' failure to make the statutory tender. Hence, by acceding to the Union's demand, the Company violated Section 8(a)(3) and (1) of the Act.

2

In reaching the conclusion herein, I have not overlooked Respondent Zoe's contentions: (1) that the New York State Unemployment Compensation Board found that the Charging Parties quit work voluntarily and, furthermore, that they failed to meet "one of the conditions of their employment" by refusing to join Local 803 in accordance with the union-security agreement. (See my first Decision, footnote 25); and (2) that the arbitrator in his August 26 award, and the New York State Supreme Court in its October 1 order confirming the award, directed the Company to discharge employees "who have failed to join the Union" by September 3.

As to (1), it is settled that the findings of a State compensation board are not controlling in the Board's independent determination of identical issues, especially upon entirely different records. *N.L.R.B. v. Packers, Inc.*, 339 F.2d 203, 204 (C.A. 6); *N.L.R.B. v. Injection Molding Co.*, 211 F.2d 59, 65-66 (C.A. 8).

As to (2), as indicated in my first decision (footnote 31), I construe the arbitrator's requirement that the employees "join the Union" (and the court's order enforcing that requirement) as nothing more than a requirement that the employees acquire membership by tendering required Local 803 dues and initiation fees. To construe the arbitration award as requiring more (i.e., to sign union membership cards) would be to ascribe to the arbitrator and State court an intent to compel the employees to do an illegal act. In short, I am applying the maxim, "An award . . . will be construed so as to uphold it if possible. Everything will be intended in its favor, consistent with the law, and nothing will be intended against it . . ." 5 Am. Jur. Arbitration and Award 144 and 14 (2d). In any event, assuming, arguendo, that the award and confirmatory State court order required employees to sign Local 803 cards as a condition to retention of employment, it is clear that, in that event, the Board would give no weight to the award and order since they would be "repugnant to the purposes of the Act." *International Harvester Company (Indianapolis Works)*, 138 NLRB 923, 928, 929, enf'd. 327 F.2d 784 (C.A. 7). See also my first Decision, footnote 32.

Zoe's claim that its failure to comply with the State court's order (even if erroneous) would have subjected it to punishment for contempt is not legally justifiable defense in this proceeding. The legal duty imposed on Respondent by Federal statute is paramount to any conflicting obligation which the State courts might have imposed on it. *N.L.R.B. v. International Union, U.A.W., Local 291 [Wisconsin Axle Division]*, 194 F.2d 698, 702 (C.A. 7); *The Grace Company*, 84 NLRB 435, 436; *Combustion Engineering Company, Inc.*, 86 NLRB 1264, 1266-67.

Furthermore, "a state court is without power to hold one in contempt for violating an injunction that the state court had no power to enter by reason of federal preemption." *In re Merritt W. Green, II*, 369 U.S. 689, 694.

Accordingly, I reject Respondent Company's contentions that the discharges were immunized by the decisions and orders of the State unemployment compensation board, the arbitrator, and the State court.

CONCLUSIONS OF LAW

1. By causing Respondent Zoe, in violation of Section 8(a)(3) of the Act, to discriminate against employees who were denied membership in Respondent Local 803 on grounds other than failure to tender the lawfully required periodic dues and initiation fees, Local 803 has engaged in unfair labor practices within the meaning of Section 8(b)(2) and (1)(A) of the Act.

2. By discharging employees upon Local 803's demand when it had reasonable grounds to believe that the employees' membership in the Union was denied for reasons other than failure to tender the uniformly required periodic dues and initiation fees, Respondent Zoe had engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

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

THE REMEDY

Having found that the Respondents engaged in unfair labor practices, I will recommend that they cease and desist therefrom and that each take certain affirmative action in order to effectuate the policies of the Act.

The affirmative relief will include a requirement that Respondent Zoe offer immediate and full reinstatement to each of the Charging Parties to her former or substantially equivalent position without prejudice to seniority or other rights and privileges. In accordance with well-established precedent, I will also recommend that the Union and the Company jointly and severally make the Charging Parties whole for any loss of pay they may have suffered by reason of the discrimination against them by the payment to each of them of a sum of money equal to that which she normally would have earned from the date of the discrimination against her to the date of the company's offer of reinstatement, less her net earnings during the said period. Since the record shows that the Union has already notified the Company and the Charging Parties (in writing) that it has no objection to their employment, the Union's backpay liability shall be limited to 5 days after the date it thus notified the Company and the Charging Parties. Backpay shall be computed with interest on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, 291-294, and *Isis Plumbing & Heating Co.*, 138 NLRB 716. To facilitate the computation, as well as to clarify the named employees' rights to reinstatement, the Company shall make available to the Board, upon request, payroll and other records necessary and appropriate for that purpose. I will further recommend that the Company notify these employees of their rights to reinstatement on application if they are serving in the Armed Forces of the United States. The posting of appropriate notices is also recommended.

RECOMMENDED ORDER ²⁴

Upon the foregoing findings of fact and conclusions of law and upon the entire record in this and the prior hearing in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is ordered that:

A. The Respondent, Zoe Chemical Co., Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from encouraging membership in Local 803, Allied Aluminum and Industrial Union, by discharging employees or in any other manner discriminating against them in regard to hire and tenure of employment or any term or condition of employment, except to the extent permitted by the proviso to Section 8(a)(3) of the Act.

2. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

²⁴ The order herein recommended supersedes the Recommended Order of Dismissal in my Decision of September 30, 1964

3. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Offer Margaret Weber, Esther Hay, Florence Gagan, Mary Di Guiseppe, Madeline Gioletti, Margaret Pisarra, Elizabeth Enzman, Helen Sujkowski, Rose De Giacomo, Julia Struffolino, Mary Fink, and Ana Bustos immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, as provided in "The Remedy" section of this Decision.

(b) Jointly and severally with the Respondent Union make whole the above-named employees for any loss of earnings suffered by them by reason of the discrimination, as provided in "The Remedy" section of this Decision.

(c) Notify the above-named employees if serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, and personnel records and reports necessary to analyze the amount of backpay due and the right to reinstatement, under the terms of this Recommended Order.

(e) Post at its plant in New Hyde Park, New York, copies of the attached notice marked "Appendix A."²⁵ Copies of the said notice, to be furnished by the Regional Director for Region 29, after being duly signed by the Respondent Company's representative, shall be posted by it immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material.

(f) Post at the same places and under the same conditions as set forth in paragraph (e) above, and as soon as they are forwarded by the Regional Director, copies of the Respondent Union's attached notice marked "Appendix B."

(g) Mail to the Regional Director for Region 29 signed copies of "Appendix A" for posting by the Respondent Union at its meeting hall and offices. Copies of said notice, to be furnished by the Regional Director, shall, after being duly signed by a representative of the Respondent Company, be forthwith returned to the Regional Director for such posting.

(h) Notify the Regional Director for Region 29, in writing, within 20 days from the receipt of this Decision, as to what steps the Respondent Company has taken to comply herewith.²⁶

B. The Respondent, Local 803, Allied Aluminum and Industrial Union, its officers, agents, and assigns, shall:

1. Cease and desist from:

(a) Causing and attempting to cause the Respondent, Zoe Chemical Co., Inc., to discriminate against employees in violation of Section 8(a)(3) of the Act.

(b) In any like or related manner restraining or coercing employees of the Respondent Company in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following action which is necessary to effectuate the policies of the Act:

(a) Jointly and severally with the Respondent Company make whole Margaret Weber, Esther Hay, Florence Gagan, Mary Di Guiseppe, Madeline Gioletti, Margaret Pisarra, Elizabeth Enzman, Helen Sujkowski, Rose De Giacomo, Julia Struffolino, Mary Fink, and Ana Bustos for any loss of pay suffered by them by reason of the discrimination, as provided in "The Remedy" section of this Decision.

²⁵ In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "a Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

²⁶ In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent Company has taken to comply herewith."

(b) Post at its meeting hall and offices copies of the attached notice marked "Appendix B."²⁷ Copies of said notice, to be furnished by the Regional Director for Region 29, after being duly signed by the Respondent Union's representative, shall be posted by the Respondent Union immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to insure that said notices are not altered, defaced, or covered by any other material.

(c) Post at the same places and under the same conditions as set forth in paragraph (b) above, and as soon as they are forwarded by the Regional Director, copies of the Respondent Company's notice attached hereto as "Appendix A."

(d) Mail to the Regional Director for Region 29, signed copies of "Appendix B" for posting by the Respondent Company at its plant. Copies of said notice, to be furnished by the Regional Director, after being signed by the Respondent Union's representative, shall be forthwith returned to the Regional Director for such posting.

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the receipt of this Decision, as to what steps the Respondent Union has taken to comply herewith.²⁸

²⁷ See footnote 25.

²⁸ See footnote 26.

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order 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 Local 803, Allied Aluminum and Industrial Union, by discharging employees or in any other manner discriminating against them in regard to hire or tenure of employment or any term or condition of employment, except to the extent permitted by the proviso to Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

WE WILL offer Margaret Weber, Esther Hay, Florence Gagan, Mary Di Guiseppe, Madeline Gioletti, Margaret Pizarra, Elizabeth Enzman, Helen Sujkowski, Rose De Giacomo, Julia Struffolino, Mary Fink, and Ana Bustos immediate and full reinstatement to their former or substantially equivalent positions without prejudice to seniority or other rights and privileges they previously enjoyed.

WE WILL jointly and severally with Local 803, Allied Aluminum and Industrial Union, make whole each of the above-named employees for any loss of earnings suffered by them by reason of the discrimination against them.

All our employees are free to become, remain, or refrain from becoming or remaining, members of the above-named Union, 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 by Section 8(a)(3) of the Act.

ZOE CHEMICAL CO., INC.,
Employer.

Dated _____ By _____
(Representative) (Title)

NOTE.—Notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

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

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 16 Court Street, Fourth Floor, Brooklyn, New York 11201, Telephone 596-5386.

APPENDIX B

NOTICE TO ALL MEMBERS OF LOCAL 803, ALLIED ALUMINUM AND INDUSTRIAL UNION

Pursuant to the Recommended Order 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 cause or attempt to cause Zoe Chemical Co., Inc., to discriminate against employees in violation of Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner restrain or coerce employees of Zoe Chemical Co., Inc., in the exercise of the rights guaranteed in Section 7 of the Act.

WE WILL jointly and severally with the above-named Company make whole Margaret Weber, Esther Hay, Florence Gagan, Mary Di Guisepppe, Madeline Gioletti, Margaret Pisarra, Elizabeth Enzman, Helen Sujkowski, Rose De Giacomo, Julia Struffolino, Mary Fink, and Ana Bustos for any loss of pay suffered by them by reason of the discrimination against them.

LOCAL 803, ALLIED ALUMINUM AND INDUSTRIAL UNION,
Employer.

Dated_____ By_____ (Representative) (Title)

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

If members have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 16 Court Street, Fourth Floor, Brooklyn, New York 11201, Telephone 596-5386.

Siskin Steel and Supply Co., Inc. and United Steelworkers of America, AFL-CIO. Case 10-CA-6035. September 12, 1966

DECISION AND ORDER

On November 26, 1965, Trial Examiner Lowell Goerlich issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel and Respondent filed exceptions to the Trial Examiner's Decision and supporting briefs, and Respondent also filed a reply brief to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Brown and Zagoria].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Trial Examiner's Decision, the exceptions, and the briefs, and hereby adopts the findings, conclu-