

Newspaper & Mail Deliverers' Union of New York & Vicinity (City & Suburban Delivery System) and Eduardo Valentin and Jimmy Clark and Willie Miles. Cases 34-CB-2202, 34-CB-2216, and 34-CB-2223

October 25, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN
AND HURTGEN

On December 3, 1999, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

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,¹ and conclusions and to adopt the recommended Order as modified.²

¹ 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.

In *Carpenters Local 270 (Eastern Contractors Assn.)*, 332 NLRB No. 25 (2000), the Board recently reaffirmed that the duty of fair representation does not apply in the context of a nonexclusive hiring referral system. We need not decide in this case, however, whether the Respondent's recommendations of casual employees for positions as regular situation-holders amounts to a nonexclusive referral system, to which the duty of fair representation does not apply. We agree with the judge that the General Counsel has proven that the Respondent refused to recommend the Charging Parties for positions as regular situation-holders in retaliation for their protected activity, which is a violation of Sec. 8(b)(1)(A) independent of the duty of fair representation. See, e.g., *Carpenters Local 626 (Strawbridge & Clothier)*, 310 NLRB 500 fn. 2 (1993); *Carpenters Local 537 (E. I. du Pont)*, 303 NLRB 419, 420 (1991). Thus, even assuming that the Respondent's actions were taken in the context of a nonexclusive referral arrangement, it is unnecessary to pass on whether the Respondent breached its duty of fair representation.

² In her cross-exceptions, the General Counsel contends that the judge's recommended Order should be modified to require explicitly that the Respondent assign Eduardo Valentin, Jimmy Clark, and Willie Miles, or see that they are assigned, the regular situation-holder number and/or group II number which they would have been assigned had they been hired effective May 4, 1998. We agree. The record shows that placement on a group II list is the mechanism for giving regular situation-holders priority over casuals in obtaining assignments for additional hours or in obtaining assignments at different facilities. To ensure restoration to their proper place, we shall modify the judge's recommended Order and notice accordingly. See *Williams Press, Inc.*, 195 NLRB 905, 908 (1972).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Newspaper & Mail Deliverers' Union of New York & Vicinity, New Rochelle, New York, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

“(b) Make Valentin, Clark, and Miles whole for any loss of earnings and other benefits suffered as a result of the Employer's failure to hire them as regular situation-holders effective May 4, 1998, and continuing until such time as the Employer has hired them for such positions or until they obtain substantially equivalent employment elsewhere.”

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs accordingly.

“(c) Assign Valentin, Clark, and Miles or see that they are assigned, the regular situation-holder number and/or group II number which they would have been assigned had they been hired effective May 4, 1998.”

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

APPENDIX

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 cause or attempt to cause City & Suburban Delivery System, the Employer, not to hire Eduardo Valentin, Jimmy Clark, and Willie Miles, or any other employee, as regular situation-holders at the New Rochelle, New York facility because they crossed or worked behind our picket lines, or because we believe

Lastly, we shall modify par. 2(b) of the judge's recommended Order to provide standard remedial language.

that they did, or because they refrained from engaging in any other union or protected, concerted activity.

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, within 14 days from the date of the Board's Order, notify the Employer that we have no objection to the hiring of Valentin, Clark, and Miles as regular situation-holders at the New Rochelle, New York facility and WE WILL request that they be hired for such positions

WE WILL assign Valentin, Clark, and Miles, or see that they are assigned, the regular situation-holder number and/or group II number which they would have been assigned had they been hired effective May 4, 1998.

WE WILL make Valentin, Clark, and Miles whole for any loss of earnings and benefits suffered by them as a result of the Employer's failure to hire them as regular situation-holders effective May 4, 1998, and continuing until such time as the Employer has hired them for such positions or until they obtain substantially equivalent employment elsewhere

NEWSPAPER & MAIL DELIVERERS'
UNION OF NEW YORK & VICINITY

Margaret A. Lareau, Esq., for the General Counsel.

J. Warren Mangan, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. This case was tried in White Plains, New York, on July 27–29 and September 2, 1999. The charges in Cases 34–CA–2202, 34–CA–2216, and 34–CA–2223 were filed by individual Charging Parties Eduardo Valentin, Jimmy Clark,¹ and Willie Miles on August 10, September 18, and October 2, 1998, respectively, and the consolidated complaint and notice of hearing was issued January 27, 1999. The complaint alleges that the Respondent, Newspaper and Mail Deliverers' Union of New York & Vicinity, violated Section 8(b)(1)(A) of the Act by objecting to and demanding that the Employer, City & Suburban Delivery System (C & S), not hire the Charging Parties as "regular situation-holders" in March 1998, and by excluding the Charging Parties from a list of 10 unit employees it sponsored for such positions on April 14, 1998.² The consolidated complaint further alleges that the Respondent Union's actions caused the Employer not to hire the Charging Parties for these positions in violation of Section 8(b)(2) of the Act. The Respondent filed an answer to the complaint on February 12, 1999, denying that it engaged in the alleged conduct and denying that it committed any unfair labor practices.

¹ The caption was amended at the hearing to reflect the Charging Party's correct name.

² All dates are in 1998 unless otherwise indicated.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer, a wholly owned subsidiary of The New York Times Company, is engaged in the wholesale distribution of the New York Times newspaper and other publications from several facilities in the States of New York and New Jersey, including the facility in New Rochelle, New York, involved in this proceeding. The Employer annually provides services valued in excess of \$50,000 in States other than the State of New York. The Respondent admits and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Employer operates a wholesale newspaper distribution facility in New Rochelle, New York. The Respondent has represented a unit of drivers, floormen, and foremen at this facility for a number of years, through a succession of different owners. Prior to May 1998, there were approximately 40 regular situation-holders in the bargaining unit at the New Rochelle facility. Regular situation-holders are permanent employees with regular schedules and assigned routes. They have seniority and other rights under the parties' collective-bargaining agreement and preference in assignment of extra shifts on their days off. Regular situation-holders also have rights to go to other distribution facilities represented by the Union and "shape" for work. The three Charging Parties are casual drivers or "shapers". Although their wages and benefits are established by the collective-bargaining agreement, they have no contractual seniority rights and are not covered by the just cause provision of the collective-bargaining agreement. Shapers obtain work at the New Rochelle facility by showing up at approximately 10 or 11 p.m. and signing a list. The employer will utilize this list to fill open routes not covered by the regular situation-holders. There is no dispute that, at least since 1992, the employer has the right to hire whomever it wants among the casuals to fill these openings. The Charging Parties testified that, on average, they shaped 5–6 nights a week to get four to five shifts of work.

The Employer has operated the New Rochelle facility since 1996. Before that, the facility, along with a similar facility on Long Island, in Farmingdale, New York, was operated by a company called Imperial Delivery Service or IDS. IDS acquired the business in May 1992 from another company called NDC Westfair. IDS' acquisition of the facility and its negotiations with the Respondent in 1992 resulted in a strike or lockout that lasted about 3 weeks and was marked by incidents of violence and harassment on both sides.³ The strike or lockout

³ The Respondent offered much testimony at the hearing regarding the events leading up to the work stoppage in an effort to establish that it was a lockout and not a strike. I find it unnecessary to resolve that

ended when the Respondent was forced to accept a new collective-bargaining agreement on less favorable terms than those that existed under its agreement with NDC Westfair. As part of this agreement, IDS reduced the number of regular situation-holders from approximately 90 to 50 through buyouts. Those remaining situation-holders found their bids and routes changed, resulting in a loss of income. IDS also refused to recognize the various lists maintained by the Respondent to fill vacancies, on a temporary or permanent basis, insisting on the Employer's exclusive right to hire. Under the new collective-bargaining agreement, the Respondent did retain the right to refer applicants for jobs whenever the employer chose to fill full-time positions. In return, the employer only agreed to give applicants referred by the Respondent the same consideration given to applicants derived from other sources. C & S adopted this collective-bargaining agreement when it acquired the facility in 1996.

The 1992 work stoppage resulted in lingering bitterness on the part of the Respondent's members and officials who were employed at the facility before and after it. This bitterness was reflected in the testimony of many of the Respondent's witnesses. Some of the hostility was directed at individuals who were hired by IDS before it acquired the facility as part of its strike preparations. These individuals were trained by IDS at a hotel in the months preceding the work stoppage and were utilized by IDS during the strike/lockout to deliver the newspapers. Some of these replacement employees, who were bussed into the facility by IDS during the work stoppage, continued to be employed as casual drivers after the union members returned to work. In the period after the strike/lockout ended, there was much discussion among Respondent's members and officers regarding who had "come in on the bus," i.e., worked during the strike/lockout. There is no dispute that one of the Charging Parties, Willie Miles, was hired and trained by IDS before the work stoppage and worked as a replacement during it. The record shows that the other two Charging Parties, Clark and Valentin, did not start working for IDS until after the Respondent's members had returned to work on May 28, 1992. However, the evidence to be discussed, below, indicates that the Respondent's officers believed that they too had "come in on the bus."

Billy Llanes, who is currently a foreman but was the assistant chapel chairman and later chairman in the period immediately after the strike/lockout, testified under subpoena for the General Counsel regarding these discussions. Although his testimony was sometimes conflicting and confusing, it is clear that the Respondent's officials were interested in learning the identity of the replacements who remained in IDS' employ after the work stoppage. Business Agent McCauley frequently asked Llanes about certain individuals, whether they had "come in on the bus" and Llanes would tell him what he knew or believed. At the hearing, Llanes could not recall with any specificity whether he had named the Charging Parties as individuals who worked during the strike/lockout. He did acknowledge that the consensus among union members after the work stoppage was

issue because it makes no difference to the allegations of the complaint whether it is characterized as a strike or a lockout.

that anyone who worked during it should never get a steady position.

There is no dispute that neither IDS nor C&S filled any regular situation-holder positions between the 1992 work stoppage and the spring of 1998, despite a steady decline in the number of regular situation-holders over the years.⁴ In early 1998, the Employer contacted the Respondent and indicated that it wanted to fill 10 positions to bring the number of regular situation-holders up to the contract guarantee of 50 such positions. After some preliminary telephone discussions between the Respondent's business agent, James McCauley, and the employer's director of labor relations and human resources, James Baker, a meeting was scheduled to discuss the matter. The parties met in February at the Employer's principal office in Long Island City, New York. The Respondent was represented by McCauley, Paul Franco, the night chapel chairman at the time, and Rafferty, who was the assistant chapel chairman. The Employer was represented by Baker, Brian DePallo, who was the general superintendent of delivery at the time, and Barry Novack. A second meeting was held, in March, at the offices of the Employer's law firm, with the same people in attendance.

DePallo gave the most detailed account of what transpired at these two meetings. DePallo had worked at the New Rochelle facility for many years in unit and management positions. He served at one time in the past as the Respondent's chapel chairman. He was NDC Westfair's superintendent of delivery on May 6, 1992 and became IDS' operations manager on May 7, 1992. He held that position for IDS from the time of the strike/lockout until the current employer took over in 1996. He was thus familiar with the operations and the employees who worked at New Rochelle before and after the work stoppage.

DePallo testified that the first meeting was informational, to communicate to the Respondent the Employer's desire to fill 10 positions and to discuss how to do so. According to DePallo, the Respondent, through McCauley, took the position that it wanted people on the old group 3 list to fill any openings.⁵ A considerable amount of time was spent discussing the names on the group 3 list. DePallo expressed the view that many of the people on the group 3 list had not worked for the employer for some time, or did not work consistently. He told the Respondent that the Employer was looking for people who had shown a commitment to working for the Employer by shaping on a consistent basis over the years. DePallo expressed the opinion that it would not be fair to hire someone off the group 3 list who had not worked for the employer consistently over the years ahead of people who had worked regularly. By the end of the first meeting, the parties had agreed on at least three names from the group 3 list, Donald Dunn, Mike Antonaccio, and

⁴ Eugene Rafferty, the current chapel chairman and previously an assistant chapel chairman, transferred into the New Rochelle facility as a regular situation-holder under a special arrangement for union members who are displaced from other facilities represented by the Respondent.

⁵ The group 3 list was a list of union members who had been displaced at other facilities and had a priority for filling vacant regular situation-holder positions under collective-bargaining agreements the Respondent had with the employers who operated the New Rochelle facility before IDS. As noted above, IDS did not recognize the Respondent's group 3 list.

Steve Naclerio, who had worked consistently for the Employer. The Respondent was still pushing to add others from the group 3 list. DePallo testified that the Respondent also suggested Jesse Ward as someone to fill one of the 10 positions. Ward had been terminated by IDS for insubordination and had been allowed to work as a shaper by the Employer. No agreement was reached as to whether he would be hired. Because there was no agreement on all 10 positions to be filled, the parties agreed to meet again with the Employer offering to prepare a list of casuals who had been working at New Rochelle consistently since 1992.

In preparation for the second meeting, DePallo asked Chris Fabbiani to prepare a list in order of date hired of the casuals who had worked consistently since 1992. Fabbiani had been a foreman at the New Rochelle facility involved in the nightly hiring of casuals since IDS took over the facility. Fabbiani had also been involved in IDS hiring and training of replacements before May 1992. There is no dispute that Fabbiani prepared such a list and that it was shown to the Union at the next meeting. The list no longer exists. According to DePallo, Miles was the first name on the list and Valentin and Clark were the fifth and sixth names. It is also undisputed that the first four names on the list did work during the strike/lockout.

DePallo testified that, at the second meeting, he explained that the list was in order of seniority and that it was his intention that the remaining positions be filled in that order.⁶ According to DePallo, the Respondent's representatives passed the list back and forth, shaking their heads. McCauley said, "We have a problem with these names," referring to the first six. McCauley indicated that the "problem" related to their dates of hire, i.e., they fell within the period of the strike/lockout. The discussion then focused on Clark's name with DePallo telling McCauley that Clark's date was after the strike/lockout, that he began work in July 1992. Rafferty, the assistant chapel chairman who was not working in New Rochelle in 1992, responded that DePallo was wrong, that Clark was there and that he had a problem with it. DePallo testified that he had a specific recollection that Clark started working after the strike/lockout. He had no specific recollection regarding Valentin and the others on the list but, according to the dates on the list, he also believed they had worked during the strike/lockout. DePallo testified that, when the Union would not change its position regarding Clark, the employer backed off and the discussion continued with the remaining names on the list. The Respondent indicated that they felt comfortable that they could recommend the next six names on the list. According to DePallo, it was agreed that the Respondent would send a letter to the Employer recommending the 10 names agreed on at the two meetings and the employer would then interview each of them. Although McCauley said something about researching the number of shifts worked by the individuals on the list through the records of the health and welfare and pension funds, no further information was provided by the Union after the meeting.

⁶ By the beginning of the second meeting, the parties had agreed on the first four positions, i.e., the three that the Employer was willing to hire off the group 3 list and Ward. This left six positions to be filled.

Baker also testified about these two meetings but his recollection was not as clear as that of DePallo. He did corroborate DePallo's testimony that the Respondent pushed for hiring from the group 3 list and that the Employer expressed its view that it wanted to hire people who had worked consistently for the Employer since 1992. Baker also corroborated DePallo's testimony that the Union was shown the list prepared by DePallo and Fabbiani and that McCauley said, "[W]e have problems with some of these names" and that he may have said "with the dates" as well. Baker testified that, regardless of the words used by McCauley, it was clear to him that McCauley's "problem" related to whether the individuals had worked during the 1992 strike/lockout. Baker recalled that the meeting ended with the Employer telling the Respondent to send a list of the people they were recommending for these positions.

McCauley testified that the Respondent had been pushing the Employer to fill regular situation-holder positions for some time before 1998. He recalled being contacted in early 1998 by Baker about the Employer's decision to fill 10 slots. According to McCauley, Baker indicated a willingness to discuss it with the Respondent. McCauley testified that he told Baker that he needed information from the Employer regarding the drivers who had been working as casuals. The only information the Respondent had was Fund records showing shifts for which contributions were made. McCauley testified that he needed to know from Baker when people started. McCauley recalled that the first meeting was spent going over the group 3 list, with the Respondent pushing to get as many people hired from that list as possible. McCauley confirmed the testimony of DePallo and Baker that the Employer had a problem with some of the names on the group 3 list because they had not been working for the Employer since 1992. McCauley testified that he told the Employer that the Respondent still needed to know who was working in the facility and when because the Respondent had no information on the casuals and that the Employer agreed to provide this information by the next meeting.

McCauley testified that, at the second meeting, the parties continued to discuss the group 3 list and the Employer gave the Union a list it had with the names of casuals. McCauley disputed that the list had dates of hire. According to McCauley, the parties went back and forth over the two lists, ultimately agreeing on 10 names. In response to leading questions, McCauley specifically denied that he objected to any of the names on the Employer's list. He also denied saying that he "had a problem" with the names on the list. However, earlier in his testimony, when asked a more open-ended question, McCauley testified as follows:

They had a list of names. We went back and forth on the 3 list, they gave us names that were on that list, and we came up with ten names. **And we said that, "do you have a problem," they asked us.**

We said, "With these people we do, the other people we don't know." I don't know who got in there. We had no idea with anybody besides the 3 list guys who was working there when the strike went in.

We said, "Look, do we agree with these ten names? Do you have a problem with these ten names?" And they said no."

(Tr. 586, L. 17–p. 587, L. 2; emphasis added.)

Rafferty was also asked about these meetings and, in response to leading questions, he denied that he made any comment regarding Clark and denied further that any other representative of the Respondent made any comments about having a problem with Clark because he worked during the strike/lockout. Rafferty also disputed whether the list provided by the Employer at the second meeting showed the dates of hire and he denied that any representative of the Respondent stated that they had a problem with "the dates." He denied that the Respondent objected to the hiring of any person whose name appeared on the Employer's list. Franco acknowledged receiving a list of names from the Employer at the second meeting, but he denied that dates of hire were on the list. Franco was also asked a series of leading questions to elicit denials that the Respondent objected to the Employer hiring any individuals on this list.

I credit DePallo's version of these two meetings, to the extent it is contradicted by the Respondent's witnesses. DePallo impressed me as a truthful witness, not prone to exaggerate or mischaracterize events. As a nonparty to these proceedings, he has no apparent incentive to testify falsely. Moreover, Baker's limited recollection tended to corroborate DePallo. Even McCauley, in the portions of his testimony excerpted above, corroborates the testimony that the Respondent at least expressed reservations about names on the Employer's list because it "had no idea . . . who was working there when the strike went in." Finally, the testimony of the Respondent's witnesses, to the extent it was elicited by leading questions, is entitled to less weight than the more detailed testimony provided by DePallo.

It is undisputed that, on April 14, the Respondent's attorney faxed a letter to the Employer listing the 10 individuals that the Respondent was sponsoring for regular situation-holder positions in New Rochelle. These were the 10 individuals agreed upon at the second meeting. None of the Charging Parties was included in this list. By letter dated April 23, Baker informed the Respondent's attorney that the Employer had interviewed all of the proposed 10 candidates, reviewed their applications and intended to appoint them as regular situation-holders. Baker requested that the Respondent's attorney contact him to determine the effective date of the appointment. On April 30, Baker wrote to the Respondent's president, Frank Sparacino, and business agents, McCauley and James DeMarzo, confirming an agreement on a May 4 effective date for the 10 individuals to become regular situation-holders. On May 5, Business Agents McCauley and DeMarzo sent a proposed seniority list for the new regular situation-holders to Baker. It is undisputed that none of the 10 new regular situation-holders worked during the 1992 strike/lockout.

Sometime in late April or early May, employees became aware of these 10 positions being filled. The three Charging Parties testified regarding conversations they had with representatives of the Respondent over their exclusion from the list.

Miles testified that he first spoke to Franco, the chapel chairman, after he saw the list of new regular situation-holders posted. According to Miles, he asked Franco why he didn't get one of the positions and Franco replied, "Well, you guys that crossed the picket line will never get a steady job." Miles then asked Franco who chose the names on the list and Franco told him the company did and that the company could pick whoever they wanted. Franco denied having any conversation with Miles. He did recall being present for a conversation between McCauley and several employees, including Miles, to be discussed below. In response to a leading question, Franco denied making the statement attributed to him by Miles during that later conversation. I credit Miles and find that Franco did tell him, in a one-on-one conversation, that casuals who crossed the picket line in 1992 would never get a regular job. This statement is consistent with the views expressed by another witness, Billy Llanes, who was the assistant chapel chairman and chapel chairman immediately after the strike/lockout and is now a foreman. It is also consistent with DePallo's testimony regarding what transpired when the Respondent and the Employer met to discuss how to fill the 10 vacancies.

Miles testified that he also spoke to McCauley about the list in June. Valentin and Richard Atkins were also present for this conversation.⁷ As noted above, Franco claims that this is the conversation he was involved in. Miles and Valentin denied that Franco was present. I credit Miles and Valentin and find that Franco was not present for this conversation. Miles testified that, when he asked McCauley why they weren't getting a steady job, McCauley responded in the same manner as Franco, i.e., McCauley said, "[Y]ou guys that crossed the picket line, they will never let you guys in." Atkins did not testify in this proceeding. Valentin testified about a conversation involving the same parties, but his version was significantly different than that of Miles. According to Valentin, he asked McCauley why he didn't get on the list and McCauley told him not to worry because three steady drivers were retiring and there would be more openings. Valentin recalled there was also discussion of the pension and McCauley said that the Union was going to have a meeting to talk about the list. In response to leading questions, Valentin recalled that McCauley said he didn't know too much because the Union didn't pick the drivers, the company did. On further leading, Valentin recalled that McCauley told them that the Company picked five and the Union picked five. Valentin had no recollection of McCauley mentioning anything about the 1992 strike/lockout. McCauley had no specific recollection of any conversation with Miles, Valentin, and Atkins. He did recall that employees stopped him to talk to him about the list but he did not remember who they were. He specifically denied telling any employees that they would not be hired as regular situation-holders because they crossed the picket line. According to McCauley, when he was questioned by employees about the list, he responded that the Union had

⁷ Atkins is another casual who started working for IDS during the 1992 strike/lockout. His name was the second on the list prepared by the Employer and shown to the Respondent at the second meeting. He also was not included in the 10 names recommended by the Respondent on April 14. Atkins did not file a charge.

no control over hiring, the Company makes the final decision. I cannot credit Miles regarding this conversation in light of Valentin's failure to corroborate him. In fact, Valentin's version was closer to what McCauley recalled telling employees who asked him about the list. Moreover, the fact that Miles testified that Franco and McCauley used almost identical words in two separate conversations convinces me that he confused these two conversations in his mind. Accordingly, I find that McCauley did not tell Miles, Atkins and Valentin that they did not get regular jobs because they had crossed the picket line.

Lee Floyd, a regular situation-holder employed at the New Rochelle facility for 16–17 years and a member of the Respondent, testified that he had a conversation with Chapel Chairman Franco soon after the list of new regular situation-holders was posted. Floyd offered to speak to Franco after Jimmy Clark told him that he had been passed over for one of these jobs. Floyd testified that he asked Franco what Clark's status was, why he was passed over and that Franco responded that he had heard that Clark crossed the picket line. Floyd asked Franco to explain that to Clark and Franco replied that, as shop chairman, he could not say that to Clark. The conversation ended with Floyd asking Franco to at least tell Clark something. Franco admitted having a conversation with Floyd about Clark's name not being on the list. According to Franco, he told Floyd that he had nothing to do with who was on the list, that it was up to the Company. He told Floyd that his only interest in meeting with the Company was to make sure that the guys on the group 3 list got hired. Franco specifically denied telling Floyd that Clark was not on the list because people thought he crossed the picket line. I credit Floyd over Franco. As a regular situation-holder and long-time union member, he had nothing to gain by testifying falsely. Moreover, his testimony is consistent with other evidence in the record, including DePallo's credible testimony, indicating that the Respondent believed Clark had worked during the strike/lockout.

Clark testified that, in August, he was approached by Assistant Chapel Chairman Rafferty who asked him when he started working for the Company. Clark told him on July 9, 1992, and asked why Rafferty wanted to know. Rafferty told him that there were rumors going around that Clark crossed the picket line and that, after talking to some guys, Rafferty didn't believe Clark crossed the picket line. Rafferty asked Clark if he could get proof of his starting date and he would see what he could do about it. After this conversation, Clark contacted the Employer's human resources department and obtained a letter verifying his date of hire as July 9, 1992. Clark gave this letter and a copy of records showing the shifts he had worked every year to Rafferty. Rafferty told Clark that this was good, that he could work with this information. Clark asked Rafferty several times after submitting this information what was happening with it. Rafferty initially told him he was working on it and later told Clark that Franco had the information. When Clark questioned Franco about it, Franco denied knowledge of the paperwork and told Clark he would speak to Rafferty. The following night, Franco told Clark that he had spoken to Rafferty who still had the papers and would bring them in for Franco. In a later conversation with Rafferty, Rafferty told Clark that he didn't think Clark crossed the picket line, but "it's the people you hang around with." When Clark questioned

you hang around with." When Clark questioned what Rafferty meant by this, Rafferty told Clark to forget he ever said this. Rafferty repeated this advice later that same night when they crossed paths on their routes.

Rafferty denied asking Clark for proof of his date of hire. He testified that Clark initiated the conversation by asking why he wasn't on the list. According to Rafferty, he told Clark that he didn't know. He admitted that Clark gave him a letter on company letterhead verifying his date of hire, but testified that this was unsolicited. Rafferty testified that he did nothing with the letter and that he still had it at home. In response to leading questions, Rafferty denied the specific statements attributed to him by Clark. Franco denied that Rafferty ever gave him any documents from Clark. According to Franco, the only conversation he had with Clark was in response to a question from Clark about the list. According to Franco, Clark asked him what he had to do to get on the list and Franco told him he had to speak to the company representatives and see about getting an interview. I find that Clark's testimony was much more believable than the testimony of Franco and Rafferty. It was obvious that Rafferty was providing only an abbreviated version of how he came into possession of a letter from the company verifying Clark's date of hire. Moreover, Clark's testimony is consistent with the other evidence in the record, including the testimony of Floyd and DePallo indicating that there was a dispute among the Respondent's representatives over whether Clark had started during or after the strike/lockout.

Valentin testified that he spoke to Franco and Pat Browne, the assistant night chapel chairman at the time, after the list of new regular situation-holders was posted. He first asked Franco why his name was not on the list since he had more seniority than those who were on the list. Franco told Valentin he would check it out. After asking Franco several more times about it, Franco finally told him to talk to DePallo. Franco could not recall having any such conversation with Valentin. Valentin then asked Browne about it because Browne told him, when he solicited Valentin to sign the agency fee checkoff authorization, that if he paid the agency fee he would be on the list for the next opening. According to Browne, when he reminded Browne of the earlier conversation about the agency fee and asked what happened, Browne said, "the scab have no right." According to Valentin, another union driver and friend of Browne, Kevin Lydon, joined them during this conversation and echoed his agreement with Browne's statement. This version of the conversation differs from what Valentin reported in his pretrial affidavit. In the affidavit, Valentin stated that it was Lydon, not Browne, who stated that scabs have no rights. At the hearing, Valentin explained that the affidavit was incorrect, yet he admittedly did not correct it before signing it. Although Browne denied having any conversation with Valentin about the list, he did acknowledge that a friend made the statement that "scabs ain't got no rights." According to Browne, when he heard this, he simply walked away. Browne specifically denied telling Valentin, as part of his solicitation of agency fee authorizations, that Valentin would be on the list for the next openings if he paid the agency fee. Considering the testimony of Valentin in light of his affidavit and the admission of Browne, I find that it was Lydon, not Browne, who made the

statement about scabs. I find further that Browne did not disavow this statement at the time it was made.

The Respondent denied that Franco, Rafferty, and Browne were its agents within the meaning of the Act, disclaiming responsibility for any statements they may have made to the Charging Parties and others. The evidence in the record, including the collective-bargaining agreement and the Respondent's constitution and bylaws, clearly establish that the chapel chairman and his assistants have the authority to act on behalf of the Respondent on a variety of matters, including contract enforcement, grievance processing, inspecting timesheets, and work schedules and interacting with the Employer's supervisors and foremen to ensure adequate coverage of the routes. It is undisputed that Browne solicited the casuals to pay agency fees to the Respondent under the terms of the collective-bargaining agreement. The Board has historically relied on such authority to find that shop stewards, a position analogous to the chapel chairman and assistant chapel chairman here, are agents of a union. *Carpenters Local 17 (A & M Wallboard)*, 318 NLRB 196 fn. 3 (1995); *Carpenters Local 296 (Acrom Construction Service)*, 305 NLRB 822 (1991). Moreover, the Board has expressly found that the chapel chairman of this union is an agent based on several of the same factors present here. *Newspaper & Mail Deliverers' Union of New York & Vicinity (Gannett Co.)*, 271 NLRB 60, 67 (1984), citing the Board's decision in *Newspaper & Mail Deliverers (Bergen Evening Record Corp.)*, 175 NLRB 386, 387 (1969). All of the statements attributed to Franco, Rafferty, and Browne fell within the scope of their authority, particularly in regard to the Respondent's role in the hiring process. Accordingly, I find that they were agents of the Respondent within the meaning of the Act when they spoke to the Charging Parties and Lee Floyd as described above.

The complaint alleges that the Respondent's conduct in connection with the Employer's effort to fill the 10 vacant regular situation-holder positions violated Section 8(b)(1)(A) and (2) of the Act. A union that is the exclusive bargaining agent of a unit of employees owes to the employees in the unit a duty of fair representation which derives from its status as exclusive representative under Section 9(a) of the Act. *Miranda Fuel Co.*, 140 NLRB 181 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963). See also *Vaca v. Sipes*, 386 U.S. 171 (1967). A union breaches this duty, and violates Section 8(b)(1)(A) of the Act, when it takes actions affecting employees' terms or conditions of employment which are based on considerations or classifications that are irrelevant, invidious, or unfair. In particular, union actions based on employees' exercise of their statutory rights violate the Act. See *Teamsters Local 705 (Pennsylvania Truck Lines)*, 314 NLRB 95 (1994); *ITT Arctic Services*, 238 NLRB 116 (1978). Under Section 8(b)(2), it is an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against employees in violation of Section 8(a)(3) of the Act. Because employees have a right under Section 7 of the Act to refrain from engaging in union or other protected concerted activities, a union violates Section 8(b)(2) where it demands the discharge of employees who cross a picket line. *Teamsters Local 705*, supra; *Commercial Workers District Union 227 (Kroger Co.)*, 247 NLRB 195, 196-197 (1980).

Based on the credited testimony of DePallo, it is clear that the Employer entered the second meeting with the Respondent in March with the intention of including the Charging Parties on the list of new regular situation-holders. Because all the casuals identified on the list prepared by Fabbiani were relatively equal in terms of their consistency and commitment to the Employer, length of service, or seniority, appeared to be the fairest way to fill the six positions remaining after the parties had agreed on the hiring of the group 3 men and Ward. The fact that the collective-bargaining agreement provided no seniority rights to the casuals is irrelevant because the Employer had expressed a willingness to recognize such rights in this instance. It was only because the Respondent had a "problem" with the first six names on the list that they were left off the final list of "applicants." Although it is undisputed that the Employer intended to interview these applicants and had the exclusive right to determine whether to hire them, it is clear from the evidence that these "interviews" were a mere formality and that the Employer would hire the 10 individuals referred by the Union. Certainly, there is no evidence that the Employer sought applicants from any other source. Under these circumstances, I find that the Respondent did cause the Employer not to hire the Charging Parties as regular situation-holders in March and April 1998.

The record evidence also establishes that the reason the Respondent objected to the first six names on the list prepared by the Employer was because of its belief that those six individuals, including the Charging Parties, had worked during the 1992 strike/lockout. The statements made by Browne, Rafferty and Franco to Floyd and the Charging Parties clearly reflect the Respondent's animus toward individuals who had "come in on the bus." McCauley's "problem" with these six names expressed at the March meeting with the Employer, particularly in light of the ensuing discussion over Clark's date of hire, establishes that it was the fact or the perception that they had crossed a picket line which was the basis for the Respondent's objection to their inclusion on the list. Under these circumstances, and considering the totality of the evidence, the conclusion is inescapable that the Respondent violated Section 8(b)(1)(A) and (2) by causing the Employer not to hire Miles, Valentin, and Clark as regular situation-holders. See *Bricklayers Local 1 (Denton's Tuckpointing)*, 308 NLRB 350, 355 (1992), and cases cited therein.

CONCLUSION OF LAW

By causing or attempting to cause City & Suburban Delivery System, an employer within the meaning of the Act, not to hire Willie Miles, Eduardo Valentin, and Jimmy Clark as regular situation-holders because of the fact, or the Respondent's belief, that they had worked during a strike or lockout, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and (2) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate

ate the policies of the Act. I shall recommend, inter alia, that the Respondent be ordered to notify the Employer that it has no objection to the Employer hiring Miles, Valentin, and Clark as regular situation-holders at the New Rochelle facility. Moreover, because the collective-bargaining agreement provides that the Respondent may refer applicants to the Employer, I shall recommend that the Respondent be ordered to request that the Employer in fact hire the Charging Parties as regular situation-holders. The General Counsel seeks an order further requiring that the Respondent make the Charging Parties whole for any lost wages and benefits resulting from the Employer's failure to hire them as regular situation-holders in May 1998. The Board has provided for such a remedy in cases analogous to the present one. See *Teamsters Local 705*, supra at 96; *Bricklayers Local 1*, supra at 356. Moreover, the Board has expressly upheld the grant of such a remedy against a respondent union even where there is no finding of culpability against the employer. *Sheet Metal Workers Local 355 (Zinsco Electrical)*, 254 NLRB 773 (1981). Accordingly, I shall recommend the remedy requested by the General Counsel.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

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

1. Cease and desist from

(a) Causing or attempting to cause City & Suburban Delivery System, an employer, not to hire Willie Miles, Eduardo Valentin, and Jimmy Clark, or any other employee, as regular situation-holders at the Employer's New Rochelle, New York facility because they crossed or worked behind the Respondent's picket lines, or because the Respondent believed that they did, or because they refrained from engaging in any other union or protected, concerted activity.

⁸ 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.

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

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

(a) Within 14 days from the date of this Order, notify City & Suburban Delivery System that it has no objection to the hiring of Willie Miles, Eduardo Valentin, and Jimmy Clark as regular situation-holders at the New Rochelle, New York facility and in fact request that they be hired for such positions.

(b) Make Miles, Valentin, and Clark whole for any loss of wages and benefits suffered by them as a result of the Employer's failure to hire them as regular situation-holders effective May 4, 1998, and continuing until such time as the Employer has hired them for such positions.

(c) Within 14 days after service by the Region, post at its union office in Long Island City, New York copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 34, 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.

(d) Sign and return to the Regional Director sufficient copies of the notice for posting by City & Suburban Delivery System, if willing, at all places where notices to employees are customarily posted.

(e) 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 has taken to comply.

⁹ 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."