

Deleet Merchandising Corp. and Local 807, International Brotherhood of Teamsters, AFL-CIO and Jesse Roberts. Cases 22-CA-20272 and 22-CB-7094

November 7, 1997

DECISION AND ORDER

CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

On June 2, 1997, Administrative Law Judge D. Barry Morris issued the attached decision. Both of the Respondents filed exceptions and supporting briefs, the General Counsel filed an answering brief, and the Respondent Union filed a reply brief.

The National Labor Relations Board has considered the decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified² and set forth in full below.

The judge found, and we agree, that the Respondent Employer's November 1994 and November 1995 reinstatement offers to discriminatee Jesse Roberts were invalid. As discussed in the judge's decision, neither offer would have returned Roberts to his former position at the Respondent Employer's Blanchard Street facility with his former 8 a.m. starting time.³

In their exceptions, the Respondents contend, *inter alia*, that the collective-bargaining agreement, which the judge did not address, supports their position that the November 1994 offer was a valid reinstatement offer. The contract terms the Respondents rely on are set forth in the margin below.⁴ Specifically, the Re-

spondents argue that seniority prevails in the selection of starting times, that Roberts had no seniority because he was a probationary employee, that shifts started at 7 or 7:30 a.m., but not at 8 a.m., that even if the Respondent Employer created an 8 a.m. shift, any position on that shift would have to be offered first to more senior employees, and that only if those employees declined the 8 a.m. starting time could the Respondent Employer offer that starting time to Roberts. In sum, it is argued that the Respondent Employer had no authority to give Roberts an 8 a.m. starting time and that the November 1994 offer of reinstatement with a 7:30 a.m. starting time should be found to be sufficient to toll backpay.

Assuming *arguendo* that the Respondents' interpretation of their collective-bargaining agreement is correct, we nevertheless find, for the following reasons, that the November 1994 reinstatement offer was invalid. First, when the Respondent Employer made the November 1994 offer, it did not inform Roberts that the terms of the contract barred him from being reinstated with his former 8 a.m. starting time. The Respondent Employer's failure to advise Roberts of the alleged contract problem at that time casts doubt on the bona fides of its offer and suggests that it is belatedly searching for a reason to justify its position.⁵

Second, it is well established that a respondent must offer a discriminatee his former position if it exists.⁶ The Respondents have not shown, however, that they have conducted the bidding process contemplated by the contract and that a more senior employee elected the 8 a.m. starting time position formerly held by Roberts. Accordingly, they have not met their burden of showing that his position no longer exists by virtue of the contractual seniority requirements.

Finally, even assuming *arguendo* that Roberts' former position no longer exists, the Respondent Employer would still be obligated to offer Roberts a substantially equivalent position. As the judge properly found, this the Respondent Employer has failed to do.

Accordingly, for all these reasons, we find no merit in the Respondents' contentions, and we adopt the judge's decision.

¹ The Respondents have excepted to the 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.

² We have modified the judge's recommended Order to specify the amount of backpay through December 11, 1997, as alleged in the backpay specification, to require the reciprocal posting of notices, and to provide that the Respondent Union's backpay liability is terminated 5 days after notice to the Respondent Employer that it no longer objects to the employment of Jesse Roberts. *C. B. Display Service*, 260 NLRB 1103 fn. 6 (1982).

³ While employed by the Respondent Employer at the Blanchard Street facility, Roberts started work at approximately 8 a.m., immediately after working from 12 midnight to 8 a.m. for another employer located next door. The November 1994 offer would have required Roberts to begin working at 7:30 a.m., which the Respondent Employer knew would have conflicted with Roberts' other job. The November 1995 offer would have required Roberts to report to a different company facility located 2 miles away, and Roberts would not have been able to arrive there in time to start work at 8 a.m.

⁴ Art. 3 (Seniority) provides in pertinent part as follows:

Seniority shall prevail at selecting a starting time so the oldest man in seniority shall have the earliest starting time, if he so elects (provided he is qualified). Regular bids shall be for a pe-

riod of one (1) year, except on mutual agreement between the Union and the Employer.

Art. 20 (Hours) provides in pertinent part as follows:

Day work starting time may be assigned from 6:00 a.m. to 8:30 a.m. Starting time to be computed from the assigned time of the Employees arrival at the Employer premises.

⁵ It is well established that in order to toll its backpay liability, a respondent "must make a good faith . . . effort calculated to remedy the wrong which it initially committed." *Reeves Rubber*, 252 NLRB 134 fn. 2 (1980).

⁶ E.g., *Adscov Mfg. Corp.*, 322 NLRB 217, 218 fn. 3 (1996).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that

A. Respondent Deleet Merchandising Corp., Newark, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees in collaboration with, or in response to an unlawful request from, Local 807, International Brotherhood of Teamsters, AFL-CIO or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Jointly and severally with the Respondent Union, pay Jesse Roberts the net backpay due him through December 11, 1996, in the amount of \$29,121.61, plus interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws.

(b) Jointly and severally with the Respondent Union, make whole Jesse Roberts for any loss of earnings and other benefits he may have suffered after December 11, 1996 as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, supra. The Respondent Union's liability for backpay shall terminate 5 days after it notifies the Respondent Employer that it has no objection to the employment of Roberts.

(c) Within 14 days from the date of this Order, offer Jesse Roberts full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(d) Within 14 days of this Order, remove from its files any reference to the unlawful discharge of Jesse Roberts, and within 3 days thereafter notify Roberts in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records and reports, all social security payment records, timecards, personnel records and reports, and all other records necessary to analyze any further amounts of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Newark, New Jersey, copies of the at-

tached notice marked "Appendix A."⁷ Copies of the Notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 7, 1994.

(g) Post at the same places and under the same conditions set forth in paragraph 2(f) above, and as soon as they are forwarded by the Regional Director, copies of the Respondent Union's notice marked as "Appendix B."

(h) Furnish to the Regional Director for Region 22 signed copies of Appendix A in sufficient number to be posted by the Respondent Union in places where notices to its members are customarily posted.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Employer has taken to comply.

B. Respondent Local 807, International Brotherhood of Teamsters, AFL-CIO, Newark, New Jersey, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing, or attempting to cause, Deleet Merchandising Corp., or any other employer to discharge or otherwise discriminate against Jesse Roberts, or any other employee, in violation of Section 8(a)(3) of the Act.

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

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

(a) Jointly and severally with the Respondent Employer, pay Jesse Roberts the net backpay due him through December 11, 1996, in the amount of \$29,121.61, plus interest as set forth in *New Horizons for the Retarded*, supra, minus tax withholdings required by Federal and state laws.

⁷If 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."

(b) Jointly and severally with the Respondent Employer, make whole Jesse Roberts for any loss of earnings and other benefits he may have suffered after December 11, 1996 as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra. The Respondent Union's liability for backpay shall terminate 5 days after it notifies the Respondent Employer that it has no objection to the employment of Roberts.

(c) Notify Deleet Merchandising Corp., in writing, with a copy to Roberts, that it rescinds any request or demand which resulted in the termination of his employment. Such written notification shall also advise Deleet that the Respondent Union has no objection to the employment of Roberts in his former position at the Blanchard Street facility with the starting time of 8 a.m.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Roberts, and within 3 days thereafter notify Roberts in writing that this has been done and that the discharge will not be used against him in any way.

(e) Within 14 days after service by the Region, post at its union office copies of the attached notice marked "Appendix B."⁸ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent Union's authorized representative, shall be posted by the Respondent Union and maintained for 60 consecutive days in conspicuous 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.

(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 Employer's attached notice marked as "Appendix A."

(g) Furnish signed copies of the notice marked "Appendix B" to the Regional Director for posting by Respondent Deleet Merchandising at all places on its premises where notices to employees are customarily posted. Copies of that notice, after being signed by the Respondent Union's authorized representative, shall be returned to the Regional Director for disposition by him.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Union has taken to comply.

⁸See fn. 7, supra.

APPENDIX A

NOTICE TO EMPLOYEES 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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against employees in collaboration with, or in response to an unlawful request from Local 807, International Brotherhood of Teamsters, AFL-CIO or any other labor organization.

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

WE WILL, jointly with the Union, or severally, make whole Jesse Roberts for any loss of earnings and other benefits he may have suffered as a result of the activity against him, with interest.

WE WILL, within 14 days from the date of the Board's Order, offer Jesse Roberts full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharge of Roberts, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

DELEET MERCHANDISING CORP.

APPENDIX B

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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT cause, or attempt to cause, Deleet Merchandising Corp., or any other employer, to discharge or otherwise discriminate against Jesse Roberts, or any other employee, in violation of Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, jointly with Deleet Merchandising Corp., or severally, make whole Jesse Roberts for any loss of earnings and other benefits he may have suffered as a result of the activity against him, with interest.

WE WILL notify Deleet Merchandising Corp., in writing, with a copy to Jesse Roberts, that we rescind any request or demand which resulted in the termination of his employment. Such written notification shall also advise Deleet that we have no objection to the employment of Roberts in his former position at the Blanchard Street facility with starting time at 8 a.m.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharge of Roberts, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

LOCAL 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Patrick E. Daly, Esq., for the General Counsel.
Sanford R. Oxfeld, Esq. (Balk, Oxfeld, Mandell & Cohen), of Newark, New Jersey, for the Employer.
Joseph J. Vitale, Esq. (Cohen, Weiss & Simon), of New York, New York, for the Union.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. Upon charges filed on November 7, 1994, a consolidated complaint was issued on June 30, 1995, alleging that Respondents, Deleet Merchandising Corp. (Deleet) and Local 807, International Brotherhood of Teamsters, AFL-CIO (the Union) violated the National Labor Relations Act (the Act). On November 19, 1996, the parties entered into the following stipulation:

Deleet Merchandising Corporation (Respondent Employer), Teamsters Local 807 (Respondent Union), and counsel for the General Counsel (the Parties) stipulate and agree with respect to the above-referenced matters, as follows:

1. In or about the first week of September, 1994, Respondent Employer hired Jesse Roberts (hereinafter Charging Party) to work at its facility located at 26 Blanchard Street, Newark, New Jersey (hereinafter the Blanchard Street facility).

2. On or about Monday, September 26, 1994, Respondent Employer terminated the employment of Charging Party solely at the request of Respondent Union which claimed that Charging Party could not be employed by Respondent Employer because he was already a member of another Teamsters local at his other place of employment.

3. Prior to his being terminated, Charging Party was advised by Respondent Union that he could not be employed by Respondent Employer because he was also member of another Teamsters local at his other place of employment.

4. On November 7, 1994, a charge was filed against Respondent Employer alleging that its termination of Charging Party at the request of Respondent Union was in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.

5. On November 7, 1994, a charge was filed against Respondent Union alleging that its action in causing Respondent Employer to terminate Charging Party was in violation of Section 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act.

6. Thereafter an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, dated June 30, 1995 (herein the Consolidated Complaint) was issued by the Regional Director against Respondent Employer and Respondent Union alleging that the aforesaid conduct of Respondent Employer and Respondent Union to be violative of the National Labor Relations Act, to which Answers were filed by Respondent Employer and Respondent Union denying the allegation of unlawful conduct.

7. Respondent Employer admits that its termination of Charging Party at the behest of Respondent Union, as described above, was violative of Section 8(a)(1) and (3) of the National Labor Relations Act, and hereby withdraws the Answer it filed in response to the Consolidated Complaint.

8. Respondent Union admits that its action in causing Respondent Employer to terminate the employment of Charging Party, as described above, was violative of Section 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, and hereby withdraws the Answer it filed in response to the Consolidated Complaint.

9. The Parties agree that this Stipulation, together with the Consolidated Complaint, constitutes the complete record with respect to the allegations of unlawful conduct at issue in this proceeding, and consent to the Administrative Law Judge making Findings of Fact and Conclusions of Law based thereon.

A controversy having arisen over the backpay due Roberts, on January 15, 1997, the Regional Director for Region 22 issued a compliance specification and notice of hearing. Respondents filed timely answers to the compliance specification. A hearing was held before me in Newark, New Jersey on March 10, 1997. All parties were given full opportunity to participate, to produce evidence, examine, and cross-examine witness, argue orally, and file briefs. Briefs were filed by the parties on April 30, 1997.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Deleet Merchandising Corp., with an office and place of business in Newark, New Jersey, has been engaged in the manufacture, sale, and distribution of printing chemicals. Respondent Deleet, having withdrawn its answer, it is deemed admitted, and I so find, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, the answers having been withdrawn, it is deemed admitted, and I so find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

Respondents have admitted that on September 26, 1994, Deleet terminated the employment of Jesse Roberts at the request of the Union. Roberts had been employed at Deleet's Blanchard Street facility. Deleet has admitted that the termination was violative of Section 8(a)(1) and (3) of the Act. In addition, the Union has admitted that its action in causing Deleet to terminate the employment of Roberts was violative of Section 8(b)(1)(A) and (2) of the Act.

III. COMPUTATION OF GROSS BACKPAY

At the hearing Respondents stipulated to the correctness of the computation of backpay as stated in the compliance specification and notice of hearing.

IV. OFFERS OF REINSTATEMENT

1. Background

Roberts first applied for a job with Deleet in early September 1994.¹ He was working at Fairmont Chemical at the time, which was one or two doors away from Deleet's Blanchard Street facility. He told Robert Schleck, Deleet's director of operations, that his job at Fairmont required him to work from 12 midnight to 8 a.m. The record is clear that while working at Deleet he started at approximately 8 a.m.²

¹ All dates refer to 1994 unless otherwise specified.

² There is conflicting testimony as to what Roberts was told would be his starting time. Schleck testified that he told Roberts that the starting time was 7:30 a.m. and there would be no problem if Roberts was a few minutes late. Roberts testified that he asked Schleck if he could report to work at 8 a.m. and Schleck responded that it would not be a problem. I credit Roberts' testimony. Roberts told Schleck that his job at Fairmont finished at 8 a.m. It is implausible that he would have told Schleck that he could start working at Deleet at 7:30 a.m. More importantly, however, irrespective of what

On September 26 the Union requested that Deleet discharge Roberts. On the same day Deleet terminated Roberts in violation of the Act.

2. November 1994 offer of reinstatement

In mid-November Roberts came to the plant and Schleck told him, "I can give you your job back but you will have to start at 7:30 in the morning." Roberts became agitated and replied, "I can't do that, you know I can't do that." Schleck testified:

Q. Now, this oral offer that was made to Mr. Roberts by you in November of 1994, I believe you testified, when you made that offer, Mr. Roberts got agitated?

A. That is correct.

Q. . . . And he said to you, you know I can't do this?

A. That is also correct

Q. . . . And the reason that he couldn't do it is it was inconsistent with his job at Fairmont Chemical?

A. Correct.

Q. And that is something that you, as the operations manager, knew before he was ever hired?

A. Yes.

Q. And you knew that throughout his period of employment?

A. Yes.

Q. And you knew that at the time that the offer was made?

A. That is correct

3. November 8, 1995 offer of reinstatement

Schleck testified that in March 1995 Deleet obtained a warehouse facility at 150 St. Charles Street, which is approximately 2 miles away from the Blanchard Street facility. The starting time at the St. Charles Street facility was 8 a.m. The record contains a letter dated November 8, 1995, from Sanford R. Oxfeld, Esquire, attorney for Deleet, which states:

I have been authorized by Deleet to offer you a position in the warehouse facility located at 150 St. Charles Street, Newark, New Jersey. Currently there are some 8 a.m. starting times available at that location. All the other terms and conditions of Mr. Schleck's offer to you will remain the same.

4. Conclusions as to offers of reinstatement

Respondents contend that Roberts is entitled to backpay only until November 15, 1994, when it orally offered him reinstatement. In the alternative, Respondents contend that backpay should be tolled as of November 8, 1995, the date of the letter offering Roberts reinstatement.

In *Duroyd Mfg.*, 285 NLRB 1, 3 (1987), it is stated:

The law is well-settled that reinstatement requires the employee to be returned to his former or substantially equivalent position of employment, on the same shift, and at the same rate of pay, including overtime, he

Roberts was initially told, the record is clear that Roberts' actual starting time at Deleet was 8 a.m.

would have received had he not been unlawfully discharged. *U.S. Mineral Products Co.*, 276 NLRB 140 (1985).

See also *Associated Grocers*, 295 NLRB 806, 807 (1989). Schleck knew that Roberts could not begin work at 7:30 a.m., because his job at Fairmont required him to be there until 8 a.m. Schleck testified that to begin at 7:30 a.m. would have been “inconsistent with his job at Fairmont Chemical” and that is something that he knew before Roberts was hired, throughout his period of employment, and at the time the offer of reinstatement was made. As stated in *Flight Chief, Inc.*, 258 NLRB 1124, 1126 (1981):

[I]n practice, the actual offers were a sham, a mere subterfuge. None of the discriminatees were offered their former work schedule. . . . The offers were obviously a concerted effort on behalf of management to provide a work schedule which was so unacceptable that the discriminatees would be forced to refuse them. If such a plan succeeded, Respondents would not only toll their liability but would also avoid rehiring the very individuals they unlawfully discharged. . . .

I find that the November 1994 oral offer was an invalid offer of reinstatement. Roberts’ work schedule while employed at Deleet began at 8 a.m. It was well known to Deleet that Roberts could not begin work prior to 8 a.m. I conclude that an offer of reinstatement to begin at 7:30 a.m. is not “substantially equivalent” to his former position, and accordingly, such offer was not a valid offer of reinstatement. See *Associated Grocers*, supra, 295 NLRB at 807.

With respect to the November 8, 1995 letter, as was stated in *California Dental Care*, 281 NLRB 578, 582 (1986):

The offer of reinstatement to another location, particularly here where [the discriminatee] had good reasons, known to Ashen, for desiring reinstatement to his former location, is not sufficient to toll backpay. *Seligman & Associates*, 273 NLRB 1216 (1984); *M. J. McCarthy Motor Sales Co.*, 147 NLRB 605, 612 (1964).

The November 8, 1995 letter offered Roberts employment at the facility located at 150 St. Charles St., which was 2 miles away from the Blanchard Street facility, where Roberts had previously been employed. Schleck knew that Roberts finished work at Fairmont, which was two doors away from Deleet, at 8 a.m. Irrespective of Roberts’ method of transportation, even if he had the use of a private automobile, he would not have been able to report for work at the St. Charles Street facility at 8 a.m. Accordingly, I find that the November 8, 1995 letter did not constitute a valid offer of reinstatement.

5. Postponement of hearing date

Respondents contend that on November 7, 1995, the Regional Director postponed the November 13 hearing date without their consent and, accordingly, they should not be held “financially responsible for the delay from November 7, 1995 until March 10, 1997, a period of one year and 4 months.” On November 7 the Regional Director issued an order postponing the hearing indefinitely. Mark Wininger,

chief financial officer of Deleet, testified that the company never asked for the hearing to be postponed nor did it consent to having the hearing date postponed. Similarly, Joseph Vitale, Esquire, counsel for the Union, stated that the Union neither requested nor consented to the adjournment of the November 13, 1995 hearing. There is no evidence in the record that after the November 7 order postponing hearing was issued, either Deleet or the Union made a motion to the Regional Director requesting that the hearing be rescheduled. In *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264–265 (1969), the Supreme Court stated:

Assuming without deciding that the delay in issuing the specification did violate the Board’s duty of prompt action under the Administrative Procedure Act, it does not follow that enforcement of the full backpay remedy was an abuse of the Board’s discretion. Wronged employees are at least as much injured by the Board’s delay in collecting their backpay as is the wrongdoing employer. . . . This Court has held before that the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers.

See also *NLRB v. Ironworkers Local 480*, 466 U.S. 720, 725 (1984). Respondents argue that in the Supreme Court cases, the delay occurred after the Board found respondents to have violated the Act. In the instant proceeding, however, the delay took place prior to Respondents’ having stipulated that they committed unfair labor practices. I am not persuaded that this distinction is of legal significance. I believe that inordinate delay, at whatever stage of the proceedings it occurs, is not to be condoned. Other than the fact that on November 7, 1995, the Regional Director issued an order postponing hearing indefinitely, the record is silent as to the reason for the postponement. As noted earlier there is nothing in the record to indicate that after the Regional Director issued his order postponing the hearing either Deleet or the Union moved for reconsideration or for an early date for hearing. As the Supreme Court reiterated in *Ironworkers*, supra, 466 U.S. at 725, “the principle of *Rutter-Rex* remains applicable: “[T]he Board is not required to place the consequences of its delay, even if inordinate, upon wronged employees.” Accordingly, I conclude that backpay should not be tolled from November 7, 1995, through March 10, 1997.

CONCLUSIONS OF LAW

1. Deleet Merchandising Corp. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By terminating the employment of Jesse Roberts in response to an unlawful union request, Respondent Deleet has violated Section 8(a)(1) and (3) of the Act.
4. By requesting that Deleet discharge Roberts because of his union affiliation and for reasons other than the failure to tender uniformly required initiation fees and periodic dues, the Union has violated Section 8(b)(1)(A) and (2) of the Act.
5. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The backpay computation contained in the backpay specification is appropriate.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I find it necessary to order them to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Since I have found that Respondent Deleet unlawfully discharged Jesse Roberts and unlawfully failed to reinstate him, I shall order that it offer Roberts immediate and full reinstatement to his former position or, if that position is no longer in existence, to a substantially equivalent one, without prejudice to his seniority or other rights and privileges. I shall further order that the Union notify Roberts and Deleet that it no longer objects to Roberts beginning work at the

Blanchard Street facility at 8 a.m. I shall also order that both Respondents, jointly and severally, make Roberts whole for any loss of earnings incurred as a result of the unlawful conduct. Pursuant to the backpay specification, net backpay due Roberts through December 11, 1996, amounts to \$29,121.61, plus interest, minus tax withholdings required by Federal and state laws. Additional backpay, if any, shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).³

[Recommended Order omitted from publication.]

³Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.