

a company-dominated employees' association that had a contract, because the association had not been served. As will be noted, that circuit court of appeals decision was before *National Licorice, supra*, had been decided by the Supreme Court. At a rehearing where *National Licorice* was considered the circuit court adhered to its original opinion in refusing to order the association disestablished, but referred the matter for further testimony on an issue of fraud (112 F. 2d 63). The Board petitioned the Supreme Court for a writ of certiorari. While this was pending the circuit court set aside its decree (114 F. 2d 738). Thereafter the Board filed in the circuit court additional evidence taken by it pursuant to the Court's direction, additional findings, and a recommendation that its original order be set aside. In granting this request of the Board the circuit court made the comments quoted in Respondent's brief (118 F. 2d 893). I find that dicta of no assistance here in the light of the decisions of the Supreme Court heretofore referred to.

In the case before me, as previously noted, the Respondent supported and assisted the Independent in violation of Section 8 (a) (2) not only in executing the contract and carrying out its provisions, but also by other independent acts. I therefore find, consistent with the above decisions of the Supreme Court, that the Independent was not an indispensable party for the purpose of starting this proceeding insofar as the 8 (a) (2) allegations in the complaint are concerned. I further find that the procedural defect in failing to name and serve the Independent as a party at the first hearing has been cured by the Board's remand order and the later service on the Independent together with the opportunity afforded it to cross-examine witnesses and present proof at the rehearing.

I therefore deny the Independent's renewed motion to dismiss as to it, and find that it has been properly joined as a party, afforded an opportunity to be heard, to cross-examine all witnesses who testified at the original hearing, and otherwise participate in the proceeding.

[Recommendations omitted from publication in this volume.]

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HAFFENREFFER & Co., INC. and THOMAS M. BROOKS

LOCAL NO. 14, INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, C. I. O. and THOMAS M. BROOKS. *Cases Nos. 1-CA-1043 and 1-CB-166. December 9, 1952*

### Decision and Order

On May 20, 1952, Trial Examiner Ralph Winkler issued his Intermediate Report in this proceeding, finding that the Respondents had not engaged in unfair labor practices as alleged in the complaints and recommending that the complaints be dismissed, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief, and the Respondents filed briefs in support of the Intermediate Report.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed.

The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following modifications.

1. In substance the issues in this case are whether the Respondents violated the Act (a) by entering into a contract, in 1951, which continued in effect seniority credits, based upon the date of acquisition of union membership, which accrued to employees under the terms of predecessor preferential-hiring contracts in force during the effective period of the Act as it existed before the 1947 amendments; and (b) by establishing, or causing to be established, thereafter, a seniority roster giving effect to such seniority credits and using, or causing to be used, such roster as a basis for a reduction in force in October 1951.

For the reasons indicated in the Intermediate Report, except as stated below, we conclude, as did the Trial Examiner, that the provision of the 1951 contract which "recognized and continued" the seniority standing of employees was valid, and that the Respondents were justified in relying upon that provision in effecting the reduction in force of October 1951. However, in reaching these conclusions, unlike the Trial Examiner, we do not rely upon the *Marine Cooks and Stewards* case, 90 NLRB 1099. We shall therefore dismiss the complaints in their entirety.

2. There was testimony that Harvey A. Anderson, specifically alleged to have been discriminatorily discharged, would have had more *union* seniority than G. A. Hopkins, an employee who was retained, had not the Union's books been closed to new members in 1943 when Anderson first applied for membership. The Trial Examiner rejected as without merit what he considered to be a contention of the General Counsel based on such testimony. However, in his brief the General Counsel states that he did not intend to base any contention on the testimony in question and that he makes no such contention now. In view of the foregoing, we find it unnecessary to consider that portion of the Intermediate Report relating to the Union's alleged delay in admitting Anderson to membership, and therefore, we do not adopt it

### Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaints herein against the Respondents be, and they hereby are, dismissed.

CHAIRMAN HERZOG and MEMBER HOUSTON took no part in the consideration of the above Decision and Order.

**Intermediate Report and Recommended Order**

## STATEMENT OF THE CASE

Upon charges filed by Thomas M. Brooks, an individual, the General Counsel of the National Labor Relations Board, by the Regional Director for the First Region (Boston, Massachusetts), issued separate complaints on March 10, 1952, against Haffenreffer & Co., Inc., herein called the Company, and against Local No. 14, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C. I. O., herein called the Union. The respective complaints allege that the Company has violated Section 8 (a) (1) and (3) of the Act (Labor Management Relations Act, 1947, 61 Stat. 136) and that the Union has violated Section 8 (b) (1) (A) and 8 (b) (2) of the Act. Copies of the respective complaints and charges were served upon the Respondents, and each Respondent filed an answer denying the commission of the unfair labor practices alleged.

Pursuant to notice and an order consolidating the cases, a hearing was held on April 21 and 22, 1952, at Boston, Massachusetts, before the undersigned Trial Examiner. The General Counsel and the Respondents were represented by counsel. The parties participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. The undersigned reserved ruling on motions of the Respondents to dismiss the proceeding. These motions are disposed of in accordance with the following findings of facts and conclusions of law. The parties presented oral argument at the conclusion of the hearing; they have also submitted briefs which have been considered.

Upon the entire record in the case and from his observation of the demeanor of witnesses, the Trial Examiner makes the following:

## FINDINGS OF FACT

## I. THE BUSINESS OF THE COMPANY

The Company, a Massachusetts corporation, is engaged in the manufacture, sale, and distribution of beer and ale in Roxbury, Massachusetts. The value of the Company's annual purchases and sales is approximately \$800,000 and \$6,000,000, respectively, 14 percent of the latter figure representing sales and shipments of merchandise outside the Commonwealth.

I find that the Company is engaged in commerce within the meaning of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

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

## III. THE ALLEGED UNFAIR LABOR PRACTICES

*The Established Seniority Policy*

This case involves, in substance, the validity of a seniority practice under which the Company laid off Harvey A. Anderson in October 1951.

The Company and the Union have been in collective-bargaining relationship for many years with terms and conditions of employment having been reduced to writing and duly executed in a series of contracts between the parties.<sup>1</sup> The

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<sup>1</sup> The contracts have been city-wide covering various employers; the Union, its affiliated International, and another local of the International were jointly recognized as the bargaining representative.

contracts which were operative during the period of the original Act, the last of which expired in March 1948, provided that "only regular members in good standing" in the Union shall be employed by the Company but that the Company may hire nonunion help when the Union was unable to supply personnel. These preamendment contracts also provided that layoffs be made on a departmental seniority basis and that "seniority is restricted to Union members whose seniority shall start from the date of their continuous employment." Each successive contract "recognized and continued" the seniority standings as they existed at the termination of the last effective agreement and each contract also required the establishment and posting of a seniority roster in accordance with the seniority provisions of the contract.

The parties entered into their first agreement under the 1947 amendments in March 1948, and they executed succeeding contracts in 1949 and 1951. In accordance with the established contract practices each of these agreements also specifically "recognized and continued" seniority standing of the employees. Unlike the earlier contracts, however, the Taft-Hartley agreements did not contain the afore-mentioned provision that new seniority be limited to union members.

The Company's seniority situation may be summarized as follows: Individuals acquired seniority by contract during Wagner Act days only if they were continuously employed and were union members, as well, and their standing on the seniority list was determined by the date on which both conditions were satisfied. (Thus, the seniority of an individual who was a union member before working for the Company commenced when his employment began; and the seniority of an individual who joined the Union after beginning his employment began running at the time he acquired union membership.) These seniority standings were continued by contract in each succeeding contract term before the 1947 amendments and the standings have also been continued since the effective date of the 1947 amendments to the Act, except that new seniority acquired since the expiration of the last Wagner Act contract has been predicated on continuous employment without regard to union membership.

#### *The Layoffs*

The Company curtailed operations in October 1951 and laid off 20 brewing department employees in inverse order of seniority. The seniority standings were in conformity with the requirements of the 1951 contract, as described above, and the layoff action based on such standings was otherwise also taken pursuant to that contract.

All brewing department personnel at the time of the 1951 layoff had begun their last period of continuous employment and also had joined the Union before December 1946. The relative seniority standings of all affected employees have therefore remained unchanged since that time, and, as indicated above, these standings have also been affirmed by the parties in the series of contracts executed since then. Anderson, the alleged discriminatee, was among the 20 employees laid off. He had actually begun his employment before G. A. Hopkins, who was retained; but Anderson's seniority commenced later than Hopkins' because he acquired union membership after Hopkins, and, as explained above, both employment and union membership were prescribed seniority conditions by the then operative contracts.

The General Counsel does not attack the seniority scheme under the contracts executed before the 1947 amendments.<sup>2</sup> Nor does he claim that the provisions for newly acquired seniority, under the contracts executed since the 1947 amendments, are invalid. The General Counsel does contend, however, and this was his sole basis at the hearing for challenging the 1951 seniority provisions, that the 1951 seniority system is invalid because it "recognized and continued" seniority standings acquired during the operative period of the preamendment contracts. The General Counsel claims in this connection that the parties were obliged, as a matter of law, to disregard the contract seniority of employees before the 1947 amendments because such preamendment closed-shop contracts would be unlawful today and because the formerly valid standard of acquiring seniority on the basis, in part, of union membership during such closed-shop conditions is accordingly also not lawful under the Act presently in force.

### Conclusions

Seniority has been defined as "the comparative status of an employee with reference to his length of service."<sup>3</sup> In addition to length of service, seniority is also frequently based upon various other factors such as merit, ability, family status,<sup>4</sup> etc., as well as union membership, that last being an ingredient of the Company's seniority system during the period before the 1947 amendments. The seniority concept has many applications in industrial relations, not the least important of which involves the relationship of each employee to all other employees for layoff purposes. Once a seniority practice is established, it becomes a "most valuable economic seniority"<sup>5</sup> of the affected employees.

Seniority exists as a legally enforceable right during the operative term of a contract or statute creating it, whence it derives its scope and significance,<sup>6</sup> and there is no legal impediment to contract parties themselves abandoning a seniority practice established under an agreement. Continuity of status is, however, the essence of the seniority principle, and it would be an anomalous seniority practice under which seniority standings did not survive from contract term to contract term.<sup>7</sup>

Assuming that a union-shop agreement consistent with the 1947 amendments were executed and that the contract also provided for seniority in layoffs and that the contract also provided that seniority be based on length of service but that employees failing to tender their dues after the 30-day free period would not earn any seniority, such seniority provisions and layoffs thereunder would be

<sup>2</sup> Thus, no claim is made that the provision of the Wagner Act contracts entitling union members alone to "seniority" was unlawful. Even under the Act as amended, it is not discriminatory to deprive an employee of seniority for nonpayment of union dues and ultimately to lay off the employee on the basis of his reduced seniority where an operative valid contract requires union membership in good standing as a condition of employment. *Firestone Tire and Rubber Company*, 93 NLRB 981.

<sup>3</sup> Casselman, P. H., *Labor Dictionary*, Philosophical Library, New York, 1949, p. 420.

<sup>4</sup> Dauterich, R. Douglas, "Seniority Plans," *Personnel Journal* September 1939, Vol. 18, No. 3, p. 114.

<sup>5</sup> *Elder v. New York Central Railroad Company*, 152 F. 2d 361, 364 (C. A. 6).

<sup>6</sup> *Aeronautical Lodge v. Campbell*, 337 U. S. 521; *Elder v. New York Central Railroad*, *supra*.

<sup>7</sup> This does not necessarily mean, and I am not deciding, that only such seniority as is derived from a contract may be recognized as valid in resolving various questions under the Act.

proper. *Firestone Tire and Rubber Company, supra*. Assuming further that the succeeding contract contains similar provisions and also provides that the seniority standings of employees be continued from the prior contract, such contract also would be valid, in my opinion, and no contrary contention is advanced here by the General Counsel. Accordingly, I would find nothing unlawful in an economic layoff based upon the seniority provisions during the term of the second contract even though such action necessarily takes into account the seniority standings of employees during the first contract term, which seniority was based in part on union membership or the lack of it during the earlier contract period. The Act does not require, in my opinion, that seniority standings under an agreement be voided at the expiration of the agreement merely because union membership was a condition, and a valid one, of such seniority.

The seniority standings, which each of the brewing department employees achieved under the seniority practice set forth in the contracts before the 1947 amendments, were based on conditions legal at the time. The standard of acquiring additional seniority in the contracts executed since the amendments has also been legal. The question, therefore, is whether the present long-established seniority standings are invalid because they are partially derived from standings based on a condition which was legal when made but which condition would not be wholly proper today as a prerequisite to acquiring new seniority. This question is answered, I believe, in *National Union of Marine Cooks and Stewards*, 90 NLRB 1099. In that case a postamendment contract provided that employment preference be given to "persons presently employed or those who had been employed during the preceding 2 years" (90 NLRB 1101). The specified 2 years covered a period before the effective date of the 1947 amendments during which an operative contract required employment preference for union members. While finding that the contract in force during the 2-year period would, by reason of its union preference provisions, be unlawful under the 1947 amendments, the Board nevertheless concluded that the postamendment agreement giving employment preference to individuals employed during the 2-year preamendment period was not unlawful.

The *Marine Cooks and Stewards* case is governing here. I therefore find that the provision of the 1951 contract which "recognized and continued" the seniority standing of employees is valid and that the use of such provision in effecting layoffs under the contract is not discriminatory.<sup>8</sup>

The General Counsel also contended as to Anderson that Anderson applied for union membership several weeks after beginning his employment in October 1943 but that the Union's books were closed at the time and that he was therefore unable to join until April 1944. The General Counsel claims that if Anderson had been permitted to join the Union when he first applied he would have had greater seniority than Hopkins, who was retained and who had begun working later than Anderson but who joined the Union in January 1944. The delayed admission of Anderson to union membership, even if it did occur, was not violative of the Act then in effect. In any event, I hardly believe that Sections 10 (b) and 102 permit raising such issue as to conduct which occurred 8 years ago.

[Recommendations omitted from publication in this volume.]

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<sup>8</sup> In view of my conclusions I find it unnecessary to consider various other grounds for dismissal urged by the Respondents.