

**Newspaper and Mail Deliverers' Union of New York and Vicinity and Gannett Co., Inc. and Erin News Company and Tara News Company.** Cases 29-CC-831, 29-CC-832, 29-CC-833, and 29-CC-834

29 June 1984

### DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS  
HUNTER AND DENNIS

On 27 October 1983 Administrative Law Judge Howard Edelman issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Charging Parties filed cross-exceptions and briefs in support of the cross-exceptions and in answer to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order as modified.<sup>3</sup>

### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Newspaper and Mail Deliverers' Union of New York and Vicinity, Long Island, New

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge refers to Augi "Spears," whereas the transcript indicates his last name to be Speirs. Also, at several points, the judge refers to Speirs as a chapel chairman rather than as an assistant chapel chairman. Contrary to the judge, the record does not clearly establish that Al Gatti, who was involved in the incidents at Erin News and Tara News, was a member of the Respondent. These errors are insufficient to affect the results of our decision.

<sup>2</sup> In adopting the judge's conclusion that the Respondent violated Sec. 8(b)(4)(i) and (ii)(B) of the Act, we find it unnecessary to rely on his finding that on 11 April 1983 Assistant Chapel Chairman Speirs spoke with the driver of the New York News delivery truck and instructed the driver not to make the delivery scheduled for Inflight Newspapers, Inc.

<sup>3</sup> In accordance with our usual practice in cases of this kind, we shall prohibit the Respondent from engaging in unlawful conduct against any secondary employers where an object is to force or require them to cease handling, selling, and distributing U.S.A. Today and to cease doing business with Gannett Co., Inc. See, e.g., *Laborers Local 676 (E. B. Roberts Construction)*, 232 NLRB 388 fn. 2 (1977).

We find it unnecessary to pass on the judge's conclusion that the Respondent violated Sec. 8(b)(4)(i) and (ii)(B) of the Act with respect to Pelham News Company, since the finding of such additional violations would not materially affect our Order.

York, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1.

"1. Cease and desist from in any manner or by any means, including picketing, work stoppages, orders, directions, instructions, requests, or appeals, however given, made, or imparted, or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, inducing or encouraging employees employed by the New York Post, New York News, Crescent News Company, Inflight Newspapers Inc., Raritan Periodical Sales, Inc., New York Times, Princeton-Windsor News Company, Erin News Company, Tara News Company, or any other persons engaged in commerce, or in an industry affecting commerce, to engage in a strike or a refusal in the course of their employment to transport or otherwise handle and work on goods, articles, and commodities or to perform services for their respective employer or threatening, coercing, or restraining the Post, News, Crescent, Inflight, Raritan, Times, Princeton, Erin, Tara, or any other employer engaged in commerce, or in an industry affecting commerce, with an object to force Inflight, Princeton, or any other person to cease handling, selling, and distributing U.S.A. Today and to cease doing business with Gannett Co., Inc., and with a further object of forcing persons doing business with Inflight, Princeton, Erin, and Tara to cease doing business with said employers."

2. Substitute the attached notice for that of the administrative law judge.

### APPENDIX

#### NOTICE TO MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT in any manner or by any means, including picketing, work stoppages, orders, directions, instructions, requests, or appeals, however given, made, or imparted, or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, induce or encourage employees employed by the New York Post, New York News, Crescent News Company, Inflight Newspapers Inc., Raritan Periodical Sales, Inc., New York Times, Princeton-Windsor News Company, Erin News Company, Tara News Company, or any other person engaged in commerce, or in an

industry affecting commerce, to engage in a strike or a refusal in the course of their employment to transport or otherwise handle and work on goods, articles, and commodities or to perform services for their respective employer or threaten, coerce, or restrain the Post, News, Crescent, Inflight, Raritan, Times, Princeton, Erin, Tara, or any other employer engaged in commerce, or in an industry affecting commerce, with an object to force Inflight, Princeton, or any other person to cease handling, selling, and distributing U.S.A. Today and to cease doing business with Gannett Co., Inc., and with a further object of forcing persons doing business with Inflight, Princeton, Erin, and Tara to cease doing business with said employer.

NEWSPAPERS AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me in Brooklyn, New York, on June 1, 2, 3, 27, 29, and 30, 1983.<sup>1</sup>

On April 11, Gannett Co., Inc. (Gannett) filed unfair labor practice charges against the Newspaper and Mail Deliverers' Union of New York and Vicinity (Respondent) alleging that Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act by inducing and encouraging employees of various newspapers and by threatening, coercing, and restraining newspaper wholesalers with an object of forcing Inflight Newspapers Inc. (Inflight) to cease handling the newspaper U.S.A. Today, published by Gannett, or to cease doing business with Gannett.

On April 12, Gannett filed additional unfair labor practice charges against Respondent alleging Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act by inducing and encouraging employees employed by Raritan Periodical Sales Company (Raritan) and by threatening, coercing, and restraining Raritan and Princeton Windsor News Company (Princeton) with an object to force Raritan to cease doing business with Princeton and to force Princeton to cease handling U.S.A. Today or to cease doing business with Gannett.

On April 12, Erin and Tara News Company filed unfair labor practice charges against Respondent alleging Respondent picketed the premises of Erin and Tara respectively and thereby induced and encouraged employees employed by Erin and Tara and by other employers and threatened, coerced, and restrained Erin and Tara and other employers, where an object was to force the New York News Inc., herein called the News, to cease doing business with Erin and Tara.

On April 25, the Regional Director for Region 29 issued an order consolidating the above cases and a consolidated complaint alleging that Respondent had violat-

ed Section 8(b)(4)(i) and (ii)(B) as alleged in charges described above.<sup>2</sup>

Briefs were filed by counsel for the General Counsel, counsel for Gannett, counsel for Erin and Tara, and counsel for Respondent. Upon consideration of the entire record, the briefs, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

Gannett is a Delaware corporation with its principal office located in the city of Rochester, New York. It maintains various facilities throughout the State of New York including facilities in Harrison and West Nyack, New York, and in other States, where it is and has been at all times material herein engaged in the publication of newspapers, including U.S.A. Today. During the past year, which period is representative of its annual operations generally, Gannett held membership in, and subscribed to, various interstate news services, published various syndicated features, advertised various nationally sold products, and derived gross revenues from its publishing in excess of \$200,000.

Respondent admits and I find that Gannett is, and has been at all times material herein, a person engaged in commerce within the meaning of Sections 2(1), (2), (6), and (7) and 8(b)(4) of the Act.

Respondent admits, and I find that it is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

Gannett commenced distribution of U.S.A. Today, a national daily newspaper, in the New York-New Jersey market on April 11. The newspaper is printed and trucked out of Gannett's facilities at Harrison and West Nyack, New York, by individual independent contractors directly to retail outlets in midtown Manhattan and to wholesalers in other New York City areas, Long Island, and New Jersey. Gannett employs a standard wholesale agreement with all wholesalers including Inflight, Pelham News Company (Pelham), and Princeton.

It was well known throughout the newspaper industry in the New York-New Jersey area for months that the distribution of U.S.A. Today in that area was to commence on April 11. Respondent, its officers, agents, chapel chairmen (shop stewards) and its members generally were well aware of this fact.

Respondent admits that at all times material and since at least April 11, it had been engaged in a labor dispute with Gannett because the individuals employed by Gannett to deliver U.S.A. Today to the retailers and wholesalers in the New York-New Jersey area are not members of, or represented by Respondent.

This case centers upon three wholesalers with whom Gannett has wholesale agreements providing for distribution of U.S.A. Today, Inflight, Princeton, and Pelham,

<sup>2</sup> On April 18, prior to the issuance of the above complaint, the Regional Director of Region 29, pursuant to Sec. 10(f) of the Act, filed a petition in the United States District Court for the Eastern District of New York seeking injunctive relief. A hearing on the petition was held before Judge Bramwell, and on May 3, Judge Bramwell issued temporary injunctive relief pending a final determination on the above charges by the Board.

<sup>1</sup> All dates are 1983 unless otherwise indicated.

and the wholesalers and newspapers who deliver papers to these three aforementioned central wholesalers.

The wholesale agreement described above requires the wholesaler to purchase its newspapers for subsequent distribution. In this connection the agreement provides, inter alia, that:

The wholesaler agrees that he is not an employee of U.S.A. Today, and that he will be acting as an independent contractor.

The wholesaler agrees to buy newspapers from U.S.A. Today for resale within his territory.

Inflight is located in Valley Stream, New York, and is engaged in the wholesale distribution of newspapers and magazines to commercial airlines for distribution on their aircraft. Inflight employs approximately 60 employees who are represented by Local 707, International Brotherhood of Teamsters. Among the publications Inflight receives for daily distribution, in addition to U.S.A. Today, are the New York Times, Daily News, New York Post, and Wall Street Journal. The Post and News are delivered to Inflight directly by the respective newspapers, whose employees are represented by Respondent. The Times and Journal are delivered to Inflight by Crescent News Company, a wholesale distributor, whose employees are also represented by Respondent. Inflight receives its copies of U.S.A. Today directly from Gannett.

Princeton is located at Princeton Junction, New Jersey, and is engaged in the home delivery of various newspapers including U.S.A. Today, the Times, Post, News, and several New Jersey newspapers. Princeton's employees are not represented by any labor organization. Princeton receives its papers with the exception of U.S.A. Today from Raritan, a newspaper wholesaler whose employees are represented by Respondent. Additionally, Princeton receives one-half of its Times order directly from the Times. Princeton receives its copies of U.S.A. Today directly from Gannett.

Pelham is located at Bruner Avenue, Bronx, New York, and is engaged in the wholesale distribution of approximately 26 newspapers and related publications in addition to U.S.A. Today. Pelham is owned and controlled entirely by Joseph Orlando, although Vincent Orlando, Joseph's brother, and owner of Tara, assists in the operations of Pelham. Pelham's employees are currently unrepresented.

There are no common officers, directors, or shareholders or employees between Gannett and Inflight, Princeton, and Pelham. Each company directs its own labor relations. There is no common ownership of equipment or facilities. The only relationship between Gannett and the three aforementioned wholesalers is that each has a wholesale agreement to purchase and sell U.S.A. Today.

Raritan is a New York corporation maintaining its principal office and place of business in Edison, New Jersey. It is engaged in the wholesale distribution of newspapers in the Edison-Princeton, New Jersey, area. Its drivers are members of and represented by Respondent.

Respondent contends that Tara and Erin constitute with Pelham a single employer.

Tara is wholly owned and operated by Vincent Orlando. Tara is a wholesaler for the News delivering the newspaper to home subscribers and is located at Middletown Road, Bronx, New York. Tara distributes the News in the Pelham Bay section of the Bronx pursuant to an agreement with the News. Tara does not distribute U.S.A. Today. Tara utilizes independent contractors for its distribution of newspapers and thus employs no employees within the meaning of the Act. Tara receives its delivery of News directly from the newspaper.

Erin is wholly owned and operated by Andrew Orlando, brother of Vincent and Joseph. Erin is a wholesaler for the News, delivering the newspaper to home subscribers, and is located in the same facility as Tara. Erin distributes the News in the South Bronx area. Erin similarly does not distribute U.S.A. Today uses independent contractors for its distribution, and receives its delivery of News directly from the newspaper.

#### The April 10 Union Meeting

Joseph Cotter, Respondent business agent, testified that on April 10 he and various other business agents including Arthur Wittenberg attended a meeting of Respondent's officers and agents called by Respondent's president Murray Schwartz. According to Cotter's highly incredible testimony,<sup>3</sup> Schwartz called this meeting to discuss with Respondent's representatives alleged picketing by other labor organizations that was anticipated at various wholesalers' facilities who were scheduled to receive U.S.A. Today for distribution, i.e., Inflight, Princeton, and Pelham. There is no evidence that other labor organizations had a labor dispute with these wholesalers. Based on the events described below I conclude such meeting was called to discuss Respondent's strategy in preventing delivery of other papers supplied to such wholesalers by drivers represented by Respondent.

#### The Events at Inflight

About 3:50 a.m. on the morning of April 11, Supervisor Mark Hampton arrived at the Inflight facility. Normally the Post has been delivered by 1:30 a.m. and is dropped off at Inflight's loading platform. Hampton noting the absence of the Post delivery called Fred Herb, Post circulation manager, and informed him about the nondelivery. Herb told Hampton that the Post driver had not delivered the Post that night claiming there was a picket line at Inflight's facility. Hampton informed Herb that there was no picket line at Inflight. However, Herb explained that it was too late at this time to attempt redelivery.

Herb testified that the Post management had knowledge that there might be problems with delivery because April 11 was the date that U.S.A. Today was to begin circulation in the New York area. In this connection, Herb testified that he had observed Respondent's president Schwartz and Business Agents Arthur Wittenberg

<sup>3</sup> I found Cotter to be an incredible witness whose testimony is largely fabricated and who is generally unworthy of belief. Cotter's credibility is discussed in detail below.

and Joseph Cotter at the Post talking to employees about 1 hour before the Inflight run was to leave.

Shortly after Hampton's conversation with Herb, Mario Milone, general foreman from the News plant in Brooklyn, arrived with his assistant, John Succoss. Inflight receives its News directly from the Brooklyn plant. Milone testified he had been sent to Inflight by his supervisor, Michael Hulahan, because it was anticipated that there would be problems with the delivery to Inflight because Inflight was to commence distributing U.S.A. Today. As Milone approached the Inflight facility he observed Augie Spears, assistant chapel chairman from the News' Brooklyn plant, in an automobile parked in the immediate vicinity of Inflight's facility. Spears should have been at work in the News' Brooklyn plant. After passing Spears, Milone heard the sound of horns behind him and glanced in his rear view mirror. At this time he observed the News truck heading for Inflight stopped in the street, flanked on each side by an automobile. Milone was unable to identify the automobiles or drivers or other passengers in view of the darkness and his distance from them. He did observe the News truck turn away and leave the area without making a delivery at Inflight.

Spears' testimony as to the reason for his presence at Inflight is so unbelievable that in deference to his position with Respondent and to the oath he took before testifying I will assume he was merely pulling my leg. Spears testified that he was working in the Brooklyn plant in the early morning hours when he observed Milone and Succoss leave the plant. Spears testified that without further inquiry and without requesting permission from a supervisor he left the plant, got in his car, and followed Milone and Succoss because he believed that their leaving the plant meant there was a problem with a driver. However, Spears admitted that if there had been a problem with a driver, as chapel chairman it would have routinely been brought to his attention. Moreover, Milone credibly testified that it is not unusual for him to leave the plant on business during working hours.

It must be noted that the drive from the Brooklyn plant to the Inflight facility takes at least 20 minutes even without traffic. Spears admitted that he could have overtaken Milone and asked him if there was a problem but chose without reason not to do so. Spears further admitted that at some point, well before reaching the Inflight facility, he stopped following Milone and took a short cut to Inflight reaching the facility before Milone. Although Spears admits that at the point he stopped following Milone, Milone might have been heading for a number of other dealers in the direction he was traveling, he believed Milone's destination was Inflight without any plausible explanation for such belief.

Spears then testified on direct examination that when he arrived at Inflight he observed, as did Milone, the News truck surrounded by two cars and then observed the truck leave the vicinity of Inflight. Spears testified that he followed the News truck driven by Respondent member Larry Hanson, caught up with it, pulled Hanson over, and asked him what happened. Spears testified Hanson told him he had been threatened (no specific

threat was stated) by unknown persons for unknown reasons not to make the delivery. However, neither Hanson nor Spears reported this alleged threat to the police or to the News.<sup>4</sup>

Moreover, although Spears testified the sole reason for his presence at Inflight was because of a suspected driver-related problem, Spears remained at the Inflight facility after Hanson left, and never questioned Milone about any such suspected problem. In fact, Spears was present at Inflight when U.S.A. Today was delivered and spoke with U.S.A. Today marketing manager Robert Palmer, who accompanied the U.S.A. Today delivery and with whom he was acquainted. Palmer testified that Spears told him he did not like the paper (U.S.A. Today) being nonunion because Respondent members were being denied work opportunities.

Based on an analysis of the events at Inflight on April 11 and 12, the events at Raritan, Princeton, Erin, and Tara described below, and the testimony of Milone and Spears, I conclude, contrary to Spears' testimony, that he was present at Inflight to insure that there was no delivery of newspapers by trucks driven by Respondent members, and that it was he and other unknown individuals who instructed Hanson not to deliver the News and prevented the delivery of the Post, Times, and Journal on April 11 as described below.

Shortly after the delivery of U.S.A. Today, about 5 a.m. the Crescent truck arrived at the Inflight facility. However, the driver, a Respondent member, drove past the plant and left without making a delivery. At this point, Inflight Supervisor Hampton called Crescent and spoke to Crescent Foreman Bert Hefferman and told him of the failure by the Crescent driver to make his delivery. Hefferman told Hampton that his driver called and told him he did not deliver because there was a picket line at Inflight.

Hefferman, a member of Respondent, testified that earlier in the morning of April 11, about 1 a.m., he was visited by Respondent's business agent Arthur Wittenberg. Wittenberg asked Hefferman who was handling the Inflight run. Hefferman told him the driver assigned to the run was John Cash. Wittenberg told Hefferman that he expected a picket line at Inflight and that he would not allow his members to take unnecessary risks. He then told Hefferman that he did not want any papers delivered to Inflight. Hefferman told Wittenberg he was going to send the papers but would leave it up to the driver whether to cross a picket line. A few minutes later Hefferman observed Wittenberg engaged in a conversation with driver Cash.

Following these events described, Inflight informed Gannett that it would cease distribution of U.S.A. Today until further notice.

I conclude that Respondent, through its agents, was directly responsible for the nondeliveries of newspapers at Inflight on April 11. This is clearly established by the events which occurred at Inflight on April 12.

On April 12, Inflight Foreman Hampton arrived at the Inflight facility at 4 a.m. On arrival, Hampton observed a

<sup>4</sup> Hanson was not called as a witness by Respondent.

car parked by the delivery entrance to Inflight with a picket sign on the windshield which stated, "Notice to the public, this Company does not hire NMDU [Respondent] employees." Hampton observed that the Post had not been delivered. Hampton called Fred Herb at the Post and told him of the nondelivery. Herb told him that delivery was not made because there was a picket line at Inflight.

Milone of the News arrived several minutes after Hampton. He observed the car and picket sign and additionally recognized the four men in the car. They were Spears, John Braccoto, Respondent chapel chairmen at Crescent, and James DiMarzo and George Schofield, News drivers and members of Respondent.

Milone entered the Inflight facility and was informed by Hampton that Inflight had ceased handling U.S.A. Today. Shortly thereafter Milone approached Spears and informed him that Inflight was no longer handling U.S.A. Today. Spears told Milone that a foreman's word was not good enough and that he needed "to see the truck [U.S.A. Today] turned away." Milone went inside Inflight and called Daniel Lehner, vice president of Inflight, and told him of his conversation with Spears. Lehner asked to speak with Spears. Milone went outside and asked Spears to come to the phone. Spears complied. Spears identified himself to Lehner as a chapel chairman of Respondent. He told Lehner that Respondent's actions were not directed to Inflight but that the dispute was between Respondent and Gannett. Lehner informed Spears that he had ceased doing business with Gannett and was no longer handling U.S.A. Today. Spears replied that he could not take Lehner's word but would have to see the truck turned away. Spears then returned to the picket line.

A short time later, the News truck driven by Larry Hanson drove up to the Inflight facility. The four pickets described above including Spears and Braccato, Respondent chapel chairmen, carrying individual picket signs were joined by a second group of four or five individuals who had driven up and parked outside the Inflight facility shortly before the arrival of the News truck. This group approached Hanson who had stopped his truck. Members of the group spoke to Hanson, who left without making a delivery.

A short time later the Crescent truck arrived at the Inflight facility. The pickets, led by Spears brandishing a picket sign, approached the Crescent driver who similarly left without making a delivery.

About 6 a.m., Hampton strolled outside and spoke to Spears. During the course of this conversation Spears reiterated Respondent's position that its actions had nothing to do with Inflight but rather because Inflight was handling a nonunion paper and Respondent wanted the jobs of the U.S.A. Today drivers.

As a result of Respondent's picketing and inducements to drivers described above, Inflight did not resume business with Gannett and delivery of U.S.A. Today until May 3, when a temporary injunction issued.

#### The Events at Raritan and Princeton

As set forth above, Raritan is a newspaper wholesaler with its facility in Edison, New Jersey. Its drivers are

represented by Respondent. Among its customers is Princeton for whom it delivers the News, Post, Times, and certain New Jersey papers.

At midnight on April 11, Paul Cavallaro, assistant foreman at Raritan, arrived at the Raritan facility. When he arrived he observed that Respondent's business agent Joseph Cotter was present. A few minutes after his arrival, driver Jim Cavallaro, a member of Respondent, told him that he had been instructed by Cotter not to load or deliver any newspapers to Princeton. Paul Cavallaro instructed the driver to load the delivery for Princeton.

Foreman Cavallaro then went over to Cotter and asked him what the problem was. He told Cotter he had instructed his driver to make the Princeton delivery. Cotter replied that he believed there might be picketing at Princeton and that in the interest of safety he did not want the driver to attempt delivery. He demanded that no papers for Princeton be loaded on the truck. The foreman told Cotter that he intended to load the truck with the Princeton delivery, but that he could not compel the driver to cross a picket line. Cotter insisted that the Princeton delivery not be loaded on the truck.

Foreman Cavallaro called Gary Hertzfield, Raritan's president of labor relations who asked to speak to Cotter. Cotter told Hertzfield that no papers would be loaded for Princeton and that any attempt to make a delivery to Princeton would result in no papers leaving the plant. A short time later Raritan owner Howard Gefand called and asked to speak with Cotter. Gefand had been notified of the Princeton problem by Foreman Cavallaro.

Foreman Cavallaro credibly testified that Cotter told Gefand that no papers would be loaded for Princeton because the driver might be put in jeopardy. At this point, Cotter, for the first time, complained that the plant was filthy and unusually littered with papers and if it was not cleaned up he would shut the place down. In fact, the floor of the plant is generally littered with paper wrappings, etc. However, it is admitted that the floor was somewhat more littered than usual on the morning of April 11 as the result of a failure to clean up properly the day before.

Following Gefand's conversation with Cotter, Gefand contacted Richard Adelman, the contract arbitrator under the parties collective-bargaining agreement and set up a conference call with Cotter and Foreman Cavallaro. Cavallaro explained the problem to Adelman. Cotter then told Adelman that he did not want the delivery to go out to Princeton because he feared for the safety of the driver and if the Company pressed the issue he would shut down the shop because the floor was a mess. Adelman ordered Respondent to deliver the papers to Princeton and ordered Raritan to clean up the floor.

Notwithstanding the order of arbitrator Adelman, Cotter walked on the floor and pulled the shop. The employees responding to Cotter's orders stopped work.

A short time later Hertzfield, Raritan's labor relations official, came to the Raritan facility. He observed the shutdown and spoke to Cotter. Cotter told Hertzfield that the employees would not return to work if Raritan intended to deliver to Princeton. Cotter reiterated his concern for the men in connection with a picket line at

Princeton. Hertzfield told Cotter he did not believe there was a picket line at Princeton but if there was the driver would not be required to cross it. Hertzfield then asked what Respondent wanted in order to get the men to return to work. Cotter replied that he wanted Hertzfield's guarantee that there would be no delivery to Princeton. Hertzfield agreed and Cotter ordered the employees back to work.

In response to Hertzfield's question Cotter never mentioned the condition of the floor. At the time Cotter ordered the employees back to work the condition of the floor was unchanged.

Cotter's testimony as to the events of April 11 contradicts that of Paul Cavallaro and Hertzfield in various significant aspects. However, I find Cotter's testimony even more unbelievable than that of Spears. Indeed, I find Cotter's testimony to be generally incredible and fabricated, and I therefore have discredited it whenever it contradicted the credible testimony of Cavallaro and Hertzfield.

An example of Cotter's unbelievable testimony is his attempt to explain why he believed there were pickets at Princeton. He testified that he was aware of a labor dispute with Braunigar News Company and an unidentified Teamsters local and since Braunigar did business with Princeton he believed there might be pickets at Princeton. However, when questioned at great length during cross-examination, Cotter was unable to explain why Teamsters pickets who had no dispute with Princeton might picket Princeton. Moreover, he admitted he made no attempt to ascertain whether there were in fact pickets at Princeton although he could have easily verified this by visiting Princeton which was not far from Raritan or by making appropriate phone calls. Moreover, he never mentioned the Braunigar dispute during his conversations with Raritan officials or arbitrator Adelman. In fact, there were no pickets at Princeton on April 11.

Cotter's testimony that the work stoppage at Raritan was entirely due to the condition of the floor is obviously fabricated. Cotter testified that the work stoppage was not related to any demand that Raritan not deliver to Princeton because the men returned to work after the arbitrator's order that Raritan clean up the floor. Yet, the credible testimony of Hertzfield and Cavallaro establish that the work stoppage took place *after* the arbitrator ordered Raritan to clean up the floor *and Respondent to permit the delivery to Princeton*. Moreover, Cotter's contention that the condition of the floor triggered the work stoppage is totally inconsistent with the fact that Cotter did not permit the employees to return to work until Hertzfield agreed not to attempt a delivery to Princeton. In this connection, Cotter admitted that no cleanup took place after the employees returned to work, although supposedly this was the reason for calling the work stoppage.

I conclude that Cotter called the work stoppage solely because Raritan was going to deliver newspapers to Princeton and that such work stoppage was called off by Cotter only when Hertzfield assured Cotter that the Princeton delivery would not be attempted.

On April 11, during the afternoon, Raritan obtained a temporary restraining order requiring Respondent to comply with the arbitrator's award.

On the morning of April 12, the Princeton delivery was loaded and driver Jim Cavallaro left for Princeton. When he arrived at Princeton he was approached by several unidentified pickets and refused to cross the picket line and so Princeton did not receive its delivery from Raritan.

Late that night a driver from Princeton went to Princeton Circle to meet the Times truck to pick up a Times delivery. When the Times truck arrived at Princeton Circle, several unidentified men approached the Times driver Larry Murphy. After they left, Murphy told Princeton's driver to have his boss "call Murray Schwartz" to straighten things out.

#### The Events at Erin and Tara

During the late night hours of April 10, Respondent's business agent Arthur Wittenberg spoke to the News manager Michael Hulahan of the News' Manhattan plant and informed Hulahan that he expected pickets at the "Ryan" and "Orlando" outlets because they were distributing U.S.A. Today.<sup>5</sup> Wittenberg further told Hulahan that he was telling his people not to cross any picket line. As a result of this conversation Hulahan went to the Ryan location and dispatched Rober Callucci, a supervisor employed at the News' Manhattan plant, to Erin and Tara.

At 3 a.m. Hulahan was present at the Ryan location. He observed the News truck drive up to the facility and observed the News' Manhattan plant chapel chairman Britton get out of a car parked at the Ryan facility with a picket sign and approach the News driver. The driver drove off without making the delivery to Ryan. Hulahan then proceeded to the Erin-Tara facility. He arrived a short time later and met Callucci. At this time both men observed the News' Manhattan plant assistant chapel chairman Robert Frantangelo and Al Gatti, employed by the News and a member of Respondent in a car parked by Erin and Tara. Shortly afterward the News truck pulled up to Erin-Tara. Gatti and Frantangelo got out of their car and approached the News truck bearing a picket sign. The truck pulled away without making a delivery.

On April 12 through 15, the News truck drove past Erin-Tara without making a delivery although there were no pickets present.<sup>6</sup> When the News driver was asked by News supervisors Joseph Gell and Daniel Greenberg why he failed to make the deliveries, he replied he had been instructed by business agent Wittenberg not to do so.

<sup>5</sup> The Ryan outlet is a wholesaler similar to Erin and Tara. It was not alleged as a secondary in this proceeding. The reference by Wittenberg to the "Orlando" outlets, as the facts establish, was a reference to Erin and Tara.

<sup>6</sup> Respondent's counsel contended in his opening statement that Respondent failed to make deliveries to Erin and Tara for a period of time after April 15 because of alleged threats of physical harm by the Orlando. However, Respondent did not introduce any evidence to support this contention.

### Analysis and Conclusions

Respondent contends that it was not responsible for the failure of Inflight to receive its deliveries on April 11 and 12; that the work stoppage at Raritan was caused entirely by the dangerous condition of the work floor; that Raritan and Respondent mutually agreed not to deliver papers to Princeton because there was mutual concern for the safety of the Raritan drivers in connection with alleged picketing at Princeton; that papers were not delivered to Princeton Circle on April 12 because of the presence of unknown pickets, not associated with Respondent; and that the nondeliveries to Erin and Tara were due solely to alleged threats by the Orlandos to Respondent drivers.

To believe Respondent's contention in view of all of the credible evidence, both direct and circumstantial, one would have to be so naive as to believe that babies are delivered by the stork.

To begin, it was well published, months prior to April 11, that U.S.A. Today would begin circulation in the metropolitan area on April 11, and nobody was more aware of this than Respondent. In this regard Respondent admits it was engaged in a labor dispute with Gannett because the drivers employed by Gannett to deliver U.S.A. Today to the various wholesalers were not members of or represented by Respondent. Moreover, there is not a scintilla of evidence in the record of any labor dispute between Gannett, any of the wholesalers described herein, and any other labor organization. Therefore, I conclude there is no labor organization other than Respondent who would have any reason to exert pressure on these wholesalers to cease doing business with Gannett, other than Respondent.

Both the circumstantial and direct evidence establish that Respondent was solely and directly responsible for the failure of Inflight, Princeton, Erin, and Tara to receive papers normally delivered by Respondent. Where there is an absence of direct evidence as to Respondent's responsibility for the above delivery stoppage, there is abundant circumstantial evidence to establish such responsibility. The Board has long held that circumstantial evidence is admissible to establish union responsibility for unlawful secondary activity. *Electrical Workers IBEW Local 25 (New York Telephone)*, 162 NLRB 703, 718-719 (1967). In this case the Board held that the absence of direct evidence was not determinative of the question of the union's responsibility, and circumstantial evidence could be used to establish such responsibility.

On April 10, Respondent's president Schwartz and his fellow officers and agents met. According to the incredible testimony of Cotter, the meeting was called to discuss alleged picketing of U.S.A. Today planned by other newspaper-related unions. For reasons set forth above. I have found Cotter to be an incredible witness, entirely unworthy of belief. The evidence failed to establish picketing or participation by any labor organization in connection with the wholesalers herein (Inflight, Princeton, Erin, and Tara) or any dispute or other reason why such labor organizations would want to cause a stoppage of deliveries to such wholesalers. Accordingly, I conclude this meeting was called to map out strategy to halt all deliveries of papers to these wholesalers usually deliv-

ered by drivers represented by Respondent. That the meeting was for such purpose is evidenced by the fact that on April 11 and thereafter these deliveries were not made.

Respondent's plan to cause a cessation of deliveries is further evidenced by the unusual meeting of various Respondent's officials including Arthur Wittenberg and Assistant Chapel Chairman Frantangelo at the New York News plant on the morning of April 11. The New York News failed to make its scheduled delivery on April 11 to Erin and Tara. Later that same night Wittenberg told Crescent Foreman Hefferman that there would be picketing at Inflight and he did not want to see anyone get hurt. This is an obvious appeal to Hefferman not to send the Inflight delivery. When Hefferman refused, Wittenberg spoke to the driver, Cash, scheduled to make the delivery. I conclude the purpose of this conversation was to instruct Cash to drive to the Inflight facility, but to continue on without making a delivery which is exactly what happened.

Also on the night of April 11, Spears, the chapel chairman at the News' Brooklyn plant, raced out to Inflight taking shortcuts to insure that he reached the Inflight facility before his supervisor or Milone so that he could contact his driver to insure that no News delivery was made notwithstanding Milone's presence at Inflight. I have no doubt that it was Spears who spoke with driver Hanson and instructed him not to make the Inflight delivery. As set forth above, I completely discredit Spears' testimony and his denials to the contrary. I also discredit Hanson's assertion that he failed to make the delivery because unknown persons threatened him. In this regard there was no reason for anyone to make such threats, nor were they reported to the police.

An examination of the direct evidence in this case establishes with absolute certainty Respondent's responsibility for the stoppage of the above deliveries as well as those discussed below.

In this connection, on April 12 at Inflight's facility, Spears returned with other pickets and was observed turning away the News and Crescent deliveries. His statement to Lehner and Hampton, Inflight representatives, that he "could not" allow deliveries until he saw a U.S.A. Today turned away by Inflight establishes not only the object of Respondent's actions but that he was acting pursuant to instructions of higher Respondent officers and representatives.

The work stoppage ordered by Cotter at Raritan was called, in my opinion, solely to cause Raritan to agree not to deliver its papers to Princeton. As set forth in my discussion concerning Cotter's credibility, the condition of the floor at Raritan was not brought up by Cotter until Raritan officials, Cavallaro and Hertzfield, refused to accede to Cotter's demand that there be no delivery to Princeton. It was only *after* the arbitrator ordered that Respondent permit Raritan to make its usual delivery to Princeton that Cotter called the work stoppage. Further, the work stoppage was ended *only* after Raritan agreed not to deliver its papers to Princeton. At the time the work stoppage concluded, no floor cleanup had taken place.

Similarly, on April 12, when Princeton sent its driver to pick up that portion of the Times delivered to Princeton Circle directly by the Times, pickets approached the Times driver who thereafter refused to make the delivery telling the Princeton driver to have his boss call Murray Schwartz, Respondent's president, to straighten out the problem.

Similarly, Respondent's responsibility for the failure of the News to deliver to Erin and Tara is directly established when the News truck pulled up at the Erin-Tara facility and Assistant Chapel Chairman Frantangelo and another picket carrying a picket sign warned the truck away.

Respondent contends that it made no deliveries to Erin and Tara after April 11 because of alleged threats to the News driver by the Orlandos. However, Respondent submitted no evidence in support of this contention and I therefore reject it.

Accordingly, I conclude that all deliveries of newspapers which were scheduled for Inflight, Princeton, Erin, and Tara on April 11 and thereafter as set forth in the facts herein were not delivered as a result of instructions to its members by Respondent representatives and as the result of a work stoppage at Raritan called by a representative of Respondent and as a result of picket lines at various times at Inflight, Princeton Circle, and Erin-Tara, authorized by Respondent.

Respondent additionally contends that its chapel chairmen, Spears and Frantangelo, are not agents of Respondent, so that their actions are not attributable to Respondent. Respondent does not deny that business Agents Cotter and Wittenberg and President Schwartz are agents. In *Electrical Workers IBEW Local 3 (New York Telephone)*, 193 NLRB 758 (1971), enfd. 467 F.2d 1158 (2d Cir. 1972), the Board held that under Section 8(b) of the Act, a union is responsible for the acts of its shop stewards as agents. In a prior case involving Respondent, *Newspaper & Mail Deliverers (Berger Corp.)*, 175 NLRB 386, 387 (1969), the Board held that chapel chairmen were the equivalent of shop stewards and were agents of the Union. Moreover, the actions of Spears and Frantangelo were entirely consistent with Respondent objectives and its course and conduct throughout this entire labor dispute. *Teamsters Local 456 (Harvey Corp.)*, 142 NLRB 1409, 1411 (1963). Further, Respondent failed to disavow any action taken by its agents. *Electrical Workers IBEW Local 3 (Northern Telecom)*, 265 NLRB 213 (1982).

Section 8(b)(4) of the Act, the so-called secondary boycott section, makes it unlawful for a labor organization to exert, by picketing or other inducement, pressure on an employer with whom it has no dispute, when an object is that of forcing such employer to cease doing business with an employer with whom the labor organization does have a labor dispute. The statute was drafted so as to preserve the traditional right of a labor organization to engage in a "primary strike" or picketing or other activity aimed at the so-called primary employer with whom the labor organization has a dispute while protecting from involvement in such dispute "neutral" or so-called secondary employees. *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951); *National Wood-*

*work Manufacturers Assn. v. NLRB*, 386 U.S. 612, 645 (1967).

For example, if a union has a labor dispute with a manufacturer it can strike or picket the manufacturer at its facilities, but cannot strike or picket the manufacturer's suppliers or the retailer to whom the manufacturer ships its products when an object is to force such supplier or retailer to cease doing business with the manufacturer. *Carrier Air Conditioning Co. v. NLRB*, 547 F.2d 1178, 1192 (2d Cir. 1976), cert. denied sub nom. *Sheet Metal Workers Local 28 v. Carrier Air Conditioning Co.*, 431 U.S. 974 (1977).

However, the Board and the courts have held that an otherwise neutral employer may lose the protection of the secondary boycott provision of the Act if such employer becomes "allied" with the primary employer in such a manner that he ceases to be a "neutral" entitled to protection of the Act. Under the "ally doctrine" an employer may lose his neutral status (a) if he performs "struck work" for the primary employer, that is, work that he would not have performed "but for" the strike at the primary employer's facility, *Teamsters Local 959 (Odom Corp.)*, 266 NLRB 834 (1983), or (b) if the primary and secondary are so closely integrated that they in essence constitute a single employer. *NLRB v. Teamsters Local 810*, 460 F.2d 1, 5 (2d Cir. 1972); *Teamsters Local 639 (Poole's Warehousing)*, 158 NLRB 1281, 1286 (1966).

In either case the burden is on the union to demonstrate the existence of an ally relationship. *Teamsters Local 959*, supra.

Respondent does not contend that any of the wholesalers (Inflight, Princeton, and Pelham) are performing struck work for Gannett, nor is there any evidence that such is the case. Respondent does contend that Gannett and Inflight, Princeton, and Pelham are so closely integrated so as to become a single employer performing a "straight line" operation. In connection with Pelham, Respondent further contends that Erin, Tara, and Pelham constitute a single employer.

In order to establish the "straight line" operation between Gannett and the wholesalers, Respondent must establish (1) common ownership; (2) common management; (3) centralized control of labor relations; and (4) interrelationship of operations. *NLRB v. Teamsters Local 810*, supra; *Graphic Arts Local 262 (London Press)*, 208 NLRB 37, 39 (1973). None of the above factors are considered in isolation. The Board "weighs all of them to determine whether in fact one employer is involved in or is wholly unconcerned with the labor disputes of the other." *Retail Clerks Local 1001 (Land Title Insurance)*, 226 NLRB 754, 756 (1976).

Applying these considerations to the relationship between Gannett and the wholesalers, Inflight, Princeton, and Pelham fails, entirely, to support Respondent's contention. There is absolutely no evidence of common ownership or financial control between any of the wholesalers and Gannett. As to any financial control between Gannett and the wholesalers, the standard contract between these parties and the testimony of the various employer representatives establish that the wholesalers buy their papers from Gannett and are entitled to all

the profits, or losses, as the case may be, from the distribution of their papers. The contract between Gannett and the wholesalers establishes an arms-length business relationship.

The evidence also fails to establish any common management. There is no evidence that the supervisors or representatives of Gannett hold any position or possess authority concerning any of the wholesalers operations, or vice versa. Rather, the evidence establishes that Gannett and the wholesalers each have separate and total control over their operation.

There is no evidence that the labor relations between Gannett and the wholesalers are in any way centralized or connected. Each company retains total control as to hiring and firing employees and establishing their conditions of employment.

There is also no evidence of any interchange of employees or equipment as between Gannett and any of the wholesalers. Rather the evidence establishes that the employees of their respective employers work entirely for and are paid by such employer.

Additionally, all of the above companies maintain separate bank accounts, financial records, and separate facilities, and operate in separate geographical areas.

Respondent apparently bases its contention as to a straight line operation between Gannett and the wholesalers on the principle that Gannett is dependent on these wholesalers for the distribution of its papers; that the papers published by Gannett are useless unless distributed, and that because of this dependence on the wholesalers for such distribution, the wholesalers form a straight line operation with Gannett and thus an ally. To state this contention is to reject it. Under this reasoning, if Respondent had a dispute with the Times it could picket any of the above wholesalers, all of whom distribute the Times, or any wholesaler in the entire United States. Under this theory a union engaged in a labor dispute with a supplier of raw materials could picket the manufacturer supplied by such supplier and the retailer to whom the manufacturer sells his products. In short, the effect of Respondent's contention would be to repeal Section 8(b)(4) of the Act.

Accordingly, I conclude that in connection with Respondent's primary labor dispute with Gannett, Inflight, Princeton, and Pelham are neutral secondary employers. In view of Respondent's contention that any action taken against Erin and Tara was that they and Pelham constituted a single employer, and in view of my finding that Pelham is a neutral secondary employer, it follows, and I conclude that Erin and Tara are also neutral secondary employers. I also find that Crescent, Raritan, the Times, Post, and News are neutral secondary employers. Respondent does not dispute this finding.

I further find that on April 11 and thereafter as set forth above, Respondent induced and encouraged employees employed by the Post, News, Crescent, Inflight, Raritan, Times, Princeton, Erin, Tara, and Pelham to engage in a strike or a refusal in the course of their employment to transport or otherwise handle and work on goods, articles, and commodities and to perform services for their respective employer and thereby threatened, coerced, and restrained the Post, News, Crescent, Inflight,

Raritan, Times, Princeton, Erin, Tara, and Pelham with an object to force Inflight, Princeton, and Pelham to cease handling, selling, and distributing U.S.A. Today and to cease doing business with Gannett, with whom it has a primary dispute, and with a further object of forcing persons doing business with Inflight, Princeton, Erin, and Tara to cease doing business with said employers, and that by engaging in such conduct with said objects, Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act.

#### CONCLUSIONS OF LAW

1. Gannett is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By picketing and causing work stoppages and by otherwise inducing and encouraging employees employed by the Post, News, Crescent, Inflight, Raritan, Times, Princeton, Erin, Tara, and Pelham to engage in a strike or a refusal in the course of their employment to transport or otherwise handle and work on goods, articles, and commodities and to perform services for their respective employer and thereby threatening, coercing, and restraining the Post, News, Crescent, Inflight, Raritan, Times, Princeton, Erin, Tara, and Pelham with an object to force Inflight, Princeton, and Pelham to cease handling, selling, and distributing U.S.A. Today and to cease doing business with Gannett, with whom it has a primary dispute, and with a further object of forcing persons doing business with Inflight, Princeton, Erin, and Tara to cease doing business with said employers, and by engaging in such conduct with said objects, Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act.

#### THE REMEDY

Having found that Respondent has violated Section 8(b)(4)(i) and (ii)(B) of the Act, I shall recommend that it cease and desist therefrom, and take certain affirmative action necessary to effectuate the policies of the Act.

On the foregoing findings and conclusions and on the entire record in this case, I issue the following recommended<sup>7</sup>

#### ORDER

The Respondent, Newspaper and Mail Deliverers' Union of New York and Vicinity, Long Island, New York, its officers, agents, and representatives, shall

1. Cease and desist from in any manner or by any means including picketing, work stoppages, orders, directions, instructions, requests, or appeals, however given, made, or imparted, or by any like or related acts or conduct, or by permitting any such to remain in existence or effect inducing or encouraging employees employed by

<sup>7</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

the New York Post, New York News, Crescent News Company, Inflight Newspapers Inc., Raritan Periodical Sales, Inc., New York Times, Princeton-Windsor News Company, Erin News Company, Tara News Company, Pelham News Company, or any other person engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal in the course of their employment to transport or otherwise handle and work on goods, articles, and commodities or to perform services for their respective employer or threatening, coercing, or restraining the Post, News, Crescent, Inflight, Raritan, Times, Princeton, Erin, Tara, Pelham or any other employer engaged in commerce or in an industry affecting commerce, with an object to force Inflight, Princeton, and Pelham to cease handling, selling, and distributing U.S.A. Today and to cease doing business with Gannett Co., Inc. and with a further object of forcing persons doing business with Inflight, Princeton, Erin, and Tara to cease doing business with said employers.<sup>8</sup>

<sup>8</sup> Charging Parties Gannett, Erin, and Tara seek a broad order which would apply to a primary dispute with Gannett or any other employer. Such so-called double-ended broad orders have been issued where the union has been a perpetual violator of this section of the Act. However, the only prior violation of this section of the Act committed by Respondent was in 1968. See *Newspaper & Mail Deliverers (Bergen Corp.)*, 175 NLRB 386 (1969). Under these circumstances, I am unable to conclude that Respondent is a perpetual violator and that such a broad order is warranted.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Furnish the Regional Director for Region 29 with signed copies of the aforesaid notice for posting at Gannett, the Post, News, Crescent, Inflight, Raritan, Times, Princeton, Erin, Tara, and Pelham should they be willing, at all places where notices to its employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>9</sup> If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."