

**Newspaper and Mail Deliverers' Union of New York
and NYP Holdings, Inc., d/b/a New York Post.**

Cases 2–CC–2429 and 2–CE–183

May 31, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND COWEN

On February 22, 2001, Administrative Law Judge Eleanor MacDonald issued the attached decision. The General Counsel, the Charging Party, and the Respondent filed exceptions and supporting briefs. The Charging Party filed an answering brief and a brief in support of the judge's decision, and the Respondent filed a reply 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 as modified and to adopt the recommended Order as modified.²

I. UNLAWFUL ENFORCEMENT OF SECTION 11-A.1
OF THE CONTRACT

The judge found that the Respondent Union violated Section 8(e) of the Act by entering into and enforcing section 11-A.1 of its collective-bargaining agreement with NYP Holdings, Inc. (Holdings), publisher of the New York Post. She also found that the Union violated Section 8(b)(4)(ii)(A) by resorting to arbitration with an object of forcing or requiring Holdings to enter into an agreement prohibited by Section 8(e). The judge further found that the Union violated Section 8(b)(4)(ii)(B) by resorting to arbitration with an object of forcing or requiring Holdings to cease doing business with United Media or its successor, D.S.A.

We agree with the judge's findings.³ Section 11-A.1 provides that

[t]o the extent permitted by law, the Publisher shall not distribute its newspapers or any of its other publications through any wholesaler or news company making distribution in any part of the Metropolitan area, as herein defined, unless such wholesaler is under written collective agreement with the Union or is willing to enter into written collective agreement as provided for in this section.

As the judge found, section 11-A.1 is a classic example of a union signatory subcontracting clause that has a secondary objective in that it seeks to regulate the labor policies of other entities over which Holdings has no right of control. Accordingly, it falls within the general proscription of Section 8(e). See, e.g., *Iron Workers (Southwestern Materials)*, 328 NLRB 934, 936 (1999). As the judge also found, the work in question—the distribution of the New York Post in Nassau and Suffolk Counties on Long Island—for the most part, historically had not been performed by members of the bargaining unit and was not fairly claimable by the Union. The Union's attempt to obtain the work for the employees of C & S, a union signatory employer, therefore had an unlawful secondary objective, and was not an attempt to retain or recapture unit work for members of the bargaining unit. See, e.g., *Teamsters Local 282 (D. Fortunato, Inc.)*, 197 NLRB 673, 677 (1972).⁴ Finally, as the judge found, the Union violated Section 8(b)(4)(ii)(A) and (B) by resorting to the contractual grievance procedure to enforce section 11-A.1 and obtain an order from the impartial chairman requiring Holdings to cease distributing the Post on Long Island via United Media and D.S.A. See, e.g., *Service Employees (Nevins Realty Corp.)*, 313 NLRB 392 (1993), enf. in relevant part 68 F.3d 490 (D.C. Cir. 1995); *Elevator Constructors (Long Elevator)*, 289 NLRB 1095 (1988), enf. 902 F.2d 1297 (8th Cir. 1990).

Teamsters (California Dump Truck), 227 NLRB 269, 274 (1976), cited by the Union, is distinguishable. There, the Board held that the Union did not violate Section 8(b)(4) by processing grievances based on 8(e) clauses, because it did not appear that the grievances were filed in order to accomplish an unlawful object. Rather, they were filed as a means of enforcing a colorable contract right. Here, by contrast, the Union brought its grievance to the impartial chairman in order to accomplish an unlawful object—preventing the subcontracting of delivery work to a nonunion company.

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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We will substitute a new notice in accordance with our recent decision in *Ishikawa Gasket American, Inc.*, 337 NLRB 175 (2001).

³ We agree with the judge that Union Business Agent DeMarzo testified that the use of a nonunion wholesaler instead of a union signatory wholesaler to deliver the Post on Long Island violated the collective-bargaining agreement. We do not rely on her finding that witnesses Cotter and Lee testified to the same effect.

⁴ The unlawful character of sec. 11-A.1 is not changed by the fact that it begins by stating, "To the extent permitted by law." See *Essex County District Council of Carpenters*, 141 NLRB 858, 862, 869 (1963), enf. denied on other grounds 332 F.2d 636 (3d Cir. 1964).

II. UNLAWFUL ENFORCEMENT OF SECTION 3-E OF THE CONTRACT

Having found that the Union violated Sections 8(e) and 8(b)(4) by enforcing section 11-A.1, the judge found it unnecessary to decide whether the Union also unlawfully enforced section 3-E of the contract. The General Counsel and Holdings have excepted to the judge's failure to find the additional violations. For the reasons discussed below, we find that the Union violated Section 8(b)(4), but not Section 8(e), by attempting to enforce section 3-E.

Section 3-E provides that

[s]ubject to the side letters and memoranda attached hereto, the methods and extent of direct delivery and combined delivery through wholesalers or news companies as they exist within the Metropolitan Area at the time of the effective date hereof are to be continued, and no change can be made except by application to and with the approval of the Joint Conference Committee.

The General Counsel and Holdings do not contend that section 3-E is unlawful on its face, and we find that it is not. The literal language of section 3-E does not specifically forbid, or even address, the use of nonunion distributors on Long Island. As Holdings explains, the provision simply prohibits Holdings from switching from "direct" to "combined" delivery without the Union's consent. (As the judge stated, "direct delivery" refers to delivery made by employees of Holdings. "Combined delivery," also called "indirect delivery," refers to delivery made by employees of other companies that have collective-bargaining agreements with the Union.)

A facially valid contract provision may violate Section 8(e) if it is authoritatively construed by an arbitrator as having a meaning that is inconsistent with Section 8(e). Such a construction will provide the necessary "agreement" for an 8(e) violation. See *Sheet Metal Workers Local 27 (Thomas Roofing)*, 321 NLRB 540 (1996). Thus, if the impartial chairman had interpreted section 3-E as meaning that Holdings could not, under the contract, distribute the Post through nonunion wholesalers, section 3-E as interpreted would be an unlawful 8(e) clause.

Here, the impartial chairman issued a ruling (a "status quo order") that Holdings could not, consistent with the contract, increase the number of papers being delivered by United Media on Long Island. As the judge found, however, that ruling apparently was based on section 11-A.1, not section 3-E. Thus, we can find no "agreement" based on the status quo order. Nor is there any evidence that Holdings intended for section 3-E to be interpreted in a way that would violate Section 8(e). Accordingly,

we find that there was no agreement by the contracting parties that would convert section 3-E into an unlawful clause, and that the Union therefore did not violate Section 8(e) by entering into and maintaining or attempting to enforce section 3-E.

We do find, however, that the Union violated Section 8(b)(4) by invoking section 3-E as a basis for its grievance against Holdings. The Board has held that a union violates Section 8(b)(4) by filing a grievance based on a reading of a portion of the collective-bargaining agreement that would effectively convert it into an unlawful Section 8(e) provision. *Elevator Constructors (Long Elevator)*, 289 NLRB at 1095. The Union admits that it relied on section 3-E before the impartial chairman. And, as the judge found, the Union had a secondary objective in pursuing its grievance. Accordingly, the Union violated Section 8(b)(4)(ii)(A) and (B) by resorting to arbitration against Holdings based on section 3-E. We shall modify the judge's recommended Order and notice accordingly.

III. RESPONDENT'S SECTION 10(B) DEFENSE

The Union argues that no violation can be found because none of its unlawful conduct took place within the 10(b) period.⁵ We find no merit in this argument. Section 10(b) is an affirmative defense that is waived if not raised in a timely fashion. *Public Service Co.*, 312 NLRB 459, 461 (1993). The Union did not assert Section 10(b) in its answer to the complaint or at the hearing; it raised the issue for the first time in its posthearing brief to the judge. In these circumstances, we find that the Union has waived its 10(b) defense by not asserting it in a timely manner. *Id.*⁶

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

1. Insert the following as paragraph 1(c).

"(c) Seeking to enforce or apply section 3-E of the collective-bargaining agreement, through the grievance and arbitration procedure, where an object thereof is to force or require NYP Holdings, Inc. to enter into any agree-

⁵ Sec. 10(b) provides, in relevant part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made[.]"

⁶ Thus, we do not find it necessary to rely on the judge's finding that the Union "maintained and reaffirmed" its reliance on sec. 11-A.1 at a meeting in January 1999.

ment that is prohibited by Section 8(e) or to cease doing business with United Media, its successor D.S.A., or any other person.”

2. 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 Federal labor law and has ordered us to post and obey this notice.

Section 11-A.1 of our collective-bargaining agreement with NYP Holdings, Inc., which prohibits distribution of the newspaper by any wholesaler that does not have a contract with us, has been found to be unlawful under Section 8(e) of the Act.

WE WILL NOT enter into, give effect to, or enforce section 11-A.1 of our collective-bargaining agreement with NYP Holdings, Inc. through the grievance-arbitration provisions of the collective-bargaining agreement.

WE WILL NOT seek to enforce or apply section 3-E of the collective-bargaining agreement, through the grievance and arbitration procedure, where an object thereof is to force or require NYP Holdings, Inc. to enter into any agreement that is prohibited by Section 8(e) or to cease doing business with United Media, its successor D.S.A., or any other person.

WE WILL withdraw our grievance relating to newspapers to be delivered by United Media or its successor D.S.A.

WE WILL request that the impartial chairman lift the status quo order issued in August 1998.

NEWSPAPER AND MAIL DELIVERERS' UNION OF
NEW YORK

Geoffrey E. Dunham, Esq., for the General Counsel.
J. Warren Mangan, Esq. and *J. Kenneth O'Connor, Esq.*
(*O'Connor & Mangan*), of Long Island City, New York, for the Respondent.
Elliot S. Azoff, Esq. (*Baker & Hostetler*), of Cleveland, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in New York, New York, on 5 days between March 28 and July 5, 2000. The Complaint, as amended, alleges that the Respondent has violated Section 8(b)(4)(ii)(A)

and (B) and Section 8(e) of the Act.¹ The Respondent denies that it has engaged in any violations of the Act.

Upon the entire record, including my observation of the demeanor of the witnesses and after considering the briefs filed by the parties on October 17, 2000, I make the following²

FINDINGS OF FACT

I. JURISDICTION

NYP Holdings, Inc. is a New York corporation with an office at South Street, New York, New York, where it is engaged in publishing a newspaper known as *The New York Post*. The parties agree, and I find, that NYP Holdings, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Newspaper and Mail Deliverers' Union of New York (the NMDU) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The New York Post is often described as the oldest continuously published newspaper in America, having been founded in 1801 by Alexander Hamilton. From 1976 through 1988 *The New York Post* was owned by News America Publishing, Inc. The ultimate corporate parent of News America Publishing is News Corporation, a South Australia company with numerous worldwide subsidiaries. In 1988 News America Publishing sold *The New York Post* in order to comply with FCC cross-ownership rules. By March 1993 the newspaper was operating under the supervision of the Bankruptcy Court and on September 14, 1993, the court approved a purchase of the paper by NYP Holdings, a subsidiary of News America Publishing.³ Before NYP Holdings purchased the paper the publisher's representatives had negotiated a new collective-bargaining agreement with the NMDU. The publisher had also negotiated new

¹ The charges herein were filed on May 11, 1999 alleging a violation of Sec. 8(b)(4)(ii)(A) and (B) and on May 14, 1999 alleging a violation of Section 8(e).

² The record is hereby corrected so that at page 15, line 21, the phrase reads "to the three means of delivery"; at p. 16, line 9 and throughout the record thereafter where "CNS" appears the correct name is "C & S"; at p. 39, line 13 the phrase should read "economic viability"; at p. 45, line 2 and thereafter the record should show that Mr. Mangan was posing questions to the witness; at p. 105, line 11, the phrase should read "from the plant"; at p. 117, line 14, the phrase should read "resolve the 8(e)"; at p. 126, line 20 and thereafter, the correct name is "Mr. Kalikow"; at p. 133, line 13, the phrase should read "the Post's objectives"; at p. 179, line 25 the phrase should read "the application of an illegal clause"; at p. 188, lines 10-11, the person's name is "Victor Strimbu"; at p. 199, line 12, the phrase should read "The Union made those sorts of arguments"; at p. 261, line 1, the phrase should read "I'm asking this witness in his position"; at p. 261, line 20, the transcript should show that Mr. Azoff was questioning the witness; at p. 307, line 5, the record should show that the ALJ gave the explanation following the words "I know"; at p. 478, line 23, the phrase should read "I have not given permission for surrebuttal."

³ The FCC issued a waiver of its cross-ownership rules. The actual purchase by NYP Holdings took place on October 1, 1993. A more complete recital of these events is contained in the ALJ decision in *NYP Acquisition Corp.*, 332 NLRB 1041 (2000).

contracts with most of the other unions representing the newspaper's employees. A major objective of the publisher in the negotiations with the NMDU as well as with the other unions was to achieve new collective-bargaining contracts that would enable the newspaper to operate more economically. Indeed, the publisher's representatives had informed all the unions when the negotiations began in the spring of 1993 that no purchase would take place unless significant labor savings were agreed to in the new collective-bargaining agreements.

The NMDU has represented the drivers and related titles employed by the successive publishers of the newspaper for many years. The oldest collective-bargaining agreement introduced in the instant proceeding dates back to the period 1948-1950. The contract negotiated in 1993 has a term from October 1, 1993 to October 31, 2003.

The witnesses called by the General Counsel in the instant proceeding testified convincingly that the earliest contract proposals made by the publisher's representatives to the NMDU during the 1993 negotiations were not based on the previous collective-bargaining agreements.⁴ As the negotiations progressed, however, the Union continued to insist that many of the old provisions should be retained. The current agreement recites that:

In order to facilitate the process of arriving at agreement on a new collective bargaining agreement, the Publisher and the UNION agreed that the "yellow books" contract previously in effect between New York Post Co., Inc. and the UNION shall be incorporated into the new collective bargaining agreement between the parties except as modified and/or changed by the Memorandum of Agreement entered into on October 1, 1993.

The New York Post is produced at 210 South Street in New York City. The paper is distributed in New York City and beyond. The five boroughs or counties comprising New York City are Queens, the Bronx, Brooklyn (Kings County), Staten Island, and Manhattan (New York County). Distribution within the five boroughs is termed "City distribution." Long Island, another area to which the newspaper is distributed, consists of Nassau and Suffolk counties. Two other areas relevant to this case are Westchester County, New York, and Hoboken, New Jersey. Delivery to these places, which are within the greater metropolitan New York area, is termed "suburban distribution." The newspaper is also sold in more distant locations and distribution to these areas is termed "country distribution."

Various terms were employed in this proceeding to describe methods of delivery: "Direct delivery" occurs when employees of the publisher bring newspapers to the retail outlets from which they are sold to the public. "Combined delivery," also known as "indirect delivery," occurs when the publisher's employees bring newspapers in bulk to an independent wholesaler who is signatory to a contract with the Union. The wholesaler then breaks down the orders and delivers them to various retail accounts. "Alternate delivery" is the term used when the publisher's employees bring the papers to an independent wholesaler who is not signatory to a contract with the NMDU. The

wholesalers whose employees are not represented by the NMDU are sometimes referred to as "bootleggers."

Various portions of the collective-bargaining agreement were cited by the parties herein.

Section 1 provides, in part:

The territory in and for which the terms and conditions herein contained shall be effective shall be the Metropolitan Area which, for the purposes of this Agreement, is defined as the corporate limits of the City of New York and all territory embraced within a radius of approximately fifty miles from Columbus Circle in the City of New York bounded approximately as follows:

To include all of Long Island to Montauk Point; . . .

Section 2 of the contract lists the various titles in the unit and states,

the Publisher recognizes the Union as the exclusive representative for collective bargaining of all its employees engaged in the [listed] operations.

Section 3 provides in part:

3-E. Subject to the side letters and memoranda attached hereto, the methods and extent of direct delivery and combined delivery through wholesalers or news companies as they exist within the Metropolitan Area at the time of the effective date hereof are to be continued, and no change can be made except by application to and with the approval of the Joint Conference Committee.

3-F. In the development of new sections or new routes within the Metropolitan Area, the Publisher shall be free to use a direct or a combined delivery through wholesalers or news companies as it may see fit and it may from time to time change from one form to another as it may find desirable.

A letter dated October 1, 1993 entitled "**Clarification of Method and Extent**" provides:

The post (sic) acknowledges that the collective bargaining agreement prohibits the subcontracting of bargaining unit deliveries except as it may exist pursuant to the contract.

Section 11 provides in part:

11-A.1. To the extent permitted by law, the Publisher shall not distribute its newspapers or any of its other publications through any wholesaler or news company making distribution in any part of the Metropolitan Area, as herein defined, unless such wholesaler is under written collective agreement with the Union or is willing to enter into written collective agreement as provided for in this section.

Section 15 provides that grievances which cannot be settled at the plant level are to be referred to a four person Joint Conference Committee. Issues which cannot be resolved by the Joint Conference Committee shall be submitted to an Impartial Chairman.

A **supplemental agreement** or side letter was negotiated during the negotiations for the October 1, 1993 contract. The side letter provided for a "Circulation Growth Program," stating, *inter alia*:

⁴ The old NMDU contracts were known as "yellow books."

[T]he Publisher will put into effect the following Circulation growth program and may discontinue said program if it becomes uneconomical to continue it It is the objective of the parties to preserve the work traditionally performed by members of the bargaining unit by working dealer outlets not currently being directly serviced by the Publisher into the Publisher's direct delivery system.

Another side letter entitled "**Addendum to the Agreement**" established a Circulation Growth Committee composed of three Union representatives and three management representatives. The letter stated:

The placing of new dealers onto existing Post routes may result in hardships and that any hardships incurred will be addressed immediately

The Circulation Growth Committee shall endeavor to add new dealer outlets obtained from news companies or wholesalers to direct Post routes

B. *The Facts*

John Amann, the vice president of circulation and labor relations of *The New York Post*, is responsible for distributing the paper and for administering the collective-bargaining agreement on behalf of the employer. Amann described the circulation amounts and methods of distribution of the paper.

Amann stated that 90 percent of the deliveries in New York City are direct deliveries by bargaining unit members. Of the other 10 percent, some papers are brought by the bargaining unit members to independent wholesalers such as Mitchells for home delivery within the five boroughs of the City. Mitchells has been in business for "quite a while"; it does not have a collective-bargaining agreement with the NMDU. Amann also presented a document which showed that some newspapers are distributed within the five boroughs by D.S.A. a wholesaler that is not under NMDU contract.⁵ D.S.A. is a subsidiary of Newsday.

Amann testified that there is no direct suburban delivery. Delivery to Nassau and Suffolk counties on Long Island is indirect: unit employees bring the paper to two wholesalers, C & S and D.S.A.⁶ C & S, a subsidiary of the New York Times Company, is signatory to a collective-bargaining agreement with the NMDU. C & S delivers about 37,500 papers per day to Long Island retailers. D.S.A. delivers about 4100 papers per day to Long Island. C & S delivers papers to Connecticut, New Jersey and outlying counties surrounding New York City. These same areas are also served by D.S.A. and by wholesale dealers such as Peekskill News, M & M News, All County News, and Transalliance, none of which have agreements with the NMDU. According to Amann, the bargaining unit member who delivers papers to All County News and M & M News for

⁵ D.S.A. is sometimes referred to in the record as Distribution Systems of America. D.S.A. was until recently known as United Media. In the past, it was known as Media Masters. At various points companies known as American and Pelham merged with Media Masters. To further confuse matters, an entity known as Transalliance broke off from D.S.A.

⁶ C & S is occasionally referred to in the record as City & Suburban.

distribution in Rockland County, New York, is Tommy Lendico, a chapel chairman and a member of the executive board of the NMDU. The Union has not objected to the use of these non-signatory wholesalers by the publisher.⁷

Amann testified that all wholesale distributors are required to maintain computer generated systems that show their draw, that is the number of newspapers they handle, as well as the number of retail dealers to whom they distribute the papers.

There is an exception to the rule that the publisher does not engage in direct delivery outside the five boroughs. About 2667 copies are delivered direct to 58 dealers in Hoboken, New Jersey, on the H1 route. Further, between 1987 and January 1998, there was direct delivery of the newspaper on two routes in Nassau County known as N1 and N2. These routes consisted of a circulation of about 4000 per day out of a total Long Island circulation at that time of 25,000 per day. In 1996 the publisher sought to convert the H1 and N1 and N2 direct delivery routes to indirect routes over the objections of the NMDU. The Union urged that Section 3-E prevented any change in the method of delivery. The dispute was eventually the subject of an award issued by the impartial chairman in January 1998. The chairman construed Section 3-E of the contract as requiring the publisher to continue to make direct deliveries to those geographical areas where it had previously delivered direct unless another contractual provision permitted a change. Thus, the employer was required to continue the Hoboken direct delivery route. However, the chairman found that the language of Section 3-F permitted the employer to change from direct to indirect delivery on new routes and thus it could change to indirect delivery on routes N1 and N2. The chairman found that these routes were new routes in the development process because most of the dealers in Nassau County were serviced by indirect delivery unlike New York City where direct delivery was well established. This dispute did not involve an attempt to have the papers delivered by a non-signatory wholesaler.

In his award the chairman noted that the parties acknowledged that there is alternate delivery outside of New York City as well as in the five boroughs of the City.

Amann testified that the purpose of the Circulation Growth Committee was to convert indirect distribution to direct distribution in the five boroughs of New York City.⁸ By switching to direct delivery, the publisher would be able to avoid paying a commission to a wholesaler. Amann oversaw the work of the committee. The members of the committee looked at computer-generated information from wholesalers, including United Media, to identify retail dealers drawing more than 15 copies of the paper.⁹ If a retail account drew 15 or more copies

⁷ Amann's testimony about the Union's acquiescence in alternate delivery was echoed by Joseph Steo, a driver from 1977 to 1994. Steo delivered papers to nonunion companies such as Pelham, American Periodical, N & M and Media Master. Steo testified that drivers bid on the various routes and that the NMDU chapel chairmen ran the bidding system.

⁸ Amann acknowledged that the agreement itself does not limit the work of the committee to the five boroughs but he maintained that the object was to preserve unit work in the five boroughs.

⁹ The computer records are called galleys. Amann testified that he regularly furnishes the Union with information concerning the whole-

it was economically feasible for the publisher's trucks to make the delivery. The committee sought to work those deliveries into existing routes and to address any hardships to employees resulting from adding new dealers onto their routes. Another result of the committee's work was to add five or six new routes in the five boroughs. The committee was disbanded at the end of 1994 or the beginning of 1995 because it had completed its task. Those retail accounts that drew fewer than 15 copies were left with independent wholesalers.

Joseph Steo, the employer's Director of Operations since 1995 and a driver from 1977 to 1994, was a member of the NMDU's negotiating committee from 1992 to 1994. He attended all the bargaining sessions leading to the 1993 contract. Steo recalled that the Union's position in the 1993 negotiations was to press for as much direct delivery as possible both in New York City and on Long Island. Moreover, Steo said that the Union's position had always been that any deliveries in the metropolitan area had to be through Union members. He noted that Section 11-A.1 of the collective-bargaining agreement required that if the publisher used a wholesaler the wholesaler must employ NMDU members. In 1993 the Union wanted to convert a lot of suburban deliveries into direct deliveries but after much discussion it became clear that this was not feasible for the publisher or the Union. As a result, the Union focussed on deliveries in New York City. Although the Union had wanted the paper to institute direct delivery for all papers in the five boroughs, the Union compromised and accepted the establishment of the Circulation Growth Committee to add as many direct routes as possible. The Committee and the Circulation Growth Program mentioned in the contract are the same. Steo said that the Union did not intend the jurisdiction of the committee to extend beyond the five boroughs.

Anthony Michele, the publisher's director of operations for the day site, testified that he was the circulation director for the paper in 1993 and a member of the employer's negotiating team. Michele recalled that the purpose of the Circulation Growth Committee was to curtail losses and to try to regain circulation. With these ends in mind, the Committee put as many New York City retail outlets as possible on direct delivery. A separate committee composed of labor and management representatives including Michele looked at delivery beyond the five boroughs. But that committee did not recommend any changes because the present indirect system of delivery was cheaper than the cost of men and equipment which would have been required to convert to direct suburban delivery.¹⁰

Victor Strimbu, Jr., Esq., has been labor counsel to *The New York Post* for many years. Strimbu attended all the 1993 negotiations with the NMDU. According to Strimbu the Union committee initially presented a proposal to convert to direct delivery in Westchester County and Long Island. The parties discussed the fact that alternate delivery was taking place beyond the five boroughs of New York City. Management gave the Union the galley sheets showing how deliveries were being

salers who distribute the paper and the draw attributable to each of them.

¹⁰ Steo was a Union member of this separate committee and he described its work in similar terms.

made beyond New York City and at least three meetings were held to discuss the economic feasibility of direct delivery. The company analysis showed that it would incur a loss of 22 cents per paper if it converted to direct delivery on Long Island. Eventually this idea was dropped. However, the discussions resulted in the formation of the Circulation Growth Committee to try to establish more direct deliveries in the five boroughs. Strimbu testified that the committee's task was limited to the five boroughs.

Strimbu testified that the publisher's initial contract proposal in 1993 had eliminated Section 11-A.1 because the company believed that the provision was unlawful. After discussions during which the Union insisted that the article be included in the collective-bargaining agreement the company dropped its demand to delete Section 11-A.1.

Strimbu testified that in the fall of 1994 the so-called Amin controversy arose at the paper. The Union filed a grievance alleging that Amin, the paper's Home Delivery Manager, was diverting papers ostensibly destined for home delivery to non-signatory wholesalers on Long Island. Strimbu attended a grievance meeting on October 7, 1994 where Union business agent Don Roberts asserted that Amin's actions constituted a violation of Section 11-A.1. Strimbu prepared several draft settlements, but none of them were signed because the issue faded away. The drafts mention that the Union alleged a violation of Section 11-A.1.

Amann testified that many small retailers on Long Island were not carrying *The New York Post*. In 1996 the publisher began developing a plan to add 10,000 or 12,000 papers to the United Media draw on Long Island so that it could deliver to retailers handling fewer than ten papers per day.¹¹ The plan was to be implemented in August 1998 by delivering an additional 2500 papers to United Media.

The NMDU objected to the increased delivery by United Media. At the Union's request arbitrator Richard Adelman, the impartial chairman under the collective-bargaining agreement, issued an oral order on August 21, 1998 requiring the publisher to restore the situation to its original state.¹² This order is referred to by the parties herein as the status quo order. The impartial chairman confirmed the order in writing on August 27. He wrote in part:

For some period of time, the Post has been delivering about 15,000 copies to Media Masters, a non-Union wholesaler. In or about August 1998, Media Masters became United Media, and Newsday owns 51% of United Media. Effective August 24, United Media was to begin using Newsday drivers, represented by another union, for delivery of about 2500 copies of the Post, and the Post increased the number of papers going to United Media beginning August 14 to about 20,000 copies. The Union asked for a status quo order preventing the Post from delivering the increased number of newspapers to United Media. Based on the Chairman's reading of the Agreement, the Chairman issued an order to the Post to cut the total number of newspapers to be delivered to United Media by 2500 copies, i.e., by the number of Post newspapers

¹¹ United Media was the precursor to D.S.A.

¹² No written grievance was filed.

that were expected to be delivered by Newsday drivers, pending a hearing on Wednesday, August 26, 1998.

At the hearing on August 26, 1998, after a general discussion, the parties agreed to have a meeting with C & S Delivery Systems, with the Chairman, in an effort to reach an acceptable resolution of this issue. The Chairman continued the status quo order pending the outcome of this meeting.

Michele recalled that in August 1998 the NMDU representatives told him that they objected to Newsday because it was not a Union shop.

Elliot Azoff, Esq., has represented the publisher for labor negotiations since 1990. He testified that in August 1998 he was informed by Steo and Michele that Adelman had issued a status quo order to the effect that the publisher could not contract for new routes on Long Island. Azoff telephoned Adelman to object to issuance of the status quo order and Adelman scheduled a time for the parties to argue the correctness of the order.¹³

The hearing took place on August 26. Azoff argued that Section 11-A.1 was an illegal clause. Azoff urged that Adelman's award concerning routes N1 and N2 had ruled that Long Island was an exclusively indirect delivery territory and Azoff argued that wholesalers did not have to be in a contractual relationship with the NMDU. According to Azoff, the Union referred to Section 1 of the contract relating to territorial coverage. The Union said that because the coverage includes the entire metropolitan area, then the Union could require that only Union wholesalers distribute the paper in that area. The Union cited the circulation growth program and urged that Section 11-A.1 permitted it to require that wholesalers be signatories with the NMDU. The Union said that Section 11-A.1 is not illegal because it begins "to the extent permitted by law." The Union said that the work relating to the new stops on Long Island was unit work whether or not the work had been performed by the unit in the past. However, if the publisher used a wholesaler it had to be a Union wholesaler. The Union also cited Section 3-E and the October 1, 1993 letter appended to the contract entitled "Clarification of Method and Extent."

Stimbu testified that he was present at the August 26 hearing. He stated that Union labor counsel J. Warren Mangan, Esq., argued on behalf of the NMDU that the attempt to have Newsday deliver papers on Long Island was a violation of Section 11-A.1 of the contract. Azoff replied that the clause was unlawful and that the impartial chairman should not consider it. The chairman ruled that he would not deal with the legality of the clause and that the parties had to get that resolved by another body.

Azoff told Adelman that although C & S was the main deliverer for the newspaper it would not handle small stops. The NMDU then told Adelman that C & S would indeed handle the proposed stops and Azoff said if that were so the employer would use C & S. Adelman suggested that he meet with the parties and C & S to work on the issue. Such a joint meeting

was held on September 25, 1998. A second similar joint meeting was held in January 1999. Despite these efforts to convince C & S to handle the extra papers, it became clear that C & S would not agree to service additional accounts on Long Island because it was not economically feasible for it to deliver to such small accounts.

After the efforts to have C & S deliver to the new stops failed, Azoff telephoned chairman Adelman and asked him to lift the status quo order. Adelman replied that Section 11-A.1 had been in the collective-bargaining agreement for many years and that he would not declare it unlawful. Adelman was willing to grant a hearing on the merits of the grievance, that is whether the publisher had the right to assign the work to Newsday. But Adelman warned Azoff that he would not decide the legality of Section 11-A.1. He was prepared only to decide the intent of Section 11-A.1. Under those circumstances, the employer did not ask for a hearing on the merits.

Michele testified that in January 1999 he and Amann and Steo attended a Joint Conference Committee meeting with the impartial chairman and representatives of the NMDU including James DeMarzo. As a result of the two meetings Adelman had conducted with the Union, the employer and C & S, it had become clear that C & S would not service the smaller stops in Long Island. At the Joint Conference Committee meeting the employer asked Adelman to lift the status quo order. Adelman stated that he had to rule on the basis of the language of the collective-bargaining agreement. When the publisher's representatives objected that the language of Section 11-A was illegal, Adelman replied that he would not rule on the law because that was an issue for a different venue. Michele reported the substance of this meeting to Azoff.

According to Amann, the 1998 dispute arose only when the publisher sought to increase the number of papers going to United Media to service the new accounts. The NMDU did not seek to have all papers for Long Island delivered direct. The NMDU told Amann that it wanted to get the additional papers delivered by trucks operated by its members. The Union was willing to have the new routes serviced by C & S employees. However, if C & S employees did not do the work, then some Union officials demanded that the publisher create new direct delivery routes to Long Island. This was not an economical solution. Moreover, the creation of new routes might have caused some C & S employees who currently delivered the paper on Long Island to be displaced. For this reason, some other Union officials told Amann that the *Post* could not create new direct routes on Long Island. Amann testified that after the issuance of the status quo order he attended a January 1999 meeting where the chairman attempted to mediate an agreement for C & S to service more accounts on Long Island. DeMarzo and other Union representatives were in attendance. C & S said that it could not deliver to the small accounts unless it got some wage relief from the NMDU.

Joseph Cotter is the secretary/treasurer of the NMDU and he has been a negotiator for the Union for a number of years. Cotter testified that in 1993 the Union asked the employer for the same direct delivery as had been in effect at *The Daily News*, that is, direct delivery in the five boroughs and on Long Island. The publisher replied that direct delivery in Nassau and

¹³ This hearing concerned the continuation of the status quo order only, because the order had been issued *ex parte*, but it did not deal with the underlying merits of the grievance according to Azoff.

Suffolk would not be profitable and so the parties concentrated on increasing direct delivery within the five boroughs. The parties agreed that routes being served by alternate delivery would be brought back to direct delivery through a circulation growth committee. Cotter maintained that during these negotiations the publisher never told the Union that there was alternate delivery beyond the five boroughs and he denied that the Union was provided with galleys giving details of both suburban and City deliveries. Cotter gave his opinion that the “methods and extent” language of Section 3-E of the contract was not violated by the use of C&S for indirect deliveries in Long Island. However, Cotter stated that if the publisher used a non-union wholesaler to deliver the paper on Long Island that would violate Section 3-E. Cotter avoided answering questions about section 11-A.1 and tried to give the impression that he did not know what it meant.

Robert E. Lee worked for *The New York Post* from 1984 to February 2000. Lee served on the wage scale committee for the NMDU and he was one of the lead negotiators for the Union in the 1993 negotiations. Lee recalled that the big issue in the negotiations was to convert alternate delivery in the five boroughs to direct delivery. The circulation growth committee was formed for this purpose. The Union also discussed direct delivery beyond the five boroughs. Lee claimed that he was never informed that the paper was delivered by alternate delivery beyond the five boroughs. Lee denied that he ever maintained that the use of alternate delivery on Long Island would violate Section 11-A.1. Lee said that the method and extent language of Section 3-E governed the use of alternate delivery. If the publisher wished to expand deliveries on Long Island it would have to be through the use of direct delivery. But Lee also said that C & S could be used to deliver to new locations on Long Island although Media Masters could not be used because the parties had agreed that the non-union operation would not be expanded. Lee impressed me as an evasive witness who did not recall facts helpful to the General Counsel even when these facts were supported by documentary evidence.

James DeMarzo has been a business agent at *The New York Post* for the NMDU since 1995. DeMarzo testified that he knew that DSA, a non-signatory wholesaler, was delivering copies of the paper but he thought it was only within the five boroughs. DeMarzo testified that he sought the status quo order from the impartial chairman when he heard that a truck was leaving the plant with papers for Newsday on Long Island. DeMarzo said that Newsday was not a signatory to a collective-bargaining agreement and it was not a news company within the agreement. Under the methods and extent language of Section 3-E it was a violation to use any wholesaler other than C & S. DeMarzo claimed that he did not mention Section 11-A.1 to the impartial chairman and that he did not try to enforce that section of the contract. He denied that he raised the issue that Newsday did not have a collective-bargaining agreement with the NMDU.

J. Warren Mangan, Esq., represented the Union at the August 26, 1998 meeting with the impartial chairman. Mangan testified that Azoff mentioned Section 11-A.1 in his statement to the chairman but the Union denied that it was relying on that section.

C. Positions of the Parties

The General Counsel alleges that the Respondent Union violated Section 8(e) of the Act when it enforced Sections 3-E and 11-A.1 of the collective-bargaining agreement by means of the impartial chairman’s status quo order.¹⁴ The General Counsel also alleges that the Union violated Section 8(b)(4)(ii)(A) and (B) by requiring the employer to give effect to an agreement prohibited by Section 8(e) and by requiring the employer to cease doing business with United Media. The General Counsel argues that by enforcing Section 11-A.1 of the collective-bargaining agreement the Respondent restricted the employer’s ability to do business with a non-signatory company for a secondary purpose to benefit union members outside the bargaining unit and not to preserve work traditionally performed by bargaining unit members. The General Counsel argues that the evidence shows that the unit members have not performed the work at issue herein and the Union is therefore not recapturing unit work. The General Counsel urges that the NMDU reaffirmed its reliance on Section 11-A.1 of the contract when the parties met with representatives of C & S in December 1998 and January 1999. After it became clear that C & S would not deliver the additional copies of the paper the employer asked the impartial chairman to lift the *status quo* order he had imposed at the behest of the Union. The chairman refused to rescind his order and he maintained his reliance on Section 11-A.1 of the contract. The General Counsel, although maintaining that the facts show that the Union relied on Section 11-A.1 before the impartial chairman, urges that even if the Union relied on Section 3-E that reliance was also unlawful.

The employer points out that the NMDU does not object in principle to the use of third parties to deliver the paper. It only objects when the third party does not have a collective-bargaining agreement with the NMDU. The employer urges that the Union’s actions in enforcing the contract by obtaining a status quo order had one aim only, that of forcing the publisher to use NMDU members to perform the new deliveries on Long Island without regard to the actual employer of the Union members. The employer concludes that this proves the secondary nature of the Union’s objectives. The employer emphasizes that whichever clause of the contract the NMDU relies on to achieve its objective, that clause has been given an unlawful aim.

The Union begins its argument by citing various judicial decisions which have referred to the NMDU as the representative of employees in the “industry.” The Union also refers to Section 4A.3 of the collective-bargaining agreement which provides for hiring of employees who have lost jobs with other employers in the industry. The Union urges that the bargaining unit encompasses the employees of all the publishers signatory to a contract with the NMDU. The Union cites Section 3-E of the collective-bargaining agreement and the clarification of method and extent side letter and urges that these provisions govern combined delivery and prohibit further subcontracting

¹⁴ The Complaint as originally issued alleged a violation only with respect to Sec. 11-A.1 of the contract. During the hearing, the General Counsel amended the Complaint to allege unlawful enforcement of Sec. 3-E.

of unit work. The Union urges that the status quo order was sought only for the purpose of work preservation under *National Woodwork Manuf. Assoc. v. NLRB*, 386 U.S. 612 (1967). The NMDU argues that Section 11-A.1 is designed to protect the wages and job opportunities of all unit employees within the industry and is therefore a facially valid work preservation clause. The Union did not seek to prevent the publisher from doing business with DSA; it only sought to limit an increase in the number of papers delivered by DSA. The Union brief states: "There is no credible evidence that the Respondent ever sought to enforce Section 11-A.1 against NYP or any other industry employer."¹⁵

D. Discussion and Conclusions

I find, based on Section 2 of the 1993 collective-bargaining agreement between the parties, that the NMDU represents a unit of employees of NYP Holdings, Inc., who perform the various duties listed in that Section of the contract. The agreement does not recognize an industry-wide unit.¹⁶

I find, based on the testimony of Amann and Steo, that a certain portion of the indirect delivery in Nassau and Suffolk Counties has historically been performed by wholesalers who do not have a contract with the NMDU. C & S delivers about 37,500 papers and D.S.A. (also called United Media or Media Masters), delivers about 4100 papers per day. I find, based on the testimony of Amann and Steo, that the Union has been aware of these deliveries being made by non-signatory companies. Indeed, the impartial chairman in his award dealing with routes N1 and N2 repeatedly mentioned that there is alternate delivery by "bootleggers" both inside and outside of New York City and he noted that the parties acknowledged this fact.¹⁷

I find, based on the testimony of Amann, Steo, Michele, and Strimbu, that the purpose of the Circulation Growth Committee and the Circulation Growth Program was to return as much delivery as possible to direct routes in the five boroughs of New York City. I do not find that the Committee was charged with any task relating to Long Island deliveries. Thus, I do not find that the history of the Circulation Growth Committee and Program shows that the NMDU has historically claimed all or a significant portion of the work on Long Island on behalf of employees in the bargaining unit covered by the 1993 collective-bargaining agreement. Although the Union has in the past stated that, under ideal conditions, it would prefer all suburban deliveries to be direct deliveries, the 1993 negotiations convinced the Union that direct delivery outside the five boroughs was not economically feasible.

The evidence shows that the publisher wished to expand its market in Nassau and Suffolk Counties and that it planned to

¹⁵ I have also considered the various arguments advanced by the Union in its brief but not discussed herein and I find them to be without merit.

¹⁶ *Patterson v. NMDU*, 384 F.Supp. 585 (S.D.N.Y. 1974), cited by the Union, discussed a different bargaining unit based on a prior and different contract.

¹⁷ I do not credit the testimony of Cotter, DeMarzo, and Lee that the Union was unaware of alternate delivery outside the five boroughs of New York City until the August 1998 controversy over the additional papers for United Media.

use United Media to deliver papers to small dealers who had not previously carried *The New York Post*. The NMDU did not seriously insist that the publisher set up direct delivery routes for these small dealers. I find, based on the testimony of Steo, Michele, and Azoff, that the Union instead tried to require the publisher to use a wholesaler whose employees were represented by the NMDU. Indeed, Cotter, DeMarzo, and Lee testified that the use of a nonunion wholesaler instead of a signatory wholesaler to deliver papers on Long Island violated the contract.

The record shows that C & S was unwilling to handle the extra papers because they would be delivered to small dealers with whom C & S would not do business.

I find that DeMarzo sought the status quo order from the impartial chairman because a non-NMDU signatory wholesaler was going to receive additional papers to deliver on Long Island. I find, based on the testimony of Azoff and Strimbu, that the Union cited Section 11-A.1 of the collective-bargaining agreement to the impartial chairman when it sought the order preventing the delivery of additional copies to United Media.¹⁸ The Union also cited Section 3-E of the contract. The Union did not seek to enforce the contract so that members of the unit covered by the collective-bargaining contract could do the work. The object of the grievance was to prevent the papers from being delivered by a wholesaler who did not employ members of the NMDU. DeMarzo, who brought the grievance, testified that it was a violation of the contract to use any wholesaler except C & S. Both Cotter and Lee stated that C & S could be used to deliver additional papers but not Media Masters because Media Masters did not have a collective-bargaining agreement with the NMDU.

Indeed, the written confirmation of his status quo order issued by the impartial chairman makes the Union's object perfectly clear. The chairman wrote that Media Masters, "a non-Union wholesaler," has been delivering copies of the paper and that United Media, the successor to Media Masters, was going to be given an additional 2500 copies to be delivered by drivers "represented by another union." Based on his "reading of the Agreement," the chairman ordered the publisher to refrain from delivering the increased number of copies to United Media. Then, the chairman confirmed the intention of the parties to meet with C & S to reach "an acceptable resolution." There was no reason for the impartial chairman to recite facts in his succinctly written document unless the parties had urged those facts before him so as to induce his subsequent action. If the Union had not objected to the non-signatory status of United Media there would have been no reason for the chairman to rely on it in issuing his order. I note that the chairman did not rely on any change in the method and extent of delivery in issuing his order, nor did he mention subcontracting. He only mentioned and relied on the nonunion status of United Media. Further, although the chairman mentioned that for some time Me-

¹⁸ I do not credit the denials by the Union witnesses that they relied on Sec. 11-A.1 in their arguments to the impartial chairman. The evidence shows that the Union sought to retain Sec. 11-A.1 in the 1993 contract, yet the Union witnesses disclaimed any knowledge of this section and purported not to know its meaning and effect.

dia Masters had been delivering the paper, he did not rely on the purported fact that it had only delivered within the five boroughs but was now expanding to Long Island. Thus, the impartial chairman's written order supports the General Counsel's witnesses in the instant case and casts grave doubt on the Union's testimonial evidence in this proceeding.

I find based on the testimony of Michele, Azoff, and Amann that the Union maintained and reaffirmed its reliance on Section 11-A.1 of the collective-bargaining agreement in January 1999 when the parties met on a second occasion with the impartial chairman and representatives of C & S in an effort to have NMDU members deliver additional papers on Long Island. The Union was thus continuing its enforcement of Section 11-A.1 of the contract by continuing to insist that only its members could deliver the papers. The Union did not seek direct delivery during the meetings with the impartial chairman. After it became clear that C & S would not do the work in question, the employer sought unsuccessfully to have the chairman's order lifted. At a Joint Conference Committee meeting the chairman reaffirmed his intention to base his ruling on the language of Section 11-A.1 without deciding whether it violated the Act. The chairman informed the employer's counsel that he would enforce Section 11-A.1 with respect to the facts at issue.

It requires no extended discussion to state that the Act prohibits secondary activity aimed at the labor relations of a non-contracting employer but permits the making and enforcement of agreements designed to preserve work traditionally performed by the contracting employer's employees. The Supreme Court has ruled that there must be "an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the primary employer's] employees." *National Woodwork Mfrs. Assn. v. N.L.R.B.*, 386 U.S. 612, 644-46 (1967). This inquiry must have reference to "the contractual recognition clause and the history of the parties' conduct under it." *NMDU (Hudson County News Co.)*, 298 NLRB 564, 566 (1990).

The contractual recognition clause herein includes employees who could perform the delivery of the additional papers in Long Island if it were done by the employer's employees. Similarly, the territorial coverage of the contract includes Long Island. Therefore, the examination must shift to the history of the parties' conduct. The credible evidence herein shows that for a lengthy period of time both C & S and United Media (or Media Masters) have delivered copies of the paper to Long Island. The credible evidence shows that the Union was aware of deliveries by United Media. Although for a time the unit members performed direct delivery on routes N1 and N2, these were regarded as new routes and consisted of only a small portion of all of the papers delivered in Long Island. The January 1998 decision of the impartial chairman found that there was no lengthy history of direct delivery and that the Union had no right under the contract to insist that the publisher's own employees must deliver any routes in Nassau County. Thus, there is a binding interpretation of the collective-bargaining agreement that the Union has no right to demand that the employer use its own employees to deliver papers on Long Island.

When the Union sought the status quo order from the impartial chairman in August 1998, it wished to prevent an increase in the number of papers being delivered by a non-signatory wholesaler. During the meetings among the Union, the employer, the impartial chairman, and representatives of C & S the Union did not seek to have the work performed by the unit employees. The objective of the NMDU was either to gain the work for its members who worked for C & S or, in the alternative, to prevent the non-member employees of United Media from doing the work.

Even without the contract interpretation by the impartial chairman that the Union had no right to require direct delivery of papers on Long Island, the record shows that this work was not fairly claimable by the Union. The Board discussed whether certain work was fairly claimable in *Local 282 (D. Fortunato, Inc.)*, 197 NLRB 673, 677 (1972), where it said, "[A]greements and conduct intended to protect, preserve, acquire, or reclaim work for union members generally (i.e., outside the immediate bargaining unit) violate both section 8(e) and 8(b)(4)(B) of the Act on the theory that they exceed the legitimate interests of the unit employees *vis-à-vis* their own employer and are therefore tactically calculated to satisfy union objectives elsewhere." The Board found that a substantial portion of the work at issue in that case had not been performed by the employees in the bargaining unit. The Board concluded that the unlawful clause was intended to benefit all union members within the geographic area of the union's jurisdiction. Similarly, in the instant case, the record demonstrates that employees of the paper have not performed a substantial portion of the deliveries on Long Island and that the NMDU is seeking to benefit its members who work for another employer in the geographic area by obtaining the new work for C & S. Moreover, in the instant case it cannot be said that the union is seeking to recapture for the unit employees work which they had performed until recent technological changes or changes in methods of distribution as in *Meat and Highway Drivers v. NLRB*, 335 F.2d 709, 714 (D.C. Cir. 1964).

I find that Section 11-A.1 of the collective-bargaining agreement requires that the employer use only wholesalers who are signatory to a contract with the NMDU. This clause seeks to regulate the labor policies of entities over which the employer exercises no right of control and it has an unlawful secondary objective which violates Section 8(e) of the Act. *Iron Workers (Southwestern Materials)*, 328 NLRB 934 (1999). As discussed above, when it relied on Section 11-A.1 the Union was not seeking to preserve, recapture, or acquire work traditionally performed by unit members.

As set forth in detail above, the Union enforced Section 11-A.1 of the contract in January 1999, when the parties met with representatives of C & S and again when the parties met with the impartial chairman in a Joint Conference Committee meeting and the chairman refused to lift the *status quo* order he had issued at the behest of the Union. When the Union gave effect to and enforced Section 11-A.1 of the collective-bargaining agreement it violated Section 8(e) of the Act. *Retail Clerks Union*, 138 NLRB 244, 247 (1962).

Based on the discussion above, I find that the Union used the grievance procedure and obtained the status quo order of the

impartial chairman in order to coerce the employer into entering into an agreement prohibited by Section 8(e) of the Act. The Respondent thus violated Section 8(b)(4)(ii)(A) of the Act. I also find that the Respondent used the grievance procedure and obtained the status quo order of the impartial chairman in order to force and require the employer to cease doing business with United Media or its successor D.S.A. The Union sought to disrupt the employer's business dealings with United Media because the latter does not have a contract with or employ members of the NMDU. The Respondent thus violated Section 8(b)(4)(ii)(B) of the Act. *Local 32B-32J (Nevins Realty)*, 313 NLRB 392 (1993).

I find it unnecessary to consider whether the Respondent also unlawfully enforced Section 3-E of the collective-bargaining agreement because I have already found that the enforcement of Section 11-A.1 was unlawful.

CONCLUSIONS OF LAW

1. By entering into Section 11-A.1 of the collective-bargaining agreement and by giving effect to Section 11-A.1 and enforcing Section 11-A.1 the Union violated Section 8(e) of the Act.

2. By resorting to arbitration against NYP Holdings, Inc. where an object thereof is to force or require Holdings to enter into an agreement prohibited by Section 8(e) of the Act, Respondent has threatened, coerced and restrained Holdings in violation of Section 8(b)(4)(ii)(A) of the Act.

3. By resorting to arbitration against NYP Holdings, Inc. where an object thereof is to force or require Holdings to cease doing business with United Media or its successor D.S.A., Respondent has threatened, coerced, and restrained Holdings in violation of Section 8(b)(4)(ii)(B) 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 the policies of the Act.

Having concluded that Section 11-A.1 of the collective-bargaining agreement is unlawful, the Respondent must cease and desist from enforcing it. The Respondent must therefore withdraw its grievance relating to the newspapers to be delivered by United Media or its successor D.S.A., and it must so

notify the impartial chairman and it must request that the impartial chairman lift the status quo order issued in August 1998.

ORDER

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

1. Cease and desist from

(a) Entering into, giving effect to, or enforcing Section 11-A.1 of its collective-bargaining agreement with NYP Holdings, Inc.

(b) Seeking to enforce or apply Section 11-A.1 of the collective-bargaining agreement through the grievance and arbitration procedure.

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

(a) Withdraw the grievance relating to the newspapers to be delivered by United Media or its successor D.S.A.

(b) Request that the impartial chairman lift the status quo order issued in August 1998.

(c) Within 14 days after service by the Region, post at its union office copies of the attached notice marked "Appendix."²⁰ Copies of the notice, on forms provided by the Regional Director for Region 2, 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 NYP Holdings, Inc., 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.

²⁰ 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."