tenure of employment because of an employee's membership in or activity on behalf of any labor organization.

NATIONAL ELECTRONIC MANUFACTURING CORPORATION,
Employer.

Dated_____ By_____
(Representative) (Title)

MYLSHER REALTY CORPORATION,
Employer.

Dated_____ By_____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Kenosha Auto Transport Corporation *and* Ivan Hazel

International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL, Local 604 *and* Ivan Hazel.
Cases Nos. 14–CA–1164 and 14–CB–230. August 15, 1955

DECISION AND ORDER

On August 9, 1954, Trial Examiner C. W. Whittemore issued his Intermediate Report in the above-entitled proceedings, finding that Respondents, Kenosha Auto Transport Corporation, herein called the Respondent Company, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL, Local 604, herein called Respondent Union, had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that Respondents had not engaged in certain other unfair labor practices and recommended that the complaint be dismissed in that respect. Thereafter, Respondents and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.

The Board has reviewed the rulings of the Trial Examiner made 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 these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions and modifications:

We find, in agreement with the Trial Examiner, that the Respondent Company and the Respondent Union violated Section 8 (a) (3) and (1) and Section 8 (b) (1) (A) and (2) of the Act, respectively, by maintaining an agreement or understanding delegating to the Respondent Union the authority finally to determine controversies relating to seniority. In addition, we find that the Respondents also vio-

lated these subsections of the Act by the Company's acquiescence in the Union's unilateral determination of the seniority status of a particular employee, Ivan Hazel, thereby implementing the unlawful seniority agreement. It has already been decided that the delegation of such power to a union and its exercise by the union, is inherently coercive and discriminatory in its broad impact on the employees in the bargaining unit.[1]

Apart from the explicit provision delegating authority in matters of seniority to the Union, the contract here in question contains various other clauses referring to the relative status rights of different categories of employees covered by the agreement. Apparently because of these other contract provisions, the Trial Examiner concluded that the treatment imposed upon Hazel by the Company and the Union did not constitute unlawful discrimination. We reject this finding because it is clear on the record as a whole that the Respondents dropped Hazel to a lower position on the seniority list, not pursuant to any agreed upon nondiscriminatory interpretation of the other clauses in the contract, but solely in effectuation of the unlawful clause delegating exclusive authority to the Union.

As more fully set out in the Intermediate Report, the Respondents maintained agreements or understandings providing for seniority by job classification in both city and over-the-road driver units. Thus, upon his transfer from the over-the-road unit to the city unit, Hazel—the driver longest employed at the St. Louis terminal—was considered the junior employee in the latter unit because he had never before worked there. When he transferred back to the over-the-road group a year later, the Company, on the basis of his long employment as an over-the-road driver, placed his name on the top of the list for that group. The Respondents claim, and the Trial Examiner found, that the Respondents thereafter redetermined Hazel's seniority by applying their agreement concerning seniority by job classification. The record does not support this assertion.

The past contract covering the over-the-road drivers, which Respondents have continued in practice since its expiration in 1952, provides for seniority by job classification. Yet that contract makes no mention of the effect to be given to prior service in a job classification in determining the seniority of an employee returning to that classification. Also, the conduct of Respondent Union, in exercising its unilateral power to determine Hazel's seniority, indicates that the seniority agreement maintained by Respondents made no provision

[1] *Pacific Intermountain Express Company*, 107 NLRB 837; *Minneapolis Star and Tribune Company*, 109 NLRB 727; *North East Texas Motor Lines, Inc.*, 109 NLRB 1147; *Chief Freight Lines Company*, 111 NLRB 22

The initial execution of a contract containing this type of seniority clause is, of course, also unlawful, but in this case we are foreclosed from making such additional unfair labor practice finding because it is not alleged and it occurred more than 6 months before the charge was filed.

for the determination of seniority under such circumstances. As stated, upon his return to the over-the-road unit, Respondent Company's terminal manager placed Hazel at the top of the seniority roster. Shortly thereafter a representative of the Union informed the terminal manager that a poll of the over-the-road drivers would be necessary to determine Hazel's proper status, the Union having received some complaints about the matter. The drivers voted against Hazel and the terminal manager, at the Union's direction, reduced Hazel to the lowest roster position. Hazel, with the approval of the Union's president and the assistance of the terminal manager, then prepared and circulated a petition in which a majority of the drivers supported his claim to top seniority. When informed by the Union that the sentiment among the drivers indicated by the petition would control, unless further complaint were raised, the terminal manager returned Hazel to the top of the roster. But in a few days the Union informed the terminal manager that another vote would be necessary, and pursuant to the result of this second poll, the Union through the Company again relegated Hazel to the lowest seniority position.

On these facts, we can hardly find, as the Respondents would have it, that they did nothing more than apply the contract provisions as they found them. Indeed, the successive shifts in position on the part of the Union, and the unquestioning acquiescence by the Company in these turnabout positions, establish beyond question that the Union was in complete control of Hazel's status and that it acted without regard to any contract arrangement other than the invalid delegation of authority to make a unilateral determination of Hazel's seniority status. It is clear, therefore, and we find, that Hazel was subjected to unlawful discrimination when he was relegated to a lower position on the over-the-road driver seniority list. Accordingly, we shall order that Hazel be restored to the position where he was placed by the Company at the top of the seniority list prior to the unlawful discrimination against him, without prejudice to the right of the Company and Union to determine his seniority position by recourse to the valid provisions of their mutual agreement and in a manner not violative of the Act.

ORDER

Upon the entire record in this case, pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

I. The Respondent Company, Kenosha Auto Transport Corporation, St. Louis, Missouri, its officers, agents, successors, and assigns, shall:

(a) Cease and desist from:

(1) Performing or giving effect to the provisions in its contracts and/or understandings with the Respondent Union which delegate to

the Respondent Union authority to settle controversies relating to seniority.

(2) Entering into or renewing any agreement or understanding with any labor organization which contains provisions delegating to the Union authority to determine the seniority of employees or to settle controversies relating to seniority, and enforcing such provisions.

(3) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act, except to the extent permitted by Section 8 (a) (3) of the Act.

(b) Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(1) Post at its terminal in St. Louis, Missouri, copies of the notice attached hereto marked "Appendix A."[2] Copies of the notice, to be furnished by the Regional Director for the Fourteenth Region, shall be posted by the Respondent Company immediately upon their receipt, after being duly signed by an official representative of the Company. When posted, they shall remain posted for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to drivers are customarily posted. Reasonable steps shall be taken by the Respondent Company to insure that these notices are not altered, defaced, or covered by any other material.

(2) Notify the Regional Director for the Fourteenth Region in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

II. The Respondent Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL, Local 604, its officers, representatives, agents, successors, and assigns, shall:

(a) Cease and desist from:

(1) Performing or giving effect to the provisions in its contracts and/or understandings with the Respondent Company which delegate to the Respondent Union the authority to determine the seniority of employees or to settle controversies relating to seniority.

(2) Entering into or renewing any agreement or understanding with any employer which contains provisions delegating to the Respondent Union the authority to determine the seniority of employees or to settle controversies relating to seniority, and enforcing such provisions.

(3) In any like or related manner causing or attempting to cause the Respondent Company, its officers, agents, successors, and assigns, to discriminate against employees in violation of Section 8 (a) (3) of the Act.

[2] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of The United States Court of Appeals, Enforcing an Order"

(4) In any like or related manner restraining or coercing employees of the Respondent Company in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent permitted by Section 8 (a) (3) of the Act.

(b) Take the following action which the Board finds will effectuate the policies of the Act:

(1) Post at its business offices and meeting halls in St. Louis, Missouri, copies of the notice attached marked "Appendix B."[3] Copies of the notice, to be furnished by the Regional Director for the Fourteenth Region, shall be posted by the Respondent Union immediately upon their receipt, after being duly signed by an official representative of the Union. When posted, they shall be maintained by it for a period of sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Union to insure that these notices are not altered, defaced, or covered by any other material.

(2) Mail copies of the said notice to the Regional Director for the Fourteenth Region, for posting at the office and places of business of Respondent Company, in places in St. Louis, Missouri, where notices to drivers are customarily posted. Copies of the notice, to be furnished by the Regional Director for the Fourteenth Region, shall be returned forthwith to the Regional Director, after they have been signed by an official representative of the Union, for such posting.

(3) Notify the Regional Director for the Fourteenth Region in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

III. The Respondents, Kenosha Auto Transport Corporation, St. Louis, Missouri, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL, Local 604, their officers, representatives, agents, successors, and assigns, shall jointly and together take the following action which the Board finds will effectuate the policies of the Act:

(1) Restore Ivan Hazel's name to the top of the seniority list for the over-the-road driver unit at the Respondent Company's St. Louis terminal, henceforth subject only to lawful and nondiscriminatory contract or collective-bargaining provisions.

MEMBER MURDOCK, dissenting:

This case, in my opinion, is an excellent illustration of the error of the majority's decision in *Pacific Intermountain Express*, *supra*, which held that the mere acceptance by a union of the right to determine an employee's seniority status is *per se* a violation of Section 8 (b) (2). There the Board held that it was to be *presumed* "that

[3] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of The United States Court of Appeals, Enforcing an Order"

such delegation is intended to, and in fact will, be used by the union to encourage membership in the Union." I did not participate in that decision. However, in my dissenting opinion in *Minneapolis Star and Tribune Company*, *supra*, I pointed out that the Board could not properly, and should not logically, *presume* that any provision of a contract, lawful on its face, would be used in an unlawful manner.

The majority finds in the instant case that Hazel was "subjected to unlawful discrimination." This finding is based *solely* on the *presumption* that the Union must have determined Hazel's seniority status for the purpose of encouraging union membership or an obligation of union membership. But the record is perfectly clear, as the majority's statement of facts reveals, that Hazel was the union member of the longest standing among the Employer's drivers at this terminal. The determination of his seniority in no way involved any disparity of treatment between members and nonmembers of the Union and was in no way related to his performance of any obligation of union membership. Indeed, there is not the slightest evidence here that Hazel was denied any seniority to which he may otherwise have been entitled either by contract or past practice. The contract provided for employee seniority by "job classification." But Hazel's previous service in the unit raised a question of the effect to be accorded accumulated seniority, a subject not covered by the contract. For this reason, the Union, the Company, and Hazel himself permitted his seniority to be determined entirely by the wishes of the individual truckdrivers in Hazel's unit. In my opinion, this was a democratic and inoffensive way to resolve the issue. Certainly, no inference is warranted that Hazel, who had been a union member longer than any other employee, was placed at the bottom of the seniority roster to encourage union membership or the performance of a union obligation. Yet this is exactly the conclusion that the majority reaches.

The statute requires that the Board base its finding of an unfair labor practice upon the "preponderance of the testimony." The majority in this case is unable to find the slightest shred of testimony that the Union's determination of Hazel's seniority was intended to, or did in fact, encourage membership in the Union. Indeed, as indicated above, the evidence is directly to the contrary. Undeterred, however, by all of this evidence, the majority insists that the *Pacific Intermountain Express* presumption is irrebuttable and must be followed. In doing so the majority accords more weight to a presumption based upon general inferences than it does to the actual evidence in this record proving unquestionably the contrary conclusion. I would think it clear that the Board does not have the power to draw conclusions inconsistent with the record evidence in the case.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed in Section 7 of the Act, except to the extent permitted by Section 8 (a) (3) of the Act.

WE WILL, jointly with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL, Local 604, restore Ivan Hazel's name to the top of the seniority list for the over-the-road drivers' unit in our St. Louis terminal henceforth subject only to lawful and nondiscriminatory contract or collective bargaining provisions.

KENOSHA AUTO TRANSPORT COMPANY,
Employer.

Dated_____ By_____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

TO ALL MEMBERS OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL, LOCAL 604, AND TO ALL EMPLOYEES OF KENOSHA AUTO TRANSPORT COMPANY

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT perform or give effect to the provision in our contracts and/or understandings with Kenosha Auto Transport Company which delegates to us authority to settle controversies relating to seniority.

WE WILL NOT enter into or renew any agreement or understanding with any employer which contains provisions delegating to us the authority to determine the seniority of employees or to settle controversies relating to seniority, and we will not enforce such provisions.

WE WILL NOT in any like or related manner cause or attempt to cause Kenosha Auto Transport Company, its officers, agents, successors, and assigns, to discriminate against employees in violation of Section 8 (a) (3) of the Act.

WE WILL NOT in any like or related manner restrain or coerce employees of Kenosha Auto Transport Company in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent permitted by Section 8 (a) (3) of the Act.

WE WILL, jointly with Kenosha Auto Transport Corporation, restore Ivan Hazel's name to the top of the seniority list for the

over-the-road drivers' unit at the corporation's St. Louis terminal henceforth subject only to lawful and nondiscriminatory contract or collective-bargaining provisions.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL, LOCAL 604,
Labor Organization.

Dated_____ By_____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

INTERMEDIATE REPORT

STATEMENT OF THE CASE

Charges having been duly filed and served; complaints, an order consolidating the above-entitled cases, and a notice of hearing having been issued and served by the General Counsel of the National Labor Relations Board; and answers having been filed by the above-named Respondents, a hearing involving allegations of unfair labor practices in violation of Section 8 (a) (1) and (3) and Section 8 (b) (1) (A) and 8 (b) (2) of the Act, was held in St. Louis, Missouri, on May 10 and 11, 1954, before the duly designated Trial Examiner.

As to the unfair labor practices, in substance the complaints (as amended at the hearing) allege and the answers deny that: (1) At all material times there has existed between the Respondents agreements or an understanding that seniority controversies shall be referred to the Respondent Union for settlement; (2) pursuant to such agreement or understanding the Respondent Union caused the Respondent Company, in violation of Section 8 (a) (3) of the Act, to discriminate in the seniority standing of employee Ivan Hazel; and (3) by maintaining the aforesaid agreement and by discriminating against Hazel the Respondents have restrained and coerced employees in the exercise of rights guaranteed by the Act.

At the hearing all parties were represented and were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file briefs and proposed findings of fact and conclusions of law. Briefs have been received from all parties.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT COMPANY

Kenosha Auto Transport Corporation is an Ohio corporation with its principal office at Kenosha, Wisconsin, and a terminal for its auto transport business at St. Louis, Missouri. It is licensed to do business in all States of the United States, either as a private transportation company or as a common carrier under certificate from the Interstate Commerce Commission.

It is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL, Local 604, is a labor organization admitting to membership employees of the Respondent Company at its St. Louis terminal.

III. THE UNFAIR LABOR PRACTICES

A. *The issues*

The major issues in this case may thus be summarized: (1) Whether or not, by actual contract or mutual understanding, there exists between the Respondents an agreement illegally delegating to the Respondent Union control of employment con-

ditions, specifically as to determination of seniority standing; and (2) whether or not actual discrimination, pursuant to such illegal delegation of authority, was visited upon employee Ivan Hazel.

B. *The agreement provisions*

A recital of facts pertinent to issue (1) now follows:

Working at or out of the St. Louis terminal, under the managership of Leonard Franklin, are two classifications of the Respondent Company's employees: over-the-road drivers who handle the interstate movement of motor vehicles, and city employees who operate mostly within the city limits of St. Louis. About 12 men are in the first group, normally 1 or 2 in the latter. For the past 10 years or more the Respondent Union has been the exclusive bargaining representative of all employees in both classifications. For the past several years negotiations and resultant contracts have been based upon a separate unit for each of the 2 classifications, and all such agreements have contained the usual union-shop clause, requiring membership in the Respondent Union after the legal 30-day period. The legality of the union-shop clause is not in issue.

There is no dispute that the city employees are now covered by a written, 4-year contract, executed in October 1953, which contains the following provisions: (article III, section 2 (b))

> Terminal seniority shall prevail at all times in accordance with job classification. A list of the employees arranged in order of their seniority in accordance with job classification shall be posted in a conspicuous place and shall be available to all employees. Any controversy over the employees' seniority shall be referred to the Union for settlement. In case of a reduction of forces, employees longest in the service of the Employer, in accordance with the job classification, shall be retained, except as otherwise provided in this Agreement. . . .

There is some dispute as to whether or not the over-the-road drivers are currently covered by a written and binding agreement containing a clause similar to that quoted above. It appears that for a number of years it has been the custom for a group of Teamsters' locals, called the National Truckaway and Driveaway Conference, to negotiate with a group of employees engaged in transporting automobiles and to enter into periodic national agreements. Both of the Respondents have, in the past, entered into such agreements. The latest such national agreement was made in March 1952, and is due to run for 5 years. Dale Ferris, representing the Respondent Union, participated in negotiations resulting in this agreement; his name appears as a signatory on the printed copy of the agreement in evidence; and as a witness he admitted not having disavowed the appearance of his name thus printed, but he denied actually having signed the original document. On the contrary, the Respondent Company concedes that its representative signed it, and its terminal manager testified that up to just before the hearing he had believed that it had also been signed by the Union and was binding upon both parties. It seems to the Trial Examiner to be an unnecessary waste of time and effort to resolve the technical controversy raised by lack of proof that Ferris actually signed and the Union's somewhat equivocal claim, made at the hearing that therefore the contract is not binding. As to the one issue raised by General Counsel—that relating to a seniority provision, the current document contains the following: (article IV, section 1)

> Any controversy over the employees' standing on such [seniority] lists shall be referred to the Union for settlement. . . . Any controversy over the employees' seniority shall be referred to the Union for settlement. Such determination shall be made without regard to whether the employees involved are members or not members of a Union.

And the preceding national contract for the same drivers, covering a period from 1950–52, which Ferris said had been continued in practice and observed by the parties since 1952, contains the following: (article III, section 2)

> Terminal seniority shall prevail at all times in accordance with job classification. . . . Any controversy over the employees' seniority shall be referred to the Union for settlement.

Thus it is plain that in essence the same delegation of the employer's authority to determine seniority is made explicit in both contracts, whichever is actually in effect. And it is equally clear, from the testimony of Ferris, Franklin, and the Complainant Hazel, that in practice the Respondent Company has yielded to the Respondent Union's demand to permit it to settle the only seniority controversy revealed by the record to have arisen during the material period. As noted more fully in the follow-

ing section of this report, after first placing Hazel in a seniority position according to his judgment, Franklin bowed to the Respondent Union's insistence that it determine his proper seniority standing. And as a witness Franklin answered in the affirmative when asked, in effect, if he had permitted the Union to settle the dispute because he believed "that the contracts which you assumed, testified you thought were in existence, called for all seniority conflicts to be decided by the Local."

In summary, the Trial Examiner concludes and finds, from the preponderance of credible evidence, that at all material times there has existed an agreement between the Respondents, whether oral, written, signed, duly executed, or a mutual understanding observed in practice, whereby—to quote the language of the Board in *Pacific Intermountain Express Company* (107 NLRB 837)—"the Respondent Company delegated to the Respondent Union complete control over the determination of seniority." And since here, as in the above-cited case, the evidence also shows that seniority standing determines the assignment of runs and the reduction in force, the delegation of such seniority control in effect gives the Respondent Union authority to determine work assignments and reduction in force.

As to the legal effect of such delegation of authority, the Board in the same case said:

> . . . we believe that such a provision is itself violative of the Act, even though it does not on its face provide that the union shall make its seniority determination on the basis of union affiliation . . . it is to be presumed, we believe, that such delegation is intended to, and in fact will, be used by the union to encourage membership in the union. Accordingly, the inclusion of a bare provision . . . that delegates complete control over seniority to a union is violative of the Act because it tends to encourage membership in the union. And because we believe that it will similarly tend to encourage membership in the union, we also conclude that, the inclusion of a statement . . . that seniority will be determined without regard to union membership is not by itself enough to cure the vice of giving to the union complete control over the settlement of a "controversy" with respect to seniority.

As an agent of the Board, in this case the Trial Examiner must adopt the conclusions just quoted. The basic facts are similar. The current city-drivers' contract, existence of which is not disputed, contains the bald delegation to the Union of control over seniority controversies. The current over-the-road drivers' contract, which the Respondent Company considered to be in effect up to the time of the hearing, also includes the statement: "Such determination shall be made without regard to whether the employees involved are members or not members of the Union," but this provision the Board found to be insufficient to cure the evil of the delegation of authority.

Moreover, counsel for the Respondent Union in his brief tacitly admits the violation when he says: ". . . the Union is not now contending that the sentence to which exception is taken shall continue to be effective. It expressely renounced the same in the record before the Trial Examiner." He also concedes that such "renunciation" was not communicated to the employees involved before the hearing, but urges that no order would have meaning "except perhaps to prevent any possible repetition in the future." Not only does his argument against a cease and desist order lack merit in the light of the long court history of remedial orders, but it avoids the more positive issue in these consolidated cases—the actual delegation of seniority control In effect he is saying "we agree that under the law we should not have accepted such delegation and do not intend to exercise it." He does not, and indeed cannot, speak for the employer who has, pursuant to an agreement which the record shows has been observed by him, delegated to the Union an item of employment control which the Board has found the Act prohibits.

In short, the Trial Examiner concludes and finds that the evidence sustains the allegations of both complaints relating to the maintenance of agreements between the Respondents delegating control over seniority controversies to the Respondent Union, and that thereby the Respondent Company and the Respondent Union have, respectively, violated Section 8 (a) (1) and (3) and Section 8 (b) (1) (A) and (2) of the Act.

C. *The alleged discrimination against Hazel*

The relevant facts bearing upon issue (2) are as follows:

Hazel came to the St. Louis terminal as an over-the-road driver in 1947. In November 1952, his request was granted for transfer to the city yard. At the time of his request, according to his own testimony, he held the top seniority position

among the over-the-road driver classification. Upon his transfer, also according to his own testimony, he was placed, without objection on his part, at the bottom seniority position in the city-driver unit. The evidence fully warrants the finding that voluntarily, and in accordance with the existing agreements, Hazel was transferred from one classification to another and from one seniority position to another. The evidence also shows that at the time of the transfer both the Employer and the employee expected that it would be permanent. In the fall of 1953, however, he began moves looking toward transfer back to the over-the-road unit, and consulted union officials concerning his probable standing in seniority if he did transfer. Ferris told him, in effect, that such standing depended upon whether or not his transfer to the city unit had been permanent or temporary. Ferris also reminded nim that according to the agreements in effect seniority status was according to job classification.

In December 1953, Hazel was transferred at his own request. Apparently without first consulting the Union, Franklin put him at the top of the over-the-road drivers' seniority list, and for at least two trips the employee was dispatched from this position. Then the Union, through a representative, raised the issue that Hazel had improperly been placed at the top of the list. The Union was permitted, by Franklin, to conduct a vote among the employees involved and thereafter, on February 2, 1954. Ferris advised the terminal manager in writing that:

> . . . Ivan Hazel's seniority status with your company as an over-the-road driveaway driver will be the date on which he was transferred from yard work back to the driveaway division the last time.

Pursuant to the Union's determination of this seniority controversy, Franklin put Hazel at the bottom of the list. It appears that he was thereafter dispatched from the lower position until during the hearing, when the Respondent Company offered to reinstate him to the top position, and General Counsel accepted the offer as being made in good faith. Counsel for the Union, however, stated when this offer was made that by his silence he did not wish it to appear that he was waiving, for his client, any rights it had under the contract.

As found above, Franklin's own testimony makes it plain that he yielded to the Union's demand, in February, pursuant to the mutual understanding existing between the Respondents that the Union should settle seniority disputes.

It has been found that this specific mutual understanding was violative of the Act. But it does not follow that all performances under a contract which contains one illegal provision are necessarily also illegal. Nor does General Counsel claim that the "job classification" seniority provision was or is violative of the Act. Instead, he argues at considerable length that the parties to the contract were, in effect, in error in their understanding of their own agreement, and that in fact job classification seniority was not spelled out in the current national contract. Even if his argument had merit, the bringing of a complaint claiming discrimination in application or interpretation of a contract appears to the Trial Examiner to approach intrusion into the affairs of contracting parties by policing such agreements. Such was not the purpose, as the Trial Examiner understands, of the Act as amended.

From the evidence here, however, the Trial Examiner can find no merit in General Counsel's contention that job classification seniority was not the accepted and agreed-upon form of seniority at the St. Louis terminal. General Counsel proved conclusively, and both Respondents conceded, that there was and is a binding contract in existence specifying job classification seniority in the city-driver unit. There were but two units at the terminal. Since the same union represented both units, it would hardly be reasonable to believe that it would enter into any agreement, written or by mutual understanding, for the employees of the other unit which would provide for a conflicting or overlapping form of seniority.

The testimony of representatives of both Respondents makes it plain, furthermore, that both considered that their agreements provided for job classification seniority, and that this form of seniority was applied. Even the complainant in the case, Hazel, testified that he was informed by his union representative *before* his transfer back to the over-the-road unit, that the contracts provided for job classification seniority, and that this form was applied when he had previously transferred into the yard. It appears that only General Counsel, not a party to or covered by the contract, now claims that all the parties concerned should have otherwise interpreted their own agreements.

Upon the credible evidence in the record, the Trial Examiner concludes and finds that Hazel was not discriminated against in violation of the Act. It will be recommended that the complaint be dismissed as to him.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

Certain of the activities of the Respondents set forth in section III, above, occurring in connection with the operations of the Respondent Company described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, the Trial Examiner will recommend that they cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

It has been found that the Respondents have entered into and maintained agreements containing seniority provisions violative of Section 8 (a) (1) and (3) and 8 (b) (1) (A) and (2) of the Act. Accordingly it will be recommended that the Respondents cease giving effect to the unlawful seniority provisions of their agreements and refrain in the future from executing agreements containing such unlawful seniority provisions. It will not be recommended that the Respondents cease giving effect to both current agreements, nor that the Respondent Company withdraw and withhold recognition from the Respondent Union.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the Trial Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent Union is a labor organization within the meaning of Section 2 (5) of the Act.
2. By entering into and maintaining agreements containing clauses delegating to the Respondent Union authority to settle controversies relating to seniority the Respondent Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act, and the Respondent Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) and (2) of the Act.
3. The unfair labor practices found herein are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.
4. The Respondents have not engaged in unfair labor practices within the meaning of the Act with respect to Ivan Hazel.

[Recommendations omitted from publication.]

International Union of Operating Engineers, Local No. 12, AFL *and* Robert A. Holderby

International Union of Operating Engineers, Local No. 12, AFL *and* Frederick R. Hummel

International Union of Operating Engineers, Local No. 12, AFL *and* Hoyt Covert. *Cases Nos. 21–CB–564, 21–CB–536, and 21–CB–586. August 15, 1955*

DECISION AND ORDER

STATEMENT OF THE CASE

Upon charges filed by Frederick R. Hummel, Robert A. Holderby, and Hoyt Covert, on November 16, 1953, February 15, 1954, and April 8, 1954, respectively, the General Counsel of the National Labor Relations Board, herein called the General Counsel, by the Regional